U.S. Department of Justice
Tax Division
Criminal Tax Manual

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CRIMINAL TAX MANUAL

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The Tax Division's criminal enforcement mission is to protect the integrity of the federal income tax system by prosecuting criminals who defraud the Internal Revenue Service. In pursuit of this mission, Tax Division prosecutors work cooperatively with the Internal Revenue Service, the Treasury Inspector General for Tax Administration (TIGTA),[1] and United States Attorneys to investigate alleged tax crimes, to identify appropriate charges, to secure convictions, and to defend them on appeal.

1.01[2] The Tax Division's Criminal Enforcement Credo

Tax Division prosecutors work cooperatively with Assistant United States Attorneys, Internal Revenue Service agents and attorneys, and TIGTA agents to seek the most effective, efficient, and expeditious means to punish criminals who obstruct or defraud the Internal Revenue Service and to deter future violations.

1.01[3] Selection of Charges

The exercise of prosecutorial discretion in criminal tax cases should be guided by the standards applicable to all criminal prosecutions handled by the Department of Justice. *See* Justice Manual (JM) § 9-27.000, *et seq*. The Tax Division therefore should authorize prosecution for the most serious readily provable offense. *See* JM § 9-27.300. The Tax Division should authorize additional charges if they are necessary to ensure that the information or indictment reflects the nature and extent of the defendant's criminal conduct and to provide the basis for an appropriate sentence or if they will significantly enhance the strength of the government's case against the defendant or a codefendant. *See* JM § 9-27.320. Charging decisions should reflect strategic prosecutorial judgments about how best to ensure that the defendant will be convicted and held accountable for

[1] In July 1998, Congress passed the IRS Restructuring and Reform Act of 1998 (RRA98), creating the TIGTA. Treasury Order 115-01, dated February 14, 2013, delineates the specific authorities granted to the TIGTA by law and those delegated by the Secretary of the Treasury.

his entire course of criminal conduct,[2] regardless of whether the appropriate charges are suggested by the investigating agency.[3]

1.01[4] Overview of the Federal Criminal Tax Program

The federal criminal tax enforcement program is designed to protect the public interest in preserving the integrity of this Nation's self-assessment tax system through vigorous and uniform enforcement of the internal revenue laws. JM § 6-4.010. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because there are insufficient resources to prosecute all violations, deterring others from violating the tax laws is a primary consideration.

1.01[4][a] Authority of the Tax Division

The Assistant Attorney General for the Tax Division of the United States Department of Justice supervises the federal criminal tax enforcement program. 28 C.F.R. § 0.70. The Division is responsible for supervising all criminal proceedings arising under and related to the internal revenue laws, with certain limited exceptions.

Tax Division jurisdiction under 28 C.F.R. § 0.70(b) depends on the nature of the underlying conduct rather than the particular criminal statute used to prosecute the defendant. In addition to Title 26 tax crimes, the Tax Division has authority over prosecutions for other crimes when they relate to tax offenses. Non-Title 26 statutes used to prosecute tax crimes include 18 U.S.C. § 287 (false claims)), 18 U.S.C. §§ 286, 371 (conspiracy to defraud the United States), 18 U.S.C. § 1001 (fraud and false statements in matters within the jurisdiction of a government agency), 18 U.S.C. §§ 1341-1344 (mail, wire, and bank fraud, when the mailing, wiring, or representation charged is used to promote or facilitate any criminal violation arising under the internal revenue laws, either as substantive offenses or as the predicate acts for RICO or specified unlawful activities for money laundering offenses), 18 U.S.C. §§ 1501-1511 (obstruction of justice and obstruction of a criminal investigation), 18 U.S.C. §§ 1621-22 (perjury and subornation

[2] A defendant who engages in a criminal conspiracy and commits substantive crimes generally should face prosecution for both conspiracy and substantive charges. A defendant who commits tax evasion and obstructs an investigation by submitting false documents likewise should be charged with multiple counts.

[3] The Tax Division generally prefers to bring Title 26 charges in traditional tax prosecutions, but other criminal statutes may be used in appropriate cases.

of perjury), and 18 U.S.C. § 1623 (false declarations before a grand jury or court). 28 C.F.R. §§ 0.70, 0.179.

1.01[4][b] Organization of the Tax Enforcement Program

The criminal tax enforcement process involves the collaborative efforts of (1) IRS Criminal Investigation (CI) special agents; (2) attorneys with the IRS's Office of Chief Counsel Criminal Tax Division (CT);[4] (3) TIGTA special agents; and (4) Assistant United States Attorneys. Each plays a key role in the investigation, evaluation, and prosecution of tax crimes.

Within the Tax Division, four sections administer the enforcement of the nation's criminal tax laws: the Criminal Appeals and Tax Enforcement Policy Section (CATEPS) and three Criminal Enforcement Sections – Northern, Southern, and Western – with responsibility over designated geographical regions of the United States. Each section is supervised by a Section Chief, who reports to the Deputy Assistant Attorney General for Criminal Matters and the Assistant Attorney General of the Tax Division. See *infra* § 1.13 (Criminal Enforcement Sections Organization Chart). The three regional Criminal Enforcement Sections review evidence of alleged tax crimes and decide whether to accept the cases for grand jury investigation or prosecution and transmit them to the United States Attorneys' Offices or decline them and return them to the IRS. CATEPS handles appeals in criminal tax cases tried by Tax Division personnel, coordinates appeals in prosecutions tried by United States Attorneys, and processes adverse decision memoranda for the Solicitor General in criminal tax cases. In addition, CATEPS helps formulate criminal tax policies and coordinates the Tax Division's position on legislative proposals.

Most criminal tax cases are investigated and prosecuted by Assistant United States Attorneys, with oversight and advice from the Tax Division's Criminal Enforcement Sections. Trial attorneys in the Tax Division's Criminal Enforcement Sections also litigate criminal tax cases with Assistant United States Attorneys or by themselves.

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[4] Since July 2000, the IRS-CT National Office has been directed by the Division Counsel/Associate Chief Counsel (Criminal Tax), who reports to the IRS Chief Counsel. IRS Criminal Tax docket attorneys are assigned to 28 field offices of CI, and Criminal Tax Area Counsel are co-located with the four CI Directors of Field Operations (DFOs). The IRS-CI operation is independent of the CT attorneys, who are charged with providing legal advice to CI.

1.02 TAX DIVISION AUTHORITY

United States Attorneys generally must secure Tax Division approval (1) before initiating a criminal tax grand jury investigation *and* (2) before bringing criminal tax charges. *See* § 1.02[1], *infra*. By general delegation of the Assistant Attorney General, however, there are two exceptions to the rule.

First, when there is a preexisting grand jury investigation of particular targets for non-tax matters, such as fraud or drug violations, the Tax Division authorizes United States Attorneys to "expand the grand jury investigation" of those targets to include tax allegations, provided that the Tax Division receives notice of the expansion and does not object. *See* § 1.03[2][b], *infra*. United States Attorneys still must secure Tax Division approval before bringing charges in such "grand jury expansion" cases.

Second, in a limited category of cases the Tax Division authorizes United States Attorneys to make investigation, prosecution, and declination decisions without prior approval. Most of these cases involve false refund claims filed in the names of nonexistent or unknowing taxpayers. *See* § 1.05[1], *infra*.

1.02[1] Department of Justice Regulations

The Tax Division's authority over criminal tax cases is codified at 28 C.F.R. §§ 0.70 - 0.71:

Title 28 -- ***Judicial Administration***

PART 0 (Zero) -- ***ORGANIZATION OF THE DEPARTMENT OF JUSTICE***

Subpart N -- Tax Division

§ 0.70 ***General functions***.

> The following functions are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division:
>
> > (a) Prosecution and defense in all courts, other than the Tax Court, of civil suits, and the handling of other matters, arising under the internal revenue laws, and litigation resulting from the taxing provisions of other Federal statutes (except civil forfeiture and civil penalty matters arising under laws relating to liquor,

narcotics, gambling, and firearms assigned to the Criminal Division by Section 0.55(d)).

(b) Criminal proceedings arising under the internal revenue laws, except the following: Proceedings pertaining to misconduct of Internal Revenue Service personnel, to taxes on liquor, narcotics, firearms, coin-operated gambling and amusement machines, and to wagering, forcible rescue of seized property (26 U.S.C. 7212(b)), corrupt or forcible interference with an officer or employee acting under the Internal Revenue laws (26 U.S.C. 7212(a)), unauthorized disclosure of information (26 U.S.C. 7213), and counterfeiting, mutilation, removal, or reuse of stamps (26 U.S.C. 7208).

(c)(1) Enforcement of tax liens, and mandamus, injunctions, and other special actions or general matters arising in connection with internal revenue matters.

(2) Defense of actions arising under section 2410 of Title 28 of the United States Code whenever the United States is named as a party to an action as the result of the existence of a Federal tax lien, including the defense of other actions arising under section 2410, if any, involving the same property whenever a tax-lien action is pending under that section.

(d) Appellate proceedings in connection with civil and criminal cases enumerated in paragraphs (a) through (c) of this section and in Section 0.71, including petitions to review decisions of the Tax Court of the United States.

§ 0.71 ***Delegation respecting immunity matters***.

The Assistant Attorney General in charge of the Tax Division is authorized to handle matters involving the immunity of the Federal Government from State or local taxation (except actions to set aside ad valorem taxes, assessments, special assessments, and tax sales of Federal real property, and matters involving payments in lieu of taxes), as well as State or local taxation involving contractors performing contracts for or on behalf of the United States.

The Tax Division also has authority under 28 C.F.R. § 0.179 *et seq*. to prosecute obstruction of criminal tax investigations, including obstruction of justice (18 U.S.C. §§ 1501-1511), perjury (18 U.S.C. §§ 1621, 1622), false declarations before a grand jury or court (18 U.S.C. § 1623), fraud and false statements in matters within the jurisdiction of a government agency (18 U.S.C. § 1001), and conspiracy to defraud the United States (18 U.S.C. § 371):

> **§ 0.179a** ***Enforcement responsibilities.***
>
> (a) Matters involving charges of obstruction of justice, perjury, fraud or false statement, as described in Section 0.179, shall be under the supervisory jurisdiction of the Division having responsibility for the case or matter in which the alleged obstruction occurred. The Assistant Attorney General in charge of each Division shall have full authority to conduct prosecution of such charges, including authority to appoint special attorneys to present evidence to grand juries. However, such enforcement shall be preceded by consultation with the Assistant Attorney General in charge of the Criminal Division, to determine the appropriate supervisory jurisdiction. (See 38 C.F.R. 0.55(p).)
>
> (b) In the event the Assistant Attorney General in charge of the Division having responsibility for the case or matter does not wish to assume supervisory jurisdiction he shall refer the matter to the Assistant Attorney General in charge of the Criminal Division for handling by that Division.

1.02[2] Criminal Violations Arising Under the Internal Revenue Laws

Tax Division jurisdiction under 28 C.F.R. § 0.70(b) depends on the nature of the underlying conduct rather than the particular criminal statute used to prosecute the defendant. Whenever the violation arises under the internal revenue laws, Tax Division authorization is required before charges are brought under any statute.[5]

In general, an offense is said to arise under the internal revenue laws when it involves (1) evasion of some responsibility imposed by the Internal Revenue Code, (2) obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes. Thus, for example, a prosecution or grand jury investigation of a violation of 18 U.S.C. § 1521 involving the filing of a false lien against the property of an Internal Revenue Service employee by a tax defier on account of the employee's

[5] Tax Division authorization also is required in any case that involves parallel state and federal tax violations, if charges are based on the parallel state tax violations.

performance of official duties, such as conducting an audit or investigation of the tax defier, must be authorized by the Tax Division.

1.03 SOURCES OF CRIMINAL TAX REFERRALS

In most criminal tax cases, tax information is disclosed to the Department of Justice by the IRS under the "referral" authority of 26 U.S.C. § 6103(h).[6] Before a case is referred to the Department of Justice, the IRS has authority to investigate using its administrative summons power. That power terminates when the Secretary of the Treasury has recommended that the Attorney General prosecute or conduct a grand jury investigation of a person for an offense connected with the administration of the internal revenue laws. 26 U.S.C. § 7602(d)(A)(I).

Under appropriate circumstances, the IRS can consult with Department of Justice prosecutors for "pre-referral advice," that is, without making a referral for a grand jury investigation or prosecution that deprives the IRS of the power to use its summons authority.

A criminal tax case may also be referred to the Department of Justice by TIGTA for grand jury investigation or prosecution. These investigations typically involve non-forcible interference with an officer or employee acting under the Internal Revenue laws (26 U.S.C. 7212(a)); tax preparer refund schemes; or perjury, conspiracy, false statements, obstruction or fraud related to a tax matter before the IRS. Other criminal matters are referred directly to a United States Attorney's Office.

1.03[1] IRS Administrative Investigations

Criminal Investigation (CI) makes many referrals after conducting investigations using the summons procedures of 26 U.S.C. § 7602. These investigations, known as "administrative investigations," typically are initiated when CI receives information about possible criminal violations of tax, money laundering, or bank secrecy laws. In administrative investigations, special agents normally examine records and interview

[6] 26 § 6103 authorizes the IRS and TIGTA to disclose tax returns and return information to the Department of Justice for use in criminal and civil tax cases on its own initiative (Section 6103(h)(2) and (3)) and for use in non-tax criminal cases pursuant to a court order (Section 6103(i)(1)). Sections 6103(h)(4) and 6103(i)(4) permit the Department to disclose such returns or return information in civil or criminal judicial proceedings relating to tax administration and in non-tax criminal cases and related civil forfeiture cases, respectively. For more about Section 6103, see Chapter 42, below.

witnesses pursuant to the use of summonses. Administrative investigations also may involve the use of search warrants or undercover operations.[7]

At the conclusion of an administrative investigation, the CI Special Agent-in-Charge (SAC) may refer the case to the Department of Justice with a recommendation to institute a criminal prosecution or to conduct further investigation using a grand jury. The Tax Division may authorize prosecution, authorize a grand jury investigation to gather additional evidence before deciding whether to prosecute, or decline prosecution and return the case to the IRS.

1.03[2] Grand Jury Investigations

In addition to conducting administrative investigations, CI special agents may assist Department of Justice attorneys in conducting grand jury criminal tax investigations.[8] As appropriate, TIGTA special agents are also available to assist Department of Justice attorneys in conducting grand jury criminal tax investigations.

1.03[2][a] IRS or TIGTA Requests for Grand Jury Investigations Involving Only Title 26 Offenses

If the IRS recommends a grand jury investigation in a new case involving only potential tax offenses, the referral is evaluated by a Criminal Enforcement Section.

An IRS CI referral generally includes the following information:

A. identification of the recommended defendant(s) or grand jury target(s) and all the tax returns at issue, identification of all taxpayers involved, and all indications of wrongdoing which support the contemplated charges;

B. identification of potential witnesses and recommendations as to the testimonial and documentary evidence to be sought before the grand jury;

C. a summary of the progress of the investigation to date, including all investigative steps taken, all evidence developed (including witnesses contacted and their

[7] For a complete discussion of the procedures CI special agents follow in conducting administrative investigations and the scope of such investigations, see Internal Revenue Manual Part 9, Section 9.5. TIGTA does not have authority to issue a summons and does not conduct "administrative" investigations related to potential tax violations. A discussion of the procedures followed by TIGTA special agents is contained in Chapter 400, Section 250, of the TIGTA Operations Manual.

[8] For a complete discussion of the procedures CI special agents follow when participating in grand jury investigations, see Internal Revenue Manual Part 9, Section 9.5.

testimony), and all summonses issued but not yet complied with (including the status of summons enforcement activities);

D. a summary of any existing or prospective civil actions against the subject(s);

E. the reason(s) why a grand jury investigation is being requested (e.g., the need for quick action rather than the administrative process, the need for subpoenas rather than administrative summonses, and any other relevant factors); and

F. the importance of the anticipated prosecutions to compliance.

If TIGTA requests a grand jury investigation in a case involving only potential tax offenses, it will do so by submission of TIGTA OI Form "Request for Grand Jury Investigation." The referral is evaluated by a Criminal Enforcement Section.

The Tax Division reviews a proposed grand jury investigation pursuant to the procedures discussed in Section 1.04[1], *infra*.

1.03[2][b] Expansion of Ongoing Non-Title 26 Offense Grand Jury Investigations to Include Potential Tax Offenses

If a United States Attorney's Office is conducting a grand jury investigation of a non-tax criminal offense and determines that criminal tax offenses may also have occurred, the U.S. Attorney may desire to expand the scope of the grand jury investigation to include tax offenses. Subject to certain restrictions, United States Attorneys are authorized to expand preexisting non-tax grand jury investigations to include tax offenses by the same persons, under a general delegation of authority by the Assistant Attorney General for the Tax Division (Directive 86-59). *See* § 1.05[2][d], *infra*.

The United States Attorney makes a written request to the SAC to evaluate the criminal tax potential of evidence uncovered by the grand jury investigating non-tax offenses. If the SAC decides to participate in the grand jury investigation, the IRS makes a referral of the matter to the Department of Justice in the form of a written response to the U.S. Attorney, with notification to the Tax Division.[9] The Tax Division reviews the

[9] Pursuant to IRM § 9.5.2.3.1.2 (11-05-2004), the IRS requires the following information from a U.S. Attorney who requests IRS assistance: the name and taxpayer identification number (TIN) of the subject(s); the names of other law enforcement agencies involved in the investigation; any non-tax violations; the years involved; and probable tax violations. If the request includes grand jury information, it should specifically authorize the disclosure of grand jury material to IRS personnel in accordance with the Rule 6(e) of the Federal Rules of Criminal Procedure. The authorization should include disclosure of information

matter to ensure that it is within the scope of the Tax Division's delegation order, Directive 86-59. See § 1.05[2][d], *infra*.

1.04 AUTHORITY TO AUTHORIZE INVESTIGATION AND PROSECUTION

Section Chiefs have discretion, upon consultation with the Deputy Assistant Attorney General, to vary the Tax Division's review procedures depending upon the complexity and sensitivity of a case and the adequacy of memoranda prepared by the IRS, TIGTA, or the United States Attorney's Office.

1.04[1] Grand Jury Investigation Authorizations

1.04[1][a] Review Procedure

A Criminal Enforcement Section attorney generally writes a memorandum evaluating a case that is referred for grand jury investigation. An Assistant Chief or the Tax Division Special Counsel for Enforcement Operations generally reviews the trial attorney's memorandum and prepares a separate recommendation. The memoranda are then forwarded to the Section Chief, and, if appropriate, to the Deputy Assistant Attorney General or Assistant Attorney General, who has authority to authorize a grand jury investigation.

1.04[1][b] Standard of Review

A grand jury investigation should be considered only if there are articulable facts supporting a reasonable belief that a tax crime is being or has been committed. JM § 6-4.211(B). If the threshold is satisfied, the prosecutor also should consider the factors articulated in the *Principles of Federal Prosecution* to determine whether a grand jury investigation and any resulting prosecution would be an appropriate use of prosecutorial resources. JM § 9-27.220, *et seq*.

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necessary to evaluate the request. Finally, the request should include a statement indicating whether there is an "ongoing" grand jury investigation.

1.04[1][c] Tax Division Review of USAO Grand Jury Expansions

The Tax Division reviews proposed grand jury expansions only to ensure that they fall within the delegation order, Directive 86-59. See § 1.05[2][d], *infra*.

1.04[2] Prosecution Authorizations

1.04[2][a] Standards of Review

In determining whether to authorize prosecution, the Tax Division first considers whether the admissible evidence is sufficient to sustain a conviction beyond a reasonable doubt and whether there is, in light of the evidence and the likely defenses, a reasonable probability of conviction. JM § 6-4.211. If the threshold is satisfied, the Tax Division also considers the factors articulated in the *Principles of Federal Prosecution* to determine whether a prosecution would be an appropriate use of prosecutorial resources. JM § 9-27.220, *et seq*. The exercise of prosecutorial discretion in tax cases is guided by the same standards applicable in all other federal criminal prosecutions. Prosecution may be declined if no substantial federal interest would be served by prosecution, the person is subject to effective and adequate prosecution in another jurisdiction, or there exists an adequate non-criminal alternative to prosecution. *Id*.

Civil remedies generally are not an adequate alternative for deliberate and significant tax fraud. The prospect of a criminal conviction and the imposition of jail time are necessary to deter tax crime and punish tax criminals in order to preserve the integrity of the nation's self-assessment tax system.

1.04[2][b] Procedures for Prosecution Authorizations in IRS Administrative Cases

At the conclusion of an administrative investigation, the IRS Special Agent prepares a Special Agent's Report (SAR) summarizing the evidence and recommending charges. In most cases, an IRS Criminal Tax attorney analyzes the evidence and proposed charges and prepares a Criminal Evaluation Memorandum (CEM). The IRS SAC then refers the matter (reports and exhibits) to the Tax Division for review and authorization.

1.04[2][b][1] Simple Cases

Tax Division Section Chiefs have discretion, upon consultation with the Deputy Assistant Attorney General, to dispense with the standard review procedure in administrative cases referred by the IRS if the cases are relatively simple.[10] Cases designated by the Section Chief as simple cases receive expedited review from the Tax Division. A senior attorney conducts a summary review of the case to determine whether there are any evident issues that require an in-depth review. If no such issue is present, the attorney writes a brief memorandum recommending expedited approval. The Section Chief may assign the case to an Assistant Chief for review and concurrence, or the Chief may authorize prosecution, without review by an Assistant Chief, under authority delegated from the Assistant Attorney General.

1.04[2][b][2] Complicated Cases

The Section Chief generally assigns complicated matters to a trial attorney for review. The trial attorney prepares a written evaluation, known as a Prosecution Memorandum, discussing the prosecutorial merits. The memorandum analyzes the proposed charges, defendants, method of proof, evidentiary issues, and policy concerns. The trial attorney makes a recommendation whether the case should be prosecuted. The trial attorney generally prepares the Prosecution Memorandum within forty-five days of the Section receiving the case.

The Section Chief then assigns the case to an Assistant Chief for review. The Assistant Chief reviews the trial attorney's Prosecution Memorandum, the Conference Memorandum (if there was a Tax Division conference (*see* § 1.04[2][b][3], *infra*)), and the IRS reports and exhibits. The Assistant Chief then prepares a written evaluation, known as a Review Note. The Review Note discusses the merits of the case and relevant issues and includes a prosecution recommendation.

On most matters, the Section Chief may then authorize prosecution under authority delegated from the Assistant Attorney General. In cases where (a) the Chief and Assistant Chief disagree, (b) a significant policy issue exists, or (c) other special factors

[10] The IRS designates administrative cases as "complex" or "non-complex." When the Tax Division authorizes prosecution in a case designated as non-complex, the U.S. Attorney should, within 90 days, initiate prosecution or recommend to the Tax Division that the Tax Division decline the matter or handle it. JM § 6-4.244.

are present, the Deputy Assistant Attorney General or the Assistant Attorney General will act on the case. *See* § 1.12, *infra*.

1.04[2][b][3] Tax Division Conferences

If the taxpayer requests a conference with the Tax Division, the request will usually be granted. A Tax Division conference is not a matter of right, however. Defense counsel generally has an opportunity to meet with an IRS attorney during an administrative investigation, and always has an opportunity to meet with the Assistant United States Attorney who ultimately handles the prosecution. The Tax Division therefore will not delay the review of a case in order to hold a conference unless there is reason to believe that defense counsel will provide information that will be useful to the government in making its prosecutorial decision. The Tax Division also may decline to grant a conference at the request of the Assistant United States Attorney, for example, in advance of an arrest when there is reason to believe that the defendant is a flight risk.

A conference gives the taxpayer an opportunity to present any explanations or evidence which he or she wants the Tax Division to consider before deciding whether to authorize prosecution. A conference is not an opportunity to explore the Government's evidence. Prior to or during the conference, the Tax Division generally advises the taxpayer of the proposed charges (including the years and tax returns), the method of proof, and the criminal tax computations provided by the IRS. JM § 6-4.214.

Defense counsel generally appears on behalf of the taxpayer, but the taxpayer may choose to participate in person. The Tax Division does not treat factual representations made by the taxpayer's representative at the conference as admissions of the taxpayer. The Government may, however, use representations made by the taxpayer's representative to authenticate a document or to develop investigative leads. If the taxpayer attends the conference, the Government may use statements made by the taxpayer without restriction.

After the conference, the prosecutor prepares a written memorandum summarizing the defense presentation. The prosecutor submits this Conference Memorandum with his or her Prosecution Memorandum.

If a conference has been held and the Tax Division authorizes prosecution or grand jury investigation, the Tax Division generally notifies defense counsel by mail shortly after transmitting the case to the United States Attorney.

If a conference has been held in an administrative investigation and the Tax Division declines prosecution, the Tax Division generally notifies defense counsel sixty working days after it notifies the IRS.

1.04[2][c] Procedures for Prosecution Authorizations Arising From Grand Jury Investigations

At the conclusion of a tax grand jury investigation, the United States Attorney conducting the investigation provides an analysis of the investigation to the Tax Division and recommends either that charges be brought or that prosecution be declined and the investigation terminated. A copy of a proposed indictment or information may accompany the recommendation. JM § 6-4.242. The IRS SAC also refers the SAR, CEM, and exhibits to the Tax Division in a grand jury investigation. JM § 6-4.125.

Review procedures similar to those discussed above (§ 1.04[2][b]) are followed within the Tax Division in grand jury cases. There is close communication with the Assistant United States Attorney conducting the grand jury investigation.

The Tax Division usually makes a final prosecution decision at the same levels and with the same considerations as in the review of an administrative case. The Deputy Assistant Attorney General or the Assistant Attorney General will resolve any significant disagreements between the United States Attorney and the Criminal Enforcement Section.

1.04[2][d] Conferences in Grand Jury Cases

If a taxpayer requests a conference, the Tax Division may grant one if the Tax Division attorney concludes, upon consultation with the Assistant United States Attorney, that there is reason to believe that defense counsel will provide information that will be useful to the government in making its prosecutorial decision and that there is no risk of flight or obstruction of justice. If the Division does grant a conference, the Assistant United States Attorney who conducted the investigation may attend the conference in person or by telephone.

1.04[3] Immunity

1.04[3][a] Immunity During Administrative Investigations

(1) ***Judicial Immunity Pursuant to Compulsion Orders***

Legal authority to grant immunity during IRS administrative investigations exists under 18 U.S.C. § 6004. *See* IRM § 9.4.5.12.1 (02-01-2005). However, immunity is infrequently granted in such investigations. The Assistant Attorney General for the Tax Division must approve such a grant of immunity.

(2) ***Proffer Letters***

In some administrative investigations, the target of an administrative investigation may refuse an unconditional interview but may be willing to submit to an interview if a prosecutor provides a proffer letter that restricts direct use of the target's statements in the government's case-in-chief, does not restrict indirect or collateral use, and does not preclude use for impeachment. A proffer interview in such a case may facilitate plea discussions, convince the government to forego prosecution in favor of cooperation, or cause the government to decline further investigation. In such cases, the IRS special agent should refer the matter to the Tax Division for advice. In appropriate cases, a Tax Division prosecutor will issue a proffer letter.

1.04[3][b] Immunity During Grand Jury Investigations

(1) ***Judicial Immunity Pursuant to Compulsion Orders***

18 U.S.C. § 6001, *et seq.*, governs the granting of "use" immunity to persons required by court order to testify during a grand jury investigation or trial. ***Kastigar* v. *United States***, 406 U.S. 441 (1972). The Assistant Attorney General for the Tax Division authorizes applications for immunity under 18 U.S.C. §§ 6001-6003 in matters involving criminal violations of the Internal Revenue Code. 28 C.F.R. § 0.175.

(2) ***Letters of Assurance***

The compulsory process of 18 U.S.C. § 6001, *et seq.*, is not the only means of granting "use" immunity to a witness. In some instances, a prosecutor may issue a letter of assurance when a prospective witness claims the Fifth Amendment but does not request a court order before providing testimony. So long as the witness is not a target of the investigation, the United States Attorney conducting the grand jury investigation is authorized to grant such a letter of assurance consistent with his or her usual practice.

(3) ***Proffer Letters***

United States Attorneys are authorized and encouraged to issue proffer letters that restrict direct use of the statements of a subject or target, but do not restrict indirect or collateral use and do not preclude use for impeachment. The United States Attorney conducting the grand jury investigation is authorized to grant such proffer immunity consistent with his or her usual practice.

1.04[4] Undercover Investigations

1.04[4][a] IRS Undercover Investigations

Undercover investigations in which IRS agents participate are classified by the IRS as either Group I or Group II. All Group I undercover operations must be approved by the Chief, Criminal Investigation. The Director of Field Operations may approve Group II undercover operations. Generally, Group I operations are those that exceed six months in duration. In addition, Group I approval is required for any operation that involves specified sensitive issues. IRM § 9.4.8.3.1 (8-27-2007). Group II operations include all other undercover activity not meeting the requirements for Group I. *See generally* IRM § 9.4.8.

Pursuant to a Memorandum of Understanding between the Department of Justice and the Internal Revenue Service, Group I undercover operations are reviewed by an Undercover Committee comprising IRS and Department of Justice personnel. A representative of the Tax Division is a member of the Undercover Committee when the investigation involves a matter arising under the supervisory authority of the Tax Division.

1.04[4][b] TIGTA Undercover Investigations

TIGTA undercover investigations are classified, like the IRS's, as either Group I or Group II. Undercover operations within TIGTA are approved by the Deputy Inspector General for Investigations (Group I) or an Assistant Inspector General for Investigations

(Group II). Department of Justice personnel are not involved in the review of TIGTA undercover operations, absent special circumstances.

1.05 DELEGATION OF AUTHORITY TO UNITED STATES ATTORNEYS

1.05[1] Prosecution Delegations

Although the general rule is that the Tax Division must specifically approve criminal tax investigations and prosecutions before United States Attorneys initiate any proceeding, an exception to this review process exists in matters that the IRS and the TIGTA may "directly" refer to the United States Attorney. JM § 6-4.243. The United States Attorney may initiate or decline prosecution of direct referral matters without prior approval from the Tax Division. Nevertheless, once prosecution has been initiated, the indictment, information, or complaint may not be dismissed without the prior approval of the Tax Division. *See* JM § 6-4.246.

The IRS may directly refer the following categories of tax cases to a United States Attorney without prior Tax Division approval: (1) all Title 26 and Title 18 offenses involving certain designated excise taxes; (2) 18 U.S.C. §§ 286 and 287, multiple filings of false and fictitious returns claiming refunds, when the target files multiple returns in a single year claiming false refunds in the names of non-existent or unknowing taxpayers;[11] (3) 26 U.S.C. §§ 7215 and 7512, violations of the trust fund laws; (4) “ten percenter” matters[12] involving the failure to report gambling income pursuant to 26 U.S.C. § 7206(2), but only if there is an arrest that occurs at the time of the offense; (5) prosecutions pursuant to 26 U.S.C. §§ 7203 and 7206 regarding IRS Forms 8300, relating to cash received in a trade or business pursuant to 26 U.S.C. § 6050I, provided that the prosecution involves solely cash received in a trade or business as required by 26 U.S.C. § 6050I and the matter does not involve the prosecution of accountants, physicians, or attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious

[11] The authority to conduct grand jury investigations of these false claim offenses also is delegated to the United States Attorneys. See § 1.05[2][a], *infra.*

[12] “Ten percenting” is the practice whereby a gambler attempts to hide his winnings by engaging a third party to cash a winning race track ticket, generally in exchange for 10% of the winnings. In this way, the winnings are reported to the IRS on a Form W-2G in the name of the third party, instead of the actual winner. *See* ***United States v. Monteiro***, 871 F.2d 204 (1st Cir. 1989).

leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly held corporations and/or their officers.[13]

The TIGTA may directly refer the following categories of tax cases to a United States Attorney without prior Tax Division approval: (1) violations involving physical assaults, threats of force or violence (26 U.S.C. § 7212(a)); (2) unauthorized disclosure of information (26 U.S.C. § 7213); (3) unauthorized inspection of returns or return information (26 U.S.C. § 7213A); (4) offenses committed by IRS employees in connection with internal revenue laws (26 U.S.C. § 7214), with the exception of IRS employee tax fraud; (5) disclosure or use of information by preparers of returns (26 U.S.C. § 7216); and (6) those cases identified in the preceding paragraph related to IRS categories of tax cases.[14]

1.05[2] United States Attorney Initiated Grand Jury Investigations

1.05[2][a] Direct Referrals

(i) ***IRS Direct Referrals***

United States Attorney is authorized to conduct a grand jury investigation for matters arising under the internal revenue laws in direct referral matters. *See* § 1.05[1], *supra*, and JM § 6-4.243. Grand jury investigations in direct referral matters are generally not necessary, except where related to investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §§ 286 and 287.[15] The SAC refers the case to the United States Attorney by sending him or her a grand jury investigation letter (and completed IRS Form 9131) and related exhibits and by sending a copy of all those materials to the Tax Division. In cases involving arrests or other exigent circumstances,

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[13] In such direct referral cases, the Internal Revenue Service must send to the Tax Division a copy of its referral letter to the United States Attorney.

[14] A majority of TIGTA investigations involve non-tax matters and are directly referred to the United States Attorneys for prosecution.

[15] The delegation of authority to the United States Attorney for investigations of false and fictitious claims for tax refunds, in violation of Sections 286 and 287, is limited to cases in which the SAC has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined in 26 U.S.C. § 7701(a)(36)), with intent to obtain tax refunds to which he/she is not entitled, has filed or conspired to file, for a single tax year, multiple tax returns on behalf of himself/herself or in the names of nonexistent taxpayers or real taxpayers who do not intend the returns to be their own. Cases in which the target has recruited real individuals to file returns in their own names are excluded from the delegation. Tax Division Directive No. 96, dated December 31, 1991.

the Special Agent-in-Charge also must send the request-for-grand-jury-investigation letter (together with the completed Form 9131) to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's Office for grand jury investigation that does not fit the above fact pattern, or in which the IRS Special Agent-in-Charge has not forwarded a copy of the referral letter to the Tax Division (by overnight courier), will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United States Attorney's Office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

(ii) ***TIGTA Direct Referrals***

All TIGTA cases directly referred to a United States Attorney's Office, for grand jury investigation or for prosecution, are done so by the TIGTA Special Agent-in-Charge. TIGTA procedures for referring matters to the United States Attorney's Office are contained in Chapter 400, Section 250.13, of the TIGTA Operations Manual.

1.05[2][b] Tax Division Referrals for Prosecution

The United States Attorney is authorized to conduct a grand jury investigation into matters arising under the internal revenue laws referred for prosecution by the Tax Division, to the extent necessary to prepare the case for indictment.

1.05[2][c] Tax Division Referrals for Grand Jury Investigation

The United States Attorney is authorized to conduct a grand jury investigation into matters arising under the internal revenue laws referred for that purpose by the Tax Division, to the extent necessary to complete the investigation.

1.05[2][d] Expansion of Non-tax Grand Jury Investigations in a Single Judicial District to Include Possible Federal Tax Crimes – Tax Division Directive No. 86-59

A United States Attorney or other delegated official[16] may approve a request to expand a non-tax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding that is being conducted within the sole jurisdiction of the designated official's office, provided that the delegated official determines that:

1. there is reason to believe, based upon information developed during the course of the non-tax grand jury proceedings, that federal criminal tax violations may have been committed;

2. the attorney for the Government conducting the subject non-tax grand jury inquiry has deemed it necessary in accordance with Fed. R. Crim. P. 6(e)(3)(A)(ii) to seek the assistance of IRS personnel to assist the attorney in enforcing federal criminal law;

3. there is no other active grand jury investigation of the matter being conducted in another judicial district;

4. the target(s) are not persons with national prominence -- such as local, state, federal, or foreign public officials or political candidates, members of the judiciary, religious leaders, representatives of the electronic or printed news media, officials of a labor union, and major corporations and/or their officers;

5. a written request seeking the assistance of IRS personnel and containing details about the alleged federal tax offense(s) is sent by the designated official to the appropriate Internal Revenue Service official;

[16] The authority to approve a request to expand a non-tax grand jury investigation to include inquiry into possible federal criminal tax violations has been conferred on the following individuals: (1) any United States Attorney appointed under 28 U.S.C. § 541 or 546; (2) any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to 28 U.S.C. § 510; and (3) any Independent Counsel appointed under 28 U.S.C. § 593.

6. the Tax Division receives a copy of the request to expand the grand jury to include potential tax violations, and the Tax Division interposes no objection to the request;

7. the Internal Revenue Service has made a referral pursuant to the provisions of 26 U.S.C. § 6103(h)(3) in writing stating that it (1) has determined that there is reason to believe that federal criminal tax violations have been committed, (2) agrees to furnish the personnel needed to assist the Government attorney in his or her duty to enforce federal criminal law, and (3) has forwarded to the Tax Division a copy of the referral; and

8. The grand jury proceedings will be conducted in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the IRS and the Tax Division prior to the initiation of criminal proceedings.

The authority delegated includes the authority to designate the targets (subjects) and the scope of the tax grand jury inquiry, including the tax years considered to warrant investigation. The delegation also includes the authority to terminate such grand jury investigations, provided that prior written notification is given to both the Internal Revenue Service and the Tax Division. If the designated official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official must state in its correspondence that the notification terminates the referral of the matter pursuant to 26 U.S.C. § 7602(d).

The delegation of authority does not include the authority to file an information or seek an indictment on tax matters. The United States Attorney may not seek an indictment or file an information without specific prior authorization of the Tax Division.

1.05[3] Search Warrants

The Tax Division generally has the authority to approve the execution of search warrants in matters arising under the internal revenue laws.

The TIGTA is authorized to submit to a United States Attorney's Office consensual monitoring (non-telephonic) and search warrant requests in investigations under the jurisdiction of the Tax Division. Section 6103(k)(6) of Title 26 provides for the ability to make this investigative disclosure to gather evidence. Such requests do not require pre-approval or notification of the Department of Justice. However, after evidence is obtained from either consensual monitoring or the execution of a search warrant, final prosecution consideration must be coordinated with the Department of Justice.

1.05[3][a] Authority Delegated to United States Attorneys –

Tax Division Directive No. 52

Tax Division has delegated to United States Attorneys, except in the circumstances discussed below, the authority to approve the execution of Title 26 U.S.C. or tax-related Title 18 U.S.C. search warrants directed at offices, structures, or premises owned, controlled, or under the dominion of the subject or target of a criminal investigation. The delegation of authority does not affect the statutory authority and procedural guidelines relating to the use of search warrants in criminal investigations involving disinterested third parties as contained in 28 C.F.R. § 59.1, *et seq.*

1.05[3][b] Exclusive Authority Retained by the Tax Division

The Tax Division retains exclusive authority to approve a search warrant that is directed at offices, structures, or premises owned or controlled by the following:

1. an accountant or accounting firm;

2. a lawyer;

3. a physician;[17]

4. a local, state, federal, or foreign public official or political candidate;

5. a member of the clergy;

[17] Chiropractors and dentists are not included in this category. In addition, if the search is directed at a physician's residence that is not known to have any patient records and the warrant does not seek to seize any patient records, then Tax Division authorization is not required.

6. a representative of the electronic or printed news media;

7. an official of a labor union; and

8. an official of an organization deemed to be exempt under 26 U.S.C. § 501(c)(3).

Any application for a warrant to search for evidence of a criminal tax offense not specifically delegated must be specifically approved in advance by the Tax Division. The Tax Division will consider the following factors: (1) whether the suspected crime is significant enough to justify use of a search warrant, (2) whether the affidavit establishes probable cause, (3) whether the particular evidence at issue can be secured without a search warrant (*i.e.,* whether a search warrant is the "least-intrusive means" to obtain the evidence), and (4) whether there is a reasonable need for the evidence (*i.e.*, whether the case can be investigated and prosecuted with other evidence, with no significant delay in completing the investigation and no significant diminution in the likelihood of conviction).

United States Attorney is required to notify the Tax Division within ten working days, in writing, of the results of each executed search warrant and to transmit to the Tax Division copies of the signed search warrant (and attachments and exhibits), inventory, and any other relevant papers.

1.06 APPEALS

The procedures and rules governing appeals are set forth in JM §§ 2-1.000, *et seq.*, and 9-2.170, and should be reviewed and followed when handling a criminal tax or other appellate matter. Particular attention is called to the following procedures set forth in the Justice Manual.

1.06[1] Appellate Responsibility for Criminal Trials

The United States Attorney has the appellate responsibility for handling in the courts of appeals criminal tax cases that have been tried by the United States Attorney, unless the Assistant Attorney General, Tax Division, elects that the Tax Division handle a particular category of cases or a case on appeal. JM § 2-3.100.

The Criminal Appeals and Tax Enforcement Policy Section (CATEPS) has the appellate responsibility for handling criminal tax cases that have been tried by attorneys in the regional Criminal Enforcement Sections of the Tax Division. In addition, the Division stands ready to assist the United States Attorneys' Offices in handling criminal tax cases on appeal -- by writing the brief, by consulting on issues being briefed, or by providing sample briefs and arguments. United States Attorneys should direct requests for assistance to the Chief of CATEPS at (202) 514-5396.

1.06[2] Recommendations for Appeal of Adverse Decisions

In all cases resulting in adverse decisions, the Solicitor General must authorize all recommendations for and against appeal, the filing of a petition for rehearing en banc, the filing of a petition for certiorari, the filing of a petition seeking mandamus or other extraordinary relief, and the filing of a direct appeal to the Supreme Court. This requirement applies to any interlocutory appeals under 28 U.S.C. § 1292(b) and litigation in state courts subject to review by a higher state court or by the United States Supreme Court. It also applies to the filing of an amicus curiae brief. JM §§ 2-2.121-24 and 9-2.170.

The need for immediate reporting of adverse decisions, whether at the trial level or the appellate level, is stressed in JM § 2-2.110:

> In any civil or criminal action before a United States District Court or a United States Court of Appeals, in which the United States is a litigant, and a decision is rendered adverse to the government's position, the United States Attorney must immediately transmit a copy of the decision to the appellate section of the division responsible for the case.

To secure the necessary authority from the Solicitor General to appeal or not appeal a criminal tax case, the United States Attorney or the Chief of the appropriate regional Criminal Enforcement Section of the Tax Division "must promptly" make a report to the Chief of CATEPS. See JM § 2-2.110, *et seq*. The Tax Division prefers that such reports be made *promptly by telephone* to the Chief of CATEPS at (202) 514-5396.

Following receipt of an adverse decision, CATEPS solicits the views of the regional Criminal Enforcement Section of the Tax Division, the United States Attorney, and the Internal Revenue Service on appropriate further action. CATEPS then prepares a Tax Division memorandum for the Solicitor General, which reflects the views and recommendation of the Tax Division, as well as the views of the United States Attorney and the Internal Revenue Service. In cases tried by Criminal Enforcement Section personnel of the Tax Division, the Tax Division prosecutor should confer with the United States Attorney with respect to the recommendation to be made by the Criminal Enforcement Section to CATEPS.

1.07 REQUESTS FOR TRIAL ASSISTANCE

While United States Attorneys usually have the initial responsibility for the trial of criminal tax cases, the Criminal Enforcement Sections of the Tax Division have staffs of highly qualified and specialized criminal tax trial attorneys who will prosecute or render assistance in the trial of a criminal tax cases upon request. The Tax Division can assume all trial responsibilities of a particular case, assign an attorney to act as co-counsel with an Assistant United States Attorney, or provide legal research or trial strategy assistance to the prosecutor(s) handling the case.

A supervisor from the United States Attorney's Office should make a written request to the appropriate Criminal Enforcement Section Chief if the supervisor wants a Tax Division attorney assigned to the case. The request should state the relevant reasons and be made well in advance of any court setting. Where time is a factor, the request may be by e-mail or phone to the Section Chief. Telephone requests should be confirmed in writing.

1.08 STATUS REPORTS

After the Tax Division has referred a criminal tax case to a United States Attorney, it is essential that the United States Attorney advise the Tax Division of all developments. As the case progresses, the minimum information required for the records of the Tax Division is as follows:

1. a copy of the indictment returned (or no billed) or the information filed, which reflects the date of the return or filing or the date of any no bill;

2. date of arraignment and kind of plea;

3. date of trial or entry of guilty plea;

4. verdict and date verdict returned;

5. date and terms of sentence; and

6. date of appeal and appellate decision.

It is important that the United States Attorney provide this information regarding developments in pending cases in a timely manner, in order that the Department's files reflect the true case status and that, upon completion of the criminal case, the Tax Division can close the case timely and return it to the Internal Revenue Service for the collection of any revenue due, through civil disposition. JM § 6-4.248.

1.09 RETURN OF REPORTS AND EXHIBITS

Upon completion of a criminal tax prosecution by a final judgment and the conclusion of appellate procedures, the United States Attorney should return exhibits to witnesses. The United States Attorney should retain all other grand jury material under secure conditions, in accordance with the requirement of maintaining the secrecy of grand jury material. Fed. R. Crim. P. 6(e). The United States Attorney should return all non-grand jury reports, exhibits, and other materials furnished by the Internal Revenue Service for use in the investigation or trial to the Special Agent-in-Charge, Criminal Investigation, by certified mail, return receipt requested, as directed in the Tax Division's letter authorizing prosecution. If the TIGTA investigated and referred the case, then the United States Attorney should return the exhibits to the TIGTA, Attention: Special Agent-in-Charge.

1.10 PRESS RELEASES

Press releases promote the important goals of general deterrence and public accountability. News reports about tax enforcement actions deter tax fraud by other people and promote the Justice Department’s obligation to keep the public informed about our criminal enforcement efforts. The Tax Division therefore recommends that United States Attorneys issue press releases at appropriate times (*e.g.*, indictment, guilty plea, trial conviction, and sentencing) in criminal tax cases, based on information in the public record.

Press releases in criminal tax cases must comply with Department of Justice policy (JM § 1-7.000, *et seq*.), the Internal Revenue Code (26 U.S.C. § 6103),[18] and the Federal Rules of Criminal Procedure (Rule 6(e)), as well as any local court rules. Most importantly, criminal tax press releases generally should be based expressly upon the court record, because some appellate courts have found that 26 U.S.C. § 6103 restricts the release of information from IRS investigations, regardless of whether the information was also in the public record, unless the immediate source of the information is a public record. *See, e.g.*, *Johnson v. Sawyer,* 120 F.3d 1307 (5th Cir. 1997); *Mallas v. United States*, 993 F.2d 1111 (4th Cir. 1993); *Rodgers v. Hyatt*, 697 F.2d 899 (10th Cir 1983). Accordingly, no public statement should be made about a tax case unless the information in the statement is attributed to a specific public source.

1.10[1] Press Releases Announcing an Indictment or Arraignment

A press release announcing an indictment or arraignment should contain only information set forth in the publicly filed document and indicate that the source of the information is the indictment. For example, a press release announcing an indictment could read: "According to the indictment, during the years 2019 and 2020, John Doe received income in excess of $500,000 which he failed to report on his income tax returns. The indictment further charges . . . ."

1.10[2] Press Releases Announcing Conviction or Sentencing

A press release announcing a conviction or sentencing should be based solely on information made public at the trial or in pleadings publicly filed in the case and should indicate that the source of the information is the public court record. Facts that do not appear in the indictment (even minor details, such as the defendant's age, full name, address, or a summary of the allegations) should be included in the press release only if they are obtained from *and attributed to* court records.

1.10[3] Tax Return Information in Non-Tax Criminal Cases and Civil Proceedings

Tax return information obtained for use in non-tax criminal cases and related civil forfeiture cases pursuant to a Section 6103(i) order is subject to the same disclosure restrictions as return information provided by the IRS for use in criminal tax cases. In

[18] Section 6103 provides generally that tax returns and return information are confidential and can be disclosed only in the manner provided in the section. See Chapter 42, infra.

addition, return information provided to the United States Attorney's office by the IRS in money laundering or narcotics cases that the IRS has determined are “related to tax administration,” under § 6103(b)(4), may be subject to the same non-disclosure rules.

1.10[4] Press Releases Issued by a United States Attorney’s Office

Press releases issued by a United States Attorney’s Office do not require approval by the Assistant Attorney General or the Office of Public Affairs. If a Tax Division prosecutor is involved in a case, the press release should be issued jointly in the name of the United States Attorney and the Assistant Attorney General for the Tax Division. The Tax Division also requests that the United States Attorney acknowledge in the press release any Tax Division prosecutor who participated in the case.

If appropriate, the Assistant Attorney General may provide a quote to include in a U.S. Attorney’s press release. All comments attributed to the Assistant Attorney General must be approved by the Assistant Attorney General or his or her designee. Tax Division prosecutors who want to include a comment by the Assistant Attorney General should consult with their Section Chief or the Counsel to the Deputy Assistant Attorney General for Criminal Matters to secure advance approval of the proposed comment.

1.10[5] Press Releases in Cases Handled Exclusively by the Tax Division

In cases handled exclusively by Tax Division prosecutors, the Tax Division generally will issue press releases through the Justice Department’s Office of Public Affairs. Criminal Enforcement Section attorneys should have a draft press release approved by their Section Chief or designee and forward a copy of the Section-approved draft press release by e-mail to the Counsel to the Deputy Assistant Attorney General for Criminal Matters at least 48 hours prior to the event. The press release should be prominently marked “DRAFT” and “NOT FOR RELEASE” to prevent inadvertent early release.

After the underlying event giving rise to the press release occurs, the prosecutor should insert any additional relevant information, review the press release for accuracy, and ensure that all information is attributed to the public record. The Tax Division prosecutor is ultimately responsible for ensuring that the press release is accurate and based on public information. The Office of Public Affairs will not issue a press release until the Tax Division confirms that the prosecutor has reviewed its contents. Tax

Division press releases must be approved and given a release number by the Office of Public Affairs before they are issued. When it may not be feasible to secure final approval of a press release from the Tax Division and the Office of Public Affairs prior to the occurrence of the underlying event (for example, a sentencing in Hawaii), the Office of Public Affairs may authorize the prosecutor to issue the release, subject to final amendment and verification by the prosecutor.

1.10[6] Tax Division to Receive Copy of Final, Issued Press Release

The final version of any press release issued in a tax case should be sent to the Tax Division, preferably by e-mail, to the Counsel to the Deputy Assistant Attorney General for Criminal Matters.

Examples of press releases issued in criminal tax cases are available on the Tax Division's internet site at www.usdoj.gov/tax.

1.11 *PRIOR APPROVALS*

JM Section	TYPE & SCOPE OF APPROVAL	WHO MUST APPROVE
6-4.120	**Grand jury investigations of tax violations, except those delegated to United States Attorneys**	**Chief, Criminal Enforcement Section, or higher Tax Division official**
6-4.123	**Expansion of a Title 26 grand jury investigation to include new target**	**Chief, Criminal Enforcement Section, or higher Tax Division official**
6-4.200; 6-4.209; 6-4.210; 6-4.218; 6-4.242;	**Prosecution of Title 26 and other offenses arising under the internal revenue laws, including stolen identity refund fraud, some conspiracy, mail fraud, wire fraud, bank fraud, RICO, and money laundering offenses**	**Chief, Criminal Enforcement Section, or higher Tax Division official**

9-105.750		
6-4.245	**Declinations of tax prosecutions**	**Chief, Criminal Enforcement Section**
6-4.125; 6-4.218; 6-4.242; 6-4.245	**Terminate tax grand jury investigation without prosecution**	**Chief, Criminal Enforcement Section**
6-4.245	**Presenting the same tax matter to another grand jury after a no bill**	**Assistant Attorney General**
6-4.246	**Dismissal of indictments, informations, and complaints**	**Deputy Assistant Attorney General**
6-4.310	**Plea to a lesser charge than Tax Division's major count**	**Chief, Criminal Enforcement Section, or higher Tax Division official**
6-4.320; 6-4.330; 9-16.010; 9-16.015; 9-27.500	**Taking of a nolo contendre or *Alford* plea in criminal tax prosecution**	**Assistant Attorney General**
9-2.031	**Dual and successive prosecution of criminal tax cases**	**Assistant Attorney General**
6-4.130	**Search warrants in specified cases**	**Deputy Assistant Attorney General**
9-23.130; 9-27.640	**Immunity or non-pros agreement in tax or tax-related investigation**	**Deputy Assistant Attorney General**

6-4.200; **9-13.410**	**Grand jury or trial subpoena to attorney for info relating to representation**	**Assistant Attorney General**

1.12 DELEGATION OF AUTHORITY WITHIN THE TAX DIVISION

The authority of the Assistant Attorney General has been delegated as follows:[19]

1. ***Authority of the Assistant Attorney General that is Not Delegated***

Action in the following criminal tax matters is expressly reserved for the Assistant Attorney General of the Tax Division:

a. A request to present the same matter to a second grand jury or to the same grand jury after a no true bill has been returned;

b. A request to recuse or disqualify a federal justice, judge or magistrate;

c. A request to consent to a nolo contendere or *Alford* plea;

d. A request to initiate or continue a federal prosecution affected by the Department's *Petite* Policy (dual and successive prosecution);

e. A request for disclosure of a tax return or return information pursuant to 26 U.S.C. § 6103(h)(3)(B);

f. A request to authorize a subpoena to, interrogation of, indictment of, or arrest of, a member of the news media;[20]

g. A subpoena to an attorney for information relating to the attorney's representation of a client; and

[19] Tax Division Directive 138, Delegation of Authority Relating to Criminal Tax Cases, dated July 14, 2010.

[20] See 28 C.F.R. § 50.10 for the policies regarding such a matter, and the principles to be taken into account in requesting an authorization, which may require the express approval of the Attorney General.

h. A request to authorize prosecution of a person who has testified or produced information pursuant to a compulsion order for an offense or offenses first disclosed in, or closely related to, such testimony or information.[21]

2. *Delegation of Authority to the Deputy Assistant Attorney General, Criminal*

The Deputy Assistant Attorney General, Criminal ("DAAG, Criminal"), is authorized to exercise all the powers and authority of the Assistant Attorney General with respect to criminal proceedings, except those delineated in Section 1 above.

In addition, the DAAG, Criminal, shall forward to the AAG matters that are deemed appropriate for action by the AAG.

3. *Delegation of Authority to the Criminal Section Chiefs*

A Chief of a Criminal Section ("Chief") is authorized to act in all criminal matters arising within the jurisdiction of his or her section, except those specifically reserved for action by the AAG in Section 1 above and the following:

a. Issuance of a search warrant when Tax Division approval is necessary (Tax Directive 52);[22]

b. A matter in which the recommendations of the Section Chief and Assistant Chief as to prosecution or declination conflict;

c. Prosecution of an attorney for criminal conduct committed in the course of acting as an attorney;

d. A prosecution involving: (a) a local, state, federal, or foreign public official or political candidate; (b) a representative of the electronic or print news media; (c) a member of the clergy or an official of an organization deemed to be exempt under section 501(c)(3) of the Internal Revenue Code; or (d) an official of a labor union;

[21] See JM § 9-23.400. The request for authorization to prosecute must be sent to the Assistant Attorney General, but authorization must come from the Attorney General, in writing.
[22] Tax Division Directive 52, The Authority to Execute Title 26 or Tax-Related Title 18 Search Warrants, revised March 17, 2008.

e. A request to issue a compulsion order in any case over which the Tax Division has jurisdiction;

f. Any prosecutorial decision that requires a deviation from Tax Division policy or procedure; and

g. A request to authorize dismissal of an indictment.

In addition, a Chief shall forward to the DAAG, Criminal, all matters that involve novel substantive, evidentiary, or procedural issues, or any other sensitive matter for which review at a higher level is appropriate.

Notwithstanding the foregoing, the DAAG, Criminal, may prescribe additional matters, the actions of which are within the authority of a Chief pursuant to this section, that the DAAG, Criminal, determines requires action by the DAAG, Criminal.

4. ***Scope and Effect of Tax Directive 138***

a. The delegation includes all tax and tax-related offenses delegated to the Tax Division pursuant to 28 C.F.R. §§ 0.70 and 0.179a.

b. The delegation supersedes Tax Division Directives 44, 53, 71, 115 and all other delegations of authority to approve criminal tax or tax-related matters or cases previously issued.

c. In the event a Chief is recused from acting on a particular matter, then the DAAG, Criminal, may select another Chief to act in that matter.

d. When either, or both, the AAG or the DAAG, Criminal, is recused in a particular matter, a ranking Tax Division official will be authorized pursuant to 28 C.F.R. § 0.137 to act as either the Acting AAG or the Acting DAAG, Criminal, in that matter.

e. When an individual has been duly designated a specified "Acting" official, the individual shall have the same authority as the position commands, unless that authority is specifically limited in writing by the appropriate authorizing official.

f. The Assistant Attorney General at any time may withdraw any authority delegated by Directive 138.

1.13 CRIMINAL ENFORCEMENT SECTIONS ORGANIZATION CHART

I. Assistant Attorney General

Currently vacant

Deputy Assistant Attorney General David A. Hubbert is Head of the Tax Division under Directive 142a.

II. Deputy Assistant Attorney General (Criminal Matters)

Acting Deputy Assistant Attorney General Stuart M. Goldberg

III. Chiefs, Criminal Enforcement Sections

A. ***Criminal Appeals & Tax Enforcement Policy Section***

Chief S. Robert Lyons
Assistant Chief Katie Bagley
(202) 514-5396
(202) 305-8687 (FAX)

B. ***Northern Criminal Enforcement Section***

Chief Jason Poole
Assistant Chiefs John Kane and Jorge Almonte
(202) 514-5150
(202) 514-8455 (FAX)
(202) 616-1786 (FAX)
States and Territories:

Connecticut	Massachusetts	Ohio
Delaware	Michigan	Pennsylvania
Kentucky	New Hampshire	Rhode Island
Maine	New Jersey	Vermont
Maryland	New York	District of Columbia

Drug Task Force Liaison Attorneys for Boston, Baltimore, New York, and Detroit

C. ***Southern Criminal Enforcement Section***

Chief Karen Kelly
Assistant Chiefs Gregory Tortella, Michael Boteler, and David Zisserson
(202) 514-5145
(202) 514-0961 (FAX)

States and Territories:

Alabama	Missouri	Virginia
Arkansas	New Mexico	West Virginia
Florida	North Carolina	Canal Zone
Georgia	South Carolina	Puerto Rico
Louisiana	Tennessee	Virgin Islands
Mississippi	Texas	

Drug Task Force Liaison Attorneys for Atlanta, Houston, St. Louis and Miami

D. ***Western Criminal Enforcement Section***

Chief Larry Wszalek
Assistant Chiefs Andrew Kameros, Matthew Kluge, and Lee Langston
(202) 514-5762
(202) 514-9623 (FAX)

States and Territories:

Alaska	Iowa	Oregon
Arizona	Kansas	South Dakota
California	Minnesota	Utah
Colorado	Montana	Washington
Hawaii	Nebraska	Wisconsin
Idaho	Nevada	Wyoming
Illinois	North Dakota	American Samoa
Indiana	Oklahoma	Guam

Drug Task Force Liaison Attorneys for Chicago, Denver, Los Angeles, San Diego and San Francisco

2.00 *CRIMINAL TAX PRACTICE AND PROCEDURES*

(UNITED STATES ATTORNEYS' MANUAL)

This chapter directly links to the official edition of the cited USAM and Resource Manual provisions.

6-4.240 United States Attorney's Responsibilities

6-4.242 Recommendation Following a Grand Jury Investigation

6-4.243 Review of Direct Referral Matters

6-4.244 Review of Noncomplex Matters

6-4.245 Request to Decline Prosecution 6-4.246 Request to Dismiss Prosecution

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6-4.310 Major Count Policy/Plea Agreements

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Tax Resource Manual Material

5. Origin of IRS Administrative Investigations
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USAM 9-13.900 Access to and Disclosure of Tax Returns in a Non-tax Criminal Case

Criminal Resource Manual Material

501. Access to and Disclosure of Tax Returns in a Non-Tax Criminal Case
502. Definitions
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506. Disclosure Under 26 U.S.C. §6103(i)(1)
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3.00 TAX DIVISION POLICY DIRECTIVES AND MEMORANDA

The Tax Division's policies and procedures are contained in a series of Tax Division Directives and Memoranda, which are set forth in the pages that follow for ease of reference.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 52

March 17, 2008

AUTHORITY TO APPLY FOR TITLE 26 OR TAX-RELATED TITLE 18 SEARCH WARRANTS

A. Pursuant to the authority vested in me by Part 0, Sub-Part N of Title 28 of the Code of Federal Regulations, Section 0.70, except as provided in paragraph B, below, I hereby delegate to the following officials authority with respect to approving applications for Title 26 U.S.C. or tax-related Title 18 U.S.C. search warrants directed at offices, structures, premises, etc., owned by, controlled by, or under the dominion of, the subject or target of a criminal investigation; search warrants directed to providers of electronic communication services or remote computing services and relating to a subject or target of a criminal investigation; and search warrants directed to disinterested third parties owning storage space businesses or similar businesses and relating to a subject or target of a criminal investigation:

1. Any United States Attorney appointed under 28 U.S.C. Section 541,
2. Any United States Attorney appointed under 28 U.S.C. Section 546,
3. Any permanently appointed representative within the United States Attorney's office assigned as First Assistant United States Attorney, and
4. Any permanently appointed representative within the United States Attorney's office assigned as chief of criminal functions.

This delegation of authority is expressly restricted to these, and no other, individuals.

This delegation of authority does not affect the statutory authority and procedural guidelines relating to the use of search warrants in criminal investigations involving disinterested third parties as contained in 28 C.F.R. Sec. 59.1, et seq.

B. 1. The Tax Division shall have exclusive authority to approve applying for a Title 26 or tax-related Title 18 search warrant directed at offices, structures or premises owned by, controlled by, or under the dominion of, a subject or target of an investigation who is reasonably believed to be:

a. An accountant;

b. A lawyer;

c. A physician;

d. A local, state, federal, or foreign public official or political candidate;

e. A member of the clergy;

f. A representative of the electronic or printed news media;

g. An official of a labor union;

h. An official of an organization deemed to be exempt under Section 501(c) of the Internal Revenue Code.

2. The Tax Division shall also have exclusive authority to approve applying for a Title 26 or tax-related Title 18 search warrant that is directed to a provider of electronic communication services or remote computing services or to a disinterested third party owning a storage space business, where the search warrant relates to a person who is reasonably believed to be:

a. An accountant;

b. A lawyer;

c. A physician;

d. A local, state, federal, or foreign public official or political candidate;

e. A member of the clergy;

f. A representative of the electronic or printed news media;

g. An official of a labor union;

h. An official of an organization deemed to be exempt under Section 501(c) of the Internal Revenue Code.

C. If authority to approve a particular application for a warrant to search for evidence of a criminal tax offense has not been delegated herein, the application must be specifically approved in advance by the Tax Division.

Notwithstanding this delegation, the United States Attorney or his delegate has the discretion to seek Tax Division approval of any search warrant or to request the advice of the Tax Division regarding any search warrant.

The United States Attorney shall notify the Tax Division within ten working days, in writing, of the results of each executed search warrant and shall transmit to the Tax

Division copies of the search warrant (and attachments and exhibits), inventory, and any other relevant papers.

This directive provides an internal guide to federal law enforcement officials. Nothing in it is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil, or criminal matter by any prospective or actual witness or party. *See United States v. Caceres*, 440 U.S. 741 (1979).

The United States Attorneys' Manual is hereby modified effective March 17, 2008.

Nathan J. Hochman
Assistant Attorney General Tax Division
Tax Division

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 86 – 58
TAXPAYER CONFERENCES

May 14, 1986

Introduction. While it is the function of the Tax Division to carefully review the facts, circumstances, and law of each criminal tax case as expeditiously as possible, the taxpayer should be given a reasonable opportunity to present his/her case at a conference before the Tax Division. Where the rules governing conferences are so rigid and inflexible that such an opportunity is effectively denied a taxpayer, the interests of justice are not served. The following guidelines will assist the Tax Division attorneys in reviewing such cases.

(1) ***Vicarious Admissions***. Effective immediately, the vicarious admissions rule for statements by lawyers attending conferences before the Criminal Section shall no longer be used by the Tax Division, except where the lawyer authenticates a written instrument, *i.e.*, document, memorandum, record, etc.

(2) ***Administrative Investigations***. Effective July 1, 1986, plea negotiations may be entertained at the conference in non-grand jury matters, consistent with the policies of the appropriate United States Attorney's office. Written plea agreements should be prepared and entered into by the United States Attorney's office unless there is a written understanding between the Tax Division and the United States Attorney's office to the contrary. Where the prospective defendant indicates a willingness to enter into a plea of guilty to the major counts(s) and to satisfy the United States Attorney's office policy, the matter should be referred to the United States Attorney's office for plea disposition.

(3) ***Number of Conferences***. There is no fixed number of conferences which may be granted in any one particular case. Ordinarily, one conference is sufficient. However, in some cases it may be that more than one conference is appropriate. The test is not in the number of conferences, for there is no right to a conference, but whether, under the facts and circumstances of the case, sufficient progress is or will be made in either the development of material facts or the clarification of the applicable law, without causing prejudice to the United States. Tax Division attorneys should be mindful that justice delayed is justice denied and, therefore, sound, professional judgment should be used at all times in such matters.

(4) ***Witness at Conferences***. On occasion, the taxpayer or a witness may attend the conference. In rare situations, the taxpayer or a witness may attempt to make oral representations or statements at the conference. There are no restrictions on the use of such statements by the Government. However, such attempts should be discouraged, since the Tax Division is conducting a review of an investigation and is not conducting either a hearing or an investigation. Under no circumstances may evidence be presented

at the conference based upon any understanding that it is in lieu of any person testifying before a grand jury.

(5) ***Grand Jury Investigations and Coordination with United States Attorney's Office***. Effective immediately, in every grand jury investigation where a conference is requested, the Tax Division trial attorney shall initially contact the United States Attorney's office and discuss the case with the appropriate Assistant United States Attorney, and ascertain whether disclosure of any facts of the case is likely to expose any person, including witnesses, to the risk of intimidation or danger. If there is such a risk, the trial attorney shall then advise the appropriate assistant chief of the Criminal Section, who shall decide the appropriate course of action. The Tax Division trial attorney shall advise the Assistant United States Attorney that he/she may attend the conference if they so desire.

ROGER M. OLSEN
Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

MEMORANDUM SUPPLEMENT TO TAX DIVISION DIRECTIVE 86-58

October 1, 2013

To: Chiefs, Assistant Chiefs, Senior Litigation Counsel, and Line Attorneys
Criminal Enforcement Sections

From: Kathryn Keneally
Assistant Attorney General

Subject: Supplemental procedures for Tax Division conferences associated with litigation to which a Tax Division attorney has been assigned

To ensure the continued independent evaluation of a matter referred to the Tax Division for prosecution, when a taxpayer requests a Tax Division conference in litigation handled solely or in part by a Tax Division attorney, the following procedures will apply:

1. Upon request of the taxpayer, where a line attorney who is not a Senior Litigation Counsel has been or will be assigned to litigation of the case, a manager or Senior Litigation Counsel will attend the Tax Division conference;

2. Where a manager or Senior Litigation Counsel has been or will be assigned to litigation of the case, a different manager or Senior Litigation Counsel will attend any requested Tax Division conference alone with the assigned attorney(s), and will be assigned to review any memoranda prepared by the manager or Senior Litigation Counsel assigned to litigate the case; and

3. Upon completion of the conference, a memorandum of the conference should be prepared by of the Tax Division participants and should be signed by all Tax Division participants.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 86-59

DELEGATION OF AUTHORITY TO APPROVE GRAND JURY EXPANSION REQUESTS TO INCLUDE FEDERAL CRIMINAL TAX VIOLATIONS

AGENCY: Department of Justice

ACTION: Notice

SUMMARY: This Directive delegates the authority to approve requests seeking to expand nontax grand jury investigations to include inquiry into possible federal criminal tax violations from the Assistant Attorney General, Tax Division, to any United States Attorney, Attorney-In-Charge of a Criminal Division Organization Strike Force or Independent Counsel. The Directive also sets forth the scope of the delegated authority and the procedures to be followed by designated field personnel in implementing the delegated authority.

EFFECTIVE DATE: October 1, 1986

FOR FURTHER INFORMATION CONTACT: Edward M. Vellines, Senior Assistant Chief, Office of Policy & Tax Enforcement Analysis, Tax Division, Criminal Section (202-633-3011). This is not a toll number. [1]

SUPPLEMENTARY INFORMATION: This order concerns internal Department management and is being published for the information of the general public.

[1] Questions concerning this directive should now be addressed to the Criminal Appeals and Tax Enforcement Policy Section at 202-514-5396.

TAX DIVISION DIRECTIVE NO. 86-59

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations, particularly Section 0.70, delegation of authority with respect to approving requests seeking to expand a nontax grand jury investigation to include inquiry into possible federal criminal tax violations is hereby conferred on the following individuals:

1. Any United States Attorney appointed under Section 541 or 546 of Title 28, United States Code.

2. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, United States Code.

3. Any Independent Counsel appointed under Section 593 of

   Title 28, United States Code.

The authority hereby conferred allows the designated official to approve, on behalf of the Assistant Attorney General, Tax Division, a request seeking to expand a nontax grand jury investigation to include inquiries into potential federal criminal tax violations in a proceeding which is being conducted within the sole jurisdiction of the designated official's office. (Section 301.6103(h)(2)-1(a)(2)(ii) (26 C.F.R.)). *Provided*, that the delegated official determines that--

1. There is reason to believe, based upon information developed during the course of the nontax grand jury proceedings, that federal criminal tax violations may have been committed.

2. The attorney for the Government conducting the subject nontax grand jury inquiry has deemed it necessary in accordance with F.R.Cr.P. 6(e)(A)(ii) to seek the assistance of Government personnel assigned to the Internal Revenue Service to assist said attorney in his/her duty to enforce federal criminal law.

3. The subject grand jury proceedings do not involve a multijurisdictional investigation, nor are the targets individuals considered to have national prominence--such as local, state, federal, or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and major corporations and/or their officers when they are the targets (subjects) of such proceedings.

4. A written request seeking the assistance of Internal Revenue Service personnel and containing pertinent information relating to the alleged federal tax offenses has been forwarded by the designated official's office to the appropriate Internal Revenue Service official (e.g., Chief, Criminal Investigations).

5. The Tax Division of the Department of Justice has been furnished by certified mail a copy of the request seeking to expand the subject grand jury to include potential tax violations, and the Tax Division interposes no objection to the request.

6. The Internal Revenue Service has made a referral pursuant to the provisions of 26 U.S.C. Section 6103(h)(3) in writing stating that it: (1) has determined, based upon the information provided by the attorney for the Government and its examination of relevant tax records, that there is reason to believe that federal criminal tax violations have been committed; (2) agrees to furnish the personnel needed to assist the Government attorney in his/her duty to enforce federal criminal law; and (3) has forwarded to the Tax Division a copy of the referral.

7. The grand jury proceedings will be conducted by attorney(s) from the designated official's office in sufficient time to allow the results of the tax segment of the grand jury proceedings to be evaluated by the Internal Revenue Service and the Tax Division before undertaking to initiate criminal proceedings.

The authority hereby delegated includes the authority to designate: the targets (subjects) and the scope of such tax grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority to terminate such grand jury investigations, *provided*, that prior written notification is given to both the Internal Revenue Service and the Tax Division. If the designated official terminates a tax grand jury investigation or the targets (subjects) thereof, then the designated official shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. Section 7602(c).

This delegation of authority does not include the authority to file an information or return an indictment on tax matters. No indictment is to be returned or information filed without specific prior authorization of the Tax Division. Except in Organized Crime Drug Task Force Investigations, individual cases for tax prosecution growing out of grand jury investigations shall be forwarded to the Tax Division by the United States Attorney, Independent Counsel or Attorney-in-Charge of a Strike Force with a special agent's report and exhibits through Regional Counsel, (Internal Revenue Service) for evaluation prior to transmittal to the Tax Division. Cases for tax prosecutions growing out of grand jury investigations conducted by an Organized Crime Drug Task Force shall be forwarded directly to the Tax Division by the United States Attorney with a special agent's report and exhibits.

The authority hereby delegated is limited to matters which seek either to: (1) expand nontax grand jury proceedings to include inquiry into possible federal criminal tax violations; (2) designate the targets (subjects) and the scope of such inquiry; or (3) terminate such proceedings. In all other instances, authority to approve the initiation of grand jury proceedings which involve inquiries into possible criminal tax violations, including requests generated by the Internal Revenue Service, remains vested in the Assistant Attorney General in charge of the Tax Division as provided in 28 C.F.R. 0.70. In addition, authority to alter any actions taken pursuant to the delegations contained herein is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. 0.70.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *October 1, 1986*

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 87 – 61

DELEGATION OF AUTHORITY FOR TAX PROSECUTIONS INVOLVING RETURNS UNDER 26 U.S.C. SECTION 6050I

By virtue of the authority vested in me by Part 0, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, delegation of authority with respect to authorizing tax prosecutions, under Title 26, United States Code (U.S.C.), Sections 7203 and 7206 with respect to Returns (IRS Form 8300) Relating to Cash Received in a Trade or Business as prescribed in 26 U.S.C. Section 6050I, is hereby conferred on the following individuals:

1. The Assistant Attorney General, Deputy Assistant Attorneys General, and Section Chiefs of the Criminal Division.

2. Any United States Attorney appointed under Section 541 or 546 of Title 28, U.S.C.

3. Any permanently appointed representative within the United States Attorney's Office assigned either as First Assistant United States Attorney or Chief of criminal functions.

4. Any Attorney-In-Charge of a Criminal Division Organization Strike Force established pursuant to Section 510 of Title 28, U.S.C.

5. Any Independent Counsel appointed under Section 593 of Title 28, U.S.C.

This delegation of authority is expressly restricted to the aforementioned individuals and may not be redelegated.

The authority hereby conferred allows the designated official to authorize, on behalf of the Assistant Attorney General, Tax Division, tax prosecutions under 26 U.S.C. Sections 7203 and 7206 with respect to returns (IRS Form 8300) prescribed in 26 U.S.C. Section 6050I relating to cash received in a trade or business; Provided, that:

1. The prosecution of such tax offenses (e.g. Sections 7203 and 7206) involves solely cash received in a trade or business as required by 26 U.S.C. Section 6050I.

2. The matter does not involve the prosecution of accountants, physicians, or attorneys (acting in their professional representative capacity) or their employees; casinos or their employees; financial institutions or their employees; local, state, federal or foreign public officials or political candidates; members of the judiciary; religious leaders; representatives of the electronic or printed news media; officials of a labor union; and publicly-held corporations and/or their officers.

3. The Tax Division of the Department of Justice will be furnished by certified mail a copy of the referral from the Internal Revenue Service to the designated field office personnel regarding the potential tax violations.

Except as expressly set forth herein, this delegation of authority does not include the authority to file an information or return an indictment on tax matters. The authority hereby delegated is limited solely to the authorization of tax prosecutions involving the filing or non-filing of returns (IRS Form 8300) pursuant to 26 U.S.C. Section 6050I. The authority to alter any actions taken pursuant to the delegation contained herein is retained by the Assistant Attorney General, Tax Division, in accordance with the authority contained in 28 C.F.R. 0.70.

Notwithstanding this delegation, the designated official has the discretion to seek Tax Division authorization of any proposed tax prosecution within the scope of this delegation or to request the advice of the Tax Division with respect thereto.

Roger M. Olsen
Assistant Attorney General
Tax Division

Approved to take effect on *February 27, 1987*.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 96

DELEGATION OF AUTHORITY TO AUTHORIZE GRAND JURY INVESTIGATIONS OF FALSE AND FICTITIOUS CLAIMS FOR TAX REFUNDS

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, authority to authorize grand jury investigations of false and fictitious claims for tax refunds, in violation of 18 U.S.C. §286 and 18 U.S.C. §287, is hereby conferred on all United States Attorneys.

This delegation of authority is subject to the following limitations:

1. The case has been referred to the United States Attorney by Regional Counsel/District Counsel, Internal Revenue Service, and a copy of the request for grand jury investigation letter has been forwarded to the Tax Division, Department of Justice; and,

2. Regional Counsel/District Counsel has determined, based upon the available evidence, that the case involves a situation where an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) for a single tax year, has filed or conspired to file multiple tax returns on behalf of himself /herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which he/she is not entitled.

In all cases, the request for grand jury investigation letter, together with the Form 9131 and a copy of all exhibits, must be sent to the Tax Division by overnight courier at the same time the case is referred to the United States Attorney. In cases involving arrests or other exigent circumstances, the request for grand jury investigation letter (together with the completed Form 9131) must also be sent to the appropriate Criminal Enforcement Section of the Tax Division by telefax.

Any case directly referred to a United States Attorney's office for grand jury investigation which does not fit the above fact pattern or in which a copy of the referral letter has not been forwarded to the Tax Division, Department of Justice (by overnight courier), by Regional Counsel/District Counsel will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United

States Attorney's office authorize a grand jury investigation. Instead, the case should be forwarded to the Tax Division for authorization.

This delegation of authority is intended to bring the authorization of grand jury investigations of cases under 18 U.S.C. §286 and 18 U.S.C. §287 in line with the delegation of authority to authorize prosecution of such cases (see United States Attorneys' Manual, Title 6, 4.243). Because the authority to authorize prosecution in these cases was delegated prior to the time the Internal Revenue Service initiated procedures for the electronic filing of tax returns, false and fictitious claims for refunds which are submitted to the Service through electronic filing are not within the original delegation of authority to authorize prosecution. Nevertheless, such cases, subject to the limitations set out above, may be directly referred for grand jury investigation. Due to the unique problems posed by electronically filed false and fictitious claims for refunds, Tax Division authorization is required if prosecution is deemed appropriate in an electronic filing case.

SHIRLEY D. PETERSON
Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: December 31, 1991

DEPARTMENT OF JUSTICE

February 17, 1993

MEMORANDUM
VOLUNTARY DISCLOSURE POLICY

TO: All Criminal Enforcement Attorneys

FROM: James A. Bruton
Acting Assistant Attorney General
Tax Division

SUBJECT: **Tax Division Voluntary Disclosure Policy**

Recent new releases by the IRS and stories in the press have raised questions within the Division concerning the proper handling of cases in which a prospective criminal tax defendant claims to have made a voluntary disclosure. Notwithstanding the news stories and rumors to the contrary, the Division has not changed its policy concerning voluntary disclosure, and cases should be evaluated as they have in the past under the provisions of Section 4.01 of the Criminal Tax Manual.

The Service, takes the view that, notwithstanding reports to the contrary, it has not changed its voluntary disclosure practice. It claims that its press releases have been issued to inform the public of the manner it has historically applied the existing practice in referring nonfiler cases to the Department of Justice. The goal has been to demonstrate to the public that the practice has been applied liberally in the past and that a nonfiler interested in reentering the tax system should not be intimidated by a theoretical threat of criminal prosecution.

The Service's carefully worded press releases and public statements have been construed by some member of the press and the defense bar as an "amnesty". This is troublesome, because some inaccurate information has been and is being disseminated to the public by the press and members of the bar that is likely to cause confusion and could interfere with the prosecution of some criminal tax cases. At bottom, the Service's voluntary disclosure policy remains, as it has since 1952, an exercise of prosecutorial discretion that does not, and legally could not, confer any legal rights on taxpayers.

We in the Tax Division should have few occasions to consider whether the Service is properly adhering to its voluntary disclosure policy. If the Service has referred a case to the Division, it is reasonable and appropriate to assume that the Service has considered any voluntary disclosure claims made by the taxpayer and has referred the case to the Division in a manner consistent with its public statements and internal policies. As a result, our review is normally confined to the merits of the case and the application of the Department's voluntary disclosure policy set forth in Section 4.01 of the Criminal Tax Manual.

Cases may, however, arise in which there is some confusion over whether a local District Counsel's office has referred a nonfiler case that seems arguably to fall within one of the Service's press releases on voluntary disclosure or otherwise appears to have been referred to the Department in a manner inconsistent with our understanding of the Service's voluntary disclosure practice. If that occurs, Tax Division reviewing attorneys should not attempt to construe the Service's voluntary disclosure practice on their own but should bring all such questions to the immediate attention of their Section Chiefs. If it is determined that but for questions concerning the applicability of the Service's policy, prosecution of the case would be authorized (i.e., the case meets Tax Division prosecution criteria and does not violate the Division's voluntary disclosure policy set forth in Criminal Tax Manual §4.01), the Section Chief should forward the case (where applicable, consistent with limitations imposed upon the disclosure of grand jury information) to the Assistant Chief Counsel Criminal Tax (CC:CT) for that office's determination whether the Service's referral was consistent with its internal voluntary disclosure practice and whether the Service actually intends that the case be prosecuted. If the Office of Assistant Chief Counsel Criminal Tax determines that the referral was appropriate, the case should be processed by the Division in the normal manner.

Finally, Tax Division reviewing attorneys should exercise considerable care in drafting letters declining cases to ensure that they reflect Tax Division policy regarding voluntary disclosures. Assistant United States Attorneys and IRS field and National Office personnel rely on our correspondence as a reflection of Tax Division policy, and it is, therefore, crucial that our letters and memoranda addressed to other offices within the government accurately state our policies.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 98
PRESS RELEASES

(Supersedes Tax Division Directive No. 57)

February 16, 1993

Press releases serve an important tax enforcement purpose. Thus, they alert the public to the potential consequences that attend noncompliance with the nation's revenue laws and inform the public that the revenue laws are, in fact, enforced. But the Division has certain responsibilities to ensure that all such press releases comply with Department policy (the Department's Media Policy is set forth in Chapter 7 of Title 1 of the United States Attorneys' Manual), and with the strictures of Section 6103 of the Internal Revenue Code and Rule 6(e) of the Federal Rules of Criminal Procedure. Certain safeguards are, therefore, appropriate to ensure that no press release that does not strictly conform to these provisions and to all applicable court rules is released from the Tax Division. While these safeguards require an additional measure of work from Division attorneys, the beneficial impact of a timely and informative press release upon our tax enforcement efforts more than outweighs the costs attributable to the effort.

Thus, the Tax Division adopts the following guidelines that must be followed prior to the Division's authorizing the issuance of such releases.

1. Attorneys should evaluate the appropriateness of a press release as soon as it is determined that action warranting a release is imminent and should consult with their section chiefs at that time.

2. In the event the section chief believes that a press release is appropriate, the attorney should prepare a draft of that release and that draft should clearly indicate that the draft is "Embargoed for Release." That draft should contain only information that will become a matter of public record, following the filing of the complaint, the return of the impending indictment, etc.

3. After the draft is approved within the applicable section, it should be discussed with the press officer in the local United States Attorney's office and with the Department's Office of Public Affairs. (In the case of press releases that are prepared by the Offices of United States Attorney, the attorney should obtain a copy of the draft release from that office.) All drafts of the press release should be clearly marked as "Embargoed for Release." And all press personnel should be alerted to the fact that information contained in the press release that is protected by either Section 6103 or Rule 6(e) cannot be released until final approval for issuance of the press release is obtained.

4. The draft press release should then be forwarded to the Office of the Assistant Attorney General. In criminal cases, an additional copy of the draft release should be

provided to the Director, Criminal Enforcement Sections. Except in unusual circumstances, this draft release should be forwarded two days in advance of the expected release date.

5. The attorney handling the case should then ensure that the Office of the Assistant Attorney General is informed when the complaint, indictment or other pleading is filed in the local court. At this time, the attorney should request a telefax copy of the pleading that is actually filed (preferably one that has been stamped as "filed" by the clerk's office). When the attorney is satisfied that the facts as set forth in the press release are consistent with the pleading, that the release does not disclose matters not set forth in the pleading, and that, under the local rules, public disclosure is permitted (e.g., some local rules prohibit public release of indictments until the defendant is arraigned), the attorney should inform the Office of the Assistant Attorney General that the release may be issued. (Attorneys should take special note of the fact that, while Department policies permit disclosure of the "defendant's name, age, residence, employment, marital status, and similar background information," disclosures in tax cases must be confined to matters set forth in the pleading.)

6. The Office of the Assistant Attorney General will then coordinate the final clearance of the release with the Office of Public Affairs. No press release can be cleared for issuance by the Tax Division without the final approval of the Office of the Assistant Attorney General.

JAMES A. BRUTON
Acting Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

October 15, 1997

MEMORANDUM
PRESS RELEASES IN CASES INVOLVING THE IRS

TO: ALL UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL CIVIL CHIEFS

FROM: Loretta C. Argrett
Assistant Attorney General

SUBJECT: **Press Releases in Cases Involving the IRS**

ACTION REQUIRED: Forward, preferably via fax, a copy of each press release in criminal tax cases to the Deputy Assistant Attorney General (Criminal), Tax Division, P.O. Box 501, Washington, D.C. 20044. FAX (202) 514-5479.

DUE DATE: None

RESPOND TO: See Below

CONTACT PERSON: Bob Lindsay
(202) 514-3011 [note]

Note: This contact information is out of date. Please contact the Chief, Criminal Appeals and Tax Enforcement Policy Section at (202) 514-5396.

Summary

The purpose of this message is to provide guidance to United States Attorneys' offices about the use of press releases publicizing indictments, convictions, and sentences in criminal tax and other IRS-investigated cases, in light of a recent circuit court opinion and several earlier decisions. [This guidance also applies to civil tax cases.]

This recent decision has increased the confusion about the information that may be released in tax cases. On August 21, 1997, the United States Court of Appeals for the Fifth Circuit ruled that the prohibitions against the disclosure of tax returns and return information from IRS or DOJ files (26 U.S.C. § 6103) continue to apply even if the information has been made public in an indictment or court proceeding. Johnson v. Sawyer, 5th Cir. No. 96-20667 ____F.3d___. [120 F.3d 1307 (5th Cir. 1997)] The Fifth Circuit concluded that "[i]f the immediate source of the information claimed to be wrongfully disclosed is tax return information ..., the disclosure violates § 6103, *regardless* of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer confidentiality." Several other circuits have addressed this issue, often reaching conflicting conclusions.

The practical effect of these holdings is that you should exercise caution when preparing tax press releases. Press releases cannot be written with information from IRS or the prosecutor's files, but must be based on, and contain only, public record information. Thus, a press release announcing an indictment should contain only information set forth in the publicly-filed indictment and indicate that the source of the information is the indictment. Similarly, a press release discussing a conviction should be based solely on information made public at the trial or in pleadings publicly filed in the case, and should indicate that the source of the information is the public court record.

Background

Section 7431 of the Internal Revenue Code (26 U.S.C.) authorizes a civil action for damages against the United States for the unauthorized disclosure of returns or return information. The minimum damage award for each negligent disclosure is $1,000. The statute also provides for punitive damages for any unauthorized disclosures that are due to gross negligence or willfulness. A willful disclosure of returns or return information in a manner not authorized by Section 6103 also is punishable as a felony under 26 U.S.C. 7213.

"Return information" is defined in Section 6103 of the Code to include virtually all information collected or gathered by the IRS with respect to a taxpayer's tax liabilities, or any investigation concerning such liability. It prohibits any disclosure of either tax returns themselves or return information, except as specifically authorized by that section. The statute authorizes the IRS to disclose tax returns and return information to the Department of Justice for use in criminal and civil tax cases on its own initiative (Section 6103(h)(2) and (3)) and for use in non-tax criminal cases pursuant to a court order (Section 6103(i)(1)). Sections 6103(h)(4) and 6103(i)(4) permit the Department to disclose such returns or return information in civil or criminal judicial proceedings relating to tax administration and in non-tax criminal cases and civil forfeiture cases, respectively.

Several circuits have addressed the question of when the non-disclosure restrictions of Section 6103 no longer apply to return information. The Ninth Circuit has held that once return information has been made public in a judicial proceeding, the non-disclosure restrictions no longer apply to that information. Lampert v. United States, 854 F.2d 335 (9th Cir. 1988). The Sixth Circuit has held that the return information disclosed by the filing of a notice of federal tax lien loses it confidentiality and is not protected by Section 6103, but emphasized that a notice of federal tax lien "is designed to provide public notice and is thus qualitatively different from disclosures made in judicial proceedings, which are only incidentally made public." Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996). In an unpublished opinion, the Third Circuit has held that a press release did not contain unauthorized disclosures of return information because the information in the press release was public information. Barnes v. United States, 73 A.F.T.R. 2d (PH) ¶ 94-581, at 1160 (3rd Cir. 1994). On the other hand, the Tenth and the Fourth Circuits have held that public disclosure of return information does not lift the non-disclosure bar on further disclosure of such information. Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983); Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). While the Seventh Circuit did not resolve the issue of whether return information disclosed in court loses its confidentiality, it concluded that information in a court opinion is not return information and, when the source of the information disclosed is the court opinion, no violation has occurred. Thomas v. United States, 890 F.2d 18 (7th Cir. 1989) In Johnson v. Sawyer, supra, the Fifth Circuit followed "the approach of the Fourth and Tenth Circuits, modified by the Seventh Circuit's "source' analysis." Under the Fifth Circuit's analysis, Section 6103 is violated only when tax return information -- which is not a public record open to public inspection -- is the immediate source of the information claimed to be wrongfully disclosed.

The starting point in determining what information may be included in a press release publicizing an indictment, conviction, or sentence is acknowledgment that the Section 6103 prohibitions on disclosure are source-based. **That is, the statute bars the public disclosure of information taken directly from IRS files, or returns and return information that have been accumulated in Department files as part of an investigation or prosecution.** It does not, however, ban the disclosure of information that is taken from the public court record.

Thus, for example, the statute, as interpreted by the majority of the circuits, prohibits the disclosure from IRS or Department files of a tax-crime defendant's name, or the fact that he was under investigation or has been indicted for a particular tax crime. To the extent that this same information has been placed in the public court record (e.g., included in an indictment or other pleading), its dissemination from the public court record does not violate the statute.

Recommendations

United States Attorneys may (**and should**) continue to issue press releases in criminal tax cases. In light of the judicial interpretations of Section 6103 discussed above, however, a press release should contain only information the immediate source of which is the public record of the judicial proceeding, and the press release should attribute the information to the public court record.

A post-indictment press release may relate information set forth in the publicly-filed indictment, and should state that the information is from the publicly-filed indictment (for example: "according to the indictment, during the years 1993 and 1994, John Doe received income in excess of $100,000 which he failed to report on his income tax returns. The indictment further charges . . ."). Facts (including minor details) that do not appear in the indictment (such as the defendant's age, full name, and address) should not be included in the press release unless they are obtained from <u>and</u> <u>attributed</u> <u>to</u> public records.

Post-conviction press releases should make it clear that the information being released came from the publicly-filed indictment, public filings in the case, or public testimony. Care should be taken to avoid statements that are ambiguous as to source. Statements that could be based on information in IRS or Department files should not be made unless the information in the statements are obtained from and attributed to specific public sources. (For example, the source of the facts in this statement -- "Doe shielded his income in offshore bank accounts" -- could be from the IRS special agent's files, trial testimony, or the indictment. If the source of the facts in the statement is trial testimony, the indictment, or other public record, disclosure is permissible.) Thus, statements of facts that could have come from the IRS files should not be made unless attributed to a specific public source.

Assistant United States Attorneys and Public Information Officers issuing a press release or responding to press inquiries should secure the source document from the public record and make it clear that the immediate source of the information they are providing is the public court record, and identify the source.

These rules apply to the use in press releases of any return information provided to the Department in any criminal [or civil] case. United State Attorneys should apply these guidelines in all cases in which tax return information has been made available to the attorney for the Government. Return information obtained for use in non-tax criminal cases and related civil forfeiture cases pursuant to a Section 6103(i) order is subject to the same disclosure restrictions as return information provided by the IRS for use in criminal tax cases. In addition, return information provided to the United States Attorney's office by the IRS in money laundering or narcotics cases that the IRS has determined are "related to tax administration," pursuant to Section 6103(b)(4), is also subject to the same non-disclosure rules.

Request

The Tax Division requests that a copy of each press release in a criminal tax case be sent to the Deputy Assistant Attorney General (Criminal), Tax Division, P.O. Box 501, Washington, D.C. 20044, preferably by faxing the release to (202) 514-5479. The Division is actively seeking to obtain more publicity for successful results in criminal tax cases and maintains a tax-interested press list for faxing press releases reflecting favorable outcomes in such cases. The Division would be happy to forward press releases from individual United States Attorneys' offices to those in the media who have shown an interest in such matters, thereby widening the publicity given to successful tax prosecutions.

DEPARTMENT OF JUSTICE

September 8, 2000

MEMORANDUM
PRESS RELEASES IN CRIMINAL TAX CASES

To: All CES Chiefs, Assistant Chiefs, and Trial Attorneys

From: Paula M. Junghans
Acting Assistant Attorney General

Subject: **Press Releases in Criminal Tax Cases**

There has been a significant decline in the number of press releases prepared for criminal cases that Tax Division lawyers are litigating or that we are prosecuting in conjunction with personnel from the United States Attorneys' Offices. This trend may be due, in part, to certain appellate court decisions that have strictly interpreted the non-disclosure requirements of Section 6103. See, e.g., Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997). Press releases, however, serve an important function; *i.e.,* they "alert the public to the potential consequences that attend noncompliance with the nation's revenue laws and inform the public that the revenue laws are, in fact, enforced." See Tax Division Directive No. 98. Accordingly, the general rule is that press releases should be prepared for all noteworthy events that occur in criminal tax cases (*e.g.,* indictments, guilty pleas, trial convictions and sentencings). This is so regardless of whether the prosecution is being directed solely by Tax Division attorneys or jointly with an AUSA.

Nothing contained herein supersedes or alters the Tax Division's (or the Justice Department's) previous pronouncements on press releases and contacts with the news media.[1] For example, it is still up to each lawyer to "evaluate the appropriateness of a press release" in consultation with his or her criminal section chief. See Tax Division Directive No. 98. Not all cases–or all events that occur within a given case–will merit the drafting of a news release. On the other hand, just because the prosecution involves a misdemeanor does not mean that it is *not* newsworthy.

Simply stated, the Tax Division must renew its efforts to provide timely and informative press releases subject, of course, to the legal restrictions attendant to taxpayer return information (26 U.S.C. § 6103, *et seq.*) and grand jury proceedings (Fed. R. Crim. P. 6(e)). No doubt, preparing these releases will require additional work on the part of our

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[1]Trial attorneys should familiarize themselves with the following: Tax Division Directive No. 98; Bluesheet 1-7.000 to the U.S. Attorney's Manual (Media Relations); and the Memorandum dated October 15, 1997, from Assistant Attorney General Loretta C. Argrett to all U.S. Attorneys, Criminal Chiefs, and Civil Chiefs.

attorneys, but the beneficial impact to the nationwide tax enforcement program will substantially outweigh the costs attributable to that effort.

It is, in fact, imperative that we do so given current circumstances. As you are aware, the Internal Revenue Service continues to undergo a comprehensive restructuring of its entire organization. During this time, the Service has initiated fewer criminal tax investigations, civil audits and collections. These declines have been reported widely by the news media. To the extent that the Tax Division may counter the impression that it is now easier to cheat on one's taxes, we must. Prompt and informative press releases relating to our cases, therefore, has taken on an added significance.

Concerning tax prosecutions where the news release is prepared by the press officer in the U.S. Attorney's Office, the proposed release (clearly marked as a "draft" and "embargoed for release") should be forwarded to the Tax Division, OAAG, as well as to the U.S. Department of Justice, Office of Public Affairs, two days in advance of the expected release date, absent unusual circumstances.[2] See Tax Division Directive No. 98, ¶ 4. In any event, approved press releases in tax cases that are subsequently issued by the local U.S. Attorney's Office should be sent, *via* facsimile, *on the day that they are released*, to:

U.S. Department of Justice
Office of Public Affairs
Attention: Mr. Charles Miller [**Updated**]
Fax No. (202) 514-5331 [**Updated**]

The Office of Public Affairs will disseminate the news releases to the national media or other press contacts that have an interest in tax matters. The goal is to expand the coverage of our significant cases for the reasons identified above.

It is also worth noting that news agencies often ignore press releases about a conviction or sentencing where the initial indictment was not covered. Accordingly, it is crucial that Tax Division attorneys prepare draft press releases for their indictments. Prior to the return of an indictment, there is ample time to craft a news release that is informative and which satisfies all relevant legal restrictions.

Finally, the Office of Public Affairs has provided some sample press releases which demonstrate the format that it prefers. These should be used as a guide in drafting press releases in criminal tax cases. Copies are attached for your reference.

cc: Thomas E. Zehnle
Counsel to the Acting Assistant Attorney General

[2] It remains the trial attorney's primary responsibility to insure that the information contained in the news release is attributable to specific public sources. (See generally Memorandum dated October 15, 1997, from Assistant Attorney General Loretta C. Argrett to all U.S. Attorneys, Criminal Chiefs, and Civil Chiefs). The trial attorney is in the best position to determine the source of the information in the case and to guard against improper disclosures.

Department of Justice

FOR IMMEDIATE RELEASE | TAX
WEDNESDAY, FEBRUARY 3, 1999 | (202) 514-2008
WWW.USDOJ.GOV | TDD (202) 514-5188

MARYLAND MAN INDICTED ON TAX CHARGES

WASHINGTON, D.C. - A Bel Air, Maryland, man was indicted late yesterday for attempting to evade his federal income taxes for 15 years, the Justice Department announced today.

Lloyd E. Darland was charged in a four-count indictment with evading the payment of his 1981 through 1992 income taxes by concealing his ownership interest in assets and income which could have been used by the IRS to satisfy his tax liabilities. He was also charged with evading the assessment of his 1993 through 1995 income taxes by concealing income earned during those years from the IRS.

According to the indictment, Darland generated income during the years 1981 through 1995 by various means, including a tax return preparation business, an Amway distributorship, and a federal pension. The indictment alleges that Darland has not filed a federal income tax return for any year from 1981 through 1995, despite owing taxes totaling approximately $260,229 for this time period.

The maximum penalty for each count is five years imprisonment and a $250,000 fine.

# # #

99-044

Department of Justice

FOR MMEDIATE RELEASE
THURSDAY, AUGUST 26, 1999
WWW.USDOJ.GOV

TAX
(202) 514-2007
TDD (202) 514-1888

FORMER FEDERAL PUBLIC DEFENDER PLEADS GUILTY TO TAX CHARGES

WASHINGTON, D.C. - James R. Gailey, former federal public defender for the Southern District of Florida, pled guilty to criminal tax charges today, the Department of Justice announced.

Gailey pled guilty to an Information charging him with one felony count of filing a false U.S. Individual Income Tax Return, Form 1040, in which he reported his total 1992 income as $111,100.50, although he knew his income was substantially greater.

The government contended, according to the plea agreement, that Gailey's actions resulted in a tax loss to the U.S. of more than $100,000. In return for his pleading guilty to the Information, the government agreed to dismiss the original two count indictment at sentencing.

Judge K. Michael Moore scheduled sentencing for November 4, 1999. Under the terms of the Plea Agreement, Gailey could face up to three years imprisonment, followed by a term of supervised release. The court could also fine Gailey up to $250,000 and order him to make restitution.

The case was investigated by the Internal Revenue Service Criminal Investigation Division and prosecuted by Arthur S. Lowry and Michael Yurkanin, Tax Division Trial Attorneys.

# # #

99-381

Department of Justice

FOR IMMEDIATE RELEASE
WEDNESDAY, AUGUST 12, 1998
WWW.USDOJ.GOV

TAX
(202) 616-2765
TDD (202) 514-1888

OKLAHOMA MAN PLEADS GUILTY TO TAX EVASION CHARGE

WASHINGTON, D.C. - David P. Luse pleaded guilty today in U.S. District Court in Tulsa, Oklahoma, to evading more than $23,000 in taxes on income that included lottery winnings, the Department of Justice announced.

According to his plea, Luse, a Tulsa resident, admitted intentionally supplying a false Form W-4 to his employer to avoid having taxes withheld from his paycheck on his earnings from his job as an aircraft tool designer. Luse also admitted paying no taxes on a $1,000 lottery prize he won from the Washington State Lottery.

Luse was originally charged in a four-count indictment in April, 1998 in Seattle, Washington. Luse pleaded guilty today to count two of the April indictment, which charged him with owing $23,376 in taxes for Tax year 1992 based on his earnings of $88,416.50 and the $1,000 lottery prize.

Judge Terry C. Kern scheduled sentencing for November 12, 1998. Luse faces a five year prison term, a $250,000 fine, or both.

# # #

DEPARTMENT OF JUSTICE

December 4, 1998

MEMORANDUM

INCLUSION OF STATE TAX LOSS IN TAX LOSS COMPUTATION FOR FEDERAL TAX OFFENSES UNDER THE SENTENCING GUIDELINES

To: All Tax Division Criminal Enforcement Section Attorneys
Assistant United States Attorneys

From: Loretta C. Argrett
Assistant Attorney General

Subject: **Inclusion of State Tax Loss in Tax Loss Computation for Federal Tax Offenses Under the Sentencing Guidelines**

Questions have been raised concerning whether state tax crimes can be treated as part of the relevant conduct for sentencing purposes in federal tax cases. For the reasons set out below, we believe that state tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG §1B1.3 and may be included in the calculation of the base offense level in appropriate cases.

Under the relevant conduct guideline, USSG §1B1.3, "relevant conduct" includes, inter alia, all acts that were part of the same course of conduct or common scheme or plan and all harm that resulted from those acts. Nothing in the language of the guideline limits relevant conduct to federal offenses, or harm to the United States or other victims of federal offenses. Moreover, the Ninth Circuit held in United States v. Newbert, 952 F.2d 281, 284 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992), that nonfederal offenses may be considered for sentence enhancement under §1B1.3. Similarly, the Eleventh Circuit has held that state offenses that were part of the same course of conduct as federal offenses and part of a common scheme or plan must be considered relevant conduct under §1B1.3(a)(2). United States v. Fuentes, 107 F.3d 1515, 1526 (11th Cir. 1997).

Fuentes involved USSG §5G1.3, which relates to imposition of a sentence on a defendant subject to an undischarged term of imprisonment. The commentary to that guideline indicates that the Sentencing Guidelines contemplate the inclusion of state offenses in the determination of the base offense level for an offense. An example set out in Application Note 2 includes the following:

> The defendant is convicted of a federal offense charging the sale of 30 grams of cocaine. Under § 1B1.3 (Relevant Conduct), the defendant is held accountable for the sale of an additional 15 grams of cocaine, an offense for which the defendant has been convicted and sentenced in state court.

Thus, there is ample support for including tax loss from state tax offenses in calculating the total tax loss in a federal tax case. Indeed, it could be argued that, in light of the language of USSG § 1B1.3 that "the base offense level . . . shall be determined on the basis of... all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," state tax losses must be included as relevant conduct in the calculation of base offense level for a federal tax violation where they qualify as part of the same course of conduct or common scheme or plan. See United States v. Fuentes, 107 F.3d at 1523. In fact, if it is not included, it could result in dissimilarly situated defendants being treated similarly -- a result clearly at odds with the spirit of the Guidelines. (United States Sentencing Commission, Guidelines Manual, Ch. 1, Pt. A, 3.) For example, one defendant might evade federal excise taxes on fuel but pay the state excise tax, while another defendant evades both.[1] If the state tax loss is not taken into account, both of these defendants will end up with the same sentence as long as the federal loss is the same.

The government argued this position -- that state tax offenses arising out of the same scheme or course of conduct as federal tax crimes constitute relevant conduct under USSG § 1B1.3 and should be included in the calculation of the base offense level -- before the Fifth Circuit in United States v. Powell, 124 F.3d 655 (1997), a case involving federal and state excise taxes. The court accepted our position, holding that state taxes evaded by the defendant qualified as "relevant conduct" that could be included in "tax loss" under Sentencing Guidelines in sentencing defendant for evading federal fuel excise taxes, where evasion of state and federal taxes occurred at same time, was based on same conduct, and was not isolated or sporadic. 124 F.3d at 665-66.

Prosecutors, therefore, may seek inclusion of state tax loss in appropriate cases -- e.g., where the state tax loss is clearly part of the same course of conduct or common scheme or plan, where the loss is easily ascertainable, and where the loss is clearly due to criminal conduct. Assistant United States Attorneys and Tax Division trial attorneys are encouraged to consult with the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division ((202) 514-3011) prior to sentencing when they are faced with a case where the defendant has also committed state offenses which could be considered part of the same course of conduct or common scheme or plan as the offense of conviction.

We recognize that there may be problems of proof, and prosecutors should be aware of these possible problems. First, evidence of state tax loss may simply be unavailable in the absence of cooperation from state officials. Even where there is cooperation, it still may be difficult to prove the state loss without slowing down the sentencing process or unnecessarily complicating it.

In addition, guideline provisions simplifying the determination of tax loss will probably be unavailable. Under USSG §2T1.1(c)(1), tax loss is 28% of the magnitude of a particular false statement in a return or other tax document (34% in the case of a corporation) unless a more accurate determination of tax loss can be made; and under

[1] This is not that far-fetched an example. There has been at least one case where the defendants evaded the federal excise tax, but paid the state excise tax.

USSG §2T1.1(c)(2), tax loss is 20% of the amount of gross income that should have been reported by a defendant who has failed to file a return (25% in the case of a corporation) unless a more accurate determination of tax loss can be made. The applicable percentages in those guidelines are loosely based on federal tax rates and bear no relation to losses under state tax rates. Where there are problems of proof, prosecutors may, in the exercise of their discretion, decide not to seek inclusion of state tax loss in the tax loss computation.

A final matter bearing note is that there may be cases in which the ability to treat state tax offenses as relevant conduct would effectively limit the defendant's federal sentence. Under §5G1.3(a) of the Guidelines, if a defendant commits an offense while serving a term of imprisonment, the sentence for his new offense must run consecutively to his undischarged term of imprisonment. However, under §5G1.3(b), if §5G1.3(a) is not applicable and an undischarged term of imprisonment has been fully taken into account in the determination of the offense level for a defendant's new offense, the sentence for the new offense must be imposed to run concurrently with the undischarged term of imprisonment. Section 5G1.3(c) provides that in any other case, the sentence for the new offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior term to achieve a reasonable punishment for the new offense. In United States v. Fuentes, supra, the court held that where subsection (a) of §5G1.3 does not apply, "the 'fully taken into account' requirement of §5G1.3(b), is satisfied when the undischarged term resulted from an offense that §1B1.3 requires to be included as relevant conduct, regardless of whether the sentencing court actually took that conduct into account." 107 F.2d at 1522; see also 107 F.2d at 1524. Thus, under Fuentes, if state offenses for which a defendant was serving a sentence constituted relevant conduct, the sentencing court would be required to impose a concurrent sentence even if the state offenses were not used in the calculation of tax loss. However, we do not think the holding in Fuentes on the application of §5G1.3, even if adopted by other circuits, will have much impact on tax cases: to our knowledge, defendants in most tax cases are not often serving state sentences for related state tax offenses. Nevertheless, prosecutors should be aware of Fuentes.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 108A

SIGNATURE AUTHORITY OF LINE ATTORNEYS

The purpose of this Directive is to provide for uniform signature authority for line attorneys engaged in civil trial and appellate litigation and in criminal review work. Criminal review work is work relating to the authorization or declination of prosecution requests received from the Internal Revenue Service or U.S. Attorneys' offices.

For purposes of this Directive, all outgoing correspondence is divided into three categories: Routine Correspondence, Reviewed Correspondence, and Excepted Correspondence. This directive authorizes line attorneys to sign and send Routine Correspondence without prior review. A copy of all Routine Correspondence must be sent simultaneously to the Section Chief, or an authorized designee, who has responsibility for supervising the line attorney's handling of the case. This Directive authorizes line attorneys to sign Reviewed Correspondence following review by a Section Chief, or an authorized designee. Line attorneys may not sign Excepted Correspondence.

The policies set forth in this Directive do not affect, in any way, the prior approvals or signature authority required by other Division Directives, and policies for other documents and actions, including documents that must be signed by a Deputy Assistant Attorney General or the Assistant Attorney General.

This Directive supersedes Directive 108.

A. EXCEPTED CORRESPONDENCE

1. The correspondence described below as Excepted Correspondence shall be signed only by the Section Chief or an authorized designee.

2. Excepted Correspondence is correspondence that:

    a. is directed to the personal attention of the Chief Counsel or an Area Counsel of the Internal Revenue Service; or

    b. is directed to the personal attention of a United States Attorney; or

    c. accepts, rejects, confirms, or modifies a settlement or acknowledges an offer; authorizes or declines to authorize the institution of a suit or filing of a complaint, adversary complaint, or counterclaim; gives notice of the filing of a complaint or counterclaim (e.g., presuit letter); recommends conceding or concedes an existing claim, or recommends raising or raises a new claim or defense in a proceeding; or transmits a trial attorney's memorandum recommending compromise or concession; or

d. pertains to criminal review work and is contained in the Criminal Sections Desk Reference Manual ("Red Book"), with the exception of the items listed in Section B.3.h., below; or

e. discusses sanctions or attorney misconduct; or

f. would be more appropriately sent under the signature of a Section Chief, in the discretion of the Section Chief and/or trial attorney, due to the subject matter of the correspondence or circumstances surrounding a case.

3. The signature block for Excepted Correspondence shall be patterned on one of the following:

Sincerely yours,

[Name]
Assistant Attorney General

By:
[Name]
Chief
[Section Name]

or

Sincerely yours,

[Name]
Chief
[Section Name]

B. ROUTINE CORRESPONDENCE

1. Line attorneys who have been with the Tax Division six months or longer are authorized to finalize, sign, and mail correspondence and documents described below as Routine Correspondence without prior review. A copy of all such correspondence must be sent simultaneously to the Section Chief, or an authorized designee, who has responsibility for supervising the line attorney's handling of the case.

2. This provision does not affect any review requirement for documents that may accompany Routine Correspondence.

3. Routine Correspondence is limited to:
    a. notices of appearance and the cover letters that transmit them;

    b. letters merely acknowledging receipt of correspondence, discovery materials, or other items, but not letters acknowledging receipt of settlement offers;

    c. letters to IRS Chief Counsel's offices requesting information regarding (or assistance in obtaining) initial defense letters or administrative files;

    d. notices of deposition and the cover letters that transmit them, and letters providing witnesses with scheduling and other logistical information (this provision does not apply to subpoenas and their cover letters, which must be reviewed);

    e. letters to opposing counsel confirming agreed scheduling changes or consents to extensions of time allowed by the applicable court and local rules;

    f. letters requesting that the United States Attorney, IRS Chief Counsel, or Special Procedures offices furnish copies of documents filed in courts in their districts;

    g. cover letters that transmit previously filed documents; and

    h. conference scheduling letters pertaining to criminal review work.

4. The signature block for Routine Correspondence shall be patterned on the following:

    Sincerely yours,

    [Name]
    Trial Attorney
    [Name of Section]

C. REVIEWED CORRESPONDENCE

1. All correspondence that is not Routine Correspondence or Excepted Correspondence is designated Reviewed Correspondence. Although Reviewed Correspondence generally shall be signed by a line attorney, it must be reviewed by a Section Chief, or an authorized designee, prior to mailing.

2. In each section, a section manager shall initial a copy of the Reviewed Correspondence, which will then be placed in the DJ file with a copy of the final version.

3. The signature block for Reviewed Correspondence shall be patterned after the following:

   Sincerely yours,

   [Name]
   Trial Attorney
   [Name of Section]

D. REVOCATION OF AUTHORITY

The delegations of signature and review authority granted by this Directive may be revoked:

1. for a particular attorney at any time if, in the discretion of the Section Chief, the attorney would not appropriately use this authority; or

2. for a particular issue, matter, opposing counsel, or judge if, in the discretion of the Section Chief, unique facts and circumstances warrant such a revocation.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 111

EXPEDITED PLEA PROGRAM

On March 1, 1986, the Tax Division, Department of Justice, and the Internal Revenue Service implemented the Simultaneous Plea Program. This program was designed to accommodate both the interests of the taxpayer who desired a speedy resolution to a criminal tax investigation and the interests of the government in obtaining a fair resolution of the case with a minimum expenditure of investigative and prosecutorial resources.

By memorandum dated February 25, 1986, the Acting Assistant Attorney General of the Tax Division notified the United States Attorneys of this program and described its operation. After reviewing the operation of the program since its inception in 1986, the Tax Division has decided to modify the program in several ways and rename it to more accurately reflect its function. This Directive is intended to explain those changes and formalize the new procedures for administering the program.

1. The program is designed to expedite the handling of criminal tax cases where the taxpayer, through counsel, indicates during the course of an administrative investigation being conducted by the Criminal Investigation Division, Internal Revenue Service, an interest in entering a guilty plea to some or all of the charges and years under investigation. The program is intended to dispose expeditiously of the entire case. It is not intended to be utilized to limit the taxpayer's exposure by curtailing or limiting the Service's investigation.

2. This program applies only to administratively investigated cases involving legal source income.

3. The program is available only to taxpayers represented by counsel.

4. The request for initiation of any plea discussions or negotiations must be originated by a taxpayer who is represented by counsel; Criminal Investigation Division shall not initiate the subject of plea discussions.

5. The taxpayer must be informed that the Internal Revenue Service has no authority to engage in plea negotiations and that only the Department of Justice can engage in such negotiations.

6. Taxpayer's counsel must provide a written statement to Criminal Investigative Division confirming the taxpayer's desire to engage immediately in plea negotiations with the Department of Justice regarding the charges under investigation.

7. The taxpayer must be informed that the taxpayer will be required to plead to the most significant violation involved, consistent with the Tax Division's Major Count Policy.

8. The Internal Revenue Service must take precautions to insure that information furnished by the taxpayer, prior to formal plea discussions with the Department of Justice, will not be foreclosed from future use under the restrictions of Rule 11(e)(6) of the Federal Rules of Criminal Procedure in the event that plea negotiations fail.

9. The Internal Revenue Service must obtain sufficient evidence to constitute a referable matter to the Tax Division.

   Although the case does not have to be as fully developed as one that does not go through the Expedited Plea Program, any referral to the Tax Division for review of the proposed plea under the program must reflect the following:

   a. That, for the years implicated in the investigation, the taxpayer has provided all records in his or her possession, or to which the taxpayer has access, to the Service and the investigating agent has reviewed those records with sufficient particularity to insure that there are no significant undiscovered issues or tax losses in the case that have not been taken into account in assessing the merits of the referral;

   b. A description of the nature and extent of the records supplied and the specific conclusions reached by the agent with respect to them;

   c. That the taxpayer has submitted to an interview, the substance of the interview, and the agent's satisfaction with the nature and extent of the taxpayer's cooperation;

   d. That the agent has secured and reviewed the taxpayer's returns for all years subsequent to the years under investigation (and any open prior years) and has addressed any issues raised by those returns in assessing the merits of the referral;

   e. The agent has inquired, and obtained the details, if appropriate, as to any other (open or closed) Federal, state, or local investigations relating to the taxpayer.

10. If District Counsel, after receipt of the Special Agent's Report (SAR), concludes that prosecution is warranted, District Counsel will refer the case to the Tax Division, with a recommendation for prosecution based on the foregoing requirements. Such referral to the Division shall include all exhibits to the SAR, and the evidentiary basis for the referral.

a. District Counsel will telephone the Tax Division liaison attorney in the appropriate Criminal Enforcement Section to advise that a referral is being made to the Tax Division;

b. The Tax Division liaison attorney will contact District Counsel by telephone to acknowledge receipt of the referral.

11. No plea negotiations may be undertaken until prosecution is authorized by the Tax Division.

12. Within 30 days after receipt of the referral from District Counsel, the Tax Division will either authorize prosecution consistent with the proposed plea bargain or disapprove of the negotiation of such a plea.

a. If the proposed plea is not authorized, the Tax Division will notify the taxpayer's counsel in writing that the case is being returned to the Internal Revenue Service, and all exhibits and files submitted will be returned to the Service;

b. If the proposed plea is authorized, the Tax Division will refer all documents to the appropriate United States Attorney's office who may then undertake plea negotiations with the taxpayer and may accept a plea to the specified major count without further authorization from the Tax Division. If the United States Attorney's office desires to accept a plea to any count other than the specified major count, the approval of the Tax Division is required.

13. If plea negotiations are unsuccessful, the United States Attorney's office will notify in writing both the taxpayer's counsel and the Tax Division that the case is being returned to the Internal Revenue Service.

a. All files and exhibits submitted to the United States Attorney's office will be returned to the Service;

b. No information or evidence submitted to the United States Attorney's office by the taxpayer and/or counsel during the course of plea negotiations will be sent to the Internal Revenue Service unless the taxpayer expressly authorizes the Service's use of such information. In such a case, a written waiver of the restrictions of Federal Rule of Criminal Procedure 11(e)(6) should be obtained.

14. All procedures and requirements for administering this program that have heretofore been agreed to between the Internal Revenue Service and the Tax Division remain in force unless inconsistent with any provision of this Directive.

/s/ LORETTA C. ARGRETT
ASSISTANT ATTORNEY GENERAL
TAX DIVISION

DATED: 2/11/99

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 128

(Supersedes Directive No. 99)

CHARGING MAIL FRAUD, WIRE FRAUD OR BANK FRAUD ALONE OR AS PREDICATE OFFENSES IN CASES INVOLVING TAX ADMINISTRATION

Tax Division approval is required for any criminal charge if the conduct at issue arises under the internal revenue laws, regardless of the criminal statute(s) used to charge the defendant.[1] Tax Division authorization is required before charging mail fraud, wire fraud or bank fraud alone or as the predicate to a RICO or money laundering charge for any conduct arising under the internal revenue laws, including any charge based on the submission of a document or information to the IRS. Tax Division approval also is required for any charge based on a state tax violation if the case involves parallel federal tax violations.

The Tax Division may approve mail fraud, wire fraud or bank fraud charges in tax-related cases involving schemes to defraud the government or other persons if there was a large fraud loss or a substantial pattern of conduct and there is a significant benefit to bringing the charges instead of or in addition to Title 26 violations. *See generally* United States Attorneys' Manual (U.S.A.M.) §9-43.100. Absent unusual circumstances, however, the Tax Division will not approve mail or wire fraud charges in cases involving only one person's tax liability, or when all submissions to the IRS were truthful.

Fraud charges should be considered if there is a significant benefit at the charging stage (*e.g.*, supporting forfeiture of the proceeds of a fraud scheme; allowing the government to describe the entire scheme in the indictment); at trial (*e.g.*, ensuring that the court will admit all relevant evidence of the scheme; permitting flexibility in choosing witnesses); or at sentencing (*e.g.*, ensuring that the court can order full restitution). *See id.* §9-27.320(B)(3) ("If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges.").

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[1] 28 C.F.R. §0.70(b): "Criminal proceedings arising under the internal revenue laws ... are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division," with a few specified exceptions.

An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade a responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

For example, mail fraud (18 U.S.C. §1341) or wire fraud (18 U.S.C. §1343) charges may be appropriate if the target filed multiple fraudulent returns seeking tax refunds using fictitious names, or using the names of real taxpayers without their knowledge.[2] Fraud charges also may be considered if the target promoted a fraudulent tax scheme.

Bank fraud charges (18 U.S.C. §1344) can be appropriate in the case of a tax fraud scheme that victimized a financial institution. Example: the defendant filed false claims for tax refund and induced a financial institution to approve refund anticipation loans on the basis of the fraudulent information submitted to the IRS.

Racketeering and Money Laundering Charges Based on Tax Offenses

The Tax Division will not authorize the use of mail, wire or bank fraud charges to convert routine tax prosecutions into RICO or money laundering cases. The Tax Division will authorize prosecution of tax-related RICO and money laundering offenses, however, when unusual circumstances warrant it.

A United States Attorney who wishes to charge a RICO violation (18 U.S.C. §1962) in any criminal matter arising under the internal revenue laws – including a predicate act based on a state tax violation, in the case of a parallel federal tax violation – must obtain the authorization of the Tax Division and the Criminal Division's Organized Crime and Racketeering Section. U.S.A.M. §9-110.101.

A United States Attorney who wishes to bring a money laundering charge (18 U.S.C. §1956) based on conduct arising under the internal revenue laws must obtain the authorization of the Tax Division and, if necessary, the Criminal Division's Asset Forfeiture and Money Laundering Section. U.S.A.M. §9-105.300.

Date: October _____, 2004 ______________________________

EILEEN J. O'CONNOR
Assistant Attorney General

[2] It was the Tax Division's prior practice to authorize the prosecution of fraudulent refund schemes and fraudulent tax promotions only under 18 U.S.C. §§ 286 (false claims conspiracy), 287 (false claims), 371 (conspiracy) and 1001 (false statements); and 26 U.S.C. § 7206 (false tax returns). Under this directive, such charges may still be pursued instead of, or in addition to, mail or wire fraud charges.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 129

(Supersedes Directive No. 77)

CHARGING OBSTRUCTION OF OR IMPEDING THE DUE ADMINISTRATION OF THE INTERNAL REVENUE LAWS UNDER SECTION 7212(a)

The "omnibus clause" of 26 U.S.C. §7212(a) makes it a crime to corruptly obstruct or impede – or endeavor to obstruct or impede – the due administration of the internal revenue code.

A §7212(a) omnibus clause charge is particularly appropriate for corrupt conduct that is intended to impede an IRS audit or investigation. Examples of such conduct include, but are not limited to, providing false information, destroying evidence, attempting to influence a witness to give false testimony, and harassing an IRS employee.[3]

A §7212(a) omnibus clause charge can also be authorized in appropriate circumstances to prosecute a person who, prior to any audit or investigation, engaged in large-scale obstructive conduct involving the tax liability of third parties. Examples include, but are not limited to, assisting in preparing or filing a large number of fraudulent returns or other tax forms, or engaging in other corrupt conduct designed to obstruct the IRS from carrying out its lawful functions.

The omnibus clause should not be used as a substitute for a charge directly related to tax liability – such as tax evasion or filing a false tax return – if such a charge is readily provable. Alleging and proving an actual or intended tax loss may result in an enhanced sentence and may estop a target from contesting application of a civil fraud penalty.

The fact that conduct that violated §7212(a) was in furtherance of a preexisting criminal scheme – for example, an ongoing conspiracy or a continuing attempt to evade taxes – does not preclude prosecution under §7212(a). Targets who first commit primary tax crimes and then engage in conduct designed to obstruct the IRS can be held accountable for the obstruction and punished more severely than those who do not engage in additional criminal conduct.

When the obstruction involves a grand jury investigation, obstruction of justice or perjury charges (*e.g.*, 18 U.S.C. §§1510, 1512 or 1623) that more specifically address the conduct are preferable to §7212(a) charges.

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[3] An act or threat of force against an individual IRS employee acting in an official capacity may be prosecuted under the first clause of §7212(a), which does not require Tax Division authorization.

Date: October _____, 2004 ____________________________

EILEEN J. O'CONNOR
Assistant Attorney General

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 138

DELEGATION OF AUTHORITY RELATING TO CRIMINAL TAX CASES

By virtue of the authority vested in me by Part O, Subpart M of Title 28 of the Code of Federal Regulations, particularly Section 0.70, the delegation of authority with respect to criminal tax matters within the jurisdiction of the Tax Division is hereby conferred as follows:

1. Authority of the Assistant Attorney General that is Not Delegated

Action in the following criminal tax matters is expressly reserved for the Assistant Attorney General of the Tax Division ("AAG"):

a. A request to present the same matter to a second grand jury or to the same grand jury after a no true bill has been returned;

b. A request to recuse or disqualify a federal justice, judge or magistrate;

c. A request to consent to a nolo contendere or *Alford* plea;

d. A request to initiate or continue a federal prosecution affected by the Department's ***Petite*** policy (dual and successive prosecution);

e. A request for disclosure of a tax return or return information pursuant to 26 U.S.C. 6103(h)(3)(B); and

f. A request to authorize a subpoena, the interrogation, indictment, or arrest of a member of the news media; [1]

g. A subpoena of an attorney for information relating to the attorney's representation of a client; and

h. A request to authorize prosecution of a person who has testified or produced information pursuant to a compulsion order for an offense or offenses first disclosed in, or closely related to, such testimony or information.[2]

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[1]See 28 C.F.R. § 50.10 for the policies regarding these matters, and the principles to be taken into account in requesting an authorization which may require the express approval of the Attorney General.

[2]See USAM 9-23.400.

2. ***Delegation of Authority to the Deputy Assistant Attorney General Criminal***

The Deputy Assistant Attorney General, Criminal ("DAAG, Criminal"), is authorized to exercise all the powers and authority of the AAG with respect to criminal proceedings covered by this delegation, except those expressly reserved in Section 1 above.

In addition, the DAAG, Criminal, shall forward to the AAG matters which are deemed appropriate for action by the AAG.

3. ***Delegation of Authority to the Chief of a Criminal Section***

A Chief of a Criminal Section ("Chief") is authorized to act in all matters arising within the jurisdiction of his or her section, except those specifically reserved for action by the AAG in Section 1 above and the following:

a. Issuance of a search warrant when Tax Division approval is necessary (Tax Directive 52);

b. A matter in which the recommendations of the Chief and Assistant Chief as to prosecution or declination conflict;

c. Prosecution of an attorney for criminal conduct committed in the course of acting as an attorney;

d. A prosecution involving: (a) a local, state, federal, or foreign public official or political candidate; (b) a representative of the electronic or print news media; (c) a member of the clergy or an official of an organization deemed to be exempt under section 501(c)(3) of the Internal Revenue Code; or (d) an official of a labor union;

e. A request to issue a compulsion order in any case over which the Tax Division has jurisdiction;

f. Any prosecutorial decision that requires a deviation from Tax Division policy or procedure; and

g. A request to authorize dismissal of an indictment.

In addition, a Chief shall forward for action to the DAAG, Criminal, all matters that involve novel substantive, evidentiary, or procedural issues, or any other sensitive matter for which review at a higher level is appropriate.

Notwithstanding the foregoing, the DAAG, Criminal, may prescribe additional matters, the actions of which are within the authority of a Chief pursuant to this section, that the DAAG, Criminal, determines requires action by the DAAG, Criminal.

4. ***Scope and Effect of this Delegation***

a. This delegation includes all tax and tax-related offenses delegated to the Tax Division pursuant to 28 C.F.R. §§0.70 and 0.179a.

b. This delegation supersedes Tax Division Directives 44, 53, 71, and 115 and all other delegations of authority to approve criminal tax or tax-related matters or cases previously issued.

c. In the event a Chief is recused from acting on a particular matter, then the DAAG, Criminal, may select another Section Chief to act in that matter.

d. When either, or both, the AAG or the DAAG, Criminal, is recused in a particular matter, a ranking Tax Division official will be authorized pursuant to 28 C.F.R. §0.137 to act as either the Acting AAG or the Acting DAAG, Criminal, in that matter.

e. When an individual has been duly designated a specified "Acting" official, the individual shall have the same authority as the position commands, unless that authority is specifically limited in writing by the appropriate authorizing official.

f. The Assistant Attorney General, at any time, may withdraw any authority delegated by this Directive.

APPROVED:

Date: July 14. 2010

/s/ John A. DiCicco
John A. DiCicco
Acting Assistant Attorney General
Tax Division

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 140

DESIGNATION AS ACTING SECTION CHIEF

The following delegation is made pursuant to, inter alia, 28 U.S.C. § 515(a) and 28 C.F.R. § 0.13.

1. Designation of Assistant Chiefs

   Each section chief shall designate, in writing, the order of the assistant chiefs in his or her section to assume the duties of acting chief. If a chief fails to do so, the assistant chiefs in that chief's section will assume the duties of acting chief in order of their tenure as assistant chief.

2. Designation as Acting Section Chief

   If a section chief is unavailable to perform his or her duties, whether due to absence from the office or other cause, then the next available assistant chief, in order as set forth in Section 1 above, is authorized to perform the functions and duties of the chief's position, as Acting Section Chief, unless the chief, or a Deputy Assistant Attorney General, designates another attorney as Acting Section Chief.

   If none of the assistant chiefs is available, and a Deputy Assistant Attorney General determines that the section chief is unavailable to perform his or her duties and has not, for any reason, designated another attorney as Acting Section Chief, the Deputy Assistant Attorney General shall designate an attorney to be the Acting Section Chief.

   All designations as Acting Section Chief shall be subject to the conditions set forth 5 C.F.R. 317.903 (describing time limits for a non-competitive temporary assignment of a non-member of the Senior Executive Service to an SES position).

3. Recusal of Section Chief

   If a section chief is recused from a particular case or category of cases, under 18 U.S.C. 208, 5 C.F.R. § 2635.501-503, or 28 C.F.R. § 45.2, the first available assistant chief in order, as set forth in Section 1 above, is authorized to perform the functions and duties of the chief's position, as Acting Section Chief, for that case or category of cases. If none of the assistant chiefs is able to perform the duties of acting chief, a Deputy Assistant Attorney General, in accordance with the procedures in Section 2 of this Directive, shall designate an Acting Section Chief for the particular case or category of cases.

4. Chief or Acting Chief for a particular case

   If a section chief is of the opinion that, although an assistant chief or other attorney will be generally performing the duties of the chief's position (in accordance with Section 2 above), the interests of the United States would be better served if the section chief retains authority with respect to a particular case or category of cases, the chief shall retain authority to act with respect to that case or category of cases.

   If, after a period of unavailability, a section chief has once again become available to perform his or her duties as chief, and is of the opinion that the interests of the United States would be better served if the attorney who was Acting Section Chief retains authority with respect to a particular case or category of cases, the chief shall delegate to that attorney the authority to act as section chief with respect to that case or category of cases.

5. Acting Section Chief treated as Section Chief

   Where an attorney has been designated as Acting Section Chief by the Deputy Assistant Attorney General (in accordance with Section 2 above), then that person shall be treated as a section chief for the purpose of this directive.

6. Delegation Authority Preserved

   All references in this Directive to a Deputy Assistant Attorney General also include the Assistant Attorney General and persons within the Department of Justice higher in the line of authority.

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Date	John A. DiCicco

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 141

DELEGATION OF AUTHORITY TO APPROVE SERVICE OF SUBPOENAS AND FILING OF PETITIONS TO ENFORCE SUMMONSES ON ATTORNEYS

The following delegation is made pursuant to, inter alia, 28 U.S.C. § 515(a) and 28 C.F.R. § 0.13.

1. Delegation to Deputy Assistant Attorney General for Civil Trial Matters

   The Deputy Assistant Attorney General for Civil Trial Matters is authorized to approve subpoenas to be issued to attorneys or law firms in civil cases and to approve the filing of petitions to enforce summonses issued to attorneys or law firms, whenever such approval is required.

2. Delegation to Deputy Assistant Attorney General for Criminal Matters

   The Deputy Assistant Attorney General for Criminal Matters is authorized to approve subpoenas to be issued to attorneys or law firms in criminal cases, whenever such approval is required.

3. Action by the Assistant Attorney General or the Principal Deputy Assistant Attorney General

   Whenever a Deputy Assistant Attorney General is of the opinion that, because of a question of law or policy, or for any other reason, a proposed subpoena to be issued to an attorney or a law firm or a proposed petition to enforce a summons issued to an attorney or a law firm, for which approval is required, should receive the personal attention of the Principal Deputy Assistant Attorney General or the Assistant Attorney General, then the Deputy Assistant Attorney General shall refer the proposed subpoena or petition to the Principal Deputy Assistant Attorney General or the Assistant Attorney General, as appropriate. xxxx

Date	John A. DiCicco

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 142

PRINCIPAL DEPUTY DELEGATION

The following delegation is made pursuant to, inter alia, 28 U.S.C. § 515(a) and 28 C.F.R. § 0.13.

1. Delegation to Principal Deputy

   If the Assistant Attorney General is unavailable to perform his or her duties, then the Principal Deputy Assistant Attorney General is authorized to perform all functions and duties of the Assistant Attorney General, to the extent permitted by law or written policies of the Department of Justice, unless the Assistant Attorney General authorizes, in writing, another attorney to perform those functions and duties.

2. Absence or Unavailability of Principal Deputy

   In the absence or unavailability of the Principal Deputy Assistant Attorney General, the Deputy Assistant Attorney General with the longest tenure as Deputy Assistant Attorney General is authorized to perform all functions and duties of the Assistant Attorney General, to the extent permitted by law or written policies of the Department of Justice.

3. Recusal of Assistant Attorney General

   If the Assistant Attorney General is recused from a particular case or category of cases, the Principal Deputy is authorized to perform the Assistant Attorney General's functions and duties, to the extent permitted by law or written policies of the Department of Justice, for that case or category of cases. The Principal Deputy is authorized to designate, in writing, another attorney to perform those functions and duties in the event the Principal Deputy is unable to perform them. In the absence or unavailability of the Principal Deputy Assistant Attorney General, the Deputy Assistant Attorney General with the longest tenure as Deputy Assistant Attorney General is authorized to perform the Assistant Attorney General's functions and duties, to the extent permitted by law or written policies of the Department of Justice, for that case or category of cases.

4. No Conflict with Vacancies Act

   Nothing in this Directive shall be construed to conflict with any provision of the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345 et seq.

Date	John A. DiCicco Acting Assistant Attorney General

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 144

DELEGATION OF AUTHORITY TO AUTHORIZE GRAND JURY INVESTIGATIONS, CRIMINAL COMPLAINTS, AND SEIZURE WARRANTS FOR CERTAIN OFFENSES ARISING FROM STOLEN IDENTITY REFUND FRAUD

Purpose and Scope

The purpose of this delegation is to provide federal law enforcement officials with the ability to timely address crimes of Stolen Identity Refund Fraud by delegating to the United States Attorney the authority to: (1) open certain tax-related grand jury investigations; (2) arrest and federally charge by criminal complaint a person engaged in Stolen Identity Refund Fraud crimes; and (3) seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from Stolen Identity Refund Fraud crimes, all without prior approval from the Criminal Enforcement Sections of the Tax Division.[1] This delegation of authority is subject to the following limitations and those set forth at Paragraphs 1 through 7 of this Directive.

First, the scope of this delegation is limited to Stolen Identity Refund Fraud crimes that entail the filing of wholly fraudulent tax returns without the named taxpayer's knowledge or consent. These crimes do not involve the legal analysis typically associated with the evaluation of whether or not a material item on a filed tax return is or is not intentionally and willfully false -- matters exclusively delegated to the Tax Division to ensure uniform enforcement and application of the tax laws.

Second, this delegation reflects the Tax Division's supervisory authority over all matters arising under the Internal Revenue laws (see 28 C.F.R. §0.70(b)[2]), regardless of

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[1] In tandem with the delegation of authority in this Directive, the Tax Division has implemented expedited review procedures in Stolen Identity Refund Fraud cases when a defendant is arrested by a state, local, or federal agency. These procedures provide for simultaneous review of the proposed indictment or information by the Tax Division and the United States Attorney's Office. (See Memorandum from Assistant Attorney General Kathryn Keneally dated September 18, 2012, entitled, "Expedited and Parallel Review of Proposed Indictments Arising from Stolen Identity Refund Fraud"). The Tax Division may, in consultation with the Stolen Identity Refund Fraud Working Group of the Attorney General's Advisory Committee, modify or supplement the procedures governing expedited review in Stolen Identity Refund Fraud prosecutions.

[2] 28 C.F.R. §0.70(b): "Criminal proceedings arising under the internal revenue laws . . . are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division," with a few specified exceptions. An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade a responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of

the level of participation in the Stolen Identity Refund Fraud investigation by the Internal Revenue Service, Criminal Investigation Division. However, it strongly encourages the participation of the Internal Revenue Service, Criminal Investigation Division, in Stolen Identity Refund Fraud investigations.[3]

Third, the application of this Directive is contingent upon the United States Attorney designating an attorney within the office to serve as a point of contact for Stolen Identity Refund Fraud cases ("USAO POC") who will be responsible for meeting the respective notice requirements set forth within this Directive. (See enumerated Paragraph 4 of this Directive).

Fourth, in all cases in which the United States Attorney seeks and obtains a federal criminal complaint against a person for offenses involving Stolen Identity Refund Fraud, any subsequent charging decision by way of indictment, information, superseding indictment, or superseding information must be authorized in advance by the Tax Division.[4]

Fifth, in all cases in which the United States Attorney applies for and obtains a seizure warrant for proceeds derived from crimes involving Stolen Identity Refund Fraud, Tax Division approval is required before forfeiture of the funds is made (either administratively or judicially) if refunds of legitimate taxpayers are at risk of being forfeited. (See enumerated Paragraph 7 of this Directive).

Sixth, in all cases in which the United States Attorney applies for and obtains a seizure warrant for proceeds derived from crimes involving Stolen Identity Refund Fraud, any subsequent judicial forfeiture of the seized proceeds, whether through civil or criminal judicial process, must be authorized in advance by the Tax Division.

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the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

For purposes of illustration, Stolen Identity Refund Fraud crimes generally implicate the following criminal statutes: 18 U.S.C. §286 (conspiracy as to false claims), 18 U.S.C. §287 (false claims), 18 U.S.C. §510 (Treasury check forgery), 18 U.S.C. §641 (theft of public money), 18 U.S.C. §1028 (identity theft), 18 U.S.C. §1028A (aggravated identity theft), 18 U.S.C. §1029 (access device fraud), 18 U.S.C. §1341 (mail fraud), 18 U.S.C. §1343 (wire fraud), 18 U.S.C. §1708 (theft or receipt of stolen mail) and/or 18 U.S.C. §1709 (mail theft by postal employee).

[3] Participation of the Internal Revenue Service, Criminal Investigation, will make available to the prosecution team tax return and return information pursuant to 26 U.S.C. §6103(h).

[4] Post indictment resolution of Stolen Identity Refund Fraud cases shall be consistent with Departmental policy.

Delegation

By virtue of the authority vested in me by Part O, Subpart N of Title 28 of the Code of Federal Regulations (C.F.R.), particularly Section 0.70, regarding criminal proceedings arising under the internal revenue laws, for all offenses involving "Stolen Identity Refund Fraud," as hereinafter defined, and subject to the limitations set forth herein, authority is hereby conferred on all United States Attorneys to: (i) authorize tax-related grand jury investigations; (ii) file federal criminal complaints; and (iii) apply for seizure warrants for the forfeiture of criminally derived proceeds arising from Stolen Identity Refund Fraud crimes.

This delegation of authority is subject to the limitations set forth above and the following:

1. With respect to authorizing a tax-related grand jury investigation, the United States Attorney has determined, based upon the available information, that:

   (a) there exist articulable facts supporting a reasonable belief that a crime involving Stolen Identity Refund Fraud is being, or has been, committed; (USAM §6-4.211. B) and

   (b) a grand jury investigation is required to preserve evidence and witness testimony, to identify further culpable persons and protect government funds, or to initiate judicial process such as search warrants, arrest warrants, electronic surveillance, or compulsory orders.

2. With respect to the filing of a federal criminal complaint, the United States Attorney has determined, based upon the available information, that probable cause exists to believe that a person has committed a Stolen Identity Refund Fraud crime within his/her jurisdiction. (USAM §9-27.200).

3. The subject grand jury proceeding and/or charged defendant does not involve a person considered to have national prominence -- such as local, state, federal or foreign public official or a political candidate, members of the judiciary, a member of the clergy, representatives of the electronic or printed news media, an official of a labor union, and major corporations and/or their officers when they are the target (subject) of such proceeding.[5]

4. Upon the opening of a tax-related grand jury investigation (or expansion of a non-tax grand jury investigation) to include Stolen Identity Refund Fraud crimes, the Special Agent in Charge, Internal Revenue Service,

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[5] See Tax Division Directive Nos. 59 and 138.

Criminal Investigation, or the USAO POC shall immediately notify the Tax Division, through electronic transmission, of the name of the grand jury investigation, the date of its inception (or expansion), the target(s) named, if any have been identified, and the tax years under investigation. If the USAO POC is the notifying party for any of the above, the USAO POC shall notify the Internal Revenue Service, Criminal Investigation, at the same time the Tax Division is notified. Upon receipt of notice and evaluation, the Internal Revenue Service, Criminal Investigation, may make a determination whether to join the investigation, thus permitting access to material that can only be disclosed pursuant to 26 U.S.C. §6103(h).[6]

5. The authority hereby delegated includes the authority to designate: the targets (subjects) and the scope of such tax-related grand jury inquiry, including the tax years considered to warrant investigation. This delegation also includes the authority for the United States Attorney to terminate such grand jury investigation, provided that prior written notification is given to both the Internal Revenue Service, Criminal Investigation, and the Tax Division. If the United States Attorney terminates a grand jury investigation involving Stolen Identity Refund Fraud crimes or de-targets subjects thereof, then the USAO POC shall indicate in its correspondence that such notification terminates the referral of the matter pursuant to 26 U.S.C. §7602 (c).

6. Upon the filing of a criminal complaint and/or application for a seizure warrant, in all Stolen Identity Refund Fraud cases, the United States Attorney shall, through his/her designated USAO POC, contemporaneously transmit an electronic copy of such pleading to the Tax Division to ensure that timely notice is made to the Chief of the appropriate Criminal Enforcement Section.

7. In Stolen Identity Refund Fraud cases involving application for a seizure warrant, actions of the United States Attorney shall be consistent with the procedures of the Internal Revenue Service, Criminal Investigation, concerning seizure of property and use of forfeiture process within criminal tax cases, except that approval of the Tax Division is not required prior to seizure.[7] **However, if refunds of legitimate taxpayers are at risk of being forfeited, Tax Division approval is required before forfeiture of the funds is made either administratively or judicially.**

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[6] If the Internal Revenue Service, Criminal Investigation, is not involved in the Stolen Identity Refund Fraud investigation, then all grand jury notice responsibilities will default to the USAO POC. Otherwise, grand jury notice responsibilities will lie with the Special Agent in Charge, Internal Revenue Service, Criminal Investigation.

[7] Forfeiture procedures of the Internal Revenue Service, Criminal Investigation, are set forth at Sections 9.7.3 and 9.7.4 of the Internal Revenue Manual.

Definition

8. For purposes of this Directive, "Stolen Identity Refund Fraud" is defined as cases involving a fraudulent claim (or attempted claim) for a tax refund wherein the fraudulent claim for refund (i.e. tax return) is in the name of a person[8] whose personal identification information appears to have been stolen or unlawfully used to make the claim, and the claim is intended to benefit someone other than the person to whom the personal identification information belongs. Stolen Identity Refund Fraud cases also include the negotiation (or attempted negotiation), possession, or transfer, of refund proceeds resulting from the above-defined scheme. (Examples of cases that fall within and outside the scope of this definition are set forth at Paragraphs 10 and 11 of this Directive.)

9. Stolen Identity Refund Fraud cases do not include situations in which the person whose personal identification information was used to make a fraudulent claim for tax refund intended such claim to be filed on his or another's behalf.

Cases Within Delegation

10. The types of cases within the scope of this Directive include, but are not limited to:

(a) a situation in which personal identification information is stolen from a non-culpable person and then used to make a fraudulent claim for tax refund benefitting someone other than the person to whom the personal identification information belongs;

(b) a situation involving a large-volume false claim scheme, in which a person sells to a third party, or agrees to let the third party use, his/her personal identification information unaware that the personal identification information will be used to make a fraudulent claim for tax refund. This includes when a person agrees to endorse a Treasury Check, having no knowledge that the check relates to a fraudulent tax return using the person's personal identification information. (But see Paragraph 11(d) of this Directive);

(c) a situation in which a return preparer makes and/or files a fraudulent claim for tax refund using non-client personal identification information that has been stolen or unlawfully used to make the claim. (But see Paragraph 11(d) of this Directive);

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[8] The term "person" is construed to mean an individual (including decedents, non-filing minors, and illegal aliens), a trust, estate, partnership, association, company or corporation.

(d) a situation in which a culpable person in schemes matching the above scenarios:

(i) receives, endorses, negotiates, utters, transfers, or cashes a refund check;
(ii) receives, possesses or transfers fraudulent refunds in bank accounts or through prepaid debit cards; or
(iii) makes ATM withdrawals from prepaid debit cards loaded with refunds.

Exceptions To Delegation

11. The types of cases outside the scope of this Directive include:

(a) a situation in which a culpable taxpayer files a fraudulent claim for refund using his own social security number but claims a false dependency exemption using another's social security number without lawful authority;

(b) a situation in which a return preparer alters the tax return of a client with or without the client's knowledge or consent, claiming a higher refund;

(c) a situation in which a return preparer and a client conspire to file a false tax return claiming an inflated refund;

(d) a situation in which a return preparer exploits or uses a client's (or potential client's) personal identification information without the client's (or potential client's) knowledge or consent, solely or in combination with other client (or potential client) information, to file a fraudulent claim for tax refund.

Dates of Effectiveness

12. This Directive originally took effect for a two-year period beginning on October 1, 2012, and thereafter was made permanent on the date noted below.

Any case directly referred to a United States Attorney's office for a tax-related grand jury investigation, criminal complaint, and or seizure warrant involving Stolen Identity Refund Fraud which does not meet all of the requirements of this Directive, will be considered an improper referral and outside the scope of this delegation of authority. In no such case may the United States Attorney's office authorize a tax-related grand jury investigation or file a criminal complaint. Instead, the case must be forwarded to the Tax Division for authorization.

Authority to alter any actions taken pursuant to the delegations contained herein is retained by the Assistant Attorney General in charge of the Tax Division in accordance with the authority contained in 28 C.F.R. §0.70.

This Directive provides only internal Department of Justice guidance. It is not intended to, does 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.

Kathryn Keneally
Assistant Attorney General
Tax Division

APPROVED TO TAKE PERMANENT EFFECT ON: January 30, 2014

MEMORANDUM

EXPEDITED AND PARALLEL REVIEW OF STOLEN IDENTITY FRAUD INDICTMENTS ARISING FROM STOLEN IDENTITY REFUND FRAUD

DATE: September 18, 2012
FROM: Kathryn Keneally
Assistant Attorney General
TO: All United States Attorneys
RE: Expedited and Parallel Review of Proposed Indictments Arising from Stolen Identity Refund Fraud

This memorandum sets forth an expedited review process by the Tax Division and United States Attorneys' Offices for all Stolen Identity Refund Fraud cases presented to federal grand juries. It applies to Stolen Identity Refund Fraud cases that meet the criteria set forth in Tax Directive No. 144 entitled "Temporary Delegation of Authority to Authorize Grand Jury Investigations, Criminal Complaints, and Seizure Warrants for Certain Offenses Arising from Stolen Identity Refund Fraud" ("Directive"). This memorandum is cross-referenced in Footnote 1 of the Directive wherein the Tax Division advised that it "will implement expedited review procedures in Stolen Identity Refund Fraud prosecutions providing for simultaneous review of the proposed indictment or information by the Tax Division and the United States Attorneys' Offices."

The Directive generally defines Stolen Identity Refund Fraud cases as those involving a fraudulent claim (or attempted claim) for a tax refund wherein the fraudulent claim for refund (i.e., tax return) is in the name of a person whose personal identification information appears to have been stolen or unlawfully used to make the claim, and the claim is intended to benefit someone other than the person to whom the personal identification information belongs. These cases also include the negotiation (or attempted negotiation), possession, or transfer, of refund proceeds resulting from these types of refund schemes. (See enumerated Paragraphs 8-11 of Tax Directive No. 144).

The expedited review process set forth in this memorandum is derived from a proposal made by the Stolen Identity Refund Fraud Working Group of the Attorney General's Advisory Committee (AGAC). With only minor changes, the Tax Division has adopted the proposal in its entirety. Accordingly, the procedures outlined below provide a methodology that will allow the Department of Justice Tax Division to review Stolen Identity Refund Fraud cases concurrently with the United States Attorney's Office's review processes, thereby meeting the United States Attorneys' Offices' arraignment and grand jury schedules for Stolen Identity Refund Fraud cases.

Scenario involving Complaint and Indictment:

1. In consultation with one of the United States Attorneys' Offices ("USAO"), Defendant(s) are arrested by state, local, or federal agency based on evidence of Stolen Identity Refund Fraud.

2. If the investigation is referred to a USAO by an agency other than the IRS, the USAO will inform local Internal Revenue Service, Criminal Investigation ("IRSCI") to give IRS-CI the opportunity to participate in the investigation. (See enumerated Paragraph 4 of Tax Directive No. 144).

3. Pursuant to the delegation of authority in Tax Directive No. 144, the USAO opens a criminal tax matter and assigns an Assistant U.S. Attorney ("AUSA") to handle the case.

4. Pursuant to the delegation of authority in Tax Directive No. 144, AUSA and investigative agent prepare a criminal complaint and affidavit, which is then sworn out before a Magistrate Judge.

5. AUSA forwards executed affidavit and criminal complaint to the United States Attorney's Office Point of Contact ("USAO POC"), who in tum forwards, via email, the affidavit and complaint to IRS-CI and the Tax Division's Point of Contact ("Tax POC"). (See enumerated Paragraph 6 of Tax Directive No. 144).

6. AUSA prepares a proposed indictment and prosecution memorandum (hereinafter "indictment package").

7. AUSA forwards indictment package to supervisory AUSA for internal review, and also to the USAO POC for Department of Justice Tax Division ("DOJ Tax") review.

8. The USAO POC forwards the indictment package, via email, to Tax POC for simultaneous review and forwards its charging recommendation to IRS-CI, with notice to both DOJ Tax and IRS-CI of the scheduled indictment presentation date. DOJ Tax agrees that it will expedite its review and final determination prior to the scheduled grand jury date.

9. USAO supervisory chain reviews indictment package.

10. Supervisory AUSA advises USAO POC of any significant, substantive modifications or revisions made to proposed indictment by USAO supervisory chain, and the USAO POC then forwards revised indictment package to Tax POC.

11. Prior to final signature on indictment by U.S. Attorney or designated representative, DOJ Tax's final determination should be received via email by the USAO POC, who will then forward it to the indictment signing authority.

12. In the ordinary course, DOJ Tax will be given three (3) calendar days (provided the calendar days include at least one (1) business day) upon electronic receipt of the indictment package from the USAO POC to review the indictment package. In matters involving unusual, exigent circumstances, DOJ Tax will make every effort to timely review and take final action on the pending indictment package.

13. If on the business day prior to presentation to the Grand Jury, DOJ Tax has not given or denied approval of the indictment, the USAO must email Tax POC and the DOJ Tax Section Chief and Assistant Chiefs requesting action by close of business.

14. In the event that DOJ Tax does not respond with an email giving or denying approval by the time the AUSA is scheduled to present the matter to the Grand Jury, the USAO has authority to proceed with presentation to the Grand Jury and seek indictment as though approval had been received.

Scenario involving Indictment:

1. In consultation with one of the USAOs, Defendant(s) are arrested by state, local, or federal agency based on evidence of Stolen Identity Refund Fraud; or, public safety, operational and/or flight concerns regarding targets of investigation create need to arrest the targets and invoke the expedited review and approval procedures.

2. If the investigation is referred to a USAO by an agency other than the IRS, the USAO will inform local IRS-CI to give IRS-CI the opportunity to participate in the investigation. (See enumerated Paragraph 4 of Tax Directive No. 144).

3. Pursuant to the delegation of authority in Tax Directive No. 144, the USAO opens a criminal tax matter and assigns an AUSA to handle the case.

4. AUSA prepares an indictment package.

5. AUSA forwards indictment package to supervisory AUSA for internal review, and also to the USAO POC for DOJ Tax review.

6. The USAO POC forwards the indictment package, via email, to Tax POC for simultaneous review and forwards its charging recommendation to IRS-CI, with notice to both DOJ Tax and IRS-CI of the scheduled indictment presentation date. DOJ Tax agrees that it will expedite its review and final determination prior to the scheduled grand jury date.

7. USAO supervisory chain reviews indictment package.

8. Supervisory AUSA advises USAO POC of any significant, substantive modifications or revisions made to proposed indictment by USAO supervisory chain, and the USAO POC then forwards revised indictment package to Tax POC.

9. Prior to final signature on indictment by U.S. Attorney or designated representative, DOJ Tax's final determination should be received via email by the USAO POC, who will then forward it to the indictment signing authority.

10. In the ordinary course, DOJ Tax will be given three (3) calendar days (provided the calendar days include at least one (1) business day) upon electronic receipt of the indictment package from the USAO POC to review the indictment package. In matters involving unusual, exigent circumstances, DOJ Tax will make every effort to timely review and take final action on the pending indictment package.

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12. In the event that DOJ Tax does not respond with an email giving or denying approval by the time the AUSA is scheduled to present the matter to the Grand Jury, the USAO has authority to proceed with presentation to the Grand Jury and seek indictment as though approval had been received.

DEPARTMENT OF JUSTICE

TAX DIVISION DIRECTIVE NO. 145

RESTRAINT, SEIZURE AND FORFEITURE POLICY IN CRIMINAL TAX AND TAX-RELATED INVESTIGATIONS AND PROSECUTIONS

Purpose

1. The purpose of this Directive is to set forth Tax Division policy with respect to the restraint, seizure and forfeiture of property in criminal tax and tax-related investigations and prosecutions.[1]

Declaration of Authority

2. The Tax Division has supervisory authority over all criminal proceedings arising under the internal revenue laws. *See* 28 C.F.R. §0.70(b).[2] As a result, Tax Division approval is required for any criminal charge if the conduct at issue arises under the internal revenue laws, regardless of the criminal statute(s) used to charge the defendant. For example, Tax Division authorization is required before charging mail fraud, wire fraud, or bank fraud alone or as the predicate to a RICO or money laundering charge for any conduct arising under the internal revenue laws, including any charge based on the submission of a document or information to the Internal Revenue Service ("IRS").

3. The Tax Division, therefore, also has authority over all:

(a) civil judicial forfeiture actions arising from a criminal tax or tax-related investigation and/or prosecution;

(b) criminal forfeiture actions arising from a tax or tax-related prosecution; and

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[1] A thorough discussion of the restraint, seizure and forfeiture of property in criminal tax investigations and prosecutions is set forth in Chapter 26 of the Criminal Tax Manual. See also Internal Revenue Manual 9.7. Nothing in this Directive is intended to conflict with existing Departmental policy concerning the restraint, seizure, and forfeiture of property. If Tax Division policy overlaps with other Departmental policy, adherence to all policies is required. This Directive does not apply to the restraint, seizure or forfeiture of property pursuant to Chapter 53 of Title 26, 26 U.S.C. §§ 5801 et. seq., or any actions taken by the Bureau of Alcohol Tobacco, Firearms and Explosives ("ATF") to enforce these provisions, nor is it intended to conflict with Departmental or ATF policy with regard to enforcement of the National Firearms Act.

[2] 28 C.F.R. § 0.70(b): "Criminal proceedings arising under the internal revenue laws ... are assigned to and shall be conducted, handled, or supervised by, the Assistant Attorney General, Tax Division," with a few specified exceptions. An offense is considered to arise under the internal revenue laws when it involves (I) an attempt to evade responsibility imposed by the Internal Revenue Code, (2) an obstruction or impairment of the Internal Revenue Service, or (3) an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes.

(c) the restraint and/or seizure of property for forfeiture in a criminal tax or tax-related investigation and/or prosecution when an attorney for the Department of Justice (Tax Division Trial Attorney or Assistant United States Attorney) is assigned to, or asked to, assist law enforcement authorities in their attempt to restrain or seize property for forfeiture pursuant to any forfeiture law.

4. Tax Division authority extends to all tax and tax-related grand jury investigations in which any law enforcement agency is a participant.

5. The Tax Division retains final authority to approve the filing of tax and tax- related forfeiture actions brought pursuant to Title 26 (commonly referred to as "Code forfeitures").

6. The Tax Division retains final authority to approve the filing of all civil judicial forfeiture actions and criminal forfeitures brought pursuant to Title 18 arising from criminal tax and tax-related offenses.[3]

7. Tax Division authorization is generally not required to administratively forfeit property seized in a criminal tax and/or tax-related investigation. However, Tax Division approval is required before any declaration of forfeiture is entered by a seizing agency if preparation fees or rightful tax refunds of innocent taxpayers seized from a tax preparer are at risk of being forfeited (See subparagraph 8(b) below).

Delegation of Authority

8. Regarding the restraint and/or seizure of property for forfeiture as described in subparagraph 3(c) above, pursuant to the authority vested in me by Part 0, Sub-Part M, of Title 28 of the Code of Federal Regulations, Section 0.70, I hereby delegate to the United States Attorney the authority to apply to the district court for an order to restrain and/or seize personal property for forfeiture arising from a criminal tax and/or tax-related investigation or prosecution when said personal property is restrained or seized pursuant to a provision of Title 18, except that:

(a) No personal property shall be seized for forfeiture in a tax and/or tax-related investigation if the personal property consists entirely of legal

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[3] If a multi-agency criminal investigation includes both tax (and/or tax-related) and non-tax offenses, and the restraint, seizure, and/or forfeiture of property is legally based upon the non-tax criminal offenses, then the Tax Division has no authority over the restraint, seizure, and/or forfeiture of said property.

source income and the only criminal activity associated with the personal property is that unpaid taxes remain due and owing on the income.[4]

(b) Tax Division authorization is required before a declaration of forfeiture is entered by a seizing agency forfeiting from a tax preparer funds held on deposit in au account in a financial institution (as defined in 18 U.S.C. § 20) that may include tax preparation fees or rightful tax refunds of innocent taxpayers. For purposes of this Directive, no portion of a wholly fraudulent tax refund shall be deemed a "preparation fee."

Notice requirement

9. The United States Attorney or his/her designee shall notify the Tax Division in writing of any actions taken pursuant to this delegation and shall electronically transmit to the Tax Division copies of all applications and court orders to restrain and/or seize property as well as the pleadings in support thereof. **If property is seized, the written notification must include acknowledgment that Tax Division authorization will be sought prior to forfeiture if either of the exceptions set forth in subparagraphs 8(a) or 8(b) above apply.**

10. The United States Attorney may seek the timely opinion and/or advice of the Tax Division regarding any matters contemplated herein, and if the United States Attorney elects not to exercise his or her delegation of authority as provided in paragraph 8 above, the Tax Division shall have final authority over all matters described therein.

11. If, per this Directive, the Tax Division is required to take action on any matter involving the restraint, seizure, and/or forfeiture of property arising in a criminal tax investigation and a deadline for that action has been imposed by statute, regulation, Departmental policy, or court order, the law enforcement agency or United States Attorney's Office responsible for administering or litigating the forfeiture-related matter shall, at the earliest possible date and no later than ten (10) business days preceding the deadline, forward to the Tax Division all relevant materials necessary to making a determination on the matter.

Effective date

12. This Directive shall be in effect beginning on the date noted below.

This Directive provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights,

[4] The forfeiture laws should not be used to seize and forfeit personal property such as wages, salaries, and compensation for services rendered that is lawfully earned and whose only relationship to criminal conduct is the unpaid tax due and owing on the income. Title 18 fraud statutes such as wire fraud and mail fraud cannot be used to convert a traditional Title 26 legal-source income tax case into a fraud offense even if the IRS is deemed to be the victim of tax fraud.

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.

Kathryn Kenneally
Assistant Attorney General
Tax Division

APPROVED TO TAKE EFFECT ON: January 30, 2014.

DEPARTMENT OF JUSTICE

November 17, 2004

MEMORANDUM

To: The Chiefs, Criminal Enforcement Sections,
For Distribution to all Criminal Enforcement Attorneys

From: Robert E. Lindsay
Chief, CATEPS

Re: **Final Advice re Tolling the Statute of Limitations under 18 U.S.C. 3292 and 3161 – The *Trainor* Decision**

On September 29, 2004, I issued a memorandum is to give interim advice regarding the Court of Appeals decision in *United States v. Trainor*, 376 F.3d 1325 (11th Cir. 2004).This decision has significant ramifications, i.e., the dismissal of indictments, for federal prosecutors seeking to toll the statute of limitations (SOL) under 18 U.S.C. 3292[5] (and, indeed, 18 U.S.C. 316l(h)(9)) pending the execution

[5] 18 U.S.C. 3292 provides as follows:

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably
appears, or reasonably appeared at the time the request was made,
that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request. **(c)** The total of all periods of suspension under this section with respect to an offense--

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

of an official request for evidence located in a foreign country.The purpose of this memorandum is to pass on the final advice on this matter given that the Office of International Affairs (OIA), Criminal Division. As was the case for my interim advice, this final advice should be considered for cases where no application or motion under Section 3292 has yet been filed, as well as cases where, even if such pleadings have been filed, there has not yet been an indictment. OIA's final advice and my interim advice are entirely consistent.

OIA has issued the following final advice re *Trainor*:

Attached are model pleadings to be used when making application to the court to toll the statute of limitations based upon an official U.S. request to obtain foreign evidence (18 U.S.C. § 3292). The application, declaration and order are drafted to conform to the ruling of the Eleventh Circuit in *United States v. Trainor,* 376 F.3d 1325 (11th Cir. 2004), which found that an unsworn application accompanied by only a copy of the evidentiary request sent to the foreign government does not satisfy § 3292 which requires the Government to demonstrate, **by a preponderance of the evidence** ,that evidence concerning the charged offense reasonably appears to be located in the foreign country. 376 F. 3d at 1327. In essence, the court in *Trainor* found that the statute contemplated the submission of factual information, **under oath or otherwise verified**, that supported the two findings required to be made by the court: (1) that an official request has been made to a foreign government for evidence (within the statutory period); and (2) that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, located in the foreign country.(The Solicitor General decided against further review.) These pleadings are consistent with the recommendations sent to all Coordinators following the initial district court decision. *United States v. Trainor,* 277 F.Supp2d. 1278 (S.D.Fl.2003),(Coordinator Update E-004, August 5, 2003).The declaration and any attachments, filed with the application, would clearly constitute evidence for the court's consideration.

While we are not aware of any challenges to applications under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(9), asking for the exclusion of time when an official request to obtain foreign evidence is made,language of this provision is virtually identical to that of § 3292.We would urge that a declaration or sworn affidavit be used with all applications under § 3161 (h)(9)as well.

Please ensure that your office is aware of the ruling in *Trainor,* and that a declaration or sworn affidavit is used when seeking relief under these statutes.Andy Levchuk[(202) 353 3622] in OIA can provide assistance if needed.

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4.00 TAX DIVISION POLICIES AND PROCEDURES

4.1 VOLUNTARY DISCLOSURE

4.01[1] Policy Respecting Voluntary Disclosure

Whenever a person voluntarily discloses that he or she committed a crime before any investigation of the person's conduct begins, that factor is considered by the Tax Division along with all other factors in the case in determining whether to pursue criminal prosecution. *See generally* *USAM*, § 9-27.220, *et. seq*.

If a putative criminal defendant has complied in all respects with all of the requirements of the Internal Revenue Service's voluntary disclosure practice,[1] the Tax Division may consider that factor in its exercise of prosecutorial discretion. It will consider, *inter alia*, the timeliness of the voluntary disclosure, what prompted the person to make the disclosure, and whether the person fully and truthfully cooperated with the government by paying past tax liabilities, complying with subsequent tax obligations, and assisting in the prosecution of other persons involved in the crime.

A person who makes a "voluntary disclosure" does not have a legal right to avoid criminal prosecution. Whether there is or is not a voluntary disclosure is only one factor in the evaluation of a case. Even if there has been a voluntary disclosure, the Tax Division still may authorize prosecution. *See* ***United States v. Hebel***, 668 F.2d 995 (8th Cir.), *cert. denied*, 456 U.S. 946 (1982).

4.2 DUAL PROSECUTION AND SUCCESSIVE PROSECUTION

***USAM*, § 9-2.031**

The Department's dual and successive prosecution policy ("Petite Policy") is set forth in detail in *USAM*, § 9-2.031. In order to prevent unwarranted dual or successive

[1]*See* ***United States v. Knottnerus***, 139 F.3d 558, 559-560 (7th Cir. 1998) (holding that prior visit by special agent disqualified defendant from voluntary disclosure program); ***United States v. Tenzer***, 127 F.3d 222, 226-28 (2d Cir. 1997), *vacated in part and remanded on other grounds*, 213 F.3d 34, 40-41 (2d Cir. 2000) (taxpayer must pay or make *bona fide* arrangement to pay taxes and penalties owed to qualify for consideration); and ***United States v. Hebel***, 668 F.2d 995 (8th Cir. 1982).

prosecutions, the policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to the initiation or continuation of a federal prosecution once a prior prosecution has reached the stage of acquittal, conviction (by verdict or guilty plea), or dismissal or termination after jeopardy has attached. In criminal tax cases, it is the Assistant Attorney General, Tax Division, who must authorize the subsequent charges. 28 C.F.R. §§ 0.70, 0.179. The United States will move to dismiss any prosecution governed by this policy in which the required prior approval was not obtained, unless the appropriate Assistant Attorney General retroactively approves it. *USAM*, § 9-2.031(E).

4.2 [1] Applicability of Policy in Tax Cases

The federal government can prosecute a state criminal defendant on federal charges for similar conduct (*i.e.*, filing false federal tax returns that fail to report the same income that was not reported on state tax returns), and it can prosecute a federal criminal defendant for failing to pay taxes on ill-gotten gains from non-tax criminal conduct. The Justice Department's "Dual and Successive Prosecution Policy" calls upon prosecutors to evaluate whether it is a wise investment of federal resources and whether it is unfair to the defendant in a particular case, before the government brings federal charges that are based on "substantially the same act(s) or transaction(s)" as previous charges. *Id.*, § 9-2.031(A). The Tax Division adheres to the spirit of the policy when considering tax prosecutions, even if the two prosecutions in issue are not based on exactly the same acts or transactions. Thus, even though a tax prosecution based on unreported criminal proceeds is not based on the same acts or transactions as the underlying crime itself -- i.e., the tax prosecution is based on the filing or non-filing of a federal tax return, while the underlying crime may have nothing to do with federal taxes (*e.g.*, embezzlement from an employer or a *Ponzi* or other fraud scheme) -- the Tax Division makes the kind of evaluation required under the policy. Likewise, the Tax Division makes such an evaluation where there has been a prior prosecution for state tax fraud, even though such a prosecution would be based on the filing or non-filing of state tax returns rather than federal tax returns.

The Department's policy precludes the initiation of a federal prosecution following a prior federal or state prosecution based on substantially the same act or transaction unless the Assistant Attorney General concludes that four conditions are satisfied:

1. the matter must involve a substantial federal interest;

2. the prior prosecution must have left that interest demonstrably unvindicated;

3. the defendant's conduct must constitute a federal offense for which the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact; and

4. prosecution is otherwise justified under the Principles of Federal Prosecution. *USAM*, § 9-27.00.

USAM, § 9-2.031(A).

1. Substantial Federal Interest

The federal government's interest in prosecuting an offender who commits a particular tax crime increases with the amount of the tax loss, the sophistication of the tax crime, the number of tax years involved, and the actual or potential prevalence of the type of tax crime at issue .

2. Federal Interest Demonstrably Unvindicated

"In general, the Department will presume that a prior prosecution, regardless of result, has vindicated the relevant federal interest." *Id.*, § 9-2.031(D). If the target was convicted in the previous prosecution, this presumption may be overcome "if the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence -- including forfeiture and restitution as well as imprisonment and fines -- is available through the contemplated federal prosecution." *Id*. In this regard, the strong federal interest in deterrence of tax fraud through criminal prosecution will almost always be unvindicated by a prior prosecution on non-tax charges.

3. Federal Offense Likely to Result in Conviction

This is the same test that is applied to all federal prosecutions under the Principles of Federal Prosecution. The Tax Division will not authorize prosecution unless it appears that there is sufficient admissible evidence to obtain and sustain a conviction.

4. Principles of Federal Prosecution

Apart from the successive prosecution policy, the Principles of Federal Prosecution require the Tax Division to evaluate whether a "substantial Federal interest would be served by prosecution." *USAM*, § 9-27.230. In making that decision, we "should weigh all relevant considerations," including federal law enforcement priorities, the nature and seriousness of the federal offense, the potential deterrent effect of prosecution, the target's culpability, criminal history, and willingness to cooperate, and the probable sentence or other consequences of a conviction. *Id.*

4.2 [2] Pretrial Diversion

The Tax Division's long-standing, strict policy is that defendants in criminal tax cases should not be granted pretrial diversion. Therefore, authorization of the Assistant Attorney General is required before a U.S. Attorney agrees to such a disposition in a tax case. *See* *USAM*, § 9-22.000.

4.3 INCARCERATED PERSONS - USAM § 9-27.230

4.03[1] General

Whenever a proposed tax defendant is incarcerated on other charges and subsequent prosecution is not barred by the Department's dual and successive prosecution policy, *see* § 4.02, *supra*, the prosecutor nonetheless should consider other factors before deciding to bring charges.

4.3 [2] Prosecution of Incarcerated Persons

In proposed tax prosecutions of incarcerated persons, the most important issues in the exercise of prosecutorial discretion are the nature and seriousness of the proposed tax offense, the deterrent effect of a tax prosecution, and the probable sentence or other consequences if the person is convicted on the tax charges. If the target is already subject to a substantial sentence or is already incarcerated, the prosecutor should weigh the likelihood that a subsequent conviction on tax charges will result in a meaningful addition to his or her sentence. The prosecutor also should consider the desirability of instituting a prosecution to prevent the running of the statute of limitations on the proposed tax charges and to preserve these charges if there appears to be a reasonable chance that the target's prior conviction may be reversed. *USAM*, § 9-27.230. In this regard, the prosecutor should consider the appropriateness of an "adequate non-criminal alternative to prosecution, " *e.g.*, "civil tax proceedings." *USAM*, 9-27.250(B).

4.4 PHYSICAL OR MENTAL INABILITY TO STANDTRIAL

4.04[1] General Policy

Whether a case against a person who otherwise warrants prosecution should be declined or dismissed because the person is in poor mental or physical health generally is best decided by the trial court. Only if it is clear beyond any doubt that a proposed defendant will never be able to stand trial because of a terminal physical condition should a case be declined because the defendant is in poor health.

4.04[2] Court Determination of Health

If a criminal defendant seeks a continuance or other delay of the trial on the ground that the defendant is not able to assist his counsel in presenting a defense and/or that a trial will pose a serious threat to the defendant's health, the prosecutor should ensure that the relevant facts and the court's decision are made a matter ofrecord.

The prosecutor should consider (1) asking the IRS special agent to conduct a discrete investigation to determine the extent of the defendant's daily activities and to eliminate the possibility of malingering; (2) asking the court to appoint a physician to conduct an examination, including hospitalization if necessary; and (3) requesting a hearing in open court to discuss the facts.

4.04[3] Mental Incompetency

A person’s mental state at the time that he or she committed the alleged tax crime will almost always be relevant to the decision whether to prosecute, because nearly all tax crimes are specific intent crimes. In criminal tax cases, the government usually can overcome a defense claim of lack of mental responsibility with evidence that the defendant was operating a successful business or otherwise earning substantial income during the time in question. Once the Tax Division has decided to authorize prosecution and charges have been filed, the prosecutor generally should let the court determine whether the defendant is competent to stand trial. *See USAM* §§ 9-9.000 and 9-18.000.

See also 18 U.S.C. § 17 (insanity defense); 18 U.S.C. §§ 4241, *et seq.* (pertaining to offenders with mental disease or defect). Sections 4241-4248 of Title 18 U.S.C. govern, *inter alia*, procedures for the determination of competency to stand trial and the commitment of a defendant. If the prosecutor, defense counsel, or the court perceives that competency is an issue, then the court may order a psychiatric examination and hold a hearing on the defendant's competency to stand trial.

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5.00 PLEA AGREEMENTS AND DETENTION POLICIES

5.01 TAX DIVISION PLEA AGREEMENT POLICY

5.01[1] Offense of Conviction — The Major Count Policy

The Tax Division designates at least one count in each authorized tax case as the "major count." The prosecutor may enter into a plea agreement that includes a plea of guilty to that count without further approval of the Tax Division. However, the Tax Division must approve separately any plea agreement that does not include the major count. *See* *United States Attorneys' Manual*, § 6-4.310. The major count policy is consistent with policies applied by the Department of Justice in all criminal cases. *See*, *e.g.*, *United States Attorneys' Manual*, § 9-27.430. The "major count" policy is intended to promote deterrence, ensure that a defendant will be held accountable at sentencing for the most serious readily provable offense, and eliminate the defendant's ability to contest the criminal conduct in any subsequent civil tax proceeding.

The designation of the major count is based on the following considerations:

a. felony counts take priority over misdemeanor counts;

b. tax evasion counts (26 U.S.C. § 7201) take priority over other substantive tax counts;

c. the count charged in the indictment or information that carries the longest prison sentence is the major count;

d. as between counts under the same statute, the count involving the greatest financial harm to the United States (*i.e.*, the greatest additional tax due and owing) will be considered the major count; and

e. when there is little difference in financial harm between counts under the same statute, the determining factor will be the severity of the conduct.

5.01[2] Relevant Conduct and Tax Loss

A plea agreement must hold the defendant accountable for all relevant conduct, including all known and provable tax loss for all years. Prosecutors should be wary of defense attorneys who seek to "bargain" over the tax loss, because such efforts may undermine uniformity and weaken the deterrent value of tax prosecutions. If there is a credible basis for reducing the tax loss, the prosecutor obviously should consider it. A prosecutor should not stipulate to a reduced tax loss, however, without first securing the concurrence of the IRS and consulting with the Tax Division. Tax Division approval is required prior to stipulation to a tax loss figure that is lower than the readily provable tax loss in the case.

When a defendant pleads guilty to the major count prior to being charged, the prosecutor must include in the factual basis for the plea the full extent of the defendant's tax violations on all of the counts in order to demonstrate the defendant's actual criminal intent. In most cases, all of the tax charges are related. Consequently, even if the defendant pleads to only a single count, the court should take into account the tax loss from all of the years when it determines the tax loss for the offense to which the defendant pleads. *United States Attorneys' Manual*, § 6-4.310.

If all of the tax charges are not part of the same course of conduct or common scheme or plan, the Tax Division may designate more than one major count -- one count from each unrelated group of counts -- or the Division may designate one count as the major count and direct the prosecutor to obtain a stipulation from the defendant establishing the commission of the offenses in the other group or groups. The Tax Division also may designate more than one major count when the computed guideline sentencing range exceeds the maximum sentence that can be imposed for a single count. *See* § 43.00, *infra*, for a full discussion of the Sentencing Guidelines in criminal tax prosecutions.

5.01[3] Waiver of Appeal of Sentence in Plea Agreements

A defendant generally may appeal the sentence imposed by the court. 18 U.S.C. § 3742 (a). A defendant also can waive the statutory right to appeal a sentence. *See*, *e.g.*,

United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995); ***United States v. Marin***, 961 F.2d 493, 496 (4th Cir. 1992).

A plea agreement generally should contain language waiving the defendant's appeal rights, particularly the right to appeal the sentence. A waiver-of-appeal provision is enforceable "so long as [the waiver] is 'the result of a knowing and intelligent decision to forgo the right to appeal.'" ***United States v. Attar***, 38 F.3d 727, 731 (4th Cir. 1994) (*quoting* ***United States v. Wessells***, 936 F.2d 165, 167 (4th Cir. 1991)); *accord* ***United States v. Bond***, 414 F.3d 542, 544 (5th Cir. 2005); ***United States v. Andis***, 333 F.3d 886, 889-891 (8th Cir. 2003) (*en banc)*; ***United States v. Teeter***, 257 F.3d 14, 25 (1st Cir. 2001); ***United States v. Nguyen***, 235 F.3d 1179, 1182-84 (9th Cir. 2000); ***United States v. Williams***, 184 F.3d 666, 668 (7th Cir. 1999); ***United States v. Hernandez***, 134 F.3d 1435, 1437 (10th Cir. 1998); ***United States v. Bushert***, 997 F.2d 1343, 1350 (11th Cir. 1993).

In tax cases, prosecutors should draft waivers of appeal to be specific, unambiguous, and as broad as possible. Depending on the language of a particular agreement, a waiver of a defendant's right to appeal his or her sentence may not preclude the defendant from appealing an order of restitution. ***United States v. Ready***, 82 F.3d 551, 560 (2d Cir. 1996); ***United States v. Catherine***, 55 F.3d 1462, 1464-65 (9th Cir. 1995).[1]

Even in cases in which there is a valid waiver of appellate rights, the defendant can appeal his or her sentence if the district court considers an impermissible factor or if the sentence exceeds the statutory maximum. ***United States v. Kratz***, 179 F.3d 1039, 1041 (7th Cir. 1999). A defendant also can challenge an illegal sentence under 28 U.S.C. § 2255. ***United States v. Rutan***, 956 F.2d 827, 829 (8th Cir. 1992), *modified in part by* ***United States v. Andis***, 333 F.3d 886, 889-891 (8th Cir. 2003) (*en banc)* (court will "refuse to enforce an otherwise valid waiver if [enforcing the waiver] would result in a miscarriage of justice").

5.01[4] Nolo Contendere Pleas

Department of Justice policy requires all prosecutors to oppose the acceptance of a *nolo contendere* plea. Only in the most unusual circumstances and only after approval

[1] *See* § 44.00, *infra*, for a complete discussion of restitution in tax cases.

by the Assistant Attorney General of the Tax Division, may a prosecutor consent to a *nolo* plea in a tax case. *See United States Attorneys' Manual*, §§ 9-16.010 and 9-27.500-.530. The Tax Division prefers a guilty plea because such a plea strengthens the government's position if the defendant contests the fraud penalty in a subsequent civil tax proceeding. A *nolo* plea does not entitle the government to use the doctrine of collateral estoppel. If the defendant persists in pleading *nolo* over the government's objections, the prosecutor should also oppose the dismissal of any charges to which the defendant does not plead *nolo contendere*. *United States Attorneys' Manual*, §9-27.530.

5.01[5] Alford Pleas

In *North Carolina v. Alford*, 400 U.S. 25, 38-39 (1970), the Supreme Court upheld the validity of accepting a plea of guilty notwithstanding the defendant's claim of innocence. As with *nolo contendere* pleas, prosecutors in a tax case may consent to a so-called "*Alford* plea" only in the most unusual circumstances and only with the approval of the Assistant Attorney General of the Tax Division. Whenever a defendant enters an *Alford* plea, the prosecutor should make an offer of proof of all known facts to support the conclusion that the defendant in fact is guilty. *See United States Attorneys' Manual*, §§ 9-16.015 and 9-27.440. In addition, prosecutors should discourage *Alford* pleas by refusing to agree to terminate the prosecution when such a plea is proffered to fewer than all of the charges pending. If, over the government's objection, the court accepts an *Alford* plea to fewer than all charges in a tax case, the prosecutor must proceed to trial on the remaining counts unless the Assistant Attorney General of the Tax Division approves the dismissal of the remaining charges.

5.01[6] Statements by Government Counsel at Sentencing; Agreeing to Probation

Counsel for the government should make a full statement of facts to the court for use at sentencing, including the amount of tax loss in all of the years for which the defendant was indicted, the means utilized to perpetrate and conceal any fraud, the past criminal record of the taxpayer, and all other information that the court may consider important in imposing an appropriate sentence. *See United States Attorneys' Manual*, § 6-4.340.

It is the Tax Division's longstanding policy that probation, even when accompanied by payment of the civil tax liability, plus a fine and costs, generally does not constitute a satisfactory disposition of a criminal tax case. Nevertheless, a prosecutor in a tax case may agree to a sentence of probation (preferably with alternative conditions of confinement) when the defendant pleads guilty, the sentencing guidelines range is 0-6 months (and the Criminal History Category is I), and the United States Attorney personally signs and approves a memorandum that identifies the unusual and exceptional circumstances that support the appropriateness of agreeing to probation. *Id.*

5.01[7] Compromise of Criminal Liability/Civil Settlement

After the IRS refers a case for prosecution, the Attorney General is authorized under 26 U.S.C. § 7122(a) to compromise the case without bringing charges. However, that authority is exercised very rarely. If there is a reasonable probability of conviction, and if prosecution would advance the administration of the internal revenue laws, then a decision to forego prosecution on the ground that the taxpayer is willing to pay a fixed sum to the United States would be susceptible to the inference that the taxpayer received preferential treatment because of his or her ability to pay whatever amount of money the government demanded.

Restitution is an important goal of all criminal enforcement, however, and a defendant's sincere willingness to account for criminal proceeds and return them to the victim(s) is an indicator of acceptance of responsibility. *See* § 44.00, *infra*, for a full discussion of restitution in criminal tax cases.

The Department generally prefers that full settlement of a defendant's civil tax liability be postponed until after sentence has been imposed in the criminal case, except when the court chooses to defer sentencing pending the outcome of such settlement. In that event, the prosecutor should notify the IRS of this fact so that it can begin civil tax negotiations with the defendant.

When contemplating a plea agreement that stipulates to a civil tax penalty, prosecutors must coordinate with IRS Counsel *before* a plea agreement offer is tendered. There are multiple of reasons for this, one of which is a statutory requirement of written pre-approval by an IRS supervisor with respect to certain civil fraud and civil tax penalties. *See* 26 U.S.C. § 6751(b)(1). For civil penalties within the purview of this statute, a failure to obtain the required written supervisory pre-approval may result in a court abating the agreed-upon penalty in a civil proceeding. Further, the IRS's internal procedures require the written supervisory approval to be obtained before asking a taxpayer to agree to the covered penalties, *see* I.R.M. 20.1.1.2.3.1, and some courts have held that tardy supervisory approval is not sufficient. *See* ***Belair Woods, LLC v. Comm'r***, 154 T.C. 1, 9-10 (2020) (supervisory approval must be obtained before a "formal written communication to the taxpayer, notifying him that the Examination Division has completed its work and has made a definite decision to assert penalties"); ***Chai v. Comm'r***, 851 F.3d 190, 219-21 (2d Cir. 2017) (written supervisory approval required "no later than the date the IRS issues the notice of deficiency"; concluding otherwise would undermine statute's purpose of "prevent[ing] IRS agents from threatening unjustified penalties to encourage taxpayers to settle"); *but see* ***Laidlaw's Harley Davidson Sales, Inc. v. Comm'r***, 29 F.4th 1066, 1070-74 (9th Cir. 2022) (declining to follow *Chai* and holding that supervisory approval need only be obtained before "the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment").

Except in the most extraordinary circumstances, the Tax Division will not approve a plea agreement that includes a global settlement of a defendant's criminal and civil tax liabilities. Criminal tax investigations are usually narrow in focus and substantially more targeted than a civil tax audit. For example, a criminal investigation may focus on one or two large, easily-provable false items on a tax return, because of the need to prove willfulness with regard to the false items. The investigation may not discover more complex, but nevertheless appropriate, tax adjustments on the return. If the government agreed in a plea agreement to a settlement of the defendant's civil tax liability, based solely on the false items discovered during the limited criminal investigation, then the defendant would receive an unwarranted windfall with regard to the more complex adjustments.

For this reason, the Tax Division also will not authorize any plea agreement that purports to bar the IRS from a further examination of the defendant's civil tax liabilities. The Tax Division strongly encourages prosecutors, however, to include in plea agreements admissions by the defendant regarding civil tax issues, such as:

> (1) an admission of either the receipt of enumerated amounts of unreported income or enumerated amounts of claimed illegal deductions or improper credits for specified years in issue;

(2) a stipulation that the defendant is liable for the civil fraud penalty imposed by 26 U.S.C. § 6663 on the understatements of tax for the years involved;[2]

(3) an agreement by the defendant to file, prior to sentencing, complete and correct initial or amended tax returns for the years in issue and, if requested, to provide the IRS with information regarding these years and pay at sentencing all additional taxes, penalties, and interest due and owing;

(4) an agreement by the defendant not to file thereafter any claims for a refund of taxes, penalties, or interest for amounts attributable to the returns filed incident to the plea; and

(5) an agreement by the defendant to sign a closing agreement with the IRS contemporaneously with the signing of the plea agreement, allowing the IRS to assess and collect enumerated amounts of tax due and owing for specified years in issue.

[2] This may be a crucial admission. Without it, the defendant may be able to avoid the payment of not only the civil fraud penalty, but the underlying tax liability, as well, if the Tax Court or U.S. District Court having jurisdiction over the civil trial ultimately determines that the statute of limitations for civil tax liability has lapsed.

5.01[8] Contract Terms, Breach, and Enforcement

When interpreting the terms of a plea agreement, a court will resort to traditional principles of contract law. *See, e.g.,* ***United States v. Brumer***, 528 F.3d 157, 158 (2d Cir. 2008); ***United States v. Williams***, 510 F.3d 416, 422 (3d Cir. 2007); ***United States v. Jordan***, 509 F.3d 191, 195 (4th Cir. 2007); ***United States v. Sanchez***, 508 F.3d 456, 460 (8th Cir. 2007) ; ***United States v. Newbert***, 504 F.3d 180, 185 (1st Cir. 2007); ***United States v. VanDam***, 493 F.3d 1194, 1199 (10th Cir. 2007), *cert. denied*, 128 S. Ct. 945 (2008); ***United States v. Lewis***, 476 F.3d 369, 387 (5th Cir.), *cert. denied*, 127 S. Ct. 2893 (2007); ***United States v. Morris***, 470 F.3d 596, 600 (6th Cir. 2006); ***United States v. Speelman***, 431 F.3d 1226, 1229 (9th Cir. 2005); ***United States v. Lockwood***, 416 F.3d 604, 607 (7th Cir. 2005); ***United States v. Rubbo***, 396 F.3d 1330, 1334 (11th Cir. 2005); ***United States v. Ahn***, 231 F.3d 26, 35-36 (D.C. Cir. 2000). Generally, the court will enforce the plain language adopted by the parties as used in its ordinary sense. *See, e.g.,* ***Ricketts v. Adamson***, 483 U.S. 1, 9-10 (1987); ***Jordan***, 509 F.3d at 195; ***United States v. Yah***, 500 F.3d 698, 704 (8th Cir. 2007); ***United States v. Wilken***, 498 F.3d 1160, 1167 (10th Cir. 2007); ***United States v. Sharp***, 436 F.3d 730, 735-36 (7th Cir. 2006); ***Speelman***, 431 F.3d at 1229; ***United States v. Hodge***, 412 F.3d 479, 486-87 (3d Cir. 2005); ***United States v. McKinney***, 406 F.3d 744, 746 (5th Cir. 2005); ***Williams v. United States****,* 396 F.3d 1340, 1342 (11th Cir. 2005); ***Smith v. Stegall***, 385 F.3d 993, 999 (6th Cir. 2004); ***United States v. Garcia***, 166 F.3d 519, 521-22 (2d Cir. 1999); ***United States v. Jones***, 58 F.3d 688, 691 (D.C. Cir. 1995). In addition, the court will imply a term that obligates the parties to the exercise of good faith and fair dealing. *See, e.g.,* ***Santobello v. New York***, 404 U.S. 257, 262 (1971); ***United States v. Habbas***, 527 F.3d 266, 272 (2d Cir. 2008); ***United States v. Drennon***, 516 F.3d 160, 162 & n.1 (3d Cir. 2008); ***United States v. Norris***, 486 F.3d 1045, 1049 (8th Cir. 2007) (*en banc*); ***United States v. McElhaney***, 469 F.3d 382, 385 (5th Cir. 2006); ***United States v. Cruz-Mercado***, 360 F.3d 30, 41 (1st Cir. 2004); ***United States v. Frazier***, 340 F.3d 5, 11 (1st Cir. 2003)*;* ***United States v. Hawkins***, 274 F.3d 420, 430-31 (6th Cir. 2001); ***Ahn***, 231 F.3d at 35-36; ***United States v. Krasn***, 614 F.2d 1229, 1234 (9th Cir. 1980).

Plea agreements are more than mere contracts, though. Because they necessarily implicate a criminal defendant's fundamental constitutional rights, and in light of the investigative and prosecutorial power of the government, the interpretation of plea agreements is subject to due process constraints to ensure that the plea bargaining defendant receives all that is due from the government. *See* ***Santobello***, 404 U.S. at 262.

Prosecutors must be precise in drafting plea agreements, because any ambiguities in the contract terms normally will be resolved against the government. *See, e.g.,* ***United States v. Cope***, 527 F.3d 944, 950 (9th Cir. 2008); ***Williams***, 510 F.3d at 422; ***United States v. Griffin***, 510 F.3d 354, 360 (2d Cir. 2007); ***Jordan***, 509 F.3d at 195-96; ***United States v. McCoy***, 508 F.3d 74, 78 (1st Cir. 2007); ***United States v. Mosley***, 505 F.3d 804, 809 (8th Cir. 2007); ***United States v. Moncivais***, 492 F.3d 652, 662-63 (6th Cir.), *cert. denied*, 128 S. Ct. 633 (2007); ***United States v. Cachucha***, 484 F.3d 1266, 1270 (10th Cir. 2007); ***United States v. Farias***, 469 F.3d 393, 397 (5th Cir. 2006); ***United States v. Copeland***, 381 F.3d 1101, 1105-06 (11th Cir. 2004); ***United States v. Atkinson***, 259 F.3d 648, 654 (7th Cir. 2001); ***United States v. Pollard***, 959 F.2d 1011, 1027-28 (D.C. Cir. 1992).

The issue of a defendant's breach of the plea agreement is not a question to be resolved unilaterally by the government; the plea bargaining defendant has a due process right to a judicial determination of the issue. *See, e.g.,* ***United States v. Williams,*** 510 F.3d at 424; ***United States v. Miller***, 406 F.3d 323, 334-35 (5th Cir. 2005); ***United States v. Guzman***, 318 F.3d 1191, 1196 (10th Cir. 2003); ***United States v. Lezine***, 166 F.3d 895, 901 (7th Cir. 1999); ***United States v. Cox***, 985 F.2d 427, 430 (8th Cir. 1993); ***United States v. Simmons***, 537 F.2d 1260, 1261-62 (4th Cir. 1976). How early in the process this determination is to be made is unclear. The Seventh Circuit has suggested that when seeking to vitiate a nonprosecution agreement, the government should not even indict the defendant until a court has ruled on the issue of breach. *See, e.g.,* ***United States v. Attaya***, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988); ***United States v. Verrusio***, 803 F.2d 885, 889 (7th Cir. 1988); *cf.* ***United States v. Castaneda***, 162 F.3d 832, 836 n.25 (5th Cir. 1998) (declining to address question of when, during progress of criminal investigation, judicial determination of breach is required). But a "prosecution" is "a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime." *BLACK'S LAW DICTIONARY* 1385 (4th ed. 1977) (citing ***Kirby v. Illinois***, 406 U.S. 682, 689 (1972); ***United States v. Reisinger***, 128 U.S. 398, 403 (1888)). Thus, even those courts that recommend that the government obtain a "breach" ruling before indictment acknowledge that generally speaking, the defendant does not have a constitutional right to a pre-indictment hearing on breach. *See* ***Ataya***, 864 F.2d at 1330 n.9; ***Verrusio***, 803 F.2d at 888-89. Ordinarily, an indictment standing alone will not constitute a deprivation of a defendant's interest in the enforcement of a nonprosecution term in a plea agreement, because an indictment does not subject the defendant to the risk of conviction without a prior judicial determination that the defendant breached the plea bargain. *See* ***Verrusio***, 803 F.2d at 889.

The party asserting breach bears the burden of proof by a preponderance of the evidence. *See, e.g.,* ***Williams***, 510 F.3d at 424; ***United States v. Byrd***, 413 F.3d 249, 251 (2d Cir. 2005); ***Kelly***, 337 F.3d at 901; ***United States v. Lukse***, 286 F.3d 906, 909 (6th Cir. 2002); ***Allen v. Hadden***, 57 F.3d 1529, 1534 (10th Cir. 1995); ***United States v. Wilder***, 15 F.3d 1292, 1295 (5th Cir. 1994); ***United States v. Tilley***, 964 F.2d 66, 71 (1st Cir. 1992). A defendant who materially fails to fulfill his promises in a plea agreement forfeits any right to its enforcement. *See, e.g.,* ***Ricketts v. Adamson***, 483 U.S. 1, 11-12 (1987); ***Byrd***, 413 F.3d at 251; ***Kelly***, 337 F.3d at 901; ***United States v. Wells***, 211 F.3d 988, 995 (6th Cir. 2000); ***Tilley***, 964 F.2d at 70; ***United States v. Britt***, 917 F.2d 353, 360-61 (8th Cir. 1990); ***United States v. Reardon***, 787 F.2d 512, 516 (10th Cir. 1986). Similarly, if the government is found to have breached the plea agreement, the court ordinarily will afford the defendant alternative remedies of specific performance or withdrawal from the plea agreement. *See, e.g.,* ***Santobello***, 404 U.S. at 263; ***United States v. Rivera***, 357 F.3d 290, 297 (3d Cir.2004); ***United States v. Lawlor***, 168 F.3d 633, 638 (2d Cir.1999); ***Allen***, 57 F.3d at 1534.

5.02 EXPEDITED PLEA PROGRAM

When a person offers to enter into a plea agreement before an investigation is completed, the prosecutor should give the offer serious consideration. The prosecutor must be cautious, however, to ensure that a defendant does not use an early plea as an opportunity to evade responsibility for all relevant conduct or to prevent the IRS from detecting substantial additional tax fraud. Agents and prosecutors therefore should continue the criminal investigation while plea discussions are ongoing.

Tax Division Directive No. 111 provides guidance regarding a taxpayer who offers to enter into a plea agreement during the course of an administrative investigation. In general, the taxpayer must be willing to "come clean" in order to be eligible for the expedited plea program. He or she must be represented by counsel, must be willing to plead to the most serious violation (consistent with the Division's major count policy;

see § 5.01[1], *supra*, must provide the IRS with all relevant financial records, and must submit to an interview with the IRS.[3]

When the target of an administrative case expresses a desire to enter a guilty plea, IRS agents or attorneys should contact the Tax Division immediately to discuss the matter. The IRS then may make a formal referral to the Tax Division for a proposed expedited plea after completing the investigative steps set forth in Directive No. 111. The Tax Division will review the case expeditiously and either authorize a plea agreement, return the case to the IRS, or authorize a grand jury investigation. If the Tax Division approves the proposed plea, then it will refer the matter to the United States Attorney, with authorization to conduct formal plea negotiations and consummate a plea agreement consistent with the charges submitted by the IRS.

5.03 TRANSFER FROM DISTRICT FOR PLEA AND SENTENCE

Rule 20 of the Federal Rules of Criminal Procedure allows a defendant to waive trial and enter a guilty plea or a *nolo* plea in the district in which he or she is arrested, held, or present, although it is a district other than the district in which the case is pending. The United States Attorney for each district must approve a transfer.

Some defendants seek to abuse Rule 20 to forum shop and have a case transferred to a more lenient court. United States Attorneys therefore should secure authorization from the Tax Division, before consenting to a transfer under Rule 20 in a criminal tax case.

In connection with the matter of prisoner transfers, prosecutors should be aware of the Interstate Agreement on Detainers, 18 U.S.C. App.2. See *United States Attorneys' Manual*, Criminal Resource Manual § 534.

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[3] It is noted that this interview with the IRS will not be deemed a formal plea negotiation. Only a Department prosecutor can engage in plea negotiations. Statements made by the target to an IRS agent prior to formal plea discussions with the Department of Justice will not be foreclosed from future use under the restrictions of Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f) in the event that plea negotiations fail.

5.04 DETENTION AND BAIL DURING THE COURSE OF PROCEEDINGS

There are no special rules governing pretrial release in criminal tax cases. Prosecutors should be cautious about defendants who have overseas ties and/or assets. Judges often treat such defendants as if they were ordinary, white-collar criminal defendants who have substantial ties to the community and pose no risk of flight. Occasionally, a defendant does flee before trial or sentencing.[4] Release pending trial and release post-trial awaiting sentencing or pending appeal are governed by the Bail Reform Act of 1984. 18 U.S.C. §§ 3141 - 3156.

Generally, the Bail Reform Act mandates the release of a defendant awaiting trial under the least restrictive condition or combination of conditions unless the conditions "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b). If the court determines that neither release on personal recognizance nor release on an unsecured bond is sufficient to ensure the defendant's appearance at trial or meet the statutory safety concerns, then it may impose pretrial release conditions. 18 U.S.C. § 3142(c).

After a defendant is convicted, the detention calculus shifts to a presumption against bail. A person who has been found guilty of an offense and is waiting to be sentenced generally should be detained, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or to pose a danger to the safety of any other person or the community if he or she is released. 18 U.S.C. § 3143(a). The defendant bears the burden of showing by clear and convincing evidence that he or she is not likely to flee if released. *See* Fed. R. Crim. P. 46(c).

Under 18 U.S.C. § 3143(b), a court is required to order detention pending appeal of any person who has been convicted and sentenced to a term of imprisonment. A

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[4] There have been several noteworthy tax cases in which a defendant or target of an investigation fled. William Pollen fled three times: prior to his arraignment on tax evasion charges, while on bail pending sentencing after his guilty plea, and after being indicted twelve years later on new evasion of payment charges. ***United States v. Pollen***, 978 F.2d 78, 80-82 (3rd Cir. 1992). Marc Rich and Pincus Green fled the country while under investigation and were fugitives for seventeen years, until President Clinton pardoned them in 2001. *See* ***In Re Grand Jury Subpoenas Dated March 9, 2001***, 179 F. Supp. 2d 270, 274 (S.D.N.Y. 2001). *See also* ***Wall Street Journal,*** July 3, 2001, ***Tax Fugitive Joseph Ross Lives Life On the Lam in a Belizean Paradise.*** Prosecutors should be alert to the possibility of flight when prosecuting defendants who own or maintain bank accounts and other assets offshore or who make numerous trips outside the country. In cases in which the defendant is believed to be a flight risk, prosecutors should strenuously oppose bail requests, seek to revoke bail where appropriate, and appeal judicial refusals to deny or revoke bail, where appropriate.

defendant may be released only if the defendant (1) establishes by clear and convincing evidence that he or she is neither a danger to the community nor a flight risk, 18 U.S.C. § 3143(b)(1)(A); (2) demonstrates that the appeal raises a substantial question of law or fact, and that the appeal is not for the purpose of delay, 18 U.S.C. § 3143(b)(1)(B); and (3) shows that the substantial question presented, if decided in the defendant's favor, will likely lead to (a) reversal or an order for new trial with respect to all the counts for which imprisonment was imposed, (b) a sentence that does not include a term of imprisonment, or (c) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal. 18 U.S.C. § 3143(b)(1)(B); *see* ***Morrison v. United States***, 486 U.S. 1306, 1306-07 (Rehnquist, Circuit Justice) (1988); ***United States v. Thompson***, 787 F.2d 1084, 1085 (7th Cir. 1986) (excise tax evasion). Under Section 3143, the defendant bears the burden of showing that his or her case fits within the statutory exception. ***United States v. Miller***, 753 F.2d 19, 24 (3d Cir. 1985) (***Klein*** conspiracy and false returns); ***United States v. Affleck***, 765 F.2d 944, 946 (10th Cir. 1985); Fed. R. Crim. P. 46(c).

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6.01 OVERVIEW

6.01[1] Generally

For a general discussion of venue, including constitutional and statutory provisions, waiver, and burden of proof, please refer to the *United States Attorney's Manual*, Title 9 (Criminal Resource Manual) at 231.

6.1 [2] Policy Considerations

It is the policy of the Department of Justice generally to attempt to establish venue for a criminal tax prosecution in the judicial district of the taxpayer's residence or principal place of business, because prosecution in that judicial district usually has the most significant deterrent effect.

6.2 VENUE IN TAX PROSECUTIONS

6.02[1] 26 U.S.C. § 7201: Tax Evasion

Tax evasion is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Root***, 585 F.3d 145, 156 (3d Cir. 2009); ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985); ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973). Therefore, venue is proper in a Section 7201 prosecution in any district in which any act in furtherance of the crime was committed, including the district in which a return was prepared, signed, mailed or filed. ***Marchant***, 774 F.2d at 891; ***Slutsky***, 487 F.2d at 839. In cases in which no return was filed, venue is proper in any district in which an affirmative act of evasion took place. ***Marchant***, 774 F.2d at 891; ***United States v. Goodyear***, 649 F.2d 226, 228 (4th Cir. 1981); ***Slutsky***, 487 F.2d at 839.

Prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that, if venue is based solely on a mailing to the IRS, a defendant charged under Section 7201 has the right to remove the case to the district in which the defendant resided at the time the offense was committed. Section 6.03[1], *infra*. For a more detailed discussion of venue in Section 7201 cases, *see* Section 8.09, *infra*.

6.02[2] 26 U.S.C. § 7203: Failure to File

Failure to file a tax return is a crime of omission. Venue for a crime of omission lies in any district in which the duty could have been performed; that is, the district in which the defendant was required to file. ***United States v. Clines***, 958 F.2d 578, 583 (4th Cir. 1992); ***United States v. Garman***, 748 F.2d 218, 219-221 (4th Cir. 1984); ***United States v. Rice***, 659 F.2d 524, 526 (5th Cir. 1981); ***United States v. Quimby***, 636 F.2d 86, 89-90 (5th Cir. 1981); ***United States v. Commerford***, 64 F.2d 28, 32-33 (2d Cir. 1933).

Generally, individual tax returns are to be filed in the internal revenue district in which the taxpayer resides or has his or her principal place of business, or at the IRS Service Center serving that district. 26 U.S.C. § 6091(b)(1).[1] The instruction booklet for the tax form and year at issue typically lists the applicable Service Center.[2] If the Internal Revenue Code does not provide for the place of filing, the Secretary of the Treasury may, by regulation, prescribe a place for filing. 26 U.S.C. § 6091(a). As a practical matter, venue in an ordinary case involving failure to file an individual tax return is proper in the district in which the appropriate IRS Service Center is located or in the district in which the defendant resides or has his or her principal place of business.

Prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that a defendant charged under Section 7203 has the right to remove the case to the district in which the defendant resided at the time the offense was committed. *See* Section 6.03[1], *infra*. For a more detailed discussion of venue in Section 7203 cases, *see* Section 10.05[7], *infra*.

6.02[3] 26 U.S.C. § 7206(1): Filing a False Tax Return

The crime of willfully making or subscribing a false tax return is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). *See* ***United States v. Shyres***, 898 F.2d 647, 657 (8th Cir. 1990); ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973). Thus, venue is proper in a section 7206(1) prosecution in any district in which the false return was prepared and signed, as well as the district in which it was received and filed. ***Shyres***, 898 F.2d at 657; ***United States v. Rooney***, 866 F.2d 28, 31 (2d Cir. 1989); ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987); ***Slutsky***, 487 F.2d at 839;

[1] The venue rules applicable to corporate and estate tax returns are similar. See 26 U.S.C. § 6091(b)(2) &. (3).
[2] For exceptions to this rule, see the discussion on venue at Section 10.05[7].

United States v. Lawhon, 499 F.2d 352, 355 (5th Cir. 1974). Venue is also proper in the district in which the return preparer received information from the taxpayer, even if the taxpayer signed and filed the return in another district. ***Rooney***, 866 F.2d at 31.

Notwithstanding the above rules, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that, if venue is based solely on a mailing to the IRS, a defendant charged under Section 7206(1) has the right to remove the case to the district in which the defendant resided at the time the offense was committed. 18 U.S.C. § 3237(b) (1988). *See* Section 6.03[1], *infra*. For a more detailed discussion of venue in section 7206(1) cases, *see* Section 12.13, *infra*.

6.2 [4] 26 U.S.C. § 7206(2): Aiding the Preparation of a False Return

The crime of willfully aiding and assisting in the preparation of a false tax return is a "continuing offense" within the meaning of 18 U.S.C. § 3237(a). ***United States v. Hirschfeld***, 964 F.2d 318, 321 (4th Cir. 1992). Venue is therefore proper in a Section 7206(2) prosecution in any district in which the false return was prepared and signed, even if the return was filed in another district. Venue is also proper in the district in which the false return was filed, as well as in any district in which any act of aiding and assisting took place. ***Hirschfeld***, 964 F.2d at 321; ***United States v. Bryan***, 896 F.2d 68, 72 (5th Cir. 1990).

Notwithstanding the above rules, prosecutors should be aware of 18 U.S.C. § 3237(b), which provides that, if venue is based solely on a mailing to the IRS, a defendant charged under Section 7206(2) has the right to remove the case to the district in which the defendant resided at the time the offense was committed. *See* Section 6.03[1], *infra*. For a more detailed discussion of venue in section 7206(2) cases, *see* Section 13.09, *infra*.

6.3 REMOVAL TO DISTRICT OFRESIDENCE

6.03[1] Section 3237(b)

Section 3237(a) of Title 18 allows the government some discretion in establishing venue for continuing offenses, defined as any offenses "begun in one district and completed in another, or committed in more than one district." However, that discretion is circumscribed by 18 U.S.C. § 3237(b), which, for certain enumerated income tax violations, gives the defendant the option to transfer venue to the district in which he or she resided at the time the offense was committed. Section 3237(b) provides:

> Notwithstanding subsection (a), *where an offense is described in section 7203 of the Internal Revenue Code, or where venue for prosecution of an offense described in section 7201 or 7206(1), (2), or (5) . . . is based solely on a mailing to the Internal Revenue Service, and prosecution is begun in a judicial district other than the judicial district in which the defendant resides*, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

18 U.S.C. § 3237(b) (emphasis added). Thus, under 18 U.S.C. § 3237(b), a prosecution under 26 U.S.C. § 7201, 7203, or 7206(1), (2) or (5) may be subject to an election by the defendant to be tried in the district in which he or she was residing at the time the alleged offense was committed, provided a motion is filed within twenty days of arraignment.

A defendant may invoke subsection (b) if the venue for offenses under Section 7201 or 7206(1), (2) or (5) is based "solely on a mailing to the Internal Revenue Service" and if the indictment is returned in a district other than the district in which the defendant resides. If the indictment charges other acts that establish venue in the district in which the indictment is returned, the defendant is not entitled to a change of venue. ***United States v. Humphreys***, 982 F.2d 254, 260 (8th Cir. 1992); ***United States v. Melvan***, 676 F. Supp. 997, 1001-02 (C.D. Cal. 1987). The mailing requirement under 18 U.S.C. § 3237(b) does not apply to prosecutions for failure to file underSection 7203.

Prosecutors should be aware that when Section 3237(b) provides a basis for transferring fewer than all counts, a court may consider it to be in the interests of justice to transfer all counts concerning the particular defendant to the transferee district. A district court is not required, however, to transfer those charges concerning the particular defendant that are not covered by Section 3237(b). Similarly, a court might use a defendant's Section 3237(b) motion to transfer fewer than all counts, as justification to grant a defendant's Rule 21(b) motion on the remaining charges.

6.03[2] Rule 21(b)

Rule 21(b) of the Federal Rules of Criminal Procedure provides an alternate basis for a change of venue. ***United States v. Benjamin***, 623 F. Supp. 1204, 1211 (D.D.C. 1985). The rule provides:

> Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and witnesses and in the interest of justice.

Fed. R. Crim. P. 21(b).

Factors that have been considered with regard to a transfer decision include (1) location of the defendant, (2) location of possible witnesses, (3) location of events likely to be in issue, (4) location of documents and records likely to be involved, (5) potential for disruption of defendant's business, (6) expense to the parties, (7) location of counsel, (8) relative accessibility of the place of trial, (9) docket condition of each district, and (10) special considerations unique to the case. *See* ***Platt v. Minnesota Mining & Mfg. Co.***, 376 U.S. 240, 243-44 (1964) (noting that district court considered these factors in deciding whether to transfer case and that parties and court of appeals agreed that first nine were appropriate).

In exercising the discretion afforded the government to place venue in a particular district, prosecutors should be cognizant of the factors enumerated above and the possibility of transfer under Rule 21(b). The Rule is discussed in the *United States Attorney's Manual*, Title 9 (Criminal Resource Manual) at 530.

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7.00 STATUTE OF LIMITATIONS

7.01 GENERALLY

7.1 [1] Statutory Provisions

This section gives a general overview of statute of limitations issues in criminal tax cases. For a more detailed discussion of a specific offense, reference should be made to the applicable chapter in this Manual.

Section 6531 of Title 26 controls the statute of limitations periods for most criminal tax offenses. This statute provides:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years –
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);
>
> (4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law orregulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

> (6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);
>
> (7) for offenses described in section 7214(a) committed by officers and employees of the United States; and
>
> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

26 U.S.C. § 6531.

Thus, under Section 6531, the general rule is that a three-year statute of limitations exists for Title 26 offenses. However, a six-year period applies to certain excepted offenses. Section 6531 switches back and forth between enumerating the exception by specific Code reference and by a description of the offense. For example, 26 U.S.C. §§ 7206(1), 7207, 7212(a) and 7214(a) and 18 U.S.C. § 371 (conspiracy to evade taxes) are all specifically designated by Section 6531 as falling within the six-year exception. By contrast, willful failure to file an income tax return and willful failure to pay a tax, criminalized by 26 U.S.C. § 7203, are each designated as subject to the six-year exception solely by description of the offense.

Generally, the statute of limitations begins to run when an offense is completed. ***Toussie v. United States***, 397 U.S. 112, 115 (1970). Prosecutors should be aware that not all tax offenses are completed upon the filing of a tax return. For example, in a multiple-year tax evasion case where the affirmative acts of evasion include the subsequent filing of a single false amended return intended to evade all years' taxes, each crime is completed at the time the amended return was filed, not when the tax liabilities arose at the time each of the false original returns was filed. ***United States v. Thompson***, 518 F.3d 832, 856-57 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 487 (2008); *see also* ***United States v. Goodyear***, 649 F.2d 226, 228 (4th Cir. 1981) (in evasion case in which the affirmative act of evasion is a subsequent false statement to IRS agents, crime is complete at time of false statement, not when false return is filed). Consequently, careful examination of the various elements is required to determine when a specific tax offense is completed.

7.1 [2] Limitations Periods for Common Tax Offenses

Description of Offense	***Code Section***	***Statute of Limitations***	***Code Section***
Tax Evasion	26 U.S.C. § 7201	6 years	26 U.S.C. § 6531(2)
Failure to Collect, Account For or Pay Over	26 U.S.C. § 7202	6 years[1]	26 U.S.C. § 6531(4)
Failure to Pay Tax	26 U.S.C. § 7203	6 years	26 U.S.C. § 6531(4)
Failure to File a Return	26 U.S.C. § 7203	6 years[2]	26 U.S.C. § 6531(4)
Failure to Keep Records	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Failure to Supply Information	26 U.S.C. § 7203	3 years	26 U.S.C. § 6531
Supplying False Withholding Exemption Certificate	26 U.S.C. § 7205	3 years	26 U.S.C. § 6531
Filing a False Tax Return	26 U.S.C. § 7206(1)	6 years	26 U.S.C. § 6531(5)

[1] The limitations period for Section 7202 offenses has been the subject of recent litigation. It is the view of the Tax Division that the six-year statute of limitations provided for in Section 6531(4) is applicable to prosecutions under Section 7202. Reference should be made to the discussion of this issue in the chapter dealing with Section 7202. *See* Chapter 9.00, *infra*.

[2] As provided by Section 6531(4), the six-year rule for failure to file a return does not apply to returns that are required to be filed under part III of subchapter A of chapter 61. Part III covers information returns required to be filed under 26 U.S.C. §§ 6031-6060, and includes, for example, partnership returns, returns of exempt organizations, subchapter S returns, and returns relating to cash received in a trade or business (Form 8300). The rules in this area are rather complicated, as there is a further exception that makes the applicable limitations period for failure to file a subchapter S return six years, rather than the three-year period generally applicable for failures to file information returns. *See* 26 U.S.C. § 6037(a). Reference should be made to these specific Code provisions for a more detailed discussion of applicable limitations periods.

Aid or Assist in Preparation or Presentation of False Tax Return	26 U.S.C. § 7206(2)	6 years	26 U.S.C. § 6531(3)
Deliver or Disclose False Document	26 U.S.C. § 7207	6 years	26 U.S.C. § 6531(5)
Attempt to Interfere With Administration of Internal Revenue Laws	26 U.S.C. § 7212(a)	6 years[3]	26 U.S.C. § 6531(6)
Conspiracy to Commit Tax Evasion	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(8)
Conspiracy to Defraud the Internal Revenue Service	18 U.S.C. § 371	6 years	26 U.S.C. § 6531(1)
False Claim for Refund	18 U.S.C. § 286/287	5 years[4]	18 U.S.C. § 3282
False Statement	18 U.S.C. § 1001	5 years	18 U.S.C. § 3282

7.2 TRIGGERING OF STATUTE OF LIMITATIONS

7.02[1] Filing a False Tax Return

[3] Section 7212(a) refers to two types of offenses: (1) impeding employees of the United States acting in an official capacity; and (2) impeding the administration of the Internal Revenue laws. The Tax Division takes the position that a six-year limitations period applies to offenses under both prongs of Section 7212(a), pursuant to 26 U.S.C. § 6531(6). Reference should be made to the discussion of this issue in the chapter dealing with Section 7212(a). *See* Chapter 17.00, *infra*.

[4] Reference should be made to the discussion of this issue in the chapter dealing with 18 U.S.C. §§ 286, 287. *See* Chapter 22.00, *infra*

7.02[1][a] General Rule

The general rule is that the statute of limitations for the filing of a false tax return starts on the day the return is filed. ***United States v. Habig***, 390 U.S. 222, 223 (1968); ***United States v. Kelly***, 864 F.2d 569, 574 (7th Cir. 1989). However, if the return is filed early (*i.e.*, before the statutory due date), the statute of limitations does not start to run until the statutory due date. 26 U.S.C. § 6513(a); ***Habig***, 390 U.S. at 225; ***United States v. Marrinson***, 832 F.2d 1465, 1475-76 (7th Cir. 1987). For example, if a tax return that is due to be filed on April 15, 2009, is filed early on February 26, 2009, the statute of limitations on the return would not begin to run until April 15, 2009.

Conversely, if a return is filed late (*i.e.*, after the statutory due date), the statute of limitations begins running the day the return is filed. ***Habig***, 390 U.S. at 223-25; ***United States v. Hills***, 618 F.3d 619, 634-35 (7th Cir. 2010); ***United States v. Anderson***, 319 F.3d 1218, 1220-21 (10th Cir. 2003). Thus, if a return that was due on April 15, 2008, was filed late on June 1, 2008, the statute of limitations began to run on June 1, 2008.

In cases where an extension of time to file at a later date has been obtained, the statute of limitations begins to run from the date the return is filed, regardless of whether it was filed before or after the extension date. ***Habig***, 390 U.S. at 225-27. Thus, where a return was initially due on April 16, 2007, and the taxpayer was granted an extension to October 16, 2007, and actually filed on October 1, 2007, the statute of limitations started to run on October 1, 2007. Similarly, if the extension was to October 16, 2007, and the return was filed November 1, 2007, the statute of limitations began to run on November 1, 2007.

The statutory due date for filing a return depends upon the type of tax and the return involved. Section 6072 of Title 26 sets out the statutory due dates for the filing of various tax returns. Individual income tax returns made on a calendar year basis are due on April 15th of the following year. 26 U.S.C. § 6072(a). Individual returns made on a fiscal year basis are due on the fifteenth day of the fourth month of the following fiscal year. 26 U.S.C. § 6072(a). Corporate returns made on a calendar year basis are due on March 15th of the following year. 26 U.S.C. § 6072(b). Corporate returns made on a fiscal basis are due on the fifteenth day of the third month of the following fiscal year.

26 U.S.C. § 6072(b). Other types of returns may have unusual rules applicable only to the particular type of return.

The statutory due date for a return remains the same even if the due date falls on a Saturday, Sunday, or a legal holiday. Section 7503 of Title 26 provides that "[w]hen the last day prescribed under the authority of the internal revenue laws for performing any act" – such as filing a return – "falls on Saturday, Sunday, or a legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday." Section 7503 provides only that a return "shall be considered timely" if due on a Saturday, Sunday, or legal holiday and filed on the next business day – it does not alter the "last day prescribed for the filing" of a return within the meaning of Section 6513(a). *See* ***Hannahs v. United States***, 1995 WL 230461 (W.D. Tenn. Jan. 30, 1995) (holding that Saturday, April 15, 1989 was "the last day prescribed for filing a return for purposes of § 6513," notwithstanding § 7503); ***Kabotyanski v. IRS***, 2007 WL 526603 (E.D.N.Y. Feb. 13, 2007); ***Weisbart v. IRS***, 2004 WL 528442 (E.D.N.Y. Mar. 15, 2004); Rev. Rul. 2003-41. Section 7503 does not delay commencement of the statute of limitations provided for in Section 6531 when a return is filed early and the limitations period does not commence until the statutory due date of the return. *See* 26 U.S.C. § 6531 (providing that "[f]or the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable").[5]

Example: April 15, 2007, was a Sunday, and Monday, April 16, 2007, was a legal holiday in Washington, DC (Emancipation Day).[6] Accordingly, a return filed on Tuesday, April 17, 2007, would be deemed timely filed. But if a taxpayer filed her return on Friday, April 13, 2007, her return would be deemed filed on Sunday, April 15, 2007. As such, the six year limitations period for charging 26 U.S.C. § 7206(1) would begin on

[5] The IRS takes the same position in the Internal Revenue Manual. *See* I.R.M. § 9.1.3.6.3 (even if return filed on next business day would be considered timely per § 7503, "the statutory due date remains unchanged," so "the calculation of the statute of limitations in investigations involving early filed returns or failures to file should use the statutory due date regardless of the day of the week on which that date falls").
[6] Section 7503 defines "legal holiday" as "a legal holiday in the District of Columbia."

April 16, 2007, and expire on Monday, April 15, 2013. An indictment returned after that date would be time-barred.

7.02[1][b] Definition of Timely Filed

A tax return is generally considered timely filed if it is received by the IRS on or before the due date of the return. Typically, when a return is received on or before the statutory due date, it is not date stamped by the IRS upon receipt. However, in cases in which a return is filed after the statutory due date, the return is date stamped on the date it is received by the Service Center. This date then becomes the date of filing for statute of limitation purposes.

Prosecutors should be aware of the timely mailed/timely filed exception to the general rule. Section 7502 of Title 26 deems the date of mailing by the taxpayer (as opposed to the date of receipt by the IRS) to be the date of filing if (1) the return is sent by U.S. Mail and contains a U.S. postmark that is dated on or before the statutory due date, (2) the return is deposited in the mail addressed to the appropriate IRS office with postage prepaid, and (3) the return is delivered to the IRS after the date it was due. 26 U.S.C. § 7502(a).[7]

In these circumstances, the return may be date stamped after the statutory due date and still be deemed timely filed under Section 7502. Typically, the IRS will retain the envelope in which the return was mailed only if the return was filed after the due date.

7.02[2] Failing to File a Tax Return

Generally, the statute of limitations does not begin to run until the crime is complete. ***Toussie v. United States***, 397 U.S. 112, 115 (1970). In cases in which the defendant has failed to file a tax return, the statute of limitations begins to run when the return is due. ***United States v. Phillips***, 843 F.2d 438, 443 (11th Cir. 1988). For example, if a defendant did not file a tax return that was due to be filed on April 15, 2008, the statute of limitations on the return began to run on that date.

[7] Returns sent by designated private delivery services are treated as having been sent by U.S. mail for purposes of the timely mailed/timely filed exception to the general rule. 26 U.S.C. § 7502(f)(1). "Designated delivery service" is defined under Section7502(f)(2).

If a defendant has obtained a valid extension of time to file a tax return, there is no duty to file until the extension date. ***Phillips***, 843 F.2d at 442-43. Thus, if a defendant obtained an extension to file from April 16, 2007, to October 16, 2007, and failed to file on or before the extended due date, the statute of limitations began to run on October 16, 2007. The extension date applies only if the extension is valid. An invalid, untimely application for automatic extension does not extend the statute of limitations beyond the statutory due date. *See* ***Phillips***, 843 F.2d at 443.

Section 6081 of Title 26 governs extensions. The regulations promulgated under Section 6081 detail the application procedures and lengths of extensions for various types of returns. Treas. Reg. (26 C.F.R.) § 1.6081-1, *et seq.* The regulations provide for an automatic extension of time for filing individual income tax returns that varies in length depending upon the tax year involved. For individual returns filed before January 1, 2006, the regulations provided for a four-month automatic extension. Treas. Reg. § 1.6081-4(a)(1) (1983), *superseded by* Temp. Treas. Reg. § 1.6081-4T(a) (2005). For individual returns filed on or after January 1, 2006, the regulations provide for a six-month automatic extension for the filing of personal income tax returns. Temp. Treas. Reg. § 1.6081-4T(a) (2005), *superseded by* Treas. Reg. § 1.6081-4(a) (2008).

Prosecutors should be aware that an automatic extension of time to file a return does not operate to extend the time for the payment of any tax due on the return. See Treas. Reg. § 1. 6081-4(b) ("[A]ny automatic extension of time for filing an individual income tax return ... shall not operate to extend the time for payment of any tax due on such return.") To qualify for an automatic extension of time to file, a taxpayer must properly estimate his tax liability using the information available, enter his tax liability on a Form 4868, and file the Form 4868 by the due date of the return. Instructions for Form 4868; *see also* Treas. Reg. § 1. 6081-4(a)(4) ("Such application for extension must show the full amount properly estimated as tax for such taxpayer for such taxable year ").
Although an extension of time to file a return does not extend the due date for paying tax, a taxpayer may obtain a valid, automatic extension of the return filing date without paying the tax; the taxpayer will, however, be liable for interest and penalties. *See* ***Deaton v. Commissioner***, 440 F.3d 223, 224-225 (5th Cir. 2006); Instructions for Form 4868.

7.02[3] Tax Evasion

In order to commit tax evasion, the defendant must commit some affirmative act to evade a tax. While this act most often is the filing of a false tax return, it may also be "any conduct, the likely effect of which would be to mislead or conceal." ***Spies v. United States***, 317 U.S. 492, 499 (1943).

The general rule is that the statute of limitations for tax evasion begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. ***United States v. Carlson,*** 235 F.3d 466, 470 (9th Cir. 2000); ***United States v. Hunerlach***, 197 F.3d 1059, 1065 (11th Cir. 1999); ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997); ***United States v. Dandy***, 998 F.2d 1344, 1356 (6th Cir. 1993); ***United States v. Payne***, 978 F.2d 1177, 1179 (10th Cir. 1992); ***United States v. DiPetto***, 936 F.2d 96, 98 (2d Cir. 1991). Thus, in a case in which the affirmative act of evasion is the filing of a false tax return, the statute of limitations begins to run on the date the return is filed or the statutory due date, whichever is later. In a case where a false return is filed and there is an affirmative act of evasion occurring after the filing date, the statute of limitations starts to run on the date the last affirmative act took place or the statutory due date, whichever is later. ***United States v. Thompson***, 518 F.3d 832, 856-57 & n.13 (10th Cir. 2008); ***United States v. Hunerlach***, 197 F.3d 1059, 1065 (11th Cir. 1999); ***United States v. Dandy***, 998 F.2d at 1355; ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986); ***United States v. Trownsell***, 367 F.2d 815, 816 (7th Cir. 1966). For example, if a false 2000 tax return was timely filed on April 16, 2001, and, on September 15, 2002, the defendant engaged in further affirmative acts of evasion (*e.g.*, lying to IRS agents) regarding his 2000 taxes, the statute of limitations began to run on September 15, 2002.

Further, in cases in which no return is filed and some other act constitutes the affirmative act of evasion, the statute of limitations begins to run on the date the last affirmative act took place or the statutory due date of the return, whichever is later. *See* ***Carlson,*** 235 F.3d at 470; ***Payne***, 978 F.2d at 1179 & n.2; ***United States v. Winfield***, 960 F.2d 970, 973-74 (11th Cir. 1992); ***DiPetto***, 936 F.2d at 98. For example, if a 2000 tax return that was due to be filed on April 16, 2001, was not filed by the defendant, and, on June 6, 2000, the defendant had committed an act of evasion (*e.g.*, filing a false Form W-4 exemption certificate) relating to his 2000 taxes, the statute of limitations started to run on April 16, 2001. Conversely, if a 2000 tax return that was due to be filed on April

16, 2001, was not filed by the defendant and, on December 1, 2003, the defendant committed an act of evasion (*e.g.*, lying to agents of the IRS) relating to her 2000 taxes, the statute of limitations started to run on December 1, 2003.

7.02[4] Conspiracy

The statute of limitations for a conspiracy to evade taxes, under the offense clause of Section 371, is six years. Similarly, the statute of limitations for a ***Klein*** conspiracy, under the defraud clause of Section 371, is six years. Both of these offenses are controlled by 26 U.S.C. § 6531. Occasionally, a defendant charged with a tax conspiracy under Section 371 will argue that the five-year statute of limitations generally applicable to Title 18 offenses[8] should apply to Section 371. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. *See* ***United States v. Aracri***, 968 F.2d 1512, 1517 (2d Cir. 1992); ***United States v. Waldman***, 941 F.2d 1544, 1548 (11th Cir. 1991); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. White***, 671 F.2d 1126, 1133-34 (8th Cir. 1982); ***United States v. Brunetti***, 615 F.2d 899, 901-02 (10th Cir. 1980); ***United States v. Fruehauf Corp.***, 577 F.2d 1038, 1070 (6th Cir. 1978); ***United States v. Lowder***, 492 F.2d 953, 955-56 (4th Cir. 1974).

The statute of limitations in a conspiracy begins to run from the date of the last overt act proved. ***Grunewald v. United States***, 353 U.S. 391, 397 (1957). The government is not required to prove, , however, that each member of a conspiracy committed an overt act within the statute of limitations. ***Hyde v. United States***, 225 U.S. 347, 369-70 (1912); *see also* ***United States v. Read***, 658 F.2d 1225, 1234 (7th Cir. 1981) (interpreting the ***Hyde*** decision). Once the government shows that a member joined the conspiracy, his continued participation in the conspiracy is presumed until the object of the conspiracy has been achieved. *See, e.g.,* ***United States v. Schorovsky***, 202 F.3d 727, 729 (5th Cir. 2000); ***United States v. Barsanti***, 943 F.2d 428, 437 (4th Cir. 1991); ***United States v. Juodakis***, 834 F.2d 1099, 1103-04 (1st Cir.1987); ***United States v. Finestone***,

[8] *See* 18 U.S.C. § 3282(a): "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense . . . unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

816 F.2d 583, 589 (11th Cir. 1987); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980); ***United States v. Panebianco***, 543 F.2d 447, 453 (2d Cir. 1976).[9]

However, a showing of withdrawal before the limitations period (*i.e.*, more than 6 years prior to the indictment, where the limitations period is 6 years) is a complete defense to conspiracy. ***Read***, 658 F.2d at 1233. The defendant carries the burden of going forward to establish this affirmative defense. ***United States v. Lash***, 937 F.2d 1077, 1083 (6th Cir. 1991); ***Juodakis***, 834 F.2d at 1102-03; ***Finestone***, 816 F.2d at 589; ***Krasn***, 614 F.2d at 1236; ***United States v. Boyd***, 610 F.2d 521, 528 (8th Cir. 1979); ***United States v. Parnell***, 581 F.2d 1374, 1384 (10th Cir. 1978); ***United States v. Borelli***, 336 F.2d 376, 385 (2d Cir. 1964). The government, however, retains the burden of persuasion. ***United States v. West***, 877 F.2d 281, 289 (4th Cir. 1989) (government retains burden of persuasion); ***United States v. Jannoti***, 729 F.2d 213, 221 (3d Cir. 1984) (initial burden on defense, then shifted to government); ***Read***, 658 F.2d at 1236 (burden of production on defendant; burden of persuasion remains on government to negate withdrawal defense); ***Manual of Model Criminal Jury Instructions for the Ninth Circuit***, Instruction No. 8.19 (2003) (following ***Read***).

The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action to defeat the object of the conspiracy is required. *See, e.g.*, ***Lash***, 937 F.2d at 1083; ***Juodakis***, 834 F.2d at 1102; ***Finestone***, 816 F.2d at 589; ***United States v. Gonzalez***, 797 F.2d 915, 917 (10th Cir. 1986); ***Krasn***, 614 F.2d at 1236.

7.2 [5] Employment Taxes

If a return with respect to social security taxes and income tax withholding (Form 941) for any period ending with or within a calendar year is filed before April 15th of the succeeding calendar year, the return is considered filed on April 15th of that following

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[9] Although the government technically is not required to prove that each member of the conspiracy committed an overt act within the statute period, in practice, the prosecutor should critically review each conspirator whose membership in the conspiracy predates the limitations period and be prepared to rebut a withdrawal defense coupled with a statute of limitations defense.

calendar year. 26 U.S.C. 6513(c)(1).[10] Thus, the limitations period as to a Form 941 filed for a reporting period during a calendar year runs from April 15th of the following year.

By its terms, § 6513(c)(1) applies only where a return was filed. Thus, in a case involving a failure to file a Form 941, the statute of limitations runs from the due date of the return, rather than the later date under § 6513(c)(1). *See* ***Toussie v. United States***, 397 U.S. 112, 115 (1970) (statute of limitations does not begin to run until an offense is complete); ***United States v. Phillips***, 843 F.2d 438, 443 (11th Cir. 1988) (failure to file a return typically is complete on the due date of the return). The Form 941 is generally due quarterly, one month after the conclusion of each quarter.[11] 26 U.S.C. 6011(a); 6151; 26 C.F.R. §§ 31.6011(a)-1; 6011(a)-4; 31.6071(a)-1(a)(1),(4).

7.3 TOLLING PROVISION: FUGITIVE OR OUTSIDE U.S.

Section 6531 of Title 26 contains its own tolling provision. The statute provides:

> The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings.

26 U.S.C. § 6531. Thus, the statute of limitations in Title 26 cases can be tolled if the defendant is outside the United States or is a fugitive.

"Outside the United States" and "fugitive from justice" are interpreted in the disjunctive. Mere absence from the United States without any intent to become a fugitive is sufficient to toll the statute of limitations. *See* ***United States v. Marchant***, 774 F.2d 888, 892 (8th Cir. 1985). In ***Marchant***, for example, the Eighth Circuit held that defendant's eleven-day health and pleasure trip to Switzerland tolled the statute of limitations under 26 U.S.C. § 6531. According to the court, persons are “outside the

[10] Similarly, Section 6513(c)(2) provides, "If a tax with respect to remuneration or other amount paid during any period ending with or within a calendar year is paid before April 15 of the succeeding calendar year, such tax shall be considered paid on April 15 of such succeeding calendar year."

[11] Persons who fail to collect the tax, pay over the tax, or file quarterly Forms 941 can be required to file and pay more often. *See, e.g.*, 26 C.F.R. § 31.6011(a)-5(a)(1) (monthly).

United States," as that term is used in Section 6531, whenever they cannot be served with criminal process within the jurisdiction of the United States under Rule 4(d)(2) of the Federal Rules of Criminal Procedure. ***Marchant***, 774 F.2d at 892.

The "fugitive from justice" clause in Section 6531 refers to 18 U.S.C. § 3290, which provides: "No statute of limitations shall extend to any person fleeing from justice." The circuits are split as to the intent required under this statute. The majority rule, as adopted by the First, Second, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits is that intent to avoid arrest or prosecution must be proved before section 3290 applies. ***Brouse v. United States***, 68 F.2d 294, 296 (1st Cir. 1933); ***Jhirad v. Ferrandina***, 486 F.2d 442, 444-45 (2d Cir. 1973); ***Donnell v. United States***, 229 F.2d 560, 563-65 (5th Cir. 1956); ***United States v. Greever***, 134 F.3d 777, 780-81 (6th Cir. 1998); ***United States v. Marshall***, 856 F.2d 896, 897-900 (7th Cir. 1988); ***United States v. Wazney***, 529 F.2d 1287, 1289 (9th Cir. 1976); ***Ross v. United States Marshal***, 168 F.3d 1190, 1194 (10th Cir. 1999). By contrast, two circuits, the District of Columbia Circuit and the Eighth Circuit, have held that mere absence from the jurisdiction, regardless of intent, is sufficient to toll the statute of limitations. *See* ***McGowen v. United States***, 105 F.2d 791, 792 (D.C. Cir. 1939); ***In Re Assarsson***, 687 F.2d 1157, 1162 (8th Cir.1982).

7.4 COMPLAINT TO EXTEND STATUTE OF LIMITATIONS

Section 6531 of Title 26 also contains a mechanism for extending the statute of limitations period. The statute provides:

> Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States.

26 U.S.C. § 6531. Thus, the government may file a complaint within the limitations period and effectively extend the statute period nine months.

However, Section 6531 "was not meant to grant the Government greater time in which to make its case." ***Jaben v. United States***, 381 U.S. 214, 219 (1965). Rather, Section 6531 "was intended to deal with the situation in which the Government has its case made within the normal limitation period but cannot obtain an indictment because of the grand jury schedule." ***Jaben***, 381 U.S. at 219-20; *cf*. ***United States v. O'Neal***, 834 F.2d 862, 865 (9th Cir. 1987) (investigation and case preparation need not cease upon filing of complaint; whether government improperly invoked extension is tested by sufficiency of the complaint at the preliminary hearing). For there to be a valid complaint triggering the extension of the limitations period under Section 6531, the complaint must allege sufficient facts to support a probable cause finding that a tax crime has been committed by the defendant. ***Jaben***, 381 U.S. at 220. Further, to take advantage of the extension under Section 6531, the government must fully comply with the complaint process and afford the defendant a preliminary hearing. ***Jaben***, 381 U.S. at 220.

As a practical matter, a complaint should only be filed for the year in which the statute of limitations would otherwise expire. This procedure will not preclude development before the grand jury of counts for subsequent years as to which the statute has not expired. Prosecutors should be aware, however, that the filing of a complaint may trigger the Speedy Trial Act as to the charge that is the subject of the complaint and, as a practical matter, may shorten the time within which the government may act on the remaining tax years under investigation. *See* 18 U.S.C. § 3161(b).

7.5 SUSPENSION OF STATUTE: SUMMONS ENFORCEMENT

Section 7609(e)(1) of Title 26 provides for the suspension of the statute of limitations in certain types of summons enforcement proceedings. This statute provides:

> If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations . . . under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.[[12]]

26 U.S.C. § 7609(e)(1).

It is beyond the scope of this Manual to treat in detail the nuances of summons enforcement proceedings. Any reliance on the suspension issue in this area requires a

[12]Subsection (b) of 26 U.S.C. § 7609 permits certain persons to intervene in proceedings with respect to enforcement of summonses and to initiate proceedings to quash summonses.

thorough analysis of Section 7609, and particular care must be taken in measuring and documenting any period for which the statute of limitations is suspended.

7.6 SUSPENSION OF STATUTE: OFFICIAL REQUEST FOR FOREIGN EVIDENCE

Criminal tax prosecutions increasingly involve the use of evidence obtained from foreign sources. Section 3292 of Title 18 provides for the suspension of the statute of limitations to permit the United States to obtain foreign evidence. This statute provides:

> (a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.
>
> . . . .
>
> (b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.
>
> (c) The total of all periods of suspension under this section with respect to an offense —
>
> (1) shall not exceed three years; and
>
> (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

18 U.S.C. § 3292.

Letters rogatory, requests under a treaty or convention, or any other request made by a court or law enforcement authority of the United States will qualify as an "official request." 18 U.S.C. § 3292(d). The statute does not require that the "request expressly list by citation the alleged statutory violations in order for a foreign evidence request to pass muster under 18 U.S.C. § 3292." ***United States v. Neill***, 952 F. Supp. 831, 832 (D.D.C. 1996).

The Eleventh Circuit has held that, in an application for an order suspending the running of the statute of limitations, the government "must provide something with evidentiary value – that is, testimony, documents, proffers, and other submissions bearing some indicia of reliability – tending to prove it is reasonably likely that evidence" of an offense is in the foreign country. ***United States v. Trainor***, 376 F.3d 1325, 1332-33 (11th Cir. 2004). In ***Trainor***, the court held that the government's submission of only its application and a request, by the Criminal Division Office of International Affairs, for foreign evidence, which were not sworn or verified, was inadequate to satisfy the government's burden of showing by a preponderance of the evidence that "it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country." ***Id.*** at 1333. The court stated that the government may satisfy that burden by including a sworn or verified application containing the necessary factual information, testimony by government officials, affidavits, declarations, exhibits, or other materials of evidentiary value, including even hearsay testimony. ***Id.*** at 1333.

While the maximum period for which the statute of limitations may be suspended for an offense is three years, the period begins to run when the government requests evidence from a foreign government. "[T]he starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 motion is made or granted." ***United States v. Bischel***, 61 F.3d 1429, 1434 (9th Cir. 1995).

Likewise, the period ends when the foreign court or authority takes final action on the request. "'[F]inal action' for purposes of § 3292 means a dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity of those records." ***United States v. Bischel***, 61 F.3d at 1434. The prosecutor's satisfaction with the evidence provided is not determinative of whether there has been a final action. "However, when the foreign government believes it has completed its engagement and communicates that belief to our government, that foreign government has taken a 'final action' for the purposes of § 3292(b)." ***United States v. Meador***, 138 F.3d 986, 992 (5th Cir. 1998). Such a communication from a foreign government does not preclude further inquiry by the United States. "If dissatisfied with a dispositive response from a foreign authority, the prosecutor need only file another request and seek a further suspension of the limitations period, subject to the ultimate three-year limitation on the suspension period." ***United States v. Meador***, 138 F.3d at 993 (footnote omitted).

All requests for foreign evidence in criminal tax investigations should be coordinated with the Criminal Appeals & Tax Enforcement Policy Section, Tax Division, and the Office of International Affairs, Criminal Division. For further information on foreign evidence gathering in criminal tax cases, see Chapter 41.00 of this Manual.

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8.00 ATTEMPT TO EVADE OR DEFEAT TAX

8.01 STATUTORY LANGUAGE: 26 U.S.C. § 7201

Section 7201. ***Attempt to evade or defeat tax***

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.[1]

8.02 TAX DIVISION POLICY

"Tax evasion" is a shorthand phrase that many people use for all manner of tax fraud. But the charge of tax evasion, in violation of 26 U.S.C. § 7201, is not necessarily the best one to bring against individuals defrauding the IRS. Defendants frequently seek to exploit the fact that, in order to establish the crime of tax evasion, the government must prove the existence of a tax due and owing and willfulness. Prosecutors therefore should consider other charges, such as conspiring to defraud the United States, 18 U.S.C. § 371; filing false returns, 26 U.S.C. § 7206; or endeavoring to obstruct the IRS, 26 U.S.C. § 7212(a), as alternatives or supplements to the charge of tax evasion.

8.03 GENERALLY

Section 7201 proscribes a single crime – attempted evasion of tax – which can be committed in two distinct manners: (a) the willful attempt to evade or defeat the assessment of a tax and (b) the willful attempt to evade or defeat the payment of a tax. *See* ***United States v. Mal***, 942 F.2d 682, 686-88 (9th Cir. 1991); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir.1990); ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990); *see also* ***United States v. Hunerlach***, 197 F.3d 1059, 1065 (11th Cir. 1999); *but see* ***Sansone v. United States***, 380 U.S. 343, 354 (1965); ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir.1988). A defendant attempting to evade assessment generally attempts to prevent the government from determining the true tax liability. *See* ***United***

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[1] For offenses under Section 7201, the maximum permissible fine is at least $250,000 for individuals and at least $500,000 for organizations. 18 U.S.C. § 3571(b) & (c). Alternatively, "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss." 18 U.S.C. § 3571(d).

States v. Mal, 942 F.2d at 687. A defendant attempting to evade payment generally seeks to evade the payment of the true tax liability by hiding assets from the government. *See* ***United States v. Hogan***, 861 F.2d at 315; ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984). Although ***Sansone*** has been cited for the proposition that evasion of payment and evasion of assessment constitute two distinct crimes, *see*, *e.g.*, ***Hogan***, 861 F.2d at 315, several circuits have rejected duplicity challenges to indictments by holding that Section 7201 proscribes only one crime, tax evasion, which can be committed either by attempting to evade assessment or by attempting to evade payment. *See* ***United States v. Masat***, 896 F.2d 88, 91 (5th Cir. 1990), *appeal after remand*, 948 F.2d 923 (5th Cir. 1991); ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990), *judgment vacated*, 498 U.S. 1043 (1991), *ruling on duplicity issue reinstated on remand*, 927 F.2d 955, 956 (7th Cir. 1991); ***United States v. Mal***, 942 F.2d at 686. Furthermore, although the First Circuit initially expressed some skepticism concerning whether ***Masat*** and ***Dunkel*** were consistent with ***Sansone***, *see* ***United States v. Waldeck***, 909 F.2d 555, 557-58 (1st Cir. 1990), it subsequently relied on ***Dunkel*** in rejecting a defendant's duplicity claim, noting that "[n]o matter how one resolves the semantic question, . . . it is beyond reasonable dispute that the indictment charged [defendant] with a single, cognizable crime, and that the jury convicted him of the same crime. *See* ***United States v. Dunkel***, 900 F.2d 105, 107 (7th Cir. 1990)." ***United States v. Huguenin***, 950 F.2d 23, 26 (1st Cir. 1991).[2]

In order to establish the offense of tax evasion, whether of assessment or of payment, the government must prove, *inter alia*, that the defendant engaged in some affirmative conduct for the purpose of misleading the IRS or concealing tax liability or assets. There are any number of ways in which a taxpayer can attempt to evade or defeat taxes or the payment thereof, and Section 7201 expressly says "attempts in any manner" to evade or defeat any tax or the payment thereof. A common method used to attempt to

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[2] The First Circuit also rejected the defendants' duplicity claims in both ***Huguenin*** and ***Waldeck*** on the grounds that the defendants in those cases were clearly apprised that the government was proceeding on an evasion of assessment theory. *See* ***Huguenin***, 950 F.2d at 26; ***Waldeck***, 909 F.2d at 558.

Although the court in ***Waldeck*** stated (909 F.2d at 558) that "the indictment could have been clearer by specifying that the crime charged was attempting to evade and defeat the assessment of taxes," the Tax Division believes that an indictment which tracks the first part of the statute and alleges an attempt to evade and defeat a tax clearly charges an attempt to evade tax by evasion of assessment. Similarly, an indictment that tracks the second part of the statute and alleges an attempt to evade payment of a tax clearly alleges an attempt to evade tax by evasion of payment. This analysis is consistent with the result in both ***Huguenin*** and ***Waldeck***.

evade or defeat assessment of a tax is the filing of a false tax return that understates tax liability, either by omitting income, claiming deductions to which the taxpayer is not entitled, or both.

In evasion of payment cases, evading or defeating the correct assessment of the tax is not the issue. Evasion of payment usually occurs after the existence of a tax due and owing has been established, either by the taxpayer's reporting the amount of tax due and owing, by the Internal Revenue Service's examining the taxpayer and assessing the amount of tax deemed to be due and owing, or by operation of law on the date that the return is due, if the taxpayer fails to file a return and the government can prove that there was a tax deficiency on that date (*see* ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992)).[3] The taxpayer then seeks to evade the payment of the taxes due and owing.[4] In order to establish the crime of attempted evasion of payment of tax, the government must establish that the taxpayer took some affirmative action to defeat the payment of the tax. "Merely failing to pay assessed taxes, without more, * * * does not constitute evasion of payment."[5] ***United States v. McGill***, 964 F.2d 222, 231 (3d Cir. 1992) (citing ***Sansone***, 380 U.S. at 351); ***United States v. Romano***, 938 F.2d 1569, 1573 (2d Cir. 1991) (evidence that defendant merely carried cash to Canada and failed to file return not sufficient to establish existence of affirmative act of evasion of payment); *see also* ***United States v. Masat***, 896 F.2d 88, 97 (5th Cir. 1990) (citing ***Spies v. United States***, 317 U.S. 492, 499 (1943)); ***United States v. Voorhies***, 658 F.2d 710, 715 (9th Cir.1981). Generally, affirmative acts associated with evasion of payment involve some type of concealment of the taxpayer's ability to pay taxes or the removal of assets from the reach of the IRS. *See* ***United States v. McGill***, 964 F.2d at 231.

Historically, the crime of willfully attempting to evade and defeat the assessment of tax through evasion of assessment, as opposed to willfully attempting to evade the payment of a tax, has been the principal revenue offense. Although the basic elements of the crime are relatively simple, actually proving the necessary elements can be difficult.

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[3] Neither a formal assessment nor a demand for payment is required. *See* ***United States v. Daniel***, 956 F.2d at 542.

[4] This is not to imply that an affirmative act to evade payment of a tax can never occur prior to its assessment. *See* ***United States v. McGill***, 964 F.2d 222, 231 (3d Cir. 1992).

[5] Willfully failing to pay taxes is, however, a misdemeanor covered by 26 U.S.C. § 7203.

8.04 PLEADING TAX LOSS IN THE INDICTMENT

The government does not have to prove the exact amount of tax due and owing in a tax case, and it is common for the unreported income or the tax due and owing figures in the indictment to differ from those established by the evidence presented to the jury and included in the final criminal tax computations made by the government's summary witness. An important preliminary charging decision is whether or not to specify a tax loss in the indictment.

The primary benefit to including the specific tax loss amount in the indictment is that the tax loss figure becomes public information within the context of Federal Rule of Criminal Procedure 6(e) and 26 U.S.C. § 6103 when the indictment is returned or unsealed. Once public, the tax loss amount is available for use in a press release, or any other public forum.

The primary concern about including a specific tax loss amount in the indictment is the likelihood that the tax loss number will change during the course of trial. For example, the prosecutor may decide to limit the number of witnesses called in order to streamline a case, the testimony of a coconspirator may change on the witness stand, or the court may decide to exclude business records pertaining to one or more transactions. Furthermore, a discrepancy between the tax loss charged and proved may confuse or distract the jury and create an opportunity for a defense attorney to undermine the jury's confidence in the government's case.

Of course, if the prosecutor decides not to include the specific tax loss figure in the indictment, the defendant may seek a bill of particulars arguing that his or her ability to prepare for trial is impaired by the failure of the indictment to identify the tax loss at issue. *See* Fed. R. Crim. P. 7(f); *see also* ***United States v. Salisbury,*** 983 F.2d 1369, 1375 (6th Cir. 1993); ***United States v. Rosa***, 891 F.2d 1063,1066 (3d Cir. 1989); ***United States v. DiCesare***, 765 F.2d 890, 897 (9th Cir. 1985) (bill of particulars only appropriate when the indictment is insufficient to permit the preparation of an adequate defense); ***United States v. Giese***, 597 F.2d 1170, 1180 (9th Cir. 1979).

When determining whether to include a specific tax loss amount in the indictment, the prosecutor must assess the facts and circumstances of the case, including the need for publicity and the likelihood of changes in the tax loss computations

8.05 ELEMENTS OF EVASION

To establish a violation of Section 7201, the following elements must be proved:

1. An affirmative act constituting an attempt to evade or defeat a tax or the payment thereof. ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Spies v. United States***, 317 U.S. 492, 497-99 (1943).

2. An additional tax due and owing. ***Boulware v. United States***, 552 U.S. 421, 424 (2008); ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Lawn v. United States***, 355 U.S. 339, 361 (1958).

3. Willfulness. ***Cheek v. United States***, 498 U.S. 192, 193 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 358-59 (1973); ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***Holland v. United States***, 348 U.S. 121, 124, 139 (1954).

The government must prove each element beyond a reasonable doubt. ***United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990); ***United States v. Williams***, 875 F.2d 846, 849 (llth Cir. 1989).

8.06 ATTEMPT TO EVADE OR DEFEAT

The means by which defendants can attempt to evade are virtually unlimited. As noted above, Section 7201 expressly prohibits attempts to evade tax "in any manner." In order to violate Section 7201, the taxpayer generally must take some affirmative action with an intent to evade tax. The general rule is that omissions to act will not satisfy the affirmative act requirement. For example, a mere failure to file a return, standing alone, cannot constitute an attempt to evade taxes. *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943); ***United States v. Hoskins***, 654 F.3d 1086, 1091 (10th Cir. 2011) ("To be liable under § 7201, a defendant must do more than passively fail to file a tax return"); United ***States v. Nelson***, 791 F.2d 336, 338 (5th Cir. 1986).

Generally, for tax evasion purposes, "any conduct, the likely effect of which would be to mislead or to conceal" constitutes an affirmative attempt to evade tax. ***Spies***, 317 U.S. at 499; *see, e.g.,* ***United States v. Bishop***, 264 F.3d 535, 545 (5th Cir. 2001). Even an activity that would otherwise be legal can constitute an affirmative act supporting a Section 7201 conviction, so long as the defendant commits the act with the intent to evade tax. *See* ***United States v. Voigt***, 89 F.3d 1050, 1090 (3d Cir. 1996); ***United States v. Jungles***, 903 F.2d 468, 474 (7th Cir. 1990) (taxpayer's entry into an "independent contractor agreement," although a legal activity in and of itself, satisfied "affirmative act" element of Section 7201); ***United States v. Conley***, 826 F.2d 551, 556-57 (7th Cir. 1987) (use of nominees and cash with intent to evade payment of taxes).

Note that the government "need not prove each affirmative act alleged." ***United States v. Mackey***, 571 F.2d 376, 387 (7th Cir. 1978); ***Conley***, 826 F.2d at 558-59; *cf.* ***United States v. Miller***, 471 U.S. 130, 145 (1985) (government's proof of only one of two fraudulent acts alleged in mail fraud indictment was not fatal variance since indictment would still make out crime of mail fraud even without the second alleged act); ***Turner v. United States***, 396 U.S. 398, 420 (1970) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged"); ***Crain v. United States***, 162 U.S. 625, 634-36 (1896) (indictment count that alleges in the conjunctive a number of means of committing a crime can support a conviction if any of the alleged means are proved).

8.06[1] Attempt To Evade Assessment

Although filing a false return is a common method of attempting to evade the assessment of a tax, the requirement of an affirmative attempt to evade can be met by proof of any affirmative act undertaken with a tax evasion motive. The Supreme Court "by way of illustration, and not by way of limitation," set out examples of what can constitute an "affirmative willful attempt" to evade, in ***Spies v. United States***, 317 U.S. 492, 499 (1943):

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and

> any conduct, the likely effect of which would be to mislead or to conceal.

Failing to file a return, coupled with an affirmative act of evasion and a tax due and owing, has come to be known as ***Spies***-evasion, an example of which is found in ***United States v. Goodyear***, 649 F.2d 226, 227-28 (4th Cir. 1981). The Goodyears failed to file a tax return for the year in question. Later, Mr. Goodyear falsely stated to Internal Revenue Service agents that the Goodyears had earned no income in that year, and the Goodyears both falsely told the agents that they had deposited all business receipts into corporate bank accounts. The false statements to the agents were the affirmative acts of evasion supporting the Goodyears' Section 7201 convictions. ***Goodyear***, 649 F.2d at 227-28. Similarly, proof of a false statement, on an application for an extension of time to file a tax return, that no tax is owed for the year is sufficient to meet the affirmative act requirement. ***United States v. Klausner***, 80 F.3d 55, 62 (2d Cir. 1996).

False statements to Internal Revenue Service agents are frequently alleged as affirmative acts of evasion. *See, e.g.*, ***United States v. Higgins***, 2 F.3d 1094, 1097 (10th Cir. 1993); ***United States v. Frederickson***, 846 F.2d 517, 520-21 (8th Cir. 1988) (holding that repeated false statements to IRS agents and instructing employees not to talk to IRS agents were sufficient to support a jury finding of at least one affirmative act); ***United States v. Ferris***, 807 F.2d 269, 270-71 (1st Cir. 1986); ***United States v. Neel***, 547 F.2d 95, 96 (9th Cir. 1976); ***United States v. Calles***, 482 F.2d 1155, 1160 (5th Cir. 1973). *But see* ***United States v. Romano***, 938 F.2d 1569, 1572-73 (2d Cir. 1991) (holding that defendant who was stopped while trying to transport $359,500 to Canada did not commit affirmative act of evasion despite initially claiming that he had only $30,000 to $35,000 in cash and only gradually acknowledging the full amount to U.S. customs officials; at the time of the conduct, the defendant had no obligation to disclose existence of the money to the IRS).

The false statements may be made before, simultaneously with, or after the taxpayer's failure to file a return. *See* ***United States v. Copeland***, 786 F.2d 768, 769-70 (7th Cir. 1985); ***Goodyear***, 649 F.2d at 227-28; *see also* ***United States v. Beacon Brass Co.***, 344 U.S. 43, 45-46 (1952); ***United States v. Dandy***, 998 F.2d 1344, 1348 (6th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 386 (7th Cir. 1992) (indictment does not fail for alleging that affirmative acts occurred on or about filing due date when they in fact occurred earlier); ***United States v. Winfield***, 960 F.2d 970, 973 (11th Cir. 1992) (allegation that defendant made false statements six years after tax return was due satisfies affirmative act element); ***United States v. Mal***, 942 F.2d 682, 684 (9th Cir. 1991). The affirmative act must, however, have been committed with the intent to evade taxes owed for the year charged. *See* ***United States v. Voigt***, 89 F.3d 1050, 1089-91 (3d Cir. 1996).

Courts have uniformly held that the filing of a false Form W-4 may constitute an affirmative act of evasion. *See* ***United States v. DiPetto***, 936 F.2d 96, 97 (2d Cir. 1991) (filing and maintaining false Forms W-4 constituted affirmative acts of evasion); ***United States v. Williams***, 928 F.2d 145, 148-49 (5th Cir. 1991) (maintenance of fraudulent Form W-4); ***United States v. Waldeck***, 909 F.2d 555, 560 (1st Cir. 1990); ***United States v. Connor***, 898 F.2d 942, 944-45 (3d Cir. 1990); ***United States v. Copeland***, 786 F.2d 768, 770-71 (7th Cir. 1985); ***United States v. King***, 126 F.3d 987, 990 (7th Cir.1997). Moreover, a false W-4 filed prior to the prosecution years may constitute an affirmative act in each year that it is maintained, because the taxpayer is under a continuing obligation to correct intentional misrepresentations on the form. *See* ***Williams***, 928 F.2d at 149 (defendant properly convicted of tax evasion for years 1983-85 where false Form W-4 claiming 50 exemptions was filed in 1983 and remained in effect through the prosecution years)***; United States v. King***, 126 F.3d 987, 990-93 (7th Cir. 1997); ***DiPetto***, 936 F.2d at 97.

The courts of appeals have recognized that various types of affirmative conduct can constitute affirmative attempts to evade tax. *See, e.g.*, ***United States v. Josephberg***, 562 F.3d 478 (2d Cir. 2009) (establishing stock accounts for his children into which [the defendant] had his investment banking income redirected). ***United States v. Beall***, 970 F.2d 343, 346-47 (7th Cir. 1992) (using a warehouse bank and instructing an employer to pay one's income to a warehouse bank constitutes an affirmative act of evasion);[6] ***United States v. Carlson***, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers and incorrect dates and places of birth could easily have misled or concealed information from the IRS); ***United States v. Valenti***, 121 F.3d 327, 333 (7th Cir. 1997) (use of cash, not keeping business records, paying employees in cash and not reporting their wages to the IRS, advising employees they did not have to pay taxes)***; United States v. Jungles***, 903 F.2d 468, 472- 74 (7th Cir. 1990) (employee's use of "independent contractor" agreement to eliminate withholding and warehouse bank to evade income tax were affirmative acts).

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[6] The ***Beall*** court held also that the government need not prove the defendant personally received any of the money, so long as the defendant earned it. 970 F.2d at 345.

A false return does not need to be signed to be treated as an affirmative act of evasion, as long as it is identified as the defendant's return. *See* ***United States v. Robinson***, 974 F.2d 575, 578 (5th Cir. 1992) (rejecting defendant's claim of variance between indictment's allegation that she filed a false return and evidence proving she filed an unsigned Form 1040, stating, "[t]he government did not have to prove that the false Form 1040 was a 'return' in order to show an affirmative act of evasion"); ***United States v. Maius***, 378 F.2d 716, 718 (6th Cir. 1967); ***Gariepy v. United States***, 220 F.2d 252, 259 (6th Cir. 1955); ***Montgomery v. United States***, 203 F.2d 887, 889 (5th Cir. 1953). Nor does the fact that the return was signed by someone other than the defendant preclude a finding that the defendant knew of its falsity and had it filed in an attempt to evade. *See* ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989).

The fact that a return or other tax document is signed with the defendant's name is prima facie evidence that the defendant signed the document. 26 U.S.C. § 6064; ***United States v. McKee***, 506 F.3d 225, 233 (3d Cir. 2007); ***United States v. Kim***, 884 F.2d 189, 195 (5th Cir. 1989); ***United States v. Brink***, 648 F.2d 1140, 1143 (8th Cir. 1981). Prosecutors need to carefully craft jury instructions reflecting the rule of section 6064. Note that "it is improper to charge a taxpayer with conclusive knowledge of the contents [of a return] on the basis of the signature alone. Knowledge may be inferred from the facts and circumstances of the case and certainly the signature at the bottom of the tax return is prima facie evidence that the signor knows the contents thereof." ***United States v. Bass***, 425 F.2d 161, 163 (7th Cir. 1970). Courts have ruled that if a jury finds beyond a reasonable doubt that the defendant signed the document, they may infer that the defendant knew of the document's contents. ***Wainwright***, 413 F.2d at 801-02; ***United States v. Rayborn***, 491 F.3d 513, 519 (6th Cir. 2007). Prosecutors must be aware, however, that 26 U.S.C § 6064 does not create a rebuttable presumption that the defendant knew the contents of the document. ***United States v. Trevino***, 419 F.3d 896, 902 (9th Cir. 2005); ***Rayborn***, 491 F.3d at 519.

8.06[2] Attempt To Evade Payment

The affirmative acts of evasion associated with evasion of payment cases almost always involve some form of concealment of the taxpayer's ability to pay the tax due and owing or the removal of assets from the reach of the IRS. Obstinately refusing to pay taxes due and possession of the funds needed to pay the taxes, *without more*, does not establish the requisite affirmative act necessary for an attempted evasion of payment charge. *See* ***Spies***, 317 U.S. at 499. *Accord* ***United States v. Hoskins*****,** 654 F.3d 1086, 1091 (11th Cir. 2011) (evasion of assessment case) (a defendant must do more than passively fail to file a tax return, the statute also "requires a positive act of commission designed to mislead or conceal"). Importantly, however, "[t]he government only need[s] to show one affirmative act of evasion for each count of tax evasion." ***Id.*** (citation omitted); *see also* ***United States v. Gross***, 626 F.3d 289, 293 (6th Cir. 2010) "([Section 7201] is distinct from the "willful failure to file" misdemeanor under § 7203, which requires the Government to prove only that the defendant willfully failed to pay income tax or perform one of the other requirements specified under that section.").

Examples of affirmative acts of evasion of payment include placing assets in the names of others, dealing in currency, using nominees to conduct business, buy and sell assets, or conduct other financial transactions, or providing false information about assets or income to the IRS. *See* ***Cohen v. United States***, 297 F.2d 760, 762, 770 (9th Cir. 1962); *see also* ***United States v. Carlson***, 235 F.3d 466, 469 (9th Cir. 2000) (opening and using bank accounts with false social security numbers, incorrect places of birth, and incorrect dates of birth could easily have misled or concealed information from the IRS); ***United States v. Gonzalez***, 58 F.3d 506, 509 (10th Cir. 1995) (signing and submitting false financial statements to the IRS)***; United States v. Pollen***, 978 F.2d 78, 88 (3d Cir. 1992); (defendant placed assets out of the reach of the United States Government by maintaining more than $350,000.00 in gold bars and coins, platinum, jewelry, and gems in safety deposit boxes at bank, in a fictitious name); ***United States v. Beall***, 970 F.2d 343, 345-47 (7th Cir. 1992) (defendant instructed employer to pay income to a tax protest organization); ***United States v. McGill***, 964 F.2d 222, 227-29, 232-33 (3d Cir. 1992) (defendant concealed assets by using bank accounts in names of family members and co-workers); ***United States v. Brimberry***, 961 F.2d 1286, 1291 (7th Cir. 1992) (defendant falsely told IRS agent that she did not own real estate and that she had no other assets with which to pay tax)***; United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant used other persons' credit cards, used cash extensively, placed assets in other persons' names); ***United States v. Conley***, 826 F.2d 551, 553 (7th Cir. 1987) (defendant concealed "nature, extent, and ownership of his assets by placing his assets, funds, and other property in the names of others and by transacting his personal business in cash to avoid creating a financial record"); ***United States v. Shorter***, 809 F.2d 54, 57 (D.C. Cir. 1987) (defendant maintained a "cash lifestyle" in which he "conducted all of his professional and personal business in cash," possessed no credit cards, never acquired attachable assets, and maintained "no bank accounts, office ledgers, or receipts or disbursement journals"), *abrogated on other grounds by* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*** 509 U.S. 579, 597-98 (1993); ***United States v. Hook***, 781 F.2d 1166, 1168-69 (6th Cir. 1986) (defendant did not file a false return or fail to file, but concealed assets); ***United States v. Voorhies***, 658 F.2d 710, 712 (9th Cir. 1981) (defendant removed money from the United States and laundered it through Swiss banks); *but see* ***McGill***, 964 F.2d at 233 (mere failure to report the opening of an account in one's own name and in one's own locale is not an affirmative act).

It is possible for a taxpayer to evade the payment of his or her taxes without making any misrepresentation. For example, a taxpayer who openly moves his assets beyond the reach of the IRS has committed an affirmative act of evasion. *See* ***Kawashima v. Holder***, 132 S. Ct. 1166, 1175 (2012) ([I]t is still true that the elements of tax evasion pursuant to § 7201 do not *necessarily* involve fraud or deceit.")

8.06[3] Proof of an Intent to Evade Tax

It is crucial that the affirmative act be committed with an intent to evade tax. The mere fact that there was a non-payment or understatement of taxes is insufficient; the government must prove that the defendant committed an affirmative act with the specific intent to evade tax. *See* ***United States v. Slutsky***, 487 F.2d 832, 844 (2d Cir. 1973); ***United States v. Coblentz***, 453 F.2d 503, 505 (2d Cir. 1972). That said, "[i]f the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." ***Spies v. United States***, 317 U.S. 492, 499 (1943); ***United States v. Voigt***, 89 F.3d 1050, 1090 (3d Cir. 1996); ***United States v. Nolen***, 472 F.3d 362, 379 (5th Cir. 2006); ***United States v. King***, 126 F.3d 987, 989-90 (7th Cir. 1997). Evidence proving that a defendant has engaged in "any conduct, the likely effect of which would be to mislead or to conceal," including "keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind" (***Spies***, 317 U.S. at 499), can establish intent to evade assessment or payment of tax.

8.07 ADDITIONAL TAX DUE AND OWING

8.07[1] Generally

A tax deficiency is an essential element of a tax evasion case.[7] "The Courts of Appeals have divided over whether the Government must prove the tax deficiency is 'substantial.'" ***Boulware v. United States***, 552 U.S. 421, 424 (2008) (citing ***United States v. Daniels***, 387 F.3d 636, 640-41 & n.2 (7th Cir. 2004)) (collecting cases). A deficiency is the amount by which the tax imposed by statute exceeds the sum of (1) the amount of tax shown on the return, (2) plus the amount of any previously assessed deficiency, (3) minus any rebate previously received. 26 U.S.C. § 6211; ***United States v. Bishop***, 264 F.3d 535 (5th Cir. 2001). The inability to prove a tax deficiency means that there may be a false return case, or some other kind of case, but not a tax evasion case.

The tax deficiency need not be for taxes due and owing by the defendant; the deficiency may be for taxes due and owing by another taxpayer. One may attempt to evade the assessment or payment of taxes of another. *See* ***United States v. Wilson***, 118 F.3d 228, 231, 236 (4th Cir. 1997) (attorney convicted of attempting to evade a client's taxes); ***United States v. Townsend***, 31 F.3d 262, 264, 266-67 (5th Cir. 1994) (motor fuels excise tax owed by someone other than defendant).

For purposes of trial preparation and the trial itself, tax computations prepared by the Internal Revenue Service are furnished to the prosecuting attorney. In addition, a revenue agent or special agent is assigned to the case to make any additional tax computations necessitated by changes during trial preparation and at the trial. In hard-fought cases, trial developments frequently will necessitate changes in the figures originally calculated by the Service and set forth in the indictment.

Although a tax deficiency must be established in all Section 7201 cases, the proof is often much simpler in an evasion of payment case. For example, if the taxpayer has filed a return and not paid the tax reported as due and owing, the reporting of the tax is a self-assessment of the tax due and owing. The existence of a tax due and owing is established by the introduction of the return. Similarly, if the Service has assessed the tax, then the element of a tax due and owing may be satisfied by introducing the Internal

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[7] When the tax at issue is the employees' share of payroll taxes withheld by the employer, careful consideration should be given to charging the misconduct under 26 U.S.C. 7202 instead of under Section 7201. *See* Section 9.03, *infra*.

Revenue Service's certificate of assessments and payments reflecting the assessment of the tax due and owing. A certificate of assessments and payments is prima facie evidence of the asserted tax deficiency, which, if unchallenged, may suffice to prove the tax due and owing. ***United States v. Silkman***, 220 F.3d 935, 937 (8th Cir. 2000); ***United States v. Voorhies***, 658 F.2d 710, 715 (9th Cir. 1981). However, it should be borne in mind that an assessment is not necessary to evasion of payment; a tax obligation arises by operation of law. ***Voorhies***, 658 F.2d at 714-15.

The amount of tax deficiency in a particular case may include penalties and interest. 26 U.S.C. § 6671(a) (the phrase "'tax' imposed by this title" also refers to the penalties and liabilities imposed by this subchapter [Subtitle F, Chapter 68B]); 26 U.S.C. § 6665(a)(2) (the phrase "'tax' imposed by this title" also refers to the additions to the tax, additional amounts, and penalties provided by this chapter [Subtitle F, Chapter 68A]); 26 U.S.C. § 6601(e)(1) (the phrase "tax imposed by this title" also refers to interest imposed by that section on such tax); USSG §2T1.1, comment, (n.1) (tax loss includes interest and penalties in evasion of payment and willful failure to pay cases). *But see* ***United States v. Wright***, 211 F.3d 233, 236 (5th Cir. 2000) (dictum) ("The IRC specifically excludes interest from being treated as tax for purposes of deficiency procedures. [Citing 26 U.S.C. § 6601.] The Sentencing Guidelines also exclude interest and penalties in assessing the penalty for tax evasion."). As a practical matter, the inclusion of penalties and interest as part of the tax deficiency will be relevant only in evasion of payment cases where it can be proved that the defendant was aware of the obligation for the additional amount of penalties and interest. The government may be able to show such knowledge by proving that, during the collection process, the IRS sent the defendant a notice and demand for payment setting forth the amount of tax, penalties, and interest for which the defendant was liable.

As noted, it is not essential that the Service has made an assessment of taxes owed and a demand for payment in order for tax evasion charges to be brought. And the government need not adjudicate a tax liability either civilly or administratively prior to bringing charges of evasion of payment of tax. *See* ***United States v. Ellett***, 527 F.3d 38, 40 (2d Cir. 2008); ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992); ***United States v. Hogan***, 861 F.2d 312, 315-16 (1st Cir. 1988) (no need to make a formal assessment of tax liability when government finds tax due and owing); ***United States v. Dack***, 747 F.2d 1172, 1174-75 (7th Cir. 1984) (per curiam); ***Voorhies***, 658 F.2d at 714-15. In both ***Ellett*** and ***Daniel***, the defendants argued that there was no tax deficiency since no assessment or demand for payment had been made. The courts rejected this argument. ***Ellett***,527 F.3d at 38; ***Daniel***, 956 F.2d at 542. In ***Daniel***, the court held that a tax deficiency arises by operation of law on the date that the return is due if the taxpayer fails to file a tax return and the government can show a tax liability. ***United States v. Voorhies***, 658 F.2d at 714-15.

8.07[2] Unit of Prosecution

As federal income taxes are paid on an annual basis, an alleged evasion of assessment must relate to a specific year and it must be shown that the defendant received, in the year alleged in the indictment, the income upon which the assessment of the tax was evaded. ***United States v. Boulet***, 577 F.2d 1165, 1167-68 (5th Cir. 1978).[8] Consequently, in most evasion of assessment cases, each tax year charged stands alone as a separate offense. Thus, if, for example, a defendant attempted to evade and defeat the assessment of tax for the years 2005, 2006, and 2007, there should be three separate counts in the indictment. *But cf.* ***United States v. Root***, 585 F.3d 145 (3d Cir. 2009) (holding that a defendant could be charged in a single count with evading assessment for multiple tax years where an "analysis of the concerns traditionally associated with duplicitous charges" demonstrated that the defendant "was not prejudiced").

Evasion of payment, on the other hand, often involves single or multiple acts that are intended to evade the payment of several years of tax due the government. Thus, in evasion of payment cases, it is often permissible to charge, in one count, that the defendant attempted to evade tax due and owing for multiple years. *See* ***United States v. Shorter***, 809 F.2d 54, 56-57 (D.C. Cir. 1987), *abrogated on other grounds by* ***Daubert v. Merrell Dow Pharmaceuticals, Inc.,*** 509 U.S. 579, 597-98 (1993); ***Root***, 585 F.3d at 152. In ***Shorter***, the court approved the use of a single count to cover several years of attempted evasion of payment, when the offense was charged "as a course of conduct in circumstances such as those . . . where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes" for those years. ***Shorter***, 809 F.2d at 56. During the twelve years covered by the single count in the indictment, the defendant in ***Shorter*** had conducted all of his personal and professional business in cash, refused to acquire attachable assets, and failed to record receipts and disbursements. These activities demonstrated a continuous course of

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[8] The government's proof of additional tax in a given year cannot be based upon income that should have been reported in a different year. *See* ***United States v. Wilkins***, 385 F.2d 465, 469-70 (4th Cir. 1967).

conduct, and "each affirmative act of tax evasion was intended to evade payment of all taxes owed" or that the defendant anticipated he might owe, at the time of his acts. *Id*. at 57. The court noted that the same evidence used to prove one multi-year count would be admissible to support the first of twelve single year counts. ***Shorter***, 809 F.2d at 57. *See also* ***United States v. Pollen***, 978 F.2d 78, 83-87 (3d Cir. 1992) (each of four counts covered the same seven years but indictment not multiplicitous when each count alleged a different affirmative act); ***United States v. England***, 347 F.2d 425, 427 (7th Cir. 1965) (defendants charged with one count of evasion of payment of taxes owed from three consecutive years).

The determination of the unit of prosecution can have an impact on the validity of an indictment. In ***United States v. Pollen***, 978 F.2d at 81-82 (3d Cir. 1992), the defendant made several international transfers of hundreds of thousands of dollars, in attempts to evade payment of seven years' taxes. Some of these transfers were made in one year. The four counts of the indictment each charged attempted evasion of the taxes for all seven years, but each count alleged a distinct affirmative act. The defendant asserted that the indictment was impermissibly multiplicitous, subjecting him to multiple punishment for the same violations of section 7201, a result prohibited by the Double Jeopardy Clause of the Fifth Amendment, *see* ***United States v. Stanfa***, 685 F.2d 85, 86-87 (3d Cir. 1982). *See also* ***Jones v. Thomas***, 491 U.S. 376, 381 (1989) (interest protected by the Double Jeopardy Clause in the multiple punishment context is confined to "ensuring that the total punishment did not exceed that authorized by the legislature"). The court of appeals rejected this contention. Looking at the plain language of section 7201, the court found that it "proscribes 'attempts' to evade or defeat any tax and thus speaks in terms of the act of evasion, as well as the taxes evaded." ***Pollen***, 978 F.2d at 86. The court then concluded that "Section 7201 permits a unit of prosecution based on separate significant acts of evasion." ***Pollen***, 978 F.2d at 86. Therefore, separate counts of an indictment may relate to evasion of payment for the same years without raising a multiciplicity problem, provided each count alleges a different affirmative act.

8.07[3] Substantial Tax Deficiency

Tax evasion prosecutions are not collection cases, and it is not necessary to charge or prove the exact amount of the tax that is due and owing. ***United States v. Bishop***, 264 F.3d 535, 550-52 (5th Cir. 2001); ***United States v. Thompson***, 806 F.2d 1332, 1335-36 (7th Cir. 1986); ***United States v. Harrold***, 796 F.2d 1275, 1278 (10th Cir. 1986); ***United***

States v. Citron, 783 F.2d 307, 314-15 (2d Cir. 1986); ***United States v. Buckner***, 610 F.2d 570, 573-74 (9th Cir. 1979); ***United States v. Marcus***, 401 F.2d 563, 565 (2d Cir. 1968).

It is enough to prove that a defendant attempted to evade a substantial income tax, even though the actual amount of tax that he or she owes may be greater than the amount charged in the criminal case. Indeed, the criminal tax figures will almost invariably be lower than the civil tax figures since, for example, items turning on reasonably debatable interpretations of the Tax Code that would increase the tax due and owing are not included in figures used in the criminal case. In other words, any doubts as to taxability are resolved in favor of the defendant in a criminal case even though they may ultimately be resolved against him or her civilly.

As noted, it is enough in a criminal case to prove that the defendant attempted to evade a substantial income tax. And as long as the amount proved as unreported is substantial, it makes no difference whether that amount is more or less than the amount charged in the indictment. *See* ***United States v. Johnson***, 319 U.S. 503, 517-18 (1943); ***United States v. Mounkes*****,** 204 F.3d 1024, 1028 (10th Cir. 2000); ***United States v. Plitman*****,** 194 F.3d 59, 65-66 (2d Cir. 1999); ***Marcus***, 401 F.2d at 565; ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962). *See*, *e.g.*, ***United States v. Burdick***, 221 F.2d 932, 933-34 (3d Cir. 1955) (upholding a conviction where the indictment charged $33,000 as unreported taxable income and the proof at trial established only $14,500 as unreported). Similarly, in ***United States v. Costello***, 221 F.2d 668, 675, 679 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956), the court upheld a conviction where the bill of particulars alleged $244,000 gross income as unreported and about $288,000 was proved at trial. In ***United States v. Citron***, 783 F.2d 307 (2d Cir. 1986), the court upheld an "open-ended" 7201 indictment that did not even allege precise amounts of unreported income or tax due but rather alleged that the defendant had attempted to evade "a large part" of the income tax due and that the tax due was "substantially in excess" of the amount he reported. ***Citron***, 783 F.2d at 314-15.

Since the government only has to prove that a substantial tax was due and owing, any bill of particulars that is filed should note that proof of an exact amount is not required and that any figures furnished in a bill of particulars represent only an approximation. Whether a tax deficiency is substantial is a jury question, and the cases suggest that relatively small sums can be deemed substantial. *See* ***United States v. Gross***, 286 F.2d 59, 60-61 (2d Cir. 1961) (unreported income in the amount of two $2500 payments deemed “substantial”); ***United States v. Nunan***, 236 F.2d 576, 585 (2d Cir. 1956) (“[A] few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution.”); *see also* ***United States v. Davenport***, 824 F.2d 1511, 1516-17 (7th Cir. 1987) ($3,358.68 in taxes evaded sufficient to support taxpayer’s conviction); ***United States v. Cunningham***, 723 F.2d 217, 230-31 (2d Cir. 1983) (the evaded tax of $2,617 as compared to the total tax due of $33,539 held to be substantial), *implied overruling on other grounds recognized by* ***United States v. Mandanici***, 205 F.3d 519, 526-27 (2d Cir. 2000).

The Seventh and Ninth Circuits have held that there is no substantiality requirement for a Section 7201 violation. ***United States v. Daniels***, 387 F.3d 636, 639 (7th Cir. 2004); ***United States v. Marashi***, 913 F.2d 724, 735 (9th Cir. 1990). The Seventh Circuit stated, "We take this opportunity to clarify the law in this Circuit: the government need not charge a substantial tax deficiency to indict or convict under 26 U.S.C. § 7201. To hold otherwise would contradict the clear language of the statute and lead to an absurd result. Requiring the government to charge and prove that a defendant's tax deficiency is substantial in order to prosecute her for tax evasion would prevent the prosecution and punishment of those who willfully cheat the government out of small or "insubstantial" amounts of money. A substantiality element would invite taxpayers to cheat on their taxes in small amounts without fear of prosecution. We cannot countenance such a result. Although evidence of a large or substantial tax deficiency may aid the government in proving willfulness, it is not itself an element of the offense." ***Daniels***, 387 F.3d at 641. In ***Marashi***, the court held that both Section 7201 and its predecessor, section 145(b) of the 1939 Code, prohibit attempts to evade “any tax” and impose no minimum amount in their language. ***Marashi***, 913 F.2d at 735. As a result, the court reasoned, the trier of fact needs to find only “some tax deficiency” to warrant a conviction. ***Marashi***, 913 F.2d at 736.

8.07[4] Method of Accounting

The general rule is that when using the net worth method of proof to approximate income, the government must follow the same method of accounting used by the taxpayer. ***Fowler v. United States***, 352 F.2d 100, 103 (8th Cir. 1965); ***United States v. Vardine***, 305 F.2d 60, 64 (2d Cir. 1962). Conversely, if the defendant has used a particular method of reporting income, then the defendant is bound by that choice at trial.

See ***United States v. Helmsley***, 941 F.2d 71, 85 (2d Cir. 1991) (defendant having used one depreciation method during the prosecution years could not recalculate her taxes under another depreciation method during trial). Thus, a defendant cannot report his income on the cash basis and then defend at trial by showing that on the accrual basis unreported income would be far less than the government proved using the cash basis. *See* ***Clark v. United States***, 211 F.2d 100, 105 (8th Cir. 1954). In a similar vein, if the taxpayer has used a hybrid method of accounting, then the taxpayer "is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income." ***United States v. Lisowski***, 504 F.2d 1268, 1275 (7th Cir. 1974); ***Morrison v. United States***, 270 F.2d 1, 4 (4th Cir. 1959).

8.07[5] Loss Carryback – Not a Defense

A defendant will sometimes argue that there is no tax deficiency and hence no evasion because a loss carryback from a subsequent year wipes out the tax deficiency in the prosecution year. For example, a defendant may admit not reporting certain income in 1989, but argue that he is not guilty of attempting to evade tax, because a 1990 loss carryback eliminates any tax deficiency for 1989. This defense is not valid; the "lucky loser argument" was expressly rejected in ***Willingham v. United States***, 289 F.2d 283, 287-88 (5th Cir. 1961). *See also* ***United States v. Keltner***, 675 F.2d 602, 604 (4th Cir. 1982). The "crime [was] complete when with willful intent, a false and fraudulent return [was] filed" – any adjustment from a loss in a subsequent year does not change in any way the fraud committed in the earlier year. ***Willingham***, 289 F.2d at 288. Any evidence of a loss in a subsequent year is therefore irrelevant.

The same argument failed when the net operating loss in a subsequent year was for a Subchapter S corporation. ***Keltner***, 675 F.2d at 604. The applicable principle is that each tax year is treated as a separate unit and all items of gross income and deductions must be reflected as they exist at the close of the tax year. *See* ***United States v. Cruz***, 698 F.2d 1148, 1151-52 (11th Cir. 1983) (applying this principle to a situation involving a claimed foreign tax credit); *cf.* ***United States v. Suskin***, 450 F.2d 596, 597-98 (2d Cir. 1971) (corporate carryforward loss not available to individual).

8.07[6] Methods of Proof

The general rule is that unreported income may be established by several methods of proof, and the government is free to use one or more legal methods available in determining whether the taxpayer has correctly reported her or his income. ***Holland v. United States***, 348 U.S. 121, 132 (1954); ***United States v. Baum***, 435 F.2d 1197, 1201 (7th Cir. 1970); ***United States v. Doyle***, 234 F.2d 788, 793 (7th Cir. 1956).

The various methods of proof used in tax cases to establish unreported income are discussed in detail in Chapters 30, 31, 32, and 33, *infra*. Briefly, the specific items method of proof consists of direct evidence of the items of income received by a taxpayer in a given year, *e.g.*, testimony by third parties as to monies paid to the taxpayer for goods or services. The net worth method of proof is an indirect method of proof that measures increases in the wealth of the taxpayer and compares the results with reported income. A variation of the net worth method is the expenditures method of proof, which reflects the expenditures made by a taxpayer. The expenditures method is particularly appropriate in the case of a taxpayer who does not purchase durable assets, such as stocks and real estate, but spends monies for consumable items, such as vacations, entertainment, food, drink, and the like. Another indirect method of proof is the bank deposits method, which is essentially a reconstruction of income by an analysis of bank deposits by a taxpayer who is in an income-producing business and makes regular and periodic deposits to bank accounts.

The Seventh Circuit and the District of Columbia Circuit have approved a variation of the expenditures method, which is called the cash method of proof. ***United States v. Hogan***, 886 F.2d 1497, 1508-11 (7th Cir. 1989); ***United States v. Khanu***, 662 F.3d 1226 (D.C. Cir. 2011). This method "focuses on the taxpayer's sources and uses of income." ***Hogan*** at 1509; ***Khanu*** at 1229. When using this method, the government is required to present evidence relating to the taxpayer's cash expenditures. ***Khanu*** at 1229 *citing* ***United States v. Touchin***, 899 F.2d 617, 619 (7th Cir. 1989). In this method of proof, the government compares the defendant's cash expenditures with her or his known cash sources, including cash on hand, for each tax period. ***Hogan*** at 1509; ***Khanu*** at 1229. If such expenditures exceed sources, the excess is presumed to be unreported income. ***Touchin*** at 620; ***Khanu*** at 1229.

Except for the cash method, each of these methods of proof is discussed in detail in sections 30.00 through 33.00, and reference should be made to these sections for the applicable case law.

8.07[7] Income Examples

Examples of sources of income with respect to which defendants have attempted to evade taxes include the following:

1. Campaign contributions, when used for personal purposes. ***United States v. Scott***, 660 F.2d 1145, 1151-52 (7th Cir. 1981).

2. Gambling proceeds. The taxpayer must report winnings and may deduct losses only to the extent of winnings. ***Garner v. United States***, 501 F.2d 228, 233 (9th Cir. 1974) (en banc), *aff'd on other grounds*, 424 U.S. 648 (1976)***;*** ***McClanahan v. United States***, 292 F.2d 630, 631-32 (5th Cir. 1961).

3. Embezzlement. Embezzled funds constitute taxable income to the recipient. ***James v. United States***, 366 U.S. 213, 219-21 (1961); ***United States v. Guidry***, 199 F.3d 1150, 1157-58 (10th Cir. 1999); ***United States v. Harris***, 942 F.2d 1125, 1134 (7th Cir. 1991). The funds are considered to be income in the year of embezzlement. ***James v. United States***, 366 U.S. 213, 219-21 (1961); ***United States v. Lippincott***, 579 F.2d 551, 552 (10th Cir. 1978) (alleged loan from embezzled funds); ***United States v. Milder***, 459 F.2d 801, 804 (8th Cir. 1972).

4. Extortion. "[M]oney obtained by extortion is income taxable to the extortioner." ***Rutkin v. United States***, 343 U.S. 130, 131 (1952); *see also* ***United States v. Cody***, 722 F.2d 1052, 1061 (2d Cir. 1983) (defendant had duty to report income generated by extortion, kickbacks, and acceptance of valuable services).

5. Fraud. ***Moore v. United States***, 412 F.2d 974, 978 (5th Cir. 1969); *see also* ***United States v. Dixon***, 698 F.2d 445, 446 (11th Cir. 1983).

6. Alleged loans lacking intent to repay. ***United States v. Swallow***, 511 F.2d 514, 519 (10th Cir. 1975); ***United States v. Rosenthal***, 470 F.2d 837, 842 (2d Cir. 1972)***; United States v. Rochelle***, 384 F.2d 748, 751 (5th Cir. 1967).

7. Kickbacks. ***United States v. Sallee***, 984 F.2d 643, 647-48 (5th Cir. 1993); ***United States v. Fogg***, 652 F.2d 551, 553-56

(5th Cir.1981); ***United States v. Wyss***, 239 F.2d 658, 660 (7th Cir. 1957).

8. Bribery. ***United States v. Anderson***, 809 F.2d 1281, 1288 (7th Cir. 1987); ***United States v. Isaacs***, 493 F.2d 1124, 1144-46 (7th Cir. 1974).

9. Gratuities received by government employees. ***United States v. St. Pierre***, 377 F. Supp. 1063, 1064 (S.D. Fla. 1974), *aff'd*, 510 F.2d 383 (5th Cir. 1975).

10. Narcotics sales. ***United States v. Palmer***, 809 F.2d 1504, 1505 (11th Cir. 1987) (court implicitly included narcotics sales proceeds in income).

8.07[8] Cases Involving Corporate Diversions

One common fact pattern involves a shareholder in a closely held company who diverts corporate funds for personal use, either through the diversion of corporate gross receipts that are not reflected in the corporate books and records, or through the payment of personal expenses that are deducted as business expenses. In such circumstances, it is relatively straightforward to charge a false corporate return, in violation of 26 U.S.C. § 7206, as either the gross receipts line or the expense line of the corporate return is false. Charging a personal income tax offense against the shareholder, however – such as evasion (Section 7201) or filing a false return (Section 7206) – requires the government to prove that the diverted funds were taxable income, such as salary, a constructive dividend, or a capital gain. A defendant, on the other hand, may argue that the funds were not taxable because they represented a return of capital. *See* 26 U.S.C. § 301(c)(3)(A).

Whether diverted funds constitute a constructive dividend, a capital gain, or a return of capital requires a determination of the amount of the current or accumulated earnings and profits of the corporation, if any, and the shareholder's adjusted basis in his stock. Diverted funds may be a constructive dividend to the extent of the corporation's current earnings and profits in the first instance, and to the extent of the corporation's accumulated earnings and profits in the second. *See* 26 U.S.C. §361(a)(1) and (2). If the diverted funds exceed both current and accumulated earnings and profits, they will be treated as a nontaxable return of capital to the extent of the shareholder's adjusted basis in the stock. *See* 26 U.S.C. § 301(c)(2). If the diverted funds exceed not only any current or accumulated earnings and profits but also the shareholder's adjusted basis in the stock, the excess will be treated as a capital gain to the shareholder. *See* 26 U.S.C. § 301(c)(3)(A).

In ***Boulware v. United States***, 552 U.S. 421, 430(2008), the Supreme Court reaffirmed that "[e]conomic substance [is] the touchstone for characterizing funds that a shareholder diverts before they can be recorded on a corporation's books." The Court held, however, that a shareholder may establish that a diversion was a return of capital, not a dividend, "without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital." *Id*. at 424. In so ruling, the Court overruled ***Miller v. United States***, 545 F2d 1204 (9th Cir. 1976), wherein the Ninth Circuit held that a corporation's earnings and profits were not relevant unless the defendant could show that the parties intended the funds to be a return of capital at the time the funds were diverted.

Notably, upon remand from the Supreme Court, the Ninth Circuit affirmed Boulware's convictions, finding that he had failed to proffer sufficient evidence of a return of capital claim to warrant a jury instruction on the issue. ***United States v. Boulware***, 558 F.3d 971 (9th Cir. 2009). Citing *Boulware*, 552 U.S. at 436 and 437 n.12, the court of appeals noted that "the return of capital theory requires: (1) a corporate distribution with respect to a corporation's stock, (2) the absence of corporate earnings or profits, and (3) the stockholder's stock basis be in excess of the distribution." 558 F.3d at 975. The court found that Boulware's proffer was insufficient to satisfy the first and the third elements. As for the first, "[h]e failed to establish in the record before the district court that he only could have received the distribution in his capacity as a shareholder. . . . [that is] without any offer to prove that the distribution was 'with respect to stock,' or that any nexus existed between the distribution and [his] stock ownership." 558 F.3d at 977. And as for the third, there was "no formal evidence of Boulware's stock basis in the record, nor did he make an offer of proof as to the amount." 558 F.3d at 978. In light of ***Boulware***, prosecutors should not assume that a given distribution was "with respect to stock," but should consider the specific facts of the case to determine whether the distribution was made to a shareholder in his capacity as a shareholder; that is, because of his ownership of the stock. 552 U.S. at 437. Factors bearing on this determination include "the distribution of stock ownership [and] conditions of corporate employment (whether, for example, a shareholder's efforts on behalf of a corporation amount to good reason to treat a payment of property as salary)." 552 U.S. at 437-38. Prosecutors should also be prepared to prove a corporation's earnings and profits, and a shareholder's stock basis, where appropriate.

8.08 WILLFULNESS

8.08[1] Definition

Willfulness has been defined by the courts as a "voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 200-01 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Therefore, in order to establish willfulness, the government must establish that the defendant was aware of his or her obligations under the tax laws. *See* ***United States v. Bishop***, 264 F.3d 535, 546 (5th Cir. 2001); ***United States v. Buford***, 889 F.2d 1406, 1409 (5th Cir. 1989); ***United States v. Conforte***, 624 F.2d 869, 875 (9th Cir. 1980); ***United States v. Peterson***, 338 F.2d 595, 598 (7th Cir. 1964). As the Seventh Circuit Court of Appeals has stated, there must be "proof that appellant knew he was violating a 'known legal duty.'" ***United States v. Fitzsimmons***, 712 F.2d 1196, 1198 (7th Cir. 1983).

When determining whether a defendant has acted willfully, the jury must apply a subjective standard; thus a defendant asserting a good faith defense is not required to have been objectively reasonable in his misunderstanding of his legal duties or belief that he was in compliance with the law. ***Cheek v. United States***, 498 U.S. 192, 202-03 (1991); ***United States v. Powell***, 955 F.2d 1206, 1211-12 (9th Cir. 1992); ***United States v. Regan***, 937 F.2d 823, 826 (2d Cir. 1991), *amended by*, 946 F.2d 188 (2d Cir. 1992); ***United States v. Whiteside***, 810 F.2d 1306, 1311 (5th Cir. 1987). The jury must therefore focus its inquiry on the knowledge of the defendant, not on the knowledge of a reasonable person. The jury may, however, "consider the reasonableness of the defendant's asserted beliefs in determining whether the belief was honestly or genuinely held." ***United States v. Grunewald***, 987 F.2d 531, 536 (8th Cir. 1993); ***United States v. Middleton***, 246 F.3d 825, 837 (6th Cir. 2001).

Although ignorance and misunderstanding of the law may be asserted in an attempt to negate willfulness, disagreement with the constitutional validity of the law may not. Once it has been established that the defendant was aware of a legal duty and intentionally violated that duty, it is no defense that the defendant believed that the law imposing the duty was unconstitutional. ***Cheek***, 498 U.S. at 204-06. The constitutionality of the tax laws is to be litigated by taxpayers in other ways established by Congress. ***Cheek***, 498 U.S. at 206; *see also* ***United States v. Bonneau***, 970 F.2d 929, 931-32 (1st Cir. 1992) (trial judge's redaction of constitutionality arguments from defendant's exhibits did not unfairly prejudice the defense). *But see* ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992) (defendant should have been allowed to present excerpts of court opinions upon which he relied in determining whether he was required to file tax returns to the jury).

In some of its opinions prior to ***United States v. Pomponio***, 429 U.S. 10 (1976), the Supreme Court spoke of willfulness in terms of "bad faith or evil intent" (***United States v. Murdock***, 290 U.S. 389, 398 (1933)), or "evil motive and want of justification in view of all the financial circumstances of the taxpayer" (***Spies v. United States***, 317 U.S. 492, 498 (1943)). This caused some confusion in the circuits, which was cleared up in ***United States v. Pomponio***, 429 U.S. 10 (1976).

In ***Pomponio***, the Court stated that its prior references to bad faith or evil intent did not modify the definition of willfulness as a "voluntary, intentional violation of a known legal duty." *Id.* at 12. The clarification is important since it provides the answer to defense requests for an instruction that speaks in terms of a bad purpose or evil intent and which gives the defendant room to argue that he did not act willfully because he acted with a good purpose or motive. Such an instruction would impose an undue burden on the government and is not required. ***Id***. The Supreme Court has made clear that "willfulness" connotes a "voluntary, intentional violation of a known legal duty," and "[i]t does not require proof of any other motive." ***United States v. Jerde***, 841 F.2d 818, 821 (8th Cir. 1988) (citing ***United States v. Pomponio***, 429 U.S. at 12); *accord*, ***United States v. Sato***, 814 F.2d 449, 451 (7th Cir. 1987) (no need to prove "evil-meaning mind"); ***United States v. Schafer***, 580 F.2d 774, 781 (5th Cir. 1978) ("Proof of evil motive or bad intent is not required"); ***United States v. Patrick***, 542 F.2d 381, 388-89 (7th Cir. 1976) ("bad" before "purpose" may be omitted from willfulness instruction); ***United States v. Moylan***, 417 F.2d 1002, 1004 (4th Cir. 1969) ("to require a bad purpose would be to confuse the concept of intent with that of motive").

Note that the Ninth Circuit has said that a showing of "bad purpose or evil motive" can substitute for a showing of intentional violation of a known legal duty as a means of establishing willfulness. ***Powell***, 955 F.2d at 1211. In ***Powell***, the court stated that evidence of bad motive or evil purpose could be used by the government to establish that the defendants acted willfully but that such proof was not required. Rather, the government had the alternative of showing that the defendants had voluntarily and intentionally violated a known legal duty, in which case, proof of evil motive or bad purpose would not be necessary. ***Powell***, 955 F.2d at 1211.

Notwithstanding the alternative methods of proving willfulness set forth in ***Powell***, the fact remains that the Supreme Court has definitively and unequivocally defined willfulness as the "voluntary, intentional violation of a known legal duty." Thus, the government should never rely on any "alternative method" of proof that does not establish the defendant's voluntary and intentional violation of a known legal duty. Similarly, juries should always be instructed that it is the government's burden to prove that a defendant acted voluntarily and intentionally and violated a known legal duty.

Good motive alone is not a defense to a finding of willfulness, and the Supreme Court has upheld as proper a jury instruction that instructed the jury that "'[g]ood motive alone is never a defense where the act done or omitted is a crime,' and that consequently motive was irrelevant except as it bore on intent." ***Pomponio***, 429 U.S. at 11; *accord*, ***United States v. Dillon***, 566 F.2d 702, 704 (10th Cir. 1977).

Note that, while some tax crimes are felonies (*e.g.*, 26 U.S.C. § 7201, attempt to evade or defeat a tax), and others are misdemeanors (*e.g.*, 26 U.S.C. § 7203, failure to file an income tax return), the word "willfully" has the same meaning for both misdemeanors and felonies. ***Pomponio***, 429 U.S. at 12. The Supreme Court, in ***United States v. Bishop***, 412 U.S. 346 (1973), rejected its previous holdings that willfulness does not have the same meaning in felony and misdemeanor cases, holding that the willfulness requirement in either class of offense is the same – "a voluntary, intentional violation of a known legal duty." ***Bishop***, 412 U.S. at 356-61.

8.08[2] Proof of Willfulness

The element of willfulness is often the most difficult element to prove in an evasion case. Absent an admission or confession, which is seldom available, or accomplice testimony, willfulness is rarely subject to direct proof and must generally be inferred from the defendant's acts or conduct. *See* ***United States v. Bishop***, 264 F.3d 535, 545-46, 550-52 (5th Cir. 2001); ***United States v. Guidry,*** 199 F.3d 1150, 1156-1158 (10th Cir. 1999)***; United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989); ***United States v. Collorafi***, 876 F.2d 303, 305-06 (2d Cir. 1989); ***United States v. Marchini***, 797 F.2d 759, 766 (9th Cir. 1986); ***United States v. Ashfield***, 735 F.2d 101, 105 (3d Cir. 1984); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984)***; United States v. Ramsdell***, 450 F.2d 130, 133-34 (10th Cir. 1971); ***Paschen v. United States***, 70 F.2d 491, 498-99 (7th Cir. 1934).

To prove willfulness, the third element, the government must show that: (1) the law imposed a duty on the defendant; (2) the defendant knew of that duty; and (3) the defendant voluntarily and intentionally violated that duty. ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Miller***, 588 F.3d 897, 907 (5th Cir. 2009); ***United States v. Beale***, 574 F.3d 512, 517-18 (8th Cir. 2009). Once the evidence establishes that a tax evasion motive played any role in a taxpayer's conduct, willfulness can be inferred from that conduct, even if the conduct also served another purpose, such as concealment of another crime or concealment of assets from, for example, one's spouse, employer or creditors. *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943)***; Guidry***, 199 F.3d at 1157; ***United States v. DeTar***, 832 F.2d 1110, 1114 n.3 (9th Cir. 1987).

The decision whether to infer willfulness from the evidence, however, must be left to the trier of fact. The government may not present expert witnesses to testify regarding whether the defendant acted willfully. *See* ***United States v. Windfelder***, 790 F.2d 576, 580-81 (7th Cir. 1986). In ***Windfelder***, an IRS agent opined that the defendant intentionally understated his income and that the defendant was well aware of what happened with certain assets. 790 F.2d at 582. The court of appeals held that, under Rule 704(b) of the Federal Rules of Evidence, the district court erred in admitting the agent's testimony because it impermissibly stated an opinion as to the defendant's willfulness. ***Id***. In light of the overwhelming nature of the evidence as to the defendant's willfulness, however, the court of appeals found that the erroneous admission of the testimony was harmless. ***Windfelder***, 790 F.2d at 580, 582-83.

When the underlying tax law at issue in a case is vague or highly debatable, it may be difficult, if not impossible, to prove that a defendant acted willfully. There may be situations, for example, when the law concerning whether a transaction has generated taxable income is not clear. While such cases are unusual, and normally readily distinguishable from most tax cases, an example of such a case is ***United States v. Critzer***, 498 F.2d 1160 (4th Cir. 1974). In ***Critzer***, the defendant had earned income from businesses located on land in which she had possessory interest on a Cherokee Indian Reservation. The court found that there was a disputed question as to whether the "income" the defendant earned from her businesses was subject to federal income taxes and that even different branches of the federal government had reached directly opposite conclusions on the question. In light of these findings, the court held that the convictions had to be reversed. "As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions." ***Id***. at 1162. The court also noted that "[i]t is settled that when the law is vague or highly debatable, a defendant – actually or imputedly – lacks the requisite intent to violate it." ***Critzer***, 498 F.2d at 1160-62. *See also* ***United States v. Harris***, 942 F.2d 1125, 1127-28, 1131-35 & n.6 (7th Cir. 1991) (law on tax treatment of payments received by mistresses from wealthy widower provided no fair warning that failure to report such payments as income would be criminal activity, and case law favored proposition that payments should be treated as gifts; criminal prosecutions are no place for the government to try out pioneering interpretations of tax law); ***United States v. Heller***, 830 F.2d 150, 151, 154-55 (11th Cir. 1987) (existence of a prior case in which Tax Court approved "case-closed method" of reporting advance payments of costs and fees received by an attorney meant that use of the method was not proscribed in reasonably certain terms, and prior case therefore was sufficient, as a matter of law, to make it inappropriate to impose criminal liability upon defendant-attorney for using the same method)***; United States v. Garber***, 607 F.2d 92, 93-94, 97-100 (5th Cir. 1979) (defendant may have lacked requisite willfulness since proper tax treatment of money received from sale of her exceedingly rare blood was "novel and unsettled" question).

Care should be taken to distinguish the average criminal tax case from a case such as ***Garber***, which was based on "unique, indeed near bizarre, facts." ***United States v. Burton***, 737 F.2d 439, 444 (5th Cir. 1984); *see also* ***United States v. Daly***, 756 F.2d 1076, 1083-84 (5th Cir. 1985). In ***Burton***, the Fifth Circuit explained and limited its opinion in ***Garber***. The court stated that "apart from those few cases where the legal duty pointed to is so uncertain as to approach the level of vagueness, the abstract question of legal uncertainty of which a defendant was unaware is of marginal relevance," explaining that "[e]vidence of legal uncertainty, except as it relates to defendant's effort to show the source of his state of mind, need not be received, at least where . . . the claimed uncertainty does not approach vagueness and is neither widely recognized nor related to a novel or unusual application of the law." ***Burton***, 737 F.2d at 444. And, in ***United States v. Curtis***, 782 F.2d 593, 598-600 (6th Cir. 1986), the Sixth Circuit rejected ***Garber*** on the following grounds: (1) ***Garber*** allows juries to find that uncertainty in the law negates willfulness even if the defendant was unaware of the uncertainty; (2) it distorts the expert's role and intrudes upon the judge's duty to inform the jury about the law; and, (3) it requires the jury to assume the judge's "responsibility to rule on questions of law."

In those few courts that have recognized uncertainty in the law as a potential defense, the court looks to see whether the law clearly prohibited the defendant's alleged conduct. *See* ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir. 1987) (explaining that application of decision in ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983), is limited to mere advocacy of tax shelter program). In ***Dahlstrom***, the court reversed the convictions of the defendants, who had advocated the creation of tax shelters to investors, because the legality of the shelters was "completely unsettled." ***Dahlstrom***, 713 F.2d at 1423, 1425, 1428. Taxpayers have fair notice of a scheme's illegality if it is clear that it is illegal under established principles of tax law, regardless of whether an appellate court has so ruled. *See* ***United States v. Krall***, 835 F.2d 711, 714 (8th Cir. 1987). *Compare* ***United States v. Mallas***, 762 F.2d 361, 361-365 (4th Cir. 1985) (coal mining tax shelter providing deductions of advance minimum royalty payments raised novel questions of tax law so vague that defendant lacked requisite specific intent) *with* ***Krall***, 835 F.2d at 711, 713, 714 ("[a]lthough precise 'foreign trust' arrangement used by Krall had not yet been declared illegal, there is no doubt the scheme violated well-established principles of tax law"; thus defendant could not claim that his conviction violated due process); ***United States v. Tranakos***, 911 F.2d 1422, 1431 (10th Cir. 1990) (illegality of sham transactions to avoid tax liabilities is well-settled); ***United States v. Schulman***, 817 F.2d 1355, 1359-60 (9th Cir. 1987) (tax shelters based on sham transactions clearly illegal); *and* ***United States v. Crooks***, 804 F.2d 1441, 1449 (9th Cir. 1986) ("The doctrine of substance versus form is well ensconced in tax law.")

To minimize problems presented by trying to establish willfulness at trial, items turning on reasonably debatable interpretations of the Tax Code and questionable items of income should be eliminated from the case; and, whenever possible, complicated facts should be simplified. This is advantageous for purposes of presentation of the case to the jury: it strengthens the government's argument that there is no doubt that the defendant committed criminal acts to evade taxes, because the taxability and tax consequences were known to the taxpayer.

The Supreme Court has furnished excellent guidance on the type of evidence from which willfulness can be inferred. In the leading case of ***Spies v. United States***, 317 U.S.

492, 499 (1943), the Supreme Court, "[b]y way of illustration, and not by way of limitation," set forth the following as examples of conduct from which an "affirmative willful attempt" may be inferred:

> keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.

Particularly noteworthy is the Court's reference to "any conduct, the likely effect of which would be to mislead or to conceal." It is apparent that the Court was intent on making it clear that there are no artificial limits on the type of conduct from which willfulness can be inferred and that evidence of any conduct at all is admissible, as long as the "likely effect" of the conduct would be to mislead or conceal.

8.08[3] Examples: Proof of Willfulness

> 1. Willfulness may be inferred from evidence of a consistent pattern of underreporting large amounts of income. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Kim***, 884 F.2d 189, 192-93 (5th Cir. 1989) (evidence of willfulness was sufficient where taxpayer, *inter alia*, failed to report $182,601 of income over three years); ***United States v. Kryzske***, 836 F.2d 1013, 1019-20 (6th Cir. 1988) (willfulness found where taxpayer failed to file complete tax returns over a four-year period and underreported his income by $940.50 for one of those years); *see also* ***United States v. Guidry***, 199 F.3d 1150, 1157 (10th Cir. 1999) (willfulness cannot be inferred solely from the understatement of income); ***United States v. Klausner***, 80 F.3d 55, 63 (2d Cir. 1996); ***United States v. Skalicky***, 615 F.2d 1117, 1120 (5th Cir. 1980); ***United States v. Larson***, 612 F.2d 1301, 1303, 1305 (8th Cir. 1980); ***United States v. Gardner***, 611 F.2d 770, 776 (9th Cir. 1980).
>
> 2. Providing accountant or return preparer with inaccurate and incomplete information. ***United States v. Bishop***, 264 F.3d 535, 552 (5th Cir. 2001); ***United States v. Samara***, 643 F.2d 701, 703 (10th Cir. 1981) (taxpayer kept receipt book for cash received but did not give the firm that prepared his returns any cash receipt books, thus concealing cash receipts); *see also* ***United States v. Guidry***, 199 F.3d 1150, 1157 (10th Cir.1999); ***United States v.***

Brimberry, 961 F.2d 1286, 1290 (7th Cir. 1992); ***United States v. O'Keefe***, 825 F.2d 314, 318 (11th Cir. 1987); ***United States v. Garavaglia***, 566 F.2d 1056, 1057-60 (6th Cir. 1977) ("taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those persons relative to taxable events and then escape responsibility for the false tax returns which result"); ***United States v. Chesson***, 933 F.2d 298, 305 (5th Cir. 1991); ***United States v. Michaud***, 860 F.2d 495, 500 (1st Cir. 1988); ***United States v. Ashfield***, 735 F.2d 101, 107 (3d Cir. 1984); ***United States v. Conforte***, 624 F.2d 869, 876-77 (9th Cir. 1980); ***United States v. Scher***, 476 F.2d 319, 323-24 (7th Cir. 1973).

3. False statements to agents; false exculpatory statements, whether made by a defendant or instigated by him. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Chesson***, 933 F.2d 298, 304 (5th Cir. 1991); ***United States v. Frederickson***, 846 F.2d 517, 520-21 (8th Cir. 1988) (taxpayer falsely stated that she did not receive income from other employees who worked in her massage parlor and that she deposited most of her income into the bank)***; United States v. Walsh***, 627 F.2d 88, 91-92 (7th Cir. 1980); ***United States v. Thompson***, 518 F.3d 832, 852-53 (10th Cir. 2008) (presenting "false, backdated loan document to the IRS"); ***United States v. Callanan***, 450 F.2d 145, 150 (4th Cir. 1971); ***United States v. Jett***, 352 F.2d 179, 182 (6th Cir. 1965); *see also* ***United States v. Klausner***, 80 F.3d 55, 63 (2d Cir. 1996); ***United States v. Pistante***, 453 F.2d 412, 413 (9th Cir. 1971); ***United States v. Adonis***, 221 F.2d 717, 719-20 (3d Cir. 1955).

4. Keeping a double set of books. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Daniels***, 617 F.2d 146, 148, 150 (5th Cir. 1980).

5. Hiding, destroying, throwing away, or "losing" books and records. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Chesson***, 933 F.2d 298, 304-05 (5th Cir. 1991) (taxpayers condoned the alteration and destruction of invoices after undergoing a civil audit for underreporting income); ***United States v. Holovachka***, 314 F.2d 345, 357-58 (7th Cir. 1963); ***Gariepy v. United States***, 189 F.2d 459, 463 (6th Cir. 1951); *see also* ***United States v. Walker***, 896 F.2d 295, 300 (8th Cir. 1990) (taxpayers hid assets "in an attempt to conceal them from the IRS").

6. Making or using false documents, false entries in books and records, false invoices, and the like. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997); ***United States v. Chesson***, 933 F.2d 298, 304 (5th Cir. 1991); ***United States v. Walker***, 896 F.2d 295, 296, 298 (8th Cir. 1990) (defendants submitted false invoices to their family company "so that the company would treat their personal expenses as business expenses").

7. Destruction of invoices to customers. ***United States v. Garavaglia***, 566 F.2d 1056, 1059 (6th Cir. 1977).

8. Use of Nominees. Placing property or a business in the name of another. ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992); ***United States v. Peterson***, 338 F.2d 595, 597 (7th Cir. 1964); ***United States v. Woodner***, 317 F.2d 649, 650-51 (2d Cir. 1963).

9. Extensive use of currency or cashier's checks. ***United States v. Daniel***, 956 F.2d 540, 542-43 (6th Cir. 1992) (defendant "used cash extensively, even converting checks to cash immediately," and paid employees and insurance policies in cash); ***United States v. Holovachka***, 314 F.2d 345, 358 (7th Cir. 1963); ***Schuermann v. United States***, 174 F.2d 397, 398 (8th Cir. 1949).

10. Spending large amounts of cash which could not be reconciled with the amount of income reported, ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001); ***United States v. Simonelli***, 237 F.3d 19, 30 (1st Cir. 2001); ***United States v. Olbres***, 61 F.3d 967, 971 (1st Cir. 1995); ***United States v. Kim***, 884 F.2d 189, 192 (5th Cir. 1989), or engaging in surreptitious cash transactions, ***United States v. Skalicky***, 615 F.2d 1117, 1120 (5th Cir. 1980); *see also* ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir. 1978)***; United States v. Mortimer***, 343 F.2d 500, 503 (7th Cir. 1965) (purchasing money orders).

11. Use of bank accounts held under fictitious names. ***United States v. Ratner***, 464 F.2d 101, 105 (9th Cir. 1972); ***Elwert v. United States***, 231 F.2d 928, 935-36 (9th Cir. 1956); *cf.* ***United States v. White***, 417 F.2d 89, 92 (2d Cir. 1969) (separate personal bank account into which large amounts of cash from unidentified sources was deposited properly offered as evidence of willfulness).

12. Cashing checks and depositing currency in an out-of-town bank account. ***United States v. White***, 417 F.2d 89, 92 (2d Cir. 1969).

13. Unorthodox accounting practices with deceptive results. ***United States v. Slutsky***, 487 F.2d 832, 844 (2d Cir. 1973); ***United States v. Waller***, 468 F.2d 327, 329 (5th Cir. 1972).

14. Repetitious omissions of items of income, *e.g.*, income from various sources not reported. ***United States v. Walker***, 896 F.2d 295, 299 (8th Cir. 1990) (over a two-year period taxpayer failed to report, *inter alia*, interest income totaling $20,476); ***United States v. Tager***, 479 F.2d 120, 122 (10th Cir. 1973); ***Sherwin v. United States***, 320 F.2d 137, 140-41 (9th Cir. 1963).

15. Prior and subsequent similar acts reasonably close to the prosecution years. ***United States v. Middleton***, 246 F.3d 825, 836-837 (6th Cir. 2001); ***Matthews v. United States***, 407 F.2d 1371, 1381 (5th Cir. 1969); ***United States v. Johnson***, 386 F.2d 630, 631 (3d Cir. 1967); ***United States v. Magnus***, 365 F.2d 1007, 1009-10 (2d Cir. 1966); ***United States v. Alker***, 260 F.2d 135, 139, 149 (3d Cir. 1958); *cf.* Fed. R. Evid. 404(b).

16. Alias used on gambling trip – relevant to an intent to evade taxes. ***United States v. Catalano***, 491 F.2d 268, 273 (2d Cir. 1974).

17. The defendant's attitude toward the reporting and payment of taxes generally. ***United States v. Hogan***, 861 F.2d 312, 316 (1st Cir. 1988); ***United States v. Stein***, 437 F.2d 775, 777, 780 (7th Cir. 1971); ***United States v. O'Connor***, 433 F.2d 752, 754 (lst Cir. 1970); ***United States v. Taylor***, 305 F.2d 183, 185-86 (4th Cir. 1962).

18. Background and experience of defendant. General educational background and experience of defendant can be considered as bearing on defendant's ability to form willful intent. ***United States v. Guidry***, 199 F.3d 1150, 1157-58 (10th Cir.1999) (willfulness inferred from defendant's expertise in accounting via her business degree and her work experience as comptroller of a company)***;*** ***United States v. Klausner***, 80 F.3d 55, 63 (2d Cir. 1996) (defendant's background as a CPA and extensive business experience including that as a professional tax preparer); ***United States v. Smith***, 890 F.2d 711, 715 (5th Cir. 1989) (defendant's background as an entrepreneur probative of willfulness); ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989) (defendant was a successful and sophisticated businessman); ***United States v.***

Rischard, 471 F.2d 105, 108 (8th Cir. 1973); *see also* ***United States v. Diamond***, 788 F.2d 1025, 1026, 1230 (4th Cir. 1986); ***United States v. MacKenzie***, 777 F.2d 811, 818 (2d Cir. 1985) (willfulness inferred from the fact that each defendant had a college degree, one in economics and the other in business).

19. Offer to bribe government agent. ***Barcott v. United States***, 169 F.2d 929, 931-32 (9th Cir. 1948) (attempt to bribe revenue agent).

20. Use of false names and surreptitious reliance on the use of cash. ***United States v. Walsh***, 627 F.2d 88, 92 (7th Cir. 1980); ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir. 1978).

21. Backdating documents to gain a tax advantage. ***United States v. Drape***, 668 F.2d 22, 25-26 (1st Cir. 1982); ***United States v. Crum***, 529 F.2d 1380, 1381-82 (9th Cir. 1976); ***United States v. O'Keefe***, 825 F.2d 314, 318 (11th Cir. 1987).

22. Illegal sources of income. ***United States v. Palmer***, 809 F.2d 1504, 1505-06 (11th Cir. 1987) ("From the illegal source of funds, a jury could reasonably infer an intent to conceal income"; sale of drugs).

8.08[4] Conscious Avoidance/Willful Blindness Instruction[9]

Most courts have ruled that if there is evidence that the defendant deliberately avoided acquiring knowledge of a fact or the law, the jury may infer that the defendant actually knew of the fact or the law and was merely trying to avoid giving the appearance (and incurring the consequences) of knowledge. *See, e.g.*, ***United States v. Poole,*** 640 F.3d 114, 122 (4th Cir. 2011); ***United States v. Williams***, 612 F.3d 500, 506-07 (6th Cir. 2010); ***United States v. Heredia***, 483 F.3d 913, 922-23 (9th Cir. 2007); ***United States v. Withers***, 100 F.3d 1142, 1145 (4th Cir. 1996); ***United States v. Abbas***, 74 F.3d 506, 513 (4th Cir. 1996); ***United States v. Wisenbaker***, 14 F.3d 1022, 1027 (5th Cir. 1994); ***United States v. Krowen***, 809 F.2d 144, 148 (1st Cir. 1987); ***United States v. Jewell***, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc); *see also* ***United States v. Ramsey***, 785 F.2d 184, 189 (7th Cir. 1986) (mail and wire fraud); *but see* ***United States v. Alston-Graves***, 435

[9] Such instructions also have been referred to as deliberate ignorance, ostrich, or head-in-the-sand instructions. To minimize the potential for confusion with the meaning of "willfulness" as it relates to the defendant's intent, the Tax Division recommends using the term "conscious avoidance" or "deliberate ignorance" and avoiding the phrase "willful blindness."

F.3d 331, 338 (D.C. Cir. 2006) (no evidence of deliberate ignorance on the part of the defendant, but error in giving instruction harmless; collecting cases addressing willful blindness instructions).[10] In such a case, the use of a conscious avoidance instruction may be appropriate.

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means**.** ***United States v. Pool***e, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." ***Id***. Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge*."* ***Id.*** *citing* ***United States v. Stadtmauer***, 620 F.3d 238, 245 (3d Cir. 2010) and ***United States v. Bussy***, *supra.*

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991). *Accord* ***United States v. Miller*** 588 F.3d 897, 906 (5th Cir. 2009) ("The evidence demonstrates that [the defendant] was subjectively aware of a high probability of existence of illegal conduct.").

The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. ***Stadtmauer***, 620 F.3d at 259. The rational supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. ***Poole***, 640 F.3d at 122; ***Stadtmauer***, at 255; ***Jewell,*** 532 F.2d at 700.

In ***Global-Tech Appliances, Inc. v. SEB S.A.***, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under Section

[10] Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991).

271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit[11] – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

> (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2068-69. The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." ***Id.*** at 270-71.

Although ***Global-Tech Appliances*** has seemingly approved the use of the conscious avoidance instructions, it is important to note that circuit courts have approved their use only under proper circumstances. *See*, *e.g.*, ***United States v. Whiteford,*** 676 F.3d 348, 357 (3d Cir. 2012) (A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of

[11] *See* ***Alston-Graves***, *supra*.

deliberate ignorance), *citing* ***United States v. Clay***, 618 F.3d 946, 953 (10th Cir. 2010); ***United States v. Hogan***, 861 F.2d 312, 316 (1st Cir. 1988)***; United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir. 1985); ***United States v. Callahan***, 588 F.2d 1078, 1081-83 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Willis***, 277 F.3d 1026, 1031-32 (8th Cir. 2002); ***United States v. Dean***, 487 F.3d 840, 851 (11th Cir. 2007). Indeed, at least one court has said that the use of such an instruction is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). *See also* ***United States v. Jinwright,*** 2012 WL 2362632 (4th Cir. 2012) (requests for willful blindness instructions should be handled with caution).

Accordingly, prosecutors should take care to ensure that a conscious avoidance instruction is given only when the facts warrant its use and that the court complies with the relevant rules of the circuit when giving such an instruction. *See, e.g.*, ***United States v. Heredia***, 483 F.3d 913, 922-23 (9th Cir. 2007); ***United States v. Withers***, 100 F.3d 1142, 1145 (4th Cir. 1996); ***United States v. Abbas***, 74 F.3d 506, 513 (4th Cir. 1996); ***United States v. Wisenbaker***, 14 F.3d 1022, 1027 (5th Cir. 1994); ***United States v. Krowen***, 809 F.2d 144, 148 (1st Cir. 1987); ***United States v. Jewell***, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc). A conscious avoidance instruction "is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because the courier knows full well that he is likely to find drugs there." ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992).

Furthermore, in a tax case, the language of any conscious avoidance instruction must not conflict with the government's obligation to prove the voluntary, intentional violation of a known legal duty. *See* Section 8.08. Care must be taken to ensure that the conscious avoidance instruction applies only to the element of "knowledge," and does not extend to the government's obligation to prove a "voluntary, intentional violation." *See* ***United States v. Stadtmauer***, 620 F.3d 238, 258-259 (3d Cir. 2010) ("The Court's instructions made clear that willful blindness applied only to the element of knowledge"). When a deliberate ignorance or conscious avoidance instruction is given, the jury should also be given a separate Good Faith instruction, which expressly directs the jury not to convict for negligence or mistake.

8.09 VENUE

Tax evasion is a continuing offense under 18 U.S.C. § 3237(a). Venue is therefore proper in any district in which an affirmative act occurred.

As previously noted, one of the most common ways in which defendants attempt to evade tax involves the filing of a false return. In such a case, venue is proper in the district where a false return was filed. *See* ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977); ***Holbrook v. United States***, 216 F.2d 238, 239 (5th Cir. 1954). Venue also lies in the district in which a false return is prepared or signed, even though the return is filed in a different district. ***United States v. Slutsky***, 487 F.2d 832, 839 (2d Cir. 1973)***;*** ***King***, 563 F.2d at 562; ***United States v. Hoover***, 233 F.2d 870, 872 (3d Cir. 1956); ***Kowalsky v. United States***, 290 F.2d 161, 162-63 (5th Cir. 1961); ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987); ***United States v. Humphreys***, 982 F.2d 254, 260 (8th Cir. 1992); ***United States v. Marchant***, 774 F.2d 888, 891 (8th Cir. 1985). This is also true in cases in which the affirmative act of evasion is the filing of a false withholding Form W-4 rather than a false tax return: venue is proper where the false W-4 was prepared and signed or where it was received and filed. *See* ***United States v. Felak***, 831 F.2d 794, 798-99 (8th Cir. 1987).

In tax evasion cases, venue is not limited to the district of signing, filing, or preparation of the false tax return. Venue is appropriate in any district where an attempt to evade took place. Thus, venue may be proper in the district in which a false statement is made to an I.R.S. agent, ***United States v. Goodyear***, 649 F.2d 226, 228 (4th Cir. 1981), where the making of false records or the concealment of assets took place, ***Beaty v. United States***, 213 F.2d 712, 715-17 (4th Cir. 1954), *vacated and remanded for reconsideration on other grounds*, 348 U.S. 905, (1955), *reaff'd*, 220 F.2d 681 (4th Cir. 1955), or where there was a concealment of assets, ***Reynolds v. United States***, 225 F.2d 123, 128 (5th Cir. 1955).

Reference should also be made to the discussion of venue in Section 6.00, *supra*.

8.10 STATUTE OF LIMITATIONS

The statute of limitations is six years "for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof." 26 U.S.C. § 6531(2). For a discussion concerning the measurement of the six-year period of limitations, *see*

Section 7.00, *supra*. The most frequently litigated issue with respect to the statute is when the period of limitations commences.

The general rule is that the six-year period of limitations begins to run from the latter of the due date of the tax return or the last affirmative act constituting an attempt to evade. *See* ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997); ***United States v. DiPetto***, 936 F.2d 96, 98 (2d Cir. 1991); ***United States v. Williams***, 928 F.2d 145, 149 (5th Cir. 1991); ***United States v. Winfield***, 960 F.2d 970, 974 (11th Cir. 1992). (For rules relating to employment taxes, see Section 7.02[5].) Thus, if the delinquent filing of a false return is the method of attempting to evade, the statute will usually start running on the day the return is filed. ***United States v. Habig***, 390 U.S. 222, 225 (1968). However, where a false return is filed before the statutory due date, the statute of limitations does not start running until the statutory due date. ***United States v. Silverman***, 449 F.2d 1341, 1346 (2d Cir. 1971); ***United States v. Ayers***, 673 F.2d 728, 729-30 (4th Cir. 1982). When the affirmative act occurs before a tax deficiency is incurred, the statute of limitations generally begins to run at the time the tax deficiency arises. ***United States v. Carlson***, 235 F.3d 466, 470 (9th Cir. 2000) ("the statute of limitations for evasion of assessment begins to run from the occurrence of the last act necessary to complete the offense, normally, a tax deficiency"); ***United States v. Payne***, 978 F.2d 1177, 1179 (10th Cir. 1992).

In tax evasion cases involving affirmative acts of evasion carried out after the statutory due date, the limitations period runs from the date of the last such act, thereby extending the period beyond six years from the time filing was required (or unpaid taxes were due). *See, e.g.*, ***United States v. Anderson***, 319 F.3d 1218, 1219 (10th Cir. 2003); ***United States v. Ferris***, 807 F.2d 269, 271 (1st Cir. 1986) (false statements by defendant to revenue agents and prosecutor regarding income from prior year in question were affirmative acts which triggered the statute of limitations computation); ***United States v. Dandy***, 998 F.2d 1344, 1355 (6th Cir. 1993) ("[T]o hold otherwise would only reward a defendant for successfully evading discovery of his tax fraud for a period of six years subsequent to the date the returns were filed"); ***United States v. Trownsell***, 367 F.2d 815, 816 (7th Cir.1966) (the statute of limitations started running in 1961 when defendant transferred a sum of money to a Swiss bank, notwithstanding that the taxes were due between 1946 and 1953); ***United States v. DeTar***, 832 F.2d 1110, 1113 (9th Cir. 1987) (affirmative acts of both placing assets in names of nominees and conducting business in cash within six years prior to indictment made indictment timely, even though taxes evaded were due and payable more than six years before the indictment); ***United States v.***

Hunerlach, 197 F.3d 1059, 1065 (11th Cir. 1999) (hiding rental income by purchasing property in nominee name within six years of indictment was timely affirmative act of evasion for limitations purposes).

In those situations in which the last affirmative act is the filing of a false return after the original due date of the return, but before the last day of the extended period resulting from the defendant's filing for an extension of the statutory due date, the limitations period should be considered to commence upon the defendant's filing of the false return. *See* ***Habig***, 390 U.S. at 226 ("This provision [26 U.S.C. § 6513] does not apply to taxpayers who are given the benefit of an extension of time in which to file their returns, and file the return before the last day of the extended period * * *").[12]

8.11 LESSER INCLUDED OFFENSES

Note: A chart in Section 8.11[7] summarizes the recommended position for each circuit.

A defendant tried for tax evasion may sometimes propose a lesser included offense instruction; that is, an instruction that the jury may find the defendant guilty of a less serious offense than tax evasion, such as filing a false return, in violation of § 7206, or misdemeanor failure to file or pay, in violation of § 7203. As explained below, the Supreme Court's adoption of the strict "elements" test in ***Schmuck v. United States***, 489 U.S. 705, 709-10, 715-22 (1989), effectively narrowed what crimes can be considered lesser included offenses. *See also* ***Carter v. United States***, 530 U.S. 255 (2000) (applying ***Schmuck***). Under the strict elements test, tax evasion does not have any lesser included offenses. But in many circuits, there is pre-***Schmuck*** law holding otherwise that has not been updated to reflect the holding of ***Schmuck***, and some post-***Schmuck*** decisions fail to properly apply the strict elements test. Prosecutors thus should research the controlling case law in their circuit and neither reflexively oppose nor acquiesce to defense requests. Prosecutors desiring to challenge circuit law as inconsistent with ***Schmuck*** and ***Carter*** should first consult with the Tax Division's Criminal Appeals & Tax Enforcement Policy Section.

Relatedly, although the government can also request a lesser included offense instruction, prosecutors should not request an instruction for tax evasion even in those

[12] Keep in mind that 26 U.S.C. § 6531 provides for a nine-month extension of the limitations period "[w]here a complaint is instituted before a commissioner of the United States."

circuits that would permit it. This abstention is consistent with the proper application of the elements test but also has other benefits. Prosecutors should, instead, consider charging the putative lesser count in addition to tax evasion if they want to rely upon that count as a potential basis for conviction. If a defendant is convicted on both counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[1] Lesser Included Offense Instructions Generally

8.11[1][a] Schmuck rejects the "inherent relationship" test in favor of the "statutory elements" test

Under the Federal Rules of Criminal Procedure, a defendant may be convicted of a lesser included offense, which is an offense that, while not charged in the indictment, is "necessarily included" in a charged count. Fed. R. Crim. P. 31(c)(1). In ***Schmuck***, the Supreme Court resolved an inter-circuit conflict as to the test for determining whether one count is "necessarily" included in another under Rule 31. ***Schmuck***, 489 U.S. at 710 & n.5; *see also* ***United States v. Browner***, 937 F.2d 165, 167-68 (5th Cir. 1991) (discussing the use of the two tests at issue in ***Schmuck*** and noting that several states also used an intermediate approach that considered the indictment).

Schmuck considered two tests for whether a lesser offense is necessarily included — the inherent relationship test and the necessary elements test — and ultimately chose the latter. Under the rejected "inherent relationship" test, "one offense [was] included in another when the facts as alleged in the indictment and proved at trial support[ed] the inference that the defendant committed the less serious offense, and an 'inherent relationship' exist[ed] between the two offenses." ***Schmuck***, 489 U.S. at 708-09. This relationship was present when both offenses related "to the protection of the same interests and the proof of the greater offense can generally be expected to require proof of the lesser offense." *Id.* at 709. The Court rejected this approach and instead adopted the strict elements test, which requires a "textual comparison of the criminal statutes," an approach, the Court explained, that lends itself to "certain and predicable" outcomes. *Id.* at 720. Under the strict elements test "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *Id*. at 716. Accordingly, no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." *Id*.

In ***Carter v. United States***, 530 U.S. 255 (2000), the Supreme Court applied ***Schmuck***'s strict elements test in a bank robbery prosecution and held that 18 U.S.C. § 2113(b) was not a lesser included offense of 18 U.S.C. § 2113(a) because subsection (b) required an element (specifically, three elements) not required by subsection (a). In so holding, the majority in ***Carter*** rejected an argument that the "application of ***Schmuck***'s elements test is too rigid." *Id*. at 262. The Court applied the test strictly and rejected an argument that the additional elements in subsection (b) were implicitly in subsection (a). *See id*. at 267-270. The Court also rejected an argument that an element in subsection (b) but not in subsection (a) – a thing of "value exceeding $1,000" – could be waived by a defendant seeking the lesser included offense instruction, noting that ***Schmuck*** explicitly rejected an approach that would permit a defendant to waive the right to notice in order to obtain a lesser included offense instruction in circumstances where a prosecutor would be barred from seeking the instruction due to the constitutional notice requirement. *Id*. at 274.

As discussed below, under a proper application of the elements test, tax evasion does not have any lesser included offenses. But some circuits have caselaw stating otherwise. How to approach the issue will vary by circuit and the circumstances of the case. Many circuits have not yet issued post-***Schmuck*** decisions applying the strict elements test announced in ***Schmuck*** and applied in ***Carter***. In these circuits, it remains open to argue, both in the district courts and to a circuit panel, that pre-***Schmuck*** decisions have been overruled and no longer constitute binding circuit law. *See generally* ***United States v. Barbosa***, 896 F.3d 60, 74 (1st Cir. 2018) (listing law-of-the-circuit exceptions). But some circuits have issued post-***Schmuck*** decisions that do not properly apply the strict elements test. In these circuits, the decisions are wrong, but correction requires action by the circuit court itself. Prosecutors thus should research the controlling case law in their circuit before deciding whether to oppose or acquiesce to a defendant's request for a lesser included instruction.

8.11[1][b] Whether the Instruction Should Be Given

Even when an offense is a lesser included offense, a defendant is not automatically entitled to the instruction. In addition to the proposed lesser offense passing the strict elements test, "the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." ***Schmuck*****,** 489 U.S. at 716 n.8. In ***Schmuck***, the Court emphasized that its decision "in no way alters th[at] independent perquisite." *Id*. ***Carter*** declined to address that separate requirement – which is a fact-based inquiry about whether the instruction is appropriate given the trial evidence in a particular case and not part of the strict elements test itself – because the strict elements test had not been satisfied. ***Carter***, 530 U.S. at 261 n.3. *Cf.* ***United States v. Whitman***, 887 F.3d 1240, 1247 (11th Cir. 2018) (declined to decide whether giving illegal gratuities is a lesser included offense of bribery because a jury could not rationally find the defendant guilty of the lesser offense yet acquit him of the greater, given his defense of being an extortion victim). As illustrated below, the circuit courts that fail to properly apply the ***Schmuck*** elements test also often find that this independent requirement is satisfied, so care must be taken in opposing a lesser offense instruction on this basis. If a prosecutor opposes an instruction on evidentiary grounds, the opposition should also raise the legal argument that tax evasion has no lesser included offense even in those circuits with contrary post-***Schmuck*** law, although in those circuits prosecutors should note the district court is still bound by the erroneous circuit law.

In ***United States v. Doyle***, 956 F.2d 73 (5th Cir. 1992), for example, the Fifth Circuit reversed the defendant's tax evasion conviction because the district court did not give a requested lesser included offense instruction on failure to file. The defendant had not filed returns and had sent false Forms W-4 to his employer claiming to be exempt from taxes; the government had argued that willfulness, the contested element, was common to both offenses, but the Fifth Circuit held that the defendant might have been willful in failing to file tax returns yet not willful in submitting the Forms W-4. *See id.* at 75.

Defense requests should generally not be opposed on statute of limitations grounds. A defendant is entitled to a lesser included offense instruction even if the statute of limitations has run on the lesser offense because the defendant's request waives a limitations argument. *See* ***United States v. DeTar****,* 832 F.2d 1110, 1115 (9th Cir. 1987) (following ***United States v. Williams***, 684 F.2d 296, 299–300 (4th Cir. 1982)). While some older cases stated the defendant was not entitled to the instruction in these circumstances, they were often based on the view that the statute of limitations was jurisdictional and could not be waived. *See, e.g.,* ***Chaifetz v. United States***, 288 F.2d 133, 135 (D.C. Cir. 1960). This was a minority view among the circuits, and the Supreme

Court has since rejected it. *See* ***Musacchio v. United States***, 577 U.S. 237, 247-48 (2016). The Supreme Court has also ruled, in a capital case, that a defendant is not entitled to the instruction when the defendant refuses to waive the statute of limitations. ***Spaziano v. Florida***, 468 U.S. 447, 456 (1984), *overruled on other grounds by* ***Hurst v. Florida***, 577 U.S. 92 (2016). Although a request for the instruction should be construed as a waiver, if there is a statute of limitations issue with a lesser offense, prosecutors should encourage the court to require an express waiver from the defendant.

If a court gives a lesser included offense instruction, the court must also decide whether to allow the jury to consider the lesser included offense only after acquitting on tax evasion or if the jury may consider it after making reasonable efforts to reach a unanimous verdict on evasion. Prosecutors should consider their circuit's pattern instruction on this, where available. In the Second and Ninth Circuits, at a minimum, the defendant is entitled to choose which version of the instruction should be given. *See* ***United States v. Tsanas***, 572 F.2d 340, 346 (2d Cir. 1978); ***United States v. Jackson***, 726 F.2d 1466, 1469 (9th Cir. 1984) (following ***Tsanas***); *see also* ***Catches v. United States,*** 582 F.2d 453, 459 & n.14 (8th Cir. 1978) (noting, in a collateral-review case, general agreement with the "well-reasoned rule" in ***Tsanas***).

If a court gives a lesser included offense instruction, it also may raise issues about the unit of prosecution. This is particularly true in an evasion of payment case, in which a single count of tax evasion may involve attempts to evade payment of multiple years of taxes due. *See* Chapter 8.07[2] (discussing unit of prosecution for tax evasion). In that situation, prosecutors should request that any lesser included offense instruction give the jury the option of convicting on an appropriate number of lesser counts (for example, if an evasion count covers five years of unpaid income taxes, then an instruction on failure to pay as a lesser included offense should allow the jury to convict on up to five counts of failure to pay in violation of Section 7203).

8.11[2] Section 7203 as a Lesser Included Offense of Section 7201

Section 7201 provides, "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall … be guilty of a felony" with a statutory maximum of five years. The elements of attempted tax evasion in violation of 26 U.S.C. § 7201 are: (1) the existence of a tax due and owing; (2) willfulness; and (3) an affirmative act constituting an attempted evasion of tax (or attempted evasion of the payment of tax). ***Boulware v. United States***, 553 U.S. 421, 424 n.2 (2008).

Section 7203 provides, "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor" with a statutory maximum of one year. The elements of 26 U.S.C. § 7203 are (1) the defendant had a duty to file a return (or to pay a tax); (2) failed to timely file (or pay); and (3) the failure was willful. ***United States v. Tucker***, 686 F.2d 230, 232 (5th Cir. 1982).

In order for Section 7203 to be a lesser included offense of a Section 7201 count under ***Schmuck***'s elements test, the elements of Section 7203 would need to be a subset of the elements of Section 7201. As explained below, Section 7203 is not a lesser included offense of Section 7201 under ***Schmuck***'s elements test because Section 7203 requires an element not required for Section 7201.

8.11[2][a] Failure to File as a Lesser Included Offense of Section 7201

An element of the offense of willful failure to file in violation of Section 7203 that is not present in Section 7201 is a failure to file. (Section 7203 also requires a personal duty, discussed below at § 8.11[2][b] in the context of failure to pay, which is not required by Section 7201.) Tax evasion can be, and frequently is, committed by filing a false return. Notwithstanding the clarity of this, the circuits have reached different conclusions about whether a § 7203 failure to file offense is a lesser included offense of tax evasion.

The Seventh and Ninth Circuits have published post-***Schmuck*** opinions correctly holding that failure to file is not a lesser included offense of evasion. In the Seventh Circuit, this conclusion is "well settled." ***United States v. Becker***, 965 F.2d 383, 391 (7th Cir. 1992). "Section 7203 does not require 'an affirmative act, whereas a § 7201 offense requires some affirmative act. Failure to file without more will not sustain a conviction under § 7201. Conversely, while someone attempting to evade or defeat tax will often fail to file a return, this is not necessary for the completion of the offense.'" *Id.*

(quoting ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir. 1986)); *see also* ***United States v. Hassebrock***, 663 F.3d 906, 917 (7th Cir. 2011).

The Ninth Circuit directly applied the ***Schmuck*** elements test in ***United States v. Nichols***, 9 F.3d 1420, 1422 (9th Cir. 1993), to reach the same result. The court reasoned that "[b]ecause failure to file a return is an element of the offense of failure to file but is not an element of tax evasion, the offense of failure to file is not 'necessarily included' in the offense of tax evasion." *Id.* Thus, "no instruction is given if the lesser offense requires an element not required for the greater offense, even if the prosecution proved that element of the lesser offense in support of its charge of the greater offense." *Id*.

The Sixth Circuit reached a similar conclusion in an unpublished case when it applied the ***Schmuck*** elements test in ***United States v. Harris***, 117 F.3d 1421 (6th Cir. 1997) (unpub.). That court found that "§ 7203 has one element not required under § 7201, the failure to file a return *by the due date*, and is not necessarily included in the § 7201 offense." *Id*. at *9 (emphasis in original). Prosecutors should be aware that, despite ***Harris***, the government conceded in another unpublished case that § 7203 might be a lesser included offense of § 7201. *See* ***United States v. Christians***, 105 F. App'x 748, 752-53 (6th Cir. 2004). Sixth Circuit Local Rule 32.1, however, limits citation of unpublished decisions to those issued on or after January 1, 2007, and neither decision has binding effect in the circuit, so the issue remains open.

The Eighth Circuit held before ***Schmuck*** that the circuit "recognized there may be situations where, under the evidence and § 7203, a defendant is entitled to lesser offense instructions." ***Sansone v. United States***, 334 F.2d 287, 295 (8th Cir. 1964), aff'd, 380 U.S. 343 (1965). But the Eighth Circuit has never found a situation where the defendant was entitled to the instruction and, as of 2023, has not yet issued a post-***Schmuck*** decision applying the strict elements test.

At least two circuits—the Second and Fourth—held, pre-***Schmuck***, that failure to file is a lesser included offense of § 7201 ***Spies*** evasion. See ***Spies v. United States***, 317 U.S. 492, 499 (1943) (holding that a willful omission was insufficient for tax evasion; there must instead be an affirmative act of evasion). In ***United States v. Rosenthal***, 454 F.2d 1252 (2d Cir. 1972), the Second Circuit addressed this issue where the defendant was convicted of both tax evasion and failure to file for the same year. ***Rosenthal*** vacated the misdemeanor conviction stating that "the crime defined in § 7203 was a lesser included offense of that defined in § 7201." 454 F.2d at 1255.

The Fourth Circuit also found failure to file to be a lesser included offense of tax evasion, at least when "one of the affirmative acts of evasion relied upon by the government in proving attempted tax evasion under Section 7201 is the failure to file an income tax return." ***United States v. Snyder***, 766 F.2d 167, 171 (4th Cir. 1985). The lesser included issue aside, the Fourth Circuit's decision errs in describing a failure to file a tax return as an affirmative act. "***Spies*** evasion" is often used as a shorthand for an evasion case where a defendant did not file a return. But the failure is not an element – some affirmative act is required. With respect to the lesser included offense holdings, the Second and Fourth circuits err because a "textual comparison of the criminal statutes" under the ***Schmuck*** strict elements test mandates the conclusion that failure to file is not necessarily a lesser included offense of tax evasion, even if on the particular facts a jury could convict on the misdemeanor and not the felony. See ***Carter***, 530 U.S. at 261 n.3 (citing ***Schmuck***, 489 U.S. at 716 n.8).

Only the Fifth Circuit has held in a post-***Schmuck*** case that failure to file is a lesser included offense of tax evasion. *See* ***United States v. Doyle***, 956 F.2d 73, 75 (5th Cir. 1992). ***Doyle*** did not cite ***Schmuck***, let alone expressly apply its strict elements test. Instead, it relied on ***United States v. DeTar***, 832 F.2d 1110 (9th Cir. 1987), which not only was a pre-***Schmuck*** decision but a failure to pay case, not a failure to file case, as well as pre-***Schmuck*** dicta in ***Sansone v. United States***, 380 U.S. 1004 (1965). (***DeTar*** is discussed below in the failure-to-pay section, 8.11[2][b] and the ***Sansone*** dicta in section 8.11[5].) Notably, the Ninth Circuit held a year later in ***United States v. Nichols***, 9 F.3d 1420, 1422 (9th Cir. 1993), that a failure to file offense is not a lesser included offense of tax evasion.

Although failing to cite ***Schmuck*** or expressly apply the strict elements test, the ***Doyle*** court did cite ***United States v. Browner***, 937 F.2d 165 (5th Cir. 1991), a post-***Schmuck*** decision which considered the government's argument that although ***Schmuck*** rejected the inherent relationship test, the Supreme Court had left "open the possibility of resort to an indictment-based test under appropriate circumstances." 937 F.2d at 169. In rejecting that argument, the ***Browner*** court noted that the Solicitor General had argued against adoption of an indictment-based theory and that "the Supreme Court's opinion in ***Schmuck*** [had] adopted the strict statutory elements test that the government had sought," presenting "no reason to address the defendant's alternative argument that under an indictment-based test he would have been entitled to the requested lesser included offense instruction." 937 F.2d at 170. ***Doyle***'s citation of ***Browner*** has resulted in at least one lower court within the circuit stating ***Doyle*** "applied the ***Schmuck*** 'statutory elements' test." ***United States v. Cryer***, 2007 WL 1805031 (W.D. La. 2007) (memorandum ruling of Magistrate Judge).

The Eleventh Circuit has not addressed the issue directly, but it has observed that "binding authority" from the pre-split Fifth Circuit "holds that a violation of § 7203 (misdemeanor failure to file a return) is a lesser included offense of § 7201 where the failure to file is the act that forms the basis of the tax evasion charge." ***United States v. Kaiser***, 893 F.2d 1300, 1306 (11th Cir. 1990) (citing pre-***Schmuck*** cases ***United States v. Newman*, **468 F.2d 791, 796 (5th Cir. 1972) and ***United States v. Buckley***, 586 F.2d 498, 503–04 (5th Cir. 1978)).

In sum, a proper application of the ***Schmuck*** strict elements test results in the conclusion that a failure to file offense in violation of Section 7203 is not a lesser included offense of evasion in violation of Section 7201, even if on the facts a jury could convict on the misdemeanor and not the felony. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should consider charging the Section 7203 failure to file counts. If a defendant is convicted on both counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[2][b] Failure to Pay as a Lesser Included Offense of Section 7201

An element of willful failure to file or pay, in violation of Section 7203, that is not present in Section 7201 is that the defendant must have an obligation to file the return or pay the tax at issue. *Compare* § 7203 ("Any person required under this title") with § 7201 ("Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof"). Thus, for example, while a defendant can be convicted under Section 7201 of evading the payment of tax not imposed on him by Title 26, ***United States v. Townsend***, 31 F.3d 262, 267 (5th Cir. 1994), a defendant generally cannot be convicted under Section 7203 for failing to pay tax unless the obligation to pay that tax is imposed on him by Title 26.. A defendant can only be convicted under Section

7203 for taxes owed and unpaid by another person by relying on 18 U.S.C. § 2 (a theory of liability implicitly present in all counts even if not expressly alleged. *See* CTM 21.04). But establishing liability under Section 2 for a failure to pay requires the involvement of another person – the individual who did have the duty to pay – which is not a requirement of Section 7201. *Cf.* ***United States v. Rivera-Figueroa***, 149 F.3d 1, n.5 (1st Cir. 1998) ("The accessory-after-the-fact offense does have some elements in common with the principal crime insofar as it requires proof of the substantive offense by someone; and it is certainly a lesser offense carrying a lesser penalty. 18 U.S.C. § 3. But the accessory offense is not a lesser *included* offense because it requires proof that the principal offense does not, namely, that the defendant assisted after the principal crime was committed.") Accordingly, a faithful application of the ***Schmuck*** strict elements test results in the conclusion that willful failure to pay in violation of Section 7203 is not a lesser included offense of Section 7201.

Two circuits have held otherwise. In a pre-***Schmuck*** case, the Ninth Circuit, in ***DeTar***, reversed a tax evasion conviction where the court declined to give an instruction on failure to pay. Although ***DeTar*** engaged in a cursory comparison of elements, it did not consider the requirement that the defendant have a personal duty to pay, instead stating that there were only two elements: willfulness and failure to pay the tax when due. ***DeTar***, 832 F.2d at 1113. The lesser-included holding of ***DeTar***, accordingly, does not survive ***Schmuck*** and ***Carter.*** However, in an unpublished post-***Schmuck*** case, ***United States v. Fisher***, 607 F. App'x 645 (9th Cir. 2015), the Ninth Circuit simply stated that "[i]t is undisputed that § 7203 is a lesser included offense of § 7201," and reversed on the basis that, on the facts, the defendant could have been convicted on § 7203 and not § 7201.

In a post-***Schmuck*** decision, the Third Circuit, in ***United States v. McGill***, 964 F.2d 222, 239-40 (3d Cir. 1992), held that failure to pay is a lesser included offense of evasion of payment. In ***McGill***, the defendant was charged with five counts of evasion of payment and the jury convicted on three counts. The jury acquitted on the other two evasion counts but convicted on failure to pay based on a lesser included instruction requested by the government. In affirming, the Third Circuit, like the Ninth Circuit in ***DeTar***, described the elements of failure to pay in violation of Section 7203 as "1) the failure to pay a tax that is due, and 2) willfulness," which elements, the court held, are within the elements of evasion of payment in violation of Section 7201. ***McGill***, 964 F.2d at 229. In its 1992 decision, the Third Circuit did not cite, much less apply, the Supreme

Court's 1989 decision in ***Schmuck***. Rather, the Third Circuit cited the Ninth Circuit's pre-***Schmuck*** decision in ***DeTar***. 964 F.2d at 239. Thus, like ***DeTar***, ***McGill*** did not consider the requirement that § 7203 requires the defendant to have has a personal duty imposed by Title 26.

In sum, a proper application of the ***Schmuck*** strict elements test results in the conclusion that a failure to file offense in violation of Section 7203 is not a lesser included offense of evasion in violation of Section 7201, even if on the facts a jury could convict on the misdemeanor and not the felony. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should consider charging the Section 7203 failure to pay counts. If a defendant is convicted on both counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[3] Section 7206(1) as a Lesser Included Offense of Section 7201

Section 7206(1) provides that whoever "[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter … shall be guilty of a felony" with a statutory maximum of three years. The elements of Section 7206(1) are (1) the defendant made and subscribed a return, statement, or other document which was false as to a material matter; (2) the return, statement, or other document contained a written declaration that it was made under the penalties of perjury; (3) the defendant did not believe the return, statement, or other document to be true and correct as to every material matter; and (4) the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law. *See* CTM 12.05.

An element of the offense of willfully filing of a false return or other document in violation of Section 7206(1) that is not present in Section 7201 is the requirement of filing a return or other document. Attempted tax evasion in violation of Section 7201 can be, and frequently is, committed by committing an act constituting attempted evasion without filing a tax return (or other document), a scenario often called "***Spies*** evasion." *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943). Thus, Section 7206(1) is not a lesser included offense of Section 7201. Notwithstanding the clarity of this, three circuits have issued post-***Schmuck*** decisions hold that filing a false return in violation of § 7206(1) can be a lesser included offense of tax evasion.

Prior to ***Schmuck***, many circuits considered the question and held that filing a false tax return is a lesser included offense when the return is alleged as an act of evasion. *See, e.g.,* ***Gaunt v. United States***, 184 F.2d 284, 288, 290 (1st Cir. 1950); ***United States v. Hooks***, 848 F.2d 785, 791 n.3 (7th Cir. 1988) (dicta); ***United States v. Lodwick***, 410 F.2d 1202 1206 (8th Cir. 1969); ***United States v. Pulawa***, 532 F.2d 1301, 1302 (9th Cir. 1976). These circuits have not issued post-***Schmuck*** decisions, however, so in these circuits it remains open to argue, both in the district courts and to a circuit panel, that these pre-***Schmuck*** decisions have been overruled by ***Schmuck***, and no longer constitute binding circuit law. The Fourth Circuit issued a similar decision shortly after ***Schmuck*** was decided, but that opinion was unpublished and relied solely on pre-***Schmuck*** law. *See* ***United States v. Payne***, 1989 WL 134637, *1 (4th Cir. 1989) (unpub.). Accordingly, in the Fourth Circuit the issue remains open. The Third and Sixth Circuits have not addressed this issue, either before or after ***Schmuck***, so the issue remains open there as well.

In the "closely related" context of multiplicity, the Tenth Circuit drew upon the ***Schmuck*** elements test to find that filing a false return and tax evasion each contain an element that the other does not. ***United States v. Greene***, 239 F. App'x 431, 437-38 (10th Cir. 2007). In particular, the court explained that the false return count "requires proof of knowingly signing a false statement under oath, which is not required to prove the evasion count." *Id.* at 438. As the court emphasized, the ***Schmuck*** test is "'certain and predictable' because it 'involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial.'" *Id.* at 437 (quoting ***Schmuck,*** 489 U.S. at 720).

The Second, Eleventh, and D.C. Circuits have issued post-***Schmuck*** decisions holding that Section 7206(1) is a lesser included offense of Section 7201. The Eleventh Circuit, in ***Kaiser***, did not cite ***Schmuck***, much less apply its strict elements test. Instead, the Eleventh Circuit rested its lesser included holding on the ***Blockburger*** test applicable to Double Jeopardy analysis. Notably, the Eleventh Circuit acknowledged that "the offense of false filing has an element not required for tax evasion—i.e., the filing of a return." ***Kaiser,*** 893 F.2d at 1305. Under ***Schmuck***'s strict elements test, that would necessarily result in a conclusion that Section 7206(1) is not a lesser included offense of

Section 7201. But the Eleventh Circuit held that under ***Blockburger***, the analysis was not limited to a comparison of the elements but also the specific facts, which in ***Kaiser*** included the fact that "tax evasion [was] charged solely by means of filing a false tax return." 893 F.2d at 1306.

The Second Circuit, in ***United States v. Helmsley***, 941 F.2d 71 (2d Cir. 1991), also failed to cite ***Schmuck***, much less apply its strict elements test, when it held that a Section 7206 conviction merged into a Section 7201 conviction because it was a lesser included offense. In so holding, the Second Circuit cited pre-***Schmuck*** circuit law, including ***United States v. White***, 417 F.2d 89 (2d Cir. 1969), to hold "that where false returns "were 'incidental step[s] in the consummation of the completed offense of attempted defeat or evasion of tax' and as such ... constituted a 'crime within [a] crime' under the lesser included offense doctrine" then a conviction under Section 7206(1) for filing those false returns merges into a conviction under Section 7201 for the inclusive fraud of tax evasion." But ***Schmuck***'s rejection of the "inherent relationship" test in favor of the strict elements test also necessarily rejected the Second Circuit's "incidental steps" case law.

The D.C. Circuit, in ***United States v. Dale***, 991 F.2d 819 (D.C. Cir. 1993), similarly failed to even cite ***Schmuck***, much less apply its strict elements test. Instead, the D.C. Circuit also relied on the Second Circuit's pre-***Schmuck*** decision in ***White***, as well as other pre-***Schmuck*** cases, to conclude "that, on the facts here presented, the section 7206 [convictions] merge, as lesser included offenses, into the 'capstone' section 7201 tax evasion convictions."[13]

In sum, a proper application of the ***Schmuck*** strict elements test results in the conclusion that a Section 7206(1) offense is not a lesser included offense of evasion in violation of Section 7201, even if on the facts a jury could convict on the Section 7206(1) offense and not Section 7201. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should consider charging the Section 7206(1) false return count. If a defendant is convicted on both

[13] In ***Arguelles-Olivares v. Mukasey***, 526 F.3d 171, 175 (5th Cir. 2008), the Fifth Circuit expressed agreement with ***Dale*** in an immigration case examining whether an immigration statute permitted removal based upon a Section 7206 conviction or only a Section 7201 conviction. But in subsequently answering this immigration question in the affirmative in ***Kawashima v. Holder***, 565 U.S. 478 (2012), the Supreme Court "employ[ed] a categorical approach by looking to the statute defining the elements of the crime of conviction, rather than to the specific facts underlying the crime." 565 U.S. at 483.

counts and then argues the lesser count merges into the evasion count for purpose of sentencing or seeks dismissal of the lesser conviction, the procedural posture would permit a low-risk challenge to the erroneous circuit law.

8.11[4] Section 7207 as a Lesser Included Offense of Section 7201

Section 7207 provides, *inter alia*, "Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter," shall be guilty of a misdemeanor, with a statutory maximum of one year. The elements of Section 7207 are: (1) the defendant submitted a return, statement, or other document to the Internal Revenue Service; (2) the return, statement, or other document was false or fraudulent as to a material matter; and (3) the defendant acted willfully. ***Sansone v. United States***, 380 U.S. 343, 352 (1965).

In order for Section 7207 to be a lesser included offense of a Section 7201 count under ***Schmuck***'s elements test, the elements of Section 7207 must be a subset of the elements of Section 7201. But Section 7207 is not a lesser included offense of Section 7201 under ***Schmuck***'s elements test because Section 7207 requires an element not required for Section 7201. Similar to Section 7206, an element of Section 7207 that is not present in Section 7201 is the requirement of submitting a "list, return, account, statement, or other document." But Section 7201 does not require anything to be delivered or disclosed to the IRS. As previously noted, attempted tax evasion in violation of Section 7201 can be, and frequently is, committed by committing an act constituting attempted evasion without delivering or disclosing anything to the IRS. *See* ***Spies v. United States***, 317 U.S. 492, 499 (1943).

8.11[5] Dictum in **Sansone** *and* **Schmuck**

Prosecutors should be aware of dictum in the pre-***Schmuck*** case of ***Sansone v. United States***, 380 U.S. 343 (1965), stating that it is possible for Section 7203 failure to pay and Section 7207 offenses to be lesser included offenses of tax evasion. In ***Sansone***, a defendant convicted of Section 7201 tax evasion had sought an instruction that Sections 7207 and 7203 were lesser included offenses, based on the argument that the jury "could acquit him of the charged offense of willfully attempting to evade or defeat tax …, but still convict him of either of both of the asserted lesser-included offenses." 380 U.S. at 345. After concluding that income tax returns were within the purview of Section 7207, 380 U.S. at 349, the Court considered the lesser included issue presented, beginning with a statement of the applicable two-prong standard. The ***Sansone*** Court stated the first prong of the test — which ***Schmuck*** later held is only satisfied if the strict-elements test is met — as providing that "[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it, [is] entitled to an instruction which would permit a finding of guilt of the lesser offense." *Id.* at 349 (citing ***Berra v. United States***, 351 U.S. 131, 134 (1956)). ***Sansone*** then stated a second requirement, stating that "a lesser-offense charge is [nonetheless] not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses." *Id.* at 349-50. As ***Sansone*** explained, this means that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." *Id.* at 350.

Sansone ultimately held that the second requirement for giving a lesser included offense instruction was not satisfied on the facts, reasoning that the jury could not rationally have found the defendant guilty of Section 7203 or 7207 but acquitted on Section 7201 because the only disputed element — willfulness — was common to all three offenses. 380 U.S. at 351-55. But before so holding, ***Sansone*** stated that Section 7203 failure-to-pay and 7207 violations based on the filing of false returns could support lesser included instructions on different sets of facts. Noting Section 7201's status as "the capstone of a system of sanctions," ***Sansone*** stated that Section 7201 "necessarily includes among its elements actions which, if isolated from the others, contains lesser offenses in this hierarchical system of sanctions." 380 U.S. at 350-51. ***Sansone*** then applied this to Section 7203, stating that "[w]here there is, in a [Section] 7201 prosecution, a disputed issue of fact as to the existence of the requisite affirmative commission in addition to the [Section] 7203 omission, a defendant would, of course, be entitled to a lesser-included offense charge based on [Section] 7203." *Id.* at 351. ***Sansone*** similarly stated that, because "Section 7207 does not . . . require that the act be done as an attempt to evade or defeat taxes[,] [c]onduct could therefore violate [Section] 7207 without violating [Section] 7201 where the false statement, though material, does not constitute an attempt to evade or defeat taxation because it does not have the requisite effect of reducing the stated tax liability." *Id.* at 352.

Prosecutors confronted with an argument that a Section 7203 failure-to-pay or Section 7207 lesser included instruction is, notwithstanding ***Schmuck*****,** proper under

Sansone should advance three related arguments. First, prosecutors should argue that the statements in ***Sansone*** to the effect that such instructions could be proper under different facts are *dicta*; as noted above, ***Sansone***'s holding was only that the separate "independent prerequisite" for entitlement to a lesser included offense instruction — "that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater," ***Schmuck,*** 489 U.S. at 716 n.8 — was not satisfied. This "independent perquisite," as noted above at Chapter 8.11[1][b], is not technically part of the ***Schmuck*** elements test but a separate fact-based inquiry about whether the instruction is appropriate given the trial evidence. Second, prosecutors should argue that these *dicta* are no longer persuasive after ***Schmuck***, under which, as explained above in Chapters 8.11[2] and [4], neither Section 7203 nor 7207 are lesser included offenses of tax evasion. And third, for similar reasons, prosecutors should argue that even if these statements in ***Sansone*** were not dicta, they were implicitly overruled by ***Schmuck***'s express adoption of a strict elements test under which Sections 7203 and 7207 are not lesser included offenses of tax evasion.

Prosecutors should also be aware of dictum in ***Schmuck*** that cites ***Sansone***, which dictum some post-***Schmuck*** cases cite without actually applying the strict elements test. The ***Schmuck*** Court, in the part of its opinion observing that Rule 31(c) was intended to be a restatement of pre-existing law, stated that the strict elements test was the prevailing practice in the courts prior to the promulgation of Rule 31(c). 489 U.S. at 718-19. In a footnote, ***Schmuck*** stated that its "decisions after the adoption of Rule 31(c), while not formally adopting the elements approach, reflect adherence to it" as they "focused on the statutory elements of the individual offenses," citing ***Keeble v. United States***, 412 U.S. 205 (1973). With a "See also" cite, ***Schmuck*** also cited ***Sansone***, with a parenthetical stating, "analyzing the elements involved in 26 U.S.C. § 7207, and finding that they are a subset of the elements in 26 U.S.C. § 7201." See ***Schmuck***, 489 U.S. at 720 n.11. Although it's true that ***Sansone*** held that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense," it's also true that ***Sansone*** did not apply ***Schmuck***'s holding, 489 U.S. at 716, that no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." See ***Carter v. United States***, 530 U.S. 255 (2000) (applying the ***Schmuck*** strict elements test to hold that no lesser included jury instruction was permitted because the lesser offense required an element not in the charged offense).

Because the offenses under Sections 7203, 7206, and 7207 each contain an element not required by Section 7201, none are lesser included offenses under the ***Schmuck***'s elements test. Where circuit law is to the contrary and a defendant would be entitled to a lesser included instruction if requested, prosecutors should preserve the argument that ***Schmuck***'s citation of ***Sansone*** is dictum. In these circuits, prosecutors should also consider charging the lesser offense in the indictment, as discussed below.

8.11[6] – Charging Tax Evasion and Putative Lesser Included Offenses

While most requests are now made by defendants, "the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged." ***Keeble v. United States***, 412 U.S. 205, 208 (1973). Both the defendant and the government can thus request a lesser included offense instruction. *See, e.g.,* ***United States v. Smith***, 990 F.3d 607, 613 (8th Cir. 2021) (instruction "may be demanded by either the prosecution or the defense"); ***United States v. Lespier***, 725 F.3d 437, 450 (4th Cir. 2013).

But to be consistent with a proper application of ***Schmuck,*** prosecutors should not request a lesser included offense instruction for a tax evasion charge even when circuit law would permit a lesser instruction; instead, the government should charge both offenses.[14] *Cf.* ***United States v. Jose***, 425 F.3d 1237, 1247 (9th Cir. 2005) ("Prosecutors should not be discouraged from charging defendants with greater and lesser included offenses in separate counts under the same indictment," and such an approach "presents a 'cleaner package' to the jury.").

This approach is not only consistent with the government's position but also has the benefit of providing a potential low-risk way to challenge incorrect circuit law. In circuits where Section 7201 evasion has been found to have a lesser included offense, a defendant convicted on both counts can seek to have the lesser offense vacated, *see id.,* or merged into the evasion conviction, *see, e.g.,* ***Helmsley***, 941 F.2d at 99, but the government can then challenge the circuit's lesser-included-offense law without risking an appellate reversal of an evasion conviction. Prosecutors desiring to do this should consult with the Tax Division's Criminal Appeals & Tax Enforcement Policy Section.

[14] To be consistent with the government's position that Section 7201 has no lesser included offense under the ***Schmuck*** elements test, the government also should not seek an entry of judgment for a lesser included offense if a Section 7201 conviction is reversed on grounds not affecting the putatively lesser offense. *Cf.* ***Rutledge v. United States***, 517 U.S. 292, 306 (1996).

By not requesting a lesser included offense instruction, and instead charging both offenses, the government also avoids potential Double Jeopardy issues. In ***Green v. United States***, 355 U.S. 184, 190 (1957), the Supreme Court held that a jury's conviction on the lesser included offense, while being silent on the greater offense, was an "implicit acquittal" that precluded retrial for the greater offense even after the lesser offense was overturned on appeal. *See also* ***Price v. George***, 398 U.S. 323, 329 (1970). Some circuits, however, have held that ***Green*** and ***Price*** do not prohibit retrial for the greater offense if the jury was clearly deadlocked on that charge, rather than merely silent. *See* ***United States v. Morgan***, 929 F.3d 411, 423 (7th Cir. 2019); ***United States v. Williams***, 449 F.3d 635, 645-46 (5th Cir. 2006); ***United States v. Bordeaux***, 121 F.3d 1187, 1193 (8th Cir. 1997).

8.11[7] – Chart Summarizing Circuit Law and Recommendations

The chart below summarizes where the circuits stand, as of 2023, on whether certain offenses are a lesser-included offense of tax evasion and provides recommended responses to defense requests for an instruction. The chart states "May oppose" in circumstances where there is contrary circuit law but a basis to conclude that the law is not binding (because the contrary law is before ***Schmuck*** was decided, is unpublished, or is dicta). In these circumstances, prosecutors may oppose a requested instruction but should first consult with the Tax Division's Criminal Appeals & Tax Enforcement Policy Section.

As discussed in section 8.11[6], the government should not request a lesser included offense instruction, even when the circuit's law would allow it. In addition, prosecutors should consider whether the evidence at trial would preclude an instruction, as discussed in section 8.11[1][b], and if opposing an instruction on those grounds, should also object on legal grounds (while acknowledging where appropriate that circuit law is to the contrary).

Circuit	**Failure to File (§ 7203)**	**Failure to Pay (§ 7203)**	**False Return (§ 7206)**[15]
1st	Oppose (no circuit law)	Oppose (no circuit law)	May oppose (contrary circuit law is pre-***Schmuck***)

[15] In all the circuits finding § 7206 to be a lesser-included offense of evasion, a false return was alleged as an affirmative act of evasion.

Circuit	Failure to File (§ 7203)	Failure to Pay (§ 7203)	False Return (§ 7206)[15]
2d	May oppose (contrary circuit law is pre-***Schmuck***)	Oppose (no circuit law)	Do not oppose (contrary post-***Schmuck*** circuit law)
3d	Oppose (no circuit law)	Do not oppose (contrary post-***Schmuck*** circuit law)	Oppose (no circuit law)
4th	May oppose (contrary circuit law is pre-***Schmuck***)[16]	Oppose (no circuit law)	May oppose (contrary post-***Schmuck*** circuit law is unpublished)
5th	Do not oppose (contrary post-***Schmuck*** circuit law)	Oppose (no circuit law)	May oppose (contrary post-***Schmuck*** circuit law is dicta)
6th	Oppose (unpublished post-***Schmuck*** law supports opposing)	Oppose (no circuit law)	Oppose (no circuit law)
7th	Oppose (published post-***Schmuck*** law supports opposing)	Oppose (no circuit law)	Oppose (contrary circuit law is pre-***Schmuck*** and dicta)
8th	Oppose (circuit law is inconclusive)	Oppose (no circuit law)	May oppose (contrary circuit law is pre-***Schmuck***)
9th	Oppose (published post-***Schmuck*** law supports opposing)	May oppose (contrary circuit law is pre-***Schmuck*** or unpublished)	May oppose (contrary circuit law is pre-***Schmuck***)
10th	Oppose (no circuit law)	Oppose (no circuit law)	May oppose (multiplicity case permits opposing and contrary post-***Schmuck*** circuit law is dicta)
11th	May oppose (post-***Schmuck*** case referencing pre-***Schmuck*** case in dicta)	Oppose (no circuit law)	Do not oppose (contrary post-***Schmuck*** circuit law)
DC	Oppose (no circuit law)	Oppose (no circuit law)	Do not oppose (contrary post-***Schmuck*** circuit law)

[16] The Fourth Circuit's law also applies only when the failure to file is charged as an affirmative act, which should not be done in any event.

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9.00 WILLFUL FAILURE TO COLLECT OR PAY OVER TAX

9.01 STATUTORY LANGUAGE: 26 U.S.C. § 7202

§7202. ***Willful failure to collect or pay over tax***

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined . . . or imprisoned not more than five years, or both, together with the costs of prosecution.[1]

9.02 TAX DIVISION POLICY

Section 7202 should be used to prosecute persons who fail to comply with their legal obligations to collect, account for, and pay over taxes. Prosecutors also should consider charges under 18 U.S.C. § 1341 (mail fraud) or § 1343 (wire fraud) if the defendant embezzled funds that were held in trust.

9.03 GENERALLY

This statute describes three ways it can be violated: (1) a willful failure to collect; (2) a willful failure to truthfully account for; and (3) a willful failure to pay over. It was designed primarily to assure compliance by third parties obligated to collect taxes or to deduct from wages paid to an employee the employee's share of Federal Insurance Contribution Act (FICA) taxes and the withholding tax on wages applicable to individual income taxes. The withheld sums are commonly referred to as "trust fund taxes." *See* ***Slodov v. United States***, 436 U.S. 238, 242-43 (1978); ***United States v. Evangelista***, 122 F.3d 112, 114 (2d Cir. 1997).[2] Although the question whether Section 7202 applies only to trust fund taxes or more broadly includes the employer's portion of FICA taxes has not been judicially determined, the Supreme Court's discussion of Section 6672, the civil

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[1] For offenses under Section 7202, the maximum permissible fine is at least $250,000 for individuals and at least $500,000 for organizations. 18 U.S.C. § 3571(b) &. (c). Alternatively, "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss . . . ." 18 U.S.C. § 3571(d).

[2] "Trust fund taxes," "collected taxes," and "third-party taxes," are used interchangeably to refer to these types of taxes. *See, e.g.,* ***Slodov***, 436 U.S. at 249; ***Davis v. United States***, 961 F.2d 867, 869 (9th Cir. 1992); ***In re Markos Gurnee P'ship***, 163 B.R. 124, 130 (Bankr. N.D. Ill. 1993).

counterpart to Section 7202, is illuminating. In ***Slodov***, the Court reviewed the legislative history of the statutory phrase "any person required to collect, truthfully account for, and pay over any tax imposed by this title," added in 1954 to the predecessor statutes to Sections 6672 and 7202, and concluded that Congress intended to limit the application of civil penalties under Section 6672 to violations of duty with respect to collected or withheld taxes -- like the employee's portion of employment tax -- and not direct taxes like the employer's portion of FICA or employer income taxes. *See* 436 U.S. at 249-50. That view is embodied in the Treasury Regulations promulgated under Section 6672. *See* Treas. Reg. § 301.6672-1 (stating in part that "[t]he penalty imposed by section 6672 applies only to the collection, accounting for, or payment over of taxes imposed on a person other than the person who is required to collect, account for, and pay over such taxes"). Additionally, that view is supported in the criminal context by the Department of Justice's position in ***United States v. Musacchia***, 955 F.2d 3, 4 (2d Cir. 1991), in which the Department took the extraordinary step of moving to vacate the defendant's conviction under Section 7202 on the ground that the motor fuel excise tax was a direct tax on that defendant and not a collected tax within the purview of Section 7202. As a result, the IRS and the Tax Division recommend that the prosecutor charge only that portion of employment tax that was withheld or collected from the employee.[3] The employer's portion of the employment taxes should be treated as relevant conduct, increasing the total tax loss to be considered by the sentencing court.

Alternatively, prosecutors may charge violations of duty with respect to both the employee and employer portions of employment tax as evasion of employment tax, in violation of 26 U.S.C. § 7201. *See generally* ***United States v. McKee***, 506 F.3d 225, 233-34 (3d Cir. 2006); ***United States v. Butler***, 297 F.3d 505, 509 (6th Cir. 2002).

9.04 ELEMENTS

To establish a violation of Section 7202, the prosecutor must prove the following elements beyond a reasonable doubt:

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[3] Because the civil penalties authorized by Section 6672 arise directly from a breach of duty with respect to collected or withheld payroll taxes, it is easy to confuse the two conceptually, and to treat them as interchangeable. They are not. Thus, it is vital to exercise care in selecting the proper theory of prosecution when making a charging decision, and to follow through on that theory at trial. The failure to recognize the distinction between collected taxes and Section 6672 penalties can have disastrous consequences. *See. e.g.,* ***United States v. Farr,*** 536 F.3d 1174 (10th Cir. 2008) (holding that government constructively amended indictment charging evasion of collected tax, where government proved only that defendant had evaded Section 6672 liability).

1. Duty to collect, and/or to truthfully account for, and/or pay over a tax;

2. Failure to collect, ***or*** truthfully account for, and/or pay over the tax; and

3. Willfulness.

United States v. Thayer, 201 F.3d 214, 219-21 (3d Cir. 1999); *see also* ***United States v. Simkanin***, 420 F.3d 397, 404-05 (5th Cir. 2005).

Cases prosecuted under this statute usually involve FICA (Social Security and Medicare taxes) and federal income tax withheld from wages. An employer's duty to collect, truthfully account for, and pay over trust fund taxes arises under Sections 3102(a) and 3402 of the Internal Revenue Code. *See generally* ***Davis v. United States***, 961 F.2d 867, 869 (9th Cir. 1992). Under Section 7202, it is the person or persons with the duty to collect, truthfully account for, and pay over who become culpable when there is a failure to perform this duty.[4] The term "person" is "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). Section 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."[5]

A person is responsible for collecting, accounting for, and paying over trust fund taxes if he or she has "the authority required to exercise *significant* control over the [employer's] financial affairs, regardless of whether [the individual] exercised such control in fact." ***United States v. Jones***, 33 F.3d 1137, 1139 (9th Cir. 1994) (interpreting "person" under 26 U.S.C. § 6672; internal quotation omitted) (emphasis in original). Examples of the criteria used to determine the individual(s) with the duty to collect, truthfully account for, and pay over include the following:

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[4] Remember that 18 U.S.C. § 2(a) imposes criminal liability on aiders and abetters; and 18 U.S.C. § 2(b) imposes criminal liability on one who causes an intermediary to commit a criminal act, even if the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged. Thus, one who is not personally required to truthfully collect, account for, and pay over can still be charged with and convicted of a violation of Section 7202.

[5] An identical definition of "person" applies to 26 U.S.C. § 6672, the civil counterpart to Section 7202. *See* 26 U.S.C. § 6671(b).

(1) the duties of the officer as outlined by the corporate by-laws;

(2) the ability of the individual to sign checks of the corporation;

(3) the . . . signature on the employer's federal employment or other tax returns;

(4) the identity of the officers, directors and shareholders of the corporation;

(5) the identity of the individuals who hired and fired employees; and

(6) the identity of the individual(s) who were in charge of the financial affairs of the corporation.

United States v. Carrigan, 31 F.3d 130, 133 (3d Cir. 1994); *see also* **United States v. McLain**, 646 F.3d 599, 603 (8th Cir. 2011) (employers, official or officers are responsible under section 7202), *cert. denied,* No 11-937 (Mar. 19, 2012). ***Purcell v. United States***, 1 F.3d 932, 936 (9th Cir. 1993) (responsible persons are "those who 'had the final word as to what bills should or should not be paid, and when'" (quoting ***Wilson v. United States***, 250 F.2d 312, 316 (9th Cir. 1958))); ***Davis v. United States***, 961 F.2d at 869, 873 (president and majority shareholder liable under § 6672 for paying other creditors rather than delinquent taxes); ***Hochstein v. United States***, 900 F.2d 543, 547 (2d Cir. 1990) (factors indicating responsible person status include duties outlined in corporate by-laws, ability to sign checks, status as officer or director, and ability to hire or fire employees); ***Gephart v. United States***, 818 F.2d 469, 473 (6th Cir. 1987) (describing five of the six criteria listed in ***Carrigan*** (all except signature on employer's tax returns)); ***Neckles v. United States***, 579 F.2d 938, 940 (5th Cir. 1978) (power and authority to pay creditors is sufficient, official position not required). More than one individual can be a responsible officer. ***Gephart***, 818 F.2d at 473.

The key to liability under Section 7202 is the person's authority with respect to corporate finances, not general management of the business. *See* ***Hochstein***, 900 F.2d at 547 (central question "is whether the individual has significant control over the enterprise's finances"); ***Jones***, 33 F.3d at 1140-41 (reversing finding of "responsible person" given absence of authority to pay taxes, even though influential in payment to creditor); ***Alsheskie v. United States***, 31 F.3d 837, 839-40 (9th Cir. 1994) (defendant not "responsible" when he submitted an affidavit indicating that the parent corporation "essentially precluded [him] from exercising the degree of autonomy, authority and control necessary to be able to pay the payroll tax liabilities . . . on a timely basis").

A responsible person who withholds taxes from his own wages, but fails to pay them over to the IRS, may not claim credit for the withheld taxes on his personal income tax returns. Such funds were never "actually withheld" because they never functionally left the control of the taxpayer. ***May v. Comm'r***, 137 T.C. 147, 152-154 (2011); ***United States v. Blanchard***, 618 F.3d 562, 576 (6th Cir. 2010).

The Tax Division's position historically has been that either (1) a willful failure to truthfully account for or (2) a willful failure to pay over constitutes a breach of the obligation to truthfully account for and pay over. Under this theory, a willful failure to pay over after the filing of a return making a truthful accounting leaves the duty as a whole unfulfilled and the responsible person subject to prosecution. This position is supported by ***Slodov***, wherein the Supreme Court stated that a person could be liable under Section 6672, the civil counterpart to Section 7202, if the person willfully failed to pay over the tax, even if he or she was not associated with the taxpayer-employer at the time the tax was collected or accounted for, assuming there were funds available to pay the trust fund taxes at the time the person became associated with the taxpayer-employer. 436 U.S. at 259-60. In ***United States v. Poll***, a pre-***Slodov*** case, the Ninth Circuit suggested a contrary reading of the statute, stating that "[w]e continue to regard the crime as requiring two failures to act, willful failure to truthfully account *and* willful failure to pay over." 521 F.2d 329, 334-35 n.3 (9th Cir. 1975), *overruled on other grounds*, ***United States v. Easterday,*** 564 F.3d 1004 (9th Cir. 2008), *cert. denied*, 130 S. Ct. 490 (2009). However, the Second and Third Circuits rejected the ***Poll*** court's interpretation. *See* ***United States v. Evangelista,*** 122 F.3d 112, 121-22 (2d Cir. 1997); ***Thayer,*** 201 F.3d at 220-21 (adopting ***Evangelista***'s analysis and noting that to interpret the statute in the conjunctive would lead to the incongruous result of criminalizing a failure to collect a tax, while permitting the collecting of the tax, reporting it to the IRS, and spending it for one's "own selfish purposes") (internal quotation omitted). Ultimately, the Ninth Circuit itself agreed with ***Evangelista*** and held that the statement in ***Poll*** that Section 7202 required both a failure to truthfully account for and a failure to pay over was dictum. ***United States v. Gilbert***, 266 F.3d 1180, 1183 (9th Cir. 2001). ***Gilbert*** concluded that there is an obligation both to withhold and to pay over the tax, and that an individual who fails to perform one of these required duties is subject to conviction under Section 7202. ***Id***. at 1184. Consequently, the court held that the defendant who had collected and truthfully accounted for the withholding taxes was nevertheless properly convicted under Section 7202 for willfully failing to pay over the withheld taxes. ***Id***. at 1183-85. Thus, ***Gilbert*** confirms the Tax Division's position that a person violates Section 7202 if he or she willfully fails to collect the tax, willfully fails to truthfully account for the tax, **or** willfully fails to pay over the tax.

The element of willfulness under Section 7202 is the same as in other offenses under Title 26. *See* Section 8.08, *supra*. It must be shown that a defendant voluntarily and intentionally acted in violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 200 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973). Section 7202 enforces the requirement that employers and "responsible persons" withhold trust fund taxes from the gross wages of employees, truthfully account for those withheld taxes, and pay over those taxes to the United States Treasury. Under Section 6672, the civil counterpart to Section 7202, a voluntary, conscious, and intentional act of paying the claims of other creditors, including the wage claims of employees, instead of the trust fund taxes, constitutes a "willful" violation of the duty to pay over. *See* ***Sorenson v. United States***, 521 F.2d 325, 328 (9th Cir. 1975). Similarly, it is the Tax Division's position that a person willfully fails to pay over tax under Section 7202 when, instead of paying the employment taxes, he voluntarily and intentionally uses the money to pay the claims of other creditors, including wages to employees, with knowledge that the collected funds and the employer's portion are due to be paid over to the United States.

Evil motive or bad purpose is not necessary to establish willfulness under the criminal tax statutes. ***Pomponio***, 429 U.S. at 12. But, in ***United States v. Poll***, 521 F.2d 329 (9th Cir. 1975), *overruled*, ***United States v. Easterday***, 564 F.3d 1004 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 490 (2009), a pre-***Pomponio*** case, the Ninth Circuit held that if an employer-taxpayer lacked the resources to pay the tax at the time it was due, the prosecutor had the burden of proving "that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer." 521 F.2d at 333. Stating it was "guided by ***United States v. Andros***,"[6] which in turn was "rooted in ***Spies v. United***

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[6] ***United States v. Andros*** held that "[t]o establish the offense of a willful failure to pay the taxes assessed [under 26 U.S.C. 7203], the Government was required to prove that the financial circumstances of the taxpayer were such that, on or about . . . [the date on which the taxpayer failed to pay the tax], the taxpayer possessed sufficient funds to be able to

States, 317 U.S. 492, 497-98 (1943)," the ***Poll*** court focused on the statement in ***Spies*** that "'*[w]e would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer*.'" 521 F.2d at 333 (emphasis in ***Poll***). The ***Poll*** court then opined that "the relevance of the taxpayer's financial circumstances is not . . . irrelevant to the proof of willfulness under 26 U.S.C. § 7202." Based on its belief that proof of willfulness required an "evil motive" or "want of justification," the Ninth Circuit then concluded that willfulness under Section 7202 required the prosecution to prove beyond a reasonable doubt that if the defendant was unable to pay the taxes when due, that inability was the result of an intentional act without justification. 521 F.2d at 333.

In ***United States v. Easterday***, 564 F.3d 1004, 1005 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 490 (2009), the Ninth Circuit held that in light of ***Pomponio***, ***Poll*** is no longer binding authority for the proposition that a defendant's ability to pay his tax liability is relevant to the determination of willfulness under 26 U.S.C. § 7202, because that requirement "was premised on a definition of willfulness that included some element of evil motive." The Tax Division agrees that ***Poll***'s requirement that the government must show a lack of justification for the expenditures that created or caused the lack of funds was abrogated by ***Pomponio***, which clarified the Supreme Court's jurisprudence on the meaning of "willfulness" in the context of the criminal tax statutes.[7] As ***Pomponio*** explained, "'the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty.'" 429 U.S. at 12 (quoting ***Bishop***, 412 U.S. at 360). The Court pointed out that this standard was not modified by "[o]ur references to other formulations of the standard" -- i.e., "bad faith or evil intent," "'*evil motive and want of justification in view of all the financial circumstances of the taxpayer*," and "knowledge that the taxpayer should have reported more income than he did." "On the contrary," the Court went on, "as the other Courts of Appeals that have considered the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty." ***Pomponio,*** 429 U.S. at 12 (citations omitted and emphasis added); *see also* ***Cheek v. United States***, 498 U.S. 192, 201 ("Taken together, ***Bishop*** and ***Pomponio*** conclusively establish that the standard for the statutory

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meet his legal obligation to the Government and that he voluntarily and intentionally did not pay such taxes." 484 F.2d 531, 533-34 (9th Cir. 1973).

[7] Given the Division's position, prosecutors should avoid relying on ***Poll*** when seeking to offer evidence at trial of an employer or responsible person's ability to pay the payroll taxes.

willfulness requirement is the 'voluntary, intentional violation of a known legal duty'" (quoting ***Bishop***, 412 U.S. at 360)).

Hence, it is the Tax Division's position, as adopted by the Ninth Circuit in ***Easterday***, that to prove a willful failure to pay over, all the government need show is that payments were voluntarily and intentionally made to creditors other than the United States with knowledge that the withheld funds were due to the United States, and that there is no separate requirement that the government prove that the payments were without justification.

Willfulness can be proved by circumstantial evidence. *See* ***United States v. Radtke***, 415 F.3d 826 (8th Cir. 2005) (evidence of defendants' knowledge of cash payments to employees from which no tax was withheld sufficient to establish defendants' intent to defraud as to several fraud and tax offenses, including 26 U.S.C. § 7202 and 18 U.S.C. § 371 conspiracy to defraud the IRS and to commit violations of 26 U.S.C. §§ 7202 and 7206(1)); *see also* ***United States v. Scharf***, 558 F.2d 498, 501 (8th Cir. 1977) (evidence that the defendant had altered records was admissible for the purpose of showing "motive, intent, and willfulness."); ***United States v. Bailey***, 789 F. Supp. 788, 814 (N.D. Tex. 1992) (failure, for almost a decade, to pay over taxes withheld from employees' paychecks "compels a finding of willfulness").

9.04[1] Motor Fuel Excise Tax Prosecutions

Section 7202 is not applicable to those who have the duty to pay, as opposed to collect and pay over, the tax at issue. Section 7202 applies to a person who is not the taxpayer but is under a duty to collect the tax from the taxpayer and then truthfully account to the government for the collected tax and pay it over.

Often, the one obligated to pay a tax will pass it on to another, by, for example, including it as part of the price of goods. But the fact that the taxpayer "collects" the tax from another in this sense does not mean that he is responsible under the law for collecting the tax and thus potentially subject to prosecution under Section 7202. The practice of passing on the motor fuel excise tax imposed by 26 U.S.C. § 4081 as part of the purchase price is common in the motor fuel industry. *See generally* ***Janus Petroleum Co., Inc. v. United States***, 915 F. Supp. 556, 557 (E.D.N.Y. 1996); ***Cook Oil Co., Inc. v. United States***, 919 F. Supp. 1556, 1562 (M.D. Ala. 1996), *aff'd,* 108 F.3d 344 (11th Cir. 1997). There is no obligation, within the meaning of Section 7202, however, to collect and pay over these taxes. *See* ***United States v. Musacchia***, 955 F.2d 3, 4 (2d Cir. 1991) (vacating defendant's conviction under Section 7202 after being advised by Department of Justice that Section 7202 "does not apply to the gasoline taxes at issue here"). Consequently, prosecutors should take great care in excise tax cases to ensure that only those persons with a duty to collect the tax -- not those with the duty to pay the tax -- are charged with violations of Section 7202.

9.05 LESSER INCLUDED OFFENSE CONSIDERATIONS

The law on lesser included offenses is discussed in depth, *supra*, at § 8.11.

A lesser included offense is an offense that is not charged but that is "necessarily included" in a charged offense. Fed. R. Crim. P. 31(c)(1). In ***Schmuck v. United States***, 489 U.S. 705 (1989), the Supreme Court adopted a strict elements test for applying Rule 31, holding that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *Id*. at 716. Accordingly, no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." *Id*.

There are few cases discussing lesser included offense in the § 7202 context but courts have held that § 7207 is not a lesser included offense of § 7202. The elements of § 7207 are:1) the defendant submitted a return, statement, or other document to the IRS; 2) the return, statement, or other document was false or fraudulent as to a material matter; and 3) willfulness. *See* ***Sansone v. United States***, 380 U.S. 343, 352 (1965). As the Eighth Circuit noted, other than willfulness, Section 7202 and Section 7207 are different statutes. *See* ***United States v. Scharf***, 558. F.2d 498, 503 (8th Cir. 1977). More recently, the Sixth Circuit repeated this point, observing that the "only element those crimes share is willfulness." ***United States v. Cheff***, 829 F.App'x 104, 108 (6th Cir. 2020). Put differently, every element of § 7207, except for willfulness, is an element that is not part of a § 7202 offense. Thus, § 7207 is not a lesser included offense of § 7202.

9.06 VENUE

If a statute does not indicate where Congress considers the place of committing a crime to be, "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). Although the Tax Division has not located any case addressing the issue, venue in a Section 7202 prosecution would appear to be proper in the judicial district in which the defendant was required to collect, truthfully account for, or pay over the tax.

For a general discussion of venue, *see* Section 6.00, *supra*.

9.07 STATUTE OF LIMITATIONS

There is a six-year statute of limitations period for prosecutions under Section 7202. 26 U.S.C. § 6531(4); *see* ***United States v. Adam***, 296 F.3d 327, 331-32 (5th Cir. 2005*);* ***United States v. Gilbert***, 266 F.3d 1180, 1186 (9th Cir. 2001); ***United States v. Gollapudi,*** 130 F.3d 66, 70 (3d Cir. 1997); ***United States v. Evangelista,*** 122 F.3d 112, 119 (2d Cir. 1997) (reaffirming prior holding in ***United States v. Musacchia***, 900 F.2d 493, 499-500 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3, 4 (2d Cir. 1991), that six-year statute of limitations applied to charges brought under Section 7202); ***United States v. Porth***, 426 F.2d 519, 522 (10th Cir. 1970); *see also* ***United States v. Creamer***, 370 F. Supp. 2d 715, 725 (N.D. Ill. 2005);[8] ***United States v. Anglin,*** 999 F. Supp. 1378, 1379-80 (D. Haw. 1998); ***United States v. Blanchard***, 618 F.3d 562, 568-69 (6th Cir. 2010).

Be aware, however, that two district courts that have considered the question have concluded that the statute of limitations for Section 7202 prosecutions is three years. ***United States v. Brennick,*** 908 F. Supp. 1004, 1019 (D. Mass. 1995); ***United States v. Block***, 497 F. Supp. 629, 630-32 (N.D. Ga. 1980), *aff'd on other grounds,* 660 F.2d 1086 (5th Cir. 1980).

In the ***Brennick/Block*** view, the omission of the language "collect, account for, and pay over" from the subsections of 26 U.S.C. § 6531 which establish the longer six-year period of limitations demonstrates that Congress did not intend to make the failure to "pay over" third party taxes subject to the six-year statute of limitations. ***Brennick***, 908 F. Supp. at 1019; ***Block***, 497 F. Supp. at 630-32. The ***Block*** court also noted that section

[8] The district court incorrectly dismissed the Section 7202 counts in its 2005 opinion, notwithstanding the court's conclusion that the six-year statute of limitations applied. The court vacated the dismissal of those two counts in a later decision. *See* ***United States v. Creamer***, No. 04 CR 281-1, 2006 WL 2037326, at *1 (N.D. Ill. Apr. 4, 2006).

6531(4) was not directed at a class of offenses but rather to "the offense of willfully failing to pay any tax." 497 F. Supp. at 632; *see* 26 U.S.C. § 7203. The court reasoned that it was "quite clear" that failure to "pay over" third-party taxes was substantively different from a failure to "pay" taxes; thus, the exception contained in Section 6531(4) was found not to apply to the failure to pay over third-party taxes. 497 F. Supp. at 632; *but see* ***Wilson v. United States***, 250 F. 2d 312, 320 (9th Cir. 1958) (finding no distinction between the duty to pay ordinary taxes and the duty to pay over trust fund taxes). Likewise, the district court in ***Brennick*** concluded that Section 7202 does not describe a Section 6531(4) exception of failing to make any return. Rather, according to ***Brennick,*** Section 6531(4) "plainly refers only to a single offense . . . clearly described by the language of Section 7203." 908 F. Supp. at 1019.

The Second Circuit, in ***Musacchia***, reviewed the ***Block*** decision and concluded that the district "court's analysis is not convincing." ***Musacchia***, 900 F.2d at 500, *vacated in part on other grounds*, 955 F.2d at 4. The ***Musacchia*** court found that, although 26 U.S.C. § 6531(4) does not track the language of section 7202 exactly, the terms "pay" and "pay over" were used interchangeably by the Supreme Court in deciding ***Slodov***, 436 U.S. at 249, and thus the fact that Section 6531(4) uses the term "pay" rather than "pay over" is not dispositive. 900 F.2d at 500.

The ***Musacchia*** court found persuasive the government's argument that "it would be inconsistent for Congress to have prescribed a six-year limitations period for the misdemeanor offense defined in 26 U.S.C. § 7203 . . . while providing only a three-year limitation period for the felony offense defined in section 7202." 900 F.2d at 500. The court also noted that the language of section 6531(4) supports the conclusion that the six-year limitations period applies in a section 7202 prosecution. ***Musacchia***, 900 F.2d at 500.

To resolve any doubt that ***Musacchia*** is still good law after being vacated in part, the Second Circuit in ***Evangelista*** explicitly "reaffirm[ed] the holding of the original ***Musacchia*** opinion that 'a six year statute of limitations applies to the offense defined by 26 U.S.C. § 7202.'" 122 F.3d at 119 (citations omitted). In so doing, the Second Circuit also implicitly rejected ***Brennick,*** an opinion on which it relied for other propositions. ***Id***. The Third Circuit in ***Gollapudi*** explicitly rejected ***Brennick*** and ***Block***, relying instead on the reasoning in ***Musacchia.*** 130 F.3d at 70-71. To the ***Gollapudi*** court, it was clear that where Congress intended to limit the applicability of Section 6531 exceptions, it unambiguously did so by references to specific sections of the code. 130 F.3d at 70-71; *see* §§ 6531(5)-(8). Congress also chose to include exceptions to the three-year period under Section 6531 by general descriptions of proscribed conduct. *See* ***Gollapudi***, 130 F.3d at 70; §§ 6531(1)-(4). Consequently, "the language of section 6531(4) -- applying the six-year statute of limitations to the 'offense of willfully failing to pay any tax, or make any return . . . at the time or times required by law or regulation' -- suggests that it applied to any of such several sections of the code that define such an offense," and should not be limited, as ***Brennick*** and ***Block*** held, to Section 7203. ***Gollapudi***, 130 F.3d at 71 (citations omitted). The Ninth Circuit in ***Gilbert*** reached the same result, relying on the plain language of the statute and the holdings of the Second Circuit in ***Evangelista***, the Third Circuit in ***Gollapudi***, and the Tenth Circuit in ***Porth***, to conclude that the six-year statute of limitations under Section 6531(4) applies to Section 7202. ***Gilbert***, 266 F.3d at 1185-86. The Fifth Circuit in ***Adam***, 296 F.3d at 331-32, followed suit, relying on the plain language of Section 6531(4) and other circuit's rulings, rejecting the ***Block*** ruling, and holding that the six-year statute of limitations applies to Section 7202.

It is the view of the Tax Division that ***Adam***, ***Gilbert***, ***Gollapudi***, ***Evangelista***, ***Musacchia***, ***Porth***, ***Creamer***, and ***Anglin*** are correctly decided and that the six-year statute of limitations provided for in Section 6531(4) is applicable to prosecutions under Section 7202.

9.08 SENTENCING

9.09[1] USSG § 3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases

The Sentencing Guidelines provision applicable to offenses under 26 U.S.C. § 7202, which proscribes a willful failure to collect, account for, and pay over trust fund employment taxes, is USSG § 2T1.6. Section 2T1.6 directs that the base offense level for Section 7202 is determined by the Section 2T4.1 Tax Table; Section 2T1.6 does not contain any enhancements for specific offense characteristics. USSG § 2T1.6(b) does contain a cross reference indicating that the base offense level is to be determined by USSG § 2B1.1 (Theft, Property Destruction, and Fraud) "[w]here the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it," if the resulting offense level is greater. Section 3B1.2 of the Sentencing Guidelines, entitled "Abuse of Position of Trust of Use of Special Skill," provides, in pertinent part, that: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics."

In at least two cases, the Courts of Appeals have reversed the imposition of the Section 3B1.2 abuse-of-trust enhancement in a Section 7202 trust-fund case. In ***United States v. May***, 568 F.3d 597 (6th Cir. 2009), the court held that the enhancement can be applied only where the defendant abused a position of trust vis-a-vis the victim, that the IRS is the victim of a Section 7202 offense, and that the defendant did not hold a position of trust vis-a-vis the IRS. In ***United States v. DeMuro***, Nos. 11-1887 & 11-1941, 2012 WL 1382985 (3d Cir. Apr. 23, 2012), the court similarly held that the defendants were not in positions of trust vis-a-vis the IRS where the defendants had been required by 26 U.S.C. § 7512 to establish a segregated bank account for withheld taxes.

There is an inter-circuit conflict as to whether a defendant must occupy a position of trust vis-a-vis the victim of the count of conviction, or whether the Section 3B1.2 enhancement may be applied where the abuse of trust occurred with respect to uncharged conduct that significantly facilitated the count of conviction. ***See United States v. Friedberg***, 558 F.3d 131, 133-35 (2d Cir. 2009) (identifying conflict). In those circuits limiting the enhancement to situations where the defendant held a position of trust vis-a-vis the victim, prosecutors should be cautious about asserting that the defendant held a position of trust vis-a-vis the IRS. In those circuits that allow uncharged conduct to be the basis for the Section 3B1.2 enhancement, the employees in a Section 7202 prosecution might be considered the "victims" of the defendant's embezzlement, as contemplated by USSG § 2T1.6(b), but the force of that position is somewhat undermined by the fact that employees automatically receive credit for taxes that are "actually withheld" even if the monies are not paid over to the government. Treasury Regulation (26 C.F.R.) § 1.31-1(a). And although the definition of a "responsible person" for Section 7202 purposes is broader than the position-of-trust definition used in Section 3B1.2 -- meaning that the enhancement can only apply to a subset of Section 7202 cases -- defendants are sure to argue that an abuse of trust is already included in the base offense level for a Section 7202 "trust fund" offense. See § 3B1.2 ("This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics.")

In sum, there is litigation risk in seeking the USSG § 3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases. As the ***May*** and ***DeMuro*** cases illustrate, a sentence that is otherwise valid may be vacated on appeal due to the imposition of that enhancement. In a Section 7202 prosecution where a defendant's egregious abuse of a position of trust is clearly not adequately reflected in the offense level, prosecutors should consider seeking a variance under Section 3553(a) as opposed to the Section 3B1.2 enhancement.

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10.00 FAILURE TO FILE, SUPPLY INFORMATION OR PAY TAX

10.1 STATUTORY LANGUAGE: 26 U.S.C. § 7203

§7203. ***Willful failure to file return, supply information, or pay tax***

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined . . ., or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year."[1]

10.2 TAX DIVISION POLICY

The misdemeanor offense of willful failure to file a tax return, pay tax, keep records or supply information should only be used when a defendant failed to comply with an affirmative requirement of the Internal Revenue Code or regulations and did not commit any act or omission as part of an attempt to evade taxes or obstruct the IRS. Cases involving individuals who fail to file tax returns or pay a tax but who also commit acts of evasion or obstruction should be charged as felonies under Section 7201 or Section 7212(a) to avoid inequitable treatment. As an example, a defendant who commits tax evasion, fails to file a tax return, and fails entirely to pay all taxes due should not be

[1] For the misdemeanor offenses set forth in section 7203, the maximum permissible fine is at least $100,000 for individuals and at least $200,000 for organizations. For felony offenses under section 7203 involving willful violations of section 6050I, the maximum permissible fine is at least $250,000 for individuals and at least $500,000 for organizations. 18 U.S.C. § 3571(b) & (c). Alternatively, "[i]f any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain ortwice the gross loss....... " 18 U.S.C. § 3571(d).

given more lenient treatment than a defendant who files a false tax return and fails to pay only a portion of taxes due.

10.3 GENERALLY

Section 7203 covers four different situations, each of which constitutes a failure to timely perform an obligation imposed by the Internal Revenue Code: (1) failure to pay an estimated tax or tax, (2) failure to make (file) a return, (3) failure to keep records, and (4) failure to supply information.

With the exception of cases involving willful violations of any provision of IRC § 6050I, all of the offenses under Section 7203 are misdemeanors. Therefore, except for Section 6050I felonies, Section 7203 prosecutions may be initiated either by information or indictment. Reference should be made to Section 25.00, *infra*, for additional discussion of violations of Section 6050I.

The charge most often brought under Section 7203 is the failure to make (file) a return. A number of cases are also brought under Section 7203 for failure to pay a tax. Note that the attempt to evade or defeat the payment of a tax is a felony under Section 7201. The difference in the offenses is that a failure to file or pay offense under Section 7203 involves a failure perform a specified act at the time required by law (an omission), whereas there must be an affirmative act or a "willful commission" to satisfy the requirements of a Section 7201 felony. ***Sansone v. United States***, 380 U.S. 343, 351-52 (1965). By its express terms, Section 7203 does not apply to a "failure to pay an estimated tax" if there is no "addition to tax" pursuant to the rules provided for in Section 6654 (Failure By Individuals To Pay Estimated Income Tax) and Section 6655 (Failure By Corporation To Pay Estimated Tax).

Few cases are brought charging a failure to supply information, possibly because of the three year statute of limitations. See Section 10.05[8], *infra*. The charge of failing to "keep any records" is also not commonly used. Consequently, these charges are not treated separately in this Manual.

10.4 PERSON LIABLE

Each of the categories set forth in Section 7203 specifies a distinct and separate obligation. Failure to perform an obligation in any one of the categories may constitutean offense. *See* ***Sansone v. United States***, 380 U.S. 343, 351 (1965). An offender may be charged with failure to perform each obligation as often as the obligation arises. *See*, *e.g.*, ***United States v. Harris***, 726 F.2d 558, 560 (9th Cir. 1984) (defendant who failed to file for three years guilty of three separate offenses rather than one continuing offense); ***United States v. Stuart***, 689 F.2d 759, 763 (8th Cir. 1982) (same).

Any "person" who fails to perform an obligation imposed by the Internal Revenue Code and the applicable regulations may be subject to prosecution under Section 7203. The term "person" is "construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(1). Section 7343 extends the definition of "person" to include "an officer or employee of a corporation, or a member or employee of a partnership who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." *See* ***United States v. Neal***, 93 F.3d 219, 223 (6th Cir. 1996) (corporate officers liable under Section 7203 for failure to file employer's quarterly tax return (Form 941)); ***Ryan v. United States***, 314 F.2d 306, 309 (10th Cir. 1963).

10.5 FAILURE TO FILE

10.5 [1] Elements

To establish the offense of failure to make (file) a return, the government must prove three essential elements beyond a reasonable doubt:

1. The defendant was a person required to file a return;

2. The defendant failed to file at the time required by law; and

3. The failure to file was willful.

United States v. Hassebrock*, 663 F.3d 906, 919 (7th Cir. 2011);** ***United States v. McKee, 506 F.3d 225, 244 (3d Cir. 2007); ***United States v. Clayton***, 506 F.3d 405, 408 (5th Cir. 2007); ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992); ***United States v. Harting***, 879 F.2d 765, 766-67 (10th Cir. 1989); ***United States v. Williams***, 875 F.2d 846, 849 (11th Cir. 1989); ***United States v. Foster***, 789 F.2d 457, 460 (7th Cir. 1986); ***United States v. Ostendorff***, 371 F.2d 729, 730 (4th Cir. 1967); *cf*. ***United States v. Doyle***, 956 F.2d 73, 74-75 (5th Cir. 1992) (in case in which there was no issue about whether defendant was a person required to file a return, Fifth Circuit listed elements of misdemeanor failure to make return as willfulness and failure to make a return when due).

10.5 [2] Required by Law to File

10.05[2][a] Income Tax Returns

Various provisions of the Internal Revenue Code (and regulations thereunder) specify the events that trigger an obligation to file a return. Section 6012 lists the persons and entities required to make returns with respect to income taxes, including, *inter alia,* "[e]very individual having for the taxable year gross income which equals or exceeds the exemption amount," with certain specified exceptions, and "every corporation subject to taxation under subtitle A." 26 U.S.C. § 6012(a)(1)(A).[2] The receipt of a specified amount of gross income generally determines whether an income tax return must be filed. *See* ***United States v. Middleton***, 246 F.3d 825, 841 (6th Cir. 2001) (stating that the assertion that the filing of an income tax return is "voluntary" is frivolous because 26 U.S.C. § 6012(a)(1)(A) requires that every individual who earns a threshold level of income must file a tax return); *see also* ***United States v. McKee***, 506 F.3d 225, 245 (3d Cir. 2007) (government must prove that an individual has a duty to file a tax return based on the receipt of income of a taxable nature, and bears burden of proving taxable character of funds). "Gross income" is broadly defined in section 61(a) of the Code to mean the following:

> [A] ll income from whatever source derived, including (but not limited to) the following items:
>
> > (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> >
> > (2) Gross income derived from business;
> >
> > (3) Gains derived from dealings in property;
> >
> > (4) Interest;
> >
> > (5) Rents;

[2] .Section 6012(a) also addresses filing requirements for estates, trusts, political organizations, homeowners associations, recipients of advanced payments of the earned income credit, and bankruptcy estates.

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

The amount of gross income that triggers the filing requirement has changed over the years. *See* ***United States v. Clayton***, 506 F.3d 405, 409 & nn.1 & 2 (5th Cir. 2007) (noting that filing requirement is tied to the "exemption amount," which is based, in part, on the Consumer Price Index). Consequently, care must be exercised to insure that the amount of gross income received by the defendant was sufficient to require the filing of a return in the particular year at issue. Attention should also be paid to the age (over or under the age of 65), marital status, and filing status of a spouse since these factors can change the threshold amount of income for a given year. Section 6012 provides a formula based on gross income to determine whether an individual must make a return.

To meet its burden, the government need prove only that a person's gross income equals or exceeds the statutory minimum. ***United States v. Bell***, 734 F.2d 1315, 1316 (8th Cir. 1984); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978). Where the government is unable to present direct evidence of gross income, its burden may be satisfied by means of an indirect method of proof. ***United States v. Bianco***, 534 F.2d 501, 503-06 (2d Cir. 1976) (evidence of expenditures in excess of the statutory minimum plus evidence negating nontaxable sources); ***United States v. Shy***, 383 F. Supp. 673, 675 (D. Del. 1974) (net worth).

Gross income is different and distinguishable from gross receipts. "Gross receipts cannot be called gross income, insofar as they consist of borrowings of capital, return of capital, or any other items which the IRS Code has excluded from gross income." ***United States v. Ballard***, 535 F.2d 400, 404 (8th Cir. 1976). Nevertheless, after appropriate adjustments are made to the gross receipts total, the resulting amount may properly reflect gross income. *See* ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); ***Brown v. United States***, 434 F.2d 1065, 1067 (5th Cir. 1970); ***Clark v. United States***, 211 F.2d 100, 102 (8th Cir. 1954); ***Ballard***, 535 F.2d at 405. For example, for manufacturing, merchandising, or mining enterprises, the filing requirement is predicated upon gross income, which is determined, in part, by subtracting the cost of goods sold from gross receipts or total sales. 26 C.F.R. § 1.61-3 (1992); ***Ballard***, 535 F.2d at 404-05. To meet its burden, the government need prove only that gross receipts exceed the cost of goods sold by an amount sufficient to trigger the reporting requirement. ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir. 1980); ***Siravo v. United States***, 377 F.2d 469, 473 (1st Cir. 1967); *see also* ***United States v. Gillings***, 568 F.2d 1307, 1310 (9th Cir. 1978). The burden then shifts to the enterprise to come forward with evidence of offsetting expenses. ***United States v. Bell***, 734 F.2d 1315, 1317 (8th Cir. 1984); ***Siravo***, 377 F.2d at 473-74; ***United States v. Bahr***, 580 F. Supp. 167, 170-71 (N.D. Iowa 1983); *see also* ***Gillings***, 568 F.2d at 1310; ***Garguilo***, 554 F.2d at 62.

The government need not cite in the indictment or information the provision of the Code that requires the filing of the particular return involved. ***United States v. Vroman***, 975 F.2d 669, 671 (9th Cir. 1992). It is enough that an indictment allege the elements of Section 7203 "with sufficient clarity to apprise [the defendant] of the charges against him and is drawn with sufficient specificity to foreclose further prosecution upon the same facts." ***Vroman***, 975 F.2d at 670-71.

10.05[2][b] Section 6050I (Forms 8300)

Section 6050I of the Internal Revenue Code requires any person engaged in a trade or business who receives more than $10,000 in cash in one transaction (or two or more related transactions) to file an information return (Form 8300). 26 U.S.C. 6050I(a); 26 C.F.R. §1.6050I-1(e)(2) (2001). The return is due the 15th day after the cash is received. 26 C.F.R. §1.6050I-1(e)(1). Attorneys are not exempt from the requirements under Section 6050I. *See* ***Lefcourt v. United States***, 125 F.3d 79, 84-86 (2d Cir. 1997) (discussion of attorney's obligation to identify client on Form 8300 in civil context). This requirement, as applied to attorneys, does not violate the Fourth, Fifth, or Sixth Amendment. ***United States v. Goldberger & Dubin, P.C.***, 935 F.2d 501, 503-04 (2d Cir. 1991). It also does not impinge on the attorney-client privilege. ***United States v. Blackman***, 72 F.3d 1418, 1425 (9th Cir. 1995); ***United States v. Leventhal***, 961 F.2d 936, 940 (11th Cir. 1992). Section 7203 criminalizes the failure to file a Form 8300. *See, e.g.,* ***Bickham Lincoln-Mercury Inc. v. United States***, 168 F.3d 790, 793 (5th Cir. 1999).

10.05[3] Return Not Filed at Time Required by Law

10.05[3][a] What is a Return

The mere fact that an individual or entity files a tax form does not necessarily satisfy the requirement that an income tax return be filed. For example, tax defiers or individuals who receive illegal source income sometimes file the correct form but do not provide meaningful or complete information. Such filings may include assertions of various constitutional privileges.

Most courts take the approach that a form which does not contain sufficient financial information to allow the calculation of a tax liability is not a "return" within the meaning of 26 U.S.C. 7203. *See, e.g.,* ***United States v. Marston***, 517 F.3d 996, 1001 (8th Cir. 2008) ("A defendant can be guilty of failure to file a tax return even if he actually files a form with the I.R.S. if that form does not contain 'sufficient information [ ] from which the IRS can calculate tax liability'"); ***United States v. Kimball***, 925 F.2d 356, 357-38 (9th Cir. 1991) (*en banc*) (Forms 1040 filed by defendant, who "wrote only asterisks in the spaces provided on the income tax forms at issue and signed his name," did not constitute "returns" for purposes of 26 U.S.C. 7203); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (taxpayer included bottom line assertion of liability, but did not include information showing how that figure was derived); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir. 1986) (Form 1040 with word "object" written in all spaces requesting financial information is not a return); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Goetz***, 746 F.2d 705, 707 (11th Cir. 1984); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984) (per curiam); ***United States v. Vance***, 730 F.2d 736, 738 (11th Cir. 1984); ***United States v. Grabinski***, 727 F.2d 681, 686-87

(8th Cir. 1984); ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir. 1982); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir. 1979) (Forms 1040 containing responses of "unknown" or "Fifth Amendment" are not returns); ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir. 1970) ("A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner"). *See also* discussion at Section 40.03[5], *infra*.

Although it is well settled that a form containing only constitutional objections or asterisks does not constitute a tax return for purposes of 26 U.S.C. § 7203, the circuits disagree on whether a tax return form that contains all zeroes or minimal monetary information constitutes a tax return. The Ninth Circuit has taken the position that a Form 1040 with zeroes on all lines that require the reporting of financial information is a return because a tax liability, albeit an incorrect one, can be computed from zeroes. ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980). (Note that under ***Long***, the filing of such a document could be charged under 26 U.S.C. 7206(1) as the filing of a false return. ***Long***, 618 F.2d at 75-76). Other courts have declined to follow ***Long***. *See, e.g.*, ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Rickman***, 638 F.2d 182, 184 (10th Cir. 1980); ***United States v. Moore***, 627 F.2d 830, 835 (7th Cir. 1980); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir.1980). Those courts do not reject ***Long***'s premise that a tax liability can be computed from zeroes. Rather, they focus on the question whether the form submitted was intended to convey the sort of tax return information required to be submitted to the government. ***Moore***, 627 F.2d at 835 ("there must be an honest and reasonable intent to supply the information required by the tax code," and "when it is apparent that the taxpayer is not attempting to file forms accurately disclosing his income, he may be charged with failure to file a return"); ***Smith***, 618 F.2d at 281 (returns that contained nothing but zeroes and constitutional objections plainly did not even purport to disclose the required information).

Some decisions suggest that the determination of what is an adequate return is a legal question, and the district court properly may decide the question. ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985); ***United States v. Moore***, 627 F.2d 830, 834 (7th Cir. 1980); ***United States v. Klee***, 494 F.2d 394, 397 (9th Cir. 1974) (a return that contained “absolutely no information” about the defendant’s tax status but merely stated “all details available on proper demand” is not a return, and the “court was right in telling the jury so”). Other courts, however, have cautioned that such a ruling may improperly invade the province of the jury. *See* Section 40.03[5][c], *infra*. In view of the Supreme Court’s reasoning in ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1995), in which the Court held that materiality in a prosecution under 18 U.S.C. 1001 is an element of the offense and must be submitted to the jury, the safer practice would be to submit to the jury, with proper instructions, the question whether the form the defendant filed is a “return” within the meaning of 26 U.S.C. 7203. As a practical matter, the prosecutor may wish to consider bringing a charge under 26 U.S.C. § 7201, 26 U.S.C. § 7206(1), or 26 U.S.C. § 7206(2). Those statutes define felonies and are not limited to tax returns. *See* ***Marston***, 517 F.3d at 1001-02 (defendant who filed a Form 1040EZ listing zero income properly charged under 26 U.S.C. § 7206(1)).

10.05[3][b] Return Not Filed at Time Required by Law

Section 7203 applies to situations in which the taxpayer does not file a tax return on the required filing date. In ***Spies v. United States***, 317 U.S. 492, 496 (1943), the Supreme Court noted the importance given to timely filing:

> Punctuality is important to the fiscal system, and these are [criminal] sanctions to assure punctual as well as faithful performance of these duties.

Section 6072 of the Internal Revenue Code prescribes the time for filing income tax returns. Individuals who file on a calendar year basis are required to file a return on or before the 15th day of April following the close of the calendar year. 26 U.S.C. § 6072(a). Corporations are generally required to file on or before the fifteenth day of the third month following the close of the taxable year, *i.e.*, March 15th for a calendar year corporation. 26 U.S.C. § 6072(b). Section 6075 fixes the time for filing estate and gift tax returns. 26 U.S.C. §§ 6075(a) & (b). Forms 8300 are due the 15th day after the cash is received. *See* 26 C.F.R. § 1.6050I-1(e) (2001). In the event that the cash is received in multiple payments, the recipient must aggregate the initial payment and subsequent payments made within one year of the initial payment until the aggregate amountexceeds $10,000, and report with respect to the aggregate amount within 15 days after receiving the payment that causes the aggregate amount to exceed $10,000. 26 C.F.R. § 1.6050I-1(b)(2) (2001). When the last day for filing a return falls on a Saturday, Sunday, or a legal holiday (including Emancipation Day, a legal holiday in the District of Columbia), the return will be considered timely filed if it is filed on the next succeeding day that is not a Saturday, Sunday, or legal holiday. 26 U.S.C. § 7503. Section 7503 provides:

> When the last day prescribed under authority of the internal revenue laws for performing any act falls on a Saturday, Sunday, or a legal holiday, the performance of such act shall be considered timely if it is performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. For purposes of this section, the last day for the performance of any act shall be determined by including any authorized extension of time; **the term "legal holiday" means a legal holiday in the District of Columbia**; and in the case of any return, statement, or other document required to be filed, or any other act required under authority of the internal revenue laws to be performed, at any office of the Secretary or at any other office of the United States or any agency thereof, located outside the district of Columbia but within an internal revenue district, the term "legal holiday" also means a Statewide legal holiday in the State where such office is located.

26 U.S.C. § 7503 (emphasis added). For example, if a return is due on April 15th and April 15th falls on a Saturday, the return would be considered timely if it was filed on the following Monday, unless the Monday is a legal holiday, in which event, the return would be considered timely if it was filed on the next day --Tuesday.

If the Code does not fix a time for the filing of a return, the Secretary is directed to prescribe that time "by regulations." 26 U.S.C. § 6071(a).

Because one of the elements of a violation of 26 U.S.C. § 7203 is the defendant's failure to file a return at the time required by law, a prosecution might be jeopardized if an indictment did not properly allege the date when the legal duty to file arose. *See, e.g.,* ***United States v. Bourque***, 541 F.2d 290, 293-94 (1st Cir. 1976) (IRS regulations allow a new corporation to determine its own fiscal year and therefore date return is due); ***United States v. Goldstein***, 502 F.2d 526, 528 (3d Cir. 1974).

Pursuant to section 6081(a) of the Code, the Secretary is authorized to grant a "reasonable extension of time" for filing any return, declaration, statement, or other document required to be filed. Except for taxpayers who are abroad, the extension cannot be for a period longer than six months. 26 U.S.C. § 6081(a). A corporation may obtain an automatic extension of three months for filing a return, provided it meets the conditions set forth in the Code and applicable regulations. 26 U.S.C. § 6081(b). Section 6081(b) requires that, in order to be granted the extension, the corporation must "pay[], on or before the date prescribed for payment of the tax, the amount properly estimated as its tax."

Because there can be no crime of failing to file an individual return by April 15th if the taxpayer has obtained extensions of time within which to file, it is important in any failure to file case to search IRS records to determine whether any extensions have been obtained by the taxpayer. *See* ***Goldstein***, 502 F.2d at 528-29 (reversing conviction of defendant who was indicted for failing to file before April 15, but who had applied for an extension and had been given until May 7 to file return). Prosecutors should always attempt to obtain the filed extension form from the IRS. Many professional return preparers routinely keep in their files unsigned extensions on behalf of their clients, but an extension application signed by the taxpayer provides evidence that the taxpayer knew a return was due. Moreover, because the extension application bears a perjury jurat, a materially false signed extension application can form the basis for a felony prosecution under 26 U.S.C. § 7206(1).

The following chart summarizes some of the filing requirements for the most common taxpaying entities:

FILING REQUIREMENTS

TAXPAYER	***RETURN/FORM***	***GROSS INCOME***		***DATE DUE***
Individual (Single)*	1040, 1040A,	1994	$6,250	April 17, 1995
	1040EZ	1995	$6,400	April 15, 1996
(Under age 65)		1996	$6,550	April 15, 1997
		1997	$6,800	April 15, 1998
		1998	$6,950	April 15, 1999

	1999	$7,050	April 17, 2000
	2000	$7,200	April 16, 2001
	2001	$7,450	April 15, 2002
	2002	$7,700	April 15, 2003
	2003	$7,800	April 15, 2004
	2004	$7,950	April 15, 2005
	2005	$8,200	April 17, 2006
	2006	$8,450	April 17, 2007
			(April 15, 2007, fell on a Sunday, and April 16th was Emancipation Day, a holiday in the District of Columbia. See IRS Questions and Answers - April 17 Deadline.)
	2007	$8,750	April 15, 2008
	2008	$8,950	April 15, 2009
	2009	$9,350	April 15, 2010
	2010	$9,350	April 18, 2011
			(Because of Emancipation Day, a holiday in the District of Columbia)
	2011	$9,500	April 17, 2012
	2012	$9,750	April 15, 2013
			GENERAL: 15th day of 4th month after close of tax year

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Married Filing Jointly (Both spouses under age 65)	1040, 1040A, 1040EZ	1994	$11,250	April 17, 1995
		1995	$11,550	April 15, 1996
		1996	$11,800	April 15, 1997
		1997	$12,200	April 15, 1998
		1998	$12,500	April 15, 1999
		1999	$12,700	April 17, 2000
		2000	$12,950	April 16, 2001
		2001	$13,400	April 15, 2002
		2002	$13,850	April 15, 2003
		2003	$15,600	April 15, 2004
		2004	$15,900	April 15, 2005
		2005	$16,400	April 17, 2006
		2006	$16,900	April 16, 2007
		2007	$17,500	April 15, 2008
		2008	$17,900	April 15, 2009
		2009	$18,700	April 15, 2010
		2010	$18,700	April 18, 2011
		2011	$19,000	April 17, 2012
		2012	$19,500	April 15, 2013
Corporation	1120	N/A		15th day of 3rd month after close of tax year
Subchapter S Corporation	1120S	N/A		Same
Partnership	1065	N/A		15th day of 4th month after close of tax year
Fiduciary (trust or estate	1041	$600 gross or any taxable income		15th day of 4th month after close of tax year

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income)				
Person in Trade or Business	8300 (CTR)	receipt of more than $10,000 cash		15 days after cash received
Employer	941	collected withholding tax (income and FICA)		Quarterly - last day of month following quarter**
Estate	706	pre-1998	$600,000	9 months after death
		1998	$625,000	9 months after death
		1999	$650,000	9 months after death
		2000	$675,000	9 months after death
		2001	$675,000	9 months after death
		2002	$1,000,000	9 months after death
		2003	$1,000,000	9 months after death
		2004	$1,500,000	9 months after death
		2005	$1,500,000	9 months after death
		2006	$2,000,000	9 months after death
		2007	$2,000,000	9 months after death
		2008	$3,500,000	9 months after death
		2009	$3,500,000	9 months after death
		2010	$5,000,000	9 months after death
		2011	$5,000,000	9 months after death
		2012	$5,250,000	9 months after death

* The minimum amount for a married individual whose spouse filed separately is less.

** If the corporation has already deposited full amount, there is an additional 10 days in which to file.

10.05[4] Proof of Failure to File

Proof that a tax return was not filed must be established through the trial testimony of a representative of the IRS. Formerly, prosecutors could ask the IRS to conduct a search of its records and, if no record of a return was located, could introduce a certification of the non-existence of such record under Federal Rules of Evidence 803(10) and 902. However, such a procedure is no longer recommended after the Supreme Court's decisions in ***Crawford v. Washington***, 541 U.S. 36 (2004), and ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009). Several circuit courts have held that certificates of the non-existence of a record violate the Confrontation Clause when introduced without the testimony of the preparer. *See* ***United States v. Orozco-Acosta***, 607 F.3d 1156 (9th Cir. 2010); ***United States v. Martinez-Rios***, 595 F.3d 581 (5th Cir. 2010); ***Gov't of Virgin Islands v. Gumbs***, No. 10-3342, 2011 WL 1667438 (3d Cir. May 4,2011); ***United States v. Madarikan***, No. 08-5589, 2009 WL 4826912 (2d Cir. Dec. 16, 2009). Instead, prosecutors should introduce the certificate through the testimony of an IRS service center representative.

Effective December 1, 2013, Federal Rule of Evidence 803 will require that a prosecutor seeking to introduce evidence "that a diligent search failed to disclose a public record or statement" provide written notice of intent to introduce such a certification at least 14 days before trial. The defendant will then have seven days to object in writing.

It is preferable that a witness be a representative of the Service Center that has custody of returns for the required place of filing. The witness testifies that he or she is a representative of the Director of a particular Service Center, that the particular Service Center has custody of tax returns for a given geographical region, that any return that the defendant was required to file would have been filed with the particular Service Center whose director he or she represents, that the Service Center keeps records of the returns filed at the Service Center, and that a search of the records revealed that no return was filed by the defendant. If this procedure is followed, the witness should personally conduct or direct the search of the records. In the event that the Service Center representative from the Service Center where the return should have been filed is unavailable, a representative from another Service Center may be used. That representative can testify that he or she has access to records from all of Service Centers, that he or she personally conducted or directed the search of all the records, and that there was no record of the filing of the return at issue.

In addition, the witness should be interviewed in advance, and the questioner should establish during direct examination that the witness is not testifying as an expert witness. This clarification is important because failure to establish this fact can lead to confusion and a very uncomfortable witness. In some cases, particularly those involving tax defiers with experienced counsel, cross-examination concerning Service Center procedures and various codes on IRS account transcripts may be extensive. The questioning under cross-examination may also focus on the witness's knowledge regarding whether the Service Center has lost or misplaced returns or whether the computerized taxpayer account system is faulty. Reference should be made to the discussion of tax defier prosecutions in Section 40.00, *infra*.

10.05[5] Willfulness

Reference should be made to the discussion of willfulness in each chapter of this Manual involving crimes of willfulness, particularly Chapter 8, *supra*, ***Attempt to Evade or Defeat Tax***.

Willfulness is the state of mind that must be proven to establish intent. Whether the charge is a felony (*e.g.*, attempted evasion) or a misdemeanor (*e.g.*, failure to file), the willfulness or intent that must be established is the same. ***United States v. Bishop***, 412 U.S. 346, 361 (1973). Courts have defined willfulness in criminal tax violations as a "voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 199 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Bishop***, 412 U.S. 346, 360 (1973); ***United States v. Murphy***, 469 F.3d 1130, 1137 (7th Cir. 2006); ***United States v. Abboud***, 438 F.3d 554, 581 (6th Cir. 2006); ***United States v. Boulerice***, 325 F.3d 75, 80 (1st Cir. 2002); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Rothbart***, 723 F.2d 752, 754 (10th Cir. 1983); ***United States v. Moon***, 718 F.2d 1210, 1222 (2d Cir. 1983); ***United States v. Dahlstrom***, 713 F.2d 1423, 1427 (9th Cir. 1983); ***United States v. Buckley***, 586 F.2d 498, 503-04 (5th Cir. 1978). Particular reference should be made to the discussion of the subjective standard for willfulness in Sections 8.00, *supra*, and 40.00, *infra*.

Thus, in a failure to file prosecution, the government must prove that the defendant acted voluntarily and intentionally, with the specific intent to do something that the law prohibited, that is to say, with intent to either disobey or disregard the law.

United States v. Abboud, 438 F.3d 554, 581 (6th Cir. 2006). Negligent conduct is not sufficient to constitute willfulness. *E.g.*, ***id***. at 581; ***United States v. Murphy***, 469 F.3d at 1137 (willfulness "requires proof of a specific intent to do something which the law forbids; more than a showing of careless disregard for the truth is required"); ***United States v. Quimby***, 636 F.2d 86, 90 (5th Cir. 1981) (Section 7203 "requires that the act be purposefully done with an awareness of the action and not just negligently or inadvertently"). However, the government is not required to prove that the defendant acted with "evil motive or a bad purpose." ***United States v. Blanchard*, 618 F.3d 562, 571 (6th Cir. 2010); *United States v. Easterday*, 564 F.3d 1004, 1008 (9th Cir. 2009);** ***United States v. Powell***, 955 F.2d 1206, 1211 (9th Cir. 1991); ***United States v. Asmus***, 774 F.2d 722, 726 (6th Cir. 1985) (taxpayer's good or evil motive is not relevant to determining whether the taxpayer's act was willful under § 7203); *see also* ***UnitedStates v. Schafer***, 580 F.2d 774, 781 (5th Cir. 1978). To establish the requisite level of willfulness, the government must prove that the defendant deliberately failed to file returns which he or she knew the law required to be filed. ***United States v. Evanko***, 604 F.2d 21, 23 (6th Cir. 1979); ***United States v. Brown***, 600 F.2d 248, 258 (10th Cir. 1979); ***United States v. Hawk***, 497 F.2d 365, 366-69 (9th Cir. 1974).

A "good purpose" is not a defense to a charge of willful failure to file. If it is shown that the taxpayer intentionally violated a known duty, the reason for doing so is irrelevant. *See* ***United States v. Dillon***, 566 F.2d 702, 703-04 (10th Cir. 1977) (rejecting argument that defendant should have been permitted to testify that his failure to file a return was an attempt to test constitutionality of income tax laws, because reason for violating known legal duty irrelevant). For example, after rejecting a defendant's argument that to prove a willful failure to file, the government had to establish an intent to defraud, the Seventh Circuit concluded that evidence the defendant sought to introduce to "explain" his failure to file -- including, *inter alia*, contemplation of suicide, lack of funds available to pay taxes, fear of IRS liens on property, pendency of divorce proceedings, an offer to pay civil liabilities, an offer to cooperate with the IRS, and a fear of prosecution for earlier years -- "was of no relevance to whether [defendant] intentionally failed to file returns knowing that he was legally obliged to do so." ***United States v. McCorkle***, 511 F.2d 482, 485-88 (7th Cir. 1975) (*en banc*); *see also* ***United States v. Klee***, 494 F.2d 394, 395 n.1 (9th Cir. 1974) ("no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes").

Willfulness is thus established when the government proves that the failure to file was “voluntary and purposeful and with the specific intent to fail to do that which he knew the law required.” ***United States v. Wilson***, 550 F.2d 259, 260 (5th Cir. 1977). But willfulness is not established if the government proves only a “careless and reckless disregard” for the obligation to file. ***United States v. Eilertson***, 707 F.2d 108, 109-10 (4th Cir. 1983) (trial court improperly used pre-***Bishop*** “careless disregard” jury instruction).

10.05[5][a] Proof of Willfulness

Proof of willfulness in a willful failure to file case may be, and usually is, shown by circumstantial evidence alone. ***United States v. Collorafi***, 876 F.2d 303, 305 (2d Cir. 1989); ***United States v. Grumka***, 728 F.2d 794, 796-97 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979) (proof of willfulness included previously filed corporate and personal returns and reminder by accountant); *see also* ***United States v. Miller***, 520 F.3d 504, 509 (5th Cir. 2008) (attempted evasion case); ***United States v. Boulerice***, 325 F.3d 75, 80 (1st Cir. 2002) (in tax evasion case, “the government does not need to show direct evidence of tax motivation so long as jury has a sufficient circumstantial basis for inferring willfulness”); ***United States v. Bishop***, 264 F.3d 535, 550 (5th Cir. 2001) (listing range of conduct that can support a finding of willful attempt to evade taxation); ***United States v. Marabelles***, 724 F.2d 1374, 1379 (9th Cir. 1984) (listing acts from which willfulness can be inferred in evasion case); ***United States v. Brown***, 548 F.2d 1194, 1199 (5th Cir. 1977) (aiding and assisting in preparation and presentation of false tax returns case); ***Swallow v. United States***, 307 F.2d 81, 83 (10th Cir. 1962) (attempted evasion case).

A defendant’s past taxpaying history is admissible to prove willfulness circumstantially. ***United States v. Daraio***, 445 F.3d 253, 264 (3d Cir. 2006); ***United States v. Bok***, 156 F.3d 157, 165 (2d Cir. 1998); ***Schiff***, 612 F.2d at 77-78; ***United States v. Magnus***, 365 F.2d 1007, 1011 (2d Cir. 1966) (prior taxpaying history, both federal and state, can be probative of a taxpayer’s willfulness in failing to pay substantial amounts of federal taxes in the years at issue). Willfulness may be inferred from a pattern of failing to file for consecutive years in which returns should have been filed. ***United States v. Greenlee***, 517 F.2d 899, 903 (3d Cir. 1975). This may include years prior or subsequent to the prosecution period. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986).

Willfulness may also be shown by such acts as mailing tax defier materials to the IRS, disregarding IRS warning letters, and filing contradictory forms. ***United States v. Shivers***, 788 F.2d 1046, 1047-48 (5th Cir. 1986) (defendant filed a W-4 claiming he was exempt from withholding only four days after filing a W-4 claiming three allowances); *see also* **United States v. Upton**, 799 F.2d 432, 433 (8th Cir. 1986) (defendant sent defier materials to IRS).

There is also an element of common sense in establishing willfulness in a failure to file case. Thus, willfulness can be shown by such factors as a defendant's background, ***United States v. McCaffrey***, 181 F.3d 854, 856 (7th Cir. 1999) (defendant was tax accountant); the filing of returns in prior years, ***United States v. Briscoe***, 65 F.3d 576, 588 (7th Cir. 1995) (evidence indicated that, except for one year, defendant failed to file or filed late in every year in which he owed taxes in excess of the amount withheld); ***United States v. Hauert***, 40 F.3d 197, 199 (7th Cir. 1994); ***United States v. Birkenstock***, 823 F.2d 1026, 1028 (7th Cir. 1987); ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986) ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); a defendant's education and accounting knowledge, ***United States v. Ostendorff***, 371 F.2d 729, 731 (4th Cir. 1967)(college graduate with some special knowledge of accounting and insurance); a defendant's familiarity with books and records and experience operating a business, ***United States v. Segal***, 867 F.2d 1173, 1179 (8th Cir. 1989); and the receipt of a large gross income, ***Bohrer***, 807 F.2d at 161.

Similarly, one appellate court found that, if the defendant received a standard Form W-2, "the jury was entitled to view the W-2 Forms as reminders of the duty to file received shortly before or during the period in which filing was required." ***United States v. Cirillo***, 251 F.2d 638, 639 (3d Cir. 1957). A Form W-2 does not serve as a return, whether filed by the taxpayer or employer. ***United States v. Birkenstock***, 823 F.2d at 1030. *See also* Section 40.05[11], *infra*. Also, evidence that a defendant had filed returns in other years when he claimed refunds, while there was a substantial tax due for the years for which he failed to file, is relevant evidence and more than enough to establish willfulness. ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); *accord* ***United States v. Briscoe***, 65 F.3d at 588. Additional examples of conduct found to constitute proof of willfulness in attempted evasion cases may be found in Section 8.08[3], *supra*.

10.05[5][b] Willful Blindness or Deliberate Ignorance

Because willfulness requires a voluntary and intentional violation of a known legal duty, a defendant's ignorance of the illegality of a failure to timely file a tax return is a defense to a finding that the defendant acted willfully. Such ignorance is not a defense, however, if the defendant purposefully sought to avoid knowledge by, for example, "consciously avoid[ing] any opportunity to learn what the tax consequences were. ***United States v. Williams***, 612 F.3d 500, 506-07 (6th Cir. 2010)" ***United States v. Bussey***, 942 F.2d 1241, 1248 (8th Cir. 1992); ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992).

When the evidence supports the conclusion that a defendant purposely contrived to avoid learning all the facts, the government may be entitled to an instruction on deliberate ignorance. ***United States v. Mapelli***, 971 F.2d at 286. The use of an "ostrich instruction" – also known as a deliberate ignorance, conscious avoidance, willful blindness, or ***Jewell*** instruction (*see* ***United States v. Jewell***, 532 F.2d 697 (9th Cir. 1976)) – may be appropriate in circumstances where "a person suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to be able to deny knowledge if apprehended." ***Jewell***, 532 F.2d at 700 n.7.

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means**.** ***United States v. Pool***e, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." ***Id***. Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge.*"* ***Id.*** *citing* ***United States v. Stadtmauer***, 620 F.3d 238, 245 (3d Cir. 2010) and ***United States v. Bussy***,*supra.*

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991). *Accord* ***United States v. Miller*** 588 F.3d 897, 906 (5th Cir. 2009) ("The evidence demonstrates that [the defendant] was subjectively aware of a high probability of existence of illegal conduct.").

The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. ***Stadtmauer***, 620 F.3d at 259. The rational supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. ***Poole***, 640 F.3d at 122; ***Stadtmauer***, at 255; ***Jewell,*** 532 F.2d at 700.

In ***Global-Tech Appliances, Inc. v. SEB S.A.***, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit[3] – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

> (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of

[3] *See* **Alston-Graves**, *supra*.

> wrongdoing and who can almost be said to have actually known the
> critical facts.

Id. at 2068-69. The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." ***Id.*** at 270-71.

Although ***Global-Tech Appliances*** has seemingly approved the use of the conscious avoidance instructions, it is important to note that circuit courts have approved their use only under proper circumstances. *See, e.g.*, ***United States v. Hogan***, 861 F.2d 312, 316 (1st Cir. 1988)***; United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir. 1985); ***United States v. Callahan***, 588 F.2d 1078, 1081-83 (5th Cir. 1979); ***United States v. Dube***, 820 F.2d 886, 892 (7th Cir. 1987); ***United States v. Willis***, 277 F.3d 1026,1031-32 (8th Cir. 2002); ***United States v. Dean***, 487 F.3d 840, 851 (11th Cir. 2007). Indeed, at least one court has said that the use of such an instruction is "rarely appropriate." ***United States v. deFrancisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991).

Accordingly, prosecutors should take care to ensure that a conscious avoidance instruction is given only when the facts warrant its use and that the court complies with the relevant rules of the circuit when giving such an instruction. *See, e.g.*, ***United States v. Heredia***, 483 F.3d 913, 922-23 (9th Cir. 2007); ***United States v. Withers***, 100 F.3d 1142, 1145 (4th Cir. 1996); ***United States v. Abbas***, 74 F.3d 506, 513 (4th Cir. 1996); ***United States v. Wisenbaker***, 14 F.3d 1022, 1027 (5th Cir. 1994); ***United States v. Krowen***, 809 F.2d 144, 148 (1st Cir. 1987); ***United States v. Jewell***, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc). A conscious avoidance instruction "is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because the courier knows full well that he is likely to find drugs there." ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992).

Furthermore, in a tax case, the language of any conscious avoidance instruction must not conflict with the government's obligation to prove the voluntary, intentional violation of a known legal duty. See § 8.08. Care must be taken to ensure that the conscious avoidance instruction applies only to the element of "knowledge," and does not extend to the government's obligation to prove a "voluntary, intentional violation." *See* ***United States v. Stadtmauer***, 620 F.3d 238, 258-259 (3d Cir. 2010) ("The Court's instructions made clear that willful blindness applied only to the element of knowledge"). When a deliberate ignorance or conscious avoidance instruction is given, the jury should also be given a separate Good Faith instruction, which expressly directs the jury not to convict for negligence or mistake.

10.05[6] Tax Deficiency Not Necessary

The crime of failing to file a return is complete if a return was required to be filed on a given date and the taxpayer intentionally did not file a return. There is no requirement that the government prove a tax liability, as long as the proof establishes that the taxpayer had sufficient gross income to require the filing of a return. ***Spies v. United States***, 317 U.S. 492, 496 (1943); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978). As a practical matter, evidence establishing a tax deficiency may be offered as a part of the government's evidence of willfulness, but this is technically not necessary. *See* ***United States v. Schmitt***, 794 F.2d 555, 560 (10th Cir. 1986) (evidence of tax liability relevant and not prejudicial in failure to file case); *cf*. ***United States v. Hairston***, 819 F.2d 971, 974 (10th Cir. 1987) (defendant not allowed to show that he would have received refund, to negate willfulness).

10.5 [7] Venue – Failure to File

Reference should be made to the discussion of venue in Section 6.00, *supra*.

As a general rule, venue in a failure to file case is proper in any judicial district in which the taxpayer was required to file a return for the year at issue, *i.e.*, the district in which the crime was committed.[4] ***United States v. Clines***, 958 F.2d 578, 583 (4th Cir. 1992) (crime of failure to file returns is committed in the district or districts where the taxpayer is required to file the returns); ***United States v. Hicks***, 947 F.2d 1356, 1361 (9th Cir. 1991) ("Failure to file a tax return is an offense either at the defendant's place of residence, or at the collection point where the return should have been filed"); ***United States v. Rice***, 659 F.2d 524, 526 (5th Cir. 1981); ***United States v. Quimby***, 636 F.2d 86, 89-90 (5th Cir. 1981).

[4] While no case exactly on point has been located, a reasonable interpretation of the law is that the place for the filing of tax returns is to be determined on the basis of the taxpayer's legal residence or principal place of business at the time the return was due, because 26 U.S.C. § 6091 is written in the present tense.

Section 6091 of the Code sets forth the places for filing returns. In those instances where the Code does not provide for the place of filing, the Secretary "shall by regulations prescribe the place for the filing." 26 U.S.C. § 6091(a).

Generally, individual tax returns are to be filed either in the internal revenue district in which the taxpayer resides or has his or her principal place of business, or at the Service Center serving the internal revenue district where the taxpayer resides or has his or her principal place of business. 26 U.S.C. § 6091(b)(1)(A). The corresponding regulation provides:

> Except as provided in § 1.6091-3 (relating to certain international income tax returns) and § 1.6091-4 (relating to exceptional cases):
>
> (a) *Individuals, estates, and trusts*. (1) Except as provided in paragraph (c) of this section, income tax returns of individuals, estates, and trusts shall be filed with any person assigned the responsibility to receive returns at the local Internal Revenue Service office that serves the legal residence or principal place of business of the person required to make the return.
>
> . . . .
>
> (c) *Returns filed with service centers*. Notwithstanding paragraphs (a) and (b) of this section, whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions.

26 C.F.R.. § 1-6091-2 (2008); ***United States v. Garman***, 748 F.2d 218, 219-21 (4th Cir. 1984). "'Legal residence' means the permanent fixed place of the abode which one intends to be his residence and to return to despite temporary residences elsewhere, or absences." ***United States v. Taylor***, 828 F.2d 630, 632-34 (10th Cir. 1987); ***United States v. Calhoun***, 566 F.2d 969, 973 (5th Cir. 1978). Note that "[a]n individual employed on a salary or commission basis who is not also engaged in conducting a commercial or professional enterprise for profit on his own account does not have a 'principal place of business' within the meaning of [26 U.S.C. § 6091(b)]." 26 C.F.R. § 1.6091-2(a)(2).

There are several exceptions to the general rule. 26 U.S.C. § 6091(b)(1)(B). If an individual citizen of the United States has a legal residence outside the United States or his or her return bears a foreign address, the taxpayer's principal place of abode is considered to be outside the United States, and the taxpayer's return should be filed as directed in the applicable forms and instructions. 26 C.F.R. § 1.6091-3(b). Similarly, an individual citizen of a possession of the United States (whether or not a citizen of the United States) who has no legal residence or principal place of business in any internal revenue district in the United States should file a return as directed in the applicable forms and instructions. 26 C.F.R. § 1.6091-3(c).

The general rule for corporations is that "income tax returns of corporations shall be filed with any person assigned the responsibility to receive returns in the local Internal Revenue Service office that serves the principal place of business or principal office or agency of the corporation." 26 C.F.R. § 1.6091-2(b). However, "whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions." 26 C.F.R. § 1.6091-2(c).

Returns can also be filed by hand carrying to the appropriate Internal Revenue Service office. 26 U.S.C. § 6091(b)(4). The regulations provide, for example, "Returns of persons other than corporations which are filed by hand carrying shall be filed with any person assigned the responsibility to receive hand-carried returns in the local Internal Revenue Service office as provided in paragraph (a) of this section." 26 C.F.R. § 1.6091-2(d)(1). Section (a) refers to the Internal Revenue Service office in the district "that serves the legal residence or principal place of business of the person required to make the return." *Id*.

As a practical matter, all of this means that venue in the usual individual failure to file case can be placed in the district in which the appropriate Service Center is located or in the district in which the taxpayer resides or has his or her principal place of business. Note, however, that under 18 U.S.C. § 3237, the statute governing venue in continuing offenses, "where an offense is described in section 7203 of the Internal Revenue Code . . ., and prosecution is begun in a judicial district other than the judicial district in which the defendant resides," the case may be transferred upon motion by the defendant, "filed within twenty days after arraignment," to "the district in which he was residing at the time the alleged offense was committed." 18 U.S.C. § 3237(b). *See also* Section 6.00 of this Manual, *supra*, on venue.

10.5 [8] Statute of Limitations

Reference should be made to Chapter 7 of this Manual, *supra*, discussing the statute of limitations in criminal tax cases.

The statute of limitations for a failure to file a return is six years, except for information returns required under Part III of subchapter A of Chapter 61 of the Internal Revenue Code. 26 U.S.C. § 6531(4). For information returns required by the Code, including returns (Forms 8300) required under section 6050I, the period of limitations is three years, as is the period of limitations for failure to supply information or keep records. 26 U.S.C. § 6531.

The statute of limitations is computed from the due date of the return. *See* Section 10.05[3][b], *supra*. In the case of an individual, this will usually be April 15th, unless an extension of time within which to file is granted (26 U.S.C. § 6081), in which case the limitations period is computed from the extended compliance date. *See generally* ***United States v. Phillips***, 843 F.2d 438 (11th Cir. 1988); ***United States v. Goldstein***, 502 F.2d 526, 529-530 (3d Cir. 1974). If April 15th fell on a Saturday, Sunday, or legal holiday, the due date was the next succeeding day that was not a Saturday, Sunday, or legal holiday. Note that taxpayers who file at the Andover Service Center receive an extra day to file in those years in which the filing date coincides with Patriots' Day in Massachusetts, which falls on the third Monday of April.

The statute of limitations is tolled by the filing of an information or indictment. ***United States v. Saussy***, 802 F.2d 849, 851 (6th Cir. 1986) (claim that information must be "verified" by affidavit or other prior determination of probable cause rejected). The statute is also tolled when the defendant is outside the United States or is a fugitive from justice, 26 U.S.C. § 6531, and during certain summons enforcement proceedings, 26 U.S.C. § 7609(e).

10.06 ***FAILURE TO PAY***

10.6 [1] Elements

To establish the offense of failure to pay a tax, the government must prove beyond a reasonable doubt that

(1) the defendant had a duty to pay a tax,

(2) the tax was not paid at the time required by law, and

(3) the failure to pay was willful.

United States v. Tucker, 686 F.2d 230, 232 (5th Cir. 1982); *see* **Sansone v. United States**, 380 U.S. 343, 351 (1965); ***In re Wray***, 433 F.3d 376, 378 (4th Cir. 2005); ***United States v. McGill***, 964 F.2d 222, 239-40 (3d Cir. 1992) ("Willful failure to pay tax under § 7203 contains two elements: 1) failure to pay a tax when due, and 2) willfulness," with the "'failure to pay' a tax element" subsuming both "a duty to pay the tax" and "the tax was unpaid"); *see also* **United States v. DeTar**, 832 F.2d 1110, 1113 (9th Cir. 1987) ("The elements of that misdemeanor as applied to this case are: (1) willfulness and (2) failure to pay the tax when due.")

10.06[2] Required by Law to Pay

In the usual failure to pay case, the taxpayer will have filed a return and then failed to pay the reported tax liability. (If the taxpayer did not file a return, the more likely charge would be failure to file the return.) When a return that shows a tax due and owing is filed and less than the full amount of tax is paid, there are at least two possible charges, depending on the facts -- an attempted evasion of payment, in violation of 26 U.S.C. § 7201, or a failure to pay a tax, in violation of 26 U.S.C. § 7203. If there is an affirmative attempt to evade payment of the tax, such as the concealment of assets or the use of nominees, the charge should be brought under Section 7201. When the conduct is simply a failure to pay a tax that was due and owing, the appropriate charge is a violation of Section 7203, failure to pay a tax. *See, e.g.,* ***Sansone v. United States***, 380 U.S. 343, 351 (1965); ***United States v. Mal***, 942 F.2d 682, 684 (9th Cir. 1991) ("What distinguishes [the felony offense of evasion] from the misdemeanor offense of willful failure to file a return, supply information, or pay taxes, which is set out in 26 U.S.C. § 7203, is the requirement of an affirmative act.").

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Although most assessments are based on filed returns, it is not necessary that the Service assess the tax as due and owing. Indeed, a tax deficiency arises by operation of law on the date the return is due: "when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return . . . ." 26 U.S.C. § 6151(a); *see* ***United States v. Drefke***, 707 F.2d 978, 981 (8th Cir. 1983); *see also* ***United States v. Ellett***, 527 F.3d 38, 40 (2d Cir. 2008) (evasion of assessment case); ***United States v. Silkman***, 220 F.3d 935, 937 (8th Cir. 2000) (evasion of assessment case); ***United States v. Voorhies***, 658 F.2d 710, 714 (9th Cir. 1981) (evasion of payment case). Otherwise stated, it is not necessary that there be an administrative assessment before a criminal prosecution may be instituted. ***Voorhies***, 658 F.2d at 714-15; *accord* ***United States v. Daniel***, 956 F.2d 540, 542 (6th Cir. 1992)(evasion case); ***United States v. Dack***, 747 F.2d 1172, 1174 (7th Cir. 1984)(evasion case).

10.06[3] Failure to Pay

The Internal Revenue Service will provide a qualified witness and/or a certified transcript of account or a certificate of assessments and payments establishing the failure to pay the tax. Section 6151(a) of the Code provides that the tax must be paid at the time and place fixed for filing "determined without regard to any extension of time for filing the return."

10.06[4] Willful Failure to Pay

See the discussion of willfulness in Sections 8.08 and 10.05[5], *supra*.

10.06[4] Willful Failure to Pay

See the discussion of willfulness in Sections 8.08 and 10.05[5], *supra*.

Willfulness does not require the government to prove that the taxpayer had the financial ability to pay his or her taxes when they came due. ***United States v. Easterday***, 539 F.3d 1176, 1182 (9th Cir. 2008); ***United States v. Ausmus***, 774 F.2d 772, 725 (6th Cir. 1985); ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir. 1982); *but see* ***United States v. McGill***, 964 F.2d 222, 238 n.30 (3d Cir. 1992) (declining to resolve the then-existing circuit split on whether the taxpayer's ability to pay was relevant to the willfulness of the failure to pay). As the Fifth Circuit stated:

> Every United States citizen has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under § 7203. Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability.

Tucker, 686 F.2d at 233.

The Ninth Circuit at one time took the position that, to establish willfulness in a failure to pay prosecution, the government must prove that the taxpayer had sufficient funds to pay the tax and voluntarily and intentionally did not do so. ***United States v. Andros***, 484 F.2d 531, 533-34 (9th Cir. 1973). However, following ***United States v. Pomponio***, 429 U.S. 10, 12 (1976), the Ninth Circuit overruled ***Andros***. ***United States v. Easterday***, 564 F.3d 1004, 1011 (9th Cir. 2009) (holding that in light of Supreme Court precedent, including ***Pomponio***, willfulness does not require the government to prove that a defendant had the ability to meet his tax obligations).

See also Section 9.04, *supra*.

10.06[5] Venue

Reference should be made to the discussion of venue in Sections 6.00 and 10.05[7], *supra*.

Proper venue for a criminal prosecution is a protected Constitutional right. ***United States v. Cabrales***, 524 U.S. 1, 6 (1998) ("The Constitution twice safeguards the defendant's venue right: Article III, § 2, cl. 3, instructs that 'Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed'; the Sixth Amendment calls for trial 'by an impartial jury of the State and district wherein the crime shall have been committed.'"). Rule 18 of the Federal Rules of Criminal Procedure requires that, "[e]xcept as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed." Thus, a defendant in a criminal trial has the right to be tried in the district where the offense took place. The "'locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it.'" ***United States v. Cabrales***, 524 U.S. at 6-7 (*quoting* ***United States v. Anderson***, 328 U.S. 699, 703 (1946)).

Generally, a person required to pay a tax must pay the tax at the place fixed for filing the return. *See* 26 U.S.C. § 6151 ("Except as otherwise provided . . ., when a return of tax is required . . ., the person required to make such return shall . . . pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return."). Venue would therefore normally be in the district in which the return was filed. As previously noted, if no return has been filed, the charge normally would be a failure to file rather than a failure to pay a tax. It is unclear whether there is venue for a failure to pay prosecution in the jurisdiction in which the taxpayer resides if there is no filed return.

10.6 [6] Statute of Limitations

The statute of limitations is six years "for the offense of willfully failing to pay any tax . . . at the time or times required by law or regulations." 26 U.S.C. § 6531(4). *See* ***United States v. Smith***, 618 F.2d 280, 281-82 (5th Cir. 1980). Generally, the statute of limitations begins to run when the crime is complete, i.e., when every element of the crime has been committed. *See* ***Toussie v. United States***, 397 U.S. 112, 115 (1970). In ***United States v. Sams***, 865 F.2d 713 (6th Cir 1988), the Sixth Circuit addressed the specific question of when the statute of limitations in a failure to pay case begins to run.

In ***Sams***, the defendant filed his 1979 tax return late and failed to pay the tax due and owing. 865 F.2d at 714. The defendant was convicted of, *inter alia*, willful failure to pay income tax for 1979. *Id*. At trial and on appeal, the defendant claimed that the statute of limitations had expired on the charge because the rules of Section 6513 govern the applicable period of limitations. 865 F.2d at 714-15. Section 6513 provides in part that "the last day prescribed for filing the return or paying the tax shall be determined without regard to any extension of time granted the taxpayer." 26 U.S.C. § 6513(a). The ***Sams*** court observed, however, that in ***United States v. Habig***, 390 U.S. 222 (1968), "the Supreme Court held that section 6513(a) is applicable only in situations where 'a return is filed or a tax is paid before the statutory deadline.'" 865 F.2d at 715 (quoting ***Habig***, 390 U.S. at 225). Noting the ***Habig*** Court's statement that "[t]here is no reason to believe that

§ 6531, by reference to the 'rules of section 6513' expands the effect and operation of the latter beyond its own terms so as to make it applicable to situations other than those involving early filing or advance payment," ***Habig***, 390 U.S. at 225, the ***Sams*** court concluded that "section 6513 does not provide the applicable limitations period" when the defendant "neither paid his taxes in advance nor filed an early return." 865 F.2d at 715.

The ***Sams*** court then considered what constitutes the appropriate "starting date" for the statute of limitations under section 6531. Noting the general rule that a criminal statute of limitations begin to run when every element of the crime has been committed and pointing out that one element of the offense of failure to pay tax is willfulness, the Sixth Circuit "agree[d] with the Ninth Circuit that the statute of limitations 'begins to run not when the taxes are assessed or when payment is demanded, but rather when the failure to pay the tax becomes wilful '" 865 F.2d at 715-16 (quoting ***United States v. Andros***, 484 F.2d 531, 532 (9th Cir. 1973) (citations omitted)). The court accordingly held that "the limitations period for willfully failing to pay income taxes cannot be determined by any general rule. Rather, the limitations period begins to run when the taxpayer manifests some act of willful nonpayment." ***United States v. Sams***, 865 F.2d at 716.

Accordingly, the six-year period of limitations begins to run when the failure to pay the tax becomes willful, not when the tax is assessed or when payment is demanded. ***United States v. Andros***, 484 F.2d at 532-33; ***United States v. Sams***, 865 F.2d at 716. Thus, it appears that there is some flexibility on the question of when the statute of limitation begins to run and when the six year statute of limitations expires. However, it is common in tax cases to use evidence of past filing or payment history to establish willfulness. Consequently, the government generally would proceed on the theory that the crime was complete on the date that the payment was due and the taxpayer failed to pay, i.e., April 15, unless there was evidence to establish that willfulness occurred after that date.

10.7 SENTENCING

Reference should be made to Section 43.00, *infra*, which discusses the application of the advisory Federal Sentencing Guidelines to criminal tax cases. Sentencing in a

Section 7203 case is governed by §2T1.1 of the Sentencing Guidelines. The commentary to §2T1.1(c)(1), which was amended in 2001, provides that:

> Tax loss does not include interest or penalties, **except** in willful evasion of payment cases under 26 U.S.C. § 7201 cases under 26 U.S.C. § 7203.

Id. Application note 1 (emphasis added). Accordingly, penalties and interest are not included in § 7203 failure to file case but **are** included in the tax loss calculation in § 7203 failure to pay cases. *See*, ***United States v. Josephberg***, 562 F.3d 478, 501-02 (2d Cir. 2009). Note, also, that costs of prosecution must be included in the punishment imposed for a violation of Section 7203. *See* ***United States v. May***, 67 F.3d 706, 707 (8th Cir. 1995).

10.8 ASSERTED DEFENSES

There are a number of defenses that have been litigated and decided by the courts. A list of some of the common defenses raised in failure to file and failure to pay cases, and how the courts have treated those defenses, follows.

10.08[1] Intent to Pay Taxes in Future

The intent to report and pay taxes due at some time in the future does not constitute a defense and "does not vitiate" the willfulness required for a failure to file or, for that matter, for an attempt to evade. ***Sansone v. United States***, 380 U.S. 343, 354 (1965).

10.08[2] Absence of a Tax Deficiency

There is no requirement that the government prove a tax liability in a failure to file case, as long as the taxpayer had a gross income that required the filing of a return. ***Spies v. United States***, 317 U.S. 492, 496 (1943); ***United States v. Wade***, 585 F.2d 573, 574 (5th Cir. 1978).

10.08[3] Delinquent Filing

The purported defense of filing late returns has been rejected in failure to file cases. In addition, evidence offered by the defendant of late filing and the late payment of taxes has been excluded. ***United States v. Ming***, 466 F.2d 1000, 1005 (7th Cir. 1972); ***United States v. Greenlee***, 380 F. Supp. 652, 660 (E.D. Pa. 1974), *aff'd.*, 517 F.2d 899, 903 (3d Cir. 1975). In this connection, the Seventh Circuit has upheld the exclusion of evidence offered by the defendant that he had eventually paid his taxes, even though the government was allowed to prove the amount of taxes the defendant owed for the years in issue. ***United States v. Sawyer***, 607 F.2d 1190 (7th Cir. 1979).

10.08[4] Negligence

Because failure to file and failure to pay are specific intent crimes, negligence is insufficient to establish willfulness. The government must prove that the defendant acted purposefully, as distinguished from inadvertently, negligently, or mistakenly. ***United States v. Collins***, 457 F.2d 781, 783 (6th Cir 1972); ***United States v. Matosky***, 421 F.2d 410, 413 (7th Cir. 1970).

10.08[5] Civil Remedy Not Relevant

The fact that the government could proceed civilly, instead of criminally, is "irrelevant to the issue of criminal liability and the defendant is not entitled to an instruction that the government could assess the taxes without filing criminal charges." ***United States v. Buras***, 633 F.2d 1356, 1360 (9th Cir. 1980); *accord* ***United States v. Merrick***, 464 F.2d 1087, 1093 (10th Cir. 1972).

10.08[6] Inability to Pay

See the detailed discussion of inability to pay as a defense to a willful failure to pay in Section 10.06[4], *supra*.

In general, a taxpayer's inability to pay his taxes is not a defense to a tax crime. ***United States v. Ausmus***, 774 F.2d 722, 724-25 (6th Cir. 1985); ***United States v. Tucker***, 686 F.2d 230, 233 (5th Cir. 1982). Although, the Ninth Circuit formerly suggested that, to establish willfulness in a failure to pay prosecution, the government must prove that the taxpayer had sufficient funds to pay the tax and voluntarily and intentionally did not do so, ***United States v. Andros***, 484 F.2d 531, 533-34 (9th Cir. 1973), it held otherwise in ***United States v. Easterday***, 564 F.3d 1004 (9th Cir. 2009). *See also* ***United States v. Gilbert***, 266 F.3d 1180, 1185 (9th Cir. 2000) (rejecting argument that "failure to pay over the withholding tax was not willful because [the business owned by defendant] did not have the funds to pay the taxes," because defendant's "act of paying wages to his employees instead of remitting withholding taxes to the IRS, shows that he voluntary and intentionally" committed a tax offense).

10.08[7] IRS Required to Prepare Returns

Code Section 6020(b) provides that if a person fails to file a return or makes a willfully false return, the Secretary "shall make such return from his own knowledge and from such information as he can obtain." 26 U.S.C. § 6020(b). Section 6020(b), however, does not require the Internal Revenue Service to prepare tax returns for individuals who fail to file, nor does it excuse the taxpayer from criminal liability for that failure. *See* ***United States v. Cheek***, 3 F.3d 1057, 1063 (7th Cir. 1993); ***In re Bergstrom***, 949 F.2d 341, 343 (10th Cir. 1991); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991); ***United States v. Schiff***, 919 F.2d 830, 832 (2d Cir. 1990); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982) ("the law does not require the Secretary to do so and the Secretary's discretion in this matter in no way reduces the obligation of the individual taxpayers to file their returns."); ***United States v. Millican***, 600 F.2d 273, 278 (5th Cir. 1979) ("no merit to [the defendant's] claim of entitlement to an instruction that the Internal Revenue Service was under a duty pursuant to 26 U.S.C.A. section 6020(b)(1) to prepare his tax return."); ***United States v. Tarrant***, 798 F. Supp. 1292, 1302-03 (E.D. Mich. 1992).

When a defendant raises this argument during trial, the court may properly instruct the jury that while Section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good-faith defense." ***Powell***, 955 F.2d at 1213. It is advisable to request that an instruction on the meaning of Section 6020(b) be coupled with a reminder to the jury that the issue in a criminal tax case is not the validity of the defendant's interpretation of §6020(b), but whether the defendant had a good faith belief that his or her actions were in compliance with the tax laws. ***Powell***, 955 F.2d at 1213; *see also* ***Tarrant***, 798 F. Supp at 1302-03 (defendant allowed to testify as to an alleged good faith belief that he was relieved from the obligation of filing returns because Section 6020(b) states that the IRS will make out returns for individuals who fail to doso).

10.08[8] Marital and Financial Difficulties

The refusal of the trial judge to allow an attorney charged with a failure to file to introduce evidence of marital and financial difficulties has been upheld on the grounds that "evidence of financial and domestic problems are not relevant to the issue of willfulness" as used in Section 7203. ***Bernabei v. United States***, 473 F.2d 1385, 1385 (6th Cir. 1973).

10.08[9] Claim That Returns Were Mailed

A claim that a return was in fact mailed to the IRS may constitute a defense to a charge under 26 U.S.C. § 7203. In ***United States v. Greenlee***, 517 F.2d 899, 901-03 (3d Cir. 1975), the defendant testified that he had mailed his 1970 tax return to the IRS, although the IRS had no record of having received the return. During its case in chief, the prosecution offered a thorough explanation by a representative of the appropriate Service Center regarding the manner in which returns were received and processed, coupled with evidence that the Service Center had no record of receiving the return. *Id*. at 902. The defendant was convicted. *Id*. at 901. The court of appeals found that whether the return had been filed was a question of fact for the jury and that, while a jury could find that a return not received by the Internal Revenue Service had in fact been mailed, the jury could also reject such testimony. *Id*. at 903. Noting its limited function in reviewing the sufficiency of the evidence on appeal, the Third Circuit affirmed. *Id*.

10.08[10] Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. § 3512 (a)(1) (PRA), provides that no person shall be subject to any penalty for failing to provide information if an agency's request does not display an Office of Management and Budget (OMB) number. Tax returns are agency requests within the scope of the PRA and bear OMB numbers. However, return instruction booklets do not bear OMB numbers, and tax defiers have attempted to manufacture a defense on this basis. The absence of an OMB number from tax return instruction booklets does not excuse the duty to file the return. *See* ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992) (IRS instruction booklets merely assist taxpayers rather than independently request information); ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir. 1992). It is also unnecessary for an expiration date to appear on a return. ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992) (year designation, *e.g.*, "1990" is sufficient); *see also* ***United States v. Patridge***, 507 F.3d1092, 1094 (7th Cir. 2007) (Paperwork Reduction Act does not repeal section 7203 and there is no inconsistency between section 7203 and the Paperwork Reduction Act). *See also* Section 40.05[12], *infra*.

10.8 [11] Other Claimed Defenses

In ***United States v. Dunkel***, 900 F.2d 105, 107-08 (7th Cir. 1990), *vacated and remanded on other grounds,* 498 U.S. 1043 (1991), *rev'g on other grounds*, 927 F.2d 955 (7th Cir. 1991), a defendant claimed that the requirement to "make a return" was unconstitutionally vague. The defendant posited different interpretations of the word "make," including to "construct a return out of raw materials." ***Dunkel***, 900 F.2d at 107. The Seventh Circuit had little sympathy for this frivolous argument and rejected it by stating that "statutes are not unconstitutional just because clever lawyers can invent multiple meanings." ***Dunkel***, 900 F.2d at 108.

10.9 LESSER INCLUDED OFFENSE/RELATIONSHIP TO TAX EVASION

In charging and sentencing determinations, the question sometimes arises whether 26 U.S.C. § 7203 is a lesser included offense of attempted evasion under 26 U.S.C. § 7201. Reference should be made to the detailed discussion of this issue in Section 8.11, *supra*.

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11.00 FRAUDULENT WITHHOLDING EXEMPTIONCERTIFICATE

OR FAILURE TO SUPPLY INFORMATION

11.1 STATUTORY LANGUAGE: 26 U.S.C. § 7205(a)

§7205. ***Fraudulent withholding exemption certificate or failure to supply information***

(a) ***Withholding on wages***. -- Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined . . ., or imprisoned not more than 1 year, or both.[1]

11.2 TAX DIVISION POLICY

Section 7205 is used only rarely. The filing of a false Form W-4 generally will be charged as an affirmative act in a § 7201 tax evasion felony prosecution rather than as a misdemeanor under § 7205. Section 7205 may be used only in those cases in which the government cannot prove tax evasion or in those situations in which there are significant mitigating circumstances, the defendant cooperates fully, satisfies all tax liabilities, and assists in the criminal prosecution of a promoter of tax fraud. *See* USAM 9-27.300, Principles of Federal Prosecution -- Selecting Charges -- Charging Most Serious Offenses.

11.3 GENERALLY

Section 7205(a) is directed at employees who attempt to thwart the income tax wage withholding system by submitting false Forms W-4 to their employers.[2] As noted

[1] . The maximum permissible fine for offenses under Section 7205(a) is at least $100,000 for individuals. Alternatively, if the offense resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. *See* 18 U.S.C. § 3571.

[2] An employer who is required to furnish withholding statements to employees but who willfully furnishes false or fraudulent statements, or who willfully fails to furnish

above, however, the government generally will charge the filing of a false or fraudulent Form W-4 as an affirmative act in a ***Spies***-evasion felony prosecution rather than bringing a misdemeanor section 7205 charge. *See, e.g.*, ***United States v. King,*** 126 F.3d 987, 989-90 (7th Cir. 1997); ***United States v. Connor***, 898 F.2d 942, 944 (3rd Cir. 1990); ***United States v. Foster***, 789 F.2d 457, 460-61 n.4 (7th Cir. 1986). *See* Section 8.06[1], *supra*, discussing ***Spies***-evasion and false Forms W-4, and Section 40.05[2], *infra*, ***Tax Defiers***. Nevertheless, in appropriate cases, a Section 7205 charge is available. *See*, *e.g.*, ***Foster***, 789 F.2d at 460-61 (charging violations of sections 7201 and 7205); ***United States v. Copeland***, 786 F.2d 768, 770-71 (7th Cir. 1986) (same).

11.4 ELEMENTS OF SECTION 7205(a)

To establish a violation of section 7205(a), the following elements must be proved beyond a reasonable doubt:

1. The defendant was required to furnish an employer with a signed withholding exemption certificate (Form W-4) relating to the number of withholding exemptions claimed;

2. The defendant supplied his or her employer with a signed withholding statement;[3]

3. The information supplied to the employer on the signed withholding statement was false or fraudulent;

4. The defendant acted willfully.

See ***United States v. Herzog***, 632 F.2d 469, 471-72 (5th Cir. 1980); ***United States v. Olson***, 576 F.2d 1267, 1271 (8th Cir. 1978).

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statements, may be prosecuted under 26 U.S.C. § 7204, which is not separately treated in this manual.

[3] . The discussion in this section is limited to the supplying of false or fraudulent information. However, Section 7205(a) also makes it a crime to willfully fail to supply an employer with a signed withholding exemption certificate.

11.5 DUTY TO COMPLETE AND FILE FORM W-4

An employee's duty to supply an employer with information relating to the number of withholding exemptions claimed arises under Section 3402 of Title 26, which provides: "On or before the date of the commencement of employment with an employer, the employee shall furnish the employer with a signed withholding exemption certificate relating to the number of withholding exemptions which he claims, which shall in no event exceed the number to which he is entitled." 26 U.S.C. §3402(f)(2)(A).

The defendant's status as an employee is an essential element of the offense that the government must prove beyond a reasonable doubt. *See* ***United States v. Bass***, 784 F.2d 1282, 1284 (5th Cir. 1986); ***United States v. Herzog***, 632 F.2d 469, 472 (5th Cir. 1980); ***United States v. Johnson***, 576 F.2d 1331, 1332 (8th Cir. 1978); ***United States v. Pryor***, 574 F.2d 440, 442 (8th Cir. 1978).

Proof that the defendant is an employee should present little difficulty, because the defendant's filing of the Form W-4 constitutes the defendant's admission of being an employee. *See* Fed. R. Evid. 801(d)(2); 26 U.S.C. § 6064. Moreover, the records and testimony of the employer, including the Forms W-2 and payroll records, provide the necessary evidence of the defendant's status as an employee.

The precise date of the filing of the Form W-4 is not an essential element of a violation of Section 7205. *See* ***Johnson***, 576 F.2d at 1332; *see also* ***Pryor***, 574 F.2d at 442.

11.6 FALSE OR FRAUDULENT INFORMATION

Section 7205(a) proscribes providing false ***or*** fraudulent information on a Form W-4. The government must thus establish that the withholding form that was filed was false or fraudulent. *See* ***United States v. Hinderman***, 625 F.2d 994, 995-96 (l0th Cir. 1980); ***United States v. Buttorff***, 572 F.2d 619, 625 (8th Cir. 1978); ***United States v. Peterson***, 548 F.2d 279, 280 (9th Cir. 1977); ***United States v. Smith***, 484 F.2d 8, 10 (l0th Cir. 1973); ***United States v. Malinowski***, 472 F.2d 850, 852-53 (3d Cir. 1973).

"'False' means more than merely 'incorrect,'" but Section 7205 does not require that a statement be "false in the sense of deceptive." ***United States v. Hinderman***, 528 F.2d 100, 102 (8th Cir. 1976) (internal quotation omitted); *see also* ***United States v.***

Lawson, 670 F.2d 923, 928 (l0th Cir. 1982); ***United States v. Hudler***, 605 F.2d 488, 490 (l0th Cir. 1979) ("The criterion is not whether the employer and the government were, or could have been, deceived"); *but see* ***United States v. Snider***, 502 F.2d 645, 655 (4th Cir. 1974) ("in order for a taxpayer to be convicted of supplying 'false or fraudulent' information contrary to section 7205 the information must either be (1) supplied with an intent to deceive, or (2) false in the sense of deceptive -- of such a nature that it could reasonably affect withholding to the detriment of the government").

The Form W-4 filed by a defendant typically is asserted to be false or fraudulent insofar as it claims either an excessive number of withholding allowances or exemption from withholding. *See*, *e.g.* ***United States v. Cree,*** No. 94-10574, 1995 WL 465792, at *2 (9th Cir. Aug. 2, 1995). In ***United States v. McDonough***, 603 F.2d 19 (7th Cir. 1979), the defendant argued that the government failed to prove beyond a reasonable doubt the number of exemptions to which the defendant actually was entitled. The Seventh Circuit ruled that the government need only establish that the information supplied was false or fraudulent:

> Proof of falsehood does not, however, require a showing of what is true. The evidence in this case contains many reasonable inferences that the information given by the defendant was untrue. The testimony of the IRS agent, together with the other evidence, was sufficient for the jury reasonably to conclude beyond a reasonable doubt that the information was false. That the agent's testimony did not establish beyond a reasonable doubt that the defendant was entitled to a certain number of exemptions is immaterial.

McDonough, 603 F.2d at 24; *see also* ***United States v. Peister***, 631 F.2d 658, 664-65 (l0th Cir. 1980) (whether taxpayer is exempt from tax is a "collateral issue" not essential to establishing a violation of 26 U.S.C. § 7205; all that is required is proof that taxpayer presented a false or fraudulent Form W-4).

As noted, one way in which a taxpayer may violate Section 7205 is to falsely claim an exemption from withholding. Instructions on Forms W-4 require the employee to read the certificate to determine whether the employee can claim exempt status. The Form W-4, at line 7, requires the employee to certify the following before claiming exempt status:

> I claim exemption from withholding for [YEAR], and I certify that I meet **both** of the following conditions for exemption.
>
> ● Last year I had a right to a refund of **all** federal income tax withheld because I had **no** tax liability **and**
>
> ● This year I expect a refund of **all** federal income tax withheld because I expect to have **no** tax liability.[4]

(Emphasis in original). *See also* 26 U.S.C. § 3402(n) (employer not required to deduct and withhold any tax upon wages if a Form W-4 certifies that the employee (1) incurred no tax for the prior year and (2) anticipates no tax liability for the currentyear).

In cases in which the defendant has claimed to be exempt, the government often can introduce a tax return for the prior year that reflects a tax liability. The prior year tax return serves as an admission that the defendant knew he or she owed federal income tax "last year" and thereby knowingly filed a false Form W-4 in the prosecution year. Alternatively, computations of the defendant's taxable income and income tax liability for each of the years in question may be introduced to demonstrate the false or fraudulent nature of the exempt Form(s) W-4 filed. The fact that aggregate withholding in a particular year exceeds an individual's income tax liability for that year *does not* alter the fact that a tax liability for that year exists. ***United States v. Echols***, 677 F.2d 498, 499 (5th Cir. 1982); ***United States v. Hinderman***, 528 F.2d at 101; *see also* Treas. Reg. § 31.3402(n)-l, ex. 3 (2007) ("Assume [Employee A, an unmarried, calendar-year basis taxpayer, files his income tax return for 2005 on April 10, 2006. Also assume] . . . that for 2005 A has taxable income of $8,000, income tax liability of $839, and income tax withheld of $1,195. Although A received a refund of $356 due to income tax withholding of $1,195, he may not certify on his withholding exemption certificate that he incurred no liability for income tax imposed by subtitle A for 2005").

An administrative assessment under 26 U.S.C. § 6201 is not required before an individual can have a tax liability. *See, e.g.*, ***United States v. Hogan***, 861 F.2d 312, 315 (1st Cir. 1988); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985). Furthermore, the government need not prove that an employer relied on the forms submitted. ***United States v. Thomas***, 788 F.2d 1250, 1254 (7th Cir.1986) ("Section 7205 forbids the filing of 'false' forms . . . and reliance on the forms is not an element of the offense").

[4] Form W-4 was amended in 1994 to its current language.

11.7 WILLFULNESS

11.07[1] Generally

Willfulness for purposes of a Section 7205 prosecution is the same as it is in all specific intent criminal tax offenses -- "a voluntary, intentional violation of a known legal duty." ***Cheek v. United States***, 498 U.S. 192, 194 (1991); ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); ***United States v. Flitcraft***, 803 F.2d 184, 186-87 (5th Cir. 1986); ***United States v. Ferguson***, 793 F.2d 828, 830-31 (7th Cir. 1986); ***United States v. Latham***, 754 F.2d 747, 750 (7th Cir. 1985); ***United States v. Grumka***, 728 F.2d 794, 796 (6th Cir. 1984); ***United States v. Hinderman***, 625 F.2d 994, 996 (l0th Cir. 1980); ***United States v. Rifen***, 577 F.2d 1111, 1113 (8th Cir. 1978); ***United States v. Olson***, 576 F.2d 1267, 1272 (8th Cir. 1978).

Whether the defendant had a good faith misunderstanding of the law, as opposed to a disagreement with the law, is a jury question. *See* ***United States v. Schiff***, 801 F.2d 108, 112 (2d Cir. 1986); ***United States v. Turner***, 799 F.2d 627, 629 (10th Cir. 1986). A jury may not be told that a defendant’s claimed misunderstanding of the law must be objectively reasonable to constitute a defense. ***Cheek***, 498 U.S. at 203; *see also* ***Flitcraft***, 803 F.2d at 187; ***United States v. Aitken***, 755 F.2d 188 (lst Cir. 1985). However, a separate instruction on good faith is unnecessary in a criminal tax case if the trial court adequately instructs the jury on willfulness. *See* ***Cheek***, 498 U.S. at 201; ***United States v. Pomponio***, 429 U.S. 10, 13 (1976); ***United States v. Hardy***, 941 F.2d 893, 897 (9th Cir. 1991). *See also* the discussion of willfulness in Sections 8.08, *supra*, and 40.04,*infra*.

11.7 [2] Examples: Proof of Willfulness

1. Evidence that prior to the year in which he falsely claimed nine exemptions, the defendant had filed tax returns, had paid his taxes, and had not claimed any exemptions; the Form W-4 filed by the defendant clearly showed that he was entitled to no more than two exemptions; and the defendant testified that he claimed nine exemptions to “zero out” his tax liability. ***United States v. Cree,*** No. 94-10574, 1995 WL 465792 at *2 (9th Cir. Aug. 2, 1995).

2. Evidence that the defendant had a tax liability in a prior year and then filed a Form W-4 in which

99 exemptions were claimed, as well as a document that falsely declared he had no tax liability in the prior year and anticipated none in the year in issue. ***United States v. Arlt***, 567 F.2d 1295, 1298 (5th Cir. 1978); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984) (filing a Form W-4 claiming total exemption from federal income taxes).

3. The filing of returns on which defendant “did not enter dollar amounts where financial information was required but rather entered the word ‘none,’ an ‘asterick’ [sic] or ‘I OBJ 5th Amend,’” and notice by the IRS that the returns were invalid. ***Grumka***, 728 F.2d at 796-97.

4. “Both the failure to file a return and the failure to pay taxes show a general motive to avoid taxes which makes it more likely that the defendant willfully filed fraudulent withholding exemption claims.” ***United States v. McDonough***, 603 F.2d 19, 23 (7th Cir. 1979).

5. The large number of exemptions claimed and the increase in the number of exemptions claimed as defendant’s income increased. ***McDonough***, 603 F.2d at 24.

6. Evidence of prior tax-paying history and of attempts by the IRS to explain legal requirements to the defendant is sufficient to sustain the jury's finding that the defendant was aware of his legal obligations and intentionally chose not to comply. ***United States v. Rifen***, 577 F.2d 1111, 1113 (8th Cir. 1978) (in addition to letters from IRS explaining legal requirements, defendant’s employer attempted

   to explain legal requirements to defendant); ***United States v. Foster***, 789 F.2d 457, 461-62 (7th Cir. 1986).

7. Defendants, husband and wife, filed Forms W-4 for prior years claiming five withholding allowances. Three days after the husband attended a tax defier seminar, both husband and

wife changed their withholding certificates to claim a total of 28 withholding allowances. Defendants gave "vague answers" to their employers when questioned about the "sudden increase" in the number of claimed allowances and made no claim at trial that they expected to have 28 allowances. ***United States v. Anderson***, 577 F.2d 258, 260-62 (5th Cir. 1978).

8. A defendant's "expressed moral and religious convictions against the payment of income taxes." ***United States v. Reed***, 670 F.2d 622, 623 (5th Cir. 1982) ("Evidence of a person's philosophy, motivation, and activities as a tax protester is relevant and material to the issue of intent"); *see also* ***Foster***, 789 F.2d at 462 (evidence that defendant sent tax defier materials to the IRS support finding that defendant acted willfully).

9. Defendant's filing of "Affidavits of Revocation" stating that she was not required to file returns or pay taxes, and letter to IRS stating that wages are not income are evidence of willfulness. ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986).

11.8 VENUE

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed." U.S. Const. amend VI; *see also* Fed. R. Crim. P. 18 (trial proper "in a district where the offense was committed"). *See also* the discussion of venue in Section 6.00, *supra*.

In a Section 7205 prosecution, venue is proper in the judicial district in which the false Form W-4 is submitted to the defendant's employer. *See* ***United States v. Anderson***, 328 U.S. 699, 703 (1946) (absent statutory provision establishing the place of committing a crime, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it"). When a defendant is charged with evasion under Section 7201 and the filing of a false or fraudulent Form W-4 is an affirmative act of evasion, "venue is proper where a false withholding statement is prepared and signed, where it is received and filed, or where an attempt to evade otherwise occurred." *See* ***United States v. Felak***, 831 F.2d 794, 799 (8th Cir. 1987).

11.9 STATUTE OFLIMITATIONS

The statute of limitations for Section 7205 offenses is three years from the date the false or fraudulent Form W-4 is filed. 26 U.S.C. § 6531. The three-year limitations period can pose difficulties in charging Section 7205 in conjunction with other tax offenses that have a six-year statute of limitation (*e.g.*, 26 U.S.C. §§ 7201, 7203, 7212(a)).

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12.00 FRAUD AND FALSE STATEMENT

12.1 STATUTORY LANGUAGE: 26 U.S.C. § 7206(1)

§7206. ***Fraud and false statements***

Any person who --

(1) ***Declaration under penalties of perjury***. --

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

. . .

shall be guilty of a felony and, upon conviction thereof, shall be fined . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

12.2 TAX DIVISION POLICY

The Tax Division prefers for tax cases to be brought under Title 26, and § 7206(1) is often a viable charge for defendants who commit tax fraud and file tax returns in their own names. Prosecutors should consider bringing charges under other statutes, such as 26 § 7201 (tax evasion), 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 1001 (false statements), and 26 U.S.C. § 7212(a) (obstruction of IRS), however, if technical defenses are likely to be raised to § 7206(1).

12.3 GENERALLY

Section 7206(1) makes it a felony to willfully make and subscribe a false document, if the document was signed under penalties of perjury. "[T]he primary purpose of section 7206(1) 'is to impose the penalties of perjury upon those who willfully falsify their returns regardless of the tax consequences of the falsehood.'" ***United States v.***

[1] Under 18 U.S.C. § 3571, the maximum fine under Section 7206(1) is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

Romanow, 509 F.2d 26, 28 (1st Cir. 1975) (quoting ***Gaunt v. United States***, 184 F.2d 284, 288 (1st Cir. 1950)). Section 7206(1) is referred to as the "tax perjury statute," because it makes the falsehood itself a crime. Historically, because Section 7206(1) does not require proof of a tax deficiency, it permits prosecution in cases in which there is no tax deficiency, a minimal tax deficiency, or a tax deficiency that would be difficult to prove. However, the government's burden of proving materiality to the jury may now make it more difficult to obtain convictions in cases with no demonstrable tax loss. *See* § 12.10[5], *infra*.

12.4 PLEADING CONSIDERATIONS

An important preliminary charging decision is whether or not to specify the amount of the unreported income or false items in the indictment.[2] The considerations are the same as those set forth in Section 8.07 of this Manual.

12.5 ELEMENTS

The elements of a Section 7206(1) offense are as follows:

1. The defendant made and subscribed a return, statement, or other document which was false as to a material matter;

2. The return, statement, or other document contained a written declaration that it was made under the penalties ofperjury;

3. The defendant did not believe the return, statement, or other document to be true and correct as to every material matter;and

4. The defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law.

United States v. Bishop, 412 U.S. 346, 350 (1973); ***United States v. Hills,*** 618 F.3d 619, 634 (7th Cir. 2010); ***United States v. Griffin***, 524 F.3d 71, 75-76 (1st Cir. 2008); ***United States v. Marston***, 517 F.3d 996, 999 n.3 (8th Cir. 2008); ***United States v. Clayton***, 506 F.3d 405, 410, 413 (5th Cir. 2007) (*per curiam*); ***United States v. Pirro***, 212 F.3d 86, 89 (2d Cir. 2000); ***United States v. Scholl***, 166 F.3d 964, 979-80 (9th Cir. 1999); ***United States v. Peters***, 153 F.3d 445, 461 (7th Cir. 1998); ***United States v. Gollapudi***, 130 F.3d

[2] *See infra*, for sample indictment forms charging Section 7206(1) violations, including a sample "open ended" indictment.

66, 71-72 (3d Cir. 1997); ***United States v. Monus***, 128 F.3d 376, 386-87 (6th Cir. 1997); ***United States v. Aramony***, 88 F.3d 1369, 1382 (4th Cir. 1996); ***United States v. Owen,*** 15 F.3d 1528, 1532 (10th Cir. 1994); ***United States v. Kaiser***, 893 F.2d 1300, 1305 (11th Cir. 1990).

12.6 RETURN, STATEMENT, OR DOCUMENT

Section 7206(1) expressly applies to "any return, statement, or other document" signed under penalties of perjury. It is not limited to tax returns. ***United States v. Marston***, 517 F.3d 996, 1002 (8th Cir. 2008).

In some cases, a defendant files what is referred to as a "zero" or "0" return, in which zeros are inserted on all the lines, or files blank Forms 1040 with no information from which a tax can be computed. In criminal cases involving such returns, there is precedent that Forms 1040 that report zeros and/or constitutional objections and returns with lines through all the boxes are not valid returns. *See* ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984) (*per curiam*); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir. 1980) (*per curiam*); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979) (*per curiam*); ***United States v. Brown***, 600 F.2d 248, 251 (10th Cir. 1979); ***United States v. Grabinski***, 558 F. Supp. 1324, 1329-31 (D. Minn. 1983) (collecting cases), *aff'd* 727 F.2d 681 (8th Cir. 1984). Similarly, a blank return with no information from which a tax can be computed has been held not to constitute a valid return. ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir. 1980) (*citing* ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir. 1970)).

This has also been true in the civil tax realm. In ***Beard v. Comm'r***, the Tax Court held that for a document to be considered a return, the document must

(1) purport to be a return;

(2) be executed under penalties of perjury;

(3) contain sufficient data to allow calculation of tax; and

(4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.

82 T.C. 766, 777-79 (T.C. 1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986); *accord* ***Turner v. Comm'r***, TC Memo. 2004-251 (T.C. 2004) (the taxpayer's return "contained zero entries for every line regarding his 1999 income" and "attached to his Form 1040 documents containing tax-protester rhetoric"). In circuits in which the document filed by a taxpayer does not constitute a return, care should be taken to charge the false filing as a "document" rather than a "return."

The United States Court of Appeals for the Ninth Circuit held in ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980) (*per curiam*), that unlike blanks, zeros on tax returns constitute information as to income from which a tax loss could be computed just as if the return had contained other numbers. In ***Long***, the Ninth Circuit held that "[n]othing can be calculated from a blank, but a zero, like other figures, has significance. A return containing false or misleading figures is still a return." ***Id***. at 76. Similarly, where a defendant filed a blank Form 1040 containing only his signature but attached his Forms W-2, the Ninth Circuit affirmed his conviction for violating § 7206(1). ***United States v. Crowhurst***, 629 F.2d at 1300. The court held that the test for determining whether a filing constitutes a return is "whether or not sufficient information is supplied from which a tax may be computed," and the fact that the defendant "did not himself enter numerals on the appropriate lines of the 1040 form should not prevent his conviction for making a false return." ***Id***.; *see also* ***United States v. Grabinski***, 558 F. Supp. at 1330 n. 11 ("A taxpayer could attach a copy of anything he wished to his 1040 form and it would be a return if he provided all of the information called for on that form.").

While most Section 7206(1) prosecutions involve income tax returns, there are some reported cases involving false documents other than tax returns. *See, e.g.*, ***United States v. Pansier***, 576 F.3d 726, 736 (7th Cir. 2009) (false Forms 8300 filed against IRS agents); ***United States v. Droms***, 566 F.2d 361, 362-63 (2d Cir. 1977) (*per curiam*) (financial information statement submitted to the IRS for settlement purposes); ***United States v. Cohen***, 544 F.2d 781, 782-83 (5th Cir. 1977) (false statement made in an offer in compromise, Form 656); ***Jaben v. United States***, 349 F.2d 913, 915-16 (8th Cir. 1965) (application for extension of time for filing). Note that these three cases are merely examples of the use of the statute: in none of them was the application of Section 7206(1) to the particular type of false document actually challenged by the defense. In ***United States v. Carrabbia***, 381 F.2d 133, 134-35 (6th Cir. 1967), however, the defendant specifically argued that his conviction on a charge under § 7206(1) was invalid because the statute did not apply to a Form 11-C, a renewal application to allow him to continue in the business of accepting wagers for the ensuing governmental fiscal year, that was alleged to be false. The court of appeals rejected the defendant's argument, concluding that the defendant's conduct fell within the ambit of § 7206(1). 381 F.2d at 136.

The Fifth Circuit limited the application of § 7206(1) to documents required either by the Internal Revenue Code or applicable regulations thereunder, in ***United States v. Levy***, 533 F.2d 969, 975 (5th Cir. 1976). But subsequent decisions of the Fifth Circuit have limited ***Levy's*** interpretation of Section 7206(1). *See* ***United States v. Damon***, 676 F.2d 1060, 1063-64 (5th Cir. 1982) (permitting § 7206(2) prosecution for filing false Schedules C); ***United States v. Taylor***, 574 F.2d 232, 237 (5th Cir. 1978) ("While there is no explicit requirement in the regulations for the completion and filing of Schedules E and F, it is implicit in required Form 1040 that such schedules, when appropriate, become integral parts of such form and are incorporated therein by reference. Therefore, we conclude that section 7206(1) requires the same duty of honest reporting on schedules as it requires for entries on the Form proper."); *see also* ***United States v. Edwards***, 777 F.2d 644, 652 (11th Cir. 1985) (permitting § 7206(1) prosecution for false Schedule C, following ***Taylor*** and distinguishing ***Levy***); *cf*. ***United States v. Hunerlach***, 197 F.3d 1059, 1068-69 (5th Cir. 1999) (affirming conviction based on defendant's submission of a false Form 433A in the fulfillment of his obligations under a plea agreement, where argument that a Section 7206(1) conviction cannot rest on Form 433A was not made below).

Other circuits flatly reject ***Levy***. In ***United States v. Holroyd***, 732 F.2d 1122 (2d Cir. 1984), the Second Circuit held that a statement made on an IRS form, the use of which is not expressly authorized by statute or regulation, may provide the basis for a Section 7206(1) prosecution. In connection with an ongoing assessment of his ability to pay a tax liability, the defendant had signed under penalties of perjury and filed with the IRS two false IRS collection information statements -- Form 433-AB and Form 433-A. ***Id***. at 1124. The trial court dismissed the indictment on the authority of ***Levy*** because Form 433-AB was not a required form. ***Id***. at 1123. The Second Circuit, however, rejected the ***Levy*** court's restrictive interpretation of Section 7206(1),concluding:

> 26 U.S.C. Section 7206(1) means what it says on its face. It applies to any verified return, statement or other document submitted to the IRS. The indictment against [the defendant], in our view, did state a crime cognizable under that section.

Holroyd, 732 F.2d at 1128.

Similarly, the defendants in ***United States v. Franks***, 723 F.2d 1482, 1485 (10th Cir. 1983), argued that because the question concerning the existence of foreign bank accounts on their 1974 income tax returns, as well as the Forms 4683 attached to their amended 1974 and 1975 returns, were not authorized by the Internal Revenue Code or by any regulation, the responses to those questions could not support a Section 7206(1) prosecution. The Tenth Circuit refused to apply the ***Levy*** rationale and rejected this argument:

> Like the Fifth Circuit, in cases decided subsequent to ***United States v. Levy***, we do not believe the rationale of ***Levy*** should be extended, and, in our view, such does not apply to the schedules here appended to a Form 1040, or to an answer made in response to a question contained in the Form 1040. In the instant case, it is clearly established that the defendants in their 1974 tax return gave a false answer to a direct question concerning their interest in foreign bank accounts, and that they attached to their amended tax return for 1974 and their tax return for 1975 a completed Form 4683 which did not identify *all* of the foreign bank accounts over which they had signatory authority. Such, in our view, comes within the purview of 26 U.S.C. Section 7206(1).

Franks, 723 F.2d at 1486 (citations omitted); *see also* ***United States v. Harvey***, 869 F.2d 1439, 1441 & n.3 (11th Cir. 1989) (failing to report interest income from Cayman Islands accounts on Schedule B and falsely answering "no" on Schedule B, Part III (Foreign Accounts and Foreign Trusts), Form 1040, supported a charge defendant violated § 7206(1)).

12.7 "MAKES" ANY RETURN, STATEMENT, ORDOCUMENT

12.07[1] Requirement of Filing

The plain language of the statute does not require that the return, statement or other document be filed. Nevertheless, some courts have held that although "make and subscribe," as used in Section 7206(1), are words that connote "preparing and signing," a completed Form 1040 does not become a 'return,' and a taxpayer does not 'make a return,' until the form is filed with the Internal Revenue Service. ***United States v. Harvey***, 869 F.2d 1439, 1448 (11th Cir. 1989) (*en banc*) ("the crime of willfully filing a false tax return for income earned in 1980 . . . could not have occurred until April of 1981 when [the defendant] filed the allegedly fraudulent return"); ***United States v. Gilkey***, 362 F. Supp. 1069, 1071 (E.D. Pa. 1973); ***United States v. Horwitz***, 247 F. Supp. 412, 413-14 (N.D. Ill. 1965); *see also* ***United States v. Dahlstrom***, 713 F.2d 1423, 1429 (9th Cir. 1983) (reversing § 7206(2) conviction because return not filed). According to ***Gilkey***, 362 F. Supp. at 1071, the rationale for this holding is that taxpayers ought to have the "right of self-correction."

12.7 [2] Persons and Entities Liable

Under traditional perjury law, corporations cannot commit perjury because a corporation cannot take an oath to tell the truth. A corporation, however, can be prosecuted for a Section 7206(1) violation because Section 7206(1) expressly refers to "any person," and 26 U.S.C. §7701(a)(1) specifically defines "person" to include a corporation. *See* ***United States v. Ingredient Technology Corp.***, 698 F.2d 88, 99-100 (2d Cir. 1983); *accord* ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir. 1986) ("A corporation will be held liable under section 7206(1) when its agent deliberately causes it to make and subscribe to a false tax return."). "While a corporation has no independent state of mind, the acts of individuals on its behalf may be properly chargeable to it." ***United States v. Ingredient Technology Corp.***, 698 F.2d at 99 (citations omitted).

Further, the maker of the return does not have to physically complete or prepare the return. In ***United States v. Badwan***, 624 F.2d 1228, 1232 (4th Cir. 1980), the defendants argued that they did not "make" the return, as required by section 7206(1), since their returns were prepared by an accountant. The Fourth Circuit rejected the argument that the defendant had to actually prepare the return:

> The evidence did clearly show, however, that the accountant who prepared the returns did so solely on the basis of information provided to him by the Badwans, and that the Badwans then signed and filed the returns. This satisfies the statute.

Badwan, 624 F.2d at 1232.

Reliance on a qualified tax return preparer has been referred to as an affirmative defense to a charge under § 7206(1). ***United States v. Loe***, 248 F.3d 449, 469 n.91 (5th Cir. 2001) (*citing* ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989)); ***United States v. Duncan***, 850 F.2d 1104, 1117 (6th Cir. 1988), *overruled on other grounds by*

Schad v. Arizona, 501 U.S. 624 (1991). In order to avail himself or herself of this defense, however, a defendant must demonstrate that he or she provided full information to the preparer and then filed the return without having reason to believe it was incorrect. ***United States v. Wilson***, 887 F.2d at 73 (citations omitted). For other cases discussing a good faith reliance defense, see ***United States v. Lindo***, 18 F.3d 353, 356 (6th Cir. 1994); ***United States v. Kenney***, 911 F.2d 315, 322 (9th Cir. 1990).

Additionally, a return preparer can be charged under Section 7206(1) for willfully making and subscribing a false tax return for a taxpayer. *See* ***United States v. Shortt Accountancy Corp.***, 785 F.2d 1448, 1454 (9th Cir. 1986). In ***Shortt Accountancy***, one of the defendant accounting firm's accountants had prepared and signed a client's Form 1040, which contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. 785 F.2d at 1450-51. On appeal, the defendant firm argued that a tax preparer cannot "make" a return within the meaning of Section 7206(1) since it is the taxpayer, not the preparer, who has the statutory duty to file the return. ***Id***. at 1451. The court rejected this argument, holding that the prohibitions of Section 7206(1) are not based on the taxpayer's duty to file, but instead, Section 7206(1) simply prohibits perjury in connection with the preparation of a federal tax return. ***Id***. at 1454. According to the court, "sections 7206(1) and 7206(2) are 'closely related companion provisions' that differ in emphasis more than in substance," and "[p]erjury in connection with the preparation of a federal tax return is chargeable under either section." ***Shortt Accountancy***, 785 F. 2d at 1454 (*quoting* ***United States v. Haynes***, 573 F.2d 236, 240 (5th Cir. 1978)). Generally, however, it is the better practice to charge a violation of Section 7206(2) against a person who prepares a false return for an individual required to file.

12.8 "SUBSCRIBES" ANY RETURN, STATEMENT, OR DOCUMENT

12.08[1] Generally

The submission of a false unsigned return cannot, without more, serve as the basis for a 7206(1) prosecution because the act of subscribing (signing) a return, statement, or other document, is an element of the offense. An unsigned return, however, may provide the basis for a tax evasion charge under 26 U.S.C. § 7201 if the evidence shows that the unsigned return was filed by the defendant as his return and was intended to be such. *See* ***United States v. Robinson***, 974 F.2d 575, 577-78 (5th Cir. 1992) (noting that submission of unsigned documents purporting to be returns can constitute affirmative acts of evasion).

Section 7206(1) does not require that the defendant personally sign the return, so long as he authorized the filing of the return with his name subscribed . ***United States v. Ponder***, 444 F.2d 816, 822 (5th Cir. 1971). Similarly, a return signed by only one spouse nevertheless qualifies as a joint return where there is evidence that the parties intended to file their return jointly. ***United States v. Robinson***, 974 F.2d at 579 n.5 (citations omitted). *See also* ***United States v. McKee***, 506 F.3d 225, 233 (3d Cir. 2007) ("'The law does not require the defendant's own signature to sustain a conviction under §7201: it merely requires sufficient circumstances . . . from which a reasonable jury could find that the defendant did authorize the filing of the return with his name subscribed to it.'") (*quoting* ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989)).

12.8 [2] Proof of Signature

Assuming that the document is signed, the government must still authenticate the signature -- establish that the signature is what the government alleges it to be, *i.e.*, that the named person actually signed the document. The signature can be authenticated by the use of any one of three methods provided bythe Federal Rules of Evidence:

1. ***Lay testimony on handwriting*** -- any witness who is familiar with the defendant's handwriting may testify that the questioned signature is that of the defendant. The limitation on this approach is that the familiarity of the witness with the handwriting of the defendant must not have been acquired for purposes of the litigation. Fed. R. Evid. 901(b)(2).

2. ***Expert testimony*** -- a qualified expert may compare the questioned signature with authenticated specimens of the defendant. Fed. R. Evid. 901(b)(3).

3. ***Jury comparison*** -- the finder of fact may compare authenticated specimens with the questioned signature without expert help. Fed. R. Evid. 901(b)(3).

For purposes of comparison, 28 U.S.C. § 1731, provides:

> The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

Furthermore, the authentication of a signature is aided by a statutory presumption provided by the Internal Revenue Code, 26 U.S.C. § 6064 (1986):

> The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

For similar presumptions with respect to corporate and partnership returns, see 26 U.S.C. §§ 6062-6063.

Accordingly, if an individual's name is signed to a return, statement, or other document, there is a rebuttable presumption by virtue of § 6064 that the document was actually signed by that individual. *See* ***United States v. Kim***, 884 F.2d 189, 195 (5th Cir. 1989) (noting presumption and rejecting constitutional challenge to § 6064). This presumption applies to both civil and criminal cases. ***United States v. Cashio***, 420 F.2d 1132, 1135 (5th Cir. 1969).

The statutory presumption has practical consequences at trial, because it is not necessary to present direct evidence showing that the defendant actually signed the returns; it is sufficient that the defendant's name is on the returns and the returns are true and correct copies of returns on file with the Internal Revenue Service. ***United States v. Wilson***, 887 F.2d 69, 72 (5th Cir. 1989); ***United States v. Carrodeguas***, 747 F.2d 1390, 1396 (11th Cir. 1984).

Even when a defendant's signature is never authenticated the jury may correctly conclude that the defendant knew that the return was false when it was filed. In ***United States v. McKee***, 506 F.3d 225, 228, 233 (3d Cir. 2007), the defendants were charged with employment tax evasion, in violation of § 7201, and one of the affirmative acts of evasion charged was the filing of false employment tax returns, Forms 941. The defendants challenged the sufficiency of the evidence of affirmative acts of evasion on the grounds that their signatures on the Forms 941 were never authenticated at trial. ***Id***. at 233. The defendants argued that the jury could not rely on 26 U.S.C. § 6064, which, as noted above, provides that the fact of a signature on a tax return is *prima facie* evidence that the return was signed by the named individual. 506 F.3d at 233. The Third Circuit held that the fact that a return may have been signed by someone other than the defendants does not necessarily undermine the jury's conclusion that the defendants knew the returns were false and approved the filings to evade the applicable employment taxes. ***Id.*** "'The law does not require the defendant's own signature to sustain a conviction under §7201: it merely requires sufficient circumstances . . . from which a reasonable jury could find that the defendant did authorize the filing of the return with his name subscribed to it.'" ***Id***. (quoting ***United States v. Fawaz***, 881 F.2d 259, 265 (6th Cir. 1989)). Although ***McKee*** involved evasion charges under § 7201, the court's holding regarding the filing of false income tax returns may be helpful in cases under § 7206(1) where the defendant challenges the authenticity of his or her signature and the applicability of § 6064.

Increasingly, taxpayers are filing tax returns electronically. Any electronically filed tax return must contain the perjury jurat. The Internal Revenue Service has developed methods by which tax returns may be electronically filed. These include the use of PINs and the IRS Form 8879, IRS e-file Signature Authorization. "[A]ny return, declaration, statement, or other document filed and verified, signed, or subscribed under any method adopted under [26 U.S.C. § 6061(b)(1)(B)] shall be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though signed or subscribed." 26 U.S.C. § 6061(b)(2). It is important to ensure that there is admissible evidence that the taxpayer was responsible for the electronic filing of the tax return.

12.9 MADE UNDER PENALTIES OFPERJURY

12.09[1] Requirement Of A Jurat

Section 7206(1) requires that the return, statement, or other document be made "under the penalties of perjury." This element should be self-evident as the document either does or does not contain a declaration that it is signed under the penalties of perjury. A signature plus the declaration is sufficient; the document need not be witnessed or notarized. As required by 26 U.S.C. § 6065, all income tax returns contain such a declaration. Note that at least one court has determined that when a taxpayer adds the phrase "without prejudice" near the taxpayer's signature on the jurat, it does not affect the jurat. ***United States v. Davis***, 603 F.3d 303, 307 (5th Cir. 2010) ([W]here there is some ambiguity as to language's effect on the jurat . . .the IRS should be entitled to construe alterations of the jurat against the taxpayer, at least when there is any doubt.")

If a taxpayer presents a return or other document in which the jurat is stricken, then prosecution should not be brought under Section 7206(1), as the document is not signed under the penalties of perjury. However, 26 U.S.C. § 7201 (tax evasion) or 18 U.S.C. § 1001 (false statement) charges may be considered in such aninstance.

12.9 [2] Law Of Perjury Does Not Apply To Section 7206(1) Prosecutions

Although referred to as the "tax perjury statute," Section 7206(1) prosecutions are not perjury prosecutions. "The language 'made under the penalties of perjury' is of purely historical significance." ***Escobar v. United States***, 388 F.2d 661, 664 (5th Cir. 1967) (citations omitted). Accordingly, the heightened requirement of proof traditionally applicable in perjury prosecutions does not apply to Section 7206(1) prosecutions. ***Id***. at 665; *see also* **United States v. Carabbia**, 381 F.2d 133, 137 (6th Cir. 1967) (holding that the two-witness rule applicable to perjury prosecutions does not apply).

12.10 FALSE MATERIAL MATTER

12.10[1] Generally

Section 7206(1) requires that a return, statement, or other document must be "true and correct as to every material matter." Accordingly, the government must prove that the matter charged as false is material.

"[A] 'material' matter is one that affects or influences the IRS in carrying out the functions committed to it by law *or* 'one that is likely to affect the calculation of tax due and payable.'" ***United States v. Griffin***, 524 F.3d 71, 76 (1st Cir. 2008) (citations omitted). "A false statement may be material even if it was only *likely to influence the calculation* of tax due and payable." ***Id***. at 76-77 (emphasis in original).

In 1994, the Supreme Court held in ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1994), that materiality is a question for the jury, and not the court, in prosecutions under 18 U.S.C. § 1001. In ***Neder v. United States***, 527 U.S. 1, 8 (1999), the "Government d[id] not dispute that the District Court erred under ***Gaudin*** in deciding the materiality element of a § 7206(1) offense itself, rather than submitting the issue to the jury." The ***Neder*** Court opined that ***Gaudin*** mandates that questions of materiality in Title 26 cases be submitted to the jury. 527 U.S. at 19-20. *Accord* **Washington v. *Recuenco***, 548 U.S. 212, 219-20 (2006) (*reaffirming* **Neder**); *see also* **United States v. *Jackson***, 196 F.3d 383, 384-85 (2d Cir. 1999).

In view of ***Neder*** and ***Gaudin***, the "better practice" in Section 7206 cases is to submit all questions of materiality to the jury. *See* 2B Kevin F. O'Malley, William C. Lee & Jay E. Grenig, Federal Jury Practice and Instructions, § 67.15 (5th ed. 2000) (collecting, by circuit, instructions in which the jury is asked to decide materiality in § 7206(1) cases).

12.10[2] Reynolds "literal truth" Defense

Prosecutors, particularly in the Seventh Circuit, need to be aware of the potential of the Reynolds "literal truth" defense despite the fact that it has no continuing validity following the change in the language of the jurat on tax returns. In ***United States v. Reynolds***, 919 F.2d 435, 436-37 (7th Cir. 1990), the defendant filed a Form 1040EZ reporting all the categories of income requested on the form, but omitting a category of income not reportable on that form. Although the defendant's responses on the form were literally true, the prosecution characterized these responses as misleading because the defendant had a category of income (the unreported income) which disqualified him from use of that form. ***Id***. at 437. The Seventh Circuit held that, although the form was misleading, the literal truth of the statements on the form precluded a Section 7206(1) conviction. The court stated, however, that Reynolds could be tried for violations of Section 7201 or Section 7203. ***Id***. The Seventh Circuit adopted a similar position with respect to Form 1040A, which, like Form 1040EZ is a simplified tax form, in ***United States v. Borman***, 992 F.2d 124, 126 (7th Cir. 1993).

The Third Circuit addressed and distinguished the "***Reynolds*** defense" in ***United States v. Gollapudi***, 130 F.3d 66 (3d Cir. 1997). There, the taxpayer was charged with a violation of section 7206(1) for listing a false amount of withholding on a Form 1040. 130 F.3d at 68. The taxpayer argued that he had in fact withheld taxes, but had simply not paid over the withheld funds to the IRS, and that his returns thus were "literally true" under ***Reynolds***. ***Id***. at 72. The Third Circuit rejected the taxpayer's claims as a factual matter, crediting the testimony of an IRS agent that no taxes had ever been withheld. ***Id.*** But the court of appeals went on to note that ***Reynolds*** and ***Borman*** offer a defense to

Section 7206 only when there is no specific line item which can be proven false. ***Gollapudi***, 130 F.3d at 72. According to the Third Circuit, ***Reynolds*** stands for the simple proposition that using the wrong tax form -- one that does not contain an identifiable line item that can be charged as false -- cannot constitute a violation of Section 7206(1). ***Id***.

In 1993, in response to the ***Reynolds*** and ***Borman*** cases, the IRS changed the jurat on the Form 1040EZ to read:

> I have read this return. Under penalties of perjury, I declare that to the best of my knowledge and belief, the return is true, correct, and accurately lists all amounts and sources of income I received during the tax year. (Emphasis added.)

In that same year, the IRS also changed the jurat on the Form 1040A to read:

> Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statement, and to the best of my knowledge and belief, they are true, correct, and accurately list all amounts and sources of income I received during the tax year. Declaration of preparer (other than the taxpayer) is based on all information of which the preparer has any knowledge. (Emphasis added.)

The additional language was incorporated to forestall any potential Reynolds literal truth defense, however, some defendants in tax cases still attempt to raise it as a defense to their crimes. *See, e.g.*, ***United States v. Ladum***, 141 F.3d 1328, 1335-36 (9th Cir. 1998).

12.10[3] Proof of One Material Item Enough

A Section 7206(1) indictment may charge in a single count that several items in one document are false. If one count in an indictment charges three items on a single return as false (*e.g.*, dividends, interest, and capital gains), then it is sufficient if only one of those items is proven to be false. The government does not have to prove that every item charged is false. The same is true of a charge that the defendant omitted several items from his or her return. *See* ***Griffin v. United States***, 502 U.S. 46, 49 (1991) (when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient as to any one of the acts charged); ***United States v. Duncan***, 850 F.2d 1104, 1108-13 (6th Cir. 1988) (noting that this principle applies only insofar as the acts on which unanimity is required fall into "distinct conceptual groupings."), *criticized by* ***Schad v. Arizona***, 501 U.S. 624, 635 (1991) (plurality opinion) ("the notion of 'distinct conceptual groupings' is simply too conclusory to serve as a real test"). It is also permissible to present to a jury alternative theories of falsity. *See* ***United States v. Foley***, 73 F.3d 484, 493 (2d Cir. 1996) (noting that "properly instructed jury" could convict under § 7206(2) for deduction of bribe that was either illegal under federal law, illegal under state law, or legal but not an ordinary business expense, but reversing conviction where one of the alternate bases was invalid as a matter of law), *overruled in part on other grounds by* ***Salinas v. United States***, 522 U.S. 52 (1997).

While a jury must reach a unanimous verdict as to the factual basis for a conviction, a general instruction on unanimity is sufficient to insure that such a unanimous verdict is reached, except in cases where the complexity of the evidence or other factors create a genuine danger of confusion. ***United States v. Schiff***, 801 F.2d 108, 114-15 (2d Cir. 1986). At least one court, however, has held that when a single false return count contains two or more factually distinct false statements, the jury must reach unanimity on the willful falsity of at least one statement. ***United States v. Duncan***, 850 F.2d at 1113. In ***Duncan***, one count in the indictment against two defendants alleged two false statements, one involving an interest deduction and one involving an income characterization. 850 F.2d at 1106. The court of appeals vacated the Section 7206(1) convictions of the defendants because the trial judge failed to instruct the jury, after a specific request by the jury during its deliberations, that conviction required unanimity on at least one of the alleged willful false statements. ***Id***. at 1110. The Sixth Circuit concluded that in the context of the case and given the juror's request for clarification, there was a "tangible risk of jury confusion and of nonunanimity on a necessary element of the offense charged." ***Duncan***, 850 F.2d at 1113-14. *But cf.* ***Schad v. Arizona***, 501 U.S. at 630-32 (plurality opinion) (finding that jury was not required in first-degree murder prosecution to agree on one of alternative theories of premeditated or felony-murder); ***United States v. Moore,*** 129 F.3d 873, 877 (6th Cir. 1997) (explaining ***Duncan*** and distinguishing its holding in bank fraud case); ***United States v. Sanderson***, 966 F.2d 184, 187-89 (6th Cir. 1992) (holding that trial court's failure to give specific unanimity instruction was not plain error in prosecution charging in a single count theft of government property and theft of employee time).

12.10[4] Proving Materiality after Neder and Gaudin

Prior to ***Gaudin***, some commentators noted conflicting authority as to what constituted proof of materiality in Section 7206 prosecutions. *See Twelfth Survey on White Collar Crime*, 34 AM. CRIM. L. REV. 1035, 1065 (1997) (noting conflict within § 7206(2) case law).[3] Courts defined a material item either as

1) one required on an income tax return that is necessary for a correct computation of the tax (the ***"Warden*** test"); *see* ***United States v. Strand***, 617 F.2d 571, 574 (10th Cir. 1980); ***United States v. Taylor***, 574 F.2d 232, 235 & n.6 (5th Cir.1978) (recognizing and describing both tests); ***United States v. Warden***, 545 F.2d 32, 37 (7th Cir. 1976); ***United States v. Null***, 415 F.2d 1178, 1181 (4th Cir. 1969); ***Siravo v. United States***, 377 F.2d 469, 472 (1st Cir. 1967); or

2) one having a natural tendency to influence or impede the Internal Revenue Service in ascertaining the correctness of the tax declared or in verifying or auditing the returns of the taxpayer (the "***DiVarco*** test"). *See* ***United States v. Greenberg***, 735 F.2d 29, 31 (2d Cir. 1984) (holding that Section 7206(1) is intended to prevent misstatements that could hinder the IRS in verifying the accuracy of a return; accordingly, such false statements are material); ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973); *see also* ***United States v. Fawaz***, 881 F.2d 259, 264 (6th Cir. 1989); ***United States v. Taylor***, 574 F.2d 232, 235 & n.6 (5th Cir. 1978) (recognizing both ***Warden*** and ***DiVarco***).

Early indications are that the conflict of authority regarding the test of materiality survived the issuance of ***Gaudin***. Some courts favor the ***Warden*** test, *see, e.g.*, ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999) (not reporting money received from academic grade-selling scheme "obviously material to the IRS's ability correctly to calculate [defendant's] tax liabilities), *aff'd*, 231 F.3d 663, 667 n.1 (9th Cir. 2000) (*en banc*); ***United States v. Scholl***, 166 F.3d 964, 979 (9th Cir.1999) ("'information is material if it is necessary to a determination of whether income tax is owed'") (*quoting*

[3] Perhaps it is more accurate to say that what occurred was not a conflict, in the sense of a circuit split, but rather the unresolved emergence of two complimentary but separate tests for materiality, with one test embracing the other. *See* ***United States v. Taylor***, 574 F.2d 232, 235 n.6 (5th Cir. 1978) ("Application of ***DiVarco*** to this case renders consideration of the ***Warden*** test unnecessary."). No circuit has explicitly rejected either the ***Warden*** or ***DiVarco*** formulation. Further, both tests have been utilized within the same circuits, without comment. Indeed, both ***Warden*** and ***DiVarco*** were decided in the Seventh Circuit.

United States v. Uchimura, 125 F.3d 1282, 1285 (9th Cir. 1997)); ***United States v. Clifton***, 127 F.3d 969, 970 (10th Cir. 1997) (material statement is one that is "necessary 'in order that the taxpayer . . . compute his taxes correctly'") (*quoting* ***United States v. Strand***, 617 F.2d 571, 574 (10th Cir. 1980)); ***United States v. Aramony***, 88 F.3d 1369, 1384 (4th Cir. 1996) (material item is one which "must be reported 'in order that the taxpayer estimate and compute his tax correctly.'") (*quoting* ***United States v. Null***, 415 F.2d 1178, 1181 (4th Cir.1969) (internal quotation omitted)); ***United States v. Klausner***, 80 F.3d 55, 60 & n.4 (2d Cir. 1996) (material matters are those "essential to the accurate computation of . . . taxes."), while the First Circuit seems to favor ***DiVarco***. *See* ***United States v. DiRico***, 78 F.3d 732, 736 n.1 (1st Cir. 1994) (quoting from ***Greenberg***, 735 F.2d at 31-32 and citing ***DiVarco***, 484 F.2d at 673); *see also* ***United States v. Gaudin***, 515 U.S. at 509 (noting that material statement for § 1001 purposes is one having a natural tendency to influence, or capable of influencing, the decision of the decision making body to which it was addressed.) (quotation omitted).

Given that the forum for litigating materiality has shifted from the bench to the jury under ***Neder*** and ***Gaudin***, how materiality is defined in jury instructions is a key issue.

Pattern Jury instructions defining materiality in Section 7206 cases exist in most circuits. The Seventh Circuit tracks the language of ***Gaudin*** and follows alternative tests:

> A line on a tax return is a material matter if the information required to be reported on that line is capable of influencing the correct computation of the amount of tax liability of the individual . . . or the verification of the accuracy of the return. . . .
>
> OR
>
> A false matter is material if the matter was capable of influencing the Internal Revenue Service.

FED. CRIM. JURY INSTR. OF THE SEVENTH CIRCUIT, 26 U.S.C. § 7206 (Materiality) (1999). The First Circuit's model instruction is similar. *See* Pattern Criminal Jury Instructions for the District Courts of the First Circuit, False Statements on Income Tax Return, 4.26.7206 (2008 rev. ed.) ("A 'material' matter is one that is likely to affect the calculation of tax due and payable, or to affect or influence the IRS in carrying out the functions committed to it bylaw, such as monitoring and verifying tax liability.").

The Fifth and Ninth Circuit pattern instructions track the language of the ***DiVarco*** test. *See* Fifth Circuit Pattern Jury Instructions - Criminal, False Statements on Tax Return, 2.97 (2001) ("A statement is 'material' if it has a natural tendency to influence, or is capable of influencing, the Internal Revenue Service in investigating or auditing a tax return or in verifying or monitoring the reporting of income by a taxpayer."); Ninth Circuit Manual of Model Jury Instructions - Criminal, Filing False Tax Return, 9.39 (2010) (noting in comment that material item is one which "had a natural tendency to influence or was capable of influencing or affecting the ability of the IRS to audit or verify the accuracy of the tax return or a related return.").

The Third Circuit follows ***Warden***. *See* Third Circuit Model Criminal Jury Instructions, False Income Tax Return - Return Was Materially False, 6.26.7206-3 (2010) ("The false statement in the return must be material. This means that it must be essential to an accurate determination of (name)'s tax liability.") The Tenth Circuit employs a hybrid instruction that incorporates both ***Warden*** and ***DiVarco***. *See* Criminal Pattern Jury Instructions, False Statements on Income Tax Return, 2.93 (10th Cir. 2011) ("A statement is material . . . if it concerned a matter necessary to the correct computation of taxes owed and was capable of influencing the decision of the Internal Revenue Service.").

The Eleventh Circuit, by comparison, has set out into uncharted territory. *See* Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Aiding and Abetting Filing False Return, No. 95 (2010) (noting, in instruction for § 7206(2), that "[a] declaration is 'material' if it relates to a matter of significance or importance as distinguished from a minor or insignificant or trivial detail. The Government does not have to prove that it was deprived of any tax because of the filing of the false return, or that additional tax is due . . . .").

12.10[5] Tax Deficiency Not Required, But Possibly No Longer "Irrelevant"

On occasion, defendants in false return cases argue that the lack of a tax deficiency renders the alleged false item immaterial. For instance, in cases involving unreported income, a taxpayer might argue that she had expenses which exceeded her true gross income, thus rendering his failure to report income immaterial, because it had no bottom-line tax effect. Prior to ***Gaudin***, such arguments fell on deaf ears. Courts held not only that proof of a tax deficiency was not required in a false return case, but also that evidence of the lack of a tax deficiency was irrelevant. ***See United States v. Marashi***, 913 F.2d 724, 736 (9th Cir. 1990) (rejecting as "irrelevant" sufficiency of evidence challenge based on asserted lack of tax deficiency in § 7206(1) case); ***United States v. Olgin***, 745 F.2d 263, 272 (3d Cir. 1984) (affirming trial court's exclusion of evidence of tax effect of unreported expenses and noting that "evidence of tax liability is generally inadmissible in prosecutions under I.R.C. 7206") (citations omitted); ***United States v. Garcia***, 553 F.2d 432, 432 (5th Cir. 1977) (*per curiam*) (upholding trial court's refusal to allow defense evidence of tax liability or lack thereof in § 7206(1) case); ***Schepps v. United States***, 395 F.2d 749, 749 (5th Cir. 1968) (*per curiam*) (same); *see also* ***United States v. Citron***, 783 F.2d 307, 313 (2d Cir. 1986) (rejecting argument that material falsity is one which results in substantial tax due); ***United States v. Fritz***, 481 F.2d 644, 645 (9th Cir. 1973) (*per curiam*) (evidence of potential adjustments to tax liability not relevant to willfulness since no evidence presented that defendant considered making the proposed adjustments); *cf*. ***United States v. Johnson***, 558 F.2d 744, 745-47 (5th Cir. 1977) (where defendant claims a good-faith-reliance defense, evidence of lack of tax deficiency might be relevant to willfulness, subject to Rule 403, but disallowing introduction based on facts of case).

While courts still maintain that proof of a tax deficiency is not *required* in a section 7206(1) prosecution, *see* ***United States v. Scholl***, 166 F.3d 964, 979 (9th Cir.1999); ***United States v. Peters***, 153 F.3d 445, 461 (7th Cir. 1998); ***United States v. Minneman***, 143 F.3d 274, 279 (7th Cir. 1998), some post-***Gaudin*** opinions indicate that the presence or *lack* of a tax deficiency may be relevant to a jury's determination of materiality.

In ***United States v. Uchimura***, 125 F.3d 1282 (9th Cir. 1997), the Ninth Circuit held that in a Section 7206(1) case, "information is material if it is necessary to a determination of whether income tax is owed." 125 F.3d at 1285. In deciding whether the question of materiality should be submitted to the jury as a matter of course in false return cases, the court addressed whether the false item at issue-- unreported income-- was inherently material. ***Id***. at 1284-85 The court considered a hypothetical situation in which a taxpayer's legitimate deductions exceed his gross income and the taxpayer thus has no taxable income. In such a circumstance, "unreported income . . . may not be necessary to a determination of whether income tax is owed." *Id*. at 1285. While the court insisted that "[w]e do not mean by this example that to satisfy the materiality element of § 7206 the government must show that additional tax is owed," it also left no doubt that the lack of a tax deficiency is relevant to a jury's determination of materiality and ought to be admitted: "That no additional tax is owed of course has a bearing on materiality, but the question is ultimately one for the jury to decide." 125 F.3d at 1285,n.5

The Tenth Circuit followed suit in ***United States v. Clifton***, 127 F.3d 969 (10th Cir. 1997). ***Clifton*** addressed the same hypothetical as ***Uchimura***, in which the taxpayer fails to report income, but has no tax due because her deductions exceed taxable income for the year. In this situation, the "taxpayer's failure to report all taxable income will not affect the computation of tax, which in turn might very well affect the jury's deliberations on the element of materiality." 127 F.3d at 971. It is hard to read this language as anything other than a mandate that evidence supporting the lack of tax deficiency must be submitted to the jury. *See also* ***United States v. Aramony***, 88 F.3d 1369, 1384-85 (4th Cir. 1996).

Prosecutors should consider arguing that if the language in ***Uchimara*** and ***Clifton*** has the effect of requiring proof of tax loss, it would no longer be true that the falsehood itself defines the crime of filing a false return. *See* ***Gaunt v. United States***, 184 F.2d 284, 288 (1st Cir. 1950) (observing that the purpose of the false returns statute is "to impose the penalties for perjury upon those who wilfully falsify their returns regardless of the tax consequences of the falsehood.").[4] Otherwise, proof of false returns would constitute proof of evasion.

Clearly, this was not Congress's intent in drafting § 7206(1), which "charges an offense separate and distinct in itself[.]" ***United States v. White***, 417 F.2d 89, 93 (2d Cir. 1969). As the Second Circuit explained in ***White***,

> Section 7206(1) . . . is only one part in a comprehensive statutory scheme to prohibit and punish fraud occurring in the assessment and collection of taxes by the government. Section 7201 is the inclusive section, prohibiting all attempts to evade or defeat any tax in any manner, and such an attempt is punishable as a felony. There follows a series of sections prohibiting specific methods of fraud in the collection and payment of taxes, all of which are separately punishable standing alone. Among these are 7203, 7206 and 7207, all directed against the taxpayer. Other sections are directed at persons involved in the process of tax collection. . . . Section 7206(1) provides penalties for signing, under oath, false returns or statements made in the process of tax collection. The offense charged is perjury, the operative element

[4] *Gaunt* referred to 26 U.S.C. § 7206's statutory predecessor, 26 U.S.C. § 145(c) (1939).

> is the signature under oath, and the felony penalties reflect the seriousness of this method of committing fraud. Thus the perjury offenses charged under 7206 may separately form the basis for an indictment[.]

United States v. White, 417 F.2d at 93-94 (citations omitted). Nevertheless, in light of the recent appellate decisions, it would be prudent for the prosecutor to consider the tax loss -- or lack thereof -- as part of the overall assessment of the government's ability to prevail in a Section 7206(1) case.

Another doctrine that may come into question, or at least be subject to reassessment, is that of the irrelevance of the "substantiality of the understatements." Pre-***Gaudin***, some defendants appealed their false returns convictions on the basis that the material falsehoods on their returns were insubstantial. Courts rejected these arguments, holding that the issue was whether the misstatements were material, not whether they were substantial. *See* ***United States v. Helmsley***, 941 F.2d 71, 92 (2d Cir. 1991); ***United States v. Citron***, 783 F.2d 307, 313 (2d Cir. 1986); ***United States v. Gaines,*** 690 F.2d 849, 858 (11th Cir. 1982)**.** The validity of these holdings is called into question by ***Uchimura*** and ***Clifton***. If it is now relevant whether a tax deficiency exists in a Section 7206(1) prosecution, it would seem that the amount of any tax deficiency, and thus the degree of any misstatement, would be relevant to a jury's determination of materiality by the rationale of these two holdings.

12.10[6] Reliance by Government on False Statements Not Required

Section 7206(1) does not require a showing that the government relied on the false statements. "[I]t is sufficient that they were made with the intention of inducing such reliance." ***Genstil v. United States***, 326 F.2d 243, 245 (1st Cir. 1964); *accord* ***United States v. Romanow***, 509 F.2d 26, 28 (1st Cir. 1975) ("[m]ateriality . . . is to be measured objectively by a statement's potential rather than by its actual impact."). The government is not required to prove that the defendant intended to induce the government to rely on his or her false statement or that the government was actually deceived. "[T]he intent to induce government reliance on a false statement or to deceive the government is *not* an element of 26 U.S.C. § 7206(1)." ***United States v. Griffin***, 524 F.3d 71, 81 (1st Cir. 2008) (emphasis original) (*citing* ***United States v. Boulerice***, 325 F.3d 75, 79-80 (1st Cir. 2003)).

Neither is it a defense that the false statements were so outrageous and flagrant that they should not be taken seriously. *See* ***United States v. Winchell***, 129 F.3d 1093, 1098 (10th Cir. 1997) (rejecting claim of tax defier who declared $7.5 billion in income and sought nearly $5.5 billion refund that statements in Section 7206(1) case were not material because they were preposterous). ***Winchell*** is a particularly favorable case for the government. There, the defendant challenged his conviction explicitly on the basis of materiality, arguing that his alleged false statements were so facially ridiculous that they would not have been acted upon by the government. 129 F.3d at 1098. ***Winchell*** thus reaffirms the proposition that it is the potential and not actual impact of the alleged false statement that the jury must weigh in determining materiality.

12.10[7] Pre-Gaudin Examples Of Material Matters

The following are examples of false items found to be material by courts, pre-***Gaudin***. They should continue to remain valid law for issues such as sufficiency of the evidence on appeal.

1. Amounts listed on returns as receipts from a business, improperly claimed deductions, and the like, have a direct bearing on a tax computation and are material. ***United States v. Morse***, 491 F.2d 149, 157 (1st Cir. 1974); ***United States v. Engle***, 458 F.2d 1017, 1019-20 (8th Cir. 1972).

2. Gross income falsely reported is clearly material. "This Court has . . . held that false statements relating to gross income, irrespective of the amount, constitute a material misstatement in violation of Section 7206(1)." ***United States v. Hedman***, 630 F.2d 1184, 1196 (7th Cir. 1980).

3. Omitted gross receipts on Schedule F, farm income, are material. ***United States v. Taylor***, 574 F.2d 232, 235-36 (5th Cir. 1978).

4. False schedule designed to induce allowance of unwarranted depreciation is material. The Ninth Circuit could "scarcely imagine anything more material." ***United States v.***

Crum, 529 F.2d 1380, 1383 (9th Cir. 1976) (Section 7206(2) violation, but principle applies to Section 7206(1)).

5. Schedule C claiming business loss deductions to which the taxpayers were not entitled rendered the returns false as to a material matter. ***United States v. Damon***, 676 F.2d 1060, 1064 (5th Cir. 1982).

6. Omission of a material fact makes a statement false, just as if the statement included a materially false fact. *See* ***United States v. Cohen***, 544 F.2d 781, 783 (5th Cir. 1977) (defendant had $30,000 in checks which he did not include on an Offer in Compromise, Form 656).

7. Understatement of gas purchases by gas station operator was material because it restricted ability of the Internal Revenue Service to verify his income tax returns and his diesel fuel excise tax returns. If purchases are unreported, a number of related items, such as inventory, income, or other costs, could also be incorrect. "'[A]uditability of this entire calculation [may be] made more difficult by the misstatements." ***United States v. Fawaz***, 881 F.2d 259, 263-64 (6th Cir. 1989).

8. The source of income is a "material matter" and the willful and knowing misstatement of the source of income is prohibited by § 7206(1). ***United States v. Vario***, 484 F.2d 1052, 1056 (2d Cir. 1973); ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973); ***United States v. Sun Myung Moon***, 532 F. Supp. 1360, 1367 (S.D.N.Y. 1982).

12.10[8] Pre-Gaudin Examples: No Tax Deficiency

12.10[8][a] Failure to Report a Business

In ***Siravo v. United States***, 377 F.2d 469, 471 (1st Cir. 1967), the defendant reported wages he had earned but did not report either his jewelry business or substantial gross receipts he received in connection therewith. The defendant argued that his omissions did not constitute false statements. ***Id***. at 472. The First Circuit affirmed his conviction, holding that for a statement to be "true and correct," it must be both accurate and complete. ***Id***.*; see also* ***United States v. Taylor***, 574 F.2d 232, 234-36 (5th Cir. 1978) (failure to report substantial amounts of gross livestock receipts on Schedule F renders a return materially false).

12.10[8][b] Failure to Report Gross Receipts

In ***United States v. Holladay***, 566 F.2d 1018, 1020 (5th Cir. 1978) (*per curiam*), the defendant did not report gross receipts from a gambling and bootlegging operation conducted at his service station. Although the government did not prove that the defendant received any profits or income from the illicit business, the failure to report substantial gross receipts was sufficient to support a conviction. ***Id***.

In ***United States v. Vario***, 484 F.2d 1052, 1053-54 (2d Cir. 1973), the defendant failed to report gross income from a gambling or "policy" operation or that he was engaged in such an operation. The government did not use the net worth, specific items, bank deposits, or expenditures method to prove the defendant's receipt of additional unreported income; instead, through federal agents and "policy" members, the government established that the defendant was active in the organization and that it produced gross income he failed to report. 484 F.2d at 1054. The court of appeals found that evidence that the defendant paid for police protection was admissible to prove that the defendant had sufficient income from the operation to pay for the protection, that he had a source of income he was concealing, and that there was a relationship between the defendant and his coconspirator. 484 F.2d at 1056 (citations omitted).

12.10[8][c] Reporting Net Business Income, But Not Gross Income

In ***United States v. Young***, 804 F.2d 116, 117 (8th Cir. 1986), the court rejected the defendant's claim that because the income from his bail bonding business was included on the corporate return as net income, the failure to include it as gross income on the return did not make the return untruthful, but only incomplete. Omissions from a tax return of material items which are necessary for a computation of income means the return is not true and correct within the meaning of section 7206(1). 804 F.2d at119.

12.10[8][d] Reporting A False Source But Correct Figures

In ***United States v. DiVarco***, 484 F.2d 670, 672-73 (7th Cir. 1973), the government proved that income reported by the defendant as commissions from a mortgage and investment business did not come from that business. The fact that the source stated on the return was false was sufficient to support a Section 7206(1) conviction because "a misstatement as to the source of income is a material matter." ***Id***. at 673.

12.10[8][e] Gambling Losses Deducted as Business Expenses

In ***United States v. Rayor***, 204 F. Supp. 486, 488 (S.D. Cal. 1962), the defendant claimed deductions for personal gambling losses on the corporate tax return of his construction business. A subsequent audit revealed that there would have been an overpayment of corporate taxes even if the gambling losses had not been falsely deducted. ***Id***. at 489. The defendant claimed in a motion to dismiss that there was no offense charged as there was no deficiency for the year in question.***Id***.

The district court denied the motion to dismiss, concluding that "what is claimed as deductible from gross income must be stated truthfully and is of utmost materiality." ***Rayor***, 204 F. Supp. at 491. Moreover, the court continued:

> The Government was entitled, as of March 7, 1956, to a statement which stated the gross income truthfully and correctly and which *did not* claim as legitimate business expenses personal gambling losses. The auditing of the return, in the light of the returns for the other years, which later developed that the omission of these falsely claimed deductions would have made *no* difference in the defendant's tax liability for the year 1955, cannot be retrojected to the date of the false statement, so as to confer verity onit.

Rayor, 204 F. Supp. at 492 (emphasis added).

12.10[8][f] Failure to Report Income from Illegal Business

In ***United States v. Garcilaso de la Vega***, 489 F.2d 761, 762 (2d Cir. 1974), the defendant was charged with failing to report income he earned from selling narcotics. The government's case was premised on the defendant's failure to report the additional income, not his failure to report that narcotics sales were the source of this additional income. ***Id***. at 765. The charge to the jury made it clear that it was the failure to report income, not the failure to report the illegal source of the income, that constituted the violation of section 7206(1). ***Id***.; *see* **Garner v. United States**, 424 U.S. 648, 659-61 (1976) (finding that defendant, who reported his occupation as "professional gambler" on his tax return instead of claiming Fifth Amendment privilege against self-incrimination, could not later rely on privilege to preclude use of return against him in a criminal prosecution).

In some cases involving illegal source income, an indirect method of proof is needed to demonstrate the material falsity of the return. In ***United States v. Marrinson***, 832 F.2d 1465 (7th Cir. 1987), the government used the cash expenditures method of proof to establish that the defendant had omitted substantial additional income in each of the years charged, and offered evidence that the likely source of the unreported taxable income was marijuana sales. 832 F.2d at 1469, 1471. The Seventh Circuit held that "[d]irect proof of a defendant's likely source of income is not required . . . . The jury needed only enough circumstantial evidence from which they reasonably could have found the marijuana business to have been the source of the increase in the defendant's wealth." 832 F.2d at 1472.

In a case involving a fraudulent pyramid investment, or "Ponzi" scheme, the government proved the defendants had additional unreported income in each of the years in question, using the expenditures method of proof. ***United States v. Weiner***, 755 F. Supp. 748, 754-55 (E.D. Mich. 1991). The court also found that the government had successfully proven that the defendant had constructively, though not actually, received income in the form of profits from the scheme that he did not report, but should have reported, on his Forms 1040. ***Id***. at 755 (citations omitted).

12.10[8][g] Foreign Bank Account Questions on Tax Forms

In ***United States v. Franks***, 723 F.2d 1482, 1485 (10th Cir. 1983), the defendants falsely answered "No" to questions on income tax returns asking if they had any interest in or signature authority over bank accounts in a foreign country. They also attached a form to their amended return which did not list "*all* of their foreign accounts over which they had control." (Emphasis in original). The court affirmed the false return convictions, holding that the false responses to these questions "comes within the purview of 26 U.S.C. § 7206(1)." ***Franks***, 723 F.2d at 1486; *accord* ***United States v. Harvey***, 869 F.2d 1439, 1441 & n.2 (11th Cir. 1989) (failing to report interest income from Cayman Islands accounts on Schedule B and falsely answering "no" on Schedule B, Part III (Foreign Accounts and Foreign Trusts), Form 1040, supported a charge defendant violated § 7206(1)).

12.11 WILLFULNESS -- DOES NOT BELIEVE TO BE TRUE AND CORRECT

12.11[1] Generally

Section 7206(1) is a specific intent crime requiring a showing of willfulness. Proof of this element is essential, and "neither a careless disregard whether one's actions violate the law nor gross negligence in signing a tax return will suffice." ***United States v. Claiborne***, 765 F.2d 784, 797 (9th Cir. 1985), *abrogation on other grounds recognized by* ***United States v. Alexander***, 48 F.3d 1477, 1484 (9th Cir. 1995); *accord* ***United States v. Rozin***, 664 F.3d 1052 1058 (6th Cir. 2012); ***United States v. Kokenis***, 664 F.3d 919, 929 (7th Cir. 2011); ***United States v. Winchell***, 129 F.3d 1093, 1096 (10th Cir. 1997) (listing § 7206 as one example of a "specific intent" crime); ***United States v. Erickson***, 676 F.2d 408, 410 n.4 (10th Cir. 1982) (same).

The Supreme Court has defined "willfulness" as "'a voluntary, intentional violation of a known legal duty.'" ***Cheek v. United States***, 498 U.S. 192, 200 (1991) (quoting ***United States v. Bishop***, 412 U.S. 346, 360 (1973)); *accord*, ***United States v. Griffin***, 524 F.3d 71, 78 (1st Cir. 2008); ***United States v. Winchell***, 129 F.3d 1093, 1096-97 (10th Cir. 1997) (noting in § 7206(1) case that ***Cheek's*** definition of willfulness is the "conclusively established standard," and affirming trial court's refusal of an additional specific intent instruction); *see* also, ***United States v. Guidry,*** 199 F.3d 1150, 1156 (10th Cir. 1999) (same). In ***Guidry***, the Tenth Circuit explained that the same principles that govern proving willfulness in an evasion case apply to proving willfulness in the context of § 7206(1):

> While it is well established willfulness cannot be inferred solely from an understatement of income, willfulness can be inferred from

> making false entries of alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.
>
> . . . This conduct can be used to prove willfulness "even though the conduct may also serve other purposes such as concealment of other crime."

199 F.3d at 1157 (*quoting* ***Spies v. United States***, 317 U.S. 492, 499 (1943); *citing* ***United States v. Samara***, 643 F.2d 701, 704 (10th Cir. 1981)). Willfulness can also be proven by evidence that the defendant had been repeatedly advised by IRS agents that he could not deduct personal, non-business expenditures on his tax returns. *See* ***United States v. Garcia***, 762 F.2d 1222, 1225 (5th Cir. 1985). Similarly, where the IRS repeatedly disallows the defendant's deductions for personal expenses in prior years, resulting in assessments of additional taxes and civil judgments to collect those assessments, such evidence can be used to establish that the defendant willfully falsified his tax return. ***Id***. at 1225-26.

When charged with violations of § 7206(1), defendants frequently request a separate instruction on good faith. The Fourth Circuit has held that where the district court gives adequate instructions on specific intent, declining to give a separate instruction on good faith is not error. *See* ***United States v. Fowler***, 932 F.2d 306, 317 (4th Cir. 1991) (citing ***United States v. Pomponio***, 429 U.S. 10, 13 (1976), and ***Cheek v. United States***, 498 U.S. 192, 201 (1991), and collecting cases). This is the majority position among the circuits. ***United States v. Leahy***, 445 F.3d 634, 652 n.14 (3d Cir. 2006) (*citing* ***United States v. Gross***, 961 F.2d 1097, 1102-03 (3d Cir. 1992)). *See also*, ***United States v. Kokenis***, 662 F.3d 919, 929-30 (7th Cir. 2011) (a defendant is not entitled to a specific instruction if a jury was adequately instructed on his theory of defense) (citation and punctuation omitted).[5]

[5] The ***Kokenis*** court, in finding that the defendant was not entitled to a good faith defense instruction, observed that "A defendant is entitled to an instruction on his theory of defense only if (1) the instruction provides a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of defense is not part of the government's charge; and (4) the failure to include the instruction would deprive the defendant of a fair trial." ***Kokenis*** at 929 (citationsomitted).

One court, however, held pre-***Cheek***, that a general instruction on willfulness is not sufficient when the evidence supports the giving of a good faith instruction. ***United States v. Harting***, 879 F.2d 765, 769 (10th Cir. 1989) (*citing* ***Pomponio); United States v. Hopkins***, 744 F.2d 716, 718 (10th Cir. 1984) (*en banc*). In ***Pomponio***, a prosecution under Section 7206(1), the Supreme Court approved the following jury instruction on willfulness:

> In explaining intent, the trial judge said that "[t]o establish the specific intent the Government must prove that these defendants knowingly did the acts, that is, filing these returns, knowing that they were false, purposely intending to violate the law." The jury was told to "bear in mind the sole charge that you have here, and that is the violation of 7206, the willful making of the false return, and subscribing to it under perjury, knowing it not to be true and [sic] to all material respects, and that and that alone."

429 U.S. at 11 n.2.

The Eighth Circuit initially took the same position as the Tenth Circuit. *See* ***United States v. Leahy***, 445 F.3d at 652 n.14 (*citing* ***United States v. Casperson***, 773 F.2d 216, 223-24 (8th Cir. 1985)). Subsequently, the Eighth Circuit appeared to move more toward the majority of circuits in finding that a good faith instruction is not required, despite a defense request, where the jury instructions adequately convey the specific intent requirement. *See* ***United States v. Leahy***, 445 F.3d at 652 n.14 (*citing* ***Willis v. United States***, 87 F.3d 1004, 1008 (8th Cir. 1996 (discussing issue in context of denial of a motion under 28 U.S.C. § 2255))). For a further discussion of willfulness and the legal ramifications of the ***Cheek*** case, *see* Section 8.08, *supra*, and Section 40.04, *infra*.

In some circumstances, the defendant may try to negate the element of willfulness by claiming that he lacked willfulness because he reasonably relied on the advice of others. *See* ***Rozin***, 664 F.3d at 1060. "The elements of a reliance defense include: (1) full disclosure of all pertinent facts and (2) good faith reliance on the accountant's advice." ***Id.***

In a Section 7206(1) prosecution, the government is not required to show an intent on the defendant's part to evade income taxes. ***United States v. Taylor***, 574 F.2d 232, 234

(5th Cir. 1978); ***United States v. Engle***, 458 F.2d 1017, 1019 (8th Cir. 1972).[6] Also, there is "no requirement that showing the specific intent for a § 7206(1) violation requires proof of an affirmative act of concealment; it is enough that the government show the defendant was aware that he was causing his taxable income to be underreported." ***United States v. Barrilleaux***, 746 F.2d 254, 256 (5th Cir. 1984) (*per curiam*). Moreover, the government may rely solely on circumstantial evidence to prove willfulness. *See, e.g.*, ***United States v. Tucker,*** 133 F.3d 1208, 1218-19 (9th Cir. 1998) (false returns); ***United States v. Klausner***, 80 F.3d 55, 63 (2d. Cir. 1996) (evasion); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984) (violation of § 7203).

12.11[2] Signature on Return as Evidence of Knowledge of Return Contents

The defendant's signature on a document can help establish willfulness. *See* ***United States v. Tucker***, 133 F.3d 1208, 1218 n.11 (9th Cir. 1998) (noting that signature is sufficient to establish knowledge of contents of return). "A taxpayer's signature on a return does not in itself prove his knowledge of the contents, but knowledge may be inferred from the signature along with the surrounding facts and circumstances, and the signature is *prima facie* evidence that the signer knows the contents of the return." ***United States v. Mohney***, 949 F.2d 1397, 1407 (6th Cir. 1991) (*citing* ***United States v. Harper***, 458 F.2d 891, 894 (7th Cir. 1971)); ***United States v. Davis***, 603 F.3d 303, 306 (5th Cir. 2010) ("A taxpayer's signature on a return with a jurat indicates that the taxpayer attests to the accuracy of the reported data."); ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982) (finding that defendant's signature is sufficient to establish knowledge once it has been shown that the return was false); ***United States v. Romanow***, 505 F.2d 813, 814-15 (1st Cir. 1974) (noting that the jury could conclude from nothing more than the presence of his uncontested signature that he had in fact read the Form 941); ***United States v. Bettenhausen***, 499 F.2d 1223, 1234 (10th Cir. 1974) ("From proof of one's signing a return it may be believed that he knew its contents ").

Prosecutors should, however, be aware of the Ninth Circuit's decision in ***United States v. Trevino***, 419 F.3d 896, 902 (9th Cir. 2005). In ***Trevino***, the court held that it was error to instruct the jury that "[a] return or other tax document signed with the defendant's name creates a rebuttable presumption that the defendant actually signed it

[6] Of course, to the extent that the government can show that the defendant was motivated by a desire to evade taxes, the case is more attractive to a jury. Consequently, this is one of the factors considered by the Tax Division in deciding whether to authorize prosecution.

and had knowledge of its contents." The court noted that while 26 U.S.C. § 6064 provides that an individual's signature on the return is prima facie evidence that the return was actually signed by that individual, it does not create any other presumption. ***Id***.; *see also* ***United States v. Rayborn***, 491 F.3d 513, 519 (6th Cir. 2007) (discussing ***Trevino*** and holding that any error was harmless where trial court instructed: "If you find beyond a reasonable doubt that the defendant signed the tax return, that is evidence from which you may but are not required to find or infer that the defendant had knowledge of the contents of the return.").

12.11[3] Collective Intent of Corporations

A showing of "collective intent" on the part of a corporate defendant can satisfy the willfulness requirement in a Section 7206(1) prosecution of a corporate defendant. *See* **United States v. Shortt Accountancy Corp.**, 785 F.2d 1448, 1454 (9th Cir. 1986). In ***Shortt Accountancy***, an accountant employed by the defendant accounting firm prepared and signed for a client a tax return that contained deductions arising from an illegal tax shelter sold to the client by the firm's chief operating officer. 785 F.2d at 1450-51. The accountant, acting on information provided to him by the chief operating officer, was unaware of the fraudulent nature of the deductions. ***Id***. at 1451. The Ninth Circuit held that the accountant's lack of intent to make and subscribe a false return did not prevent the conviction of the defendant corporation under Section 7206(1), because the defendant's chief operating officer acted willfully. ***Id***. at 1454. The officer's willfulness and the accountant's act of making and subscribing the false return were sufficient to constitute an intentional violation of Section 7206(1) on the part of the defendant corporation. ***Id***. The court reasoned that precluding a finding of willfulness in this situation would allow a tax return preparer to "escape prosecution for perjury by arranging for an innocent employee to complete the proscribed act of subscribing a false return." ***Id***. Thus, a corporation is liable under section 7206(1) when its agent intentionally causes it to violate the statute. ***Shortt Accountancy,*** 785 F. 2d at 1454; *cf*. ***United States v. Bank of New England, N.A.***, 821 F.2d 844, 855-56 (1st Cir.1987) (collective knowledge in prosecution of bank for currency transaction reporting violations); ***United States v. Gold***, 743 F.2d 800, 822-23 (11th Cir. 1984) (Medicare fraud prosecution of medical corporation); ***United States v. Phillip Morris USA, Inc.***, 449 F. Supp. 2d 1, 893-894 (D.D.C. 2006) ("Corporations are liable for the collective knowledge of all employees and agents within (and acting on behalf of) the corporation.") (citation omitted).

12.11[4] Amended Returns

Although willfulness may be inferred from circumstantial evidence, the Second Circuit has held that the filing of an amended return after the filing of a false return cannot provide the sole basis for an inference of willfulness. ***United States v. Dyer***, 922 F.2d 105, 108 (2d Cir. 1990). In ***Dyer***, the court reversed a Section 7206(1) conviction because the trial judge's instructions allowed the jury to conclude that the defendant's amended return, by itself, could support a finding that he had known his original return to be false when he filed it. 922 F.2d at 107-108. The filing of an amended return may indicate that a taxpayer now believes the original return was inaccurate, but it does not prove he had such knowledge at the time of the false filing. ***Id***. at 108. Thus, without more, an amended return provides only an inference of mistake, rather than of fraud. ***Id***.; *cf.* ***Santopietro v. United States***, 948 F. Supp. 145, 154 (D. Conn. 1996) (explaining ***Dyer*** and allowing introduction of amended return coupled with other evidence), *aff'd in part, vacated in part on other grounds*, 166 F.3d 88 (2d Cir. 1999), *abrogated sub nom.* ***Sabri v. United States***, 541 U.S. 600 (2004).

In ***United States v. Tishberg***, 854 F.2d 1070, 1073 (7th Cir. 1988), the court decided that amended returns filed between an audit and indictment may demonstrate a defendant's good faith effort to correct his past mistakes. As the trier of fact, the jury is free to consider this evidence, but the filing of amended returns does not negate the import of the defendant's previous actions. ***Id***. at 1073-74. A defendant's act of filing amended returns after he becomes aware that he is under criminal investigation for tax evasion may be considered by the jury to evaluate the defendant's true intent during the earlier period. ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990). Where the facts and circumstances establish that the defendant was aware of his receipt of additional taxable income and failed to report it, a reasonable jury can conclude that the defendant's omission of income from his original returns was intentional, as opposed to an act of negligence or mistake. ***United States v. Tishberg***, 854 F.2d at 1073.

Similarly, if a defendant underreported income on a false return, the inclusion of the income on a subsequent return does not establish a lack of willfulness at the time the original return was filed. The Seventh Circuit has held that a subsequent return is not probative of the defendant's state of mind at the time he filed the false return. ***United States v. McClain***, 934 F.2d 822, 834-35 (7th Cir. 1991) (affirming trial court's exclusion of amended return offered by *defendant*).

The district court may be within its discretion to grant a motion *in limine* to exclude the defendant's amended return filed post-indictment, where the return is offered for the purpose of showing that the defendant made a good faith mistake in omitting income from his original return. ***United States v. Radtke***, 415 F.3d 826, 840 (8th Cir. 2005). "Whether an amended tax return filed post-indictment technically might be 'relevant' to the taxpayer's intent at the time he filed the original return, there is no doubt that self-serving exculpatory acts performed substantially after a defendant's wrongdoing is discovered are of minimal probative value as to his state of mind at the time of the alleged crime." ***Id***. at 840-41.

12.11[5] Reliance On Professional Advice

Reliance by the defendant on a qualified tax preparer is an affirmative defense to a charge of willful filing of a false tax return, if the defendant can show that he or she provided the preparer with complete information and then filed the return without any reason to believe it was false. *See* **United States v. Tandon,** 111 F.3d 482, 490 (6th Cir. 1997) (noting that jury instruction for professional reliance defense not warranted where there was no evidence that full disclosure was made or that advice was given); ***United States v. Brimberry***, 961 F.2d 1286, 1290-91 (7th Cir. 1992) (denying good faith reliance defense in absence of full disclosure of all material facts); ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989) (finding that professional reliance defense was not available where defendant presented no evidence concerning either element).

12.11[6] Willful Blindness Instruction

It is a defense to a finding of willfulness that the defendant was ignorant of the law or of facts which made the conduct illegal, since willfulness requires a voluntary and intentional violation of a known legal duty. However, if the defendant deliberately avoided acquiring knowledge of a fact or the law, then the jury may infer that he actually knew it and that he was merely trying to avoid giving the appearance (and incurring the consequences) of knowledge. *See* ***United States v. Dykstra***, 991 F.2d 450, 452 (8th Cir. 1993); ***United States v. Ramsey***, 785 F.2d 184, 189-91 (7th Cir. 1986) (mail and wire fraud charges).[7] In such a case, the use of an "ostrich instruction" -- also known as a

[7] Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991); *cf.* ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1986) ("The element of knowledge may be

deliberate ignorance, conscious avoidance, willful blindness, or ***Jewell*** instruction, may be appropriate. *See* ***United States v. Bussey***, 942 F.2d 1241, 1245-48 (8th Cir. 1991); ***United States v. Defazio***, 899 F.2d 626, 635-36 (7th Cir. 1990); ***United States v. Jewell***, 532 F.2d 697, 699-704 (9th Cir.1976); *see generally* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351(1992).

The Fourth Circuit noted that the government in criminal prosecution elects to establish a defendant's guilty knowledge by one of two different means. ***United States v. Poole***, 640 F.3d 114, 121 (4th Cir. 2011). The government may show that "the defendant was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." Id. Under the second method, evidence establishing a defendant's "willful blindness" constitutes proof of his subjective state of mind, thus satisfying the scienter requirement of knowledge." ***Id.*** *citing* ***United States v. Stadtmauer***, 620 F.3d 238, 245 (3d Cir. 2010) and ***United States v. Bussy***,*supra*.

Even if the defendant successfully avoided actual knowledge of the fact, "[t]he required knowledge is established if the accused is aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir. 1991). The government is not required to present direct evidence of conscious avoidance to justify a willful blindness instruction. ***Stadtmauer***, 620 F.3d at 259. The rational supporting the principle of willful blindness is that intentional ignorance and actual knowledge are equally culpable under the law. ***Pool***e, 640 F.3d at 122; ***Stadtmauer***, at 255; Jewell, 532 F.2d at 700.

In ***Global-Tech Appliances, Inc. v. SEB S.A.***, 131 S. Ct. 2060 (2011), the Supreme Court issued an opinion in a civil patent infringement case that may have broad implications regarding the knowledge requirement in criminal cases. The Court interpreted 35 U.S.C. § 271(b) which provides, "Whoever actively induces infringement of a patent shall be liable as an infringer." Although observing that the statute was subject to conflicting interpretations, the Court held that induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement. The Court next addressed whether this knowledge could be supported by a finding under the doctrine of willful blindness. The Court noted that:

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satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious tohim."

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge.

Id. at 2068-69.

Finding that all the Courts of Appeals – with the possible exception of the District of Columbia Circuit – have applied the willful blindness doctrine to a wide range of criminal statutes, the Court saw no reason why it should not apply in civil lawsuits. The Court noted that the courts all appear to agree on two basic requirements:

> (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2068-69.

The Court distinguished the willful blindness standard from that of mere recklessness or negligence. "[A] reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing," and "a negligent defendant is one who should have known of a similar risk but, in fact, did not." ***Id.*** at 270-71. *Accord* ***Poole***, 640 F.3d at 122 (This circuit approves willful blindness instructions when the jury is not permitted to infer guilty knowledge from a mere showing of careless disregard or mistake."). *See also* ***United States v. Wert-Ruiz***, 228 F.3d 250, 255 (3d Cir. 2000); ***Wisenbaker***, 14 F.3d at 1027.

A number of courts have approved the use of such instructions under proper circumstances. *See*, *e.g.*, ***United States v. Griffin***, 524 F.3d 71, 79 (1st Cir. 2008) (government did not forfeit its right to request a willful blindness instruction where the evidence supported such an instruction, simply because it contended at trial that defendant had actual knowledge); ***United States v. Alston-Graves***, 435 F.3d 331, 338 n.2 (D.C. Cir. 2006) (collecting cases reflecting that all circuits have approved willful blindness instructions for specific intent criminal offenses when evidence supports instruction); ***United States v. Marston***, 517 F.3d 996, 1003-04 (8th Cir. 2008) (district court did not err in giving willful blindness/deliberate ignorance instruction in prosecution for filing false tax documents); ***United States v. Bornfield,*** 145 F.3d 1123, 1128-30 (10th Cir. 1998) (finding no plain error in trial court's use of deliberate ignorance instruction in money laundering case)*;* ***United States v. Neville,*** 82 F.3d 750, 759-60 (7th Cir. 1996) (drug conspiracy); ***United States v. Hauert***, 40 F.3d 197, 203 (7th Cir. 1994) (finding, in false returns and evasion case, no error in court's instruction that "[n]o person can intentionally avoid knowledge by closing his or her eyes to information or facts which would otherwise have been obvious"); ***United States v. Bussey***, 942 F.2d 1241, 1246-51 (8th Cir. 1991) (false returns, failure to file, and false statement under 18 U.S.C. §1001); ***United States v. Fingado***, 934 F.2d 1163, 1166-67 (10th Cir. 1991) (failure to file); ***United States v. Picciandra***, 788 F.2d 39, 46-47 (1st Cir. 1986) (evasion); ***United States v. MacKenzie***; 777 F.2d 811, 818-19 (2d Cir. 1985) (conspiracy and false returns); ***United States v. Callahan***, 588 F.2d 1078, 1081-83 (5th Cir. 1979) (evasion).

In a criminal tax prosecution, when the evidence supports an inference that a defendant was subjectively aware of a high probability of the existence of a tax liability, and purposefully avoided learning the facts pointing to such liability, the trier of fact may find that the defendant exhibited "willful blindness" satisfying the scienter requirement of knowledge. ***Poole,*** 640 F.3d at 122; ***United States v. Anthony***, 545 F.3d 60, 64 (1st Cir. 2008). However, it has also been said that the use of such instructions is "rarely appropriate." ***United States v. de Francisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991) (*per curiam*) (reversing drug possession conviction where deliberate ignorance instruction given); ***United States v. Heredia***, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (collecting cases); *cf*. ***United States v. Rodriguez***, 983 F.2d 455, 457-58 (2d Cir. 1993) (noting that in the Second Circuit, unlike the Ninth, a "conscious avoidance" charge is "commonly used.").

Thus, it is advisable not to request such an instruction unless it is clearly warranted by the evidence in a particular case. Furthermore, the language of any deliberate ignorance instruction in a criminal tax case must comport with the government's obligation to prove the voluntary, intentional violation of a known legal duty. The deliberate ignorance instruction set forth in ***United States v. Fingado***, 934 F.2d at 1166, appears to be suitable for a criminal tax case. Out of an abundance of caution, however, a prosecutor may wish to utilize the instruction set out in ***United States v. MacKenzie***, 777 F.2d at 818 n.2. Further, to avoid potential confusion as to the meaning of "willfulness" as it relates to the defendant's intent, it may be wise to avoid use of the phrase "willful blindness," using instead such phrases as "deliberate ignorance" or "conscious avoidance." Any time a deliberate ignorance or conscious avoidance instruction is given, the prosecutor should also insure that the jury is expressly directed not to convict for negligence or mistake.

12.12 LESSER INCLUDED OFFENSE CONSIDERATIONS

The Tax Division's policy concerning lesser-included offenses is stated at Section 8.11, *supra*.

12.13 VENUE

"[T]he place of signing a tax return does not control the determination of venue[]" for a charge under Section 7206(1). ***United States v. Marrinson***, 832 F.2d 1465, 1475 (7th Cir. 1987). Venue in a Section 7206(1) prosecution lies in any district where the false return was made, subscribed, or filed. ***Id***.; ***United States v. Shyres***, 898 F.2d 647, 657-58 (8th Cir. 1990). Venue also lies in the district where the false return was prepared and signed. ***United States v. Rooney***, 866 F.2d 28, 31 (2d Cir. 1989); ***Marrinson***, 832 F.2d at 1475; ***United States v. King***, 563 F.2d 559, 562 (2d Cir. 1977). Venue may also lie "where the preparer received information from the defendant even though the defendant signed and filed the returns elsewhere." ***United States v. Marrinson***, 832 F.2d at 1475 (collecting cases).

Reference should be made to the discussion of venue in Section 6.00, *supra*.

12.14 STATUTE OF LIMITATIONS

The statute of limitations for Section 7206(1) offenses is six years. In the case of a return, the limitations period runs from the date of filing, unless the return is filed early, in which case the statute of limitations runs from the statutory due date for filing. 26 U.S.C. § 6531(5); ***United States v. Habig***, 390 U.S. 222, 225 (1968); ***United States v. Marrinson***, 832 F.2d 1465, 1475-76; ***United States v. Samara***, 643 F.2d 701, 704 (10th Cir. 1981). (For rules relating to employment taxes, see Section 7.02[5].)

For a further discussion of the statute of limitations, *see* Section 7.00, *supra*.

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13.00 AID OR ASSIST FALSE OR FRAUDULENT DOCUMENT

13.01 STATUTORY LANGUAGE: 26 U.S.C. § 7206(2)

> §7206. ***Fraud and false statements***
>
> Any person who -- . . .
>
> (2) ***Aid or assistance***. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;
>
> . . . . .
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

13.02 POLICY

Section 7206(2) may be used to prosecute a person who willfully prepares or in some way assists in preparing a materially false tax return or other document. The document need not be signed under penalties of perjury. The statute is also advantageous because there is no need for the prosecution to show a tax due and owing, as is necessary in § 7201 tax evasion prosecutions.

Section 7206(2) is particularly useful to prosecute tax return preparers. However, false claims charges under 18 U.S.C. § 287 may be preferable for tax returns claiming refunds when there is no question that the claim is fraudulent, particularly where the

[1] . Under 18 U.S.C. § 3571, the maximum fine for violations of 26 U.S.C. § 7206(2) is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

return is filed in the name of a fictitious or unknowing taxpayer, because the case will raise no tax issues and restitution is more readily available under Title 18. In addition, 18 U.S.C. § 1341 or 1343, may be preferable for large-scale fraudulent return schemes. Mail or wire fraud charges yield strategic benefits by allowing prosecutors to make the entire scheme an express element of each count, and they support restitution, money-laundering, and asset-forfeiture charges.

If a tax return preparer willfully created a fraudulent refund return for an undercover agent and actually filed the agent's tax return by mail or electronic filing, it may be strategically useful to charge the return preparer with a substantive offense for filing the agent's return, because the defendant will have no basis to attack the credibility of the undercover agent. The preparer may be prosecuted under 18 U.S.C. § 287 or 26 U.S.C. § 7206(2) for filing the false return.

If the taxpayer did not actually file the return, however, the prosecutor should be cautious about bringing a § 7206(2) charge. *See* ***United States v. Dahlstrom***, 713 F.2d 1423 (9th Cir. 1983) (reversing conviction based on unfiled return); *but see* ***United States v. Smith***, 424 F.3d 992, 1009 n.8 (9th Cir. 2005) (*limiting* ***Dahlstrom***); ***United States v. Feaster***, No. 87-1340, 1988 WL 33814, at *2 (6th Cir. Apr. 15, 1988) (unpublished) (*rejecting* ***Dahlstrom***). As one court has aptly put it, "[t]here are few cases that discuss whether § 7206(2) contains a filing requirement . . . ." ***United States v. Borden***, No. 6:05-cr-181-Orl-31DAB, 2007 WL 1128969, at *1 (M.D. Fla. April 12, 2007), *aff'd*, 269 Fed. Appx. 903 (11th Cir. 2008). The Eighth Circuit stated that "liability under section 7206(2) can attach even if a false return is never filed." ***United States v. McLain,*** 646 F.3d 599, 604 (8th Cir. 2010). Two courts have held that an offense under § 7206(2) is complete when the document or information has been presented to the entity required by law to transmit the information to the IRS. ***United States v. Cutler***, 948 F.2d 691, 695 (10th Cir. 1991); ***United States v. Monteiro***, 871 F.2d 204, 210 (1st Cir. 1989); *see also* ***Dahlstrom***, 713 F.2d at 1431 (Goodwin, J., dissenting) ("The statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented. . . . Presentation is a separate act from preparation . . . ."), *as quoted in* ***United States v. Borden***, 2007 WL 1128969 at *2. To adopt a requirement that the filing of a return is an element of § 7206(2) "would mean that a conviction under § 7206(2) could never result from an undercover operation, because the tax forms in those cases would never be filed, nor would the 'taxpayer' ever intend to file them." ***United States v. Borden***, 2007 WL 1128969 at *2. Concluding that such a result would be contrary to

Congress's intent in drafting the statute, the district court in ***Borden*** declined to hold that the filing of the return in question was an element of § 7206(2). 2007 WL 1128969 at **2-3.

The Tax Division strongly encourages the use, wherever possible, of both civil injunctions and parallel criminal proceedings against fraudulent tax preparers. *See* Section 13.11, *infra*, for further discussion.

13.03 GENERALLY

Section 7206(2) has been described as the Internal Revenue Code's "aiding and abetting" provision. ***United States v. Williams***, 644 F.2d 696, 701 (8th Cir. 1981) (*citing* ***United States v. Crum***, 529 F.2d 1380, 1382 (9th Cir. 1976)), *abrogated on other grounds as noted in* ***United States v. Brooks***, 174 F.3d 950, 956 (8th Cir. 1999). It is frequently used to prosecute individuals who advise or otherwise assist in the preparation or presentation of false documents, *e.g.*, fraudulent tax return preparers. However, this statute is not limited to preparers, but applies to anyone who causes a false return to be filed. While frequently the false document will be a tax return or information return, any document required or authorized to be filed with the IRS can give rise to the offense.

The constitutionality of Section 7206(2) has been upheld against challenges based on the First Amendment free speech clause and the Fifth Amendment due process clause. ***United States v. Knapp,*** 25 F.3d 451, 452, 457 (7th Cir. 1994) (rejecting First Amendment claim by defendant, "a self-proclaimed expert on preserving personal assets through creative estate planning" who claimed a "unique understanding of the United States Constitution, the Tax Code, [and] the . . . IRS"); ***United States v. Rowlee,*** 899 F.2d 1275, 1278-79 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by evoking the First Amendment."); ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (finding statute not unconstitutionally vague); ***United States v. Damon***, 676 F.2d 1060, 1062-63 (5th Cir. 1982) (same); ***United States v. Buttorff***, 572 F.2d 619, 623-24 (8th Cir. 1978) (First Amendment); *but cf.* ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing § 7206(2) conviction where advice provided on unsettled point of law).

Because similar concepts apply to both section 7206(2) and section 7206(1) violations, reference should be made to the discussion of section 7206(1) in Section 12.00, *supra*.]

13.04 ELEMENTS OF SECTION 7206(2) OFFENSE

To establish a violation of Section 7206(2), the government must prove the following elements beyond a reasonable doubt:

1. Defendant aided or assisted in, procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the internal revenue laws;

2. The document was false as to a material matter;

3. The act of the defendant was willful.

United States v. McLain, 646 F.3d 599, 604 (8th Cir. 2010); ***United States v. Goosby***, 523 F.3d 632, 637 (6th Cir. 2008; ***United States v. Smith***, 424 F.3d 992, 1009 (9th Cir. 2005); ***United States v. Gambone***, 314 F.3d 163, 174 (3d Cir. 2003); ***United States v. Searan***, 259 F.3d 434, 443 (6th Cir. 2001); ***United States v. Aramony***, 88 F.3d 1369, 1382 (4th Cir. 1996); ***United States v. Klausner***, 80 F.3d 55, 59 (2d Cir. 1996); ***United States v. Salerno***, 902 F.2d 1429, 1431-32 (9th Cir. 1990); ***United States v. Sassak***, 881 F.2d 276, 278 (6th Cir. 1989); ***United States v. Coveney***, 995 F.2d 578, 588 (5th Cir. 1993); ***United States v. Hooks***, 848 F.2d 785, 788-89 (7th Cir. 1988); ***United States v. Crum***, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976). "[O]ne must engage in 'some affirmative participation which at least encourages the perpetrator' in order to be guilty of aiding in the preparation and presentation of false tax returns." ***Sassak***, 881 F.2d at 277 (*quoting* ***United States v. Graham***, 758 F.2d 879, 885 (3d Cir. 1985)) .

"[T]he 'willfully aiding, assisting, procuring, counseling, advising, or causing' language of § 7206(2) effectively incorporates into this statute the theory behind accomplice liability." ***Searan***, 259 F.3d at 443. This "obviates the need for a grand jury to add 18 U.S.C. § 2 to an indictment." ***Searan***, 259 F.3d at 444.

13.05 AIDING AND ASSISTING

13.05[1] Persons Liable

The purpose of the statute "is to make it a crime for one to knowingly assist another in preparation and presentation of a false and fraudulent income tax return." ***United States v. Jackson***, 452 F.2d 144, 147 (7th Cir. 1971). Section 7206(2) and its predecessor statutes have been directed against fraudulent tax return preparers since as early as 1939. In ***United States v. Kelley***, 105 F.2d 912 (2d Cir. 1939), Judge Learned Hand described the statutory predecessor of Section 7206(2):

> The purpose was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent.

Kelley, 105 F.2d at 917.

Liability under Section 7206(2) is not limited to return preparers. The argument that Section 7206(2) "is applicable only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns" was flatly rejected by the Third Circuit in ***United States v. McCrane***, 527 F.2d 906, 913 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909, *reaff'd in relevant part on remand*, 547 F.2d 204 (3d Cir. 1976) (*per curiam*). The statute "has a broad sweep, making all forms of willful assistance in preparing a false return an offense." ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988) (citations omitted); *accord* ***United States v. Coveney***, 995 F.2d 578, 588 (5th Cir. 1993).

The statute "reaches all knowing participants in the fraud." ***United States v. Clark***, 577 F.3d 273, 285 (5th Cir. 2009); *accord* ***United States v. Fletcher***, 322 F.3d 508, 514 (8th Cir. 2003). Courts have held that anyone who causes a false return to be filed or furnishes information which leads to the filing of a false return can be guilty of violating Section 7206(2). *See, e.g.,* ***United States v. Clark***, 139 F.3d 485, 489-90 (5th Cir. 1998) (rejecting insufficiency claim by Pilot Connection members who counseled taxpayers to claim excess exemptions on Forms W-4). There need not be actual physical preparation of the return if the evidence demonstrates that the defendant provided aid, assistance, and advice in the preparation of the false tax return or took other actions that caused the taxpayer to file the false and fraudulent return. ***United States v. Smith***, 424

F.3d 992, 1010-11 (9th Cir. 2005). The question is whether the defendant consciously did something that led to the filing of the false return.

The defendant in ***United States v. Crum,*** 529 F.2d 1380, 1381 (9th Cir. 1976), was involved in a scheme designed to furnish high income doctors with backdated beaver purchase contracts for use in obtaining fraudulent depreciation deductions. Crum, who bred and sold beavers, did not participate in the preparation of the returns, but he did attend two meetings with doctors where the scheme was discussed. He also signed two backdated beaver purchase contracts, one of which was signed to exhibit to an IRS agent. ***Crum***, 529 F.2d at 1381-82. In affirming Crum's conviction under section 7206(2), the court described the following jury instruction as "a proper statement of the law":

> In order to aid and abet another to commit a crime it is necessary that the accused wilfully associate himself in some way with the criminal venture, and wilfully participates in it as he would in something he wishes to bring about; that is to say, that he wilfully seeks by some act or omission of his to make the criminal venture succeed.
>
> In making a determination as to whether the defendants aided or assisted in or procured or advised the preparation for filing of false income tax returns, the fact that the defendants did not sign the income tax returns in question is not material to your consideration.

Crum, 529 F.2d at 1382-83 n.4.

Accordingly, the court in ***Crum*** rejected the contention that Section 7206(2) applies only to preparers of tax returns. "'The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of [a taxable business] interest . . . .'" ***Crum***, 529 F.2d at 1382 (quoting ***United States v. Johnson***, 319 U.S. 503, 518 (1943)).

In ***United States v. Maius***, 378 F.2d 716, 718 (6th Cir. 1967), the defendant was convicted even though he did not participate in the actual preparation of the false return, sign it, or file it. Maius managed a casino's bar and restaurant. As part of his duties, he prepared false daily sheets of the casino gambling loss collections. The figures were entered into the casino books and ultimately reflected on its income tax returns. ***Id***. at 716-17. The defendant's knowledge that the records would be used in preparing the tax returns, which he examined prior to their filing, was held sufficient to sustain his conviction. 378 F.2d at 718.

Similarly, in ***United States v. Thomas***, No. 94-3249, 1994 WL 645725, at *6 (6th Cir. Nov. 15, 1994) (*per curiam*), the court upheld the conviction of a CPA who did not actually prepare the false returns and forms in question. In ***Thomas***, the defendant CPA structured transactions to disguise personal expenses as deductible corporate expenditures, and controlled the account used in these transactions, which generated the records relied upon for the preparation of false corporate and personal tax returns. 1994 WL 645725, at **1-2. The defendant, who orchestrated the underlying scheme that resulted in the filing of false Forms W-2 and false corporate and personal income tax returns, was convicted of violating § 7206(2), even though he did not personally prepare the false forms in question, based on his role in creating the false information used to prepare and file those false forms. 1994 WL 645725, at **6-7.

In ***United States v. Hooks***, 848 F.2d 785 (7th Cir. 1988), the defendant withheld $375,000 worth of bearer bonds from the bank administering his deceased father-in-law's $8 million estate. 848 F.2d at 787. He then cashed the bonds through a transaction structured to conceal his connection with the sale. ***Id***. at 788. As a result, the value of the bonds was not included in the federal estate tax return prepared by the bank, and $96,564.58 in estate tax was evaded. ***Id***. The court found that the defendant's activities resulted in the filing of the false return: even though he did not actually prepare the returns and the preparer (the bank) did not know of the fraud, the defendant had violated Section 7206(2). ***Hooks***, 848 F.2d at 791.

In ***United States v. McCrane***, 527 F.2d 906 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909 (1976), *reaff'd in relevant part on remand*, 547 F.2d 204, 207 (3d Cir. 1976) (*per curiam*), the defendant solicited political contributions as finance chairman for a gubernatorial candidate. 527 F.2d at 908. The basic scheme was that the defendant advised donors to the political campaign that he would have false invoices for advertising services sent to them so they could deduct the disguised contributions as business expenses. ***Id***. at 908-09. Even though the defendant did not assist in the preparation of the two false returns for which he was convicted, he "was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses." ***Id***. at 913.

United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978), provides another example of what might be termed the underlying causation theory that can support a Section 7206(2) violation. Wolfson was charged with supplying inflated appraisals to persons who donated yachts to a university. 573 F.2d at 218. The taxpayers subsequently claimed charitable deductions on their returns based on the inflated appraisals. ***Id***. Although Wolfson's conviction was reversed on evidentiary grounds, the court rejected his contention that his actions were not within Section 7206(2). As the court explained:

> Wolfson does not have to sign or prepare the return to be amenable to prosecution. If it is proved . . . that he knowingly gave a false appraisal with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime.

Wolfson, 573 F.2d at 225; *accord* ***United States v. Gambone***, 314 F.3d 163,173-74 (3d Cir. 2003) (in a scheme to pay overtime wages from non-payroll accounts where no tax was withheld and false Forms W-2 were provided to employees, prosecution under § 7206(2) was appropriate); ***United States v. MacKenzie***, 777 F.2d 811, 820 (2d Cir. 1985) (defendants' conviction under § 7206(2) upheld where defendants issued false Forms W-2 to employees, knowing they would be used to file false returns, to conceal defendants' own ongoing fraud). "[A]ffirmative participation need not rise to the level of actual counseling, . . . as long as it 'at least encourages' the preparation or presentation of a false return." ***Gambone***, 314 F.3d at 173-74; *see also* ***United States v. Head***, 697 F.2d 1200, 1208 n.13 (4th Cir. 1982) (court of appeals noted that trial court's dismissal of § 7206(2) charges because government had failed to prove defendant had actually prepared the returns at issue was "clearly contrary" to holdings of numerous circuits, which all held that actual preparation of the return was not required under § 7206(2)).

13.05[2] Signing of Document Not Required

Section 7206(2) prohibits aiding or assisting in, procuring, counseling, or advising the preparation or presentation of a false document. The fact that the defendant does not actually sign or file the document is not material. ***United States v. Coveney***, 995 F.2d 578, 588 (5th Cir. 1993) (observing that "[a] person need not actually sign or prepare a tax return to aid in its preparation"); ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991) (rejecting insufficiency claim based on the fact that defendant neither signed nor mailed returns); ***United States v. Crum***, 529 F.2d 1380, 1382 n.4 (9th Cir.

1976) (approving instruction in case arising under § 7206(2) that "the fact that the defendants did not sign the income tax returns in question is not material").

In this respect, a Section 7206(2) prosecution differs from a Section 7206(1) prosecution because one of the elements of a Section 7206(1) violation is subscribing (signing) any return, statement, or other document under penalties of perjury.

13.05[3] Knowledge of Taxpayer

It is no defense to a Section 7206(2) prosecution that the taxpayer who submitted the return was not charged, even when the taxpayer was aware of the falsity of the return, went along with the scheme, and could have been charged with a violation. Any criminal mental state (or lack thereof) on the part of the taxpayer is not relevant to the propriety of a defendant's prosecution under Section 7206(2).

Rejecting a defense argument that taxpayer-witnesses commit perjury either when they sign the jurat indicating that they have examined their returns or when they testify under oath that they had not examined their returns before signing them, one court has held that "the innocence or guilty knowledge of a taxpayer is irrelevant" to a Section 7206 prosecution. ***United States v. Jennings***, 51 Fed. Appx. 98, 99-100 (4th Cir. 2002) (*per curiam*) (citations omitted). Accordingly, both a defendant supplying false information to an entirely innocent taxpayer and a defendant supplying false information to a taxpayer who willingly accepts and uses the false information are guilty of violating Section 7206(2). This is clear from the language of Section 7206(2) which provides that it applies "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . ." *See also* ***Baker v. United States***, 401 F.2d 958, 987-88 (D.C. Cir. 1968) (affirming convictions of defendants charged with conspiracy and violations of § 7206(2), where defendants agreed to report fees earned by one defendant on the other defendant's tax return, which the second defendant filed, to conceal the first defendant's receipt of additional taxable income).

After surveying other circuit precedent involving Section 7206(2) prosecutions of individuals who did not prepare the false returns, the Fourth Circuit stated that all that is required for a Section 7206(2) prosecution is that a defendant knowingly participate in providing information that results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements. ***United States v. Nealy***, 729 F.2d 961, 963

(4th Cir. 1984); *accord* ***United States v. Lefkowitz,*** 125 F.3d 608, 618-19 (8th Cir. 1997) (affirming § 7206(2) conviction of corporation president who provided to accountant false information the president knew would result in filing of false return); ***United States v. Marshall,*** 92 F.3d 758, 760 (8th Cir. 1996) (noting that the taxpayers were unaware of inaccuracies while rejecting sufficiency challenge to § 7206(2) conviction); ***United States v. Motley***, 940 F.2d 1079, 1084 (7th Cir. 1991) (in rejecting claim that evidence on § 7206(2) counts was insufficient because defendant neither "signed any of the returns or . . . personally mailed any of the returns himself," the court of appeals noted that § 7206(2) specifically permits conviction of a defendant "'whether or not [the] falsity or fraud is with the knowledge or consent of the [innocent] person.'"); ***United States v. Hooks***, 848 F.2d 785, 791 (7th Cir. 1988) (observing that defendant willfully caused tax preparer to file a false estate tax return and therefore violated § 7206(2), regardless of whether the tax preparer knew of the falsity or fraud).

Occasionally, the primary witness against the person charged with aiding and assisting in the preparation or presentation of a false tax return may be the taxpayer, who may also be culpable. In order to enable the jury to weigh properly the credibility of such a witness, it may be necessary to ask the district court to instruct the jury on the requirements for accomplice testimony. ***Hull v. United States***, 324 F.2d 817, 823 (5th Cir. 1963).

13.05[4] Filing of Documents

The Ninth Circuit in ***United States v. Dahlstrom***, 713 F.2d 1423, 1429 (9th Cir. 1983), found that the filing of a return is an element of a Section 7206(2) violation. The dissent argued, however, that "[t]he statute was clearly intended to reach tax return preparers whether or not the returns they prepare are ultimately presented." ***Dahlstrom***, 713 F.2d at 1431 (Goodwin, J., dissenting).

The government has similarly argued that an offense under Section 7206(2) may be committed without the filing of a document. By its terms, the statute prohibits aiding or advising either the preparation or the presentation of a fraudulent income tax return. Therefore, the offense can be committed simply by counseling a taxpayer to file a false return: nothing in the statute suggests that the taxpayer must follow that advice and actually file the return in order for the offense defined by Section 7206(2) to be committed. In ***United States v. Feaster***, No. 87-1340, 1988 WL 33814, at *2 (6th Cir.

April 15, 1988), the Sixth Circuit agreed with the government and held that "***Dahlstrom*** is contrary to the plain language of 26 U.S.C. § 7206(2)." *Cf.* ***United States v. Monteiro***, 871 F.2d 204, 209-10 (1st Cir. 1989) (court questioned, but did not decide, whether there is a filing requirement for a Section 7206(2) conviction).

Even if the crime may not be completed until a return is filed, it is not necessary that the defendant be the same individual who actually filed the false return, as long as the defendant's willful conduct led to the filing of the false return. ***United States v. Kellogg***, 955 F.2d 1244, 1248-49 (9th Cir. 1992). A plausible argument can be made that an unfiled return may form the basis of a Section 7206(1) or (2) prosecution if the return was transmitted to a third person obligated to file it. *See* ***United States v. Cutler***, 948 F.2d 691, 694-95 (10th Cir. 1991) (upholding § 7206(2) conviction for false and unfiled 1099B given to intermediary required to file); *accord* ***Monteiro***, 871 F.2d at 210-11 (Section 7206(2) applies where defendant did not sign Forms W-2G but conspired with those who did; the offense is complete when the false information is given to the intermediary obligated by law to file it.). Similarly, in ***United States v. Qaimari***, No. 3:05 CR 766, 2006 WL 1023684, at *1 (N.D. Ohio April 18, 2006), the defendant completed false Quick Claim forms to redeem lottery tickets, and was charged with violations of § 7206(2). These Quick Claim forms, which were not filed, became the basis for Forms W-2G, which the Ohio Lottery Commission subsequently filed via an IRS transmittal form, Form 4804. ***Qaimari***, 2006 WL 1023684, at *3 n.2. The court held that the third party of legal consequence was the Lottery Commission, which paid out the winnings and was obligated to transmit information to the IRS via the Form W-2G. ***Id.***

However, in sharp contrast to ***Cutler***, ***Monteiro*** and ***Qaimari***, is Seventh Circuit's decision in ***United States v. Palivos***, 486 F.3d 250, 259 (7th Cir. 2007). In ***Palivos***, the court vacated a § 7206(2) conviction on the basis that a fraudulent tax return, which was patently false and was used to defraud a lender and the Small Business Administration, was never filed. 486 F.3d at 259. After commenting that "[t]here seems to be no dispute that to be a violation of [§ 7206(2)] the return must have been filed with the Internal Revenue Service," the court noted that the fifth superseding indictment used the language "aided in the preparation ***and*** presentation to the IRS." ***Id***. (emphasis added). The court then noted that "the return for which there is some evidence of fraud is not the return which was filed with the IRS and cited in the indictment," whereas there was insufficient evidence to establish that the Form 1040 and Schedule C ultimately filed with the IRS were false. Based on its findings, the court vacated the defendant's conviction. It is not clear from the court's opinion whether the use of the conjunctive "and" in the indictment was the determinative factor in vacating the conviction, or whether the court reversed based on what it determined to be a variance. In any event, the court's statement that there is "no dispute" that § 7206(2) includes a filing element may be non-binding dictum.

13.06 FALSE MATERIAL MATTER

13.06[1] Generally

A tax deficiency is not a prerequisite to a conviction under § 7206(2). *See* ***Hull v. United States***, 324 F.2d 817, 823 (5th Cir. 1963) (rejecting the defense argument that there was insufficient evidence that the return was false as to a material matter because the indictment did not state the amount by which income had been underreported). A "wash" transaction, having no tax consequences, may be material if there is sufficient evidence of willfulness and intent to deceive. ***Baker v. United States***, 401 F.2d 958, 987 (D.C. Cir. 1968) (*citing* ***Sansone v. United States***, 380 U.S. 343, 353 (1965)). As noted in Section 12.10, the law on materiality changed in the wake of ***United States v. Gaudin***, 515 U.S. 506 (1995), and materiality is now held to be a jury question in Section 7206 prosecutions by the majority of circuits.

13.06[2] Examples: False "Material Matter"

The following are pre-***Gaudin*** examples of matters found to be material by courts. Such law should still be consulted for issues such as sufficiency of the evidence.

In ***United States v. Helmsley,*** 941 F.2d 71, 75-76 (2d Cir. 1991), the defendant reported as ordinary business expenses certain payments that the government argued were actually nondeductible constructive dividends to the defendant and her husband. The testimony of the government's expert witness on cross-examination, however, implied that the payments were a form of salary compensation to the Helmsleys, which were properly deductible as a business expense. ***Id***. at 92. The trial court instructed the jury that it could convict whether the deductions were improper, as the government argued, or whether they were mischaracterized, as suggested by the government's expert. ***Id***. On appeal, the defendant challenged the conviction, claiming that mischaracterization of deductions was insufficient to support a Section 7206(2) conviction. The court, however, affirmed the conviction and held that whether the deductions were improperly taken or whether they were mischaracterized was inconsequential. In either case, the court reasoned, the tax return entries were false, as proscribed by the statute. ***Helmsley,*** 941 F.2d at 92-93.

In ***United States v. Damon***, 676 F.2d 1060, 1063-64 (5th Cir. 1982), the defendant tax return preparers argued on appeal that their convictions under Section 7206(2) were improper because the documents containing the false information, their clients' Schedules C, "were not specifically and explicitly required by statute or regulation." ***Damon***, 676 F.2d at 1063. The Fifth Circuit affirmed the convictions on the grounds that the Schedules C prepared by defendants were "integral parts of such returns and were incorporated therein by reference." ***Id***. at 1064.

In ***United States v. Taylor***, 574 F.2d 232, 235 (5th Cir. 1978), the court held that, as a matter of law, the omission of a substantial amount of livestock receipts on tax return schedules constituted the omission of a material matter, because the schedules were integral parts of the tax return. At trial, Taylor was permitted to introduce evidence that he did not believe that the omission of livestock receipts was material because offsetting expenses rendered the omission without tax consequences. ***Id***. at 234. The Fifth Circuit noted that the existence of offsetting expenses did not go to the materiality of the omitted receipts, "but to the lack of *mens rea* in their omission." ***Taylor***, 574 F.2d at 237. Accordingly, the defendant's claimed belief of a lack of tax consequences may be admissible on the willfulness of the omission, even if not relevant to the materiality of the omission.[2]

The Sixth Circuit in ***United States v. Theunick,*** 651 F.3d 578, 586 (6th Cir. 2011), *petition for cert. filed* October 27, 2011, stated that Section 7206(2) prohibits causing a materially false statement to be made in a document required to be filed by the internal revenue laws. In the Theunick case, the defendants bought automatic weapons for personal use. The defendants purchased them using Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) forms for the tax-exempt transfer and registration of firearms. The seller, or transferors of the weapons were National firearms Act vendors. The ATF forms indicated that the firearms were "being transferred to . . . a government entity." The forms contained a box to check if the firearm was being acquired "for personal use," which was left unchecked. The forms also indicated that the weapons were tax-exempt by nature of their use by a government entity. The defendants were charged with

[2] Although ***Taylor*** was a Section 7206(1) case, the same principles apply to Section 7206(2) violations. *See* ***Damon***, 676 F.2d at 1063-64.

violating Section 7206(2) by falsely claiming that the firearms transactions were tax-exempt. These tax-exempt forms were then forwarded to the Internal Revenue Service.

13.07 WILLFULNESS

Willfulness has the same meaning in Section 7206(2) cases as it has for other criminal tax violations: "the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty." ***United States v. Bishop***, 412 U.S. 346, 360 (1973); s*ee also* ***Cheek v. United States***, 498 U.S. 192, 200 (1991); ***United States v. Ervasti***, 201 F.3d 1029, 1041 (8th Cir. 2000). For additional discussions of willfulness, *see* Sections 8.08 and 12.11, *supra*.

In ***Edwards v. United States***, 375 F.2d 862, 864-65 (9th Cir. 1967), the defendant tax attorney collected estimated tax payments from his clients, pocketed the money, and reported on the clients' returns that the estimated tax payments had been made and were properly credited against the tax due. The defendant argued that he did not intend to evade tax but only wanted to gain a little time. ***Id***. at 865. Rejecting the defendant's claim that he did not act willfully, the court explained:

> The offense to which this section is directed is not evasion or defeat of tax. Rather it is falsification and the counseling and procuring of such deception as to any material matter. Here the falsification was committed deliberately, with full understanding of its materiality; with intent that it be accepted as true and that appellant thereby gain the end he sought. This in our judgment is sufficient to constitute willfulness under this section.

Edwards, 375 F.2d at 865; *see also* ***United States v. Greer***, 607 F.2d 1251, 1252 (9th Cir. 1979) ("section 7206(2) requires that the accused must know or believe that his actions will likely lead to the filing of a false return").

It is not enough that the defendant's purposeful conduct merely resulted in the filing of a false return; the false filing must also have been a deliberate objective of the defendant. *See* ***United States v. Salerno***, 902 F.2d 1429, 1433 (9th Cir. 1990) (convictions reversed because government failed to show that casino employee knew or understood that his embezzlement scheme would affect preparation of the casino corporate returns); ***United States v. Aracri***, 968 F.2d 1512, 1523 (2d Cir. 1992) (government presented sufficient evidence for jury to find that defendants intended that fuel companies file false gasoline excise tax returns); *cf.* ***United States v. Gurary***, 860 F.2d 521, 523-24 (2d Cir. 1988) (government presented sufficient evidence to show that defendants who sold fraudulent purchase invoices to corporations knew their scheme would result in corporations' using the fraudulent invoices in the preparation of the tax returns).

Section 7206(2) charges often arise in prosecutions of promoters of abusive tax shelters. In this context, a few cases have recognized uncertainty in the law as a defense to a finding of willfulness. *See*, *e.g.*, ***United States v. Dahlstrom***, 713 F.2d 1423, 1428 (9th Cir. 1983) (court reversed Section 7206(2) convictions of defendants who had instructed investors on creating and carrying out a tax avoidance scheme, because the legality of the shelters was "completely unsettled"). However, the Ninth Circuit has narrowed the circumstances in which such a defense may be raised to situations in which the defendant has merely advocated tax strategies that were of debatable legality. *See* ***United States v. Schulman***, 817 F.2d 1355, 1359 (9th Cir. 1987). Various courts have held that ***Dahlstrom*** does not to provide a defense for defendants whose participation in an illegal scheme extended beyond advocacy and included actual assistance in effectuating the tax avoidance strategies. *See* ***United States v. Tranakos***, 911 F.2d 1422, 1430-31 (10th Cir. 1990); ***United States v. Kelley***, 864 F.2d 569, 577 (7th Cir. 1989); ***United States v. Krall***, 835 F.2d 711, 713-14 (8th Cir. 1987); ***United States v. Solomon***, 825 F.2d 1292, 1297-98 (9th Cir. 1987).

In instances in which the defendant's promotion of a tax avoidance scheme extended beyond mere advocacy, the government may show that irrespective of the defendant's claim that the law with respect to the scheme's legality is unclear, the defendant's conduct was clearly prohibited. *See* ***Solomon***, 825 F.2d at 1297 (even assuming that the patent tax shelter itself was legal or of unsettled legality, defendants could not rely on an uncertainty of the law defense since their conduct in administration of the scheme was so clearly fraudulent); *see also* ***Schulman***, 817 F.2d at 1359. In ***United States v. Smith***, 424 F.3d 992 (9th Cir. 2005), the government told the jury during closing argument to assume that trusts known as Unincorporated Business Organizations, or "UBOs," which the defendants promoted and charged their clients to set up, were "legitimate," and the court found that there was "nothing 'inherently unlawful with an UBO.'" ***Id***. at 1010. Even though the defendants did not actually prepare any of the returns in question, their convictions on the § 7206(2) charges were nonetheless upheld based on ample evidence that the defendants "gave advice to *unlawfully* use UBOs to file false or fraudulent tax returns (or not to file at all)." ***Id***. (emphasis in original).

While mere advocacy may not be sufficient for a finding of aiding in the filing of false documents, it is not necessary that the defendant have a definite relationship (*i.e.* business partners, etc.) with the filing party. *See* ***Aracri***, 968 F.2d at 1524 (defendants' aiding in the filing of false documents rendered them criminally liable regardless of relationship to filing organization).

13.08 CASE EXAMPLES

13.08[1] Return Preparers

In ***United States v. Jackson***, 452 F.2d 144 (7th Cir. 1971) (*per curiam*), the Seventh Circuit affirmed the convictions of a return preparer. Twelve taxpayer witnesses testified that they paid the defendant to prepare their returns, which contained itemized deductions and exemptions in excess of any amount they could correctly claim. 452 F.2d at 146. The returns contained various false deductions that the taxpayers testified they had not told the defendant to claim on their behalf but that the defendant had independently claimed on their behalf. ***Id***. The defendant argued that his conviction was unfair because the client-taxpayers had an incentive to lie. The court of appeals affirmed the defendant's convictions, concluding that "the innocence or guilty knowledge of a taxpayer is irrelevant to . . . a prosecution [under 26 U.S.C. § 7206(2)]." ***Id***. at 147; *see also* ***United States v. Haynes***, 573 F.2d 236, 240-41 (5th Cir.1978).

13.08[2] Sham Circular Financing Transactions

In ***United States v. Clardy***, 612 F.2d 1139, 1143-49 (9th Cir. 1980), the defendant employed check kiting and check swapping as a basis for deducting non-existent interest payments on his clients' tax returns. As part of his scheme, the defendant arranged for the preparation of false documentation to support the claimed deductions. ***Id***. at 1446-47. The jury was instructed on a good faith belief defense, but was also instructed: "If you find from the evidence that transactions do not exist except in form and are otherwise unreal or sham, you are to consider whether the defendant willfully engaged in such conduct for the purpose of procuring, counseling, advising, or preparing or presenting false federal income tax returns as charged in the indictment." ***Clardy***, 612 F.2d at 1152-53. The court of appeals affirmed the defendant's convictions under § 7206(2), concluding that there was ample evidence to support a finding that the defendant "engineered the three paper transactions for the sole purpose of taking interest tax deductions without any serious intention by anyone at any time, 1971 as well as later, of completing any of the transactions. ***Id***. at 1153.

13.08[3] Inflated Values

In ***United States v. Barshov***, 733 F.2d 842, 845 (11th Cir. 1984), the defendants, as general partners, had formed limited partnerships to purchase motion pictures for distribution and exhibition. The defendants inflated the purchase prices and the income generated by the films to maximize the depreciation costs and the investment credits, and they caused returns to be filed based on the inflated numbers. ***Id***. at 845-46. The Eleventh Circuit affirmed the conviction for aiding and assisting in the preparation of false partnership returns and individual returns of the limited partners. ***Id***. at 846.

13.08[4] Political Contributions Deducted as Business Expenses

In ***United States v. McCrane***, 527 F.2d 906 (3d Cir. 1975), *vacated on other grounds*, 427 U.S. 909, *reaff'd in relevant part*, 547 F.2d 204 (3d Cir. 1976), the defendant, who was the finance chairman for a gubernatorial candidate, solicited political contributions, but issued fictitious invoices through a public relations firm describing the money as payment for advertising services, in order to disguise the payments as business expenses for the contributors. The contributors then deducted the contributions as business expenses on their tax returns. 527 F.2d at 908-09. The defendant argued that Section 7206(2) applies only to accountants, bookkeepers, tax consultants, or preparers who actually prepare the tax returns. ***Id***. at 913. Affirming the defendant's conviction, the Third Circuit noted that "[t]he defendant was convicted on evidence that he assisted certain taxpayers by providing false invoices as documentation of business expenses . . . [and] [h]e also advised and counseled the contributors to use these expenditures as tax deductions." ***McCrane***, 527 F.2d at 913.

13.08[5] Winning Racetrack Tickets -- Not Cashed by True Owner

Winners at the racetrack often pay other people to cash winning tickets so that the real winners' names will not appear on the Forms 1099 that the racetrack files with the IRS.

In ***United States v. Haimowitz***, 404 F.2d 38 (2d Cir. 1968) (*per curiam*), two people testified that they had cashed about $100,000 worth of winning tickets for the defendants for a commission of 2½ % or 3%. A third witness testified that he had cashed $200,000 worth of winning tickets. 404 F.2d at 39-40. The defendant apparently told two of the cashing parties that they would be given sufficient losing tickets to offset the winnings attributed to them. The Second Circuit upheld the conviction because the "scheme of causing the track to record another person as the winner was calculated to defeat the government in its tax collection." ***Haimowitz***, 404 F.2d at 40; *see also* ***United States v. Monteiro***, 871 F.2d at 209-211 (defendant's liability for aiding the preparation of fraudulent tax documents accrued at the point when those documents were submitted to an intermediary required by law to transmit the information in those documents to the IRS, with the intent that the racetrack would accept as true the information provided in those documents). Similarly, in ***United States v. McGee***, 572 F.2d 1097, 1099 (5th Cir. 1978) (*per curiam*), the court affirmed the § 7206(2) conviction of a defendant who cashed winning racetrack tickets for others under his own name in return for a 10% commission. The court stated that "[t]he statute is written disjunctively and it is sufficient for the government to prove either that the information was supplied with the intent to deceive or that the information was false in the sense of being deceptive." ***McGee***, 572 F.2d at 1099 (citation omitted).

13.08[6] Payoffs to Union Officials Reflected as Commissions and Repairs

In ***United States v. Kopituk***, 690 F.2d 1289 (11th Cir. 1982), the defendants made payoffs to union officials, but falsely reflected the amounts in corporate records as payments for commissions, repairs, and other items. Pointing out that even if it were true that the defendants never examined the returns, which had been prepared by their accountant, the Eleventh Circuit held that "[s]ince the tax returns were prepared in reliance upon the information supplied by appellants, they were chargeable with knowledge of the content of those returns regardless of the fact that they did not actually fill out the tax forms." ***Kopituk***, 690 F.2d at 1333 (citations omitted).

13.09 VENUE

Venue will lie where the acts of aiding, assisting, counseling or advising the preparation of a false return took place or where the return was filed. ***United States v. Hirschfeld***, 964 F.2d 318, 321 (4th Cir. 1992); *but see* ***United States v. Griffin***, 814 F.2d

806, 810 n.7 (1st Cir. 1987) (leaving open the question whether the district of filing provides a sufficient basis for venue in a Section 7206(2) prosecution where return was prepared in one district and filed in another).

For further information, *see* the discussion of venue in Section 6.00, *supra*, and the discussion of venue in connection with section 7206(1) violations in Section 12.13, *supra*.

13.10 STATUTE OF LIMITATIONS

The statute of limitations for Section 7206(2) offenses is six years from the date of filing, unless the return is filed early, in which case the statute of limitations runs from the statutory due date for filing. 26 U.S.C. § 6531(3); ***United States v. Habig***, 390 U.S. 222, 223, 225-27 (1968). (For rules relating to employment taxes, see Section 7.02[5].)

Where the defendant's act of aiding a false filing precedes the filing of a return, the significant event is the filing of the false document, not the defendant's act that aided or caused the filing. Thus, although the defendant may have provided false information to the filer more than six years prior to the filing of the return, the filing of a subsequent return based on the false information renews the limitations period every time such a filing occurs. *See*, *e.g.*, ***United States v. Kelley***, 864 F.2d 569, 574-75 (7th Cir. 1989) (although defendant sold an abusive tax shelter more than six years before indictment, his clients' filing of returns that included illegal deductions arising from the shelter within the six years prior to his prosecution prevented the charges from being time-barred).

For further information, *see* the discussion of the statute of limitations in Section 7.00, *supra*.

13.11 CIVIL INJUNCTIONS AGAINST FRAUDULENT RETURN PREPARERS

The Tax Division strongly encourages federal prosecutors to utilize, wherever possible, both civil injunctions and parallel criminal proceedings against fraudulent tax preparers. While care must be taken not to interfere with or jeopardize a criminal investigation, a civil injunction case should proceed first, to the extent that the civil injunction case is ready to proceed. Use of civil injunctions enables the Department of Justice to put fraudulent return preparers out of business as fast as we can develop the cases to do so. The Tax Division's policy on parallel proceedings, if consistently adhered to, will result in most or all criminal cases' reaching the trial or guilty plea stage after the United States has already sued for (and in most instances obtained) an injunction.

In cases involving charges against fraudulent return preparers who are still preparing returns, the Tax Division strongly encourages attorneys to seek a preliminary injunction, under 26 U.S.C. §§ 7402 and 7407, upon the filing of the complaint or very soon thereafter in order to actually put these fraudulent return preparers out of business. Section 7402 provides:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, . . . and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws.26 U.S.C. §7402(a); ***United States v. Bell***, 414 F.3d 474, 476-77 n.2 (3d Cir. 2005). Section 7407 provides:
>
> A civil action in the name of the United States to enjoin any person who is a tax return preparer from further engaging in any conduct described in subsection (b) or from further acting as a tax return preparer may be commenced at the request of the Secretary. . . . The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against any such tax return preparer or any taxpayer.

26 U.S.C. §7407(a). Under Section 7407(b), if the district court finds

> (1) that a tax return preparer has --
>
> (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by [Title 26 of the United States Code],
>
> (B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience or education as a tax return preparer,
>
> (C) guaranteed the payment of any tax refund or the allowance of any tax credit, or
>
> (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and

> (2) that injunctive relief is appropriate to prevent the recurrence of such conduct,
>
> the court may enjoin such person from further engaging in such conduct. If the court finds that a tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as a tax return preparer.

26 U.S.C. §7407(b).

Injunctive relief may also be obtained under § 7408 against tax return preparers who promote unlawful tax shelters. Section 7408(b) provides:

> [I]f the court finds --
>
> (1) that the person has engaged in any specified conduct, and
>
> (2) that injunctive relief is appropriate to prevent recurrence of such conduct,
>
> the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under [Title 26].

'Specified conduct' is defined in relevant part as

> any action, or failure to take action, which is . . . subject to penalty under section 6700 [relating to penalty for promoting abusive tax shelters, etc.] [or] section 6701 [relating to penalties for aiding and abetting understatement of tax liability].

26 U.S.C. §7208(c); ***United States v. Bell***, 414 F.3d at 476-77 n. 2.; ***United States v. Gleason***, 432 F.3d 678, 682-84 (6th Cir. 2005).

Courts consider the following factors to determine whether a permanent injunction is needed: (1) the gravity of the harm caused by the offense; (2) the extent of the defendant's participation; (3) the defendant's degree of scienter; (4) the isolated or recurrent nature of the infraction; (5) the defendant's own recognition or non-recognition of his or her own culpability; and (6) the likelihood that the defendant's occupation would place him or her in a position where future violations could be anticipated. ***United States v. Gleason***, 432 F.3d at 683 (citations omitted). Noting that promoters of tax fraud who provide detailed instructions and techniques to avoid paying taxes have been prosecuted for aiding and abetting the commission of tax fraud, the United States Court of Appeals for the Third Circuit has suggested that, where the facts of the case indicate that the defendant went beyond advocating and assisted the commission of tax violations, the injunction should include language to forbid aiding and abetting. *See* ***United States v. Bell***, 414 F.3d at 483-84.

If a fraudulent tax return preparer is already out of business and the case is strictly a historical case, then the Tax Division's goals are to punish the return preparer, deter others, and ensure that the one-time return preparer does not reenter the field. In cases in which there is a substantial likelihood the return preparer will resume his or her return preparation business but there is no ongoing criminal investigation and there are reasons why a criminal investigation is not warranted, the Tax Division recommends filing a civil injunction complaint.

Federal prosecutors are also urged to use the media to deter the preparer's conduct and inform his or her customers of the indictment. This is critical in all cases in which an indictment is returned, especially where the circumstances of the case provided an insufficient basis to seek a preliminary injunction or where the return preparer is already out of business. Deterrence is key to our mission, and there is great potential for deterrence in publicizing our efforts to combat tax fraud, either through the public affairs offices of United States Attorneys' offices or the Office of Public Affairs at the Department of Justice. Toward that end, thought must be given in each case to how best to achieve deterrence, which necessarily includes a press release and efforts to obtain maximum media exposure in every case.

Where criminal tax charges against a fraudulent return preparer are resolved by guilty plea, the Tax Division encourages federal prosecutors to include a provision in the plea agreement by which the defendant agrees to be permanently enjoined from preparing or filing federal tax returns on behalf of third parties. As indicated by the sample language below, a Tax Division Civil Tax Section attorney will effectuate the agreement by filing a civil complaint:

> Defendant agrees, as part of this plea agreement, to be permanently enjoined under IRC §§ 7402, 7407, and 7408, from preparing, assisting in,

> directing or supervising the preparation or filing of federal tax returns, amended tax returns, or other related documents or forms for any person or entity for anyone other than (himself/herself) or other than for an entity for which they have a legal obligation to file a tax return. Defendant understands that the United States will file a civil complaint against (him / her) seeking this relief and related provisions, and defendant consents to the entry of a permanent injunction consistent with Fed. R. Civ. P. 65(d) in that separate civil action.

Prosecutors who include this or a similar provision in a plea agreement should notify the IRS Small Business, Self-Employed ("SBSE") Group or the Tax Division Counsel for Civil/Criminal Coordination.

A plea agreement with a fraudulent return preparer may also include a stipulation that the defendant is liable for civil tax penalties. Prosecutors contemplating such an agreement should refer to Section 5.01[7], *supra*, which discusses the approval they may need to obtain under 26 U.S.C. § 6751(b)(1) before entering into such a plea agreement.

A criminal defendant can promise, as part of a plea agreement, to never prepare returns for third parties again, but that creates only a contract. Once the defendant's period of incarceration, supervised release and/or probation have ended, the contract, if violated, is enforceable only by bringing a civil suit against the defendant. An injunction, on the other hand, is permanent, and if it is violated the government does not have to sue to enforce a contract. Rather, the government can go straight to civil contempt proceedings to force compliance with the injunction or to a criminal contempt prosecution to punish the violation.

The IRS and the Tax Division have worked together for many years to obtain similar injunctions against preparers who were pleading guilty to crimes. Language in a plea agreement indicating the defendant's consent to the injunction facilitates the government's ability to obtain a permanent injunction and, in most cases, requires minimal additional effort on behalf of the prosecutor. Such language should be included in every a plea agreement, unless there is a very compelling reason not to pursue this parallel civil relief.

Where fraudulent preparers do not plead guilty or otherwise agree and stipulate to such an injunction, the United States must file a civil injunction complaint (if one has not already been filed), to ensure that a permanent injunction goes into effect. A permanent injunction will deter illegal conduct after the expiration of restrictions placed on the defendant during incarceration, supervised release, and/or probation, since such restrictions will be lifted once these periods have ended.

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14.00 REMOVAL OR CONCEALMENT WITH INTENT TO DEFRAUD

14.1 STATUTORY LANGUAGE: 26 U.S.C. § 7206(4)

§7206. ***Fraud and false statements***

Any person who --

. . .

(4) . . . Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title . . . shall be guilty of a felony and, upon conviction thereof, shall be fined . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

14.2 TAX DIVISION POLICY

Section 7206(4) prosecutions are rarely brought because, in the usual criminal income tax case, the violation is covered by § 7201 (evasion), § 7206(1) (false return), or § 7212(a) (obstruction). However, § 7206(4) may be useful in appropriate circumstances, for example, to prosecute a defendant who removes or conceals assets subject to levy, because it does not require proof of a tax due and owing or proof of any filed document.

14.3 GENERALLY

Section 7206(4) and its predecessor, Section 3321(a) of the Internal Revenue Code of 1939,[2] have been used from an early date in cases involving the sale of untaxed liquor. *See, e.g.*, ***United States v. Champion***, 387 F.2d 561, 562-63 (4th Cir. 1967); ***United States v. Davis***, 369 F.2d 775, 779-80 (4th Cir. 1966); ***United States v. Goss***,

[1] For the felony offenses set forth in section 7206(4), the maximum permissible fine is at least $250,000 for individuals and $500,000 for corporations. 18 U.S.C. § 3571. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. *Id.*

[2] Section 3321(a) (I.R.C. 1939) provided: "Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both."

353 F.2d 671, 672 (4th Cir. 1965); ***Hyche v. United States***, 286 F.2d 248, 248-49 (5th Cir. 1961) (*per curiam*); ***Ingram v. United States***, 241 F.2d 708, 709 (5th Cir. 1957) (*per curiam*); ***Price v. United States***, 150 F.2d 283, 285 (5th Cir. 1945). Cases involving the sale of untaxed liquor are beyond the scope of this manual, but some of those cases are helpful in interpreting the statute.

Congress amended what is now Section 7206(4) as part of its recodification of the Internal Revenue Code in 1954. As amended, Section 7206(4) addresses not only concealment of goods or commodities, but also conduct committed in order to avoid a levy. *See* ***United States v. Swarthout***, 420 F.2d 831, 835 (6th Cir. 1970) (citing H.R. Rep. No. 83-1337 (1954), as reprinted in 1954 U.S.C.C.A.N. 4573).

14.4 ELEMENTS OF OFFENSE

To establish a section 7206(4) offense, the following elements must be proved beyond a reasonable doubt:

> 1. The defendant removed, deposited, or concealed, or was concerned in removing, depositing, or concealing
>
> 2. goods or commodities for which, or in respect of which, a tax is or shall be imposed, or any property upon which levy is authorized by 26 U.S.C. §6331,
>
> 3. with intent to evade or defeat the assessment or collection of any tax imposed by Title 26.

14.5 REMOVES, DEPOSITS, OR CONCEALS

Section 7206(4) applies to any person who removes, deposits, or conceals certain goods, commodities, or property upon which a tax is or shall be imposed, or upon which a levy is authorized by 26 U.S.C. § 6331. By its own terms, the statute is not limited to persons who directly conceal goods, commodities, or property, but extends to any person "concerned in" those acts. 26 U.S.C. § 7206(4). The concept of concealment under the statute is not limited to a physical concealment of the property. *See* ***United States v. Bregman***, 306 F.2d 653 (3d Cir. 1962).

In ***Bregman***, the one-count indictmentcharged:

> That on or about October 30, 1954, at Philadelphia, in the Eastern District of Pennsylvania, Rudolph R. Bregman and Milton H.L. Schwartz, with intent to evade and defeat the collection of taxes assessed against Rudolph Motor Service, Inc., did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers, property of Rudolph Motor Service, Inc., upon which a levy was authorized by Section 6331 of the Internal Revenue Code . . . .

Bregman, 306 F.2d at 654. The defendant argued that there was a variance between the indictment and the proof because the indictment charged the concealment of 18 trailers and "the government's proof only established a false entry with respect to possession of the trailers." ***Bregman***, 306 F.2d at 655. Rejecting the defendant's argument, the court of appeals concluded that "[w]hen Bregman falsified Rudolph's corporate records to show that the trailers had been 'repossessed'[,] the effect of that falsification was to 'conceal' Rudolph's possession of the trailers." ***Bregman***, 306 F.2d at 655. According to the court, the applicable principle is that the word "conceal" does not merely mean to secrete or hide away. It also means "'to prevent the discovery of or to withhold knowledge of.'" ***Bregman***, 306 F.2d at 656 (quoting ***United States v. Schireson***, 116 F.2d 881, 884 (3d Cir. 1941)). The court therefore concluded:

> The government's proof that Bregman falsified the records pertaining to the trailers -- property of Rudolph -- to show that they had been "repossessed" was foursquare with the charge of "concealment" in the indictment and not by any stretch of the imagination at variance with it.

Bregman, 306 F.2d at 656.

Proof of any one of the prohibited acts -- "removing, depositing, or concealing" -- is sufficient for conviction, even if the acts are charged conjunctively. ***United States v. Davis***, 369 F.2d 775, 779 (4th Cir. 1966); ***Hyche v. United States***, 286 F.2d 248, 249 (5th Cir. 1961); ***Price v. United States***, 150 F.2d 283, 285 (5th Cir. 1945).

14.6 TAX IMPOSED OR LEVY AUTHORIZED

Care should be exercised in drafting indictments charging violations of section 7206(4). If the defendant is charged with removing, depositing, or concealing goods or commodities for or in respect whereof any tax is or shall be imposed, the prohibited acts may be based on actions committed prior to the time the tax is due. However, if the charge is based upon the commission of the prohibited actions with regard to "property upon which levy is authorized," it should be noted that at least one court has held that such actions must have occurred after a tax has been assessed and the taxpayer has refused to pay after notice and demand for payment. *See* ***United States v. Swarthout***, 420 F.2d 831, 833-34 (6th Cir. 1970).

Concealment of assets *prior* to assessment or levy may be charged under section 7201. By including concealment of assets among the prohibited conduct in section 7206(4), Congress did not intend to provide the exclusive criminal remedy for such conduct. ***United States v. Hook***, 781 F.2d 1166, 1170 (6th Cir. 1986). The government is not foreclosed from charging those who conceal assets, either before or after assessment or levy, under the general evasion statute. ***Hook***, 781 F.2d at 1170; *but see* ***United States v. Minarik***, 875 F.2d 1186, 1195 (6th Cir. 1989) (reversing conviction based on finding that government should have charged defendant with violating offense prong of conspiracy statute with reference to 26 U.S.C. § 7206(4), rather than with violating general defraud prong).[3]

14.7 WILLFULNESS

Section 7206(4) does not by its terms require proof of willfulness. The statute does, however, require intent to evade or defeat the assessment or collection of any tax imposed by the Internal Revenue Code. 26 U.S.C. § 7206(4). The same type of evidence used to establish an affirmative act of evasion in an attempted evasion prosecution may be used to prove such intent. See the discussion of affirmative acts in Section 8.06, *supra*.

14.8 VENUE

The Sixth Amendment to the Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed . . . ." U.S. Const. amend VI; Fed. R. Crim. P. 18. If a statute does not indicate what Congress considers to be the place

[3] ***Minarik*** has not fared well over time. The Sixth Circuit has limited it, *see* ***United States v. Khalife***, 106 F.3d 1300, 1303-06 (6th Cir. 1996); *United States v. Kraig*, 99 F.3d 1361, 1366-68 (6th Cir. 1996); ***United States v. Sturman***, 951 F.2d 1466, 1473 (6th Cir. 1991); ***United States v. Mohney***, 949 F.2d 899, 902-03 (6th Cir. 1991); and other circuits have shown no inclination to follow it, *see, e.g.*, ***United States v. Goulding***, 26 F.3d 656, 663 (7th Cir. 1994); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1092 (4th Cir. 1993); ***United States v. Harmas***, 974 F.2d 1262, 1267 (11th Cir. 1992).

"wherein the crime shall have been committed," "the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In a Section 7206(4) prosecution, venue is proper in the judicial district in which the act of concealment took place. Venue also may be laid where the return was filed, if the charge is an attempt to evade and defeat the assessment of a tax. See discussion of venue in Section 6.00,*supra*.

14.9 STATUTE OF LIMITATIONS

Under 26 U.S.C. § 6531, the statute of limitations for tax offenses is three years, unless an offense falls within an exception making the period six years. There is no exception specifically referring to Section 7206(4). However, Section 6531(1) makes the limitations period six years "for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner." It has been held that this provision applies to an offense involving fraud, even if the statute defining the offense does not use the word "fraud." *See* ***United States v. Workinger***, 90 F.3d 1409, 1413-14 (9th Cir. 1996). Concealment of property with intent to evade taxes, in violation of Section 7206(4), could be characterized as fraud. Therefore, it is arguable that the limitations period for such an offense is six years rather than three years. But the safest approach is to proceed on the assumption that the limitations period is three years for all offenses under Section 7206(4). For a general overview of statute of limitations issues, see Chapter 7.00, *supra*.

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15.00 COMPROMISES AND CLOSING AGREEMENTS

15.1 STATUTORY LANGUAGE: 26 U.S.C. § 7206(5)

§7206. ***Fraud and false statements***

Any person who * * *

(5) Compromises and closing agreements. -- In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

> (A) Concealment of property. -- Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or
>
> (B) Withholding, falsifying, and destroying records. -- Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined ... or imprisoned not more than 3 years, or both, together with the costs of prosecution.[1]

15.2 TAX DIVISION POLICY

Section 7206(5) prosecutions are rare because conduct covered by the statute often may be prosecuted using the more general provisions of § 7206(1) or § 7206(2), or § 7212(a). The statute may be used in appropriate cases where a defendant concealed property or withheld or destroyed records in connection with a compromise or closing agreement, regardless of whether the defendant was the taxpayer.

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[1] For the felony offenses set forth in section 7206(5), the maximum permissible fine for offenses committed after December 31, 1984, is at least $250,000 for individuals and $500,000 for corporations. 18 U.S.C. § 3571. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. *Id.*

15.3 GENERALLY

As noted above, section 7206(5) prosecutions are very rare. There are only two reported court of appeals cases involving charges of violating section 7206(5), and even those cases involved violations of other sections, including Section 7206(1), along with violations of section 7206(5)(B) (false offers in compromise). ***United States v. Zichettello***, 208 F.3d 72, 80 (2d Cir. 2000); ***Gentsil v. United States***, 326 F.2d 243, 244 (1st Cir. 1964). In virtually all instances, the availability of the commonly used Section 7206(1) charge will obviate the need for using section 7206(5). *See*, *e.g.*, ***United States v. Cohen***, 544 F.2d 781 (5th Cir. 1977) (a material omission in an "Offer in Compromise" filed with the Internal Revenue Service was prosecuted as a section 7206(1) violation). For principles applicable to both sections 7206(1) and 7206(5), reference should be made to the discussion of section 7206(1) in Section 12.00, *supra*.

15.4 SCOPE OF SECTION 7206(5)

By its terms, section 7206(5) applies to concealment of property or withholding, falsifying, or destroying records in connection with (1) closing agreements (as provided for in Section 7121 of the Internal Revenue Code (Title 26))[2] and (2) compromises of any civil or criminal case (as provided for in section 7122 of the Internal Revenue Code (Title 26)). *See* ***United States v. Jenkins***, 745 F. Supp. 2d 692 (E.D. VA 2010). If, in connection with such closing agreements or compromises, the taxpayer willfully (A) conceals from an employee of the United States any property belonging to the estate of a taxpayer or other person liable for the tax or (B) withholds, falsifies, or destroys records or makes a false statement as to the estate or financial condition of the taxpayer or other person liable for the tax, then a violation of section 7206(5) hasoccurred.

In the context of sections 7121 and 7122, the terms “settlement agreement” and "compromise" pertain to monetary settlements of civil tax liability, not plea agreements resolving the criminal aspects of a case. *See* ***United States v. McCue***, 178 F. Supp. 426, 434-35 (D. Conn. 1959) (rejecting defendant’s argument that a plea bargain resulting in dismissal of charges constituted a compromise under section 7122, and noting that

[2] "A closing agreement is a written agreement between an individual and the Commissioner [of the Internal Revenue Service] which [finally] settles or ‘closes’ the liability of that individual . . .with respect to any Internal Revenue tax for a taxable period." 14 Mertens, ***Law of Federal Income Taxation***, Sec. 52.01 (Rev. 2012).

section 7122 compromises require resolution of the **civil** tax liability). In ***McCue***, the district court held (178 F. Supp. at 434):

> The use of the disjunctive in the phrase 'to compromise any civil or criminal case' was intended to take care of circumstances where criminal prosecution has actually been commenced but no formal action has been taken with regard to the civil liabilities and an agreement has been reached covering both the civil and criminal aspects. It is significant that this statute and its predecessors go back more than 91 years and in that long period of time no case appears to have arisen where an attempt was made to agree on a compromise of a criminal case standing alone and unrelated to the disposition of civil liabilities. . . . [T]he purpose of the compromise statute was to facilitate money settlements of tax liability and the settlement of criminal charges are [sic] contemplated only when they are ancillary thereto.

Perhaps one reason criminal cases under this statute are rare is the long-standing policy of the Department not to settle civil tax liability while a criminal case is pending. *See* ***United States Attorneys' Manual*** (USAM), Title 6, Sec. 6-4.360. Note that a restitution order generally does not resolve purely civil issues and that, when resolving their cases, prosecutors are required to consider whether restitution in appropriate. *See* USAM, Title 6, Sec. 6-4.370. For more information on restitution, see the discussion in Section 44.00, *infra.*

15.5 WILLFULNESS

The word "willfully" has the same meaning in a section 7206(5) violation as it does in the other criminal tax violations -- a voluntary, intentional violation of a known legal duty. *See* ***Cheek v. United States***, 498 U.S. 192, 200 (1991); ***United States v. Bishop***, 412 U.S. 346, 359-60 (1973). *See* the discussion of willfulness in Sections 8.08 and 12.11, *supra*.

15.6 VENUE

Venue for a section 7206(5) violation may be laid in any district in which any of the acts prohibited by section 7206(5) occurred. *See* the discussion of venue in connection with section 7206(1) offenses in Section 12.13, *supra*. *See* also the general discussion of venue in Section 6.00, *supra*.

15.7 STATUTE OF LIMITATIONS

The statute of limitations for section 7206(5) offenses is three years. 26 U.S.C. § 6531. *See* also the general discussion of the statute of limitations in Section 7.00, *supra*.

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Last updated: May 2024

16.00 FRAUDULENT RETURNS, STATEMENTS, OR OTHER DOCUMENTS

16.01 STATUTORY LANGUAGE: 26 U.S.C. § 7207

Section 7207 of the Internal Revenue Code provides, in pertinent part:

> Any person who willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined[1] . . . or imprisoned not more than 1 year, or both.[2]

16.02 ELEMENTS

To establish a violation of Section 7207, the following elements must be proved beyond a reasonable doubt:

> 1. the defendant submitted a return, statement, or other document to the Internal Revenue Service;
>
> 2.the return, statement, or other document was false or fraudulent as to a material matter; and
>
> 3.the defendant acted willfully.

Sansone v. United States, 380 U.S. 343, 352 (1965).

16.03 RETURN, STATEMENT, OR OTHER DOCUMENT

By its express terms, Section 7207 applies to "any list, return, account, statement, or other document." Moreover, "a document prepared by another could give rise to liability on the part of the taxpayer if he delivered or disclosed it to the Service." ***United States v. Bishop***, 412 U.S. 346, 358 (1973). Aside from the policy considerations discussed below and except as noted in § 16.03[1] *infra*, there is no limit on the type of

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.[1] The maximum permissible fine for a violation of 26 U.S.C. § 7207 is $100,000 for an individual and $200,000 for a corporation. 18 U.S.C. §§ 3571(b)(5) & (c)(5). Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined up to the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d).

[2] The portion of Section 7207 dealing with information furnished to the Internal Revenue Service in connection with 26 U.S.C. § 6047(b) (information relating to certain trusts and annuity plans), 26 U.S.C. § 6104(d) (public inspection of exempt organizations' annual reports), and 26 U.S.C. 527 (political organizations) is not covered in this Manual.

document that can be the subject of a violation of 26 U.S.C. § 7207. *See* ***United States v. Holroyd***, 732 F.2d 1122, 1126 (2d Cir. 1984). The usual situation will involve an IRS audit and the submission to the auditor of altered canceled checks, altered invoices, or altered receipts to support overstated deductions. Unlike Section 7206(1), Section 7207 does not require that the alleged false document be signed under penalties of perjury, or even signed at all. ***United States v. Bishop***, 412 U.S. at 357-58. It is enough to show that the defendant delivered or disclosed the document to the Internal Revenue Service, knowing it was materially false. ***Id***. at 358.

16.03[1] Tax Return as False Document

The Tax Division generally will not authorize a prosecution or plea agreement under Section 7207 where the allegedly false document forming the basis for a charge under Section 7207 is a tax return.

16.04 FALSE OR FRAUDULENT MATERIAL MATTER

The requirement to establish that the document in issue is false or fraudulent as to a material matter is an element that is common to violations of Sections 7206(1), 7206(2), and 7207. *See* 26 U.S.C. 7206(1) ("does not believe to be true and correct as to every material matter,"); 26 U.S.C. § 7206(2) & 2707 ("fraudulent or . . . false as to any material matter"). Accordingly, reference should be made to the discussion of materiality in §§ 12.10 and 13.06, *supra*.

Although no court has addressed the issue, materiality appears to be a question for the jury in Section 7207 cases. *See* ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1995) (holding that materiality under 18 U.S.C. 1001 is a jury question); ***Neder v. United States***, 527 U.S. 1, 8 (1999) (noting that government did not dispute that the district court had erred under ***Gaudin*** in deciding materiality element of a § 7206(1) offense itself, rather than submitting the issue to the jury). The question of materiality therefore should be submitted to the jury in Section 7207 cases, to avoid any issue on appeal. *See* 2B KEVIN F. O'MALLEY, ET AL, FEDERAL JURY PRACTICE AND INSTRUCTIONS--CRIMINAL § 67.18, note (5th ed. 2000) (stating that, after ***Gaudin***, "a better practice might be to submit *all* questions of materiality to the jury" (citing ***United States v. DiRico***, 78 F.3d 732, 736 (1st Cir. 1996)); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Instruction 96, Annotations (2003 Revision) ("The issue of 'materiality' [under 26 U.S.C. § 7207] is for the jury, not the Court" (citing ***Gaudin***)).

Materiality in a Section 7207 case does not depend on whether the false statement has any bearing on the tax liability of the defendant. To the contrary, conduct can violate Section 7207 even when the false material statement does not have the effect of reducing the defendant's tax liability. ***Sansone v. United States***, 380 U.S. 343, 352-53 (1965).

16.05 WILLFULNESS

The word "willfully" has the same meaning in the "misdemeanor and felony sections of the Revenue Code." ***United States v. Pomponio***, 429 U.S. 10, 12 (1976); *accord* ***United States v. Bishop***, 412 U.S. 346, 361 n.9 (1973). It "generally connotes a voluntary, intentional violation of a known legal duty." ***United States v. Bishop***, 412 U.S. at 360; ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982).

For an in-depth discussion of willfulness, *see* §§ 8.08 and 12.11, *supra*.

16.06 TAX DIVISION POLICY

The Tax Division generally disapproves the use of Section 7207 in any case in which a defendant used a false document as part of a scheme to deceive the IRS. In such a case, felony prosecution under 26 U.S.C. § 7212(a) or 18 U.S.C. § 1001 should be considered.[3] A misdemeanor prosecution under Section 7207 may be appropriate, however, for a defendant who cooperates fully, if the case involves an isolated false document and there are mitigating circumstances, such as evidence that the defendant immediately confessed when questioned about the document. This exception particularly applies to a lower-echelon participant in a wider scheme who agrees to cooperate fully and provide substantial assistance in the investigation and prosecution of another individual. In such cases,

1. any plea agreement to a misdemeanor charge is subject to the approval of the Tax Division, which will evaluate whether the conduct at issue merits treatment as a misdemeanor;

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[3] A false document can be the basis for a felony charge of violating 18 U.S.C. § 1001 even if the document could also support a Section 7207 misdemeanor violation. *See* ***United States v. Tomeny***, 144 F.3d 749, 752-53 (11th Cir. 1998); ***United States v. Parsons,*** 967 F.2d 452, 456 (10th Cir. 1992); ***United States v. Fern***, 696 F.2d 1269, 1273-74 (11th Cir. 1983); ***United States v. Schmoker***, 564 F.2d 289, 291-92 (9th Cir. 1977) (concurring opinion); *see also* ***United States v. Batchelder***, 442 U.S. 114, 123-24 (1979) (noting that selection of charges is within the government's discretion). A false document often can establish an attempt to evade and defeat a tax in violation of Section 7201. *See* § 8.06, ***Attempt To Evade Or Defeat***, *supra*.

2. the prosecutor recommending the misdemeanor plea should provide a written statement confirming that the prosecutor anticipates further criminal prosecutions and believes that the defendant will provide substantial assistance;

3. the IRS should express its view and refer the case pursuant to 26 U.S.C. § 6103(h)(3)(A);

4. the plea agreement should be conditioned on the defendant's full and truthful cooperation with the IRS in any civil audit or adjustment of the tax liability arising out of the circumstances of the criminal case;

5. the tax loss should not exceed $20,000 for any year; and

6. the defendant should sign a statement reflecting the amount of the unreported income or fraudulent deductions and the circumstances involved for all of the years under investigation.

16.07 LESSER INCLUDED OFFENSE CONSIDERATIONS

The law on lesser included offenses is discussed in depth at § 8.11, *supra*.

A lesser included offense is an offense that is not charged but that is "necessarily included" in a charged offense. Fed. R. Crim. P. 31(c)(1). In ***Schmuck v. United States***, 489 U.S. 705 (1989), the Supreme Court adopted a strict elements test for applying Rule 31, holding that "one offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense." *Id*. at 716. Accordingly, no lesser included offense instruction should be given "[w]here the lesser offense requires an element not required for the greater offense." *Id*.

The elements of § 7207 are not a subset of the elements of any other tax offense. But prosecutors should be aware of dicta in ***Schmuck*** and in ***Sansone v. United States***, 380 U.S. 343, 352-53 (1965), that indicate § 7207 is a lesser included offense of tax evasion. Sections 8.11[4] and 8.11[5], *supra*, explain, however, why § 7207 is not a lesser included offense of evasion.

Section 7207 is not a lesser included offense of either § 7206(1) or § 7206(2) in the majority of circuits holding that filing is not an element of those offenses, because submitting the return or other document to the IRS is an element of § 7207. Despite the statutory text not requiring the defendant's filing of a return as an element of § 7206(1), some circuits have held or stated otherwise, complicating the analysis in those circuits. *See supra* § 12.07[1] (discussing the law in these circuits). Courts in these circuits may, for this reason, conclude § 7207 is a lesser-included offense of § 7206(1). Nonetheless, a lesser-included offense instruction will rarely be appropriate. Even when the threshold legal test is met, "the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." ***Schmuck*,** 489 U.S. at 716 n.8. As a practical matter, that means the instruction would only be appropriate when there is a factual dispute about whether the return was signed under penalty of perjury, which will rarely be the case. *See* ***Escobar***, 388 F.2d at 665 (holding that defendant was not entitled to instruction because it was undisputed that the returns at issue had perjury jurats); ***United States v. Gaines***, 690 F.2d 849, 856 (11th Cir. 1982) (same, and noting ***Escobar*** binds the Eleventh Circuit); ***United States v. Taylor***, 849 F.2d 1477, *4 (9th Cir. 1988) (table) (same).

Courts have also held that § 7207 is not a lesser included offense of § 7202. The elements of § 7202 are: 1) a duty to collect, account for, and pay over a tax; 2) the failure to collect, truthfully account for, or pay over the tax; and 3) willfulness. *See, e.g.,* ***United States v. Thayer,*** 201 F.3d 214, 219-21 (3d Cir. 1999). As the Eighth Circuit noted, other than willfulness, § 7202 and § 7207 are different statutes. *See* ***United States v. Scharf***, 558. F.2d 498, 503 (8th Cir. 1977). More recently, the Sixth Circuit repeated this point, observing that the "only element those crimes share is willfulness." ***United States v. Cheff*,** 829 F.App'x 104, 108 (6th Cir. 2020). Put differently, every element of § 7207, except for willfulness, is an element that is not part of a § 7202 offense. Thus, § 7207 is not a lesser included offense of § 7202.

16.08 VENUE

The Sixth Amendment to the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed." U.S. Const. amend VI; *see also* Fed. R. Crim. P. 18 (trial proper "in a district where the offense was committed"). If a statute does not indicate what Congress considers to be the place "wherein the crime shall have been committed," U.S. Const. amend VI, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In a Section 7207 prosecution, venue is proper in the judicial district in which the defendant delivered or disclosed a false document to the IRS. *See also* the discussion of venue in Section 6.00, *supra*.

16.09 STATUTE OF LIMITATIONS

The statute of limitations for Section 7207 offenses is six years from the date the defendant delivered or disclosed the false or fraudulent document to the IRS. *See* 26 U.S.C. § 6531(5). *See also* the discussion of the statute of limitations in § 7.00, *supra*.

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17.00 26 U.S.C. § 7212(a): "OMNIBUS CLAUSE"

17.01 STATUTORY LANGUAGE

[Note: the language of the "Omnibus Clause" is italicized.]

§ 7212. Attempts to interfere with administration of Internal Revenue Laws.

> (a) Corrupt or forcible interference. -- Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or in any other way corruptly* or by force or threat of force (including any threatening letter or communication) *obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title,* shall, upon conviction thereof, be fined . . ., or imprisoned not more than three years or both . . . .[1]

17.02 GENERALLY

26 U.S.C. § 7212(a) contains two clauses. ***United States v. Pansier***, 576 F.3d 726, 734 (7th Cir. 2009). The first clause, known as the "Officer Clause," prohibits threats or forcible endeavors designed to interfere with federal agents acting pursuant to Title 26. *E.g.*, ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984) (per curiam). The second and more general clause, known as the "Omnibus Clause," prohibits acts that corruptly obstruct or impede, or endeavor to obstruct or impede, the due administration of the Internal Revenue Code. ***United States v. Bostian***, 59 F.3d 474, 477 (4th Cir. 1995); ***United States v. Koff***, 43 F.3d 417, 418 (9th Cir. 1994); ***United States v. Popkin***, 943 F.2d 1535, 1539 (11th Cir. 1991).

In ***Marinello v. United States***, 138 S. Ct. 1101 (2018), the Supreme Court considered the "breadth" of the Omnibus Clause, and – rejecting the interpretation of the Clause's scope that most courts of appeal had adopted – concluded that the Omnibus Clause proscribed only "specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit." ***Id.*** at 1104. Specifically,

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[1] Under 18 U.S.C. § 3571, the maximum fine for felony offenses under Section 7212(a) is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d).

Marinello held that, "to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action," and also must "show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." ***Id.*** at 1109-10. ***Marinello***'s reasoning and the requirements of proof it imposed are explored at length below.

17.03 TAX DIVISION POLICY

As a matter of Tax Division policy, an Omnibus Clause charge should, for reasons explained *infra*, Section 17.04[3], be based on acts of commission and not acts of omission.

17.04 ELEMENTS OF THE OMNIBUS CLAUSE AS CONSTRUED IN **MARINELLO**

To establish a Section 7212(a) Omnibus Clause violation, the government must prove beyond a reasonable doubt that the defendant in any way (1) corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code. *See*, *e.g.*, ***United States v. Marek***, 548 F.3d 147, 150 (1st Cir. 2008); ***United States v. Winchell***, 129 F.3d 1093, 1098 (10th Cir. 1997); ***United States v. Wilson***, 118 F.3d 228, 234 (4th Cir. 1997); ***United States v. Hanson***, 2 F.3d 942, 946-47 (9th Cir. 1993).

In ***Marinello***, the Supreme Court held that a conviction under the Omnibus Clause requires (1) proof of a targeted administrative IRS action known to the defendant, or at least reasonably foreseeable by the defendant at the time of the corrupt endeavor, and (2) proof of a "nexus" – defined as a relationship in time, causation, or logic – between the defendant's corrupt endeavor to obstruct and the pending or foreseeable administrative action. 138 S. Ct. at 1109-10.

Marinello arrived at the nexus and pending proceeding requirements through an interpretation of the phrase, "due administration of [the Internal Revenue Code]," as used in § 7212(a). 138 S. Ct. at 1104-09. The Court interpreted this language to refer only to "specific, targeted acts of administration," concluding that it did "not cover routine administrative procedures that are near universally applied to all taxpayers, such as the ordinary processing of income tax returns." ***Ibid.***

The ***Marinello*** Court offered several reasons for adopting this narrower construction of "due administration" in the Omnibus Clause. First, the Court relied upon its interpretation of "a similarly worded statute," 18 U.S.C. § 1503(a), in ***United States v. Aguilar***, 515 U.S. 593 (1995). 138 S. Ct. at 1105-06. Section 1503(a) proscribes various types of obstruction directed at court officials and participants, and, like § 7212(a), contains its own Omnibus Clause, which makes it a felony to "corruptly or by threats or force, or by any threatening letter or communication, influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the *due administration* of justice." (Emphasis added.) In ***Aguilar***, the Court interpreted § 1503(a)'s Omnibus Clause to impose a "nexus" requirement, under which the defendant's obstructive "act must have a relationship in time, causation, or logic with the judicial proceedings" in question. 515 U.S. at 599-600. ***Aguilar***, stating that the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute," adopted the nexus requirement "both out of deference to the prerogatives of Congress . . . and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." ***Id.*** at 600 (cleaned up).

Marinello also found support for its construction of "due administration of [the Internal Revenue Code]" in both the statutory text of the Omnibus Clause and its immediate context in § 7212. The Court acknowledged that the word "administration" on its own "can be read literally to refer to every '[a]ct or process of administering' including every act of 'managing' or 'conduct[ing]' any 'office,' or 'performing the executive duties of' any 'institution, business, or the like.'" 138 S. Ct. at 1106 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 34 (2d ed. 1954) (alteration in original)). But the Court concluded that "the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business." ***Ibid.*** (citing ***Aguilar***, 515 U.S. at 600-01). The Court also found support for its construction in the fact that other provisions in Section 7212 "refer to corrupt or forceful actions taken against individual identifiable persons or property."[2] ***Id.*** at 1106-07. The Court concluded that, in this context, "the

[2] Specifically, ***Marinello*** pointed to the Officer Clause's proscription of attempts to intimidate or impede "'*any officer or employee of the United States* acting in an official capacity'" and of "'threats of bodily harm to [an] *officer or employee of the United States or to a member of his family*,'" and to Section 7212(b)'s reference to the "'forcibl[e] rescu[e]' of 'any *property* after it shall have been seized under' the Internal Revenue Code." 138 S. Ct. at 1106-07 (quoting § 7212) (emphases and alterations in original)).

Omnibus Clause logically serves as a 'catchall' in respect to the obstructive conduct the subsection sets forth, not as a 'catchall' for every violation that interferes with . . . the 'continuous, ubiquitous, and universally known' administration of the Internal Revenue Code." ***Id.*** at 1107.

Marinello also looked to the "broader statutory context of the full Internal Revenue Code" to support its reading of the Omnibus Clause. 138 S. Ct. 1107-08. Specifically, the Court noted that the Code contained "numerous misdemeanors" – including failure to pay or to keep required records in violation of § 7203, failure to furnish a statement of withholding in violation of § 7204, and willfully misrepresenting the number of exemptions to which one is entitled on a Form W-4, in violation of § 7205 – which an interpretation of the Omnibus Clause as "applying to all Code administration would potentially transform . . . into felonies, making the specific provisions redundant, or perhaps the subject matter of plea bargaining." ***Id.*** at 1107. The Court agreed that "[s]ome overlap in criminal provisions is . . . inevitable," and even noted that "Marinello's preferred reading of § 7212" overlapped with 18 U.S.C. § 1505, which criminalizes the obstruction of the "due and proper administration of the law under which any pending proceeding is being had before any agency of the United States," but ultimately found the degree of "overlap and redundancy" too great, "particularly when it would render superfluous other provisions in the same enactment." ***Ibid.*** (cleaned up).

17.04[1] Corruptly

Felony criminal tax statutes under Title 26 are specific intent statutes. The mens rea for most criminal tax statutes is "willfulness," which is defined as the voluntary and intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 200 (1991). The mens rea for the Omnibus Clause of Section 7212(a) is not "willfulness," but "corruptly," which the courts of appeals have uniformly interpreted as requiring proof that the defendant "act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person." *See* ***United States v. Floyd***, 740 F.3d 22, 31 (1st Cir. 2014) (collecting cases).

Noting that the definition of "corruptly" can vary in meaning depending on the statute, ***Reeves*** adopted a definition of "corruptly" for Section 7212(a) different than that typically used in 18 U.S.C. § 1503(a), for which the term is often described in terms of an improper motive or evil or wicked purpose. *See* ***United States v. Haas***, 583 F.2d 216, 220

(5th Cir. 1978). In defining "corruptly" for § 7212(a) as having acted with an intent to procure an unlawful benefit, the Fifth Circuit reasoned that § 1503(a) "covers only conduct that is related to a pending judicial proceeding" and thus "presupposes a proceeding the disruption of which will almost necessarily result in an improper advantage to one side in the case," whereas "interference with the administration of the tax laws [in violation of Section 7212(a)] need not concern a proceeding in which a party stands to gain an improper advantage," so "there is no reason to presume that every annoyance or impeding of an IRS agent is done per se 'corruptly.'" ***Reeves***, 752 F.2d at 999. The distinction noted in ***Reeves*** – that § 1503(a) required a pending proceeding whereas § 7212(a) does not – no longer exists after ***Marinello***. The distinction relied upon by ***Reeves***, however, is not the sole basis for rejecting improper motive or evil purpose as the definition of "corruptly" for § 7212(a); in ***United States v. Pomponio***, 429 U.S. 10 (1976), decided two years prior to ***Reeves***, the Supreme Court held that in tax statutes, the term "willful" meant a voluntary and intentional violation of a known legal duty, and the government was not required to also prove a bad purpose or evil motive. ***Id.*** at 11-13.

In any event, ***Marinello*** did not alter Section 7212(a)'s definition of "corruptly." The Court's only discussion of "corruptly" occurred in the context of considering – and ultimately rejecting – the government's argument that the scope of the statute was sufficiently cabined by the "corruptly" element. ***Marinello,*** 138 S. Ct. at 1108. Referencing its conclusion that the "corruptly" requirement, by itself, did not sufficiently limit the statute's scope, the Court simply opined that, "practically speaking," a taxpayer who "willfully" violates the tax code would also intend to obtain an unlawful advantage. ***Ibid***.

Marinello's recognizing that "corruptly," as used in § 7212(a), and "willfully," as used in other Title 26 statutes, are similar, "practically speaking," but respecting that Congress used "corruptly," not "willfully," in Section 7212(a), is also found in earlier court of appeals opinions. The Second Circuit, for example, has rejected the contention that "willfulness" is a necessary element of Section 7212(a), concluding that when "a court properly instructs a jury concerning ['corruptly,'] it need not usurp the function of Congress by inserting the term 'willfully' in a statute where Congress saw fit to omit it." ***United States v. Kelly***, 147 F.3d 172, 176 (2d Cir. 1998). At the same time, the Second Circuit has also concluded that the "definition of the proof required for the section 7212(a) violation [is] as comprehensive and accurate as if the word 'willfully' was incorporated in the statute." ***Id***. at 177; *see also* ***United States v. Coplan***, 703 F.3d 46, 73 (2d Cir. 2012) (citing ***Kelly***).

Prior to ***Marinello***, courts held that a broad reading of the term "corruptly" is supported by its modifying phrase "in any other way." *See* ***United States v. Mitchell***, 985 F.2d 1275, 1278-79 (4th Cir. 1993) (the language of the clause encourages a broad construction and should be read to include the full scope of conduct that such a construction commands). As long as the ***Marinello*** requirements are otherwise satisfied, earlier cases holding that an intent to obtain an unlawful benefit or advantage includes "impeding the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records," ***Reeves***, 752 F.2d at 998, should remain good law.

In ***United States v. Dykstra***, 991 F.2d 450 (8th Cir. 1993), the defendant sent IRS officials involved in a collection action Forms 1099 that falsely indicated that the defendant had paid those IRS officials non-employee compensation. The defendant then notified the IRS that the officials failed to pay taxes on that compensation and requested a reward for supplying the information. ***Id.*** at 451. The court of appeals held that the defendant acted corruptly because he attempted to secure "an unwarranted financial gain for himself" by preventing the IRS from seizing his home to satisfy his tax outstanding liability and by attempting to obtain rewards from the IRS for reporting alleged tax violations. ***Id.*** at 453. Another court, discussing a similar scheme, reasoned that "[t]he fact that the taxpayer may claim sums which are rationally 'preposterous' does not obviate a corrupt intent." ***United States v. Winchell***, 129 F.3d 1093, 1099 (10th Cir. 1997) (citing ***United States v. Kuball***, 976 F.2d 529, 530-31 (9th Cir. 1992); ***United States v. Yagow***, 953 F.2d 423, 425-27 (8th Cir. 1992)). *See also* ***United States v. Croteau***, 819 F.3d 1293, 1308 (11th Cir. 2016) ("disagree[ing with the defendant] that in assessing whether [he] acted corruptly, our sufficiency analysis must take into account whether the numerous documents [the defendant] submitted were obviously fictitious or fraudulent").

The defendant, however, need not seek a benefit that is specifically financial in order to satisfy the element of acting "corruptly." In ***United States v. Giambalvo***, 810 F.3d 1086 (8th Cir. 2016), the defendant claimed that he did not act corruptly because he did not have any tax liability for the tax years implicated in the § 7212(a) charge against him. The Eighth Circuit, however, rejected this argument, holding that "'corruptly' is not limited to situations where the defendant wrongfully sought or gained a financial advantage under the tax laws." ***Id.*** at 1098-99.

In ***United States v. Reeves***, 782 F.2d 1323 (5th Cir. 1986) (per curiam), the Fifth Circuit concluded that attempting to divert the time and attention of an IRS agent from pursuing a tax investigation against the defendant was sufficient to establish that the defendant had acted "corruptly" for purposes of Section 7212(a). ***Id.*** at 1326. However, mere "harassment" of an agent, if it is not done to obtain an undue advantage, may not rise to the level of a section 7212(a) violation:

> [T]here is no reason to presume that every annoyance or impeding of an IRS agent is done *per se* "corruptly." A disgruntled taxpayer may annoy a revenue agent with no intent to gain any advantage or benefit other than the satisfaction of annoying the agent. Such actions by taxpayers are not to be condoned, but neither are they "corrupt" under Section 7212(a).

Reeves, 752 F.2d at 999 (emphasis omitted).

As long as there is a "nexus" between the defendant's conduct and a pending or foreseeable administrative proceeding, conduct can be "corrupt" under the provisions of the omnibus clause even if it is not directed at individual officers or employees of the Internal Revenue Service. The omnibus clause of section 7212(a) "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States Government.'" ***Popkin***, 943 F.2d at 1539 (quoting § 7212(a)). Two of the victims of the Form 1099 scheme in ***Dykstra*** were not government agents. The Eighth Circuit held that the Section 7212(a) charge properly included the defendant's actions against those victims. *See also* ***United States v. Lovern***, 293 F.3d 695, 700 n.5 (4th Cir. 2002) (noting that Section 7212(a) omnibus clause does not require that the victim of the threat be an officer or employee of the United States).

An endeavor may be corrupt even when it involves means that are not intrinsically illegal, as long as the defendant commits them to secure an unlawful benefit for himself or for others. ***Mitchell***, 985 F.2d at 1278-79 (citing cases); ***Popkin***, 943 F.2d at 1537 (creating a corporation "expressly for the purpose of enabling [one of defendant's clients] to disguise the character of illegally earned income and repatriate it from a foreign bank" is corrupt); ***Wilson***, 118 F.3d at 234 (citing ***Bostian***, 59 F.3d at 479).

A defendant may also corruptly endeavor to obstruct or impede the due administration of the internal revenue laws by filing or threatening to file frivolous lawsuits or otherwise-legal requests for the government to provide information, although the government must "tread carefully" when it prosecutes a defendant for such corrupt endeavors to ensure it does not violate the defendant's constitutional rights. ***United States v. Miner***, 774 F.3d 336, 347-48 (6th Cir. 2014). In ***Miner***, the Sixth Circuit affirmed the defendant's § 7212(a) conviction for corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws by, *inter alia*, "threat[ening] to sue government officials" and filing "FOIA and Privacy Act requests." ***Id.*** at 347. The ***Miner*** court rejected the defendant's First Amendment challenge to his prosecution based on these actions, concluding that this argument was "defeated" by the fact that "the statute applies only to conduct committed 'corruptly' . . . ." ***Ibid.*** The court further explained that there is no constitutional right to "corruptly" engage in such conduct:

> If a defendant embarks upon a course of conduct specifically for the purpose of gaining an unlawful benefit or advantage, he is not necessarily insulated from punishment simply because the discrete acts in which he engages may be otherwise constitutionally or statutorily authorized. For example, although an individual certainly has a general right under the Petition Clause "to appeal to courts and other forums established by the government for resolution of legal disputes," ***Borough of Duryea, Pa. v. Guarnieri***, [564] U.S. [379], 131 S. Ct. 2488, 2494, 180 L.Ed.2d 408 (2011), someone who files a frivolous lawsuit may legitimately be punished for malicious prosecution or abuse of process. ***Bill Johnson's Restaurants, Inc. v. NLRB***, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983). At that point, in fact, the defendant is no longer exercising a constitutional right: "[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition." ***Id.*** (citation omitted).

Ibid. *See also* ***Reeves***, 752 F.2d at 1001-02 (holding that "the filing of frivolous common law liens with the intention of securing improper benefits or advantages for one's self or for others constitutes a prohibited corrupt endeavor under section 7212(a)").

The Miner court did, however, caution that "a prosecution based on conduct that is closely related to citizens' rights to access the courts and to obtain information about their government must tread carefully." 774 F.3d at 348. This is so, the court explained, because "[n]onfrivolous court filings—even those that are intended to impede the IRS's ability to collect taxes—are at the very core of the Petition Clause, meaning that even frivolous claims 'are at least adjacent to areas of protected activity.'" Ibid. (quoting Reeves, 752 F.2d at 1001). Thus, if the Miner defendant "had been non-frivolously expressing his clients' likelihood of suing IRS officials, was truly attempting to obtain information from the IRS via Privacy Act and FOIA requests, or was legitimately creating trusts to structure clients' finances in a manner that he believed was legal, then his conduct would not have been criminal." Ibid.

17.04[2] Endeavor

The second element of the omnibus clause of section 7212(a) is an "endeavor." To help define this term for purposes of Section 7212(a), courts have looked to case law interpreting similar language in the obstruction of justice statutes, 18 U.S.C. §§ 1503 and 1505. *See* ***United States v. Martin***, 747 F.2d 1404, 1409 (11th Cir. 1984). In ***Osborn v. United States***, 385 U.S. 323 (1966), the Supreme Court defined "endeavor," in a § 1503 case, as "any effort . . . to do or accomplish the evil purpose that section was intended to prevent." ***Id.*** at 333 (internal quotation omitted).

The use of "endeavor" in the Omnibus Clause makes clear that § 7212(a) is a crime of attempt. "When proving violations of § 7212(a), the government is not required to prove that the administration of the internal revenue laws was actually obstructed or impeded, but only that the defendant corruptly attempted to do so." ***Croteau***, 819 F.3d at 1308. Justice Scalia, concurring in part and dissenting in part in ***Aguilar***, noted that in ***Osborn***, the Court confirmed that Congress's use of the term "endeavor" "got rid of the technicalities which might be urged as besetting the word 'attempt,'" and even made "immaterial whether the endeavor to obstruct pending proceedings is possible of accomplishment":

> In ***Osborn v. United States***, 385 U.S. 323, 333, 87 S.Ct. 429, 435, 17 L.Ed.2d 394 (1966), we dismissed out of hand the "impossibility" defense of a defendant who had sought to convey a bribe to a prospective juror . . .. "Whatever continuing validity," we said, "the doctrine of 'impossibility' ... may continue to have in the law of criminal attempt, that body of law is inapplicable here." ***Ibid.*** (footnote omitted).

515 U.S. at 610 (internal quotation omitted).

Though ***Marinello*** did limit the scope of the Omnibus Clause via a narrow reading of “due administration,” ***Marinello*** did not purport to place any categorical limitations on the types of “endeavors” that fall within the statute’s scope. *See* ***Marinello***, 138 S. Ct. at 1102-10. Rather, the limits as to whether a particular “endeavor” is sufficient for a conviction in a specific case is provided by the requirement that the endeavor have a nexus to a pending or foreseeable targeted administrative action.

17.04[3] Omissions as Endeavors

In explaining its rationale for limiting the scope of the Omnibus Clause, ***Marinello*** observed that many of the Tax Code’s misdemeanor provisions are based upon omissions. 138 S. Ct. at 1107-08. But the Court also stated that “[s]ome overlap in criminal provisions is . . . inevitable,” ***ibid.***, and ultimately limited the Omnibus Clause not by imposing an affirmative act requirement but by requiring proof of a nexus between the defendant’s conduct and a particular administrative proceeding known or foreseeable to the defendant. In response to a Tenth Circuit case decided prior to ***Marinello***, which questioned whether a failure to file a tax return could constitute a corrupt endeavor under § 7212(a), ***United States v. Wood***, 384 Fed. App’x 698, 708 (10th Cir. 2010), *overruled on other grounds by* ***Marinello***, 138 S. Ct. 1101, the Tax Division had articulated a policy of limiting the Omnibus Clause to affirmative acts. The Second Circuit’s ***Marinello*** decision, however, found no error in basing an Omnibus Clause conviction on an omission, reasoning that the statute’s prohibition of obstructing or impeding “in any other way” was sufficiently broad to encompass omissions. ***United States v. Marinello***, 839 F.3d 209, 224-25 (2d Cir. 2016). The Supreme Court’s decision did not reach this aspect of the Second Circuit’s opinion, and also did not take up the government’s suggestion during oral argument that instead of limiting the Omnibus Clause’s scope by imposing a pending proceeding requirement, the Court could, in the alternative, exclude omissions from the scope of the statute. Sup. Ct. Tr. pp. 59-63. With ***Marinello*** having acknowledged that some overlap between misdemeanor and felony statutes is permissible, indeed “inevitable,” and having addressed its scope concerns by requiring a nexus to a pending or foreseeable proceeding, the Supreme Court did not address, and thus left as an open question, whether a Section 7212(a) conviction can be predicated upon an omission.

Against this legal backdrop, it remains the policy of the Tax Division that a § 7212(a) Omnibus Clause prosecution should not be based upon an omission, including a failure to file a tax return, without the express authorization of the Tax Division's Criminal Appeals & Tax Enforcement Policy Section.

17.04[4] Targeted Administrative IRS Action

Marinello, as explained above, rested on a narrow interpretation of "the due administration [of the internal revenue laws]," under which this phrase encompasses only a "particular administrative proceeding." 138 S. Ct. at 1104, 1109. The Court made clear that "'particular administrative proceeding' . . . do[es] not mean every act carried out by IRS employees in the course of their 'continuous, ubiquitous, and universally known' administration of the Tax Code." ***Id.*** at 1109-10. The ***Marinello*** Court declined to "exhaustively itemize" what falls outside the definition of "particular administrative proceeding," but did expressly state that the "routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns" does not constitute a particular administrative proceeding. ***Id.*** at 1110; *see also* ***id.*** at 1104 (stating that "the ordinary processing of income tax returns" falls outside the statute's reach).

Marinello likewise declined to "exhaustively itemize the types of administrative conduct that fall within the scope of the statute." 138 S. Ct. at 1110. The Court did, however, expressly state that "investigation[s]" and "audit[s]" are both particular administrative proceedings within the scope of the Omnibus Clause, as is any "other targeted administrative action." ***Id.*** at 1109; *see also* ***id.*** at 1104 ("the [Omnibus C]lause as a whole refers to specific interference with targeted governmental tax-related proceedings"). Between the two extremes of a full audit or investigation on the one hand, and the day-to-day processing of tax returns on the other hand, are many IRS procedures, proceedings, and actions. The dividing line indicated by post-***Marinello*** appellate decisions is whether the administrative action was "targeted" as opposed to one that applies to most taxpayers.

Marinello's specific reference to investigations and audits has led some defendants to argue that collection proceedings fall outside the scope of the "due administration [of the Internal Revenue Code]." These challenges have been uniformly rejected. *See, e.g.,* ***United States v. Reed***, 75 F.4th 396, 403–04 (4th Cir. 2023); ***United States v. Snyder***, 71

F.4th 555, 571–73 (7th Cir. 2023); ***United States v. Prelogar***, 996 F.3d 526, 533 (8th Cir. 2021); ***United States v. Graham***, 981 F.3d 1254, 1259-60 (11th Cir. 2020).

In ***Graham***, the Eleventh Circuit held that ***Marinello*** was satisfied where the IRS had "regular and persistent contact" with the defendant over several years in an attempt to collect unpaid taxes. ***Graham***, 981 F.3d at 1259. While the collections activity in ***Graham*** was extensive, the Eleventh Circuit did not say that a particular volume of activity was necessary. Rather, the court observed that this extensive activity meant it was "not a borderline case." ***Id.*** The court also declined to interpret ***Marinello's*** "proceeding" requirement so narrowly as to apply only to "a quasi-judicial proceeding." ***Ibid.*** Instead, the court reasoned ***Marinello's*** concern "was to *exclude* relatively innocuous conduct from prosecution under the Omnibus Clause." *Id.* (emphasis in original).

In ***Prelogar***, the Eighth Circuit, following ***Graham***, concluded that IRS collection activity satisfied ***Marinello's*** administrative proceeding requirement. In ***Prelogar***, as in ***Graham***, the IRS for several years had issued liens and levies against Prelogar's property in an attempt to collect unpaid taxes. ***Prelogar***, 996 F.3d at 533-34.

In ***Reed***, the Fourth Circuit found that the targeted administrative proceeding requirement was met when an IRS collections agent issued a notice of levy to the defendant's employer and then visited the employer to serve a final demand to garnish the defendant's wages. ***Reed***, 75 F.4th at 403. The court rejected the argument that ***Marinello*** was not satisfied because garnishing wages was part of the collections agent's '"day-to-day duties,'" concluding that "what constitutes routine work for an officer in a specialized division that handles difficult cases and repeat tax avoiders does not define what is routine for the whole agency." ***Id.*** at 404. Similarly, the court noted that while the IRS sent hundreds of thousands of notices of levies each year, and garnished wages on a daily basis, that paled in comparison to the more than 150 million tax returns the IRS received annually. *See* ***ibid.*** (citing statistics for 2020 and 2021).

Likewise, the Seventh Circuit has found ***Marinello*** satisfied where "the IRS had taken 'specific, targeted' steps to collect by levying [the defendant's] personal and business bank accounts." ***United States v. Snyder***, 71 F.4th 555, 571-72 (7th Cir. 2023), *cert. granted* on unrelated grounds, 2023 WL 8605740.

In a case not just involving collections activity, the Fourth Circuit also found ***Marinello*** satisfied where the IRS "conducted a years-long investigation in an attempt to ascertain the exact amount" that the defendant owed after she filed false tax returns. ***United States v. Jackson***, 796 F. App'x 186, 187 (4th Cir. 2020). And in ***United States v. Westbrooks***, 728 Fed. App'x 379 (5th Cir. 2018) (per curiam), the Fifth Circuit concluded that ***Marinello***'s requirement for a "particular administrative proceeding" was satisfied where the defendant "provided false testimony at a show cause hearing in federal court . . . that . . . was held to assess her compliance with an IRS subpoena for tax records." ***Id.*** at 380.

On this topic, precedent from the Sixth Circuit – which required proof of knowledge of a pending IRS proceeding before ***Marinello*** was decided – is also instructive. In ***United States v. Miner***, 774 F.3d 336 (6th Cir. 2014), the Sixth Circuit found that this requirement was satisfied because, *inter alia*, the defendant was aware of pending IRS collection activities against the defendant's clients, including notices of deficiency, notices of tax past due, and federal tax liens. ***Id.*** at 340-41, 346. In so holding, the ***Miner*** court explained that "[t]he IRS, of course, does not issue notices of deficiency or obtain tax liens against individuals as a routine matter; it takes these steps only after determining that a particular taxpayer must be pursued for additional funds." ***Id.*** at 346. Likewise, in ***United States v. Faller***, 675 Fed. App'x 557 (6th Cir. 2017), the Sixth Circuit upheld a conviction for "attempting to obstruct the IRS in the collection of taxes," finding it sufficient that the defendant knew of "steps taken by the IRS to collect [his] unpaid income taxes" when he opened nominee bank accounts, filed additional false tax returns, and filed a false income-and-assets form. ***Id.*** at 561.

17.04[5] Pending or Reasonably Foreseeable

The Supreme Court held in ***Marinello*** that the administrative proceeding the defendant intended to obstruct or impede must be "pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." 138 S. Ct. at 1110 (citing ***Arthur Andersen LLP v. United States***, 544 U.S. 696, 703, 707-08 (2005)). ***Marinello*** offered only scant elaboration of this requirement, observing only that "[i]t is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually," but, instead, "[t]o use a maritime analogy, the proceeding must at least be in the offing." ***Ibid.***

In ***United States v. Takesian***, 945 F.3d 553 (1st Cir. 2019), the First Circuit applied ***Marinello***'s reasonable foreseeability standard, and held that Takesian, the president of a corporation, could reasonably foresee a criminal investigation into his own tax affairs because he was aware that a federal grand jury carrying out a related health care fraud investigation had subpoenaed records showing that he diverted around $1 million in corporate funds to his personal use. ***Id.*** at 563-67. With knowledge of this subpoena, Takesian filed late corporate returns that falsely reported that loans had been made to a corporate officer, and filed amended personal returns that omitted the diverted funds from his reported income. ***Ibid.*** As the court of appeals explained, the related investigation "would foreseeably cast a very bright spotlight on the $1 million payout" of corporate funds for Takesian's personal use, because it involved a subpoena for all of T & C's "corporate records and books relative to its financial transactions." ***Id.*** at 566 (cleaned up). Thus, "with the IRS primed to check the flow of money to and from [the corporation]," the court concluded that Takesian "concocted the fake loan theory to put one over the revenuers." ***Ibid.*** *See also* ***United States v. Jackson***, 796 Fed. App'x 186, 188 (4th Cir. 2020) (per curiam) (concluding in the alternative that defendant's attempt to extinguish her tax liability with fraudulent checks had a nexus to a reasonably foreseeable proceeding given prior IRS collection activity).

In determining what satisfies ***Marinello***'s "reasonably foreseeable" requirement, the standard the Supreme Court set forth in ***Arthur Andersen*** for violations of 18 U.S.C. § 1512(b)(2)(A) may provide some guidance. Section 1512(b)(2)(A) criminalizes "knowingly" and "corruptly persuad[ing]" another person "with intent to . . . cause" that person to tamper with documents that would be used in an official proceeding. ***Arthur Andersen*** applied ***Aguilar***'s nexus requirement to this statute, and – like ***Marinello*** which followed it – required a nexus between the defendant's conduct and an official proceeding which is at least "foreseen." 544 U.S. at 707-08. And some courts of appeal have extended this requirement to 18 U.S.C. § 1512(c)(2), which penalizes anyone who "corruptly . . . obstructs, influences, or impedes any official proceeding." *See* ***United States v. Young***, 916 F.3d 368, 386 (4th Cir. 2019) (collecting cases); ***United States v. Pugh***, 945 F.3d 9, 22-23 (2d Cir. 2019) (official proceeding was reasonably foreseeable under § 1512(c)(2) to defendant who traveled to Turkey with intent to join ISIS in Syria, and destroyed electronic files when he was denied entry to Turkey, in light of U.S. law enforcement's announcement of an investigation of those seeking to provide support to ISIS). Prosecutors should therefore be guided by their Circuit Court's application of the ***Arthur Andersen*** standard in considering whether a particular IRS administrative action was "reasonably foreseeable by the defendant."

17.04[6] "Nexus" Between Conduct and a Particular Administrative Proceeding

Marinello, as discussed above, borrowed the nexus requirement from the Supreme Court's interpretation of 18 U.S.C. § 1503 in ***United States v. Aguilar***, 515 U.S. 593 (1995). To satisfy this requirement, "the Government must show . . . that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action." 138 S. Ct. at 1109. Proof of a nexus "requires a 'relationship in time, causation, or logic with the [administrative] proceeding.'" ***Ibid.*** (quoting ***Aguilar***, 515 U.S. at 599) (alteration in original).

In ***United States v. Beckham***, 917 F.3d 1059 (8th Cir. 2019), the Eighth Circuit concluded that the ***Marinello*** nexus requirement was satisfied by the defendant's efforts to influence an IRS audit. The defendant, while subject to an IRS audit, gave the examining agent a falsified day-planner that purported to substantiate the defendant's false claims that he materially participated in a business, and thus was entitled to claim nonpassive losses attributable to the business. ***Id.*** at 1062-63. This action, the ***Beckham*** court concluded, satisfied the nexus requirement because "the IRS indisputably obtained the day planner as a functional part of the audit during the audit." ***Id.*** at 1064-65. ***Beckham*** thus concluded that the failure of the district court to instruct the jury on ***Marinello***'s nexus requirement was harmless beyond a reasonable doubt. ***Ibid.***

Since ***Marinello*** borrowed its formulation of the nexus requirement directly from ***Aguilar***, its discussion of the nexus requirement, and the case law further interpreting it, may provide relevant guidance. ***Aguilar*** itself stated that another equivalent formulation of the nexus requirement is that "the [defendant's] endeavor must have the 'natural and probable effect' of interfering with the due administration of justice." 515 U.S. at 599 (quoting ***United States v. Wood***, 6 F.3d 692, 695 (10th Cir. 1993)). Given this, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." ***Ibid.***

In ***Aguilar***, the Court found that the required nexus to a grand jury proceeding was lacking where the defendant merely "utter[ed] false statements to an investigating agent . . . who might or might not testify before a grand jury." 515 U.S. at 600. There was no proof that "the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents." ***Ibid.*** As such, the Court concluded that the defendant's conduct "falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself." ***Id.*** at 601.

In applying the ***Aguilar*** nexus requirement, at least two circuits have expressly recognized that "the 'discretionary actions of a third person' . . . can form part of the nexus to an official proceeding." ***United States v. Sutherland***, 921 F.3d 421, 428 (4th Cir. 2019). In ***United States v. Reich***, 479 F.3d 179 (2d Cir. 2007) (Sotomayor, J.), the Second Circuit concluded that the evidence was sufficient to find a nexus between the defendant's conduct and an official proceeding even though it relied in part upon the actions of third parties. The defendant, who was party to a federal lawsuit, faxed a forged order to opposing counsel; opposing counsel, believing the order to be genuine, subsequently withdrew a mandamus petition pending before the Second Circuit because he believed the forged order rendered the petition moot. ***Id.*** at 181-83. Recognizing that "the necessary nexus can exist when the discretionary actions of a third person are required to obstruct the judicial proceeding," the ***Reich*** court concluded that because the "forged Order appeared to render moot [the opposing party's] application to the Second Circuit for a writ of mandamus," the "evidence is clearly sufficient to establish a 'relationship in time, causation, or logic' between [the defendant's] transmission of the forged Order and effects on the judicial proceeding, as *Aguilar* requires." ***Id.*** at 185-86 (quoting ***Aguilar***, 515 U.S. at 599).

Similarly, in ***Sutherland***, the Fourth Circuit concluded that the jury could rely on the discretionary acts of the employees of a United States Attorney's Office to establish the nexus between the defendant's obstructive conduct and a grand jury proceeding. 921 F.3d at 428. The ***Sutherland*** defendant attempted to hide income he earned from insurance businesses by disguising this income as loan proceeds. ***Id.*** at 423-24. A grand jury began investigating the defendant's scheme, and served him with subpoenas seeking his companies' financial records. ***Id.*** at 424. Three months later, the defendant's attorney sent a letter to the U.S. Attorney's Office that "purported to explain away a large number of transactions relating to the subpoenaed materials," and attached to the letter the bogus loan agreements that purported to substantiate the defendant's treatment of his business income as loan proceeds. ***Ibid.*** The ***Sutherland*** court concluded that the evidence was sufficient to establish a nexus between the sending of the letter to the U.S. Attorney's Office and the grand jury proceeding because "[a] prosecutor tasked with presenting to the grand jury is more akin to a witness who has been subpoenaed than one who has not. As with a subpoenaed witness, there is a strong likelihood that the U.S. Attorney's office would serve as a channel or conduit to the grand jury for the false evidence or testimony presented to it." ***Id.*** at 428.

Marinello did not specifically address how to prove a nexus where the tax-related proceeding involves multiple tax years or periods. Nor did not it require proof of a nexus between a corrupt endeavor and the IRS's administrative proceedings with regards to a specific tax year or period. Instead, it required proof only of a "'nexus' between the defendant's conduct and a particular administrative proceeding," and identified "investigation[s]" and "audit[s]" *simplicter*, not audits or investigations of particular tax periods, as examples of such proceedings. 138 S. Ct. at 1109. In the analogous situation of obstructing a grand jury, the government is not required to prove the defendant specifically intended to be obstructive as to the subject of the grand jury's inquiry, only that the defendant intended to obstruct the grand jury generally. *See e.g.,* ***United States v. Quattrone***, 441 F.3d 153, 171 (2d Cir. 2006) (defendant need not read grand jury subpoena or know its precise contents to obstruct the grand jury; enough that defendant knows the subpoena seeks some document and the defendant acts to put it beyond the grand jury's reach); ***United States v. Brenson***, 104 F.3d 1267, 1278-80 (11th Cir. 1997) (rejecting defendant's claim that he was entitled to a jury instruction that specifically stated that the jury must find that he endeavored to obstruct the grand jury proceeding identified in the indictment, rather than merely stating that he endeavored to obstruct the due administration of justice); ***United States v. Ahrensfield***, 2010 WL 11619114, at *10 (D.N.M. 2010) (don't have to foresee which particular proceeding will arise in the future for conduct to have nexus to a foreseeable future proceeding).

17.04[7] Pleading Violations of the Omnibus Clause under **Marinello**

Marinello involved not the sufficiency of an indictment but, instead, the sufficiency of the evidence following a conviction, and grounded its nexus-to-a-pending-or-foreseeable proceeding requirement in an interpretation of what "due administration" of the Internal Revenue Code meant. It thus is the Tax Division's position that the nexus requirement is one of proof and does not constitute a newly created core element that must be expressly and separately pled in the indictment in order to state an offense. That said, indictments should, in order to avoid litigation over the sufficiency of an Omnibus Clause indictment, expressly allege the nexus-to-a-pending-or-foreseeable-proceeding requirement. A model indictment form incorporating these requirements can be found in the Indictment and Information Forms appended to this Manual.

In construing the phrase "due administration" as requiring a nexus to a pending or foreseeable proceeding, ***Marinello*** relied upon ***Aguilar***, which itself construed "due administration" to require a nexus to a pending or foreseeable proceeding. 138 S. Ct. at 1106. In the decades since ***Aguilar*** was decided, no court has held that the decision imposed a requirement to plead the nexus requirement, but numerous courts have held that it did not. *See, e.g.,* ***United States v. Collis***, 128 F.3d 313, 317 & n.3 (6th Cir. 1997) (concluding that Collis' argument that the indictment failed to establish the "nexus" required by ***Aguilar*** "is more appropriately viewed as a challenge to the sufficiency of the evidence at trial"); ***United States v. Meza***, No. 15-cr-3175, 2017 WL 1371102, at *4 (S.D. Cal. 2017) (rejecting the argument that ***Aguilar***'s nexus requirement must be alleged in an indictment as one that "conflates pleading with proof"); ***United States v. Pirk***, 267 F.Supp.3d 392, 398 (W.D.N.Y. 2017) ("Nexus is an issue of proof, rather than an issue of the sufficiency of the indictment." (citing cases)); ***United States v. Triumph Capital Group, Inc.***, 260 F.Supp.2d 470, 475 (D. Conn. 2003) (denying motion to dismiss count under omnibus provision of § 1503, where defendants argued that the indictment failed to allege that they knew their obstructive actions would likely affect a grand jury investigation); *see also* ***United States v. Ring***, 628 F.Supp.2d 195, 223-24 (D. D.C. 2009) (holding that the nexus requirement of § 1512 is a jury question and need not be alleged in the indictment). C*f.* ***United States v. Quattrone***, 441 F.3d 153, 170 (2d Cir. 2006) ("The nexus limitation is best understood as an articulation of the proof of wrongful intent that will satisfy the mens rea requirement of 'corruptly' obstructing or endeavoring to obstruct."). As ***Collis*** observed, the "nexus" required by ***Aguilar*** is "implicit" in the statutory element of 18 U.S.C. § 1503(a) that "the defendant acted corruptly with the intent of influencing, obstructing, or impeding the proceeding in the due administration of justice." 128 F.3d at 318; *cf.* ***United States v. Resendiz-Ponce***, 549 U.S. 102, 107 (2007) (agreeing with the government that the indictment "implicitly alleged" that the defendant committed an "overt act" "simply by alleging that he 'attempted to enter the United States'").

This approach was applied to § 7212(a) by the Eighth Circuit in ***Prelogar***, which rejected the argument that the nexus-to-a-pending-or-foreseeable-proceeding requirement must be pled in the indictment. *See* 996 F.3d at 532. The ***Prelogar*** court held "that ***Marinello*** clarifies what must be proven to sustain a conviction under § 7212(a) but does not require that nexus and knowledge be charged in the indictment." ***Ibid.*** In so holding, ***Prelogar*** relied upon the cases, discussed above, that held there was no need to plead a nexus after ***Aguilar*** when charging a violation of 18 U.S.C. § 1503(a). ***Id.*** at 531-32 (citing ***Collis***, 128 F.3d at 317-18, and ***United States v. Sussman***, 709 F.3d 155, 177 (3d Cir. 2013)). ***Prelogar*** also reasoned that "[t]his interpretation is consistent with other Supreme Court decisions that have clarified statutory elements in conjunction the government's proof obligations," including ***Rehaif v. United States***, 139 S. Ct. 2191 (2019), which held that an indictment charging the defendant as a felon in possession under 18 U.S.C. § 922(g)(5)(A) that tracked the statutory language was sufficient notwithstanding its failure to plead that the defendant knew he was a felon. ***Prelogar***, 996 F.3d at 532 (citing ***Rehaif***, 139 S. Ct. at 2200).

Notwithstanding this authority, post-***Marinello*** indictments should at least allege facts showing that the nexus-to-a-pending-or-foreseeable-proceeding requirement is satisfied in order to avoid this issue. In ***United States v. Rankin***, 929 F.3d 399 (6th Cir. 2019), the Sixth Circuit – which, as noted, had a pending proceeding requirement even before ***Marinello*** – rejected a defendant's argument that an indictment charging him with a violation of the Omnibus Clause failed to allege a nexus between his conduct and a pending administrative proceeding of which he was aware. ***Rankin*** declined to address whether an indictment must expressly plead a nexus to a pending proceeding in order to state an offense, concluding that the subject indictment did sufficiently allege a nexus and knowledge of a pending proceeding because – notwithstanding its lack of express language mirroring these requirements – the indictment alleged that the defendant "willfully misl[ed] agents of the IRS by making false and misleading statements to those agents and by concealing information sought by those agents who he well knew were attempting to ascertain income, expenses and taxes for defendant and his various business entities and interests." ***Id.*** at 405-06. This language, ***Rankin*** concluded, sufficiently "allege[d] a nexus between Rankin's misleading conduct and the agents' attempts 'to ascertain [his] income, expenses and taxes,'" which was a "particular investigation" that fell within the scope of the Omnibus Clause under ***Marinello***. ***Id.*** at 406 (citing ***Marinello***, 138 S. Ct. at 1110). This allegation was also held to be sufficient to allege a pending proceeding of which the defendant had knowledge, because "it specifically note[d] that [the defendant] 'well knew' that the agents were attempting to ascertain information about him when he misled them and concealed information from them." ***Ibid.***

Note: The model indictment form appended to this Manual reflects the Tax Division's recommendation that the indictment *expressly* allege a nexus to a pending or foreseeable proceeding.

17.04[8] Jury Instructions after **Marinello**

Marinello's requirement of a nexus-to-a-pending-or-reasonably-foreseeable proceeding, of course, must be found by a jury, and thus must be reflected in the instructions given the jury. A model jury instruction incorporating ***Marinello***'s requirements of proof can be found in the model jury instructions appended to this Manual.

17.04[8][a] Specific Unanimity of Corrupt Endeavors

Another topic not expressly addressed in ***Marinello*** is whether the general requirement that jurors return a unanimous verdict requires that jurors be instructed that they must unanimously agree on a particular corrupt act when an indictment charging a violation of § 7212(a) alleges more than one such act. ***Marinello*** noted that the district court had instructed the jury that "it must find unanimously that [Marinello corruptly] engaged in at least one of the eight" corrupt acts alleged in the indictment, and that "the jurors need not agree on which one," 138 S. Ct. at 1105, but did not otherwise address the issue.

It is generally well-settled that the requirement that a verdict be "unanimous" requires jurors to unanimously agree that each element of an offense has been proven, but does not require unanimity with regards to the particular means by which an offense is committed. In ***Schad v. Arizona***, 501 U.S. 624 (1991), a four-Justice plurality stated "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." ***Id***. at 631. Instead, the plurality explained, "[i]n these cases, as in litigation generally, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" ***Id***. at 631-32 (citation omitted). Justice Scalia agreed with the plurality in a concurring opinion, stating that "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." ***Id***. at 649. And in ***Richardson v. United States***, 526 U.S. 813 (1999), the Supreme Court confirmed that "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." ***Id***. at 817.

In ***United States v. Sorensen***, 801 F.3d 1217 (10th Cir. 2015), the Tenth Circuit applied Richardson to a charge under the Omnibus Clause of § 7212(a), and held that an instruction requiring the jury to unanimously agree on a specific corrupt endeavor alleged in the indictment was unnecessary. In ***Sorensen***, the district court, sua sponte, instructed the jury as follows:

> [T]he indictment alleges that the defendant endeavored to obstruct or impede the due administration of the Internal Revenue laws through a variety of different means. The government does not have to prove all of these different means for you to return a guilty verdict. But in order to return a guilty verdict, all twelve of you must agree upon one or more listed means, which you find constituted a corrupt endeavor to obstruct or impede the due administration of the Internal Revenue laws.

Id. at 1235. Sorensen challenged this instruction on appeal, and the Tenth Circuit agreed that "the district court erred in giving the instruction." ***Id***. at 1237. But the Tenth Circuit held that the error favored the defense. The court explained that, unlike ***Richardson***, which required unanimity about the "predicate felonies required to prove a continuing criminal enterprise," the district court mistakenly "took the novel course of requiring the jury's unanimity on at least one means listed in the indictment." ***Ibid***. (emphasis added). ***Sorensen***, however, found no grounds for relief on account of this error, because "the instruction effectively increased the government's burden in proving its case." ***Ibid***. *Accord* ***United States v. Adams***, 150 F. Supp. 3d 32, 37-38 (D.D.C. 2015) (following ***Sorensen***); ***cf. United States v. Kozeny***, 667 F.3d 122, 131-32 (2d Cir. 2011) (jury need not unanimously agree on which overt act was taken in furtherance of a conspiracy); ***United States v. Griggs***, 569 F.3d 341, 343 (7th Cir. 2009) (same).

17.04[9] Unit of Prosecution

Marinello assumed, though it did not expressly state, that the Omnibus Clause and the Officer Clause of Section 7212(a) state two separate offenses. ***Marinello*** observed that Section 7212(a) "has two substantive clauses," the Officer and Omnibus Clauses, 138 S. Ct. at 1104-05, and proceeded, as discussed above, to address what the government must prove to establish a violation of the Omnibus Clause, id. at 1106-10. Pre-***Marinello*** cases have expressly held that the Officer and Omnibus Clauses state two different offenses. *See* ***United States v. Pansier***, 576 F.3d 726, 734 (7th Cir. 2009) (Section 7212(a) "contains two distinct clauses, which each describe a separate offense"); ***United States v. Lovern***, 293 F.3d 695, 700 n.5 (4th Cir. 2002). Accordingly, courts have assumed that a single § 7212(a) count that alleges corrupt acts that violate both the Officer and Omnibus Clauses would be duplicitous, but have generally rejected defendants' claims that the specific count under review, in fact, charged both offenses. *See* ***Pansier***, 576 F.3d at 734-35 (holding that indictment charged only a violation of the Omnibus Clause, notwithstanding reference in indictment to "retaliation against public officials," because "[t]he language of [the indictment] tracks the statutory language of the omnibus clause of 26 U.S.C. § 7212(a) and states that [defendant's] actions . . . were intended to obstruct the due administration of the code"); ***United States v. Kozak***, 2014 WL 1281916, at *4 (D. Neb. Feb. 7, 2014) (following ***Pansier***).

Cases decided before ***Marinello*** have held that indictments charging multiple corrupt acts in a single count under the Omnibus Clause are not duplicitous so long as those acts "constitute a continuing course of conduct." ***United States v. Armstrong***, 974 F. Supp. 528, 539 (E.D. Va. 1997) (citing ***United States v. Berardi***, 675 F.2d 894, 898 (7th Cir. 1982) (indictment alleging multiple acts of obstruction of justice in violation of 18 U.S.C. § 1503 not duplicitous)); *accord* ***United States v. Daugerdas***, 837 F.3d. 212, 225-26 (2d Cir. 2016) (Omnibus Clause count not duplicitous where it charged multiple corrupt acts relating to a tax shelter that defendant both set up for his clients and for himself); ***United States v. Murphy***, 824 F.3d 1197, 1206 (9th Cir. 2016) (no duplicity because "the nine discrete acts of interference alleged in the indictment merely stated multiple ways of committing the same offense" (cleaned up)); ***United States v. Kamalu***, 298 Fed. App'x 251, 254-55 (4th Cir. 2008) (no prejudicial duplicity in Omnibus Clause count where the indictment "expressly charged [the defendant] with 'engaging in a continuing scheme'"); ***United States v. Willner***, 2007 WL 2963711, at *6-7 (S.D.N.Y. Oct. 11, 2007) (Omnibus Clause count not duplicitous where it "expressly charges a single, continuous, 'endeavor,'" and this allegation was plausible because all the alleged corrupt acts related to the defendant's efforts to improperly exploit a single net operating loss); ***United States v. Toliver***, 972 F. Supp. 1030, 1040 (W.D. Va. 1997) ("multiple acts alleged [in Section 7212(a) count] amount to a single continuous offense" because "[e]ach act was focused on achieving the same objective").

In rejecting claims that multiple-act Omnibus Clause counts are duplicitous, these courts have drawn analogies to two other types of tax charges where multiple criminal acts can be alleged in a single count if those acts constitute a single continuing scheme: conspiracies to defraud the United States or to commit a particular offense, in violation of 18 U.S.C. § 371, and evasion of tax payments, in violation of 26 U.S.C. § 7201. For instance, in ***Armstrong***, the court, in rejecting a duplicity challenge, observed that "Section 7212(a) is analogous to the general conspiracy statute, 18 U.S.C. § 371, in that both statutes cover a broad range of unlawful conduct. Just as a conspiracy may involve violations of numerous and different laws, a violation of § 7212(a) may also involve violations of several different laws." 974 F. Supp. at 540; *see also* ***Daugerdas***, 837 F.3d at 226 (observing that "it is well established that the allegation in a single count of a conspiracy to commit several crimes is not duplicitous" (cleaned up)). And in ***Kamalu***, the Fourth Circuit rejected a duplicity challenge to a Section 7212(a) count by relying upon ***United States v. Shorter***, 809 F.2d 54 (D.C. Cir. 1987), which held that an indictment charging evasion of tax payment for multiple tax years was not duplicitous because "'two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme.'" ***Kamalu***, 298 Fed. App'x at 254 (quoting ***Shorter***, 809 F.2d at 56); Armstrong, 974 F. Supp. at 539-40 (citing ***Shorter***); ***Toliver***, 972 F. Supp. at 1039 (same).[3]

Pre-***Marinello*** cases also have largely rejected claims that indictments charging the Omnibus Clause are multiplicitous because there are other charges in the indictment that are based on some of the same facts as an alleged corrupt act. Courts have held that an indictment is not multiplicitous even though it charges both willfully filing of a false tax return, in violation of 26 U.S.C. § 7206(1), and charges the filing of that same return as a corrupt act in violation of the Omnibus Clause. For instance, ***in United States v. Swanson***, 1997 WL 225446 (4th Cir. 1997), the court applied the familiar test for impermissible multiple punishments established in ***Blockburger v. United States***, 284 U.S. 299 (1932), under which "'the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not,'" and concluded it was "obvious[]" from a statement of their respective elements that Sections 7206(1) and 7212(a) "each . . . require[] proof of facts that the other does not." ***Swanson***, 1997 WL 225446, at *3-4 (quoting ***Blockburger***, 284 U.S. at 304); *see also* ***United States v. Dain***, 258 Fed. App'x 90, 93 (9th Cir. 2007) (no

[3] For further discussion of the unit of prosecution for tax evasion charges, *see supra*, Chapter 8.07[2].

multiplicity because "a false filing violation under § 7206(1) requires a signed writing under penalties of perjury, whereas an obstruction charge under § 7212(a) does not"); ***United States v. Biller***, 2006 WL 2221695, at *4-5 (N.D. W. Va. Aug. 2, 2006) (following ***Swanson***); ***Armstrong***, 974 F. Supp. at 540; *but see* ***United States v. Mathis***, 1997 WL 683648, at *7-8 (S.D. Ohio June 2, 1997) (dismissing Section 7212(a) count as impermissibly multiplicitous of false return counts where the court had stricken as surplusage all the allegations in the 7212(a) count save those relating to the filing of false returns, and reasoning that Congress "did not intend for a violation of Section 7206(1), alone, to be the basis for a Section 7212(a) violation"). Courts have also rejected similar multiplicity claims involving other offenses. *See* ***United States v. Saoud***, 595 Fed. App'x 182, 191 n.6 (4th Cir. 2014) (Section 7212(a) count not multiplicitous of false statement counts under 18 U.S.C. § 1001); ***United States v. McCray***, 1990 WL 138571, at *4-5 (9th Cir. 1990) (same with respect to mailing a threatening communication in violation of 18 U.S.C. § 876); ***United States v. Williams***, 644 F.2d 696, 699 n.14 (8th Cir. 1981) (same with respect to willful filing of a false withholding statement in violation of 26 U.S.C. § 7205).

Marinello did not specifically discuss how its requirement of proof of a nexus to a pending or reasonably foreseeable targeted tax-related proceeding might affect multiplicity and duplicity claims. With regards to multiplicity, however, ***Marinello*** did make clear that its interpretation of the Omnibus Clause was motivated by a concern that, absent these additional requirements of proof, the Omnibus Clause would "transform many, if not all, of [the] misdemeanor provisions [in Title 26] into felonies, making the specific provisions redundant . . . ." 138 S. Ct. at 1107. Consequently, ***Marinello***'s additional requirements of proof of a nexus to a pending or reasonably foreseeable targeted tax-related proceeding can be properly cited to oppose a claim that an Omnibus Clause count is impermissibly multiplicitious of a Title 26 misdemeanor count in the same indictment.

With regards to claims of duplicity, ***Marinello*** said nothing that would disturb the general principle that an indictment may charge in one count that a defendant committed an offense by "one or more specified means." Fed. R. Crim. P. 7(c)(1) (emphasis added); *see also* ***Schad***, 501 U.S. at 631; ***United States v. Miller***, 471 U.S. 130, 136-40 (1985). Nor did ***Marinello***, on its face, disavow earlier cases holding that such a count is not impermissibly duplicitous provided that the acts alleged constitute a single continuous scheme or course of conduct. Consequently, cases holding that the government may allege multiple acts, each of which would sustain a conviction, in a single count under the Omnibus Clause without necessarily rendering an indictment duplicitous, appear to still be good law following ***Marinello***. *See* **Murphy**, 824 F.3d at 1206; ***Sorennsen***, 801 F.3d at 1237. Prosecutors should bear in mind, however, that ***Marinello***'s requirements of proof of a nexus to a pending or reasonably foreseeable targeted tax-related proceeding are factors that should be taken into consideration in assessing whether a series of acts constitutes a single scheme or course of conduct.

17.05 VENUE

Prior to ***Marinello***, the Ninth Circuit held that venue for a Section 7212(a) prosecution lies in the district in which the defendant committed the corrupt act or acts constituting an endeavor to impede the administration of the Internal Revenue Code, but not in the district where the IRS was carrying out tax-related proceedings targeting the defendant. ***United States v. Marsh***, 144 F.3d 1229 (9th Cir. 1998). Specifically, the Ninth Circuit held that venue for a charge that the defendant violated the Omnibus Clause by filing bogus liens against IRS agents who were criminally investigating the defendant did not lie in the districts where the agents were located, the Northern and Eastern Districts of California, because the defendant filed the liens in Nevada and Washington. ***Id.*** at 1242. This was so, the ***Marsh*** court reasoned, because "the crime of endeavoring to impede the IRS is complete when the endeavor is made. The government did not have to show that its agents abandoned their investigation or even that the agents were anxious about the effect of the liens on their credit. No effect need be proved." ***Ibid.***; *see also* ***United States v. Sorensen***, 2014 WL 585330, at *2 (D. Colo. February 14, 2014) (accepting ***Marsh*** venue rule, but distinguishing ***Marsh*** on the facts because the indictment alleged corrupt endeavors that occurred in part in the District of Colorado); ***United States v. Westbrooks***, 858 F.3d 317, 326-27 (5th Cir. 2017) (venue lied in the Southern District of Texas, even though defendant's business that carried out scheme to defraud was based in North Carolina, because "part of a continuing pattern of obstructive conduct occurred [in the Southern District of Texas]"), *overruled on other grounds by* ***Westbrooks v. United States***, 138 S. Ct. 1323 (2018)

The courts have not yet addressed whether ***Marinello***'s holding that the government must prove a nexus to a targeted tax-related proceeding provides a basis for venue in a district where such a proceeding is pending, in addition to any district where a corrupt endeavor took place. But cases discussing venue for violations of 18 U.S.C. §§ 1503 and

1512 prior to the 1988 enactment of 18 U.S.C. § 1512(i),[4] which provides for venue in the district of both the proceeding and the act, may be helpful. Prior to the enactment of § 1512(i), several circuits had held that "a prosecution under section 1503 may be brought in the district where the judicial proceeding that the accused sought to obstruct is pending, even if the obstructing acts took place in a different district." ***United States v. Frederick***, 835 F.2d 1211, 1213-14 (7th Cir. 1987) (collecting cases so interpreting § 1503, and so holding with respect to § 1512 on the theory that the assault on a grand jury witness that formed the basis of the charge was "not just as an assault upon an individual victim but as an assault upon the grand jury sitting in the [district of prosecution] and upon the judicial process"); *but see* ***United States v. Swann***, 441 F.2d 1053, 1054-55 (D.C. Cir. 1971) (venue is proper only in district in which obstructive act occurred because "[t]he offense was begun, carried out, and completed" in the district where the defendant assaulted a grand jury witness, and "could not be altered by anything that might happen thereafter" in the different district where the grand jury was sitting). Prosecutors who wish to base venue upon where an IRS administrative action is pending should carefully consider both the law of their circuit and the practicable aspects of proving in what judicial district (or districts) a particular IRS proceeding is "pending."

For a further discussion of venue rules, please see Section 6.00, *supra*.

17.06 STATUTE OF LIMITATIONS

The general rule under 26 U.S.C. § 6531 is that tax offenses are subject to a three-year statute of limitations period. However, Section 6531(6) provides a six-year statute of limitations for "the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States)." In ***United States v. Workinger***, 90 F.3d 1409 (9th Cir. 1996), the defense argued that Section 6531(6) does not apply to the Omnibus Clause, because the parenthetical language limits the scope of the six-year limitations exception to offenses involving intimidation of officers and employees of the United States. 90 F.3d at 1412-13. The Ninth Circuit, after analyzing the language and structure of the statute, rejected this argument and held that "the parenthetical language in § 6531(6) is descriptive, not limiting." ***Workinger***, 90 F.3d at 1414. *Accord* ***United States v. Adams***, 955 F.3d 238, 251 (2d Cir. 2020); ***United States v. Giambalvo***, 810 F.3d 1086, 1092-93 (8th Cir. 2016);

[4] *See* Pub. L. No. 100-690, § 7029(a), 102 Stat. 4397, 4398 (1988).

United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998); ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997).

Accordingly, the statute of limitations for an omnibus clause offense will run six years from the last act that constitutes a corrupt endeavor to impede and impair the due administration of the tax code. 26 U.S.C. § 6531(6); ***Adams***, 955 F.3d at 251 ("Violations of 26 U.S.C. § 7212(a) are subject to a six-year limitations period that does not start to run until the last act in furtherance of the scheme"); ***United States v. Murphy***, 824 F.3d 1197, 1206 (9th Cir. 2016) (rejecting the defendant's "argument that earlier acts of interference should immunize [him] from liability for a crime occurring within the limitations period"); ***Wilson***, 118 F.3d at 236. For a full discussion of the statute of limitation in criminal tax offenses, see Section 7.00, *supra*.

17.07 SENTENCING GUIDELINES

The Sentencing Guidelines, following a November 1993 amendment, direct a sentencing court to apply either the Tax Evasion guideline (Section 2T1.1) or the Obstruction of Justice guideline (Section 2J1.2) to offenses under the Omnibus Clause. USSG App. A, App. C, Amend. 496.[5] The court is to use the guideline provision "most appropriate for the offense conduct charged in the count of which the defendant was convicted." USSG App A, intro. comment.

Use of the Tax Evasion guideline may be more appropriate where the defendant's obstructive conduct was part of an effort to evade taxes or where measurable tax loss was intended by the obstruction, as both the Sixth and Tenth Circuits have concluded.

In ***United States v. Neilson***, 721 F.3d 1185 (10th Cir. 2013), the Tenth Circuit held that the 2T1.1 guideline was most appropriate on the facts of the case. The ***Neilson*** court began its analysis by "consider[ing] what type of conduct is covered by each of the possible guidelines." 721 F.3d at 1188. The court enumerated the particular offenses covered by the

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[5] Some cases decided before the November 1993 amendment applied the 2J1.2 obstruction guideline, reasoning that the 2J1.2 guideline was more applicable than other guidelines besides 2T1.1. *See, e.g.*, ***United States v. Koff***, 43 F.3d 417, 419 (9th Cir. 1994) (comparing 2J1.2 to the now-repealed 2T1.5 guideline); ***United States v. Van Krieken***, 39 F.3d 227, 231 (9th Cir. 1994) (same); ***United States v. Dykstra***, 991 F.2d 450, 453-54 (8th Cir. 1993) (comparing 2J1.2 and USSG § 2A2.4). These cases, however, have no enduring precedential value because they did not undertake the comparison mandated by the November 1993 amendment.

2T1.1 and 2J1.2 guidelines, characterizing the 2T1.1 offenses as "target[ing] both tax evasion and various other illegal and fraudulent actions involving taxation," and the 2J1.2 offenses as "cover[ing] a broad range of conduct that generally involves interfering with the administration of the justice system." ***Ibid.*** The court then "[c]ompar[ed] the [defendant's] stipulated conduct to the conduct covered under each guideline," and concluded that "Section 2T1.1 was the most appropriate guideline" because defendant's "conduct overall had more to do with taxation." ***Ibid.*** As the court explained, "[t]he actions [defendant] stipulated to—using third parties to transfer property to trusts, reporting different financial information to the IRS than he reported to lenders, mailing frivolous letters seeking to 'redeem' the value of his birth certificate, declaring that he was not subject to the laws of the United States, harassing IRS employees, and seeking to satisfy his tax debts through 'Bills of Exchange' rather than payment—are more akin to the other types of tax offenses covered under Section 2T1.1 than to the other types of obstruction of justice covered under Section 2J1.2." ***Id.*** at 1188-89. The court, moreover, concluded that it was of no moment that the defendant's "admitted conduct does not squarely meet every element of the tax evasion statute"; it sufficed that his conduct was "akin to tax evasion and the other taxation offenses punishable under Section 2T1.1." ***Id.*** at 1189.

In ***United States v. Ballard***, 850 F.3d 292 (6th Cir. 2017), the Sixth Circuit likewise held that the 2T1.1 guideline was the most appropriate guideline on the facts of the case. The ***Ballard*** defendant argued that his violation of the Omnibus Clause was most akin to the offenses covered by the 2J1.2 obstruction guideline because "all that was actually charged was [a] . . . lie to IRS investigators, and he had always intended, he claimed, to pay his taxes once he had the money." ***Id.*** at 294. The court, however, disagreed, concluding that the defendant's offense was "just the sort of 'Willful Failure to . . . Supply Information[ ] or Pay Tax' that § 2T1.1 is built for." ***Id.*** at 295 (quoting USSG § 2T1.1 (alteration in original)). This was so, the ***Ballard*** court explained, because the defendant lied in order "[t]o throw off the investigation of his outstanding debt for taxes." ***Ibid.*** (internal quotations omitted). Thus, the defendant's "offense conduct could have been charged under other statutes punishable under § 2T1.1," including tax evasion. ***Ibid.***

Marinello did not address sentencing issues under the Omnibus Clause, although its requirement that the defendant's obstructive conduct have a nexus to a "targeted governmental tax-related proceeding[]," 138 S. Ct. at 1104, may make it more common for violations of the Omnibus Clause to be sentenced under the 2T1.1 guideline. However, the general obstruction of justice guideline (Section 2J1.2) may still be the most appropriate sentencing guideline to be applied to some Section 7212(a) violations, particularly where no tax loss was intended by the defendant's conduct. *Cf.* ***United States v. Giambalvo***, 810 F.3d 1086, 1099 (8th Cir. 2016) (no need to seek financial benefit to act "corruptly" under § 7212(a)).

In ***United States v. Nagle***, 2021 WL 3825190 (11th Cir. Aug. 27, 2021), the Eleventh Circuit, in a post-***Marinello*** appeal, affirmed the district court's decision to use the § 2T1.1 rather than the § 2J1.2 guideline to calculate the sentencing range for a § 7212(a) offense. ***Nagle*** reasoned that § 2T1.1 was the most appropriate guideline because the "[t]he offense conduct charged in Nagle's indictment recounts Nagle's numerous and varied attempts to avoid paying his taxes by, among other things, failing to file returns or pay taxes and submitting false or fraudulent documents and statements." ***Id.*** at *2. This, ***Nagle*** reasoned, made the offense similar to the offenses sentenced under § 2T1.1, such as "tax evasion; the willful failure to file returns, supply information, or pay taxes; and filing fraudulent or false returns, statements, or other documents." ***Ibid.*** In contrast, ***Nagle*** explained that Section 2J1.2 "is 'frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense.'" ***Ibid.*** (quoting USSG § 2J1.2, comment. (backg'd.)).

For a more complete discussion of sentencing issues in criminal tax cases see Chapter 43.00, *infra*.

sentencing guideline to be applied to some Section 7212(a) violations, particularly where no tax loss was intended by the defendant's conduct. *Cf.* ***United States v. Giambalvo***, 810 F.3d 1086, 1099 (8th Cir. 2016) (no need to seek financial benefit to act "corruptly"under § 7212(a)).

For a more complete discussion of sentencing issues in criminal tax cases see Chapter 43.00, *infra*.

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18.00 OFFENSES WITH RESPECT TO COLLECTED TAXES

18.1 STATUTORY LANGUAGE: 26 U.S.C. §§ 7215 & 7512

Notice: As explained in Section 18.06[1], Section 7512, which makes it a misdemeanor to fail to comply with Section 7215(b), is obsolete, because the IRS no longer issues notices under Section 7212(b) requiring the use of special deposit procedures for collected employment tax. See Internal Revenue Manual (IRM) 3.17.244.4.3. [Edited October 2014.]

§7215. ***Offenses with respect to collected taxes***

(a) ***Penalty***.--Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined . . . or imprisoned not more than one year, or both, together with the costs of prosecution.[1]

(b) ***Exceptions***.--This section shall not apply--

(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by

[1] For the misdemeanor offense set forth in Section 7215, the maximum permissible fine is at least $100,000 for individuals and $200,000 for corporations. 18 U.S.C. § 3571(b), (c). Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d). Before seeking a fine under this provision, prosecutors are advised to read Chapter 45.

the payment of such wages) shall not be considered to be circumstances beyond the control of a person.

§ 7512. ***Separate accounting for certain collected taxes, etc.***

(a) ***General rule***.--Whenever any person who is required to collect, account for, and pay over any tax imposed by subtitle C, or chapter 33 --

(1) at the time and in the manner prescribed by law or regulations (A) fails to collect, truthfully account for, or pay over such tax, or (B) fails to make deposits, payments, or returns of such tax, and

(2) is notified, by notice delivered in hand to such person, of any such failure,

then all the requirements of subsection (b) shall be complied with. In the case of a corporation, partnership, or trust, notice delivered in hand to an officer, partner, or trustee, shall, for purposes of this section, be deemed to be notice delivered in hand to such corporation, partnership, or trust and to all officers, partners, trustees, and employees thereof.

(b) ***Requirements***.-- Any person who is required to collect, account for, and pay over any tax imposed by subtitle C, or chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C, or chapter 33 which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amount of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee.

(c) ***Relief from further compliance with subsection (b)***.--Whenever the Secretary is satisfied, with respect to any notification made under subsection (a), that all requirements of law and regulations with respect to the taxes imposed by subtitle C, or chapter 33, as the case may be, will henceforth be complied with, he may cancel such notification. Such cancellation shall take effect at such time as is specified in the notice of suchcancellation.

18.2 TAX DIVISION POLICY

Pursuant to Department of Justice policy, trust fund cases under Section 7215 may be referred directly from the Internal Revenue Service to United States Attorneys. USAM § 6-4.243. However, where felony charges are available, prosecutors should instead seek authorization from the Tax Division to pursue such charges, particularly for employers who are repeat or serial violators.

18.3 GENERALLY

It is a crime under Section 7215 to fail to comply with any provision of instead 7512(b) of the Internal Revenue Code, which requires employers (among others), upon notice, to collect employment taxes and deposit the withheld taxes in a special bank account held in trust for the United States. ***United States v. Erne***, 576 F.2d 212, 215 (9th Cir. 1978); ***United States v. Paulton***, 540 F.2d 886, 888 (8th Cir. 1976); ***United States v. Merriwether***, 329 F. Supp. 1156, 1159 (S.D. Ala. 1971), *aff'd*, 469 F.2d 1406 (5th Cir. 1972).

Employment taxes are based on an employer-employee relationship, and they include the following:

1. Old-Age, Survivors, and Disability Insurance taxes and Hospital Insurance taxes, all commonly known as Social Security or FICA taxes, which are levied as a tax against the wage income of an employee and as an excise tax against the wages paid by an employer. 26 U.S.C. §§ 3101 & 3111. The taxes are to be paid by the employer, who is required to deduct the employee's share of social security taxes from the employee's wages, and add to this amount the employer's share of the tax. 26 U.S.C. § 3102.

2. Federal unemployment taxes, commonly known as FUTA taxes, which are levied as an excise tax against the employer, based on the total wages paid with respect to employment. 26 U.S.C. § 3301. The actual FUTA tax ordinarily is inconsequential because contributions to state unemployment funds are credited against FUTA taxes, up to 90 percent of the FUTA taxes. 26 U.S.C. § 3302.

3. Employees' income taxes deducted by an employer from the wages paid to employees, for payment by the employer to the IRS. 26 U.S.C. §§ 3402, 3403.

Employers are required, under the above-noted provisions of the Internal Revenue Code, to (1) withhold Social Security, unemployment, and income taxes from the wages of employees; (2) make quarterly returns of their withholdings on Form 941; and (3) pay over to the IRS the amounts of taxes withheld. FICA, Social Security, and withholding taxes are referred to as "trust fund" taxes. *See* ***Slodov v. United States***, 436 U.S. 238, 242-248 (1978); ***United States v. Evangelista***, 122 F.3d 112, 114 (2d Cir. 1997). In sum, an employer is obliged to collect or withhold the above-referenced taxes in each pay period and pay them to the IRS on a quarterly basis. ***United States v. Paulton***, 540 F.2d 886, 888 (8th Cir. 1976). While not required to be segregated or held in a special account before payment to the IRS, the funds are essentially held in trust for the IRS and may not be used as working capital by the employer. *See* ***Cline v. United States***, 997 F.2d 191, 194 (6th Cir. 1993); ***Paulton***, 540 F.2d at 888; 26 U.S.C. § 7501. An employee whose taxes are withheld but not paid to the IRS is still credited with payment. ***Paulton***, 540 F.2d at 888. The IRS's recourse is against the employer or persons responsible for collecting and paying over to the IRS. ***Cline***, 997 F.2d at 194. If an employer is delinquent with respect to the obligations regarding collecting, accounting, and paying over, the IRS may invoke the provisions of Section 7512. ***Paulton***, 540 F.2d at 888. Pursuant to Section 7512, an employer or person responsible will have heightened obligations, including the duty to establish a separate account to hold the trust funds and pay the IRS on a monthly, rather than quarterly, basis.

18.4 ELEMENTS OF "TRUST FUND" CASES

To establish a violation of Section 7215, the government must prove the following elements beyond a reasonable doubt:

1. The defendant was a person required to collect, account for, and pay over FICA taxes and withheld income taxes.

2. The defendant was served with the statutory notice prescribed by Section 7512(a);

3. The defendant failed to comply with the notice, while not entertaining a reasonable doubt as to whether the law

> required the defendant to do so, and the failure was not due
> to circumstances beyond the defendant's control.

United States v. Erne, 576 F.2d 212, 213 (9th Cir. 1978) (*per curiam*); ***United States v. Polk***, 550 F.2d 566, 567 (9th Cir. 1977). It is important to note, however, that certain courts require a fourth element: the defendant's failure to pay FICA taxes before notice under 26 U.S.C. § 7512(a) was issued. *See* ***United States v. Hemphill***, 544 F.2d 341, 343-44 (8th Cir. 1976); ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir. 1975) (evidence of prior tax deficiencies was "necessary and material" because Section 7512(b) is triggered by defendant's prior failures to properly collect, account for, or pay over taxes).

18.5 PERSON REQUIRED TO COLLECT, ACCOUNT FOR, AND PAY OVER

18.05[1] Person Required -- "Employer"

Although the cases often use the term "employer," Section 7215 specifically refers to "person" and does not use the term "employer." In fact, 26 U.S.C. § 7343 defines "person" for purposes of Section 7215 as, *inter alia*, "an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. 7343; ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir. 1975); ***United States v. Stevenson***, 540 F. Supp. 93, 95-96 (D. Del. 1982) (holding that the section defining "person" for purposes of Section 7215 is Section 7343); *see also* ***United States v. Neal***, 93 F.3d 219, 222-24 (6th Cir. 1996) (relying on definition of "person" under 26 U.S.C. § 7343 in failure to file case under Section 7203); *but see* ***United States v. Merriwether***, 329 F. Supp. 1156, 1159 (S.D. Ala. 1971) (rejecting government's argument that, for purposes of Section 7215, "person" is defined under Section 7343 and instead relying on general definition of "person" under 26 U.S.C. § 7701), *aff'd*, 469 F.2d 1406 (5th Cir. 1972).

The Seventh Circuit stated in ***McMullen***, 516 F.2d at 921, that the term "person" includes individuals "with significant control over the financial decision-making process within such a corporation." Thus, if a defendant has such control, he or she is a person who has the legal duty to collect, truthfully account for, and pay over the withholding taxes. Moreover, in ***McMullen***, the fact that the defendant's signature did not appear on some payroll checks was not conclusive on whether the defendant was a "responsible person" and was not a basis to exclude these checks from admission at trial; "responsibility for withholding taxes does not turn on the ministerial act of signing checks but on authority to control the disposition of funds."***Ibid***.

In ***Stevenson***, 540 F. Supp. at 93-94, the defendants, the president and vice-president of a corporation, moved to dismiss the indictment on the grounds that the indictment charged them individually with failing to make the required deposits and did not charge the corporation, which was the actual employer. The court held that by alleging that the defendants, as officers of the corporation, had notice and were obliged to pay taxes withheld from employees' wages, the indictment was sufficient to charge an offense under Section 7215, even though the corporation itself was not named. ***Id.*** at 95-96. Of course, the government needed to prove that the defendants were "persons" responsible for such taxes and that the corporation of which they were officers owed the taxes. ***Id.*** at 96.

In ***Merriwether,*** 329 F. Supp. at 1159-60, the court took a different approach to the issue of corporation versus officer, but reached the same result on criminal liability. While the district court acknowledged that Section 7343's definition of person applied to § 7215, the court concluded that the relevant provisions for liability were Sections 7501 and 7512, which are *not* governed by Section 7343's definition of "person" since neither Section 7501 nor Section 7512 is part of Chapter 75 of the Internal Revenue Code. *Id.* at 1159.[2] Moreover, the court concluded that Section 7501 does not encompass corporate officers and only imposes an obligation to collect "trust fund" taxes on corporations, not individuals. The corporation was not charged, but the court found the defendant, who was the president and principal officer of the corporation, guilty of violating Section 7215 as an *aider and abettor* to the corporate employer. *Id*. at 1159-60. *It is the Tax Division's view that the* Merriwether *court's analysis is incorrect given its attention on* Section *7512 rather than* Section *7215, even though we concur with the conviction.*

Section 6672 of Title 26 U.S.C. is the civil corollary to Sections 7202 (felony charge) and 7215 (misdemeanor charge). It imposes penalties on a "person" who fails to "collect, truthfully account for, and pay over" trust fund taxes. A "person" under Section 6672 is defined in 26 U.S.C. § 6671(b) in the same terms used in Section 7343. Accordingly, cases interpreting "responsible persons" under Section 6672 are instructive.

[2] Section 7343, which is part of Chapter 75 of the Internal Revenue Code, specifically states that it applies only to "this chapter." Chapter 75 encompasses Sections 7201 through 7344.

See, e.g., ***Pacific National Insurance v. United States***, 422 F.2d 26, 29-32 (9th Cir. 1970), *see also* ***United States v. Carrigan,*** 31 F.3d 130 (3d Cir. 1994); Section 9.04, *supra*.

18.5 [2] Employees

To establish the requirement for withholding taxes, the government must prove that the taxes in issue relate to employees of the defendant or the defendant's business. On this issue, the jury can consider all of the circumstances surrounding the relationship between the defendant and those individuals considered to be employees. The analysis is the common law test of the employer's right to control the workers. "The right to control must include control of the activity of the workers, not only with regard to the result accomplished but also with regard to the means by which this result is accomplished." ***United States v. Polk***, 550 F.2d 566, 567 (9th Cir. 1977) (*per curiam*); *see* ***Lifetime Siding, Inc. v. United States***, 359 F.2d 657, 660 (2d Cir. 1966). Essentially, the government must prove that the workers were employees and not independent contractors.

18.6 REQUIREMENTS OF SECTION7512(b)

18.06[1] Notice of Failure to Collect, Account For, and Pay Over

Obsolescence of Section 7215: Section 7215(a) makes it a misdemeanor offense to fail to comply with any provision of Section 7512(b). Section 7512 provides that upon receipt of special notice from the IRS, an employer is required to, among other things, deposit collected employment tax in a separate bank account and to pay over to the IRS the funds in that bank account. Accordingly, one of the elements of an offense under Section 7215(a) is the IRS's issuing the Section 7512(b) notice. The Tax Division has been informed that due to the wide availability of electronic methods of transferring funds, the IRS has determined, among other things, that the "special deposit procedures [of Section 7512] are no longer applicable. See IRM 3.17.244.4.3. Accordingly, effective January 1, 2012, the IRS will no longer issue notices under Section 7512. As a result, the government will be not be able to prove one or more of the essential elements of the misdemeanor described in Section 7215(a). Accordingly, the Tax Division no longer expects the IRS to refer cases recommending misdemeanor charges under Section 7215(a). [Edited October 2014.]

In order to establish a violation of Section 7215(a), the IRS first must have notified the employer of his or her failure to collect, truthfully account for, or pay over the covered taxes, or to make deposits, payments, or returns of such taxes, "by notice delivered in hand . . . ." 26 U.S.C. § 7512(a)(2). Thus, personal service of the notice is required. In the case of a formal business or legal entity, however, service on any corporate officer will suffice as notice to all other officers. ***United States v. McMullen***, 516 F.2d 917, 920 (7th Cir. 1975); ***United States v. Stevenson***, 540 F. Supp. 93, 96 (D. Del. 1982).

The IRS uses Form 2481, Notice to Make Special Deposits of Taxes, as the formal notice served pursuant to Section 7512. *See* ***United States v. Stevenson***, 540 F. Supp. 93, 96 (D. Del. 1982). The recipient signs this form as proof of having received notice. A defendant can be prosecuted, however, even if he or she refuses to sign Form 2481 as long as it is shown that the defendant actually received the form. *See* ***McMullen***, 516 F.2d at 919.[3]

Form 2481 informs the recipient of his or her statutory obligation to open a special trust account in a bank for the benefit of the United States and deposit in that account all taxes withheld from wages within two banking days after the taxes are collected. 26 U.S.C. § 7512(b). Furthermore, the employer must pay over the taxes monthly, instead of quarterly, with the filing of Form 720, Quarterly Federal Excise Tax Return, or Form 941-M, Employer's Monthly Federal Tax Return. The requirements set forth in Form 2481 cannot be waived and remain in effect until the employer receives written notice from the IRS canceling these obligations. *See* ***United States v. Gay***, 576 F.2d 1134, 1137 (5th Cir. 1978); Treas. Reg. §§ 31.6011(a)-5(a)(2),301.7512-1(e).

18.06[2] Bank Account for Trust Deposits

The bank account used for the trust deposits must be designated as a special fund in trust for the United States, payable to the United States by the employer as trustee. 26 U.S.C. § 7512(b). The fact that a defendant had three general bank accounts in his own name did not meet this requirement. ***United States v. McMullen***, 516 F.2d 917, 920-21 (7th Cir.1975). As a practical matter, however, unless there are unusual circumstances present, an employer probably will not be prosecuted for failing to establish sucha

[3] In egregious cases of non-compliance the IRS hand delivers a Letter 903 and a Notice 931, Deposit Requirements for Employment Taxes, to the taxpayer.

special account if the employer has paid the required taxes monthly by filing Form 720 or 941-M. In such a situation, the government is receiving its money on a timely basis.

Section 7512(b) requires the employer to make a deposit each pay period, even though the employer does not have to formally pay over the funds to the United States until the end of each month. Thus, for every pay period that the employer fails to deposit the withheld taxes to the trust account, the employer is violating Section 7215. Otherwise stated, where there is a series of failures to deposit over numerous pay periods, each failure is a separate offense and not part of one continuing offense. ***United States v. Paulton***, 540 F.2d 886, 893 (8th Cir. 1976); *see* ***United States v. Hemphill***, 544 F.2d 341, 343 (8th Cir. 1976) (separate violation identified for each pay period defendant failed to pay).

It is not necessary for the prosecutor to prove the exact amount of each deposit required. ***United States v. Gay***, 576 F.2d 1134, 1138 (5th Cir. 1978). "The essence of the [Section 7215] offense is failing to make a timely deposit" to a trust account. ***Id***. If no deposits were made at all, then the government need only prove that a deposit was due, to show noncompliance with Section 7512 and, therefore, a violation of Section 7215. ***Ibid***. Similarly, a belated payment is not a defense, "since the focus of section 7512 is not eventual payment, but timely payment, and an offense under section 7215 has nothing directly to do with payment at all, but with failure to comply with mandatory accounting procedures." ***McMullen***, 516 F.2d at 921.

18.06[3] Prior Failures to Pay

As noted, courts have expressed different views on the relevance of a defendant's failure to pay withholding and FICA taxes for periods before those named in the indictment or information. In ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir. 1975), the Seventh Circuit held that evidence of prior tax deficiencies was "necessary and material" because Section 7512(b) is triggered by a defendant's prior failures to properly collect, account for, or pay over taxes. *See* ***United States v. Hemphill***, 544 F.2d 341, 343-44 (8th Cir. 1976) (element of offense included defendant's failure to pay FICA taxes before notice under Section 7212 was issued). Alternatively, in ***United States v. Polk***, 550 F.2d 566, 568 (9th Cir. 1977), the Ninth Circuit held that prior failures to pay FICA and Social Security taxes was admissible to show a defendant's state of mind and intent. The rationale of ***Polk*** is questionable, however, because intent is not an element of

Section 7215; it is a strict liability offense. *See* ***United States v. Erne,*** 576 F.2d 212, 214-16 (9th Cir. 1978), and Section 18.07, *infra*.

18.06[4] Dates of Payroll Checks

Questions or slight inconsistencies regarding the dates of employees' checks and the dates that the checks were cashed are not fatal to an indictment or proof of the crime. "'It is not material that [payroll] checks may not have been delivered on the exact dates appearing thereon or that particular employees may not have cashed their checks immediately after receiving them.'" ***United States v. Gay***, 576 F.2d 1134, 1138 (5th Cir. 1978) (quoting ***United States v. Paulton***, 540 F.2d 886, 891 (8th Cir. 1976)). "[T]he mere fact that some checks were not dated on the paydays listed [in the information] is an inconsequential and harmless variance." ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir. 1975).

18.6 [5] Expert Testimony Excluded

The Fifth Circuit has approved the exclusion of expert testimony at trial concerning the requirements of Section 7512. A defendant's legal obligations under this statute are a matter for the court's instructions to the jury on the law and are not properly a subject for testimony by an expert witness. ***United States v. Gay***, 576 F.2d 1134, 1137 (5th Cir. 1978).

18.7 CIRCUMSTANCES BEYOND CONTROL

Section 7215(b)(2) provides that there is no violation if the defendant "shows" that the failure to collect, account for, or pay over the tax was "due to circumstances beyond his control." Section 7215(b) also provides that a lack of funds existing immediately after the payment of wages, whether or not caused by the payment of the wages, "shall not be considered to be circumstances beyond the control of a person." The scope of this "circumstances beyond his control" exception to the statute "was intended to be narrow." ***United States v. Randolph***, 588 F.2d 931, 932-33 (5th Cir. 1979) (*per curiam*).

The legislative history of Section 7215 includes examples of acceptable circumstances beyond an employer's control that would cause a lack of funds after (but not immediately after) the payment of wages. These special circumstances include theft, embezzlement, destruction of the business from fire or other casualty, and the failure of the bank in which the employer had deposited funds prior to transferring them to the trust account for the government. ***Randolph***, 588 F.2d at 933 (citing S. Rep. No. 85-1182 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 2179, 2191-92). Conversely, a lack of funds caused by the defendant's taking care of other liabilities and paying other creditors is not considered a circumstance beyond a person's control and is not a viable defense. ***Ibid***.; ***United States v. Plotkin***, 239 F. Supp. 129, 131 (E.D. Wis. 1965).

18.8 INTENT

Section 7215 is a strict criminal liability provision. The government is not required to prove any particular mental state, intent, or willfulness, as it must for other criminal tax violations. ***United States v. Erne***, 576 F.2d 212, 213-15 (9th Cir. 1978); ***United States v. Paulton***, 540 F.2d 886, 890 (8th Cir. 1976); ***United States v. Dreske***, 536 F.2d 188, 196 (7th Cir. 1976); ***United States v. Gorden***, 495 F.2d 308, 310 (7th Cir.1974); ***United States v. Stevenson***, 540 F. Supp. 93, 97 (D. Del. 1982); *see also* ***United States v. Evangelista,*** 122 F. 3d 112, 121-22 (2d Cir. 1997) (recognizing that the felony offense of failing to account for and pay over under Section 7202 entails the element of willfulness, while the misdemeanor under Sections 7215 and 7512 does not).

Because Section 7215 does not require willfulness, but Section 7202 does, and because Section 7215 requires proof of specific notice to defendant, while Section 7202 does not, Section 7215's misdemeanor charge is *not* a lesser included offense of Section 7202. ***United States v. Ellis***, No. 06-76-Cr-1, 2007 WL 2316486, at *4 (S.D. Ind. Aug. 2, 2007); *see* ***Erne***, 576 F.2d at 215 (noting differences between Sections 7215 and 7202).

18.9 DEFENSES

18.09[1] Constitutional Contentions

Sections 7215 and 7512 have been upheld in the face of various constitutional challenges. The argument that Section 7512 is unconstitutional because it does not provide for a prior administrative hearing before an employer is required to comply with subsection (b) has been rejected. ***United States v. Paulton***, 540 F.2d 886, 889 (8th Cir. 1976); ***United States v. Patterson***, 465 F.2d 360, 361 (9th Cir. 1972); ***United States v.***

Plotkin, 239 F. Supp. 129, 131-32 (E.D. Wis. 1965). A defendant who believes a notice and obligation are in error may pay the disputed tax and seek a refund. ***Paulton***, 540 F.2d at 889.

The Eighth Circuit also stated in ***Paulton*** that the exceptions appearing in Section 7215(b) do not unconstitutionally place on a defendant the burden of proving his innocence and therefore do not impermissibly infringe on the defendant's privilege against self-incrimination. 540 F.2d at 891-92. Once a defendant presents "sufficient" evidence "to create a real issue" of whether he is entitled to a statutory exception from liability, the burden shifts to the government to prove the exception does not apply. ***Id***. at 892.

Finally, the contention that a sentence of imprisonment for violation of Section 7215 is contrary to the Fifth Amendment of the United States Constitution has been rejected. Defendants have been unsuccessful in claiming that they were being imprisoned for debt because they were unable to pay the taxes. ***United States v. Gorden***, 495 F.2d 308, 310 (7th Cir. 1974); ***United States v. Patterson***, 465 F.2d at 361.

18.09[2] Selective Prosecution

Courts also have rejected claims of selective, discriminatory prosecution. ***United States v. Erne***, 576 F.2d 212, 216-17 (9th Cir. 1978); ***United States v. Stevenson***, 540 F. Supp. 93, 97-98 (D. Del. 1982). These holdings, rather than being based on the nature of the statute, simply rested on the defendants' failure of proof.

18.09[3] Prior Excess Deposits

Making advance deposits into the trust account in excess of withheld amounts for pay periods prior to those charged is not an absolute defense to the failure to make the proper deposits for the pay periods named in the indictment or information. "To ensure collection of withheld taxes, section 7215 imposes strict compliance with the deposit requirements of section 7512 and any deviation from these provisions constitutes an offense." ***United States v. Gay***, 576 F.2d 1134, 1137 (5th Cir. 1978). However, evidence of overpayment for prior pay periods may be admissible as proof that the defendant had a reasonable doubt as to his obligation to collect taxes in the charged pay periods because he may already have deposited any taxes due. ***Ibid***.

18.09[4] Late Payment of Taxes

Evidence of late payments of withholding taxes is no defense because "the focus of section 7512 is not eventual payment, but timely payment, and an offense under section 7215 has nothing directly to do with payment at all, but with failure to comply with mandatory accounting procedures," which were designed to avoid late payments. ***United States v. McMullen***, 516 F.2d 917, 921 (7th Cir. 1975).

18.09[5] Lack of Funds

Section 7215 specifically rejects "lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages)" as being an exception to the sanctions of the statute. *See* **United States v. Dreske,** 536 F.2d 188, 195 (7th Cir. 1976) (no error for court to deny admission of evidence of lack of funds prior to or subsequent to payroll due to employer's failure to receive monies expected from agencies).

18.9 [6] Embezzlement

Congress has stated that embezzlement is an example of an acceptable circumstance beyond a person's control that may excuse a person's liability under Section 7215. ***United States v. Randolph***, 588 F.2d 931, 933 (5th Cir. 1979) (citing S. Rep. No. 85-1182 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 2187, 2191-92)). In ***Randolph***, 588 F.2d at 933, the court held that there was insufficient proof to support the embezzlement defense where the evidence consisted only of involvement of a co-owner of the defendant with a competitor. The court noted that in order to assert a viable embezzlement defense, a defendant must prove that the embezzling co-owner or employee lied to the defendant about the bank balances at the time the payroll checks were drawn, or embezzled the funds after the payroll checks were drawn, leaving insufficient funds to make the trust deposits. ***Ibid***. Embezzlement before payroll checks are drawn would not constitute a defense if the defendant knew or should reasonably have known of the embezzlement. ***Ibid***.

18.10 VENUE

The Sixth Amendment of the United States Constitution provides that trials shall be in the "State and district wherein the crime shall have been committed " *See also*

Fed. R. Crim. P. 18. If a statute does not indicate the location of the crime, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." ***United States v. Anderson***, 328 U.S. 699, 703 (1946). In Section 7215 prosecutions, venue is proper in the judicial district in which the employer had his or her place of business or in which he or she maintained his or her special trust bank account, if he or she ever opened such an account.

See also the discussion of venue in Section 6.00, *supra*.

18.11 STATUTE OF LIMITATIONS

The statute of limitations for Section 7215 offenses is three years from the date the defendant was required to make the deposit to the trust account and failed to do so. 26 U.S.C. § 6531. According to Section 7512(b), the deposit must be made by the end of the second banking day after the taxes are collected. Where proper deposits have been made but the defendant later withdraws the funds from the trust account and uses them for purposes other than payment to the IRS, then presumably the statute of limitations commences to run from the date the defendant made such withdrawals.

See also the discussion of the statute of limitations in Section 7.00, *supra*.

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21.00 AIDING AND ABETTING

21.1 STATUTORY LANGUAGE: 18 U.S.C. § 2

§ 2. ***Principals***

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21.2 GENERALLY

A person may be convicted of a crime even if he or she personally did not perform every act constituting the crime. The basis for this liability is Section 2 of Title 18, the accomplice statute. Under this statute, an individual may be indicted as a principal for the commission of a substantive offense and may be convicted by proof showing the individual to be an aider and abettor. *See* ***Nye & Nissen v. United States***, 336 U.S. 613, 618-20 (1949); ***United States v. Griffin***, 324 F.3d 330, 357 (5th Cir. 2003); ***United States v. Clifford***, 979 F.2d 896, 899 (1st Cir. 1992); ***United States v. Horton***, 847 F.2d 313, 321-22 (6th Cir. 1988); ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984); ***United States v. Sannicandro***, 434 F.2d 321, 323-24 (9th Cir. 1970).

Aiding and abetting is not an independent crime. ***United States v. Roan Eagle***, 867 F.2d 436, 445 (8th Cir. 1989); ***United States v. Causey***, 835 F.2d 1289, 1291 (9th Cir. 1987); ***United States v. Cook***, 745 F.2d 1311, 1315 (10th Cir. 1984); ***Martin***, 747 F.2d at 1407. One cannot aid or abet oneself. Some underlying criminal offense must be pled and proved in order for liability to attach under Section 2. ***Roan Eagle***, 867 F.2d at 445; ***Martin***, 747 F.2d at 1407.

Section 2 covers two types of aiding and abetting. ***Causey***, 835 F.2d at 1291-92. Subsection 2(a) of the statute is aimed at traditional aiding and abetting, which requires

proof of an underlying substantive offense. ***Id***. at 1291; ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991). Under subsection 2(a), the government must prove that someone committed a crime and that another person aided and abetted in the commission of that crime. ***Causey***, 835 F.2d at 1291-92. In effect, the second person is made "a coprincipal with the person who takes the final step and violates a criminal statute." ***Id***. at 1292; ***United States v. Smith***, 891 F.2d 703, 711 (9th Cir. 1989).

Under subsection 2(b), frequently referred to as "causing," the government is not required to prove that someone other than the defendant was guilty of a substantive offense. ***Causey***, 835 F.2d at 1292. This subsection is aimed at the person "who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and . . . is innocent of the substantive crime charged." ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 (11th Cir. 1983).

Under subsection 2(b), it is irrelevant whether the agent who committed the criminal act is innocent or acquitted, ***Motley***, 940 F.2d at 1081; ***United States v. Ruffin***, 613 F.2d 408, 412 (2d Cir. 1979); whether the agent lacked a criminal intent to commit the offense, ***Causey***, 835 F.2d at 1292; or whether the accused lacked the capacity to commit the criminal offense without the agent's involvement, ***Causey***, 835 F.2d at 1292***;*** ***Smith***, 891 F.2d at 711.

21.3 ELEMENTS

To establish a violation of 18 U.S.C. § 2, the government must establish the following elements beyond a reasonable doubt:

1. The defendant associated with the criminal venture;

2. The defendant knowingly participated in the venture; and

3. The defendant sought by his or her actions to make the venture succeed.

Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); ***United v. McDowell***, 498F.3d 308, 313 (5th Cir. 2007); ***United States v. Sobrilski***, 127 F.3d 669, 677 (8th Cir. 1997); ***United States v. Yost***, 24 F.3d 99, 104 (10th Cir. 1994); ***United States v. Clifford***, 979 F.2d 896, 899 (1st Cir. 1992); ***United States v. Singh***, 922 F.2d 1169, 1173 (5th Cir.

1991); ***United States v. Perez***, 922 F.2d 782, 785 (11th Cir. 1991); ***United States v. Labat***, 905 F.2d 18, 23 (2d Cir. 1990); ***United States v. Lanier***, 838 F.2d 281, 284 (8th Cir. 1988); ***United States v. Torres***, 809 F.2d 429, 433 (7th Cir. 1987); ***United States v. Weaver***, 594 F.2d 1272, 1275 (9th Cir. 1979).

To establish a violation of 18 U.S.C. § 2, Third Circuit precedent requires that the government establish two elements beyond a reasonable doubt: "(1) that the substantive crime has been committed; and (2) that the defendant charged with aiding and abetting knew of the commission of the substantive offense and acted with intent to facilitate it." ***United States v. Huet***, 665 F.3d 588, 596 (3d Cir. 2012); ***United States v. Petersen***, 622 F.3d 196, 208 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011). Similarly, the Sixth Circuit determined that in order to establish a violation of § 2 "the essential elements of aiding and abetting are (1) an act by the defendant that contributes to the commission of the crime, and (2) an intention to aid in the commission of the crime." ***United States v. Graham***, 622 F.3d 445, 450 (6th Cir. 2010) According to the Graham court "to prove that [the defendant] participated in the venture as something [] he wished to bring about and sought to make succeed." ***Id.*** (citations and punctuation omitted).

Criminal intent may be inferred from surrounding facts and circumstances. ***United States v. Campa***, 679 F.2d 1006, 1010-11 (1st Cir. 1982). The aiding and abetting statute is broader than a conspiracy charge because "it states a rule of criminal responsibility for acts which one *assists* another in performing." ***Nye & Nissen***, 336 U.S. at 620 (emphasis added). A crime is aided and abetted at the moment one "consciously shares in any criminal act" with a principal regardless of whether there is a conspiracy. ***Id***.

21.03[1] Need for Underlying Offense

In order to sustain a conviction under subsection 2(a), the government must present evidence showing that a principal committed an underlying offense and that the principal was aided and abetted by the accused. ***United States v. Elusma***, 849 F.2d 76, 78 (2d Cir. 1988); ***United States v. Martin***, 747 F.2d 1404, 1407-08 (11th Cir. 1984). The government is not required, however, to show that the principal was indicted, convicted or even identified. ***United States v. Powell***, 806 F.2d 1421, 1424 (9th Cir. 1986); ***Ray v. United States***, 588 F.2d 601, 603-04 (8th Cir. 1978). Moreover, the fact that the principal may have been acquitted of the underlying offense does not bar prosecution of the aider and abettor for the same offense. ***Standefer v. United States***, 447 U.S. 10, 14 (1980); ***Ray***, 588 F.2d at 603-04.

Under subsection 2(b), the government does not have to establish the guilt of the actor, but only that of the accused who caused the actor to commit the offense. ***United States v. Motley***, 940 F.2d 1079, 1082 (7th Cir. 1991). The government need only show that the aider and abettor caused the act to be performed. ***Id***.; ***United States v. Smith***, 891 F.2d 703, 711 (9th Cir. 1989).

21.03[2] Association Defined

Association with the criminal venture has been interpreted to mean that the defendant shared the criminal intent of the principal. *See* ***United States v. Spinney***, 65 F.3d 231, 233-36 (1st Cir. 1995) (circumstantial evidence, including evidence of 73 phone calls between defendant and principal in 19-day period preceding bank robbery, evidence that principal picked defendant up on day of robbery and then proceeded to "criss-cross the streets around" bank principal robbed, evidence of coordinated traffic maneuvers between defendant and principal later that same day, and evidence that defendant and principal abandoned their vehicles near each other, was sufficient to support jury finding that defendant possessed criminal intent); ***United States v. Moore***, 936 F.2d 1508, 1527 (7th Cir. 1991); ***United States v. Roan Eagle***, 867 F.2d 436, 445 n.15 (8th Cir. 1989); ***United States v. Winstead***, 708 F.2d 925, 927 (4th Cir. 1983).

In prosecutions under subsection 2(a), this means that the government must show that (1) the perpetrator had the requisite criminal intent to commit the underlying offense and (2) the aider and abettor had the same requisite intent. ***Perez***, 922 F.2d at 785; ***Labat***, 905 F.2d at 23; ***United States v. Lindell***, 881 F.2d 1313, 1323 (5th Cir. 1989); ***United States v. Gaskins***, 849 F.2d 454, 459 (9th Cir. 1988); ***United States v. Lard***, 734 F.2d 1290, 1298 (8th Cir. 1984); ***United States v. Sanborn***, 563 F.2d 488, 491 (1st Cir. 1977); *see also* ***United States v. Bancalari***, 110 F.3d 1425, 1430 (9th Cir. 1997) (jury must find that defendant knowingly and intentionally aided and abetted the principals in each essential element of the crime).

Under subsection 2(b), the government need only show that the one causing the commission of the prohibited act had the requisite criminal intent to commit the underlying offense. The intent of the actor who committed the criminal act is irrelevant.

United States v. Johnson, 132 F.3d 1279, 1285 (9th Cir. 1997); ***United States v. Rucker***, 586 F.2d 899, 905 (2d Cir. 1978).

The government may use circumstantial evidence to establish the aider and abettor's intent. ***Spinney***, 65 F.3d at 235-36; ***United States v. Castro***, 887 F.2d 988, 995-96 (9th Cir. 1989). Further, the government is not required to show that the aider and abettor knew every detail of the underlying crime. ***Perez***, 922 F.2d at 785; ***Campbell v. Fair***, 838 F.2d 1, 4 (1st Cir. 1988); ***United States v. Smith***, 832 F.2d 1167, 1170 (9thCir. 1987); ***Torres***, 809 F.2d at 433; ***Lard***, 734 F.2d at 1298; ***United States v. Sampol***, 636 F.2d 621, 676 (D.C. Cir. 1980).

21.3 [3] Participation and Success of Venture

In order to aid and abet, one must do more than merely be present at the scene of a crime and have knowledge of its commission. ***United States v. Ortiz***, 447 F.3d 28, 32-33 (1st Cir. 2006); ***United States v. Morrow***, 977 F.2d 222, 231 (6th Cir. 1992) (*en banc*); ***United States v. Esparsen***, 930 F.2d 1461, 1470 (10th Cir. 1991); ***Lindell***, 881 F.2dat 1323; ***Lard***, 734 F.2d at 1298; ***United States v. Burrell***, 496 F.2d 609, 610 (3d Cir. 1974). The element of participation requires the government to show some active participation or encouragement, or some affirmative act designed to further the crime. ***Morrow***, 977 F.2d at 231; ***Perez***, 922 F.2d at 785. Prosecutors should be aware that in a number of cases, courts of appeals have reversed aiding and abetting convictions after determining that the facts adduced at trial did not support a finding that the defendant was a participant in the offense. For example, in ***Burrell***, a transportation of stolen goods case, the Third Circuit reversed one defendant’s aiding and abetting conviction after concluding that, viewed in the light most favorable to the verdict, the evidence established only that the defendant had traveled with others engaged in the transport of stolen goods, that the defendant and the stolen goods had arrived at a certain foreign location on the same date, and that, on the date of arrival, further transport arrangements were made for the stolen goods. ***Id.*** at 614-15. The court noted that although there was evidence that the defendant had been present during discussions relating to the sale of the goods, there was no evidence to suggest whether the defendant knew that the goods were stolen or from whom they were stolen. ***Id.*** at 615; *cf.* ***Spinney***, 65 F.3d at 233-36 (affirming conviction as aider and abettor on circumstantial evidence of defendant’s involvement in bank robbery).

The “participation” and “seeking success of the venture” elements may be established by circumstantial evidence. *See* ***United States v. Leos-Quijada***, 107 F.3d 786, 794 (10th Cir. 1997); ***Smith***, 832 F.2d at 1170. Further, the evidence may be of "relatively slight moment." ***United States v. Issac-Sigala***, 448 F.3d 1206, 1210 (10th Cir. 2006) (internal quotation omitted); ***United States v. Folks***, 236 F.3d 384, 389 (7th Cir. 2001); ***Burrell***, 496 F.2d at 610; ***United States v. King***, 373 F.2d 813, 815 (2d Cir. 1967). While mere presence and association alone are insufficient to sustain a conviction under Section 2, they are factors that may be considered along with other circumstantial evidence establishing participation. ***United States v. Ivey***, 915 F.2d 380, 384 (8th Cir. 1990); ***Lindell***, 881 F.2d at 1323.

For example, in ***King***, the Second Circuit explained that, while merely providing company to a person engaged in criminal conduct is not sufficient to support an aiding and abetting charge, “‘evidence of an act of relatively slight moment may warrant a jury’s finding participation in a crime.’” 373 F.2d at 815 (quoting ***United States v. Garguilo***, 310 F.2d 249, 253 (2d Cir. 1962)). The court in ***King*** affirmed the defendant’s aiding and abetting conviction for his participation in carrying on the business of a non-bonded distillery based on evidence that the defendant had acted as lookout, assisted in handling the distilling equipment, and fled from the scene when arresting officers arrived. ***Id***. In a drug distribution case, the First Circuit affirmed the aiding and abetting conviction of a defendant who had gathered with others at a warehouse, traveled to another town in a refrigeration truck together with the others who had gathered, was present on the truck when there was talk of unloading marijuana, and spent the night waiting to unload a vessel that never arrived. ***United States v. Clifford***, 979 F.2d 896, 898-99 (1st Cir. 1992). The court characterized those acts as “secretive and suspicious” and determined that, from those acts alone, the jury could reasonably infer that the defendant had knowingly participated in the criminal venture to distribute drugs. ***Id***. at 899. Finally, “[w]hile innocent association with those involved in illegal activities can never form the sole basis for a conviction . . ., the existence of a close relationship between a defendant and others involved in criminal activity can, as a part of a larger package of proof, assist in supporting an inference of involvement in illicit activity.” ***United States v. Ortiz***, 966 F.2d 707, 713 (1st Cir. 1992) (citations omitted) (describing brother-in-law relationship between principal and defendant convicted of aiding and abetting drug trafficking).

21.4 PLEADING REQUIREMENTS

Because Section 2 does not define a separate offense, the defendant must be charged with a substantive offense as to which the he or she was an aider and abettor. ***Londono-Gomez v. INS***, 699 F.2d 475, 477 (9th Cir. 1983); ***United States v. Cowart***, 595 F.2d 1023, 1031 n.10 (11th Cir. 1979); ***United States v. Campbell***, 426 F.2d 547, 553 (2d Cir. 1970). It is well settled that Section 2 applies to all federal criminal offenses except those as to which Congress clearly provides to the contrary. *See* ***United States v. Hill***, 55 F.3d 1197, 1200 (6th Cir.1995); ***United States v. Frorup***, 963 F.2d 41, 42 n.1(3d Cir. 1992); ***United States v. Pino-Perez***, 870 F.2d 1230, 1233 (7th Cir. 1989); ***United States v. Sopczak***, 742 F.2d 1119, 1121 (8th Cir. 1984); ***United States v. Jones***, 678 F.2d 102, 105 (9th Cir. 1982); ***Breeze v. United States***, 398 F.2d 178, 192 (10th Cir. 1968); *see also* ***United States v. Southard***, 700 F.2d 1, 19-20 (1st Cir. 1983) (listing exceptions -- *e.g.*, a victim whose conduct significantly assisted in the commission of the crime, such as a person who pays extortion).

While it is preferable that an indictment charge a violation of Section 2 if the government intends to proceed on a theory of aiding and abetting, Section 2 need not be specifically alleged. ***Frorup***, 963 F.2d at 42 n.1; ***United States v. Vaughn***, 797 F.2d 1485, 1491 n.1 (9th Cir. 1986); ***United States v. Cook***, 745 F.2d 1311, 1315 (10th Cir. 1984); ***United States v. Tobon-Builes***, 706 F.2d 1092, 1099 n.3 (11th Cir. 1983); ***United States v. Beardslee***, 609 F.2d 914, 919 (8th Cir. 1979); ***United States v. Tucker***, 552 F.2d 202, 204 (7th Cir. 1977); ***United States v. McCambridge***, 551 F.2d 865, 871 (1st Cir. 1977) (collecting cases). All indictments for substantive offenses must be read as if the alternative provided by Section 2 were embodied in the indictment. ***United States v. Sabatino***, 943 F.2d 94, 99-100 (1st Cir. 1991); ***United States v. Gaskins***, 849 F.2d 454, 459 (9th Cir. 1988); ***United States v. Catena***, 500 F.2d 1319, 1323 (3d Cir. 1974); ***United States v. Bullock***, 451 F.2d 884, 888 (11th Cir. 1971).

One may be convicted of aiding and abetting even though it is not alleged in the indictment, provided that (1) the jury is properly instructed on the aiding and abetting charge and (2) the defendant had sufficient notice of the aiding and abetting charge and was not unfairly surprised. ***United States v. Martin***, 747 F.2d 1404, 1407 (11th Cir. 1984); ***Tucker***, 552 F.2d at 204; *see also* ***United States v. Gordon***, 641 F.2d 1281, 1284 (9th Cir. 1981) (omission of statutory citation from indictment not fatal to indictment if defendant is not misled); Fed. R. Crim. P. 7(c)(3) ("Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction").

If an indictment charges Section 2, it is not necessary for the indictment to state particulars such as who, when, how, or in what manner the defendant aided and abetted another in the commission of a substantive offense. *See* ***United States v. Garrison***, 527 F.2d 998, 999 (8th Cir. 1975).

21.5 APPLICATION IN TAX CASES

21.05[1] Aiding in Preparation/Filing of False Return: 26 U.S.C. § 7206(2)

Section 7206(2) of Title 26 makes it a felony to

> [w]illfully aid[] or assist[] in . . . the preparation or presentation under . . . the internal revenue laws . . . of a return, . . . which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return . . . .

This statute is known as the Internal Revenue Code's aiding and abetting provision, and applies not only to tax return preparers but to anyone who causes or aids in the filing of a false return. ***United States v. Sassak***, 881 F.2d 276, 277-78 (6th Cir. 1989); ***United States v. Hooks***, 848 F.2d 785, 789 (7th Cir. 1988); ***United States v. Williams***, 644 F.2d 696, 701 (8th Cir. 1981), *superseded on other grounds by statute*, Pub. L. 98-369, § 159(a)(1), 98 Stat. 696, *as recognized in* ***United States v. Brooks***, 174 F.3d 950 (8th Cir. 1999). Reference should be made to the discussion of this statute in the section of this Manual dealing with section 7206(2). *See* Section 13, *supra*.

In prosecutions under 18 U.S.C. 2(a), the government must prove that a criminally responsible person committed an underlying offense. Internal Revenue Code Section 7206(2), however, does not require proof that the assisted taxpayer was criminally responsible. *See* ***United States v. Griffin***, 814 F.2d 806, 811 (1st Cir. 1987); ***United States v. Motley***, 940 F.2d 1079, 1082-83 (7th Cir. 1991) (language of Section 7206(2) makes it clear that government does not have to show that the taxpayers had guilty knowledge). Consequently, in false return cases in which the taxpayer does not appear to be criminally culpable, 26 U.S.C. § 7206(2), rather than another offense and 18 U.S.C. § 2(a), should be charged.

21.5 [2] Filing False Claim for Refund: 18 U.S.C. § 287

Section 287 of Title 18 makes it a felony to "make[] or present[] . . . any claim upon or against the United States, . . . knowing such claim to be false, fictitious or fraudulent." 18 U.S.C. § 287. Sections 287 and 2(b) are commonly used in false claim for refund schemes.

For example, in ***United States v. Causey***, 835 F.2d 1289, 1290 (9th Cir. 1987), the Ninth Circuit upheld a defendant's convictions under 18 U.S.C. §§ 287 and 2 for causing 18 individuals to file false tax returns claiming refunds. The defendant argued on appeal that the evidence was insufficient to support the convictions because the government had failed to establish that the persons actually submitting the false claims knew them to be false. ***Id***. at 1291. Distinguishing between 18 U.S.C. § 2(a) and 18 U.S.C. § 2(b), the Ninth Circuit concluded that under subsection 2(b), a person may be guilty of causing a false claim to be presented to the United States even though he or she uses an innocent intermediary to actually pass on the claim to the United States. ***Id***. at 1292.

Consequently, in prosecutions for false refund claims, it is recommended that prosecutors charge Sections 287 and 2(b).

21.6 VENUE

Venue in an aiding and abetting charge is proper both in the district in which the underlying offense took place and in the district where the accessorial acts took place. ***United States v. Delia***, 944 F.2d 1010, 1013-14 (2d Cir. 1991); ***United States v. Griffin***, 814 F.2d 806, 810 (1st Cir. 1987); ***United States v. Winship***, 724 F.2d 1116, 1125 (5th Cir. 1984); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir. 1978); ***United States v. Kilpatrick***, 458 F.2d 864, 868 (7th Cir. 1972).

For a general discussion of venue in criminal tax cases, *see* Section 6.00, *supra*.

21.7 STATUTE OF LIMITATIONS

The statute of limitations for the offense of aiding and abetting is the statute of limitations applicable to the substantive offense. ***United States v. Musacchia***, 900 F.2d 493, 499 (2d Cir. 1990), *vacated in part on other grounds*, 955 F.2d 3, 4 (2d Cir. 1991).

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22.00 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS

22.01 STATUTORY LANGUAGE: 18 U.S.C. §§ 287, 286

§ 287. ***False, fictitious or fraudulent claims***

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

§ 286. ***Conspiracy to defraud the Government with respect to claims***

Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.[1]

22.02 TAX DIVISION POLICY

22.02[1] Policy

Title 18 false claims and false claims conspiracy charges are among the non-Title 26 statutes traditionally used in tax prosecutions that involve fraudulent refund schemes. Tax charges under these statutes often are brought against a defendant who filed multiple fictitious income tax returns claiming refunds of income tax in the same year, particularly when the defendant personally received and retained some or all of the proceeds.

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[1] For the felony offenses set forth in sections 286 and 287, the maximum permissible fine is $250,000 for individuals and $500,000 for corporations. Alternatively, if the offense has resulted in pecuniary gain to the defendant or pecuniary loss to another person, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571.

Many false refund claim cases could also be charged using 26 U.S.C. § 7206(1) or (2) (false returns),[2] or 18 U.S.C. § 1001 (false statements), § 1341 (mail fraud) or § 1343 (wire fraud). Section 287 is preferred to Section 7206 when the defendant pocketed the refund proceeds, because restitution for Title 18 offenses is more readily available than for Title 26 offenses. *See* 18 U.S.C. § 3663(a)(1). Also *see* Chapter 44, *infra*, for a full discussion of restitution for criminal tax offenses.

When a scheme involves many false claims, the prosecutor should consider mail fraud or wire fraud charges if they yield strategic advantages. Such situations may include cases in which conspiracy is not a viable charge; when a fraud-scheme charge would ensure the admission of all relevant evidence; or when a fraud-scheme charge would serve as a predicate for the government to charge money laundering, to pursue asset forfeiture or to seek full restitution.

If the tax return preparer willfully created a fraudulent refund return for an undercover agent and actually filed the false return by mail or electronic filing, it may be strategically useful to charge the defendant with a substantive offense for filing the undercover agent's return because the defendant will have no basis to attack the credibility of the undercover agent. The preparer may be prosecuted under 18 U.S.C. § 287 for filing the undercover agent's false return.

22.02[2] Authorization of Grand Jury Investigations in False Claim Cases

The Assistant Attorney General has delegated to United States Attorneys the authority to authorize grand jury investigations of false and fictitious claims in cases where, for a single tax year, an individual (other than a return preparer as defined in Section 7701(a)(36) of the Internal Revenue Code) has filed or conspired to file multiple tax returns on behalf of himself or herself, or has filed or conspired to file multiple tax returns in the names of nonexistent taxpayers or in the names of real taxpayers who do not intend the returns to be their own, with the intent of obtaining tax refunds to which the individual is not entitled.[3] *See* USAM 6-4.122(D), 6-4.243; Tax Division Directive No. 96.

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[2] The statute of limitations for offenses under 26 U.S.C. § 7206(1) and (2) is six years. *See* 26 U.S.C. § 6531(3) & (5).

[3] Cases involving schemes that recruit real individuals to file returns in their own names and under their correct Social Security numbers do not fall within the terms of the delegation of authority and must be referred to the Tax Division for authorization of the grand jury investigation.

These are known as "direct referral" cases, because the IRS is authorized to refer the cases directly to United States Attorneys. However, in every direct referral case, a copy of the letter requesting a grand jury investigation must be sent to the Tax Division.

22.03 GENERALLY

The purpose of 18 U.S.C. § 287 is to protect the government from false, fictitious, or fraudulent claims.[4] ***United States v. Montoya***, 716 F.2d 1340, 1344 (10th Cir. 1983); ***United States v. Maher***, 582 F.2d 842, 847-48 (4th Cir. 1978).

22.04 18 U.S.C. § 287 -- ELEMENTS

In order to establish a violation of 18 U.S.C. § 287, the following elements must be proved beyond a reasonable doubt:

1. The defendant made or presented a claim to a department or agency of the United States for money or property;
2. The claim was false, fictitious or fraudulent;
3. The defendant knew at the time that the claim was false, fictitious or fraudulent.

Johnson v. United States, 410 F.2d 38, 46 (8th Cir. 1969); ***United States v. Clark***, 577 F.3d 273, 285 (5th Cir. 2009); *see also* ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982) (holding that the signing and filing of a false tax return claiming a refund constituted a false claim under 18 U.S.C. § 287); ***United States v. Miller***, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976) (same), *abrogated on other grounds by* ***Boulware v. United States***, 552 U.S. 421, 436 (2008).

22.04[1] Claim Against the United States

To establish a violation of Section 287, the government must prove that the defendant filed or caused to be filed a claim against the United States, or any department

[4] The ***United States Attorneys' Manual*** (USAM) contains a general explanation of 18 U.S.C. § 287. USAM 9-42.001 and Criminal Resource Manual 921, 922.

or agency of the United States, for money or property. ***United States v. Neifert-White Co.***, 390 U.S. 228, 233 (1968); ***United States v. Jackson***, 845 F.2d 880, 883 (9th Cir. 1988); ***Johnson v. United States***, 410 F.2d 38, 44 (8th Cir. 1969); ***United States v. Mastros***, 257 F.2d 808, 809 (3d Cir. 1958) (*per curiam*). A tax return seeking a refund is a claim against the United States. ***United States v. Thayer***, 201 F.3d 214, 223 (3d Cir. 1999); ***United States v. Parsons***, 967 F.2d 452, 456 (10th Cir. 1992); ***United States v. Drape***, 668 F.2d 22, 26 (1st Cir. 1982). Proof that a return was filed may include the IRS transcript of the account in which the refund claim was made. *See* ***United States v. Bade***, 668 F.2d 1004, 1005 (8th Cir. 1982) (*per curiam*). Note, however, that it has been held that a taxpayer who attempts to pay taxes with a bad check has not filed a claim against the United States. *See* ***United States v. McBride***, 362 F.3d 360, 369-71 (6th Cir. 2004). In ***McBride***, the Sixth Circuit reasoned that, "[b]ecause [the defendant] never received any advance payments from the government to which he was not entitled, nor could his action of sending the IRS a bad check have possibly elicited any payment from the government, he cannot, as a matter of law, be found liable under § 287." ***Id.*** at 371-72. However, the presentation of a government check by a party who is not entitled to it constitutes a presentation of a false claim within the meaning of the False Claims Act. ***United States v. Branker***, 395 F.2d 881, 889 (2d Cir. 1968) (presentation of a false refund check for payment constitutes the making of a false claim against the United States under Section 287); ***Scolnick v. United States***, 331 F.2d 598, 599 (1st Cir. 1964) (endorsement and deposit for collection of a government check to which the depositor was not entitled constituted a false claim within the meaning of the civil false claims statute, 31 U.S.C. § 231); ***United States v. McLeod***, 721 F.2d 282, 284 (9th Cir. 1983) (same).

Although the language of the statute would appear to require that the government receive the claim, it does not require that the defendant present it directly to the government. For example, in ***United States v. Blecker***, 657 F.2d 629 (4th Cir. 1981), the Fourth Circuit held that presentation of a claim to an intermediary authorized to accept the claim for presentation to the government satisfied the "presentation" requirement of Section 287:

> [T]here was substantial evidence that [the corporate defendant] submitted invoices for hourly rates based on falsified resumes with knowledge that [the company employing the corporate defendant] would seek reimbursement for the payment of the invoices from the GSA. This evidence amply supported the government's charge that [the corporate defendant and the individual defendant, who was its president,] violated section 287 by submitting false claims to the

> government through an intermediary, and we find that theory of prosecution to be consonant with the language and meaning of the false claims statute.

Id. at 634.

Tax return preparers and electronic return originators should be considered intermediaries, and should not be characterized as "agents" of the IRS. *See* ***United States v. Hebeka***, 89 F.3d 279, 283-84 (6th Cir. 1996); ***Blecker***, 657 F.2d at 634; ***United States v. Catena***, 500 F.2d 1319, 1322 (3d Cir. 1974). The defendant need not be the person who actually filed the claim for refund. *See* 18 U.S.C. § 2; *see also* ***United States v. Davis***, 717 F.3d 28, 30-31 (1st Cir. 2013); ***Blecker***, 657 F.2d at 633. The offense is complete on the filing of the claim with the government. The statute does not require that the government pay or honor the claim. Thus, violations of Section 287 are chargeable even if the government has not lost money because of the false or fictitious claim. ***United States v. Coachman***, 727 F.2d 1293, 1302 (D.C. Cir. 1984); ***United States v. Miller***, 545 F.2d 1204, 1212 n.10 (9th Cir. 1976), *abrogated on other grounds by* ***Boulware v. United States***, 552 U.S. 421, 436 (2008).

The Third and Tenth Circuits have held that Section 287 does not require a defendant who presents a false claim directly to the federal government to know that he is presenting the claim to the federal government. ***United States v. Gumbs***, 283 F.3d 128, 135-36 (3d Cir. 2002); ***United States v. Montoya***, 716 F.2d 1340, 1344-45 (10th Cir. 1983). The Third Circuit, however, reserved deciding whether a defendant who causes an intermediary to submit a false claim to the government under Sections 287 and 2(b) must know that he is causing the intermediary to submit a false claim and also that the claim will be presented to the federal government. ***Gumbs***, 283 F.3d at 136.

22.04[2] False, Fictitious, or Fraudulent Claim

22.04[2][a] False, Fictitious, or Fraudulent

Section 287 is phrased in the disjunctive. Thus, charges under the statute may be based on proof that a claim submitted to the government is either false, fictitious, or fraudulent. ***United States v. Murph***, 707 F.2d 895, 896-97 (6th Cir. 1983) (*per curiam*) ("[T]he government may prove and the trial judge may instruct in the disjunctive form used in the statute."); ***United States v. Blecker***, 657 F.2d 629, 634 (4th Cir. 1981); ***United States v. Irwin***, 654 F.2d 671, 683 (10th Cir. 1981), *overruled on other grounds by* ***United States***

v. Daily, 921 F.2d 994, 1004 & n.11 (10th Cir. 1990); ***United States v. Milton***, 602 F.2d 231, 233 n.5 (9th Cir. 1979); ***United States v. Maher***, 582 F.2d 842, 847 (4th Cir. 1978). The conduct proscribed by Section 287 has been defined as follows:

> A claim is false or fictitious within the meaning of § 287 if untrue when made, and then known to be untrue by the person making it or causing it to be made. A claim is fraudulent if known to be untrue, and made or caused to be made with the intent to deceive the Government agency to whom submitted.

Irwin, 654 F.2d at 683 n.15 (internal quotation marks omitted) (quoting ***Milton***, 602 F.2d at 233 & n.6). A return may be false or fictitious under the statute if the facts and figures used on the return are fictitious even though the taxpayer might be entitled to a refund if a true return were filed. For example, an individual who recruits others to file false returns based on fictitious reports of wages and withholding (Forms W-2) could be charged under Section 287 even if the recruited taxpayers were legally entitled to refunds. *See* ***United States v. Gieger***, 190 F.3d 661, 666-67 (5th Cir. 1999); ***United States v. Leahy***, 82 F.3d 624, 634 n.11 (5th Cir. 1996) (contractor violated Section 286 even though the false claims were irrelevant to the total amount paid by the government to the contractor). Similarly, a return may be false under Sections 286 and 287 if the defendant files a correct return in the name of another taxpayer in an attempt to obtain for himself or herself the refund that is due to the other taxpayer. *See, e.g.*, ***Kercher v. United States***, 409 F.2d 814, 818 (8th Cir. 1969) ("What Kercher was trying to do . . . was to lay claim . . . to what were claims of the taxpayers against the government. Therein lies the falsity and § 287 has appropriate application.").

22.04[2][b] Materiality

Section 287 does not specifically require that a claim be false as to a "material" matter. Several circuits have expressly held that materiality is not an essential element of Section 287 and need not be alleged in an indictment charging a violation of that statute. *See* ***United States v. Lawrence***, 405 F.3d 888, 899 (10th Cir. 2005); ***United States v.Nash***, 175 F.3d 429, 433-34 (6th Cir.1999); ***United States v. Upton***, 91 F.3d 677, 684-685 (5th Cir. 1995); ***United States v. Taylor***, 66 F.3d 254, 255 (9th Cir. 1995); ***United States v. Parsons***, 967 F.2d 452, 455 (10th Cir. 1992); ***United States v. Elkin***, 731 F.2d 1005, 1009-10 (2d Cir. 1984), *overruled on other grounds by* ***United States v. Ali***, 68 F.3d 1468 (2d Cir. 1995). However, the Eighth Circuit has held that materiality is an element of Section 287, and the Fourth Circuit has suggested as much in *dictum*. *See* ***United States v. Pruitt***, 702 F.2d 152, 155 (8th Cir. 1983); ***United States v. Snider***, 502 F.2d 645, 652 n.12 (4th Cir. 1974). Similarly, the Fifth Circuit, which had held in ***United States v. Upton***, 91 F.3d 677, 684-85 (5th Cir. 1995) that materiality was not an element of the offense, later suggested in dicta that the better practice would be to give a materiality instruction in a Section 287 case. ***United States v. Foster***, 229 F.3d 1196, 1196 n.2 (5th Cir. 2000). The Third Circuit found that materiality is not **always** an element of Section 287. ***United States v. Saybolt***, 577 F.3d 195, 199-200 (3d Cir. 2009). The Third observed that Section 287 forbids the filing of claims that are false, fictitious, or fraudulent. Since the statute is written in the disjunctive, each word must be given separate meanings. ***Id.*** The court then stated, "[W]e read Section 287 to demand a showing that the claim was known to be either 'fraudulent,' which would require proof of materiality, or 'false' or 'fictitious,' which would not require proof of materiality." ***Id.*** at 200. Note that in those circuits that have held that materiality is an element of Section 287, the issue must be submitted to the jury. *See* ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1995).

In ***United States v. Neder***, 527 U.S. 1, 20-25 (1999), the Supreme Court held that materiality is an element of the mail fraud, wire fraud, and bank fraud statutes, despite the fact that the term "materiality" was not mentioned in any of them.[5] The Court noted that the term "defraud" had a settled meaning at common law that included the requirement of materiality and that the inference was that Congress meant to incorporate the established meaning of that term. ***Id.*** at 22. Thus, applying ***Neder***, a court may read the term "fraudulent" in Section 287 to require that the claim be material and that this question be submitted to the jury. *See* ***United States v. Foster***, 229 F.3d 1196, 1196 & n.1 (5th Cir. 2000) (while expressly not deciding the issue, the Fifth Circuit reads ***Neder*** to require a materiality instruction and states that "the better practice would be to give the instruction in a § 28[7] false claim offense").[6] But even assuming that ***Neder*** supports the conclusion

[5] In ***United States v. Wells***, 519 U.S. 482, 490-94 (1996), the Supreme Court laid out the approach a court should follow in determining whether a statute requires proof of a particular item as an element of the offense.

[6] In addressing "materiality" in the criminal tax context, the Supreme Court stated in ***Neder*** that "a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed,'" and the Court noted that several courts had determined that "any failure to report income is material." ***Neder,*** 527 U.S. 16 (citations omitted). The Court concluded that, under either formulation, no jury could reasonably find that the defendant's failure to report substantial amounts of income on his tax returns was not a material matter. ***Id***. Applying ***Neder*** to a Section 287 prosecution for filing false claims for tax refunds involving so-called "black tax returns," the Fifth Circuit concluded, similarly to ***Neder***, that the defendant's three false statements (each seeking a refund of "black taxes" in the amount of $43,209) were material to the tax refund claims. ***Foster***, 229 F.3d at 1197. The court stated, "[T]here is no doubt that the amounts claimed in the 'black tax returns' that [the

that materiality is an element of a Section 287 charge that the defendant made a fraudulent claim for a refund (*but see* ***Neder***, 527 U.S. at 23 n.7), it would seem that the holding of ***Neder*** could be avoided by a charge that the defendant filed a false claim for a refund, omitting any reference in the charge to "fraudulent."

For further discussion of materiality, *see* Section 12.08, *supra*.

22.04[3] Knowledge -- Intent -- Willfulness

Section 287 requires the government to prove that a false claim against the government was made, "knowing such claim to be false, fictitious, or fraudulent . . . ." A Section 287 indictment should allege such knowledge, and the proof that the defendant knew the return was false is part of the government's burden of proof. ***United States v. Miller***, 728 F.3d 768, 774-75 (8th Cir. 2013); ***United States v. Holloway***, 731 F.2d 378, 380-81 (6th Cir. 1984).[7]

It is not necessary to allege willfulness in the indictment. The term "willfully" is not used in Section 287 and is not "an essential element" of § 287. ***United States v. Irwin***, 654 F.2d 671, 682 (10th Cir. 1981); ***United States v. Catton***, 89 F.3d 387, 392 (7th Cir. 1996).

The circuits vary, however, on the proof of intent necessary to convict for a violation of Section 287. In ***United States v. Maher***, 582 F.2d 842, 847 (4th Cir. 1978), the Fourth Circuit approved a jury instruction stating that, under Section 287, criminal intent "could be proved by either a showing that the defendant was aware he was doing something wrong or that he acted with a specific intent to violate the law." In ***United States v. Milton***, 602 F.2d 231, 234 (9th Cir. 1979), the court held that no instruction on "intent to defraud" is necessary where a false claim is charged (because it is not an element of the offense), but left open whether an "intent to deceive" is an element of a charge of submitting a "fraudulent" claim. ***Id***. at 233 & n.7. The Eighth Circuit, in ***Kercher v. United States***,

defendant] assisted with were as material as they were unjustified. The huge scope of IRS's processing and review activities makes it inevitable that a sensible threshold of materiality must be applied to irregularities planted in tax refund claims. Were it not so, taxpayers would be encouraged to take advantage of IRS's practical inability to review each return individually." ***Id***.

[7] Although the element of knowledge can sometimes be established through proof of "willful blindness," care should be exercised in seeking and framing appropriate jury instructions. *See* Section 8.08[4], *supra*.

409 F.2d 814, 817 (8th Cir. 1969), did not draw a distinction between false and fraudulent claims, but held without elaboration that Section 287 requires proof of criminal intent.

22.05 18 U.S.C. § 286 -- ELEMENTS

Chapter 23 of this Manual discusses the law of conspiracy in detail. This section addresses only those aspects of 18 U.S.C. § 286 that differ from the general conspiracy to defraud statute, 18 U.S.C. § 371. For a further discussion of the differences between Section 286 and Section 371, see ***United States v. Lanier***, 920 F.2d 887, 891-95 (11th Cir. 1991).

The courts of appeals are not uniform in their descriptions of the elements of a Section 286 offense. The Sixth Circuit has held that the necessary elements are: "(1) the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; (2) the claim was false, fictitious, or fraudulent; (3) the defendant knew or was deliberately ignorant of the claim's falsity, fictitiousness, or fraudulence; (4) the defendant knew of the conspiracy and intended to join it; and (5) the defendant voluntarily participated in the conspiracy." ***United States v. Dedman***, 527 F.3d 577, 593-94 (6th Cir. 2008). In contrast, the Fifth Circuit has held that, in order to establish a violation of § 286, the government need only prove "that the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; that the claim was false, fictitious, or fraudulent; and that the defendant knew at the time that the claim was false, fictitious, or fraudulent." ***United States v. Leahy***, 82 F.3d 624, 633 (5th Cir. 1996).

The crime proscribed by Section 286 is entering into an agreement to defraud the government in the manner specified. In order to convict, the government must prove that the defendant agreed to engage in a scheme to defraud the government[8] and knew that the objective of the scheme was illegal. The government need not charge or establish an overt act undertaken in furtherance of the conspiracy in order to prove a violation of Section 286 because, unlike Section 371, an overt act is not an element of a Section 286 conspiracy. *See* ***Dedman***, 527 F.3d at 594 n.7; ***Lanier***, 920 F.2d at 892.[9] The government must also

[8] *See* discussion of *United States v. Neder*, 527 U.S. 1 (1999), *supra*, § 22.04[2][b].

[9] The Eleventh Circuit has suggested that § 286 has an overt act requirement. *See* ***United States v. Gupta***, 463 F.3d 1182, 1194 (11th Cir. 2006). However, ***Gupta*** derives the overt act requirement from a case involving a conspiracy under 18 U.S.C. § 371, rather than 18 U.S.C. § 286. *See* ***Gupta***, 463 F.3d at 1194 (quoting ***United States v. Suba***, 132 F.3d 662, 672 (11th Cir. 1998)).

prove that the conspirators agreed to defraud the government by obtaining the payment of false claims against the government. There is no requirement that the coconspirators actually obtained the payment or that the government prove that any steps were taken to consummate the filing of a false claim, so long as the existence of the agreement can be proved. *Cf.* ***United States v. Coachman***, 727 F.2d 1293, 1302 (D.C. Cir. 1984). As a practical matter, the proof in Section 286 cases generally does not differ from proof in Section 371 tax cases, because in most false claims conspiracy cases, the existence of the agreement will be proved by acts that were undertaken furthering the conspiracy or in consummating the attempt to obtain payment of the claim.[10]

22.06 VENUE

The general venue statute provides that a prosecution can be brought in any district where an offense was begun, continued, or completed. 18 U.S.C. § 3237(a). Venue has been found proper where the claim was made or prepared or where the claim was presented to the government, *see* ***United States v. Leahy***, 82 F.3d 624, 633 (5th Cir. 1996); ***United States v. Fahnbulleh***, 752 F.3d 470, 477 (D.C. Cir. 2014); ***United States v. Massa***, 686 F.2d 526, 528 (7th Cir. 1982); ***United States v. Blecker***, 657 F.2d 629, 632 (4th Cir. 1981), and where the claim was acted upon, *see* ***United States v. Ebersole***, 411 F.3d 517, 530-33 (4th Cir. 2005); ***Fuller v. United States***, 110 F.2d 815, 817 (9th Cir. 1940). In electronic filing cases, venue may be proper in the district in which the false return was submitted to a preparer or electronic originator, in addition to the districts in which it was prepared or filed with the IRS.

Venue may be proved either by direct or circumstantial evidence. It need only be established by a preponderance of the evidence, not by proof beyond a reasonable doubt. Proof of venue, although an essential element of the government's proof, has been held to be more akin to jurisdiction than to a substantive element of the crime. Therefore, where venue is not disputed, it may be ruled on by the court as a matter of law and need not be submitted to the jury with an instruction. ***Massa***, 686 F.2d at 530-31. *See* Chapter 6, *supra*, for a general discussion of venue, and § 23.09, *infra*, for a discussion of venue for conspiracy charges.

[10] There is a sample section 286 indictment included in the forms in this Manual.

22.07 STATUTE OF LIMITATIONS

Section 3282 of Title 18 provides a five-year statute of limitations for crimes for which a period of limitations is not otherwise specified. At least three cases state that the general five-year statute applies to § 286 and § 287 offenses. *See* ***United States v. Burdix-Dana***, 149 F.3d 741, 742 (7th Cir. 1998); *see also* ***United States v. Barrera***, 444 Fed. App'x 16, 25 (5th Cir. 2011); ***United States v. Mikanda***, 416 Fed. App'x 126, 128 (3d Cir. 2011). Those cases are consistent with the Tax Division's practice. Where a § 286 offense or a § 287 offense occurred more than five years prior (but less than six years), it is the Tax Division's practice and recommendation to charge the offense as one under § 7206.

"[O]ffenses arising under the internal revenue laws," have a default limitations period of 3 years, 26 U.S.C. § 6531, unless the offense falls within one of a number of enumerated categories -- including "offenses involving the defrauding or attempting to defraud the United States or any agency thereof," § 6531(1) -- in which case the offense has an extended limitations period of 6 years. The Tax Division is not aware of any cases holding that offenses under § 286 and § 287 have a six year limitations period. Without categorically foreclosing the possibility that there may be a basis for arguing for a six year limitations period for § 286 and § 287 offenses in an appropriate case, the Tax Division recommends bringing false claim cases within five years of the commission of the offense.

22.08 THE MECHANICS OF A FALSE RETURN

In general, most false return schemes are based on Forms W-2 that are false or fictitious. The paper refund fraud schemes generally involve one individual filing multiple false returns on which refunds are claimed to be due. Typically, a fictitious Form W-2 showing income tax withheld in excess of the computed tax liability is used to generate the false refund claim. In some instances, the Form W-2 may show a real employer and the proper employer identification number (EIN), while in other schemes both the employer and the identification number are fictitious. Although less common, some false returns are based on a fictitious Schedule C (reporting the income of a self-employed individual) or a false corporate income tax return (Form 1120) and fictitious quarterly estimated tax returns.

In some schemes, the individual or individuals involved obtain a list of names and Social Security numbers (SSN) of persons who probably will not file income tax returns, and use those names and SSNs on the fictitious returns. In other instances, the name and SSN of the "taxpayer" are fictitious. The fictitious refunds generally are all directed to a common address or a mail drop. Such schemes are relatively simple and do not present unusual problems in developing sufficient facts to prosecute those responsible. Once the targets have been identified and linked to the false returns, prosecution is usually straightforward.

Electronic Filing (ELF) schemes are typically larger and more organized, and involve more participants than a false paper return scheme. Recruiters, or "runners," recruit individuals to act as "taxpayers." One or more of the participants prepare false W-2s (and, in some cases, the false return as well) for each "taxpayer," using the "taxpayer's" real name and SSN. The false Forms W-2 generally show an amount of income that would entitle the "taxpayer" to claim the Earned Income Credit as part of the refund. (The Earned Income Credit is a refundable credit for low-income taxpayers. It offsets tax liability and the portion of it that exceeds the tax due is payable directly to the taxpayer.)

If only Forms W-2 were prepared, a recruiter, or runner, escorts each "taxpayer" to a tax return preparer's office, where the "taxpayer" requests a return to be prepared from the phony W-2s and other information supplied by the runners. If the participants in the scheme prepared a complete return, the runner escorts the "taxpayer" to an Electronic Return Originator (ERO), where the return is filed using the "taxpayer's" name and SSN. In either case, the "taxpayer" applies for a refund anticipation loan. When the proceeds of the loan are available (usually within one or two days), the runner and the "taxpayer" pick up the check and cash it at a check cashing service. The "taxpayer" receives a portion of the loan amount and the participants split the remainder of the funds. Many false claims for refund are just under the maximum refund anticipation loan limit (generally under $5,000). ELF schemes may involve as few as one or two returns, or as many as hundreds of returns and over $1,000,000 in false claims. One scheme involved 23 individuals and false claims exceeding $2 million over a period of several months. Other schemes have also exceeded $1 million in false claims.[11]

[11] It appears that 18 U.S.C. § 287 cannot be used in ELF cases in which the return preparer or ERO has not transmitted the return to the IRS. Section 287 punishes those false claims that an individual "makes or presents" to the government, but does not punish attempts. Where the preparer or ERO has notified the IRS of a suspicious return and has not transmitted that return, the individual(s) who attempted to file the return should be charged with making a false statement in a matter within the jurisdiction of the IRS, in violation

Another Section 287 scheme involves filing fraudulent federal income tax returns and other documents, including false Forms 1099-OID and Schedules B. The return preparer – who may or may not be the taxpayer -- fabricates federal income tax withholdings on tax returns, resulting in fraudulent claims for refund. The district court in ***United States v. McIntyre*** described such a scheme as follows:

> IRS Forms 1099–OID are used by issuers of financial instruments generating original issue discount ("OID") to report OID income and any federal income tax withheld from that income. OID income refers to the difference between the discounted price at which a debt instrument is sold at issuance and the stated redemption price at maturity; it is taxable as interest over the life of the obligation. IRS Forms Schedule B are used to report interest and dividend income, and are attached to IRS Forms 1040. The fraudulent Forms 1099–OID that [the return preparers] prepare and submit with returns they prepare falsely state that [the taxpayers] are "payees" who receive OID income from their creditors. The fraudulent Forms 1099–OID typically show false income paid by a [taxpayer's] creditors to the [taxpayer]. Some of these forms even show the [taxpayer] paying OID income to himself.[12]

United States v. McIntyre, 715 F. Supp. 2d 1003, 1006-07 (C.D. CA 2010) (internal citations omitted). Thus, through this scheme, nonexistent withheld taxes reported in the returns that are prepared and filed result in sometimes massive undeserved claimed refunds.

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of 18 U.S.C. § 1001. A false statement punishable under Section 1001 need not be submitted directly to the government. *See, e.g.*, ***United States v. Suggs***, 755 F.2d 1538, 1542 (11th Cir. 1985); ***United States v. Blecker***, 657 F.2d 629, 634 (4th Cir. 1981).

[12] This scheme is based on a tax-defier theory that has been described as implausible and clearly nonsense. "Under this theory, there exists an 'unrestricted right for collections and return of funds/securities' issued to every child born in the United States. . . *see* [] ***United States v. Weldon***, No. 1:08–cv–01643–LJO–SMS, 2010 WL 1797529, * 2 (E.D. CA May 4, 2010) (discussing the 'redemption' or 'charge-back' theory). The birth certificates issued to such children become a registered security representing that child's life-long labor on a general average basis. The security is held in trust by the United States government, in whom the children are its stockholders, as a redeemable bond. The Social Security Administration tracks each persons' funds. Individuals may access the funds held in trust by filing an IRS Form 1099. This theory has been routinely rejected in all other jurisdictions. *See* ***Weldon***, 2010 WL 1797529, at * 3." ***United States v. Jones***, 2011 WL 2680742, *5 (D. ID 2011); *see also* ***United States v. Haines***, 2013 WL 3354421 (W.D. WA 2013); ***United States v. Beeman***, 2011 WL 2601959 (W.D. PA 2011); ***United States v. Knupp***, 2010 WL 2245551 (N.D. GA 2010).

22.09 SENTENCING GUIDELINES CONSIDERATIONS

Section 287 of Title 18 prohibits the presentation of false, fictitious, or fraudulent claims to the government. Similarly, 18 U.S.C. § 286 prohibits conspiracies to defraud the government by obtaining or aiding to obtain the payment of any false, fictitious, or fraudulent claim. In the criminal tax context, these statutes generally apply to individuals who file income tax returns claiming false or fraudulent refunds of income tax.

The Statutory Index, found in Appendix A of the sentencing guidelines, provides a list to help determine the offense guidelines applicable to statutes of conviction. This Statutory Index lists USSG § 2B1.1 as the applicable guideline for violations of 18 U.S.C. §§ 286 and 287. By its own terms, Section 2B1.1 governs larceny, embezzlement, and other forms of theft; offenses involving stolen property; property damage or destruction; fraud and deceit; forgery; and offenses involving altered or counterfeit instruments other than counterfeit bearer obligations of the United States. Section 2B1.1 also includes, however, a cross-reference provision that instructs the court to use a different guideline when certain circumstances are present. Specifically, when the case involves false, fictitious, or fraudulent statements and "the conduct set forth in the count of conviction establishes an offense specifically covered by another guideline," the court is to apply that other guideline. USSG § 2B1.1(c)(3[13] The application note for this provision makes clear that, when a defendant is convicted under a general fraud statute but the conduct underlying the count of conviction is covered by a more specific guideline, the sentencing court should apply the more specific guideline. USSG § 2B1.1, comment. (n.15).

The Tax Division takes the position that the tax guidelines apply when a defendant has been convicted of filing a false claim for a tax refund in violation of 18 U.S.C. § 287 or conspiring to file a false claim for a tax refund in violation of 18 U.S.C. § 286. Although the statutes are not tax statutes, the offense conduct relates to a tax scheme. When a defendant is convicted of filing a false claim for a tax refund, the defendant has necessarily filed a false tax return. This conduct is specifically covered by Section 2T1.1, which applies to tax offenses. Relying on the cross-reference provision, Section 2B1.1(c)(3), sentencing courts should use Section 2T1.1 when a defendant has been convicted of filing a false claim for a tax refund.

[13] This provision does not apply to offenses listed in Section 2B1.1(c)(1) and Section 2B1.1(c)(2), which are offenses involving firearms, explosives, or arson.

This position is supported by case law in which several courts have held that Section 2T1.1 applies to a false claim for a tax refund when the defendant has been convicted under 18 U.S.C. § 286 or § 287. *See* ***United States v. Brisson***, 448 F.3d 989, 991-92 (7th Cir. 2006) ("Brisson's offense conduct was at heart a scheme to file fraudulent tax returns and thus could be considered on a par with tax fraud") (internal quotation marks omitted); *United States v. Barnes*, 324 F.3d 135, 139-40 (3d Cir. 2003); ***United States v. Aragbaye***, 234 F.3d 1101, 1105-06 (9th Cir. 2000); *but cf.* ***United States v. Baldwin***, 774 F.3d 711, 733 (11th Cir. 2014) (applying Section 2B1.1 where the defendant's scheme "was not simply to file fraudulent tax returns, impede the IRS . . ., or counsel others to falsify their own returns[,]" but was instead a broader attempt to enrich himself by stealing identities, defrauding his victims, and obtaining and using fraudulent debit cards).

Accordingly, the prosecutor should request the court to apply the provisions of Section 2T1.1 when the defendant has been convicted of filing a false claim for a tax refund in violation of 18 U.S.C. § 287 or of conspiring to file a false claim for a tax refund in violation of 18 U.S.C. § 286. We reach this conclusion because, as noted, filing a false claim for a tax refund is essentially a tax offense. Thus, applying Section 2T1.1 will achieve one of the sentencing goals set forth in 18 U.S.C. § 3553 -- "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *See* 18 U.S.C. § 3553(a)(6). Moreover, this approach has the advantage of simplifying guidelines calculations in cases involving defendants who have been convicted of both 18 U.S.C. §§ 286/287 and Title 26 offenses, since the intended losses from all of the offenses would be aggregated under a single guideline. *See* USSG §3D1.2(d).

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23.00 CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD THE UNITED STATES

23.01 STATUTORY LANGUAGE: 18 U.S.C. § 371

Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Under 18 U.S.C. § 3571, the maximum fine under Section 371 for felony offenses is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

23.02 GENERALLY

The criminal tax statutes in Title 26 of the United States Code do not include a statute for the crime of conspiracy.[1] As a result, tax-related conspiracies are generally prosecuted under 18 U.S.C. § 371, the general conspiracy statute in Title 18.

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[1] 26 U.S.C. § 7214(a)(4) contains a provision prohibiting conspiracy to defraud the United States. However, this statute only applies to officers and employees of the United States who conspire with any other person to defraud the government.

Section 371 defines two types of conspiracies: (1) conspiracies to commit a specific federal offense ("any offense against the United States") and (2) conspiracies "to defraud the United States."

A person violates the first clause of Section 371 (the "offense clause") by conspiring or agreeing to engage in conduct that is prohibited by a federal criminal statute. In criminal tax prosecutions, that typically involves agreeing to commit substantive Title 26 offenses, such as attempted income tax evasion (26 U.S.C. § 7201) or filing false income tax returns (26 U.S.C. § 7206). *See, e.g.*, ***United States v. Searan***, 259 F.3d 434, 441-42 (6th Cir. 2001); ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991).

A person violates the second clause of Section 371 (the "defraud clause") by agreeing to defraud the United States. In this context the word "defraud" includes not only obtaining money or property (as under the mail- and wire-fraud statutes in Title 18), but also deceptively obstructing governmental operations: "To conspire to defraud the United States means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924); *see also* ***Dennis v. United States***, 384 U.S. 855, 861 (1966) (defining "defrauding" the United States in this context as "impairing, obstructing or defeating the lawful function of any department of Government."). When the federal agency being cheated out of money or property or deceptively obstructed is the Internal Revenue Service, such a conspiracy is known as a "*Klein* conspiracy," after ***United States v. Klein***, 247 F.2d 908 (2d Cir. 1957). *See, e.g.*, ***United States v. Hough***, 803 F.3d 1181, 1187 (11th Cir. 2015) ("conspiracy to defraud the IRS . . . is commonly called a *Klein* conspiracy, after the first decision to recognize it"); ***United States v. Mubayyid***, 658 F.3d 35, 57 (1st Cir. 2011).

The body of law on conspiracy covers a large number of issues that have been thoroughly analyzed and summarized in various treatises and other sources. *See, e.g.,* Paul Marcus, ***Prosecution and Defense of Criminal Conspiracy Cases*** (2008); 2 Kevin F. O'Malley, Jay E. Grenig, & William C. Lee, ***Federal Jury Practice and Instructions: Criminal***, ch. 31 (5th Ed. 2000) (successor to Devitt & Blackmar); Abraham S.

Goldstein, ***Conspiracy to Defraud the United States***, 68 Yale L.J. 405 (1959). Accordingly, the following discussion is intended to highlight only those issues relevant to criminal tax prosecutions.

23.03 ELEMENTS

Conspiracies under both the offense clause and the defraud clause of 18 U.S.C. § 371 require three elements to be proved beyond a reasonable doubt:

1. The existence of an agreement by two or more persons to commit an offense against the United States or to defraud the United States;

2. The defendant's knowing and voluntary participation in the conspiracy; and

3. The commission of an overt act in furtherance of the conspiracy.

United States v. Falcone, 311 U.S. 205, 210 (1940); ***United States v. Ngige***, 780 F.3d 497, 503 (1st Cir. 2015); ***United States v. Svoboda***, 347 F.3d 471, 476 (2d Cir. 2003); ***United States v. Whiteford***, 676 F.3d 348, 357 (3d Cir. 2012); ***United States v. Fleschner***, 98 F.3d 155, 159-60 (4th Cir. 1996); ***United States v. Njoku***, 737 F.3d 55, 64 (5th Cir. 2013); ***United States v. Douglas***, 398 F.3d 407, 413 (6th Cir. 2005); ***United States v. Mealy***, 851 F.2d 890, 895-96 (7th Cir. 1988); ***United States v. Hayes***, 574 F.3d 460, 472 (8th Cir. 2009); ***United States v. Montgomery***, 384 F.3d 1050, 1062 (9th Cir. 2004); ***United States v. Hanzlicek***, 187 F.3d 1228, 1232-33 (10th Cir. 1999) (adding a fourth element of "interdependence"); ***United States v. Hough***, 803 F.3d 1181, 1187 (11th Cir. 2015); ***United States v. Treadwell***, 760 F.2d 327, 333 (D.C. Cir. 1985).

23.04 AGREEMENT

23.04[1] Proof of Agreement

The essence of the crime of conspiracy is the agreement. ***United States v. Falcone***, 311 U.S. 205, 210 (1940); ***Iannelli v. United States***, 420 U.S. 770, 785 n.17 (1975). Without an agreement, there can be no conspiracy. ***Ingram v. United States***, 360 U.S. 672, 677-78 (1959). Because the agreement is the essence of a conspiracy, the success of the conspiracy is irrelevant. ***United States v. Jimenez Recio***, 537 U.S. 270, 274-75 (2003); *see also* **United States v. Nguyen**, 246 F.3d 52, 54 (1st Cir. 2001); ***United States v. Labat***, 905 F.2d 18, 21 (2d Cir. 1990); ***United States v. Jannotti***, 673 F.2d 578, 591 (3d Cir. 1982) (en banc); ***United States v. Littlefield***, 594 F.2d 682, 684 (8th Cir. 1979); ***United States v. Thompson***, 493 F.2d 305, 310 (9th Cir. 1974). The agreement to commit an unlawful act is "a distinct evil, dangerous to the public," which "may exist and be punished whether or not the substantive crime ensues." ***Salinas v. United States***, 522 U.S. 52, 65 (1997). A defendant may be charged with conspiracy as well as the substantive offense that served as the object of the conspiracy. *See* ***Iannelli***, 420 U.S. at 777-78, 790-91; ***Pinkerton v. United States***, 328 U.S. 640, 643 (1946).

The agreement need not be expressly stated, be in writing, or cover all the details of how it is to be carried out. *See, e.g.,* ***United States v. Aubin,*** 87 F.3d 141, 145 (5th Cir. 1996); ***United States v. Boone***, 951 F.2d 1526, 1543 (9th Cir. 1992); ***United States v. DePew***, 932 F.2d 324, 326 (4th Cir. 1991); ***United States v. Pearce***, 912 F.2d 159, 161 (6th Cir. 1990); ***United States v. Powell***, 853 F.2d 601, 604 (8th Cir. 1988); ***United States v. Elledge***, 723 F.2d 864, 868 (11th Cir. 1984). The government is not required to prove that the members of the conspiracy directly stated to each other the purpose of the agreement or all of the details of the agreement. *See* **United States v. Gonzalez**, 940 F.2d 1413, 1426-27 (11th Cir. 1991); ***United States v. Schultz***, 855 F.2d 1217, 1221 (6th Cir. 1988). The existence of an agreement may be proven inferentially, from the actions and statements of the conspirators or from the circumstances surrounding the scheme. ***Glasser v. United States***, 315 U.S. 60, 80 (1942), *superseded on other grounds by statute, as recognized by* **Bourjaily v. United States**, 483 U.S. 171, 177-78 (1987); ***United States v. McKee***, 506 F.3d 225, 238 (3d Cir. 2007); ***United States v. Onyiego***, 286 F.3d 249, 254-55 (5th Cir. 2002); ***United States v. Collins***, 78 F.3d 1021, 1037 (6th Cir. 1996); ***United States v. Cruz***, 981 F.2d 613, 616 (1st Cir. 1992); ***United States v. Young***, 954 F.2d 614, 618-19 (10th Cir. 1992); ***United States v. Penagos***, 823 F.2d 346, 348 (9th Cir. 1987); ***United States v. Hoelscher***, 764 F.2d 491, 494 (8th Cir. 1985); ***United States v. Mariani***, 725 F.2d 862, 865-66 (2d Cir. 1984).

23.04[2] Two or More Persons

A defendant cannot conspire with himself or herself. ***Morrison v. California***, 291 U.S. 82, 92 (1934). In order to establish the existence of a conspiratorial agreement under Section 371, the government must show that the defendant and at least one other person reached an understanding or agreement to carry out the objective of the conspiracy. *See* ***United States v. Rosenblatt***, 554 F.2d 36, 38 & n.2 (2d Cir. 1977); ***United States v. Chase***, 372 F.2d 453, 459 (4th Cir. 1967); ***Sears v. United States***, 343 F.2d 139, 141-42 (5th Cir. 1965). It makes no difference whether the other person is another defendant or even named in the indictment. ***Rogers v. United States***, 340 U.S. 367, 375 (1951) ("identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown"); *see also* ***United States v. Lopez***, 6 F.3d 1281, 1288 (7th Cir. 1993); ***United States v. Galvan***, 961 F.2d 738, 742 (8th Cir. 1992); ***United States v. Rey***, 923 F.2d 1217, 1222 (6th Cir. 1991); ***United States v. Lewis***, 902 F.2d 1176, 1181 n.4 (5th Cir. 1990); ***United States v. Indorato***, 628 F.2d 711, 717-18 (1st Cir. 1980); ***United States v. Allen***, 613 F.2d 1248, 1253 (3d Cir. 1980); ***United States v. Anderson***, 611 F.2d 504, 511 (4th Cir. 1979).

23.04[2][a] Limitation on Naming Unindicted Co-conspirators

Prosecutors should be aware that it is the policy of the Department of Justice that, in the absence of some sound reason, unindicted co-conspirators should not be identified in conspiracy indictments. Justice Manual 9-11.130 (April 2018) (noting that the practice was severely criticized in ***United States v. Briggs***, 514 F.2d 794 (5th Cir. 1975)). The recommended practice in such cases is to merely allege that the defendant "conspired with another person or persons known" and supply the identity, if requested, in a bill of particulars. This policy does not apply, however, where the person "has been officially charged with the misconduct at issue." JM 9-27.760.

23.04[2][b] Conspiring with Government Agents

Because the government must prove that at least two culpable parties reached an agreement, proof of an agreement solely between a defendant and a government agent or informer will not support a conspiracy conviction under Section 371. *See* ***United States v. Giry***, 818 F.2d 120, 125 (1st Cir. 1987); ***United States v. Barboa***, 777 F.2d 1420, 1422 & n.1 (10th Cir. 1985); ***United States v. Escobar de Bright***, 742 F.2d 1196, 1198-1200 (9th Cir. 1984); ***United States v. Pennell***, 737 F.2d 521, 536 (6th Cir. 1984); ***United States v. Barnes***, 604 F.2d 121, 161 (2d Cir. 1979); ***United States v. Chase***, 372 F.2d 453, 459 (4th Cir. 1967); ***Sears v. United States***, 343 F.2d 139, 142 (5th Cir. 1965).

However, in cases in which a valid agreement exists between two or more culpable parties, one of whom committed overt acts solely with a government agent, it is entirely proper to charge that party with conspiracy and prove at trial an overt act that involved only that person and the government agent. ***United States v. Enstam***, 622 F.2d 857, 867 (5th Cir. 1980); ***Sears v. United States***, 343 F.2d 139, 142 (5th Cir. 1965).

23.04[2][c] Corporations as Conspirators

A corporation may be found criminally liable for conspiracy under Section 371. ***United States v. Stevens***, 909 F.2d 431, 432-33 (11th Cir. 1990); ***United States v. Peters***, 732 F.2d 1004, 1008 (1st Cir. 1984); ***United States v. S & Vee Cartage Co.***, 704 F.2d 914, 920 (6th Cir. 1983). Moreover, a corporation can enter into a conspiracy with its own employees. ***United States v. Ams Sintering Co.***, 927 F.2d 232, 236-37 (6th Cir. 1990); ***United States v. Hartley***, 678 F.2d 961, 972 (11th Cir. 1982).[2]

23.04[3] Scope of the Agreement -- Single or Multiple Conspiracies

A single conspiracy may have multiple objectives and involve a number of sub-agreements to accomplish particular objectives. ***Braverman v. United States***, 317 U.S. 49, 53 (1942); ***United States v. Maldonado-Rivera***, 922 F.2d 934, 963 (2d Cir. 1990); ***United States v. Warner***, 690 F.2d 545, 550 n.8 (6th Cir. 1982); ***United States v. Zemek***,

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[2] The cases suggest, however, that because the threat posed to society by conspiracies "arises from the creative interaction of two autonomous minds," no conspiracy can be found to exist between a single human actor and the corporation that the human actor controls. ***United States v. Stevens***, 909 F.2d 431, 432-33 (11th Cir. 1990); ***United States v. Peters***, 732 F.2d 1004, 1008 (1st Cir. 1984).

634 F.2d 1159, 1167 (9th Cir. 1980). On the other hand, a single actor may be involved in several, separate conspiracies. ***Kotteakos v. United States***, 328 U.S. 750, 755 (1946). In determining whether there is a single conspiracy with multiple objectives or multiple conspiracies each with a separate objective, the general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. *See* ***United States v. Berger***, 224 F.3d 107, 113-15 (2d Cir. 2000); ***United States v. Rigas***, 605 F.3d 194, 213 (3d Cir. 2010) (en banc); ***United States v. Leavis***, 853 F.2d 215, 218 (4th Cir. 1988); ***United States v. Springer***, 831 F.2d 781, 784 (8th Cir. 1984); ***United States v. Arbelaez***, 719 F.2d 1453, 1457-58 (9th Cir. 1983); ***United States v. Warner***, 690 F.2d 545, 548-49 (6th Cir. 1982); ***United States v. Perez***, 489 F.2d 51, 62 (5th Cir. 1973). To determine whether there is one overall agreement, the courts apply a totality-of-the-circumstances test, considering, *inter alia*, the commonality of goals, the nature of the scheme, and any overlap among participants in the various dealings. *See* ***Rigas***, 605 F.3d at 213 ("The ultimate goal of the totality-of-the-circumstances test is to determine whether there are two agreements or only one."); *see also* ***Berger***, 224 F.3d at 114-115; ***Hanzlicek***, 187 F.3d at 1232 (noting that this is a question of fact); ***United States v. David***, 940 F.2d 722, 734 (1st Cir. 1991); ***United States v. Tarantino***, 846 F.2d 1384, 1392-93 (D.C. Cir. 1988); ***United States v. Smith***, 789 F.2d 196, 201-02 (3d Cir. 1986); ***United States v. DeLuna***, 763 F.2d 897, 918 (8th Cir. 1985), *overruled on other grounds by* ***United States v. Inadi***, 475 U.S. 387, 391 (1986); ***United States v. Plotke***, 725 F.2d 1303, 1308 (11th Cir. 1984); ***United States v. Mayo***, 646 F.2d 369, 372-73 (9th Cir. 1981); *see also* ***United States v. Marable***, 578 F.2d 151, 154 (5th Cir. 1978) (court looks to (1) time, (2) co-conspirators, (3) statutory offenses charged, (4) overt acts charged, and (5) location where the events occurred).

A single conspiracy does not become multiple conspiracies simply because of personnel changes or because its members are cast in different roles over time. *E.g.*, ***United States v. Richerson***, 833 F.2d 1147, 1153-54 (5th Cir. 1987); ***United States v. Spector***, 793 F.2d 932, 935-36 (8th Cir. 1986); ***United States v. Andrews***, 585 F.2d 961, 964 (10th Cir. 1978); ***United States v. Cambindo Valencia***, 609 F.2d 603, 625 (2d Cir. 1979); ***United States v. Mayes***, 512 F.2d 637, 642-43 (6th Cir. 1975). And a single conspiracy may encompass distinct transactions and conspirators who do not necessarily all know each other, as long as they know "the essential nature of the plan and their connections with it," even without "knowledge of all its details or of the participation of others." ***Blumenthal v. United States***, 332 U.S. 539, 557 (1947); ***United States v. Parnell***, 581 F.2d 1374, 1382-83 (10th Cir. 1978) (explaining how a single conspiracy can involve different transactions and a changing membership).

One circuit, the Tenth, has added "interdependence" as an element of conspiracy. *See, e.g.*, ***United States v. Hammers***, 942 F.3d 1001, 1013 (10th Cir. 2019); ***United States v. Quarrell***, 310 F.3d 664, 678 (10th Cir. 2002); ***United States v. Edwards***, 69 F.3d 419, 431 (10th Cir. 1995); ***United States v. Hanzlicek***, 187 F.3d 1228, 1232-33 (10th Cir. 1999). "Interdependence requires that a defendant's actions facilitate the endeavors of other alleged coconspirators or facilitate the venture as a whole [and] also requires proof that the conspirators intended to act together for their shared mutual benefit within the scope of the conspiracy charged." ***United States v. Serrato***, 742 F.3d 461, 467 (10th Cir. 2014) (cleaned up); *accord* Tenth Circuit Pattern Jury Instructions, § 2.19 (defining "interdependence" to require that "the members, in some way or manner, intended to act together for their shared mutual benefit within the scope of the conspiracy charged").

United States v. Carter, 130 F.3d 1432 (10th Cir. 1997), illustrates how the Tenth Circuit has applied the interdependence element in practice. There, Carter met Anthlia Craft at a bus station in Tulsa, after receiving a pager message from Craft. ***Id.*** at 1435-36. Craft was carrying a bag with bricks of cocaine, and, unbeknownst to Carter, was cooperating with DEA agents who had intercepted her in route to Tulsa. ***Ibid.*** The court rejected Carter's challenge to the sufficiency of the evidence supporting his conspiracy conviction, reasoning that "the jury reasonably could have inferred that Craft was the courier for the cocaine and that Carter picked up Craft at the bus station to assist her in distributing the cocaine. Thus, the jury reasonably could have inferred that Carter was dependent on Craft to smuggle the cocaine to Tulsa, and Craft was dependent on Carter to assist her in the distribution process once she arrived in Tulsa." ***Id.*** at 1440. *See also* ***United States v. Wardell***, 591 F.3d 1279, 1289-91 (10th Cir. 2009) (finding evidence of interdependence sufficient to support conviction for conspiracy to retaliate against a witness who testified against the defendant in a criminal tax case because the evidence "established beyond a reasonable doubt that the success of the venture as a whole—[the witness's] beating—depended upon the steps [the defendant] took to realize this common goal"; these steps included arranging with a co-conspirator to have the perpetrators of the assault transported to the jail where the witness was imprisoned).

The Tenth Circuit appears to be alone in treating "interdependence" as a separate element, although some circuits, following ***Kotteakos***, 328 U.S. at 755, use "interdependence" as a test for whether various sub-schemes are part of a single, overall criminal agreement instead of multiple agreements. ***United States v. Sanchez-Badillo***, 540 F.3d 24, 29 (1st Cir. 2008); ***United States v. Gaskin***, 364 F.3d 438, 452 n.4 (2d Cir. 2004); ***United States v. Mathis***, 216 F.3d 18, 24 (D.C. Cir. 2000); ***United States v. Adkism***, 180 F.3d 264 (Table), 1999 WL 301315, at *6-7 (5th Cir. 1999); ***United States v. Toler***, 144 F.3d 1423, 1426 (11th Cir. 1998); cf. ***United States v. Farias***, 469 F.3d 393, 398 (5th Cir. 2006) ("we do not explicitly require 'interdependence' in this circuit").[3]

23.05 MEMBERSHIP

23.05[1] Intent Requirement

To establish a defendant's membership in a conspiracy, the government must prove that the defendant knew of the conspiracy and intended to join it with the purpose of accomplishing the object of the conspiracy. *See* ***United States v. Berger***, 224 F.3d 107,

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[3] Earlier Tenth Circuit cases also treated interdependence exclusively as a test for whether there is a single conspiracy, primarily when the government alleged a "chain conspiracy" in which the co-conspirators did not all know one another. *See, e.g.*, ***United States v. Petersen***, 611 F.2d 1313, 1325-26 (10th Cir. 1979) (quoting ***United States v. Elliot***, 571 F.2d 880, 901 (5th Cir. 1978), which described interdependence as "[t]he essential element of a chain conspiracy"); ***United States v. Dickey***, 736 F.2d 571, 582 (10th Cir. 1984) (stating that "[t]o make a finding of a single conspiracy . . . the essential element of interdependence must be met"). Later cases, however, cited indirectly to these earlier cases for the proposition that interdependence is an element of a conspiracy offense. *See* ***United States v. Fox***, 902 F.2d 1508, 1514 (10th Cir. 1990) ("the evidence must demonstrate 'the essential element of interdependence' among the co-conspirators" (quoting ***Dickey***, 736 F.2d at 582)); ***United States v. Evans***, 970 F.2d 663, 668 (10th Cir. 1992) (citing ***Fox*** for the proposition that the elements of conspiracy include "that the alleged coconspirators were interdependent"). But regardless of its origins, "[i]nterdependence[] as an essential element of § 371 conspiracy . . . now appears to be settled law" in the circuit. Tenth Circuit Pattern Jury Instructions, § 2.19, Comment (citing cases); *see* ***ibid***. (listing "interdependence among members of the conspiracy" as one of the elements the jury should be instructed it must find to convict on a conspiracy charge).

114-115 (2d Cir. 2000); ***United States v. Conley***, 37 F.3d 970, 976-77 (3d Cir. 1994); ***United States v. Rogers***, 982 F.2d 1241, 1244 (8th Cir. 1993); ***United States v. Evans***, 970 F.2d 663, 668 (10th Cir. 1992); ***United States v. Lynch***, 934 F.2d 1226, 1231 (11th Cir. 1991); ***United States v. Brown***, 934 F.2d 886, 889 (7th Cir. 1991); ***United States v. Sanchez***, 928 F.2d 1450, 1457 (6th Cir. 1991); ***United States v. Esparza***, 876 F.2d 1390, 1392 (9th Cir. 1989); ***United States v. Yanin***, 868 F.2d 130, 133 (5th Cir. 1989); ***United States v. Christian***, 786 F.2d 203, 211 (6th Cir. 1986); ***United States v. Norris***, 749 F.2d 1116, 1121 (4th Cir. 1984); ***United States v. Flaherty***, 668 F.2d 566, 580 (1st Cir. 1981). A defendant may become a member of a conspiracy without knowing all of the details of the unlawful scheme and without knowing all of the members. ***Blumenthal v. United States***, 332 U.S. 539, 557 (1947); ***United States v. Horn***, 946 F.2d 738, 741 (10th Cir. 1991); ***United States v. Noble***, 754 F.2d 1324, 1329 (7th Cir. 1985); ***United States v. Lemm***, 680 F.2d 1193, 1204 (8th Cir. 1982); ***United States v. Diecidue***, 603 F.2d 535, 548 (5th Cir. 1979); ***United States v. Camacho***, 528 F.2d 464, 469-70 (9th Cir. 1976). Similarly, a defendant may become a member of a conspiracy even if that person agrees to play only a minor role in the conspiracy, so long as he or she understands the essential nature of the scheme and intentionally joins in it. ***United States v. Lopez***, 443 F.3d 1026, 1030 (8th Cir. 2006) (en banc); ***United States v. Andrews***, 953 F.2d 1312, 1318 (11th Cir. 1992); ***United States v. Roberts***, 881 F.2d 95, 101 (4th Cir. 1989); ***United States v. Alvarez***, 625 F.2d 1196, 1198 (5th Cir. 1980). "Although conspirators must pursue the same criminal objective, a conspirator need not agree to commit or facilitate each and every part of the substantive offense. A defendant must merely reach an agreement with the specific intent that the underlying crime *be committed* by some member of the conspiracy." ***Ocasio v. United States***, 136 S. Ct. 1423, 1429 (2016) (cleaned up) (emphasis in original).

When a conspiracy involves "conduct . . . intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue," the enhancement in Sentencing Guidelines Section 2T1.9(b)(2) may apply. *See* ¶ 23.11, *infra*, for further discussion.

23.05[2] Proof of Membership

A defendant's knowledge of a conspiracy need not be proved by direct evidence; circumstantial evidence is sufficient. ***United States v. Gupta***, 463 F.3d 1182, 1194 (11th Cir. 2006); ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999), *adopted by* 231 F.3d 663, 667 n.1 (9th Cir. 2000) (en banc); ***United States v. David***, 940 F.2d 722, 735 (1st Cir. 1991); ***United States v. Beale***, 921 F.2d 1412, 1430 (11th Cir. 1991); ***United States v. Christian***, 786 F.2d 203, 211 (6th Cir. 1986); *see generally* **Holland v. United States**, 348 U.S. 121, 140 (1954) (explaining that in some respects circumstantial evidence "is intrinsically no different from testimonial evidence"). Generally, a defendant's membership in the conspiracy can be inferred from the defendant's own acts and statements. *See* ***United States v. Kane***, 944 F.2d 1406, 1410-11 (7th Cir. 1991); ***United States v. Martin***, 920 F.2d 345, 348 (6th Cir. 1990).

It is not essential that the government establish that each conspirator knew of all the identities or activities of the other conspirators or that each conspirator participated in all of the activities of the conspiracy. ***United States v. Berger***, 224 F.3d 107, 114-15 (2d Cir. 2000); ***United States v. Colson***, 662 F.2d 1389, 1391 (11th Cir. 1981); ***United States v. Brunetti***, 615 F.2d 899, 903 (10th Cir. 1980); ***Parnell***, 581 F.2d at 1382. However, mere presence at the scene of a transaction or event connected to an alleged conspiracy is insufficient, without more, to prove that a person is a member of the conspiracy. *See* ***United States v. Cintolo***, 818 F.2d 980, 1003 (1st Cir. 1987); ***United States v. Holcomb***, 797 F.2d 1320, 1327 (5th Cir. 1986); ***United States v. Raymond***, 793 F.2d 928, 932 (8th Cir. 1986); ***United States v. Marian***, 725 F.2d 862, 865 (2d Cir. 1984); ***United States v. Bostic***, 480 F.2d 965, 968 (6th Cir. 1973). Similarly, merely acting in the same way as other persons or merely associating with other persons does not establish that a person joined in an agreement or understanding with those other persons. *E.g.*, ***United States v. McKee***, 506 F.3d 225, 238-39 (3d Cir. 2007); ***United States v. Knox***, 68 F.3d 990, 995 (7th Cir. 1995); ***United States v. Chang An-Lo***, 851 F.2d 547, 55443 (2d Cir. 1988); ***United States v. Corley***, 824 F.2d 931, 937 (11th Cir. 1987); ***United States v. Casperson***, 773 F.2d 216, 221 (8th Cir. 1985); ***United States v. Murray***, 751 F.2d 1528, 1534 (9th Cir. 1985). Mere knowledge that something illegal is occurring is also insufficient to prove membership in a conspiracy. ***United States v. Schmidt***, 947 F.2d

362, 367 (9th Cir. 1991); ***United States v. Casperson***, 773 F.2d 216, 221 (8th Cir. 1985); ***United States v. Webb***, 359 F.2d 558, 562 (6th Cir. 1966).

Some circuits have held that although the government must prove that a defendant was a member of a conspiracy, this requirement may be satisfied by a showing of even a "slight connection" to the conspiracy, so long as the connection is proven beyond a reasonable doubt. ***United States v. Burgos***, 94 F.3d 849, 860-61 (4th Cir. 1996) (en banc); ***United States v. Ward***, 190 F.3d 483, 488 (6th Cir. 1998); ***United States v. Slater***, 971 F.2d 626, 630 (10th Cir. 1992); ***United States v. Dunn***, 564 F.2d 348, 356-57 (9th Cir. 1977); ***United States v. Marsh***, 747 F.2d 7, 13 & n.3 (1st Cir. 1984). As the Ninth Circuit explained in ***Dunn***, the qualification in this formulation requiring proof of the *connection* beyond a reasonable doubt helps avoid potential confusion about the government's burden of proof in a conspiracy prosecution, particularly when it is said — as it was in some earlier cases — that only "slight evidence" is necessary to connect a defendant to a conspiracy:

> Those knowingly participating in the conspiracy in any respect or to any degree are guilty of that crime, but their guilt must be established under the same standards applicable to those charged with any other crime — neither more nor less — and the sufficiency of the evidence is subject to the same standards of review.
>
> Accordingly, we think it appropriate here to restate the slight evidence rule correctly and as we are reasonably certain that our predecessors intended it: Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the connection is slight, is sufficient to convict him with knowing participation in the conspiracy. Thus, the word "slight" properly modifies "connection" and not "evidence." It is tied to that which is proved, not to the type of evidence or the burden of proof.

Ibid.; *see also* **Burgos**, 94 F.3d at 861 (explaining that "[t]he term 'slight' does not describe the *quantum* of evidence that the Government must elicit in order to establish the conspiracy, but rather the *connection* that the defendant maintains with the conspiracy" (emphasis in original)). Other circuits, concerned about this potential for confusion, have rejected or disapproved the use of the "slight connection" formulation in jury instructions or as a standard for assessing the sufficiency of evidence of membership in a conspiracy. *See* ***United States v. Durrive***, 902 F.2d 1221, 1225-29 (7th Cir. 1990) (concluding that "when the sufficiency of the evidence to connect a particular defendant to a conspiracy is challenged on appeal, 'substantial evidence' should be the test rather than 'slight evidence' or 'slight connection'"); ***United States v. Huezo***, 546 F.3d 174, 180 n.2, 184-89 (2d Cir. 2008) ("[t]he 'not overwhelming evidence' or 'slight evidence' formulation risks misleading not only jurors but district and appellate courts reviewing post-verdict challenges as to the sufficiency of the evidence"); *see* ***id.*** at 184-89 (Newman, J., concurring, joined by Walker, J., and Sotomayor, J.) (arguing that "the quantitative adjectives "slight" or "not overwhelming" or other variations [should] not be repeated either in appellate opinions or in jury instructions with reference to the evidence sufficient to prove beyond a reasonable doubt a defendant's participation in a conspiracy"); *see also* ***United States v. Malatesta***, 590 F.2d 1379, 1381-82 (5th Cir. 1979) (en banc) ("The 'slight evidence' rule . . . is . . . [b]anished as to all appeals hereafter to be decided by this Court"). Prosecutors should take care not to rely on a version of the "slight connection" formulation that is inconsistent with applicable circuit law.

23.05[3] Pinkerton Liability

A conspirator is criminally responsible for the "substantive offenses" committed by a co-conspirator if the conspirator was a member of the conspiracy when the co-conspirator committed the offense and the offense was committed in furtherance of, or as a foreseeable consequence of, the conspiracy. ***Pinkerton v. United States***, 328 U.S. 640, 645-47 (1946). The government is not required to prove that each defendant specifically agreed to commit the substantive offense or knew that the offense would be committed. *E.g.*, ***United States v. Bennett***, 665 F.2d 16, 20 n.4 (2d Cir. 1981); ***United States v. Sanjar***, 876 F.3d 725, 743 (5th Cir. 2017); ***United States v. Etheridge***, 424 F.2d 951, 965 (6th Cir. 1970). It is sufficient that the government establish the offense was in furtherance of the conspiracy or was reasonably foreseeable as a necessary or natural consequence of the conspiracy. ***United States v. Fonseca-Caro***, 114 F.3d 906, 908 (9th Cir. 1997); ***United States v. Myers***, 102 F.3d 227, 237 (6th Cir. 1996); ***United States v.***

Eyster, 948 F.2d 1196, 1206 n.13 (11th Cir. 1991); ***United States v. Cummings***, 937 F.2d 941, 944 (4th Cir. 1991); ***United States v. Ciambrone***, 787 F.2d 799, 809 (2d Cir. 1986); ***United States v. Redwine***, 715 F.2d 315, 322 (7th Cir. 1983); ***United States v. Tilton***, 610 F.2d 302, 309 (5th Cir. 1980).

Although a conspirator "may join a conspiracy already in existence and become criminally liable for acts committed thereafter in furtherance of the scheme," ***United States v. Hamlin***, 986 F.2d 384, 387 (10th Cir. 1993), the Supreme Court held that a defendant "cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy," ***Levine v. United States***, 383 U.S. 265, 266 (1966) (per curiam) (accepting the government's concession on this point). Some cases state, without express qualification, that a person who joins a conspiracy adopts the prior acts of the other conspirators and may be held responsible for conduct committed before he or she joined the conspiracy. *See* ***United States v. Rea***, 958 F.2d 1206, 1214 (2d Cir. 1992); ***United States v. Covelli***, 738 F.2d 847, 859 n.16 (7th Cir. 1984); ***United States v. Bridgeman***, 523 F.2d 1099, 1107-08 (D.C. Cir. 1975); ***United States v. Cimini***, 427 F.2d 129, 130-31 (6th Cir. 1970). These statements are properly understood as referring to liability for the conspiracy itself, not to liability under ***Pinkerton*** for the substantive offenses of co-conspirators. As one court explained, a defendant who joins an ongoing conspiracy may be held liable for "acts or statements of coconspirators that occurred prior to his entry into the conspiracy" for purposes of determining the scope and objects of the conspiracy and for satisfying the overt-act element and venue, even though "such a defendant cannot be held liable for *substantive crimes* committed by coconspirators prior to his entry in the conspiracy." ***United States v. Hamilton***, 587 F.3d 1199, 1207 & n.5 (10th Cir. 2009) (emphasis in original); *see also* ***United States v. Carrascal-Olivera***, 755 F.2d 1446, 1452 & n.8 (11th Cir. 1985).

23.06 OVERT ACT

23.06[1] Definition

In order to establish criminal liability for a conspiracy under Section 371, the government must prove that a member of the conspiracy committed an overt act in furtherance of the conspiracy — in the words of the statute, that "one or more of such persons d[id] any act to effect the object of the conspiracy." 18 U.S.C. § 371. The function of this statutory overt-act requirement is to show that the conspiracy "is at work" and is not simply an agreement existing solely in the minds of the conspirators. ***Yates v. United States***, 354 U.S. 298, 334 (1957), *overruled on other grounds by* ***Burks v. United States***, 437 U.S. 1, 12 (1978); ***United States v. Arboleda***, 929 F.2d 858, 865 (1st Cir. 1991); ***Carlson v. United States***, 187 F.2d 366, 370 (10th Cir. 1951). Because it is a statutory element, the overt-act requirement does not apply to other conspiracy statutes that, unlike Section 371, do not expressly require an overt act. ***United States v. Shabani***, 513 U.S. 10, 15-17 (1994). Conspiracy statutes that do not contain an overt-act requirement include 18 U.S.C. § 286, which proscribes conspiring to defraud the United States with respect to false, fictitious, or fraudulent claims. *See supra*, Chapter 22.05.

An overt act is any act done by a member of the conspiracy for the purpose of carrying out or accomplishing the object of the conspiracy. ***United States v. Falcone***, 311 U.S. 205, 210 (1940); ***United States v. McKee***, 506 F.3d 225, 243 (3d Cir. 2007); ***United States v. Ross***, 190 F.3d 446, 450 (6th Cir. 1999); ***United States v. Davis***, 965 F.2d 804, 811-12 (10th Cir. 1992). Because the purpose of the overt-act requirement is merely to show that the conspiracy is at work, the overt act need not be criminal in character. ***Yates v. United States***, 354 U.S. 298, 334 (1957), *overruled on other grounds by* ***Burks v. United States***, 437 U.S. 1, 12 (1978); ***Braverman v. United States***, 317 U.S. 49, 53-54 (1942); ***United States v. Touhey***, 867 F.2d 534, 537 (9th Cir. 1989); ***Carlson v. United States***, 187 F.2d 366, 370 (10th Cir. 1951). Indeed, the act may be totally legal in itself. *See*, *e.g.*, ***United States v. Hermes***, 847 F.2d 493, 495-96 (8th Cir. 1988). The government is not required to prove all of the overt acts alleged in an indictment. Proof of at least one overt act committed in furtherance of the conspiracy is sufficient. *See, e.g.*, ***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir. 1985); ***United States v. Anderson***, 611 F.2d 504, 510 (4th Cir. 1979); ***United States v. Adamo***, 534 F.2d 31, 38 (3d Cir. 1976).

The government is not required to disclose during pre-trial discovery all of the overt acts it intends to establish at trial. ***United States v. Murray***, 527 F.2d 401, 411 (5th Cir. 1976); ***United States v. Armocida***, 515 F.2d 49, 54 (3d Cir. 1975); ***United States v. Carroll***, 510 F.2d 507, 509 (2d Cir. 1975); ***Cook v. United States***, 354 F.2d 529, 531

(9th Cir. 1965). Moreover, the government may prove at trial overt acts not charged in the indictment. ***United States v. Lewis***, 759 F.2d 1316, 1344 (8th Cir. 1985); ***United States v. Diecidue***, 603 F.2d 535, 563 (5th Cir. 1979); ***United States v. Johnson***, 575 F.2d 1347, 1357 (5th Cir. 1978); ***United States v. Fassoulis***, 445 F.2d 13, 19 (2d Cir. 1971). And because which particular overt act (or acts) were committed is a question of *how* a defendant violated Section 371, not *whether* he did, most courts to address the issue have held that the jury need not unanimously agree on a particular overt act as long as it unanimously agrees that an overt act did, in fact, occur. ***United States v. Kozeny***, 667 F.3d 122 (2d Cir. 2011); ***United States v. Griggs***, 569 F.3d 341, 343 (7th Cir. 2009); *see* ***Schad v. Arizona***, 501 U.S. 624, 649 (1991) (Scalia, J., concurring) ("it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission"); ***Richardson v. United States***, 526 U.S. 813, 817 (1999) ("a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime"); *cf.* ***United States v. Liu***, 631 F.3d 993, 1000 n.7 (9th Cir. 2011) (questioning whether, in light of ***Schad***, the jury must agree on the identity of the overt act, even though the Ninth Circuit pattern instruction does so require).

23.06[2] Acts of Concealment

Acts of concealment may constitute overt acts. However, these acts are admissible only if they were committed before the object of the conspiracy was fully accomplished. Once the object is accomplished, the conspiracy is over and subsequent overt acts are not probative of the conspiracy. ***Grunewald v. United States***, 353 U.S. 391, 405 (1957).

In ***Grunewald***, the Supreme Court was concerned with the government's attempts to lengthen indefinitely the duration of a conspiracy by simply showing that the conspirators took steps to cover their tracks in order to avoid detection and punishment after the central criminal purpose had been accomplished. The Court stressed that a "distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." ***Id***. at 405.

In criminal tax conspiracies, the object of the crime is usually to conceal income or assets from the IRS. Indeed, in the context of tax evasion under 26 U.S.C. § 7201, an "affirmative act of evasion" is generally defined as "any conduct, the likely effect of which would be to mislead or to conceal." ***Spies v. United States***, 317 U.S. 492, 499 (1943); *cf.* ***Kawashima v. Holder***, 565 U.S. 478, 488 (2012) (noting that tax evasion will "almost invariably" involve fraud or deceit, even though it is not a necessary element of the offense). Thus, in general, overt acts in furtherance of a conspiracy to commit tax offenses or to defraud the United States in connection with tax assessment and collection will involve acts that mislead or conceal. *See*, *e.g.*, ***Forman v. United States***, 361 U.S. 416, 422-24 (1960), *overruled on other grounds by* ***Burks v. United States***, 437 U.S. 1 (1978); ***United States v. Vogt***, 910 F.2d 1184, 1201-02 (4th Cir. 1990); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. Mackey***, 571 F.2d 376, 383-84 (7th Cir. 1978). Given the holding in ***Grunewald***, indictments charging such acts of concealment should make clear that concealing income or assets from the IRS was an object of the conspiracy. *See* ***United States v. Masters***, 924 F.2d 1362, 1368 (7th Cir. 1991) (observing that ***Grunewald*** did not "hold that a conspiracy can never include an agreement to conceal the defendants' conduct"); ***United States v. Upton***, 559 F.3d 3, 14 (1st Cir. 2009) (rejecting argument that ***Grunewald*** "imposes a requirement that conspirators expressly agree to engage in acts of concealment where those acts are done in furtherance of the main objectives of the conspiracy"). Failure to do so might preclude using acts of concealment to satisfy the statute of limitations or to establish venue, *see* ¶¶ 23.08 & 23.10, *infra*.

23.07 CONSPIRACY TO DEFRAUD THE UNITED STATES

23.07[1] Generally

23.07[1][a] Section 371: Two Forms of Conspiracy

As noted above, Section 371 is written in the disjunctive and prohibits two distinct types of conspiracies. ***United States v. Conti***, 804 F.3d 977, 979-80 (9th Cir. 2015); ***United States v. Hitt***, 249 F.3d 1010, 1015 (D.C. Cir. 2001); ***United States v. Kraig***, 99 F.3d 1361, 1366 (6th Cir. 1996); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1091 (4th Cir. 1993); ***United States v. Helmsley***, 941 F.2d 71, 90 (2d Cir. 1991);

United States v. Haga, 821 F.2d 1036, 1039 (5th Cir. 1987) ("Cases construing section 371 have made it plain that the 'commit any offense' clause and the 'defraud the United States' clause describe different criminal offenses."). The first part of the statute, the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes; the second part of the statute, the "defraud clause," prohibits conspiring to defraud the United States. ***United States v. Hurley***, 957 F.2d 1, 3 (1st Cir. 1992); ***United States v. Touhey***, 867 F.2d 534, 536 (9th Cir. 1989); ***United States v. Cure***, 804 F.2d 625, 628 (11th Cir. 1986); *see also* ***Dennis v. United States***, 384 U.S. 855, 862-63 (1966) (referring to these as "alternative clause[s]").

The offense clause requires that the indictment refer to another criminal statute that defines the object of the conspiracy. The defraud clause, however, stands on its own, and an indictment charging a conspiracy to defraud does not need to refer to another statute to define the crime. ***United States v. Minarik***, 875 F.2d 1186, 1187 (6th Cir. 1989); *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir. 1991). In criminal tax prosecutions, Section 371 can be used to charge conspiracies to commit specific substantive tax offenses or to defraud the IRS. ***United States v. Jerkins***, 871 F.2d 598, 602 (6th Cir. 1989); ***United States v. Little***, 753 F.2d 1420, 1442 (9th Cir. 1984); ***United States v. Shermetaro***, 625 F.2d 104, 109 (6th Cir. 1980).

23.07[1][b] Scope of Defraud Clause

The Supreme Court has held that "[t]o conspire to defraud the United States" means (1) "to cheat the government out of money or property" or (2) "to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924). The defraud clause of Section 371 encompasses a wide array of conduct, including acts that do not constitute a crime under a separate federal statute. ***United States v. Tuohey***, 867 F.2d 534, 536-67 (9th Cir. 1989).

In a 1910 case involving the Department of Agriculture, the Supreme Court rejected the argument that in order to prove a conspiracy "to defraud the United States" under Section 371 the government must "charge or prove an actual financial or property loss." ***Haas v. Henckel***, 216 U.S. 462, 479-80 (1910) (construing Rev. Stat. § 5440

(1878), the predecessor of the modern Section 371, which, like the current statute, prohibited conspiracies to "defraud the United States in any manner or for any purpose"). The indictment at issue in ***Haas*** charged that the defendants had conspired to obtain a government crop report "in advance of general publicity" and to "use such information in speculating upon the cotton market, and thereby defraud the United States by defeating, obstructing and impairing it in the exercise of its governmental function in the regular and official duty of publicly promulgating fair, impartial and accurate reports concerning the cotton crop." ***Haas***, 216 U.S. at 478. The Court explained that "it is not essential that such a conspiracy shall contemplate a financial loss or that one shall result." ***Id***. at 479. Rather, the statute was "broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government." ***Id***.

Fourteen years later, in 1924, the Supreme Court clarified that the defraud clause — although it reaches conspiracies to interfere with the government's lawful functions in ways that do not result in direct financial loss — still requires "fraud" and that ***Haas*** did not eliminate the traditional requirement that a fraudulent scheme be deceitful. ***Hammerschmidt***, 265 U.S. at 187-88. "To conspire to defraud the United States," the Court stated in ***Hammerschmidt***, "means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." ***Id***. at 188. Thus, although the defraud clause does not require a contemplated "property or pecuniary loss by the fraud," it still requires that the conspiracy involve some form of "misrepresentation" or "chicane." ***Ibid***.

In the century since ***Hammerschmidt*** was decided, the Supreme Court has repeatedly recognized and re-affirmed its construction of the defraud clause. *See, e.g.*, ***United States v. Scharton***, 285 U.S. 518, 520-21 (1932); ***Glasser v. United States***, 315 U.S. 60, 66 (1942); ***Dennis***, 384 U.S. at 861; ***McNally v. United States***, 483 U.S. 350, 359 n.8. And courts have applied the clause to conspiracies to defraud various federal agencies, including, but not limited to, the Internal Revenue Service. *See, e.g.*, ***United***

States v. Ballistrea, 101 F.3d 827, 832 (2d Cir. 1996) (Food and Drug Administration); ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957) (IRS);[4] ***United States v. Pintar***, 630 F.2d 1270 (8th Cir. 1980) (Upper Great Lakes Regional Commission); ***United States v. Tuohey***, 867 F.2d 534, 537 (9th Cir. 1989) (Federal Deposit Insurance Corporation); ***United States v. Lane***, 765 F.2d 1376, 1379 (9th Cir. 1985) (Social Security Administration); ***United States v. Elbeblawy***, 899 F.3d 925 (11th Cir. 2018) (Department of Health and Human Services); ***United States v. Puerto***, 730 F.2d 627 (11th Cir. 1984) (Treasury Department); ***United States v. Dean***, 55 F.3d 640, 647 (D.C. Cir. 1995) (Department of Housing and Urban Development); ***United States v. Madeoy***, 912 F.2d 1486 (D.C. Cir. 1990) (Federal Housing Administration and Veterans Administration); *cf.* ***United States v. Johnson***, 383 U.S. 169, 172 (1966) (Department of Justice).

Moreover, because a conspiracy to defraud the United States is a type of conspiracy, it is the unlawful agreement that constitutes the crime: it is not necessary to show that the scheme to defraud was a success or that the government was actually harmed. ***United States v. Rosengarten***, 857 F.2d 76, 79 (2d Cir. 1988); ***United States v. Everett***, 692 F.2d 596, 599 (9th Cir. 1982); ***Pintar***, 630 F.2d at 1277-78. Nor is it necessary to show that the "fraud" contemplated by the conspiracy was a crime on its own. ***United States v. Jerkins***, 871 F.2d 598, 603 (6th Cir. 1989). This means, in a tax case, that a prosecutor who charges a conspiracy to defraud the United States is not burdened with having to establish all of the elements of an underlying offense (e.g., tax evasion) and each member's intent to commit that offense (e.g., willfulness).[5] Rather, all the prosecutor must show is that the members agreed to interfere with or obstruct one of the government's lawful functions "by deceit, craft or trickery, or at least by means that are dishonest." ***Hammerschmidt***, 265 U.S. at 188; *see also* ***United States v. Hurley***, 957 F.2d 1, 4-5 (1st Cir. 1992); ***Jerkins***, 871 F.2d at 603; ***United States v. Nersesian***,

[4] Conspiracies to defraud the IRS, commonly called "*Klein* conspiracies" after the case cited here, are discussed at length at ¶ 23.07[2], *infra.*

[5] However, when the government charges a conspiracy to commit a substantive tax offense, "it must prove that "the intended future conduct [the conspirators] agreed upon include all the elements of the substantive crime." ***United States v. Pinckney***, 85 F.3d 4, 8 (2d Cir. 1996) (cleaned up).

824 F.2d 1294, 1313 (2d Cir. 1987); ***United States v. Caldwell***, 989 F.2d 1056, 1058-59 (9th Cir. 1993) (*see* discussion at ¶ 23.07[2][c], *infra*); *cf.* ***United States v. Alston***, 77 F.3d 713, 720-21 (3d Cir. 1996).

23.07[1][c] Pleading Requirements

Because of the broad scope of the defraud clause, the Supreme Court has warned the lower courts to proceed with care in Section 371 cases:

> [I]ndictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable.

Dennis v. United States, 384 U.S. 855, 860 (1966). One court has opined that the courts "must be mindful that [Section 371] is a broad [statute], and that there is a danger that prosecutors may use it arbitrarily to punish activity not properly within the ambit of the federal criminal sanction." ***United States v. Shoup***, 608 F.2d 950, 955-56 (3d Cir. 1979); *see also* ***United States v. Rosenblatt***, 554 F.2d 36, 41 n.6 (2d Cir. 1977) (potential for abuse under the defraud clause is much greater than under the offense clause because (1) under the defraud clause, the charge is broader and less precise; (2) the defraud clause expands the scope of conspiracy and, thus, liability for crimes, co-conspirators, and admissibility of co-conspirators' declarations; (3) the defraud clause includes more overt acts and, thus, both lengthens the period of the statute of limitations and increases the number of jurisdictions where venue can be laid; and (4) charges under the defraud clause may avoid the limit placed on the penalty for conspiracy to commit a misdemeanor).

Thus, the courts have held that when the government proceeds under the conspiracy-to-defraud clause, it must plead the "essential nature" of the alleged fraudulent scheme. *See, e.g.*, ***United States v. Helmsley***, 941 F.2d 71, 90-91 (2d Cir. 1991). It is not sufficient for the indictment to simply re-allege the language in the statute; rather, it must allege the fraudulent scheme in its particulars. ***United States v. Rosenblatt***, 554 F.2d 36, 41 (2d Cir. 1977). This means that a defraud-clause indictment should include (1) the name of the agency impeded; (2) the functions of the agency that were impeded; (3) the means used to impede the agency; and (4) the identities of those charged with impeding the agency. ***United States v. Mohney***, 949 F.2d 899, 904 (6th Cir. 1991).

23.07[2] **Klein** *Conspiracy*

23.07[2][a] Generally

A conspiracy to defraud the IRS charged under Section 371's defraud clause is commonly referred to as a "*Klein* conspiracy," after ***United States v. Klein***, 247 F.2d 908, 915 (2d Cir. 1957). *See, e.g.*, ***United States v. Hough***, 803 F.3d 1181, 1187 (11th Cir. 2015); ***United States v. Coplan***, 703 F.3d 46, 59-60 (2d Cir. 2012); ***United States v. Mubayyid***, 658 F.3d 35, 57 (1st Cir. 2011); ***United States v. Cohen***, 510 F.3d 1114, 1117 (9th Cir. 2007); ***United States v. Tucker***, 419 F.3d 719, 720 (8th Cir. 2005). It is worth noting, however, that the term "*Klein* conspiracy" is "in some sense a misnomer, since the primary holding of *Klein* is a quote from *Hammerschmidt*." ***Coplan***, 703 F.3d at 60 n.18. ***Klein*** simply applied ***Hammerschmidt v. United States***, 265 U.S. 182 (1924), to a tax case, describing a conspiracy:

> to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Department of the Treasury in the collection of the revenue; to wit, income taxes.[6]

Klein, 247 F.2d at 915. Thus, in ***Klein***, the Second Circuit approved the government's use of the defraud clause to charge a conspiracy to deceptively impede the IRS's assessment

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[6] When drafting an indictment charging a ***Klein*** conspiracy, it is preferable to use slightly different language to describe the object of the conspiracy. In ***Haas v. Henkel***, 216 U.S. 462, 479 (1910), the Supreme Court stated that Section 371 "is broad enough in its terms to include any conspiracy *for the purpose of* impairing, obstructing, or defeating the lawful function of any department of government." (Emphasis added.) *See also* ***Hammerschmidt***, 265 U.S. at 185-86 (quoting ***Haas v. Henkel***, 216 U.S. at 479). Using "for the purpose of," instead of "by," more accurately describes the object of a conspiracy to defraud the United States.

and collection of taxes, regardless of whether the government could prove "direct tax evasion" of an actual tax due and owing. 247 F.2d at 916.

The court summarized twenty acts of concealment that qualified as efforts to impede the functions of the IRS, including the following (247 F.2d at 915):

1. Alteration of the books to make liquidating dividends appear as commissions;

2. Alteration of the books to make a gratuitous payment of $1,500,000 appear as repayment of a loan;

3. A false entry in the books disguising as commissions what was actually a dividend, which in turn was diverted to corporate nominees;

4. A false statement in Klein's personal income tax return regarding the payment for a stock purchase;

5. Klein's false answer to Treasury interrogatories seeking to identify the owners of various corporations;

6. A return falsely reporting that stock was sold for an immense profit;

7. The evasive affidavit of Klein's secretary denying that he remembered altering certain books; and

8. Income tax returns that falsely claimed sales of stock.

While it is not necessary to have evidence of acts as pronounced as those in ***Klein***, the government must introduce evidence establishing that the intent of each member of the conspiracy was to deceptively impede the functions of the IRS.

23.07[2][b] Examples: **Klein** *fact patterns*

First Circuit

1. ***United States v. Flete-Garcia***, 925 F.3d 17, 21-22 (1st Cir. 2019) (scheme to fraudulently obtain tax refunds using stolen identities of Puerto Rico residents).

2. ***United States v. Floyd***, 740 F.3d 22, 26-27 (1st Cir. 2014) (scheme to impede collection of employment taxes by funneling wages through a nominee entity).

3. ***United States v. Allen***, 670 F.3d 12, 14-15 (1st Cir. 2012) (scheme to avoid withholding of income taxes, file "zero" returns, and place assets in name of nominees).

4. ***United States v. Mubayyid***, 658 F.3d 35, 57 (1st Cir. 2011) (conspiracy to impede the IRS's ability to determine whether entity qualified for nonprofit status).

5. ***United States v. Goldberg***, 105 F.3d 770, 772 (1st Cir. 1997) (scheme to conceal payments to individuals through use of "straw employees" and benefits to third parties).

6. ***United States v. Hurley***, 957 F.2d 1, 6-7 (1st Cir. 1992) (money laundering scheme using front

companies set up in Panama and the Bahamas, and unconventional business practices such as currency transactions totaling at least $125,000 and checks made out in names of third parties).

7. ***United States v. Cambara***, 902 F.2d 144, 146-47 (1st Cir. 1990) (laundering money through use of real estate management company as front company, structuring cash withdrawals, and purchasing large assets with currency), *abrogated on other grounds by* ***United States v. Martinez-Salazar***, 528 U.S. 304, 310-11 (2000).

8. ***United States v. Lizotte***, 856 F.2d 341, 342-43 (1st Cir. 1988) (money laundering scheme using cash to purchase real estate through nominees).

9. ***United States v. Tarvers***, 833 F.2d 1068, 1071-72 (1st Cir. 1987) (money laundering scheme using nail polish remover company set up as front and nominees using cash to purchase real estate).

Second Circuit

1. ***United States v. Daugerdas***, 837 F.3d 212, 218 (2d Cir. 2016) (various complex tax shelters designed to create paper losses to offset real income).

2. ***United States v. Coplan***, 703 F.3d 46, 59-60 (2d Cir. 2012) (same, as well as tax shelters through which defendants purported to convert ordinary income into long-term capital gains through the creation and cancellation of trading partnerships).

3. ***United States v. Drachenberg***, 623 F.3d 122, 123-24 (2d Cir. 2010) (per curiam) (scheme to use nominee entities to conceal income).

4. ***United States v. Macchia***, 35 F.3d 662, 666 (2d Cir. 1994) (gasoline excise tax scheme using daisy chain of fictitious transactions to make it appear that an insolvent "burn" company had been the first entity to engage in a sale requiring payment of the fuel excise tax).

5. ***United States v. Aracri***, 968 F.2d 1512, 1515 (2d Cir. 1992) (*Klein* conspiracy in federal gasoline excise tax context, creation of sham paper sales of gas among various entities, creation of shell corporations to hold tax exemption licenses).

6. ***United States v. Bilzerian***, 926 F.2d 1285, 1302 (2d Cir. 1991) (dual-object conspiracy to defraud SEC and IRS by parking stock to generate false tax losses and false claims for deductions, accumulating stock through nominees, and failing to comply with SEC reporting requirements under 15 U.S.C. § 78m(d)).

7. ***United States v. Attanasio***, 870 F.2d 809, 816 (2d Cir. 1989) (creating false capital gain transactions and laundering $600,000 through attorney trust accounts).

8. ***United States v. Gurary***, 860 F.2d 521, 524 (2d Cir. 1988) (creation of phony invoices for "goods" that did not exist, and sale of those invoices to companies that included the phony costs in their cost-of-goods sold figure on corporate tax returns).

9. ***United States v. Rosengarten***, 857 F.2d 76, 77 (2d Cir. 1988) (creation of false tax deductions by backdating documents relating to a real estate tax shelter investment).

10. ***United States v. Turoff***, 853 F.2d 1037, 1040-41 (2d Cir. 1988) (failing to report substantial interest income derived from mail fraud scheme and depositing monies into a credit union that did not report interest to the IRS).

11. ***United States v. Nersesian***, 824 F.2d 1294, 1309-10 (2d Cir. 1987) (converting $117,000 in cash into money orders and traveler's checks in amounts less than $10,000 to avoid CTR filings).

12. ***United States v. Sigalow***, 812 F.2d 783, 784-85 (2d Cir. 1987) (serving as a frontman owner of massage parlors known to be under investigation by IRS; knowingly filing false tax returns in role as front; systematic destruction of business records).

13. ***United States v. Heinemann***, 801 F.2d 86, 91-92 (2d Cir. 1986) (sale of ministries in purported tax-exempt churches offering vow of poverty and false charitable deductions).

Third Circuit

1. ***United States v. Adeolu***, 836 F.3d 330, 331-32 (3d Cir. 2016) (scheme to prepare returns that claimed false dependents for clients).

2. ***United States v. Ottaviano***, 738 F.3d 586, 589-91 (3d Cir. 2013) (sale of bogus trust schemes that

purported to extinguish tax liabilities by accessing fictitious secret Treasury accounts).

3. ***United States v. Turner***, 718 F.3d 226, 229-30 (3d Cir. 2013) (promotion of scheme to use common-law trusts to impede assessment and collection of taxes).

4. ***United States v. DeMuro***, 677 F.3d 550, 556 (3d Cir. 2012) (spending lavishly on personal and discretionary business items while professing an inability to pay delinquent taxes).

5. ***United States v. Stadtmauer***, 620 F.3d 238, 241-42 (3d Cir. 2010) (conspiracy to impede assessment and collection of business income by claiming bogus charitable and business expense deductions).

6. ***United States v. McKee***, 506 F.3d 225, 238-41 (3d Cir. 2007) (conspiracy to impede IRS's collection of employment taxes).

7. ***United States v. Gambone***, 314 F.3d 163, 167-68, 176-77 (3d Cir. 2003) (systematic plan to receive payments from home purchasers in cash and to hide this additional income from the IRS by buying U.S. savings bonds or by holding the cash in a safe or a nightstand).

8. ***United States v. Gricco***, 277 F.3d 339, 346-50 (3d Cir. 2002) (scheme to skim cash from airport parking garage; structuring of financial transactions involving the proceeds of this scheme so as to avoid the filing of currency transaction reports).

9. ***United States v. American Investors of Pittsburgh, Inc.***, 879 F.2d 1087, 1101-02 (3d Cir. 1989) (money laundering scheme using structured currency transactions and unauthorized use of other customer accounts to funnel currency; false statements to IRS regarding defendants' use of those other accounts).

Fourth Circuit

1. ***United States v. Jinwright***, 683 F.3d 471, 475-76 (4th Cir. 2012) (conspiracy to underreport income that a pastor earned from his church's reimbursements of his personal expenses and from outside speaking engagements).

2. ***United States v. Thorson***, 633 F.3d 312, 314-17 (4th Cir. 2011) (scheme to claim charitable deductions from donations of cemetery sites, which involved fabrication of documents to create false appearance that the sites had been held long enough to qualify for deduction at fair market value).

3. ***United States v. Fleschner***, 98 F.3d 155, 159 (4th Cir. 1996) (defendants, associated with the Hickory Carolina Patriots, advised others to claim excess allowances on Forms W-4, not to file tax returns, to hide income from the banking system, and to deal in cash).

4. ***United States v. Hirschfeld***, 964 F.2d 318, 323-24 (4th Cir. 1992) (complex series of financial transactions designed to create significant tax losses and provide cash flow from illegal underwriting of a small corporation; creation of fraudulent settlement

of sham lawsuit to generate $2.1 million false tax deduction).

5. ***United States v. Schmidt***, 935 F.2d 1440, 1442-43 (4th Cir. 1991) (scheme to sell trusts known as Unincorporated Business Organizations, where participants could assign income and assets to the trusts and take false business deductions on personal expenses, as well as hide their income in financial institutions in the Marshall Islands), *overruled on other grounds by* ***United States v. Delfino***, 510 F.3d 468, 472 (4th Cir. 2007).

6. ***United States v. Vogt***, 910 F.2d 1184, 1188-90 (4th Cir. 1990) (money laundering scheme using front corporations and foreign bank accounts).

7. ***United States v. Kelley***, 769 F.2d 215, 216 (4th Cir. 1985) (leader of tax protestor organization counseled members to claim exempt status on Forms W-4 to avoid withholding, to report zero wages on tax returns, and to deal only in cash).

Fifth Circuit

1. ***United States v. De Nieto***, 922 F.3d 669, 672-73 (5th Cir. 2019) (scheme to fraudulently claim tax refunds using stolen identities).

2. ***United States v. Montgomery***, 747 F.3d 303, 305-06 (5th Cir. 2014) (scheme to underreport gross receipts of contracting business).

3. ***United States v. Heard***, 709 F.3d 413, 418-19 (5th Cir. 2013) (opening and closing corporations,

changing company names, moving physical locations, using different versions of the company names, signing documents with fictitious names, and using mail drops to prevent the IRS from discovering the individuals operating these companies and from collecting unpaid employment taxes).

4. ***United States v. Aubin***, 87 F.3d 141, 144 (5th Cir. 1996) (land flip, purchase and simultaneous resale devised to obtain cash without identifying parties).

5. ***United States v. Bourgeois***, 950 F.2d 980, 983 (5th Cir. 1992) (creation of false tax deductions by backdating documents relating to a real estate tax shelter investment).

6. ***United States v. Chesson***, 933 F.2d 298, 306-07 (5th Cir. 1991) (corporation paying personal expenses of owner, as well as construction costs for new church and school, all of which were written off as business deductions or charitable donations, and use of altered invoices).

7. ***United States v. Montalvo***, 820 F.2d 686, 690 (5th Cir. 1987) (money laundering scheme using front companies and foreign bank accounts; drug proceeds disguised as loan repayments).

8. ***United States v. Lamp***, 779 F.2d 1088, 1092 (5th Cir. 1986) (drug trafficker under IRS criminal investigation concocted story with codefendant to justify his increases in net worth and corroborate his lack of ownership of certain property and assets).

Sixth Circuit

1. ***United States v. Bradley***, 917 F.3d 493, 498-99 (6th Cir. 2019) (scheme to impede assessment and collection of taxes on misappropriated state charter school funds through a series of fraudulent transfers).

2. ***United States v. Rozin***, 664 F.3d 1052, 1054-57 (6th Cir. 2012) (scheme involving bogus deductions from "loss of income" insurance policies).

3. ***United States v. Fisher***, 648 F.3d 442, 445 (6th Cir. 2011) (scheme to impede assessment and collection of employment taxes).

4. ***United States v. Damra***, 621 F.3d 474, 479-81 (6th Cir. 2010) (conspiracy to evade corporate tax by disguising personal payments as business expenses).

5. ***United States v. Sabino***, 274 F.3d 1053, 1062 (6th Cir. 2001), *amended on rehearing*, 307 F.3d 446 (6th Cir. 2002) (use of trusts to hold all personal and business assets; frequent changes in nominal trustees of the trusts; retention of personal control over the trusts by defendants through use of signature stamp; using trusts to pay personal expenses and buy personal items; closing all personal bank accounts and certificates of deposit originally held in defendants' names).

6. ***United States v. Kraig***, 99 F.3d 1361, 1364 (6th Cir. 1996) (attorney aided client in concealing assets through use of foreign shell corporations).

7. ***United States v. Sturman***, 951 F.2d 1466, 1471-72 (6th Cir. 1991) (conspirators created 150 corporations, five of which were in foreign countries with strict secrecy laws; listed nominees as owners of the corporations; used the corporations to conceal income and make it difficult to trace income, expenses and cash skims; and destroyed corporate records after receipt of subpoenas).

8. ***United States v. Mohney***, 949 F.2d 899, 900, 904-05 (6th Cir. 1991) (conspirators concealed ownership of adult entertainment businesses by using nominees on tax returns, skimming cash receipts, and using corporate checks to pay personal expenses).

9. ***United States v. Iles***, 906 F.2d 1122, 1124 (6th Cir. 1990) (promotion and sale of three sham tax shelters and preparation of tax returns of investors in the shelters).

10. ***United States v. Jerkins***, 871 F.2d 598, 600-01 (6th Cir. 1989) (attorney aided client in money laundering scheme by depositing cash in attorney's trust fund account then purchasing real estate in the names of nominees).

Seventh Circuit

1. ***United States v. Vallone***, 698 F.3d 416, 432-45 (7th Cir. 2012) (promotion and sale of the abusive Aegis scheme, which involved the use of domestic and foreign trusts to conceal income and assets from the IRS, the preparation of fraudulent returns for clients, and making false representations to IRS

agents to defend the scheme during audits), *vacated on other grounds by* ***Dunn v. United States***, 570 U.S. 901 (2013); *see also* ***United States v. Wasson***, 679 F.3d 938, 941-42 (7th Cir. 2012) (same scheme); ***United States v. Hills***, 618 F.3d 619, 623-24 (7th Cir. 2010) (same).

2. ***United States v. McKinney***, 686 F.3d 432, 433-34 (7th Cir. 2012) (use of nominees to avoid collection of business's unpaid taxes).

3. ***United States v. Chavin***, 316 F.3d 666, 668-69 (7th Cir. 2002) (conspirators created fraudulent bad debt loss deduction of $900,000 by manufacturing a sham sale of a clothing store owned by defendant to defendant's cousin without defendant's ceding any control over store).

4. ***United States v. Furkin***, 119 F.3d 1276, 1280 (7th Cir. 1997) (scheme involved preventing the creation of records reflecting income from gambling machines, not reporting income from gambling machines, and encouraging others to lie).

5. ***United States v. Price***, 995 F.2d 729, 730 (7th Cir. 1993) (scheme involved concealing corporate receipts using secret bank accounts, second sales journal, alteration of deposit tickets, false notations on memo portion of corporate checks, and forged sales invoices that were later supplied to an IRS auditor).

6. ***United States v. Brown***, 944 F.2d 1377, 1386-87 (7th Cir. 1991) (conspirators structured currency transactions and used a nearly bankrupt mortgage

brokerage firm to engage in elaborate and time-consuming transfers of funds).

7. ***United States v. Beverly***, 913 F.2d 337, 358 (7th Cir. 1990) (drug trafficker used codefendant as nominee owner of certain assets, real estate, and businesses and used codefendant's bank account to pay expenses).

8. ***United States v. Bucey***, 876 F.2d 1297, 1299-1300 (7th Cir. 1989) (money laundering scheme using bogus church as a front to move proceeds to offshore bank accounts and foreign corporations).

9. ***United States v. Hooks***, 848 F.2d 785, 793 (7th Cir. 1988) (diversion of bearer bonds worth $375,000 from inclusion in estate and liquidation of bonds through nominee).

Eighth Circuit

1. ***United States v. Keleta***, 949 F.3d 1082, 1085-86 (8th Cir. 2020) (scheme to claim tax credits for return-preparation clients for which the clients did not qualify).

2. ***United States v. Cole***, 721 F.3d 1016, 1019-21 (8th Cir. 2013) (scheme to impede assessment and collection of taxes on illegal-source income from billing fraud scheme).

3. ***United States v. Wirth***, 719 F.3d 911, 913-14 (8th Cir. 2013) (scheme to falsely claim personal expenses as business expenses)

4. ***United States v. Ellefsen***, 655 F.3d 769, 773-77 (8th Cir. 2011) (scheme to hide income in offshore trusts).

5. ***United States v. Maxwell***, 643 F.3d 1096, 1098-99 (8th Cir. 2011) (scheme to promote trust and nominee schemes and to prepare false returns).

6. ***United States v. Tucker***, 419 F.3d 719, 720 (8th Cir. 2005) (conspiracy to impede assessment and collection of corporate-level tax on the profitable sale of a company through a fraudulent transfer in a bankruptcy proceeding).

7. ***United States v. Fletcher***, 322 F.3d 508, 513-15 (8th Cir. 2003) (claims at seminars given for clients and potential clients of a tax consulting and return preparation business that there were secret provisions in the Internal Revenue Code that could "convert" personal expenses to business expenses; creation of a phony invoice to support an improper deduction for client whose tax return was under audit).

8. ***United States v. Sileven***, 985 F.2d 962, 967-69 (8th Cir. 1993) (untaxed cash receipts from business transferred to Canada and returned as nontaxable loan proceeds).

9. ***United States v. Tierney***, 947 F.2d 854, 866-67 (8th Cir. 1991) (backdating of documents to create a paper trail to falsely corroborate that ethanol plants, promoted and sold as tax shelters, had been placed in service by the end of 1982).

10. ***United States v. Derezinski***, 945 F.2d 1006, 1011-12 (8th Cir. 1991) (falsifying business records; structuring currency transactions; and employing nominees).

11. ***Alexander v. Thornburgh***, 943 F.2d 825, 827-29 (8th Cir. 1991) (owner of adult entertainment business set up sham corporations and operated his companies using false names and names of employees), *vacated on other grounds*, 509 U.S. 544, 559 (1993).

12. ***United States v. Telemaque***, 934 F.2d 169, 170 (8th Cir. 1991) (sale of packages to participants in a Form 1099 scheme).

13. ***United States v. Zimmerman***, 832 F.2d 454, 456 (8th Cir. 1987) (sale of ministries in Universal Life Church, which allowed participants to engage in sham transactions, check kiting, and fund-rotation schemes).

Ninth Circuit

1. ***United States v. Kahre***, 737 F.3d 554, 559-60 (9th Cir. 2013) (per curiam) (scheme to impede assessment and collection of income and employment taxes by paying wages in gold and silver coins).

2. ***United States v. Jennings***, 711 F.3d 1144, 1145-46 (9th Cir. 2013) (scheme using nominee entity to disguise personal payments to owners of corporation as business expenses).

3. ***United States v. Meredith***, 685 F.3d 814, 817-19 (9th Cir. 2012) (scheme to promote and sell so-called "pure trusts").

4. ***United States v. Yip***, 592 F.3d 1035, 1036-37 (9th Cir. 2010) (scheme to impede assessment and collection of tax on income earned from off-the-books side business).

5. ***United States v. Huebner***, 48 F.3d 376, 377-78 (9th Cir. 1994) (defendants created sham debts and advised clients to file bankruptcy to impede IRS collection activity).

6. ***United States v. Crooks***, 804 F.2d 1441, 1443-44, 1448 (9th Cir. 1986), *modified on denial of rehearing*, 826 F.2d 4 (9th Cir. 1987) (promotion and sale of interests in bogus mineral royalty tax shelters that cycled the same funds between the partnerships and lenders and payees under the promoters' control to create canceled checks that could be provided to the IRS as purported substantiation of the partnerships' bogus mineral royalty payments).

7. ***United States v. Moran***, 759 F.2d 777, 780 (9th Cir. 1985) (money laundering scheme using foreign bank accounts and foreign corporations).

8. ***United States v. Little***, 753 F.2d 1420, 1427 (9th Cir. 1985) (promotion and sale of real estate tax shelters using retroactive application to new partner of partnership losses attributable to periods prior to partner's entry into partnership).

Tenth Circuit

1. ***United States v. Ray***, 899 F.3d 852, 856-57 (10th Cir. 2018) (scheme to claim false deductions for job expenses and charitable contributions on returns prepared for clients).

2. ***United States v. Thompson***, 518 F.3d 832, 840-43, 847 (10th Cir. 2008) (commission checks deposited into bank account not disclosed to return preparer; conversion of some commission checks to cash; deposit of commission checks into one defendant's personal savings account; corporate funds used to purchase property on which defendants intended to build personal residence; creation of phony loan document).

3. ***United States v. Scott***, 37 F.3d 1564, 1573 (10th Cir. 1994) (promotion of trusts and unincorporated business organizations to eliminate income tax liability without losing control of money or assets).

4. ***United States v. Tranakos***, 911 F.2d 1422, 1430 (10th Cir. 1990) (selling of sham common law trusts in an attempt to redirect income and avoid taxation).

5. ***United States v. Pinto***, 838 F.2d 426, 428-29 (10th Cir. 1988) (conspirators concealed drug income by using cash to purchase a home, selling that home and purchasing two more homes, and devising sham mortgages purportedly encumbering the later-purchased homes to create the appearance that the purchase money came from loans).

6. ***United States v. Kapnison***, 743 F.2d 1450, 1252 (10th Cir. 1985) (scheme to obtain loans from banks for various borrowers, receive kickbacks from the proceeds of the loans, and fail to report the kickbacks).

Eleventh Circuit

1. ***United States v. Margarita Garcia***, 906 F.3d 1255 (11th Cir. 2018) (scheme to defraud by paying personal expenses through the business).

2. ***United States v. Shabazz***, 887 F.3d 1204, 1209-11 (11th Cir. 2018) (scheme to defraud using identifying information of prisoners obtained under false pretense of offering services of a charity for the prisoners' benefit).

3. ***United States v. Hough***, 803 F.3d 1181, 1184-85 (11th Cir. 2015) (hiding tens of millions of dollars from the sale of medical schools from the IRS through offshore bank accounts and nominee entities).

4. ***United States v. Hernandez***, 921 F.2d 1569, 1575-76 (11th Cir. 1991) (money laundering scheme where funds were converted to money orders and then deposited into a nominee bank account for nightclub owned in name of third party).

5. ***United States v. Lafaurie***, 833 F.2d 1468, 1469-70 (11th Cir. 1987) (money laundering scheme using foreign bank accounts, front corporations, and

structured purchases of cashier's checks and money orders to avoid CTR filing).

6. ***United States v. Cure***, 804 F.2d 625, 626-27 (11th Cir. 1986) (money laundering scheme in which purchases of cashier's checks were structured).

7. ***United States v. Carrodeguas***, 747 F.2d 1390, 1392 (11th Cir. 1984) (scheme to avoid reporting of bonus income by arranging for corporate accounting records to be falsified).

8. ***United States v. Barshov***, 733 F.2d 842, 846 (11th Cir. 1984) (promotion and sale of limited partnership to buy movies, where purchase price was inflated and thereby depreciation costs and investment credits were overstated).

9. ***United States v. Sans***, 731 F.2d 1521, 1534 (11th Cir. 1984) (money laundering scheme using structured currency transactions to avoid CTR filings).

10. ***United States v. Browning***, 723 F.2d 1544, 1545 (11th Cir. 1984) (money laundering scheme using investment counseling firm as front and foreign bank accounts to return money in the form of fictitious loans or salaries from offshore companies).

District of Columbia Circuit

1. ***United States v. Davis***, 863 F.3d 894, 901 (D.C. 2017) (scheme to claim bogus deductions and

inflate income to qualify for the maximum Earned Income Tax Credit).

2. ***United States v. Hunter***, 809 F.3d 677, 679 (D.C. Cir. 2016) (promotion and sale of "tax defiance schemes" that included "Bills of Exchange" and frivolous complaints against IRS employees).

3. ***United States v. Dale***, 991 F.2d 819, 826-29 (D.C. Cir. 1993) (scheme to defraud by falsifying deductions, misclassifying payments, and creating phony debts).

4. ***United States v. Treadwell***, 760 F.2d 327, 329-32 (D.C. Cir. 1985) (scheme to misappropriate assets from a low-income housing project by misapplication, diversion, and theft).

23.07[2][c] Overbreadth Concerns

Prosecutors charging ***Klein*** conspiracies should be aware of some judicial decisions expressing concerns about the broad scope of the defraud clause.

The First Circuit has emphasized that, given the breadth of the defraud clause, "the fraud has to be a *purpose* or *object* of the conspiracy, and not merely a foreseeable consequence of the conspiratorial scheme" — although the court found that standard met in the case before it. ***United States v. Goldberg***, 105 F.3d 770, 773 (1st Cir. 1997). And the Second Circuit, in ***United States v. Coplan***, 703 F.3d 46, (2d Cir. 2012), *cert. denied* 571 U.S. 819 (2013), expressed "skepticism" about the correctness as an original matter of the Supreme Court's statutory interpretation of the defraud clause in ***Haas v. Henkel***, 216 U.S. 462 (1910), and ***Hammerschmidt v. United States***, 265 U.S. 182, 188 (1924), while acknowledging that as an inferior court it was bound to follow those "long-lived Supreme Court decisions." 703 F.3d at 61-62. (Another decision, ***United States v. Minarik***, 875 F.2d 1186 (6th Cir. 1989), also expressed concern about the breadth of the defraud clause, though that decision has since been restricted to its facts. *See* ¶ 23.07[3], *infra*.) And in ***United States v. Caldwell***, 989 F.2d 1056 (9th Cir. 1993), the Ninth Circuit held that a district court's jury instructions were deficient because the court did not tell the jurors that, in order to convict the defendant of a conspiracy to defraud the United States, they had to find that the defendant intended to do so by "deceitful or dishonest means." ***Caldwell***, 989 F.2d at 1060.

Prosecutors responding to judicial concerns about the breadth of the defraud clause, or to defendants citing ***Caldwell***, ***Goldberg***, or ***Coplan***, should be familiar with those decisions and understand the limits of their holdings. ***Caldwell*** and ***Goldberg*** did not question the current scope of the defraud clause but instead discussed why the clause's scope should not be enlarged. And ***Coplan***, although it questioned the "*Klein* doctrine," correctly recognized that the doctrine comes not from the Second Circuit's decision in ***Klein*** but from century-old Supreme Court precedents in ***Haas*** and ***Hammerschmidt***. None of these decisions provides a basis for a lower court to depart from the well-established precedent governing the defraud clause.

23.07[2][d] Precedent Governing Different Statutes

Defendants sometimes attempt to attack the ***Klein*** doctrine using recent Supreme Court decisions where the Court has restricted the reach of different statutes. *See, e.g.*, ***Kelly v. United States***, 140 S. Ct. 1565 (2020) ("property fraud" statutes, including mail and wire fraud, 18 U.S.C. §§ 1341 & 1343, and federal-program fraud, 18 U.S.C. § 666); ***Marinello v. United States***, 138 S. Ct. 1101 (2018) ("tax obstruction" statute, 26 U.S.C. § 7212(a), discussed in ¶17.04, *supra*); ***Skilling v. United States***, 561 U.S. 358 (2010) ("honest services" fraud, 18 U.S.C. § 1346).

These decisions have no relevance to Section 371 or the defraud clause. The government successfully rebutted such an argument in ***United States v. Atilla***, 966 F. 3d 118 (2d Cir. 2020). Atilla was convicted of violating Section 371 by conspiring to obstruct the lawful functions of the Treasury Department in enforcing the laws imposing economic sanctions on Iran. ***Id.*** at 121-23. Atilla challenged this conviction, relying on ***Marinello*** to argue that "that the defraud clause should be construed narrowly to avoid vagueness concerns." ***Id.*** at 130-31. The court, however, found the analogy to ***Marinello*** "inapposite because in that case, the Supreme Court analyzed 26 U.S.C. § 7212(a)'s unique text, context, and history – which are wholly unrelated to § 371's defraud clause." ***Ibid.***

United States v. Flynn,____F.3d_____, 2020 WL 4687010 (8th Cir. Aug. 13, 2020), likewise declined to apply ***Marinello*** to the defraud clause. Flynn pleaded guilty to a ***Klein*** conspiracy and unsuccessfully sought to withdraw his guilty plea before sentencing. ***Id.*** at *1-2. Flynn argued on appeal that his guilty plea lacked a factual basis because ***Marinello***, which requires proof of a nexus to a pending or reasonably foreseeable targeted to sustain a tax obstruction conviction under § 7212(a), requires proof of a similar "nexus" to establish a ***Klein*** conspiracy. ***Id.*** at *3-4. This is so, Flynn maintained, because § 371's defraud clause is otherwise void for vagueness. ***Id.*** at *4-5 & n.4.

Flynn rejected these arguments, concluding that "***Marinello*** did not alter ***Klein*** conspiracies." 2020 WL 4687010 at *3-5 & n.4. The court explained that, unlike § 7212(a), "the broad language in § 371 makes no reference to 'the due administration [of the Internal Revenue Code].'" ***Id.*** at 4. And ***Flynn*** reasoned that because "the broad scope of ***Klein*** conspiracies is sanctioned in 'long-lived Supreme Court decisions' . . . arguments aimed at narrowing it 'are properly directed to a higherauthority.'" ***Ibid.*** (quoting ***Coplan***, 703 F.3d at 62).

23.07[3] Overlapping Conspiracies and the Sixth Circuit's **Minarik** *Decision*

As noted, Section 371 provides for two forms of conspiracies. The defraud clause and the offense clause overlap, however, when a fraud against the United States also violates a specific federal statute. *See* **United States v. Helmsley**, 941 F.2d 71, 90 (2d Cir. 1991). The question then becomes which clause should be charged.

In ***United States v. Minarik***, 875 F.2d 1186 (6th Cir. 1989), the Sixth Circuit stated that in order to properly alert defendants to the charges against them, prosecutors must use the offense clause, rather than the defraud clause, when the conduct charged constitutes a conspiracy to violate a specific statute. 875 F.2d at 1187.

Subsequent Sixth Circuit decisions, however, have "confined the [***Minarik***] decision to its facts." ***United States v. Damra***, 621 F.3d 474, 506 (6th Cir. 2010); *see also* ***United States v. Sturman***, 951 F.2d 1466, 1473-74 (6th Cir. 1991); ***United States v. Mohney***, 949 F.2d 899, 900-03 (6th Cir. 1991); ***United States v. Kraig***, 99 F.3d 1361, 1364-68 (6th Cir. 1996); ***United States v. Khalife***, 106 F.3d 1300, 1303-04 (6th Cir. 1997); ***United States v. Rozin***, 664 F.3d 1052, 1064-66 (6th Cir. 2012). These cases have held that ***Minarik*** is applicable "only when the defendant receives no specific notice of the crimes charged, the violation was too isolated to comprise a conspiracy to defraud, and the taxpayer's duties are technical." ***Damra***, 621 F.3d at 507; *see also* ***Khalife***, 106 F.3d at 1303-04 (elaborating upon these requirements, and concluding that ***Minarik***'s statement regarding the application of the offense and defraud clauses of § 371 was "[d]icta").

Other circuits have rejected ***Minarik*** entirely and allow the government to charge the defraud clause regardless of whether the fraud constitutes a separate federal criminal offense. *See*, *e.g.*, ***United States v. Fletcher***, 322 F.3d 508, 519 (8th Cir. 2003); ***United States v. Arch Trading Co.***, 987 F.2d 1087, 1092 (4th Cir. 1993); ***United States v. Harmas***, 974 F.2d 1262, 1266-67 (11th Cir. 1992); ***United States v. Hurley***, 957 F.2d 1, 3 (1st Cir. 1992); ***United States v. Derezinski***, 945 F.2d 1006, 1010 (8th Cir. 1991); ***United States v. Notch***, 939 F.2d 895, 900-01 (10th Cir. 1991); ***United States v. Bilzerian***, 926 F.2d 1285, 1301-02 (2d Cir. 1991); ***United States v. Reynolds***, 919 F.2d 435, 438-39 (7th Cir. 1990); ***United States v. Haga***, 821 F.2d 1036, 1044-45 (5th Cir. 1987).

23.07[4] Scope of Intent

23.07[4][a] Generally

The crime of conspiracy includes an intent element that requires the government to show that each member of the conspiracy had knowledge of the object of the conspiracy and joined the conspiracy intending to achieve that object. ***Ingram v. United States***, 360 U.S. 672, 678 (1959). The government may rely on circumstantial evidence to establish this element. *E.g.*, ***United States v. Lore***, 430 F.3d 190, 204 (3d Cir. 2005); ***United States v. Hayes***, 190 F.3d 939, 946 (9th Cir. 1999), *aff'd en banc*, 231 F.3d 663, 667 n.1 (9th Cir. 2000); ***United States v. Gonzalez***, 810 F.2d 1538, 1542-43 (11th Cir. 1987). Further, the government need only show that a defendant knew of the essential nature of the scheme: the government need not show that he or she knew all of the details or the identity of all other members of the conspiracy. *See*, *e.g.*, ***United States v. Browning***, 723 F.2d 1544, 1546 (11th Cir. 1984). In the context of a ***Klein*** conspiracy, this typically means that the government must prove that each member knew that at least one of the objects of the scheme was to deceptively impede the functions of the IRS and that the member intended to join in the scheme to achieve that object. *See*, *e.g.*, ***United States v. Shermetaro***, 625 F.2d 104, 109 (6th Cir. 1980).

23.07[4][b] Multiple Purposes

Although each member of the conspiracy must intend to deceptively impede the IRS, that need not be the exclusive or even primary purpose of the conspiracy. *Cf.* ¶ 8.06[3], *supra* (explaining that a defendant is guilty under Section 7201 if tax evasion "plays any part" in the defendant's conduct, even if there are other purposes, as well, such as concealment of a crime, quoting ***Spies v. United States***, 317 U.S. 492, 499(1943)).

In ***Goldberg***, the First Circuit, although expressing concern about the breadth of the ***Klein*** doctrine, *see* ¶ 23.07[2][c], *supra*, nonetheless rejected the argument that deceptively impeding the IRS must be the "primary purpose" of a ***Klein*** conspiracy:

> [Goldberg] argues, inventively, that the conspirators either must have as their primary purpose the aim of frustrating the IRS or must be agreeing to undertake the conduct in question to conceal some other crime. An example of the first alternative (primary purpose) is ***Klein*** itself where a web of shell companies and deceptive arrangements was devised to evade taxes; the second alternative captures the money laundering precedents.
>
> This view of section 371 might explain a number of cases and create a barrier against overreaching by prosecutors. But it makes no doctrinal sense. A conspiracy can have multiple objects, ***Ingram v. United States***, 360 U.S. 672, 679-80 (1959), and any agreed-upon object can be a purpose of the conspiracy and used to define its character.

105 F.3d at 773-74. Having rejected the "primary purpose" argument, ***Goldberg*** clarified that "interfering with government functions" must be "*a* purpose" of the conspiracy, as opposed to "merely a foreseeable effect of joint action taken for other reasons." ***Id.*** at 774 (emphasis added); *see also* ***United States v. Gricco***, 277 F.3d 339, 348 (3d Cir. 2002), *overruled on other grounds*, ***United States v. Cesare***, 581 F.3d 206, 208 n.3 (3d Cir. 2009); ***United States v. Adkinson***, 158 F.3d 1147, 1155 (11th Cir. 1998).

Even in the absence of a "primary purpose" rule of the sort that ***Goldberg*** rejected, the requirement to prove that interfering with the IRS's operations is a purpose of a ***Klein*** conspiracy, rather than a mere foreseeable consequence, is a significant requirement. ***Goldberg*** itself concluded that the two conspiracies to defraud at issue in the case "f[e]ll within the outer bounds of Section 371." ***Id.*** at 775. ***Goldberg*** nonetheless found sufficient evidence that these conspiracies — both of which had non-tax objects relating to Goldberg's efforts to derail a harbor tunnel project that he believed would harm his businesses — also had tax-obstructive purposes because both conspiracies involved "falsify[ing] IRS documents to misstate or misattribute income." ***Id.*** at 771-72, 774-75. But ***Goldberg*** cautioned, in dictum, that "[t]his would be a different case if, without filing false tax documents, Goldberg had agreed with his partners to pay [someone] under the table, knowing that [person] had no intention of reporting the money to the IRS." ***Id.*** at 774.

In ***United States v. Pappathanasi***, 383 F. Supp. 2d 289 (D. Mass. 2005), the district relied upon ***Goldberg*** to grant the defendants' motion for a judgment of acquittal on a ***Klein*** conspiracy charge. A jury found the ***Pappathanasi*** defendants guilty of a ***Klein*** conspiracy that "involved a rebate program for the sale of light cream by [defendants' company named] WLC to Dunkin' Donut stores, in which WLC allegedly gave franchisees inflated invoices and then rebated the difference back to them in checks and cash." ***Id.*** at 290. The district court, in overturning the jury's verdict, observed that, unlike in ***Goldberg***, "neither the defendants nor WLC filed any false documents with the IRS." ***Id.*** at 295. Relying on ***Goldberg***'s dictum, the district court concluded that the evidence of a tax-obstructive purpose was insufficient even though "[s]ome of the Dunkin' Donuts franchisees' rebates were paid in cash, and it could be inferred that [one of the defendants] knew that they might not pay taxes on the money." ***Ibid.***

23.07[4][c] **Klein** ***Conspiracy Coupled with a Narcotics or Money Laundering Prosecution***

In some cases, prosecutors will charge a ***Klein*** conspiracy in conjunction with narcotics or money laundering charges. Such cases typically involve the failure to report income derived from the sale of narcotics or the laundering of drug proceeds. In these cases, the element of intent, especially as to the ***Klein*** objective, becomes an issue. A question is raised as to whether acts of concealing sources of income and disguising the character of narcotics proceeds are alone sufficient to infer an intent to impede and impair the functions of the IRS.

A line of cases holds that when acts of concealment are reasonably explainable in terms other than a motivation to evade taxes, the government must produce *independent evidence* of an intent to evade taxes. ***United States v. Pritchett***, 908 F.2d 816, 820-22 (11th Cir. 1990); ***United States v. Krasovich***, 819 F.2d 253, 256 (9th Cir. 1987).

For example, in ***Krasovich***, the Ninth Circuit reversed a defendant's ***Klein*** conspiracy conviction where the evidence adduced at trial failed to establish a link between the defendant and the tax laws. 819 F.2d at 256. Krasovich was an auto mechanic for John and Andrea Drummond, who were cocaine traffickers. The evidence at trial showed that Krasovich knew the Drummonds sold narcotics and that Krasovich knowingly registered, in his own name, vehicles and equipment purchased by the Drummonds, for the purpose of keeping title out of the Drummonds' names. 819 F.2d at 254.

The government charged Krasovich and the Drummonds with a ***Klein*** conspiracy relating to the personal income taxes of John Drummond. 819 F.2d at 254-55. Krasovich argued that there was no direct or circumstantial evidence to indicate that he agreed with anyone to impede the functions of the IRS. In response, the government pointed to the defendant's acts of concealment as circumstantial evidence of his intent. 819 F.2d at 255-56. The court of appeals rejected the government's position. The court found that when efforts at concealment can be explained in terms of motivation other than to evade taxes, the government must supply other evidence to show the defendant knew that the purpose of the concealment was to impede the functions of the IRS. 819 F.2d at 256.

The ***Krasovich*** court based its holding on the Supreme Court decision in ***Ingram v. United States***, 360 U.S. 672 (1959). There, the Court reversed the convictions of two low-level co-conspirators in a gambling operation, who had been charged under the offense clause of Section 371 with conspiracy to evade the wagering tax. 360 U.S. at 673. The Supreme Court stressed that, under the offense clause, the government must establish an intent to agree and an intent to commit the substantive offense itself. 360 U.S. at 678.

The ***Ingram*** Court found the record barren of any direct evidence to establish an underlying intent to evade taxes. Further, the Court held that the government could not use the acts of concealing the gambling operation to infer a tax motive because concealment is common to all crime and may be used to infer any number of motives. Without independent proof to show knowledge of the tax motive, the intent element could not be made out, and the Court reversed the convictions. 360 U.S. at 678-80.

In ***United States v. Pritchett***, 908 F.2d 816 (1990), the Eleventh Circuit followed the rationale of ***Ingram*** and ***Krasovich***. The defendants, David and Mark Pritchett, along with three others, were indicted for conspiracy to distribute cocaine and conspiracy to evade the personal income taxes of Joe Pritchett. The evidence showed that both defendants knew of the drug operation and participated in concealing assets of Joe Pritchett, including the unknown contents of several safe deposit boxes. 908 F.2d at 818-21.

Relying on ***Ingram***, and ***Krasovich***, the court found:

> [T]hese two [defendants'] efforts at concealing Joe's source of income and ownership interests are "not reasonably explainable only in terms of motivation to evade taxes." . . . Because David knew about and participated in the drug sales, his efforts at hiding the income are explained in terms of an effort to prevent detection of the drug business. The evidence does not show that Mark knew Joe's cash represented current income, and therefore only shows that Mark knew that Joe was hiding his ownership interests in various assets.

908 F.2d at 821 (quoting ***Ingram***, 360 U.S. at 679).

The court distinguished two earlier cases — ***United States v. Enstam***, 622 F.2d 857, 861-64 (5th Cir. 1980), and ***United States v. Browning***, 723 F.2d 1544, 1546-49 (11th Cir. 1984), based on what it described as differences in the evidence in those cases. According to the court, in ***Enstam*** and ***Browning***, the government "offered independent evidence of an intent to avoid income taxes,"[7] evidence the court found to be lacking in ***Pritchett***. 908 F.2d at 821-22. The ***Pritchett*** court concluded that, because of the additional evidence proven in ***Enstam*** and ***Browning***, the findings in those cases were consistent with ***Ingram***. 908 F.2d at 821-22.

Consistent with the Fifth and Eleventh Circuits' decisions in ***Enstam*** and ***Browning***, other circuits have also sustained convictions where there was evidence supporting a finding of intent to defraud the IRS along with evidence of concealment of the source of money or other assets or the true ownership of income or assets. *See* ***United States v. Beverly***, 913 F.2d 337, 357-58 (7th Cir. 1990); ***United States v. Vogt***, 910 F.2d

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[7] That evidence consisted primarily of statements made by co-conspirators evincing an intent to avoid taxes. 908 F.2d at 822.

1184, 1202-03 (4th Cir. 1990); ***United States v. Bucey***, 876 F.2d 1297, 1311-13 (7th Cir. 1989).

The First Circuit, in contrast, has held that the act of "laundering" money itself constitutes impeding the IRS in its ability to collect taxes. ***United States v. Hurley***, 957 F.2d 1, 4-7 (1st Cir. 1992); ***United States v. Paiva***, 892 F.2d 148, 162 (1st Cir. 1989); ***United States v. Tarvers***, 833 F.2d 1068, 1075-76 (1st Cir. 1987). Thus, in the First Circuit, the government need not necessarily be concerned about other motives behind acts of concealment or with establishing independent proof of the tax motive. The government must establish (1) that the defendant participated in or knew about a money laundering scheme that had the effect of impeding the IRS in its collection of taxes and (2) that the defendant knew the money being laundered came from illegal activities. ***Tarvers***, 833 F.2d at 1076. Where possible, however, the prosecutor should seek to introduce evidence of an intent to impede the IRS.

23.08 STATUTE OF LIMITATIONS

23.08[1] Generally

The statute of limitations for a conspiracy to evade taxes under the offense clause of Section 371 is six years. Similarly, the statute of limitations for a ***Klein*** conspiracy under the defraud clause of Section 371 is six years. Both of these offenses are controlled by 26 U.S.C. § 6531, which provides in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years —
>
> > (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

. . . .

> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

26 U.S.C. § 6531.

Occasionally, defendants charged with a tax conspiracy under Section 371 will argue that a five-year statute of limitations should apply to Section 371, pursuant to 18 U.S.C. § 3282, which is the general limitations statute for Title 18 offenses. The courts have routinely rejected this position and affirmed the application of the six-year limitations period to tax conspiracies. *See* ***United States v. Bellomo***, 176 F.3d 580, 598 (2d Cir. 1999); ***United States v. Aubin***, 87 F.3d 141, 145 (5th Cir. 1996); ***United States v. Aracri***, 968 F.2d 1512, 1517 (2d Cir. 1992); ***United States v. Waldman***, 941 F.2d 1544, 1548-49 (11th Cir. 1991); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990); ***United States v. Pinto***, 838 F.2d 426, 435 (10th Cir. 1988); ***United States v. White***, 671 F.2d 1126, 1133-34 (8th Cir. 1982); ***United States v. Brunetti***, 615 F.2d 899, 901-02 (10th Cir. 1980); ***United States v. Fruehauf Corp.***, 577 F.2d 1038, 1070 (6th Cir. 1978); ***United States v. Lowder***, 492 F.2d 953, 955-56 (4th Cir. 1974).

23.08[2] Beginning of Limitations Period

The statute of limitations in a conspiracy begins to run from the last overt act proved. ***Grunewald v. United States***, 353 U.S. 391, 396-97 (1957); *see also* ***United States v. Anderson***, 319 F.3d 1218, 1218 (10th Cir. 2003); ***United States v. Dandy***, 998 F.2d 1344, 1355 (6th Cir. 1993); ***United States v. Fletcher***, 928 F.2d 495, 498 (2d Cir. 1991); ***United States v. Vogt***, 910 F.2d 1184, 1201 (4th Cir. 1990); *see also* ***United States v. Salmonese***, 352 F.3d 608, 614 (2d Cir. 2003) (noting "the requirement for an overt act within the limitations period"). And because statutes of limitation and venue requirements serve distinct purposes, the overt act serving to make the conspiracy timely need not be committed in the district in which the defendant is charged. ***United States v. Tannenbaum***, 934 F.2d 8, 12-13 (2d Cir. 1991).

23.08[3] Withdrawal Defense

The government is not required to prove that each member of a conspiracy committed an overt act within the statute of limitations. ***Hyde v. United States***, 225 U.S. 347, 369-70 (1912); *see also* ***United States v. Read***, 658 F.2d 1225, 1233-34 (7th Cir. 1981) (interpreting ***Hyde***). Once the government establishes that a member joined the conspiracy, that member's continued participation in the conspiracy is presumed until the object of the conspiracy has been accomplished, or until the member has withdrawn from or abandoned the conspiratorial purpose. *See, e.g.*, ***United States v. Vaquero***, 997 F.2d 78, 82 (5th Cir. 1993); ***United States v. West***, 877 F.2d 281, 289 (4th Cir. 1989); ***United States v. Juodakis***, 834 F.2d 1099, 1103 (1st Cir. 1987); ***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir. 1987); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980). *See also* ***United States v. Jimenez Recio***, 537 U.S. 270 (2003) (a conspiracy does not automatically terminate simply because the Government has defeated its object).

Withdrawal marks a conspirator's disavowal or abandonment of the conspiratorial agreement. ***Hyde v. United States***, 225 U.S. at 369. Whether a conspirator has withdrawn from the conspiracy is a question of fact for the jury. In ***United States v. U.S. Gypsum Co.***, 438 U.S. 422, 464-65 (1978), the Supreme Court stated that "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." The courts have held that mere cessation of activity is insufficient to prove withdrawal. Rather, some sort of affirmative action that demonstrates one has abandoned the object of the conspiracy is required. *See* ***United States v. Berger***, 224 F.3d 107, 118-19 (2d Cir. 2000); ***United States v. Antar***, 53 F.3d 568, 583 (3d Cir. 1995), *overruled on other grounds by* ***Smith v. Berg***, 247 F.3d 532, 534 (3d Cir.2001); ***United States v. Lash***, 937 F.2d 1077, 1083 (6th Cir. 1991); ***United States v. Juodakis***, 834 F.2d 1099, 1102 (1st Cir. 1987); ***United States v. Finestone***, 816 F.2d 583, 589 (11th Cir. 1987); ***United States v. Gonzalez***, 797 F.2d 915, 917 (10th Cir. 1986); ***United States v. Krasn***, 614 F.2d 1229, 1236 (9th Cir. 1980).

A conspirator's withdrawal from a conspiracy starts the running of the statute of limitations as to that conspirator. If an indictment is filed after the applicable statute of limitations period as to a conspirator has run (i.e., more than six years after the conspirator's withdrawal from the conspiracy where the limitations period is six years), the statute of limitations bars prosecution of that conspirator for his or her participation in the conspiracy. ***United States v. Read***, 658 F.2d 1225, 1232-33 (7th Cir. 1981). The defendant carries the full burden of establishing this affirmative defense; the burden does not shift to the government merely because the defendant "produces some evidence supporting such a defense." ***Smith v. United States***, 568 U.S. 106, 107, 110-12 (2013).

In short, the government technically is not required to prove that each member of the conspiracy committed an overt act within the limitations period. Indeed, a defendant cannot raise such a "statute-of-limitations bar for the first time on appeal." ***Musacchio v. United States***, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016).[8] In practice, however, a prosecutor should critically review those conspirators whose membership predates the limitations period and be prepared to rebut any withdrawal defense based on the statute of limitations.

23.09 CO-CONSPIRATOR STATEMENTS

Statements made by a co-conspirator as part of a conspiracy are not excluded from evidence by the hearsay rule or the Confrontation Clause of the Sixth Amendment. Fed. R. Evid. 801(d)(2)(E); ***Crawford v. Washington***, 541 U.S. 36, 56 (2004) ("by their nature . . . statements in furtherance of a conspiracy" are "not testimonial"). Whether a statement qualifies as a co-conspirator statement must be proved by a preponderance of the evidence, and the court must consider the statement itself in determining whether there existed a conspiracy and whether the statement was in furtherance of the conspiracy. ***Bourjaily v. United States***, 483 U.S. 171 (1987). There also must be some independent corroborating evidence: although "[t]he statement must be considered," it

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[8] Some circuits have indicated, however, that a defendant may still attempt to premise a claim of ineffective assistance of counsel on a failure to raise a limitations defense, even after ***Musacchio***. *See, e.g.,* ***United States v. Samchuk***, 739 Fed. App'x 460, 461 (9th Cir. 2018) (declining to address issue on direct appeal, and observing that the ineffective assistance "claim is better suited for review in a [collateral] proceeding . . . under 28 U.S.C. § 2255").

"does not by itself establish . . . the existence of the conspiracy or participation in it." Fed. R. Evid. 801(d).

Because the existence of a conspiracy for the purpose of introducing a co-conspirator statement is a preliminary, factual question for the court, *see* Fed. R. Evid. 104; ***Bourjaily***, 483 U.S. at 181, "it is not necessary that the conspiracy upon which admissibility of the statement is predicated be that [conspiracy] charged" in the indictment. ***United States v. El-Mezain***, 664 F.3d 467, 502 (5th Cir. 2011). Indeed, many courts have concluded that the "conspiracy" need not be criminal at all. The subsection excluding co-conspirator statements from the definition of "hearsay" in Rule 801(d)(2) deals with statements by an "opposing party," including the defendant's own statements and statements by a defendant's agent. *See* Fed. R. Evid. 801(a), (c); *see also* ***id.***, Notes of Committee on the Judiciary, Senate Report No. 93–1277. Accordingly, numerous courts of appeals have concluded that the "conspiracy" referred to in Rule 801(d)(2)(E) includes joint undertakings generally, both legal and illegal. *See* ***United States v. Russo***, 302 F.3d 37, 45 (2d Cir. 2002) (collecting cases) ("[T]he objective of the joint venture that justifies deeming the speaker as the agent of the defendant need not be criminal at all."); *see also* ***Government of the Virgin Islands v. Brathwaite***, 782 F.2d 399, 403 & n.1 (3d Cir. 1986); ***United States v. Nelson***, 732 F.3d 504, 516 (5th Cir. 2013); ***United States v. Porter***, 933 F.2d 1010 (6th Cir. 1991); ***United States v. Kelley***, 864 F.2d 569, 573 (7th Cir. 1989); ***United States v. Layton***, 855 F.2d 1388, 1400 (9th Cir. 1988); ***United States v. Bucaro***, 801 F.2d 1230, 1232 (10th Cir. 1986); ***United States v. Brockenborrugh***, 575 F.3d 726, 735 (D.C. Cir. 2009).

In the usual conspiracy prosecution, however, there will be substantial overlap between the evidence needed to prove the existence of a conspiracy to the court (to establish applicability of the co-conspirator exception by a preponderance of the evidence) and the evidence needed to prove the existence of a conspiracy to the jury (to prove the conspiracy charged in the indictment beyond a reasonable doubt). Circuit practice varies as to how and when the government must meet these two distinct burdens. A number of circuits encourage district courts to conditionally admit co-conspirator statements and then evaluate, at the conclusion of the government's case, whether the government met its burden of proving the conspiracy by a preponderance of the evidence. *See* ***United Sates v. Correa-Osorio***, 784 F.3d 11, 23-24 (1st Cir. 2015); ***United States v.***

Tracy, 12 F.3d 1186, 1199-1200 (2d Cir. 1993); ***United States v. Blevins***, 960 F.2d 1252, 1256 (4th Cir. 1992); ***United States v. Cardena***, 842 F.3d 959, 994-95 (7th Cir. 2016); ***United States v. Cazares***, 521 F.3d 991, 998 n. 5 (8th Cir. 2008). In other circuits, a district court will generally hold a pretrial hearing, often called a ***James*** hearing after the Fifth Circuit's decision in ***United States v. James***, 590 F.2d 575 (5th Cir. 1979) (en banc), to determine whether a conspiracy existed and whether the statements sought to be offered were made in furtherance of that conspiracy. *See* ***id.*** at 581-82 ("The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator."); ***United States v. Urena***, 27 F.3d 1487, 1491 (10th Cir. 1994) ("The strongly preferred order of proof in determining the admissibility of an alleged co-conspirator statement is first to hold a *James* hearing, outside the presence of the jury to determine by a preponderance of the evidence the existence of a predicate conspiracy."). Other circuits leave the question of whether to hold a pretrial hearing or to conditionally admit the statement entirely to the trial judge. *See, e.g.*, ***United States v. Weaver***, 507 F.3d 178, 187-88 (3d Cir. 2007). Even in the circuits that prefer a ***James*** hearing, however, such a hearing is a matter of discretion, not a requirement. *See* ***United States v. Gonzalez-Balderas***, 11 F.3d 1218, 1224 (5th Cir. 1994); ***United States v. Hewes***, 729 F.2d 1302, 1312 (11th Cir. 1984).

23.10 VENUE

The crime of conspiracy is a continuing offense, the prosecution of which is proper "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a); ***Smith v. United States***, 568 U.S. 106, 111 (2013) ("Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence") (cleaned up); ***United States v. Tannenbaum***, 934 F.2d 8, 12 (2d Cir. 1991); *see also* ***United States v. Askia***, 893 F.3d 1110, 1119 (8th Cir. 2018) (referring to conspiracy as a "well-established continuing offense[]" for statute-of-limitations purposes); ***United States v. Jaynes***, 75 F.3d 1493, 1505 (10th Cir. 1996) ("prototypical continuing offense"). The government must establish venue by a preponderance of the evidence. *E.g.*, ***United States v. Lukashov***, 694 F.3d 1107, 1120 (9th Cir. 2012); ***United States v. Smith***, 918 F.2d 1551, 1557 (11th Cir. 1990); ***United States v. Record***, 873 F.2d 1363, 1366 (10th Cir.

1989); ***United States v. Moeckly***, 769 F.2d 453, 460 (8th Cir. 1985). The government may rely on an overt act not alleged in the indictment as the basis for venue. ***United States v. Schwartz***, 535 F.2d 160, 164-65 (2d Cir. 1976).

Venue as to an offense arising under 18 U.S.C. § 371 lies in any district where the agreement was made or where an overt act in furtherance of the conspiracy was committed. ***Hyde v. United States***, 225 U.S. 347, 362-63 (1912); ***United States v. Crozier***, 259 F.3d 503, 519 (6th Cir. 2001); ***United States v. Pomranz***, 43 F.3d 156, 158-59 (5th Cir. 1995); ***United States v. Lam Kwong-Wah***, 924 F.2d 298, 301 (D.C. Cir. 1991); ***United States v. Smith***, 918 F.2d 1551, 1557 (11th Cir. 1990); ***United States v. Uribe***, 890 F.2d 554, 558 (1st Cir. 1989); ***United States v. Ahumada-Avalos***, 875 F.2d 681, 682-83 (9th Cir. 1989); ***United States v. Record***, 873 F.2d 1363, 1366 (10th Cir. 1989); ***United States v. Ramirez-Amaya***, 812 F.2d 813, 816 (2d Cir. 1987); ***United States v. Levy Auto Parts of Canada***, 787 F.2d 946, 952 (4th Cir. 1986); ***United States v. Andrus***, 775 F.2d 825, 846 (7th Cir. 1985); ***United States v. Moeckly***, 769 F.2d 453, 460-61 (8th Cir. 1985). "[W]here a criminal conspirator commits an act in one district which is intended to further a conspiracy by virtue of its effect in another district, the act has been committed in both districts and venue is properly laid in either." ***United States v. Lewis***, 676 F.2d 508, 511 (11th Cir. 1982); *see* ***United States v. Brown***, 739 F.2d 1136, 1148 (7th Cir. 1984).

The government is not required to show that all of the members of a conspiracy committed an overt act within the district of prosecution. So long as one conspirator committed an overt act within the district, venue is established as to all members of the conspiracy. *See, e.g.*, ***Tannenbaum***, 934 F.2d at 13; ***United States v. Uribe***, 890 F.2d 554, 558 (1st Cir. 1989); ***United States v. Meyers***, 847 F.2d 1408, 1411 (9th Cir. 1988). Moreover, the overt act serving as the basis for venue need not be committed within the statute of limitations. *See* ***Tannenbaum***, 934 F.2d at 13 (rules governing venue and limitations serve different purposes).

23.11 SENTENCING GUIDELINES

Conspiracies under the offense clause and the defraud clause of Section 371 are governed by different provisions of the Sentencing Guidelines. The general Guidelines provision for conspiracies, USSG § 2X1.1, applies to offense-clause conspiracies, while ***Klein*** conspiracies are specifically covered by USSG § 2T1.9. *See* ¶ 16.02[6], *supra*; ¶ 43.03[1][g], *infra*; *see also* USSG App. A (statutory index).

Under Section 2X1.1(a), the base offense level is the "base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty." Under this provision, "the only specific offense characteristics from the guideline for the substantive offense that apply are those that are determined to have been specifically intended or actually occurred. Speculative specific offense characteristics will not be applied." USSG § 2X1.1 comment. (n.2).

The offense level under Section 2X1.1 is decreased by three levels "unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control." USSG § 2X1.1(b)(2). The Guidelines commentary explains that, for "most prosecutions for conspiracies, . . . no reduction of the offense level is warranted" under this provision because "the substantive offense was substantially completed or was interrupted or prevented on the verge of completion by the intercession of law enforcement authorities or the victim." USSG § 2X1.1 comment. (backg'd).

Under Section 2T1.9, the base offense level is the offense level — including any applicable specific offense characteristics — from § 2T1.1 (which covers most tax crimes) or § 2T1.4 (which specifically covers aiding and assisting in the filing of false returns), "as appropriate," but the offense level is increased to a minimum of 10 if either of those provisions yields an offense level lower than 10. USSG § 2T1.9(a), comment. (n.2).[9] There are also offense-level enhancements for planned or threatened use of

[9] In ***United States v. Kraig***, 99 F.3d 1361 (6th Cir. 1996), the defendant argued that his offense level should be 10 under this provision because "his offense is not similar to either of the tax offenses covered by sections 2T1.1 or 2T1.3," which the version of 2T1.9 then applicable cross-referenced instead

violence (four levels) or for "encourag[ing] persons other than or in addition to co-conspirators to violate the internal revenue laws" (two levels), but if both these enhancements apply, only "the greater" 4 level enhancement is applied. USSG 2T1.9(b); *see also* ***United States v. Hopper***, 177 F.3d 824, 833 (9th Cir. 1999) (remanding for resentencing because both enhancements were applied). The enhancement for encouraging others besides co-conspirators to violate the internal revenue laws cannot be applied in addition to the enhancements under § 2T1.4(b)(1) for being in the business of preparing false returns, deriving substantial income from the scheme, or using sophisticated means in carrying out the offense. *See* USSG § 2T1.9(b)(2).

Application note 4 to Section 2T1.9 explains that "[s]ubsection (b)(2) provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws," and gives two examples of offenses to which the enhancement applies: "an offense involving a 'tax protest' group that encourages persons to violate the tax laws," and "an offense involving the marketing of fraudulent tax shelters or schemes." *See also, e.g.,* ***United States v. Reinke***, 283 F.3d 918, 920-21 (8th Cir. 2003) (applying enhancement where defendants "marketed and sold hundreds of trusts" and falsely "told trust purchasers that they could assign their assets and income to the trusts and then deduct from their taxes the money that they paid for personal living expenses"); ***United States v. Fant***, 180 F.3d 261 (Table), 1999 WL 274489, at *1 (5th Cir. 1999) (per curiam) (applying enhancement where defendant "invited someone who was not a coconspirator to a 'tax protest' meeting for the purpose of encouraging him to violate the tax laws"). The enhancement's application, however, is not limited to these examples, and prosecutors should seek the enhancement where it applies. *See* ***United States v. Macchia***, 104 F.3d 350 (Table), 1996 WL 518509, at *3 (2d Cir. 1996) (rejecting argument that enhancement applies only to

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of Section 2T1.4. ***Id.*** at 1370. The court, however, rejected this argument, concluding that "the plain language of the guideline directs that one of these two sections is to be used" if the offense level under the "most applicable" of those two sections is greater than 10. ***Ibid.***; *see also* USSG § 2T1.9, comment. (n.2) (directing the use of "whichever guideline [2T1.1 or 2T1.4] most closely addresses the harm that would have resulted had the conspirators succeeded in impeding, impairing, obstructing, or defeating the Internal Revenue Service").

"tax protest groups and promoters of fraudulent tax shelters," and applying it where the defendant encouraged others to prepare false invoices so he and his co-conspirators could evade gasoline excise taxes); ***United States v. Rabin***, 986 F. Supp. 887, 890-91 (D. N.J. 1997) (where agreement in *Klein* conspiracy was between company manager and company union representative, enhancement applied where a girlfriend and an attorney were encouraged to violate tax laws).

In ***United States v. Sabino***, 307 F.3d 446 (6th Cir. 2002), the court rejected the defendants' argument that it was improper double-counting to impose an obstruction of justice enhancement under USSG § 3C1.1 for providing false grand jury testimony when they were convicted of a ***Klein*** conspiracy and sentenced under Section 2T1.9. Although the defendants' false statements to the grand jury were alleged as overt acts in furtherance of the conspiracy, the court reasoned that because Section 2T1.9 "applies to conspiracies under § 371 that are designed to 'defraud the United States by impeding, impairing, obstructing, and defeating . . . the collection of revenue,'" there was "no reason to conclude that this guideline takes into consideration a defendant's obstruction of the administration of justice in furtherance of the fraudulent scheme, such as giving false testimony before the grand jury or bribing a witness." ***Id.*** at 450-51 (quoting USSG 2T1.9, comment. (n.1)).

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24.00 FALSE STATEMENTS

24.1 STATUTORY LANGUAGE: 18 U.S.C. § 1001

§1001. ***Statements or entries generally***

(a) . . . [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,[1] knowingly and willfully --

> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years.........[2]

Under 18 U.S.C. § 3571, the maximum fine under Section 1001 is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a

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[1] The ***False Statements Accountability Act of 1996***, Pub. L. No. 104-292, 110 Stat. 3459, changed the language of Section 1001, which previously criminalized false statements made "in any matter within the jurisdiction of any department or agency of the United States ...... [.]" The ***False Statements Accountability Act*** superseded the Supreme Court's 1995 decision in ***Hubbard v. United States,*** 514 U.S. 695, 702-03 (1995), which held that the previous version of Section 1001 prohibited only false statements made to the executive branch. The ***False Statements Accountability Act*** extended the application of Section 1001 to false statements or entries on any matter within the jurisdiction of the executive, legislative or judicial branch of the federal government. However, this prohibition does not apply to a party to a judicial proceeding, or to that party's counsel, "for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding." 18 U.S.C. § 1001(b).

[2] The ***Intelligence Reform and Terrorism Prevention Act of 2004,*** Pub. L. No. 108-458, 118 Stat. 3638, with an effective date of December 17, 2004, increased the penalties under Section 1001 for crimes involving international or domestic terrorism to include a term of imprisonment of not more than 8 years. Two separate pieces of legislation, each of which would increase the term of imprisonment under Section 1001 for crimes involving terrorism to not more than 10 years, are currently pending in Congress. *See* ***Counter-Terrorism and National Security Act of 2007***, H.R. 3147, 110th Cong. (1st Sess. 2007); ***Violent Crime Control Act of 2007***, H.R. 3156, 110th Cong. (1st Sess. 2007).

pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss.

24.2 [DELETED]

24.3 GENERALLY

The purpose of Section 1001 is "to protect the authorized functions of governmental departments and agencies from the perversion which might result from" concealment of material facts and from false material representations. ***United States v. Gilliland***, 312 U.S. 86, 93-94 (1941); *see* **Bryson v. United States**, 396 U.S. 64, 70 (1969); ***United States v. Yeaman,*** 194 F.3d 442, 454-55 (3d. Cir. 1999); ***United States v. Olson***, 751 F.2d 1126, 1128 (9th Cir. 1985); ***United States v. Brack***, 747 F.2d 1142, 1151-52 (7th Cir. 1984). Because "Congress could not [have] hope[d] to foresee the multitude and variety of deceptive practices which ingenious individuals might perpetrate upon an increasingly complex governmental machinery, a complexity that renders vital the truthful reporting of material data . . .," Section 1001, which has its origin in a statute enacted in 1863, *see* ***United States v. Bramblett***, 348 U.S. 503, 504-05 (1955), *overruled on other grounds*, ***Hubbard v. United States***, 514 U.S. 695, 702-03 (1995), is "couched in very broad terms." ***United States v. Beer***, 518 F.2d 168, 170 (5th Cir. 1975); *see also* ***United States v. Fern***, 696 F.2d 1269, 1273-74 (11th Cir. 1983).

Under Section 1001(a), in a matter within the jurisdiction of a government agency, it is a crime (1) to falsify, conceal or cover up a material fact, (2) to make any materially false, fictitious or fraudulent statement, or (3) to make or use a document containing a materially false statement. ***United States v. Stewart***, 433 F.3d 273, 319 (2d Cir. 2006); ***United States v. Mayberry***, 913 F.2d 719, 721 n.1 (9th Cir. 1990). Some courts have interpreted the statute as describing two distinct offenses, namely concealment and false representation, and have held that these two distinct offenses require different elements of proof. ***United States v. Mayberry***, 913 F.2d at 722 n.7 (*citing* ***United States v. UCO Oil Co.***, 546 F.2d 833, 835 n.2 (9th Cir. 1996); ***United States v. Anzalone***, 766 F.2d 676, 682-683 (1st Cir. 1985); ***United States v. Diogo***, 320 F.2d 898, 902 (2d Cir. 1963); and ***United States v. Tobon-Builes***, 706 F.2d 1092, 1096-97 (11th Cir. 1983)); *see also* ***United States v. Mandanici***, 205 F.3d 519, 522 (2d Cir. 2000) ("By its plain terms, [Section 1001] established three separate offenses: (1) falsifying, concealing, or covering up by any trick, scheme, or device a material fact; (2)

making a false, fictitious, or fraudulent statement; and (3) making or using a false writing or document. A conviction under §1001 could be sustained if the jury found that the requirements of any one of these three offenses had been met." (internal footnote omitted)). The United States Court of Appeals for the Second Circuit has since held, however, that "[t]he several different types of fraudulent conduct proscribed by section 1001 are not separate offenses . . .; rather they describe different means by which the statute is violated." ***United States v. Stewart***, 433 F.3d at 319 (discussing ***United States v. Diogo***, 320 F.2d at 902, and ***United States v. UCO Oil Co.***, 546 F.2d at 835 n.2 (additional citations omitted)).

A charge of making or using a false statement, representation, or document under Section 1001 requires different proof from a charge of concealment. When a defendant is charged with making a false statement, there is no requirement that the government prove that the statement made was one required by statute or regulation. ***United States v. Arcadipane*.** 41 F.3d 1, 4-5 (1st Cir. 1994); ***United States v. Meuli***, 8 F.3d 1481, 1485 (10th Cir. 1993). Requiring proof of an independent duty to disclose "under some other statute . . . 'would be inconsistent with the purpose of § 1001 because it is a catchall that reaches fraud not prohibited by other statutes.'" ***United States v. Austin***, 817 F.2d 1352, 1354-55 (9th Cir. 1987) (quoting ***United States v. DeRosa***, 783 F.2d 1401, 1407 (9th Cir. 1986)); ***United States v. Olson***, 751 F.2d 1126, 1127-28 (9th Cir. 1985). If, however, the defendant is charged with concealing or failing to disclose material facts under Section 1001, the government must prove that the defendant had a legal duty to disclose the material facts at the time the defendant allegedly concealed them. ***United States v. Dorey***, 711 F.2d 125, 128 (9th Cir. 1983). "[I]n prosecuting a §1001 concealment violation, it is incumbent upon the government to prove that the defendant had a *legal duty* to disclose the material facts at the time he was alleged to have concealed them." ***United States v. Anzalone***, 766 F.2d 676, 683 (1st Cir. 1985) (emphasis original) (*citing* ***United States v. Irwin***, 654 F.2d 671, 678-79 (10th Cir. 1981), *overruled on other grounds by* ***United States v. Daily***, 921 F.2d 994 (10th Cir. 1990)). "'The duty to disclose a particular fact to the executive branch of the federal government or its agent arises from requirements in federal statutes, regulations, or government forms.'" ***United States v. Safavian***, 528 F.3d 957, 965 n.7 (D.C. Cir. 2008) (*quoting* ***United States v. Moore***, 446 F.3d 671, 680 (7th Cir. 2006)). Where the evidence does not establish that the defendant had a duty to disclose to the government, directly or indirectly, the material fact he is alleged to have concealed, there can be no concealment in violation of § 1001. ***United States v. Safavian***, 528 F.3d at 965; ***United States v. Anzalone***, 766 F.2d at 683 (*citing* **United States v.**

Muntain, 610 F.2d 964, 971-72 (D.C. Cir. 1979); ***United States v. Phillips***, 600 F.2d 535, 536-37 (5th Cir. 1979); and ***United States v. Ivey***, 322 F.2d 523, 524-26 (4th Cir. 1963)).

In the criminal tax context, the statute is normally used in connection with false documents or statements submitted to an Internal Revenue agent during the course of an audit or investigation. *See*, *e.g.*, ***United States v. Fern***, 696 F.2d 1269, 1273-74 (11th Cir. 1983). Section 1001 is generally not used in the case of a false statement on a return because, if the return is signed under the penalties of perjury, as most are, Section 7206(1) of the Internal Revenue Code is considered a more appropriate charge. Because Section 1001 is normally used in criminal tax cases involving a defendant's use of false statements or documents, the following discussion of the elements of the offense will focus on false statements or documents, rather than on concealment.

24.4 ELEMENTS

To establish a violation of Section 1001 for an offense involving false statements, false representations, or false documents, the government must prove the following elements beyond a reasonable doubt:

> 1. The defendant made a statement or representation, or made or used a document;
>
> 2. The statement, representation, or document is false or fraudulent;
>
> 3. The statement, representation, or document is material;
>
> 4. The defendant made the statement or representation, or made or used the document, knowingly and willfully; and
>
> 5. The statement, representation, or document pertained to an activity within the jurisdiction of the federal agency to which it wasaddressed.

United States v. Abrahem, 678 F.3d 370, 373 (5th Cir. 2012) (A violation of 18 U.S.C. § 1001 requires proof of five elements: (1) a statement, that is (2) false, (and material, (4) made with the requisite specific intent, and (5) within the purview of government agency jurisdiction); ***United States v. Siemaszko***, 612 F.3d 450, 462 (6th Cir. 2010); ***United States v. Shafer***, 199 F.3d 826, 828 (6th Cir. 1999) (*quoting* ***United States v. Lutz***, 154 F.3d 581, 587 (6th Cir. 1998) (*citing* ***United States v. Steele***, 933 F.2d 1313, 1318-19 (6th Cir. 1991) (*en banc*)); ***United States v. Manning***, 526 F.3d 611, 613 n.1 (10th Cir. 2008) (*citing* ***United States v. Kingston***, 971 F.2d 481, 486 (10th Cir. 1992)); ***United States v. Atalig***, 502 F.3d 1063, 1066-67 (9th Cir. 2007) (*citing* ***United States v. Camper***, 384 F.3d 1073, 1075 (9th Cir. 2004)); ***United States v. Hatch***, 434 F.3d 1, 4 (1st Cir. 2006) (*citing* ***United States v. McGauley***, 279 F.3d 62, 69 (1st Cir. 2002)); ***United States v. Pickett***, 353 F.3d 62, 66-67 (D.C. Cir. 2004); ***United States v. Ballistrea***, 101 F.3d 827, 834-35 (2d Cir. 1996); ***United States v. Ranum***, 96 F.3d 1020, 1028 (7th Cir. 1996); ***United States v. David,*** 83 F.3d 638, 640 (4th Cir. 1996); ***United States v. Barr***, 963 F.2d 641, 645 (3d Cir. 1992); ***United States v. Lawson***, 809 F.2d 1514, 1517 (11th Cir. 1987); ***United States v. Baker***, 626 F.2d 512, 514 (5th Cir. 1980); ***United States v. Gilbertson***, 588 F.2d 584, 589 (8th Cir. 1978).

24.5 FALSE STATEMENTS OR REPRESENTATIONS

"Statement" as used in Section 1001 has been given a broad interpretation. Both oral and written statements can form the basis for a charge under Section 1001. ***United States v. Beacon Brass Co.***, 344 U.S. 43, 46 (1952). The United States Court of Appeals for the Second Circuit has stated that:

> The . . . contention that Section 1001 does not apply to oral statements is disputed by the language of the statute itself which penalizes the making of "any false, fictitious or fraudulent statements" as well as the making or using of "any false writing or document."

United States v. McCue, 301 F.2d 452, 456 (2d Cir. 1962) (citations omitted); *see also* ***United States v. Steele***, 933 F.2d 1313, 1318 n.4 (6th Cir. 1991) (*en banc*); ***United States v. Massey***, 550 F.2d 300, 305 (5th Cir. 1977).

There also is no requirement that the statement be under oath. The statute applies to unsworn, as well as sworn, statements. ***Massey***, 550 F.2d at 305; ***United States v. Isaacs***, 493 F.2d 1124, 1157 (7th Cir. 1974). Section 1001 is not limited to "formal statements, to written statements, or to statements under oath. It applies to 'any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States.'" ***Neely v. United States***, 300 F.2d 67, 70

(9th Cir. 1962) (*quoting* ***Marzani v. United States***, 168 F.2d 133, 141-42 (D.C. Cir.1948)).

The Second Circuit has stated that a conviction for a false statement or false representation requires evidence of actual falsity. ***United States v. Stewart***, 433 F.3d 273, 319 (2d Cir. 2006) (*citing* ***United States v. Diogo***, 320 F.2d at 902)). The court has also stated that a defendant may not be convicted under Section 1001 for a statement that is, although misleading, literally true. ***United States v. Mandanici***, 729 F.2d 914, 921 (2d Cir. 1984) (*citing* ***Bronston v. United States***, 409 U.S. 352, 359-62 (1973)).

In ***Bronston,*** a case involving a charge of perjury, the Supreme Court held that the burden to elicit the truth remains on the questioner and a witness may not be convicted of perjury "for an answer, under oath, that is *literally true but not responsive* to the question asked and arguably misleading by negative implication." ***Bronston v. United States***, 409 U.S. at 353 (emphasis added). However, the Supreme Court also said in ***Bronston***, 409 U.S. at 358 n.4, that a different standard applies to criminally fraudulent statements, noting that, in that context, the law goes rather far in punishing the intentional creation of false impressions by a selection of literally true representations, because the actor himself generally selects and arranges the representations.

Peterson v. United States, 344 F.2d 419 (5th Cir. 1965), is illustrative. There, in response to a question whether a payment was for past earned fees or fees to be earned, a defendant submitted a letter stating that *his records reflected* that the payment was for accrued fees and that the fees were accordingly a deductible expense for the codefendant for a particular year. 344 F.2d at 427. On appeal, the Fifth Circuit held that whether the letter was true was a question for the jury and that even if the literal language of the letter was true as to what the records reflected, it was clearly open to the jury to find that the statement in the letter as to the payment's being for an accrued fee was false. ***Id***.; *see also* ***United States v. Brack***, 747 F.2d 1142, 1150 (7th Cir. 1984) ("even though the statements were accurate as to the total amount of the contract they constituted false statements within the meaning of § 1001 by concealing the fraudulent nature of the contract").

A forged endorsement on a tax refund check has been held to be a false statement within the ambit of Section 1001. ***Gilbert v. United States***, 359 F.2d 285 (9th Cir. 1966). In ***Gilbert***, the defendant, an accountant, endorsed checks with the taxpayer's name and his own name, and then deposited the checks into his own trust account. The court acknowledged that the defendant "made no pretense that the payees had themselves executed the endorsements," but held nevertheless that his endorsements constituted unlawful misrepresentations. ***Gilbert***, 359 F.2d at 286-87.

Section 1001 prohibits false statements generally, not just those statements or documents required by law or regulation to be kept or furnished to a federal agency. As the First Circuit held,

> It seems self-evident that section 1001 is intended to promote the smooth functioning of government agencies and the expeditious processing of the government's business by ensuring that those who deal with the government furnish information on which the government confidently may rely. To this end, section 1001 *in and of itself* constitutes a blanket proscription against the making of false statements to federal agencies. Thus, while section 1001 prohibits falsification in connection with documents that persons are required by law to file with agencies of the federal government, . . . its prohibitory sweep is not limited to such documents. The statute equally forbids falsification of any other statements, whether or not legally required, made to a federal agency.

United States v. Arcadipane*.** 41 F.3d 1, 4-5 (1st Cir. 1994) (emphasis in original) (*citing* ***United States v. Meuli*,** 8 F.3d 1481, 1485 (10th Cir. 1993) (prohibiting false statements "whether or not another law requires the information be provided"); ***United States v. Dale, 991 F.2d 819, 828-29 (D.C. Cir. 1993) (involving a fraudulent application for a Department of Defense security clearance); ***United States v. Kappes***, 936 F.2d 227, 231 (6th Cir. 1991) (Section 1001, itself, "provides clear statutory authority to justify holding [persons] to the reporting requirement"); ***United States v. Olson***, 751 F.2d 1126, 1127 (9th Cir. 1985) (*per curiam*) (Section 1001's prohibition on false statements is not restricted to those submissions that are submitted under some other statutory requirement)). *See also* ***United States v. De Rosa***, 783 F.2d 1401, 1407-08 (9th Cir. 1986) (Section 1001 does not limit its prohibition against falsifications to matters that another statute or a regulation requires a person to provide). Thus, a prosecutor does not have to establish that the alleged false statement was a statement that the defendant was required by law to make, in order to establish a violation of Section 1001 . ***Neely***, 300 F.2d at 70-71 (citing ***Knowles v. United States***, 224 F.2d 168, 172 (10th Cir. 1955); ***Cohen v. United States***, 201 F.2d 386 (9th Cir 1953)).

In contrast to the perjury statutes (18 U.S.C. § 1621, *et seq.*), under which the general rule is that "the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment," *Hammer v. United States*, 271 U.S. 620, 626 (1926),[3] there are no particular requirements under Section 1001 as to how the prosecutor may prove the falsity of statements. Thus, falsity may be proven by the uncorroborated testimony of a single witness. *E.g.*, ***United States v. Fern***, 696 F.2d 1269, 1275 (11th Cir. 1983); ***United States v. Carabbia***, 381 F.2d 133, 137 (6th Cir. 1967); ***United States v. Marchisio***, 344 F.2d 653, 665 (2d Cir. 1965), *superseded by statute on other grounds, as noted in* ***United States v. Mandanici***, 205 F.3d 519, 522 (2d Cir. 2000); ***McCue***, 301 F.2d at 456; ***Neely***, 300 F.2d at 70; ***Travis v. United States***, 269 F.2d 928, 936 (10th Cir. 1959), *rev'd on other grounds*, 364 U.S.631 (1961); ***United States v. Killian***, 246 F.2d 77, 82 (7th Cir. 1957).

24.6 MATTER WITHIN JURISDICTION OF A BRANCH OF THE FEDERAL GOVERNMENT

To establish a violation of Section 1001, the false statement or representation must be shown to have been made in a matter within the jurisdiction of the executive, legislative, or judicial branch of the United States Government. The term "jurisdiction" in this statute is not used in a technical sense. *See* ***Ogden v. United States***, 303 F.2d 724, 743 (9th Cir. 1962). Relying upon Congressional intent, courts have given the term "jurisdiction" an expansive reading. For example, in ***United States v. Rodgers***, 466 U.S. 475 (1984), the Court stated that "'[t]he term 'jurisdiction' should not be given a narrow or technical meaning for purposes of Section 1001.'" 466 U.S. at 480 (quoting ***Bryson v. United States***, 396 U.S. 64, 70 (1969)); *see also* ***United States v. Shafer***, 199 F.3d 826, 828-29 (6th Cir. 1999). Consequently, the jurisdiction of the executive, legislative, or judicial branch within the meaning of the statute is not limited to the power to make final or binding determinations. Rather, it also includes matters within an agency's investigative authority. ***Rodgers***, 466 U.S. at 480-81. Thus, "a 'statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent

[3] Note that under 18 U.S.C. § 1623, the two-witness rule does not apply to perjury for false declarations in court proceedings or before grand juries. Section 1001 nevertheless differs from 18 U.S.C. § 1623 in that the perjury conviction requires proof of an oath while a false statement conviction does not. ***United States v. D'Amato***, 507 F.2d 26, 29 (2d Cir.1974).

statements under § 1001.'" ***Rodgers***, 466 U.S. at 481 (quoting ***Bryson***, 396 U.S. at 70-71); *see also* ***United States v. Milton***, 8 F.3d. 39, 46 (D.C. Cir. 1993); ***United States v. Bilzerian***, 926 F.2d 1285, 1300 (2d Cir.1991). Likewise, a false statement submitted to a federal agency falls within the statute if the false statement "relates to a matter as to which the Department had the power to act." ***Ogden v. United States***, 303 F.2d 724, 743 (9th Cir. 1962); ***United States v. Shafer***, 199 F.3d at 828-29; ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982); ***United States v. Cartwright***, 632 F.2d 1290, 1292-93 (5th Cir. 1980); ***United States v. Adler***, 380 F.2d 917, 921-22 (2d Cir. 1967).

"'[T]he phrase "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.'" ***Shafer***, 199 F.3d at 829 (*quoting* ***Rodgers***, 466 U.S. at 479.) Under case law prior to the Supreme Court's decision in ***United States v. Gaudin,*** 515 U.S. 506 (1995), whether a matter fell within the jurisdiction of the executive, legislative or judicial branch of the government was treated as a question of law. *See*, *e.g.*, ***Shafer***, 199 F.3d at 828; ***United States v. Gafyczk***, 847 F.2d 685, 690 (11th Cir. 1988); ***United States v. Goldstein***, 695 F.2d 1228, 1236 (10th Cir. 1981); ***Pitts v. United States***, 263 F.2d 353, 358 (9th Cir. 1959). In ***Gaudin***, the Supreme Court, recognizing that the Constitution requires that the jury decide all elements of the crime, held that it was error in a prosecution under 18 U.S.C § 1001 to take the question of materiality from the jury. 515 U.S. at 511-23. Holding that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged[,]" ***Gaudin*** strongly suggests that whether a matter falls within the jurisdiction of an agency of the government for purposes of § 1001 is an issue that must be submitted to and resolved by the jury, irrespective of whether it is considered a question of fact or a question of law. 515 U.S at 522-23.

Prior to 1996, Section 1001 criminalized false statements made "in any matter within the jurisdiction of any department or agency of the United States . . . [.]" Act of June 25, 1948, ch. 645, 62 Stat. 749 (1948) (current version at 18 U.S.C. § 1001). In the past, the courts uniformly found that the Internal Revenue Service was a "department or agency of the United States" within the meaning of that version of 18 U.S.C. § 1001. *E.g.*, ***United States v. Morris***, 741 F.2d 188, 190-91 (8th Cir. 1984); ***United States v. Fern***, 696 F.2d 1269, 1273 (11th Cir. 1983); ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977); ***United States v. Johnson***, 530 F.2d 52, 54-55 (5th Cir. 1976); ***United States v. Isaacs***, 493 F.2d 1124, 1156-57 (7th Cir. 1974); ***United States v. Ratner***, 464 F.2d 101, 104 (9th Cir. 1972); ***United States v. McCue***, 301 F.2d 452, 455-56 (2d Cir. 1962); *see also* ***United States v. Knox***, 396 U.S. 77, 80-81 & n.3 (1969) (Court simply accepted, without directly holding, the applicability of the statute to false documents submitted to the IRS). Indeed, as noted in ***United States v. Beer***, Section 1001 has its origins in a perceived need to protect the government from monetary frauds. 518 F.2d 168, 170 (5th Cir. 1975) (*citing* ***United States v. Bramblett***, 348 U.S. 503 (1955), *overruled on other grounds by* ***Hubbard v. United States***, 514 U.S. 695, 715 (1995); ***United States v. Gilliland***, 312 U.S. 86 (1941); and ***United States v. Stark***, 131 F. Supp. 190, 199-202 (D. Md. 1955)). It is reasonable to infer that this goal could not be accomplished unless false representations made to the IRS on matters relating to tax liability were among the prohibited statements.

In ***United States v. Bramblett***, the Supreme Court held that the term "department" as used in the version of Section 1001 in effect from 1948 to 1996 referred to all three branches of government. 348 U.S. at 509.[4] In ***Hubbard v. United States***, the Court overruled ***Bramblett***, concluding that "department" referred only to a "component of the Executive Branch." 514 U.S. at 699-703, 715. ***Hubbard*** also held that a court was not an "agency of the United States," as that phrase was used in the then-extant version of Section 1001. 514 U.S. at 715. As noted above, see n.1, *supra*, the ***False Statements Accountability Act of 1996*** superseded ***Hubbard*** and included in Section 1001 all branches of the federal government. Because the executive branch is now explicitly listed under Section 1001, the IRS is necessarily included within the reach of the statute. Moreover, the long history of judicial findings that the IRS is an "agency or department" within the meaning of the prior version of Section 1001 further supports the conclusion that false representations to the IRS fall within the ambit of Section 1001.

The false statement need not be made directly to or even received by the executive, legislative or judicial branch of the government. *See* ***United States v. Oren***, 893 F.2d 1057, 1064 (9th Cir. 1990); ***United States v. Gibson***, 881 F.2d 318, 322 (6th Cir. 1989); ***United States v. Suggs***, 755 F.2d 1538, 1542 (11th Cir. 1985); ***United States v. Wolf,*** 645 F.2d 23, 25 (10th Cir. 1981); ***United States v. Baker***, 626 F.2d 512, 514 & n.5 (5th Cir. 1980); ***United States v. Bass***, 472 F.2d 207, 212 (8th Cir. 1972). If the defendant puts the statement or document in motion, that is sufficient. For example, a defendant who falsely endorsed tax refund checks and deposited them into his bank account was guilty of violating Section 1001. ***Gilbert v. United States***, 359 F.2d 285, 287

[4] *Bramblett* was silent on what constituted an "agency" of the United States. 348 U.S. at 509.

(9th Cir. 1966). Moreover, false statements made to state, local or even private entities who either receive federal funds or are subject to federal supervision can form the basis of a Section 1001 violation. *See* ***Shafer***, 199 F.3d at 829 (false statements made to state agency that received federal support and was subject to federal regulation "squarely within the jurisdiction of an agency or department of the United States); ***Gibson***, 881 F.2d at 320-23 (overstated invoices submitted by private party to Tennessee Valley Authority was a matter within federal jurisdiction); ***United States v. Lawson***, 809 F.2d 1514, 1518 (11th Cir. 1987) (false statements to local housing authority acting as agent for HUD); ***United States v. Green***, 745 F.2d 1205, 1208-09 (9th Cir. 1984) (falsified test reports presented to private firm constructing nuclear power plant regulated by NRC); ***United States v. Petullo***, 709 F.2d 1178, 1180-81 (7th Cir. 1983) (false statements submitted to city administrating federal disaster relief funds); ***United States v. Lewis***, 587 F.2d 854, 857 (6th Cir. 1978) (*per curiam*) (false statement made to state welfare agency receiving federal funds); ***United States v. Kirby***, 587 F.2d 876, 881 (7th Cir. 1978) (false inspection and weight certificates submitted to private party in transaction regulated by Department of Agriculture).

Because the false statements or documents need not actually be received by the executive, legislative or judicial branch, the Tax Division has authorized prosecution under Section 1001 for false claims which have been prepared, but not yet filed with the IRS. This scenario occurs, for example, in electronic filing prosecutions in which the filer has been apprehended either after or at the time of the presentation of a false claim to a tax filing service, but before transmission is effectuated. Because the false claim has not been submitted to the IRS, the commonly used 18 U.S.C. § 287 charge is unavailable. Section 1001 provides a mechanism by which these false claims can be prosecuted. *See* Section 22.08, *supra*.

24.7 MATERIALITY

The Supreme Court has held that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." ***United States v. Gaudin***, 515 U.S. 506, 522-23 (1995). One of the elements that the government must prove under § 1001 is that the false statement is "'material' to the government inquiry[.]" ***Gaudin***, 515 U.S. at 509; 18 U.S.C. 1001. Thus, materiality under 18 U.S.C. § 1001 is an issue for the jury. ***Gaudin***, 515 U.S. at 522-23.

Although the word "material" was explicitly mentioned in only the first clause of the pre-1997 version of Section 1001, which referred to the falsification or concealment of a material fact, most courts "read such a requirement into . . . [the false statement and false document clauses] . . . 'in order to exclude trivial falsehoods from the purview of the statute.'" ***Hughes v. United States***, 899 F.2d 1495, 1498 (6th Cir. 1990) (citations omitted).[5] The present wording of the statute is much more explicit, referring in each subpart to a "material fact" or any "materially false, fictitious, or fraudulent statement or representation." This leaves little room for interpretation and clearly suggests that materiality is an element of all aspects of this offense.[6]

Prior to ***Gaudin***, when the false statements and false documents clauses of §1001 were not explicitly qualified by the word "materially," the Ninth Circuit held that the failure to allege the materiality of the false statement or document was not fatal to an indictment "'when the facts advanced by the pleader warrant the *inference of materiality*.'" ***United States v. Oren***, 893 F.2d 1057, 1063 (9th Cir. 1990) (quoting ***Dear Wing Jung v. United States***, 312 F.2d 73, 75 (9th Cir. 1962)) (emphasis in original). It is unclear whether the Ninth Circuit would consider itself bound by ***Oren*** in light of ***Gaudin***. In any event, the Tax Division strongly recommends that materiality be specifically alleged in any count charging a violation of Section 1001.

The first step in the materiality analysis is to ask two "questions of purely historical fact" (1) what statement was made, and (2) what decision was the agency trying to make. ***United States v. Gaudin***, 515 U.S. 506, 509 (1995); ***United States v. Abrahem***, 678 F.3d at 373. The third question is, whether under the appropriate legal standard, the statement was material to the decision the agency was trying to make. ***Abrahem*** at 373.

The commonly used test for determining whether a matter is material is whether the falsity or concealment had a natural tendency to influence, or was capable of influencing, the decision-making body to which it was addressed. ***United States v. Neder***,

[5] Prior to ***Gaudin***, the Second Circuit refused to read a materiality requirement into the second and third clauses of the pre-1996 statute, consistently holding that "materiality is not an element of the offense of making a false statement in violation of § 1001." ***United States v. Elkin***, 731 F.2d 1005, 1009 (2d Cir. 1984) (citing cases); *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1299 (2d Cir. 1991). In light of ***Gaudin***, the Second Circuit overruled its precedents and held that materiality is an element of any and all charges under § 1001. ***United States v. Mandanici***, 205 F.3d 519, 523 (2d Cir. 2000) (*citing* ***United States v. Ali***, 68 F.3d 1468, 1474-75 (2d Cir. 1995), *amended on denial of rehearing*, 86 F.3d 275 (2d Cir. 1996)).

[6] The Supreme Court did not make specific findings on this issue in ***Gaudin*** because the government conceded that materiality was an element of § 1001. ***Gaudin,*** 515 U.S. at 509.

527 U.S. 1, 16 (1999); ***United States v. Gaudin***, 515 U.S. at 509; ***United States v. Abrahem***, 678 F.3d 370, 373-74 (5th Cir. 2012); ***United States v. Siemaszko***, 612 F.3d 450, 470 (6th Cir. 2010); ***United States v. Robertson***, 324 F.3d 1028, 1030 (8th Cir. 2003) (citing ***Preston v. United States***, 312 F.3d 959, 961 n.3 (8th Cir. 2002)); ***United States v. Baker***, 200 F.3d 558, 561 (8th Cir. 2000); ***United States v. Hutchison***, 22 F.3d 846, 851 (9th Cir. 1992), *abrogated on other grounds by* ***United States v. Wells***, 519 U.S. 482 (1997); ***United States v. Meuli***, 8 F.3d 1481, 1485 (10th Cir. 1993); ***United States v. Steele***, 933 F.2d 1313, 1319 (6th Cir. 1991) (*en banc*); ***United States v. Grizzle***, 933 F.2d 943, 948 (11th Cir. 1991); ***United States v. Brack***, 747 F.2d 1142, 1150-51 (7th Cir. 1984); ***United States v. Green***, 745 F.2d 1205, 1208 (9th Cir. 1984); ***United States v. Diaz***, 690 F.2d 1352, 1357 (11th Cir. 1982). As the Ninth Circuit stated:

> [T]he test for determining the materiality of the falsification is whether the falsification is calculated to induce action or reliance by an agency of the United States, -- is it one that could affect or influence the exercise of governmental functions, -- does it have a natural tendency to influence or is it capable of influencing agency decision?

United States v. East. 416 F.2d 351, 353 (9th Cir. 1969); *see also* ***United States v. Swaim***, 757 F.2d 1530, 1535 (5th Cir. 1985) ("The relevant test of materiality . . . looks to whether the statement had the capacity to impair the functioning of a government agency"); ***United States v. Lichenstein***, 610 F.2d 1272, 1278 (5th Cir. 1980).

It is not essential that the agency or department actually rely on or be influenced by the falsity or concealment. *E.g.*, ***Baker***, 200 F.3d at 561; ***United States v. Myers,*** 878 F.2d 1142, 1143 (9th Cir. 1989); ***United States v. Lawson***, 809 F.2d 1514, 1520 (11th Cir. 1987); ***Green***, 745 F.2d at 1208; ***United States v. Fern***, 696 F.2d 1269,1275 (11th Cir. 1983); ***Diaz***, 690 F.2d at 1357; ***United States v. Markham***, 537 F.2d 187, 196 (5th Cir. 1976); ***United States v. Jones***, 464 F.2d 1118, 1122 (8th Cir. 1973). Accordingly, the United States Court of Appeals for the Tenth Circuit found that false Forms 1099 were material despite the defendant's argument that the amounts claimed "were so ludicrous that no IRS agent would believe them." ***United States v. Parsons***, 967 F.2d 452, 455 (10th Cir. 1992). On the contrary, the court explained, the very fact that the amounts were high increased the likelihood that the Service would be influenced by the forms' contents:

> The large amounts involved do not reduce the forms to scraps of blank paper. If anything, the reverse is the case. They cry out for attention and it would be a blameworthy administration to ignore them.

Id.

Similarly, the Fifth Circuit found that "[a]ctual influence is not required—a statement can be ignored or never read and still be material—and the statement need not be believed." ***Abrahem***, 678 F.3d at 374, *citing* ***Gaudin*** 515 U.S. at 509. In ***Abrahem***, the defendant attempted to visit Major Hasan, a restricted patient and military prisoner who had been accused of shooting a number of individuals at Fort Hood. After being informed that he was not allowed access to the shooter, the defendant claimed to be Major Hasan's attorney. The defendant was charged and convicted of a violation of § 1001 for claiming to be an attorney in an attempt to gain unauthorized access to Hasan when the defendant knew that he was neither a lawyer nor representing Hasan. The ***Abrahem*** court applied the test outlined in ***Kungys v. United States,*** observing that "the 'natural tendency' test is an objective one focused on whether the statement is 'of a type capable of influencing a *reasonable* decision maker.'" ***Abrahem*** at 375, *citing* ***United States v. McBane***, 433 F.3d 344, 351 (3d Cir. 2005). In applying the test, the court focused on "the intrinsic capabilities of the statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." ***Abrahem*** at 375, *citing* ***McBane*** at 352. Accordingly, the ***Abrahem*** court found the defendant's statement to be material.

It is also not required that the false statement be one which the defendant was obligated by statute or regulation to make. *See* ***United States v. Hutchison***, 22 F.3d at 852 (court rejected the argument that false Forms 1099-S were not material because defendant was not required to file them (citing ***United States v. Olson***, 751 F.2d 1126, 1127 (9th Cir. 1985))). Moreover, the federal agency need not actually receive the statement. *See* ***United States v. Hooper***, 596 F.2d 219, 223 (7th Cir. 1979). Simply stated, "[t]he false statement must simply have the capacity to impair or pervert the functioning of a government agency." ***Lichenstein***, 610 F.2d at 1278 (*citations omitted*). Likewise, proof of pecuniary or property loss to the government is not necessary. ***Id***. at 1278-79. For example, the fact that the government had begun its own tax investigation did not make the defendant's statements regarding income tax entries immaterial to a Section 1001 prosecution. ***United States v. Schmoker***, 564 F.2d 289, 291 (9th Cir. 1977).

24.8 WILLFULNESS

On March 31, 2014, the Department of Justice issued a memorandum to all federal prosecutors providing guidance on the definition of the term "willfully" as used in the statutes 18 U.S.C. § 1001 (false statements) and 18 U.S.C. § 1035 (false statements in connection with health care benefits). Criminal tax attorneys should review this memorandum and follow its guidelines with respect to investigations, jury instructions, plea agreements, and colloquies.

There is a longstanding circuit split over the proper meaning of the term "willfully" as used in Section 1001 (and, by implication, Section 1035, which is based on Section 1001). Some circuits require only that the defendant have made the false statement deliberately and with knowledge that it was false. Others require that the government prove that the defendant have known that his conduct was aware of the "generally unlawful nature of his actions." One circuit requires proof of "intent to deceive."

On March 10, 2014, the Solicitor General filed oppositions to petitions for certiorari in the Supreme Court in two cases in which the Department argued that the term "willfully" in Sections 1001 and 1035 "requires proof that the defendant knew his conduct was unlawful," rather than proof that the defendant acted "deliberately and with knowledge" that his statements were false. This means that the Department will interpret the term "willfully" in the context of Sections 1001 and 1035 "to require that a defendant be aware that the conduct with which he is charged was, in a general sense, prohibited by law. In other words, the defendant must have acted with a 'bad purpose' within the meaning of *Bryan* [*v. United States,* 524 U.S. 184, 192 (1998)]."

Prosecutors should act consistently with the Solicitor General's concession and submit Section 1001 jury instructions equivalent to the following:

The word "willfully" means that the defendant committed the act voluntarily and purposely, and with knowledge that his conduct was, in a general sense, unlawful. That is, the defendant must have acted with a bad purpose to disobey or disregard the law. The government need not prove that the defendant was aware of the specific provision of the law that he is charged with violating or any other specificprovision.

This definition derives from *Bryan*, which holds that, in order to establish the "bad purpose" necessary for willfulness in most criminal cases, the government must prove that the defendant "acted with knowledge that his conduct was unlawful." 524 U.S. at 194. This definition is substantially similar to the one adopted by the Third Circuit to prove a violation of Section 1001, *see United States v. Starnes*, 583 F.3d 196, 210 (3d Cir. 2009) (requiring the government to prove "that the defendant acted not merely 'voluntarily,' but with a 'bad purpose,' that is, with knowledge that his conduct was, in some general sense, 'unlawful.'" (quotation marks omitted)), and a leading treatise on criminal jury instructions, *see* 2 Leonard B. Sand et al., Modern Federal Jury Instructions (Criminal) § 37-17 (2007) ("An act is done willfully [under Section 1001] if it is done with an intention to do something the law forbids, a bad purpose to disobey the law.").

CAUTION:

The information below, which has not yet been edited to reflect the Solicitor General's concession (see box above), is superseded to the extent it is inconsistent with that concession.

To establish a Section 1001 violation, the government must prove that the defendant acted knowingly and willfully. *E.g.*, ***United States v. Hildebrandt***, 961 F.2d 116, 118 (8th Cir. 1992). As used in Section 1001, the term "willful" simply means that the defendant did the forbidden act (*e.g.*, made a false, fictitious, or fraudulent statement) deliberately and with knowledge. ***Id***. at 118 (citing ***United States v. Carrier***, 654 F.2d 559, 561 (9th Cir. 1981)). The Second Circuit has recognized that "whether a defendant has 'knowingly and willfully . . . ma[de] any materially false, fictitious or fraudulent statements or representations' under § 1001 is governed by the same legal standards as whether a defendant 'willfully subscribes as true any material matter which he does not believe to be true' in violation of the perjury statute, 18 U.S.C. § 1621." ***United States v. Triumph Capital Group, Inc.***, 237 Fed.Appx. 625, 627-28 (2d Cir. 2007) (citing ***United States v. Mandanici***, 729 F.2d 914, 921 (2d Cir. 1984); ***Bronston v. United States***, 409 U.S. 352, 359-62 (1973)); ***United States v. Stewart***, 433 F.3d 273, 319 (2d Cir. 2006).

The government need not prove an intent to deceive. ***United States v. Yermian***, 468 U.S. 63, 69 (1984); ***United States v. Riccio***, 529 F.3d 40, 46-47 (1st Cir. 2008); ***United States v. Gonsalves***, 435 F.3d 64, 72 (1st Cir. 2006); ***Hildebrandt***, 961 F.2d at 118-19; *see* ***United States v. Ranum,*** 96 F.3d 1020, 1027-1029 (7th Cir. 1996). Nor need the government prove that the defendant had actual knowledge of federal agency jurisdiction -- *i.e.*, knowledge that the statements were made within federal agency jurisdiction. ***Yermian***, 468 U.S. at 69-70, 73; ***Hildebrandt***, 961 F.2d at 118-19. Furthermore, several courts have held that the element of knowledge can be satisfied by proof of "willful blindness" or "conscious avoidance." ***United States v. Evans***, 559 F.2d 244, 246 (5th Cir. 1977); ***United States v. Abrams***, 427 F.2d 86, 91 (2d Cir. 1970).

For a further discussion of willfulness, *see, e.g.*, Sections 8.08, *supra*, and 40.04, *infra*.

24.9 CLAIMED DEFENSES

24.09[1] Generally

Challenging the validity of the underlying reporting requirement in situations in which a person is required by law to provide the United States government with information and furnishes false information in feigned compliance with the statutory requirement does not provide a defense to a charge brought under Section 1001. *See* ***United States v. Knox***, 396 U.S. 77, 79-80 (1969) (*citing* ***Bryson v. United States***, 396 U.S. 64, 68-72 (1969); ***Dennis v. United States***, 384 U.S. 855, 857 (1966)). As the Supreme Court stated in ***Bryson***,

> [o]ur legal system provides methods for challenging the Government's right to ask questions -- lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

Bryson v. United States, 396 U.S. at 72 (footnote omitted).

24.09[2] Wrong Statute Charged

Similarly unavailing is the claim that a defendant may not be prosecuted under 18 U.S.C. § 1001 because of the existence of a more specific statute addressing the defendant's conduct. The United States Supreme Court has long recognized that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." ***United States v. Batchelder***, 442 U.S. 114, 123-24 (1979) (citations omitted). "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." ***Id***. at 124. These principles are particularly relevant in criminal tax cases in which the evidence could support either a misdemeanor charge under 26 U.S.C. § 7207 or a felony charge under 18 U.S.C. § 1001.

In ***United States v. Fern***, 696 F.2d 1269 (11th Cir. 1983), the defendant argued that the enactment of 26 U.S.C. § 7207 rendered Section 1001 inapplicable to a situation involving false statements made to the IRS. *See* Section 16.00, *supra*, for a discussion of 26 U.S.C. § 7207. Although the Eleventh Circuit indicated a preference for specific statutes and noted that Section 1001 is the more general statute and provides for a greater penalty, the court held that the government still may choose to prosecute under Section 1001 when a false statement has been made to the Internal Revenue Service. ***Fern***, 696 F.2d at 1273-74; *see also* ***United States v. Parsons***, 967 F.2d 452, 456 (10th Cir. 1992) ("we agree with the Eleventh Circuit that the existence of section 7207 does not preclude prosecution under 18 U.S.C. § 1001" (citing ***Fern***)). A similar argument was raised by the defendant in ***United States v. Greenberg***, 268 F.2d 120, 121 (2d Cir. 1959), who was charged under 18 U.S.C. 1001 with aiding and abetting the submission of false payroll reports to the U.S. Navy. That defendant argued on appeal "that the acts charged and proved did not constitute a violation of Title 18 U.S.C.A. § 1001," asserting that "the payroll statements were subject to prosecution only under Title 18 U.S.C.A. 1621 instead of § 1001." 268 F.2d at 122. Rejecting the argument, the Second Circuit held that the government was not barred from prosecuting under Section 1001 merely because it also could have proceeded under Section 1621: "a single act or transaction may violate more than one criminal statute . . . [and] the government ha[s] the authority to decide under which statute the offenses here [are] to be prosecuted." ***Greenberg***, 268 F.2d at 122; *see also* ***United States v. Bilzerian***, 926 F.2d 1285, 1299-1301 (2d Cir. 1991) (false statements in informational reports filed with the SEC under §32(a) of the Exchange Act, 15 U.S.C. § 78ff, can be prosecuted as false statements under § 1001); *but see* ***United States v. D'Amato***, 507 F.2d 26, 28-29 (2d Cir. 1974) (Section 1001 does not apply to a false statement made in a private civil action, a context in which the government is only involved by way of a court deciding a matter in which neither the government nor its agencies is involved).

24.09[3] Variance

Although not every variance is fatal, *see* ***Berger v. United States***, 295 U.S. 78, 82 (1935), when a comparison of the evidence with the charged conduct differs to such an extent that the defendant does not have sufficient notice to prepare a defense or is not protected from re-prosecution for the same offense, the variance is fatal, and the indictment will be dismissed. *See* ***United States v. Lambert***, 501 F.2d 943, 947-48 (5th Cir. 1974), *abrogated on other grounds by* ***United States v. Rodriguez-Rios***, 14 F.3d 1040, 1050 (5th Cir. 1994). In ***Lambert***, the defendant was convicted under 18 U.S.C. § 1001 for making a false statement to the FBI. 501 F.2d at 945. The defendant had gone to the FBI to swear out a detailed complaint, alleging that two Tampa, Florida police officers had "physically mistreated him." The defendant's complaint also stated his "'feeling' that his civil rights had been violated because the two officers, in plain clothes, had arrested him for no reason." ***Id***. The indictment charging a violation of 18 U.S.C. § 1001 alleged, "Fred Lambert stated and represented that he had been severely beaten and subjected to illegal and unnecessary punishment by two members of the Tampa Police Department, Tampa, Florida, in violation of his Civil Rights." ***Id***. at 947. The government acknowledged that there was a variance between the charge and proof, and that in fact, the defendant had not stated "that he had been 'severely beaten' or that he had been 'subjected to illegal and unnecessary punishment.'"

On appeal, the Fifth Circuit found the variance fatal. The court concluded:

> The trouble with the indictment was not vagueness and generality in what it said but its use of facially specific terms which, as it developed at trial, were not intended to be that at all, but to be generalized recharacterizations of what the draftsman considered to be the substance of all or of parts of what it would try to prove the defendant had said. In this situation a defendant is left to guess what part or parts of the statement placed in evidence the government will rely upon, or whether it will rely on overall tenor. The prosecution is free at trial, in offering evidence and arguing to the jury, to pick and choose previously unspecified bits and pieces of the statement that it considers arguably relevant to its conclusory restatement. The safe defense for such a defendant -- with respect to every arguably material utterance in the actual statement that is also arguably relevant to the indictment's conclusory language -- is to prove that he did not utter it or that it was true. Even then he faces the threat that without regard to specifics the gist of the entire statement may be viewed as conforming to the indictment's charge. An indictment which leaves in this

> dilemma a defendant who has given a lengthy and detailed statement is outside the allowable range of variance.

501 F.2d at 948-49. The result in ***Lambert*** highlights the need, when drafting charges, to reference the precise false statements the defendant made and not to utilize generic language or a summary.

24.9 [4] Exculpatory No Doctrine

Prior to 1996, a number of courts of appeals had created an exception to prosecution under Section 1001. The central feature of this exception, commonly referred to as the "exculpatory no" doctrine, was that “a simple denial of guilt” to a government investigator did not come within the ambit of Section 1001, thereby preventing the government from prosecuting individuals who had, without more, provided negative responses to questions put to them in the course of a federal criminal investigation. *See* ***Brogan v. United States***, 522 U.S. 398, 401 (1998) (*citations omitted*). The Supreme Court rejected this doctrine in ***Brogan***, stating that "the plain language of § 1001 admits of no exception for an 'exculpatory no.'" 522 U.S. at 408. Accordingly, the “exculpatory no” doctrine no longer constitutes a valid defense to a prosecution under 18 U.S.C. § 1001. *See also* ***United States v. Brandt***, 546 F.3d (7th Cir. 2008) (the “exculpatory no” doctrine provides no valid defense to liability under § 1001).

24.10 VENUE

“Venue is proper only where the acts constituting the offense -- the crime’s ‘essential conduct elements’ -- took place.” ***United States v. Ramirez***, 420 F.3d 134, 138-39 (2d Cir. 2005) (*citing* ***United States v. Rodriguez-Moreno***, 526 U.S. 275, 279 (1999)). “When a crime consists of a single, non-continuing act, the proper venue is clear: The crime ‘is “committed” in the district where the act is performed.’” ***United States v. Ramirez***, 420 F.3d at 139 (quoting ***United States v. Beech-Nut Nutrition Corp.***, 871 F.2d 1181, 1188 (2d Cir. 1989)). Venue in a Section 1001 prosecution lies where the false statement was made, where the false document was prepared and signed, or where it was filed or presented. *See* ***United States v. Simpson***, 995 F.2d 109, 112 (7th Cir. 1993); ***United States v. Barsanti***, 943 F.2d 428, 434-35 (4th Cir. 1991); ***United States v. Bilzerian***, 926 F.2d 1285, 1301 (2d Cir. 1991); ***United States v. Mendel***, 746 F.2d 155, 165 (2d Cir. 1985); ***United States v. Herberman***, 583 F.2d 222, 225-27 (5th Cir. 1978).

"[W]here 'the acts constituting the crime and the nature of the crime charged implicate more than one location,' . . . venue is properly laid in any of the districts where an essential conduct element of the crime took place." ***United States v. Ramirez***, 420 F.3d at 139 (quoting ***United States v. Reed***, 773 F.2d 477, 480 (2d Cir. 1985)). The general venue statute, 18 U.S.C. § 3237(a), provides that any offense "begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." Thus, in the case of a scheme, venue should lie in any district where any overt act in furtherance of the scheme occurred. Similarly, when a defendant prepares, presents, submits or files a false statement or document in one jurisdiction and that false statement or document is audited or processed in another jurisdiction and ultimately acted or relied upon by a federal agency in yet a different jurisdiction, the offense may have "begun" in the first jurisdiction, but was not completed until the false statement was processed. ***United States v. Ramirez***, 420 F.3d at 142 (citing ***United States v. Candella***, 487 F.2d 1223, 1228 (2d Cir. 1973)). Thus, the Second Circuit has concluded that an offense under Section 1001 is by its nature a continuing offense for venue purposes, which may be prosecuted in the jurisdiction in which the false statement or document was prepared or presented, in which it was audited or processed, or in which it was acted or relied upon by the federal government. ***Ramirez***, 420 F.3d at 142; *see also* ***United States v. Blecker***, 657 F.2d 629, 632-33 (4th Cir. 1981) (offenses under Section 1001 continuing offenses for venue purposes).

In a case in which the false statements were forged endorsements on tax refund checks, the Ninth Circuit held that venue was proper in the district where the defendant deposited the checks into his bank account. ***Gilbert v. United States***, 359 F.2d 285, 288 (9th Cir. 1966); *cf.* ***Travis v. United States***, 364 U.S. 631, 635-37 (1961) (venue was proper only in district where false document was filed, since another federal statute provided that criminal penalties would attach for false affidavits on file with the National Labor Relations Board, and therefore, there was no federal jurisdiction until the NLRB actually received the affidavit); ***United States v. DeLoach***, 654 F.2d 763, 766-67 (D.C. Cir. 1980) (determining that ***Travis*** was limited to its facts).

Venue need only be established by a preponderance of the evidence, and not by proof beyond a reasonable doubt. Moreover, such proof can be by circumstantial evidence alone; direct evidence is not required. *See* ***United States v. Wuagneux***, 683 F.2d 1343, 1356-57 (11th Cir. 1982). Venue is discussed in further detail in Chapter6.

24.11 STATUTE OF LIMITATIONS

The statute of limitations for prosecutions under Section 1001 is five years. *See* 18 U.S.C. § 3282; Chapter 7, *supra*. The statute of limitations starts to run when the crime is completed, which is when the false statement is made or the false document is submitted. ***United States v. Roshko***, 969 F.2d 9, 12 (2d Cir. 1992); ***United States v. Smith***, 740 F.2d 734, 736 (9th Cir. 1984).

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25.00 TAX MONEY LAUNDERING - 18 U.S.C. § 1956(a)(1)(A)(ii)

The Tax Division must authorize all criminal charges for which the conduct at issue arises under the internal revenue laws, regardless of the criminal statutes invoked. See 28 C.F.R. § 0.70(b). This includes money laundering charges where the sole or a principal purpose of the financial transaction is a violation of the tax laws, including tax evasion or the making of false statements to the IRS.

Other authorization requirements for money laundering may apply as described in the *United States Attorneys' Manual* § 9-105.300.

This chapter is concerned with the tax-specific provisions of 18 U.S.C. § 1956. The Asset Forfeiture and Money Laundering Section of the Criminal Division has a number of resources available on its intranet site, http://dojnet.doj.gov/criminal/afoml/default.htm, including an online version of the comprehensive reference guide *Federal Money Laundering Cases* (April 2007). Information about money laundering in general may also be found in Chapter 9-105 of the *United States Attorneys' Manual*, and in Sections 2101-2186 of the *Criminal Resource Manual*.

25.1 TAX DIVISION POLICY

The Tax Division must approve any and all criminal charges that a United States Attorney intends to bring against a defendant in connection with conduct arising under the internal revenue laws, regardless of which criminal statutes the United States Attorney proposes to use in charging the defendant. Conduct arising under the internal revenue laws includes a defendant's submission of documents or information to the IRS. USAM § 6-4.210.

Prosecution for money laundering offenses requires Tax Division authorization when (1) the indictment also contains charges for which Tax Division authorization is required, including allegations of a tax fraud (e.g., *Klein*) conspiracy, or (2) the intent to engage in conduct constituting a violation of 26 U.S.C. § 7201 or 26 U.S.C. § 7206 is the sole or principal purpose of the financial transaction which is the subject of the money laundering count. USAM § 9-105.750.

The Tax Division will not authorize such charges where the effect would merely be to convert routine tax prosecutions into money laundering prosecutions, as the statute was not intended to provide a substitute for traditional Title 18 and Title 26 charges related to tax evasion, filing of false returns, or tax fraud conspiracy. Appropriate tax-related Title 18 and Title 26 charges should be utilized when the evidence so warrants. However, the Tax Division will approve money laundering charges when warranted by the circumstances. See Tax Division Directive Number 128.

Tax Division authorization is not required when (1) the principal purpose of the financial transaction was to accomplish some other covered purpose, such as carrying on a specified unlawful activity like drug trafficking; (2) the circumstances do not warrant the filing of substantive tax or tax fraud conspiracy charges; and (3) the existence of a secondary tax evasion or false return motivation for the transaction is one that is readily apparent from the nature of the money laundering transaction itself. USAM § 9-105.750.

25.2 STATUTORY LANGUAGE: 18 U.S.C. §1956(a)(1)(A)

This statute provides in part:

> **§ 1956. Laundering of monetary instruments**
>
> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity --
>
>> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
>>
>> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986;
>>
>> . . .
>>
>> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1)(A).

25.3 ELEMENTS OF MONEYLAUNDERING

25.03[1] Section 1956(a)(1)(A)(i)

Tax crimes are not included in the list of "specified unlawful activities" in 18 U.S.C. § 1956(c)(7). But "specified unlawful activity" does include mail fraud. See18 U.S.C. 1956(a)(7)(A) (term includes any act or activity constituting an offense listed in section 1961(1)); 18 U.S.C. 1961(1) (mail fraud included as listed offense). The Tax Division will authorize mail fraud charges, and money laundering charges predicated upon mail fraud offenses, in unusual circumstances. See Tax Division Directive 128.

In 2008, the Supreme Court in ***United States v. Santos***, interpreted whether the term "proceeds" as used in some of the money-laundering statutes meant "receipts" or "profits." ***United States v. Santos***, 553 U.S. 507 (2008) (plurality opinion). The Court observed that the term "profits" requires which requires more proof than receipts. ***Id.*** at 520. The Court noted that when a term is undefined, it is given its ordinary meaning. ***Id.*** at 511. The Court then determined that "proceeds" had not acquired a common meaning in the provisions of the Federal Criminal Code. ***Id.*** Consequently, the Court found that "proceeds" should be interpreted to mean "profits." In ***United States v. Yusuf***, 536 F.3d 178 (3d Cir. 2008), the Third Circuit held that unpaid Virgin Islands Gross Receipts Taxes, which were unlawfully disguised and retained by means of the filing of false Virgin Islands Gross Receipts Tax Returns through the U.S. mail, are "proceeds" of mail fraud for purposes of stating a money laundering offense. The tax at issue in ***Yusuf*** was not income tax, but a non-federal tax calculated as a straight percentage of sales, which helped satisfy the limited circumstances under which the Tax Division will authorize such charges. In addition to holding that the retained taxes were the proceeds of mail fraud, the Third Circuit further held that the retained taxes amounted to "profits," thus satisfying ***United States v. Santos***. ***Yusuf*** created a conflict with ***United States v. Khanani***, 502 F.3d 1281, 1296-97 (11th Cir. 2007), in which the Eleventh Circuit held that the definition of "proceeds" is limited to "something which is obtained in exchange for the sale of something else," and thus does not include retainedtaxes.

Following the Court's holding in ***Santos***, Congress amended the money-laundering statute to provide a definition of "proceeds." The Fraud Enforcement and Regulatory Act of 2009, Pub. L. No. 111-21, & 2(f)(1), 123 Stat. 1617, 1618 (2009). As amended, the statute defines "proceeds" broadly as "any property derived from or obtained or retained, directly or indirectly through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9). Nonetheless, there is still considerable discussion of the definition of "proceeds" regarding various money-laundering schemes. *See. e.g.,* ***United States v. Hosseini,*** 679 F.3d 544 (7th Cir. 2012). For a discussion of various courts' interpretation of ***Santos,*** *see* ***People v. Gutman,*** 59 N.E.2d 621 (Ill.2010). It is recommended that prosecutors research the law on the issue of "proceeds" in their own jurisdictions prior to indictment.

25.03[2] Section 1956(a)(1)(A)(ii)

To establish a violation of 18 U.S.C. § 1956(a)(1)(A)(ii), the government must prove the following beyond a reasonable doubt: (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew the property involved in the transaction represented the proceeds of some unlawful activity; (3) the property did, in fact, represent the proceeds of a specified illegal activity, as defined in 18 U.S.C. § 1956(c)(7); and (4) the defendant intended to engage in conduct constituting a violation of 26 U.S.C. § 7201 (tax evasion) or 26 U.S.C. § 7206 (false statement).

For more information about the first three elements, please consult the United States Attorneys' Manual and the Asset Forfeiture and Money Laundering Section.

25.3 [2][a] Intent to Evade Tax or Commit Tax Fraud

To establish a violation under 18 U.S.C. § 1956(a)(1)(A)(ii), the prosecution must prove that the defendant took part in a financial transaction with the intent to engage in conduct that would constitute a violation of 26 U.S.C. § 7201 or 7206. The tax involved need not be that of the defendant and may be any type of tax, including, but not limited to, income tax, employment tax, estate tax, excise tax, and gift tax.

Section 7201 criminalizes tax evasion; that is, any willful attempt, by any means, to evade or defeat the proper assessment or payment of any tax. For a discussion of tax evasion, see Chapter 8 of this Manual.

Section 7206 criminalizes various kinds of false statements to the Internal Revenue Service. The section may be violated in many ways, including, but not limited to, (1) willfully making or subscribing a false return or other document under penalties of perjury; (2) willfully aiding or assisting in the preparation or presentation of a false return, affidavit, claim, or document; (3) falsely or fraudulently executing, signing, procuring, or conniving at the false execution of any bond, permit, entry, or other document required under the Internal Revenue Code or regulations promulgated thereunder; (4) removing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, or upon which levy is authorized by 26 U.S.C. § 6331, with the intent to evade or defeat the assessment or collection of any tax imposed under Title 26; or (5) concealing property or falsifying information in connection with any offer in compromise. For further information about Section 7206, see Sections 12.00, 13.00, 14.00, and 15.00 of this Manual, *supra.*

The language of Section 1956 requires only that the defendant intend to engage in conduct that constitutes a violation of Section 7201 or Section 7206. However, because both statutes require that the defendant acted willfully, conduct is not truly violative of either statute unless the defendant is aware of the duty the tax laws impose and voluntarily and intentionally violates that duty. ***Cheek v. United States***, 498 U.S. 192, 201 (1991); ***United States v. Zanghi***, 189 F.3d 71, 77-78 (1st Cir. 1999).

Proof, related to a financial transaction, of a completed violation under Section 7201 or Section 7206 could be relied upon to prove that the defendant acted with the required intent. But the language of Section 1956(a)(1)(A)(ii) does not seem to require proof of a completed offense under either § 7201 or § 7206(1) for a successful prosecution. Instead, it is enough to show that the defendant's objective was to engage in conduct that constituted a violation of either section.

In some cases, there may be direct proof that the defendant acted with the necessary intent, such as the defendant's statements that the financial transaction was intended to avoid paying taxes or to hide income from the IRS. In the absence of such an express statement, however, care must be taken in selecting the acts relied upon to prove that the defendant acted with the requisite intent. Concealment of the existence or source of assets through money laundering may be undertaken for any number of reasons unrelated to the tax laws, such as a desire to hide an illegal business from the government.

Thus, proof that the defendant's actions *in fact* concealed sources of income or the ownership of assets might not be enough by itself to show an intent to act in violation of either Section 7201 or Section 7206. The government must offer evidence that the defendant *intended* to evade taxes. *Cf.* ***Ingram v. United States***, 360 U.S. 672, 679 (1959); ***United States v. Pritchett***, 908 F.2d 816, 821 (11th Cir. 1990) ("When efforts at concealment are reasonably explainable in terms other than a motivation to evade taxes, the government must offer independent proof that those who participated in the concealment intended to assist the taxpayer in evading taxes"); ***United States v. Krasovich***, 819 F.2d 253, 256 (9th Cir. 1987) (same).

In short, there must be some proof that the defendant was aware that the transaction was intended in some way to violate the tax laws. In some cases, such proof may involve evidence beyond the nature of the financial transaction itself. In other cases, the form of the money laundering transaction may provide proof that the transaction was undertaken for the purpose of tax evasion or tax fraud, such as where taxable funds are laundered and returned through a series of transactions to the taxpayer in a nontaxable form, such as a purported loan or gift.

In ***United States v. Zanghi***, 189 F.3d 71 (1st Cir. 1999), the First Circuit upheld Zanghi's 1956(a)(1)(A)(ii) money laundering convictions, rejecting the defendant's contention that the sufficiency of the evidence should be measured in accordance with a patently erroneous jury instruction requiring the jury to find that Zanghi's sole intent in making financial transactions with proceeds of securities fraud was tax evasion. 189 F.3d at 79-80. The court pointed out that tax evasion need only be a principal motive, since "[s]ole or exclusive intent to evade taxes is not required under § 7201." ***Id***. at 78. The court held that Section 1956 does not impose a scienter requirement greater than that imposed by Sections 7201 or 7206. ***Id***. at 78-79. Evidence sufficient to establish willfulness for purposes of Sections 7201 and 7206 should be sufficient to establish the requisite intent for Section 1956.

The ***Zanghi*** court concluded that there was sufficient evidence that Zanghi acted with a sufficient tax evasion motive to meet the willfulness standard of Section 7201. 189 F.3d at 80-81. The defendant paid no personal income tax for 1991 and 1992 and paid only minimal amounts in 1990; his unreported income for the three years totaled over $1 million, and he reported none of the funds he withdrew from certain accounts in 1990 through 1992 as personal income; and when his accountant informed him of a substantial tax liability for 1992, defendant declared: "no taxes, no taxes. I can't pay any taxes." 189 F.3d at 81. The defendant also labeled checks at issue as loan repayments. ***Id***. at 80. The court determined that a reasonable jury could find that Zanghi intended to engage in conduct constituting a violation of 26 U.S.C. § 7201 and that the evidence thus sufficed to support Zanghi's convictions under 18 U.S.C. § 1956(a)(1)(A)(ii). ***Id***. at 81.

25.4 SENTENCING

A conviction under this subsection may bring a maximum prison sentence of 20 years and/or a fine of up to $500,000, or twice the amount involved in the transaction, whichever is greater. The Guideline applicable to offenses under 18 U.S.C. § 1956(a)(1)(A)(ii) is USSG §2S1.1. *See* USSG App. A. See Chapter 43, *infra*, for a further discussion of sentencing in criminal tax offenses.]

25.5 VENUE

Venue is proper in the district in which the offense was committed or in any district in which an act in furtherance of the crime was committed. 18 U.S.C. § 3237(a); Fed. R. Crim. P. 18.

In ***United States v. Cabrales***, 524 U.S. 1, 5-6 (1998), the Supreme Court held that venue in a money laundering case was not established in Missouri even though the funds were generated by a cocaine distribution operation in Missouri, because the money laundering alleged in the case had taken place entirely in Florida. While the Court acknowledged that, in some instances, money laundering could be a continuing offense for venue purposes, where the funds were transported from one district to another, it found that it was not a continuing offense where the transactions began, continued, and were completed in Florida. *See* ***Cabrales***, 524 U.S. at 8.

For a general discussion of venue, *see* Section 6.00, *supra*.

25.6 STATUTE OF LIMITATIONS

Under 18 U.S.C. § 3282, the statute of limitations for violations of section 1956(a)(1)(A)(ii) is five years. For a general discussion of the statute of limitations, *see* Section 7.00, *supra*.

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CHAPTER 26: FORFEITURE IN CRIMINAL TAX CASES

26.01 INTRODUCTION

The purpose of this chapter is twofold. First, the chapter explains Tax Division policy regarding the restraint, seizure, and forfeiture of property in criminal tax or criminal tax-related cases. Specifically, Tax Directive 145 sets forth the Tax Division's overall forfeiture policy and delegates to the United States Attorneys authority to seek and obtain Title 18 seizure warrants in criminal tax and tax-related investigations and prosecutions. (Tax Division Directives) Similarly, Tax Directive 144 sets forth Tax Division policy with respect to Stolen Identity Refund Fraud (SIRF) crimes and, among other things, delegates to United States Attorneys the authority to seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from SIRF crimes. (Tax Division Directives)

Second, the chapter provides a primer on federal asset forfeiture law. The chapter discusses the restraint and seizure of property for forfeiture; administrative, civil, and criminal forfeiture; issues arising in parallel criminal and civil forfeiture proceedings; and additional constitutional considerations arising in forfeiture cases. The chapter borrows heavily from a treatise on asset forfeiture law authored by Assistant United States Attorney Stefan Cassella, former deputy chief of the Asset Forfeiture and Money Laundering Section of the Criminal Division of the Justice Department. Mr. Cassella is the foremost authority on the asset forfeiture laws in the United States and his full treatise is available at AFMLS Online at

Asset Forfeiture in the United States: A Treatise on Forfeiture Law: Cassella (2d ed.)

26.1 [1] Forfeiture Overview

When analyzing a forfeiture issue, a prosecutor must first identify what, if any, provisions provide a basis for forfeiture in connection with the alleged criminal offense.

No single general forfeiture provision exists in federal law; instead, several different statutes provide for the forfeiture of property used in the commission of, representing the proceeds of, or otherwise related to violations of certain federal criminal laws. For example, some criminal statutes such as identity theft (18 U.S.C. § 1028) and access device fraud (18 U.S.C. § 1029) have forfeiture provisions embedded within the statutes themselves. *See* 18 U.S.C. §§ 1028(b)(5), 1029(c)(1)(C). Other Title 18 offenses such as wire fraud, mail fraud, and money laundering rely on the primary civil (18 U.S.C. § 981) and criminal forfeiture statutes (18 U.S.C. § 982) as the statutory bases for forfeiture. And for other criminal offenses, such as making a false claim (18 U.S.C. § 287) and conspiracy to make a false claim (18 U.S.C. § 286), Congress has not provided any forfeiture authority at all.

Title 26 has its own forfeiture provisions in Sections 7302 and 7303. Forfeitures under these provisions, commonly referred to as "Code Forfeitures," are rare. Section 7302 provides for the forfeiture of any property intended for use in violating the provisions of the internal revenue laws, and Section 7303 lists specific property subject to forfeiture for offenses described in 26 U.S.C. §§ 7207, 7208, and 7271.

Next, the prosecutor must be cognizant of what type of property can be forfeited under the applicable forfeiture statutes. Each forfeiture statute defines the category of property subject to forfeiture, and the type of property that can be forfeited varies greatly from one offense to another. The three most common theories of forfeiture are that (1) the property constitutes, or is traceable to, the proceeds of a crime (proceeds theory); (2) the property was used to commit or facilitate the commission of a crime (facilitation theory); and (3) the property was "involved in" a money laundering offense. The forfeiture statutes may overlap or supplement one another. For example, in the case of an identity theft offense in violation of 18 U.S.C. § 1028, two different forfeiture statutes permit forfeiture of two different types of property, namely "facilitating property" and "proceeds property." Section 1028(b)(5) permits the forfeiture of personal property used to facilitate the offense ("any personal property used or intended to be used to commit the offense"), while Sections 981(a)(1)(C) and 982(a)(2)(B) permit the forfeiture of any property, real or personal, that constitutes or is traceable to proceeds of the crime, including identity theft. Thus, the commission of a single criminal offense can give rise to forfeiture under different statutes, and each statute might permit the forfeiture of different types of property associated with the crime.

Lastly, the prosecutor must be aware that there are three different procedures to forfeit property; namely, administrative forfeiture, civil forfeiture, and criminal forfeiture. Each method of forfeiture is governed by separate procedures defined by federal law.

The administrative forfeiture procedures permit the seizing federal agency to forfeit property without judicial involvement if the agency sends proper notice of the forfeiture action to potential claimants and no one files a claim. Administrative forfeiture allows for the efficient disposition of seized property in uncontested cases, which represent the vast majority of forfeiture proceedings. In contrast, both civil forfeiture and criminal forfeiture entail judicial proceedings and require the commencement of a formal action in federal court.

Civil forfeiture is not part of a criminal case. Instead, the government files a separate civil action *in rem* against the property itself, and then proves by a preponderance of the evidence that the property was derived from or was used to commit a crime. The civil forfeiture action may be initiated before or after indictment, or may be initiated in the absence of any indictment.

Criminal forfeiture is part of the sentence in a criminal case. A forfeiture allegation is included in the criminal indictment, giving notice to the defendant that the government intends to extinguish the defendant's interest in any property associated with the crime upon conviction. Once the defendant is convicted, the court (or jury) hears additional evidence and argument on the forfeiture allegation and returns a special verdict deciding whether the government has established, by a preponderance of the evidence, the requisite nexus between the property and the crime. To protect the property rights of third parties, the court conducts an ancillary hearing after the trial is concluded to address ownership claims raised by third parties. All of these concepts are discussed more fully in the subchapters below.

26.2 TAX DIVISION POLICY

26.02 [1] Tax Directive 145 – Overview

Tax Directive 145 sets forth Tax Division policy with respect to the restraint, seizure, and forfeiture of property arising from the commission of a criminal tax or tax-related offense. (Tax Division Directives.) The Directive initially defines those forfeiture matters over which the Tax Division has supervisory authority. (*See* Tax Directive 145, ¶¶ 3, 4.) (Tax Division Directives.) They include all civil forfeiture actions, all criminal forfeitures, and the restraint or seizure of property for forfeiture purposes "in a criminal tax or tax related investigation and/or prosecution when an attorney for the Department of Justice (Tax Division Trial Attorney or Assistant United States Attorney)" is responsible for or assists in obtaining a federal seizure warrant. Thus, the Tax Division has supervisory authority over the forfeiture matter if the Department of Justice is involved in the tax investigation – either by supervising a tax grand jury investigation, or assisting a law enforcement agency in its administrative criminal tax investigation (usually IRS-CI). This assistance generally entails the filingof a civil forfeiture action in federal court or making application to a federal magistrate for a seizure warrant.

It is important to note, however, that if a criminal investigation includes both tax and non-tax offenses, and the proposed restraint, seizure, and/or forfeiture of property is legally based upon the commission of a non-tax offense, then the Tax Division has no supervisory authority over the restraint, seizure, and/or forfeiture of that property. (*See* Tax Directive 145 n.3). (Tax Division Directives.) The Tax Division has supervisory authority over all criminal proceedings arising under the internal revenue laws and nothing more. An offense is considered to arise under the internal revenue laws when it involves (1) an attempt to evade responsibility imposed by the Internal Revenue Code; (2) an obstruction or impairment of the Internal Revenue Service; or (3) an attempt to defraud the government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes. 28 C.F.R. § 0.70(b).

After defining the scope of the Tax Division's supervisory authority in forfeiture matters, Tax Directive 145 next addresses the Tax Division's approval authority. Specifically, the Tax Division retains final authority to approve all Title 26 forfeiture matters (commonly referred to as "Code forfeitures"), and all Title 18 civil and criminal forfeitures arising from the commission of a criminal tax or tax-related offense. (*See* Tax Directive 145, ¶¶5, 6.) (Tax Division Directives.) However, Tax Directive 145 delegates to the United States Attorneys the authority to obtain a Title 18 restraining order or seizure warrant for personal property if the property is to be forfeited and if the forfeiture arises from the commission of a criminal tax or tax-related offense. (*See* Tax Directive 145, ¶8.) (Tax Division Directives.)

This delegation of authority to the United States Attorneys is not unlimited. First, no property shall be seized for forfeiture if the property consists entirely of legal source income and the only criminal activity associated with the property is that unpaid taxes remain due and owing on the income. By definition, legal source income is not derived from criminal activity and therefore does not constitute proceeds of a crime.

Second, in tax return preparer investigations, Tax Division approval is required before a seizing agency may enter a declaration of forfeiture against seized funds previously held on deposit by a tax return preparer or tax return preparation business in a financial institution (as defined in 18 U.S.C. § 20) if it is determined post-seizure that the funds may include tax preparation fees or the rightful tax refunds of innocent taxpayers.

These limitations emphasize two important policy concerns articulated in Tax Directive 145. First, a prosecutor may not convert a traditional Title 26 legal-source income tax case into a Title 18 fraud and forfeiture offense even if the IRS is deemed to be the victim of tax fraud. (*See* Tax Directive 145, ¶8(a) & n.5.) (Tax Division Directives.) By definition, legal source income is lawfully earned income and does not constitute proceeds of a crime. Second, the seizure of funds from a tax return preparer or tax return preparation business requires special scrutiny. The Tax Division generally disfavors forfeiting lawfully earned return preparation fees unless the fees have been co-mingled with criminal proceeds and involved in a money laundering transaction, in violation of 18 U.S.C. §§ 1956, 1957, or 1960, thereby making them eligible for forfeiture under Title 18 forfeiture laws.

In addition, the Tax Division disfavors forfeiting any rightful tax refund of an innocent taxpayer. Under forfeiture law, an innocent taxpayer whose refund has been seized may not be entitled to notice of the initial seizure because the innocent taxpayer is deemed an unsecured creditor. *See* ***United States v. $515,060.42 in U.S. Currency***, 152 F.3d 491, 497 (6th Cir. 1998); ***United States v. One-Sixth Share Of James J. Bulger In All Present And Future Proceeds Of Mass Millions Lottery Ticket No. M246233***, 326 F.3d 36, 44 (1st Cir. 2003). As a result, an innocent taxpayer may remain unaware that his or her refund has been seized until well after it was forfeited leaving the innocent taxpayer with the additional burden of having to pursue a remission course of action administered by the Asset Forfeiture and Money Laundering Section of the Criminal Division. The limitations imposed by Tax Directive 145 seek to ensure that legal-source income is not improperly seized and that the Tax Division plays a meaningful role in evaluating seizures made from financial accounts held by tax return preparers and tax return preparation businesses.

Lastly, Tax Directive 145 imposes reporting requirements on the United States Attorneys. First, the United States Attorney must electronically transmit to the Tax Division copies of all applications and court orders and the pleadings in support of any action taken by the United States Attorney to restrain or seize property as provided in the directive. (*See* Tax Directive 145, ¶9.) (Tax Division Directives.) In addition, if property is seized, the notification must include an acknowledgement that Tax Division authorization will be sought prior to forfeiture of any property that falls within the exceptions set forth in the directive.

Second, if Tax Division approval is required on a forfeiture matter as contemplated in the directive and a deadline for that action has been imposed by statute, regulation, Departmental policy, or court order, then either the United States Attorney or the law enforcement agency responsible for administering the seizure/forfeiture of the property shall, at the earliest possible date, but no later than ten (10) business days preceding the deadline, forward to the Tax Division all relevant materials necessary to making a determination on the matter. (*See* Tax Directive 145, ¶11.) (Tax Division Directives.) The materials should be forwarded to the appropriate Section Chief of the Tax Division's three Criminal Enforcement Sections.

26.2 [2] Tax Directive 144 – Stolen Identity Refund Fraud(SIRF)

Tax Directive 144 sets forth Tax Division policy with respect to tax and tax-related crimes associated with Stolen Identity Refund Fraud (SIRF). (Tax Division Directives.) Implemented on October 1, 2012, the purpose of Directive 144 is to delegate to United States Attorneys the authority to (1) open tax-related grand jury investigations in matters involving SIRF; (2) arrest and federally charge by criminal complaint a person engaged in SIRF crimes; and (3) seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from SIRF crimes, all without prior approval from the Tax Division.

Tax Directive 144 defines SIRF cases as those cases involving a fraudulent claim for a tax refund when the tax return is in the name of a person whose personal identification information (PII) has been stolen or unlawfully used to make the claim and the refund is intended to benefit someone other than the person to whom the PII belongs. (Tax Division Directives.) Tax Directive 144's definition also includes false claim schemes in which a person sells to a third-party, or agrees to let the third party use, his or her PII unaware that the PII will be used to make a fraudulent claim for tax refund. SIRF cases also include cases involving tax return preparers who make and/or file fraudulent claims for tax refunds using non-client PII that has been stolen or unlawfully used. For purposes of illustration, SIRF crimes generally implicate the following criminal statutes: 18 U.S.C. § 286 (conspiracy to make false claims), 18 U.S.C. § 287 (making false claims), 18 U.S.C. § 510 (Treasury check forgery), 18 U.S.C. § 641 (theft of public money), 18 U.S.C. § 1028 (identity theft), 18 U.S.C. § 1028A (aggravated identity theft), 18 U.S.C. § 1029 (access device fraud), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1708 (theft or receipt of stolen mail), and/or 18 U.S.C. § 1709 (mail theft by postal employee).

The forfeiture policy set forth in Tax Directive 144 for SIRF crimes is consistent with the Tax Division's overall forfeiture policy reflected in Tax Directive 145. (Tax Division Directives.) That is, in all SIRF cases, the United States Attorney has authority to seek and obtain seizure warrants from the federal district court for forfeiture of criminally derived proceeds arising from SIRF crimes without prior approval from the Tax Division. However, if the SIRF case involves a tax return preparer who has co-mingled SIRF proceeds with other funds held in an account with any financial institution (as defined in 18 U.S.C. § 20), and the seized funds may contain lawfully earned return preparation fees or tax refunds of innocent taxpayers, then Tax Division approval is required before the seized funds may be administratively forfeited. The policy concerns set forth in Tax Directive 145, namely, the Tax Division's general disfavor of forfeiting lawfully earned return preparation fees or rightful tax refunds of innocent taxpayers, applies with equal force to SIRF cases. (Tax Division Directives.)

26.3 SEIZING AND RESTRAINING PROPERTY FOR FORFEITURE

The government may seize property for reasons that have nothing to do with forfeiture. For example, documents and cash may be seized from a criminal at the time of arrest or during execution of a search warrant because the property represents evidence of a crime. Other property deemed to be contraband, such as drugs and guns, may be seized because they are unlawful to possess. Property that has already been seized by the government for other purposes may be forfeited without the government taking any additional steps to maintain possession of the property.

This section, however, addresses property that the government seeks to forfeit but does **not** already have in its possession. In those situations, a seizure warrant serves as the primary basis for taking possession of property for purposes of forfeiture.

26.03 [1] Seizure Warrants

If property is not in the government's possession when a forfeiture proceeding begins, the government may apply for a seizure warrant. The two statutes that govern the issuance of such seizure warrants are 18 U.S.C. § 981(b), which applies when the government has probable cause to believe property is subject to civil forfeiture, and 21 U.S.C. § 853(f), which applies when the government has probable cause to believe property is subject to criminal forfeiture. Both statutes authorize the issuance of a seizure warrant in the same manner as provided for a search warrant. *See* 18 U.S.C. § 981(b)(1)(civil forfeiture); 18 U.S.C. § 982(b)(1); 21U.S.C. § 853(f) (criminal forfeiture); Fed. R. Crim. P. 41.

Property originally seized under the civil statute can be forfeited in a criminal case if certain procedural steps are taken; similarly, property seized under the criminal statute can be forfeited in a civil case. Either statute may be used to take possession of property before an administrative forfeiture proceeding is commenced.

When a prosecutor is uncertain whether forfeiture will be pursued civilly or criminally, both statutes can be cited in the application for the seizure warrant and related probable cause affidavit. In such instances, the warrant application should say, on its face, that the warrant is sought pursuant to 18 U.S.C. § 981(b) and 21U.S.C. § 853(f). Obtaining a seizure warrant under Section 981(b) and Section 853(f) means that the government will already be in compliance with Section 983(a)(3)(B) when forfeiture of the property is sought in an indictment, without needing to commence a parallel administrative or civil forfeiture proceeding. ***United States v. Dupree***, 781 F. Supp. 2d 115, 131-32 & n.9 (E.D.N.Y. 2011); ***United States v. Wiese***, 2012 WL 43369, at *2 (E.D. Mich. 2012).

Even after commencing forfeiture proceedings, the government may seek to keep the affidavit submitted in support of a seizure warrant under seal if unsealing the affidavit would jeopardize an ongoing criminal investigation. In reviewing a defense motion to unseal the affidavit and application, a court will typically balance the public's right of access to judicial documents against the government's interest in protecting an ongoing criminal investigation. ***United States v. All Funds on Deposit at Wells Fargo Bank***, 643 F. Supp. 2d 577, 583-85 (S.D.N.Y. 2009).

26.03 [1][a] Civil warrants — 18 U.S.C. § 981(b)

Title 18, United State Code Section 981(b) applies when the government has probable cause to believe that property is subject to civil forfeiture. Section 981(b), which applies to all seizures under Section 981, sets forth the general rule that "[s]eizures pursuant to this section shall be made pursuant to a warrant obtained in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure . . ." unless certain exceptions apply.[1] In order to obtain a seizure warrant under Section 981, the government must show that there is probable cause to believe that the property is subject to forfeiture.

26.03 [1][b] Criminal warrants – 21 U.S.C. § 853(f)

Title 21, United State Code Section 853(f) applies when the government has probable cause to believe that property is subject to criminal forfeiture. It provides that:

> The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

As with a civil forfeiture warrant application, the government must show there is probable cause to believe that the property is subject to forfeiture. In other words, the affidavit must describe the nexus between the charged crime and property to be seized, thereby allowing the court to find probable cause of forfeitability. *See* ***United States v. Harvey***, 2006 WL 3513940, at *6 (D.V.I. 2006) (finding invalid affidavit for seizure warrant where affidavit provided no reason for affiant's conclusion that property was subject to forfeiture).

Probable cause may be based upon the same theory of forfeiture that would support a finding of forfeitability at trial. *See* ***United States v. Dupree***, 2011 WL 3235637, at *8 (E.D.N.Y. 2011). In determining whether probable cause exists, the court may consider that a federal grand jury found probable cause to charge defendant with the offense giving rise to seizure and forfeiture of the property. ***United States v. Bollin***, 264 F.3d 391, 421 (4th Cir. 2001); ***United States v. Lewis***, 2006 WL 1579855, at *8 (D. Minn. 2006). Even if a grand jury has made such a finding, the facts supporting probable cause must be set forth in the application for the seizure warrant: inclusion of a forfeiture

[1] It should be noted that drug offenses have their own civil forfeiture statute, 21 U.S.C. § 881, with its own seizure provision.

allegation in the indictment does not suffice. ***United States v. Walker***, 943 F. Supp. 1326, 1329 (D. Col. 1996).

In its application for the seizure warrant, the government must also make a showing that a restraining order will not be sufficient to assure the availability of the property at trial. 21 U.S.C. § 853(f). The requirement can typically be met by showing that the property at issue can be easily moved, concealed, or dissipated by a person unwilling to comply with a restraining order. *See, e.g.*, ***Lewis***, 2006 WL 1579855, at *5 (personal property including vehicles and funds in a bank account); ***Wiese***, 2012 WL 43369, at *2-3 (funds in bank account); ***United States v. Martin***, 460 F. Supp. 2d 669, 677 (D. Md. 2006); *but see* ***Walker***, 943 F. Supp. at 1331 (agent's guess of what the defendants might do if they left the country not sufficient to establish need for a restraining order); ***In re: 2000 White Mercedes ML320***, 220 F. Supp. 2d 1322, 1325-26 (M.D. Fla. 2001) (finding that government had failed to make required showing that a restraining order would be insufficient). In the case of cash or personal property, the government may also cite evidence that some forfeitable property has already been dissipated.

Depending on the circumstances, the government may obtain and execute a seizure warrant before or after indictment, after the defendant has been found guilty, or after the court has entered an order of forfeiture. ***Dupree***, 781 F. Supp. 2d at 131-32; ***Lewis***, 2006 WL 1579855, at *4. There is no requirement that the property at issue be in the government's possession before the court can order forfeiture as part of the defendant's sentence.

26.03 [2] Standard for Seizure

For both civil and criminal seizures, the government must show that there is probable cause to believe that the property to be seized is forfeitable.

Probable cause means the same thing in the forfeiture context as it does in any other case. ***United States v. $9,041,598.68***, 163 F.3d 238, 246 (5th Cir. 1998); ***United States v. Real Property 874 Gartel Drive***, 79 F.3d 918, 922 (9th Cir. 1996); ***United States v. $149,442.43 in U.S. Currency***, 965 F.2d 868, 876 (10th Cir. 1992). The government must show, based on the totality of circumstances and a practical, commonsense approach that there is a fair probability that the property was derived from, used to commit, or otherwise involved in the commission of an act giving rise to forfeiture under the applicable statute. ***United States v. 1948 Martin Luther King Drive***, 270 F.3d 1102, 1111 (7th Cir. 2001); ***United States v. One 1987 Mercedes Benz 300E***, 820 F. Supp. 248, 251 (E.D. Va. 1993). The government may rely on circumstantial evidence to establish probable cause, such as a lack of legitimate income and the timing of the assets' acquisition. ***United States v. Melrose East Subdivision***, 357 F.3d 493, 507, 507 n.18 (5th Cir. 2004).

What the government has to show to establish probable cause necessarily depends on its theory of forfeiture. If the theory is that the property constitutes or is traceable to the proceeds of a crime, there must be probable cause to believe that such a nexus exists. This could be shown by strictly tracing the property to the offense or relying on a "but for" test, accepted accounting principles, or a lack of legitimate funds.

26.03 [3] Out-of-District Warrants

Both civil and criminal seizure warrants must be issued in accordance with Rule 41. And while Rule 41(b) provides that the warrant must be issued in the district in which the warrant is to be executed, 21 U.S.C. § 853(l) makes clear that criminal seizure warrants can be served anywhere in the United States. Section 853(l) provides that district courts may issue orders for property subject to forfeiture regardless of the property's location. In 2000, the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) amended Section 981(b). Section 981(b)(3) now provides that, notwithstanding Rule 41(b), a seizure warrant may be issued in any district in which a forfeiture action may be filed and may be executed in any district in which the property is found. Thus, both civil and criminal seizure warrants may be served outside the district in which they were issued.

26.03 [4] Appeals

Pursuant to 28 U.S.C. § 1291, the government may appeal the denial of an application for a seizure warrant. ***In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo***, 861 F.2d 307, 309 (1st Cir. 1988). The issuance of a warrant, however, is not appealable. ***United States v. Quintana-Aguayo***, 235 F.3d 682, 686-87 (1st Cir. 2000) (per curiam); ***United States v. Victoria-21***, 3 F.3d 571, 574-75 (2d Cir. 1993) (generally interlocutory order denying an application to vacate an in rem arrest warrant is not immediately appealable, but if a business is "virtually shut down" by the seizure, order denying vacatur of seizure is appealable).

26.03 [5] Warrantless Seizure

Department of Justice policy recommends using a seizure warrant to seize property for forfeiture. Property may be seized without a warrant, however, if one of the exceptions to the Fourth Amendment warrant requirement applies or the property was lawfully seized by a state or local law enforcement agency and then turned over to a federal agency. 18 U.S.C. §§ 981(b)(2)(B), (b)(2)(C). The most common exceptions to the warrant requirement include consent, the automobile exception, search incident to arrest, the plain view doctrine, exigent circumstances, and abandoned property. Some of these exceptions are discussed briefly below.

26.03 [5][a] Automobile Exception

In ***Florida v. White***, 526 U.S. 559, 564-66 (1999), the Supreme Court held that the warrantless seizure of an automobile did not violate the Fourth Amendment where there was probable cause to believe that the automobile itself was subject to forfeiture and it was found in a public place. *See* **United States v. Nelson**, 530 F. Supp. 2d 719, 729-30 (D. Md. 2008). If the car is located on private land, however, law enforcement may need to obtain either a search warrant or writ of entry to make the seizure. In ***United States v. Mendoza***, 438 F.3d 792, 796 (7th Cir. 2006), however, the Seventh Circuit held that police officers, who had probable cause to believe that a vehicle was subject to forfeiture, were able to enter upon private land and seize a vehicle without a warrant when they saw the vehicle in plain view in the defendant's unattached, open garage. In that case, the court concluded that the defendant had no expectation of privacy in the place from which the vehicle was seized. *See also* **United States v. Musick**, 291 Fed. Appx. 706, 722 (6th Cir. 2008) (right to seize a vehicle for forfeiture from a public place without a warrant under ***Florida v. White*** applies to vehicle seized from an auto repair shop and to vehicle defendant was driving when he arrived at the shop to pick up the first vehicle).

26.03 [5][b] Search Incident to Lawful Arrest and Plain View Doctrine

Property subject to forfeiture may be seized without a warrant if it is found during a search incident to a lawful arrest or otherwise discovered in plain view by law enforcement officers who are lawfully in the place where the property is found. *See* ***United States v. $557,933.89 More or Less, in U.S. Funds***, 287 F.3d 66, 81-87 (2d Cir. 2002); ***$149,442.43 in U.S. Currency***, 965 F.2d at 875-76; ***Nelson***, 530 F. Supp. 2d at 729-30; *see also* **United States v. Medina**, 301 F. Supp. 2d 322, 332-33 (S.D.N.Y. 2004) (agents did not exceed scope of protective sweep search incident to lawful arrest); ***United States v. Warren***, 181 F. Supp. 2d 1232, 1244-47 (D. Kan. 2001) (officer could properly seize guns not described in warrant as the guns were in plain view and officer knew that the defendant's possession of the guns violated state law); ***Lefler v. United States***, 2011 WL 2132827, at *2 (S.D. Cal. 2011) (owner of motor home had notice of its seizure as it was seized in his presence when he was arrested).

26.03 [5][c] Exigent Circumstances

Exigent circumstances may justify a warrantless seizure based on probable cause. ***United States v. $291,828.00 in U.S. Currency***, 536 F.3d 1234, 1237-38 (11th Cir. 2008); ***United States v. Daccarett***, 6 F.3d 37, 49 (2d Cir. 1993)

26.03 [5][d] Abandoned Property

If a person disclaims ownership in property, law enforcement officers may seize it regardless of whether they have probable cause to believe that it is subject to forfeiture. *See* ***Medina***, 301 F. Supp. 2d at 331.

26.3 [6] Exclusionary Rule

The Fourth Amendment exclusionary rule applies to civil forfeiture cases. ***One 1958 Plymouth Sedan v. Pennsylvania***, 380 U.S. 693, 696-703 (1965); ***United States v. $186,410 in U.S. Currency***, 590 F.3d 942, 950 (9th Cir. 2010). Thus, a property owner may challenge the legality of a seizure by filing a motion to suppress under Supplemental Rule G(8)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (hereinafter Fed. R. Civ. P. Supp.). *See* ***U.S. v. $285,350.00 in U.S. Currency***, 547 Fed. Appx. 886, 887 (10th Cir. 2013).

Supplemental Rule G(8)(a) provides that:

> If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

The exclusionary rule operates in the same way in a forfeiture case as in any other case. Thus, the rule is subject to the good faith exception, and only persons with Fourth Amendment standing to contest the seizure may move to suppress the use of the seized property in the forfeiture case. *See* ***United States v. Salvucci***, 448 U.S. 83, 86-88 (1980); ***Rakas v. Illinois***, 439 U.S. 128, 130-31, 133-34 (1978). A claimant will generally not have Fourth Amendment standing to object to a seizure that occurs of property in third party's possession, unless the item seized was in a closed container. *See* ***United States v. $90,178.20 U.S. Currency***, 2006 WL 3025614, at *2 (W.D. Wis. 2006) (claimant retained an expectation of privacy in container he left in third party's house, and therefore had Fourth Amendment standing to move to suppress currency found in that container when the house was searched); ***United States v. $100,120.00 in U.S. Currency***, 494 F. Supp. 2d 960, 965-66 (N.D. Ill. 2007) (claimant retained an expectation of privacy in contents of a locked briefcase he entrusted to a courier, and therefore had standing to move to suppress the fruits of an illegal search of the briefcase), *aff'd on this point, but reversed on other grounds*, ***United States v. Marrocco***, 578 F.3d 627, 631 n.4 (7thCir. 2009); s*ee also* ***United States v. $40,955.00 in U.S. Currency***, 554 F.3d 752, 757-58 (9th Cir. 2009) (to establish standing, a defendant must show a legitimate expectation of privacy in the area searched); ***United States v. $572,204 in U.S. Currency***, 606 F. Supp. 2d 153, 158-59 (D. Mass. 2009); ***United States v. $1,790,021 in U.S. Currency***, 261 F. Supp. 2d 310, 316-17 (M.D. Pa. 2003).

Conversely, the Fifth Amendment's Self-Incrimination Clause is only applicable to civil forfeiture proceedings where the forfeiture statute makes the culpability of the owner relevant or where the owner faces the possibility of subsequent criminal proceedings. *See* ***United States v. $141,770.00 in U.S. Currency***, 157 F.3d 600, 606 n.5 (8th Cir. 1998) (citing ***Austin v. United States***, 509 U.S. 602, 608 & n.4 (1993)). "In rem forfeitures under 21 U.S.C. § 881 are not predicated on the culpability of any defendant," and where there is no evidence that a claimant faces any criminal proceedings related to civil forfeiture, such cases are considered civil actions for the purpose of the Fifth Amendment. *See* ***$141,770.00 in U.S. Currency***, 157 F.3d at 606 n.5 (citing ***United States v. Two Parcels of Real Prop. Located in Russell County, Ala.***, 92 F.3d 1123, 1129 (11th Cir.1996)); ***United States v. $107,840 in U.S. Currency***, 784 F.Supp.2d 1109, 1118-19 (S.D. Iowa 2011).

Although an illegal seizure may require suppression of evidence, it does not always require dismissal of the civil forfeiture complaint. ***United States v. Property, Parcel of Aguilar***, 337 F.3d 225, 234 (2d Cir. 2003); ***United States v. One 1974 Learjet***, 191 F.3d 668, 673 (6th Cir. 1999); ***$9,041,598.68***, 163 F.3d at 246; ***Madewell v.Downs***, 68 F.3d 1030, 1044 n.18 (8th Cir. 1995); *see also* ***INS v. Lopez-Mendoza***, 468 U.S. 1032, 1039-40 (1984) (mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding); *but see* ***United States v. One Parcel of Real Property, Located at 9638 Chicago Heights***, 27 F.3d 327, 330 (8th Cir.1994) (lack of required notice and a hearing prior to the issuance of a warrant for the seizure of the real property rendered warrant invalid and unconstitutional, forfeiture action must be dismissed, government can seek to obtain proper warrant, if time permits). Rather, the government may proceed with the forfeiture action against the property that was seized illegally and attempt to establish that the property is forfeitable based on untainted, independently-derived evidence. ***$186,410 in U.S. Currency***, 590 F.3d at 953-54; ***United States v. $404,905.00 in U.S. Currency***, 182 F.3d 643, 646 (8th Cir. 1999); ***United States v. $493,850.00 in U.S. Currency***, 518 F.3d 1159, 1165 (9th Cir. 2008); ***United States v. $174,206.00 in U.S. Currency***, 320 F.3d 658, 663 (6th Cir. 2003); ***United States v. Real Property Known as 415 East Mitchell Ave.***, 149 F.3d 472, 476 (6th Cir. 1998); *but see* ***One Parcel of Real Property, Located at 9638 Chicago Heights***, 27 F.3d at 330.

A party that has litigated the suppression issue in a parallel criminal case or state case will be collaterally estopped from attempting to relitigate the issue by filing a motion to suppress in a civil forfeiture case. ***Real Property Known as 415 East Mitchell Ave.***, 149 F.3d at 476; ***United States v. Real Property Located in El Dorado County***, 59 F.3d 974, 979-80 (9th Cir. 1995); ***United States v. One Parcel of Real Property Known as 16614 Cayuga Road***, 69 Fed Appx. 915, 918 (10th Cir. 2003).

26.4 ADMINISTRATIVE FORFEITURE

Administrative forfeiture is commonly used when a federal law enforcement agency seizes property during the course of an investigation. The administrative forfeiture process allows the agency to obtain clear title to the seized property quickly and without any judicial involvement. ***United States v. Ninety-Three (93) Firearms***, 330 F.3d 414, 422 (6th Cir. 2003); ***Malladi Drugs and Pharmaceuticals, Ltd. v. Tandy***, 552 F.3d 885, 889-90 (D.C. Cir. 2009); ***One 1988 Chevrolet Monte Carlo***, 861 F.2d at 310. A prerequisite to administrative forfeiture is that the seizure was lawful, meaning there was probable cause to believe that the property is subject to forfeiture. Such seizures should generally be pursuant to a judicial warrant, unless one of the exceptions to the Fourth Amendment warrant requirement applies.

In order to undertake administrative forfeiture, the law enforcement agency must have jurisdiction over the property, or *res*. An agency generally obtains jurisdiction by seizing the property at issue. ***United States v. Thomas***, 319 F.3d 640, 634-44 (3d. Cir. 2003). After the property has been seized, administrative forfeiture commences whenthe federal law enforcement agency sends notice of its intent to forfeit the property to anyone with a potential interest in contesting the action and by publishing a notice in a printed publication, such as a newspaper. If no one contests the forfeiture by filing a claim within the prescribed time period, the matter is concluded by the agency entering a declaration of forfeiture. This declaration has the same force and effect as a judicial order. 19 U.S.C. § 1609(b).

There is no judicial review of administrative forfeitures, except to ensure that the procedures followed by the seizing agency satisfied the requirements of due process. An agency may entertain "petitions for remission," through which persons with no legal defense to forfeiture ask the seizing agency to remit all or part of the property as an exercise of executive discretion. 19 U.S.C. § 1618; 28 C.F.R. Part 9. Agency denials of petitions for remission are not subject to judicial review.

26.04 [1] Statutory Authority

Administrative forfeiture is authorized by the Tariff Act of 1930, 19 U.S.C. §§ 1602-21. Statutes that cross-reference the provisions of the Tariff Act, including 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d), authorize administrative forfeiture. Additionally, any civil forfeiture statute that incorporates the procedures of Title 18, Chapter 46 authorizes administrative forfeiture. Even if administrative forfeiture of property is authorized by statute, the seizing agency must also have statutory authority to process administrative forfeitures.

26.04 [2] Civil Asset Forfeiture Reform Act of 2000 (CAFRA)

CAFRA reformed some of the procedures that apply to administrative forfeitures. These new procedures, which apply to most administrative forfeiture proceedings, were codified at 18 U.S.C. § 983(a)(1), (2); ***Malladi Drugs***, 552 F.3d at 887; ***VanHorn v. Florida***, 67 7 F. Supp. 2d 1288, 1293 (M.D. Fla. 2009). It should be noted, however, that CAFRA did not replace prior administrative forfeiture procedures, but instead superimposed new procedures on the existing ones, making the new procedures applicable in some situations and not others. Consequently, some administrative forfeitures are governed by CAFRA, others are not.

Under CAFRA, the seizing agency must begin the forfeiture proceeding within a fixed period of time and must give the property owner ample time to file a claim. 18 U.S.C. § 983(a)(1) & (2), 19 U.S.C. § 1602 *et seq*. If someone does file a claim, the agency must refer the matter to the United States Attorney, who must commence a judicial action for civil or criminal forfeiture within 90 days or return the property. 18 U.S.C. § 983(a)(3).

26.04 [2][a] Customs Carve-Out to CAFRA

Section 983(i) exempts certain categories of forfeiture cases from any of the CAFRA reforms in 18 U.S.C. 983, including Section 983(a)(1) and (2). Cases brought under the following provisions are exempt:

(A) the Tariff Act of 1930 or any other provision of law codified in Title 19;
(B) the Internal Revenue Code of 1986[2];
(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 *et seq*.);
(D) the Trading with the Enemy Act (50 U.S.C. § 1 *et seq*.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1701 *et seq*.);
(E) Section 1 of Title IV of the Act of June 15, 1917 (22 U.S.C. § 401).

It should be noted that the Section 983(1) carve-out only applies to the provisions of Section 983. The provisions in Section 985 (real property) or Section 2465(b) (attorney fee and interest provisions) apply to all civil forfeiture actions

[2] United States v. One TRW, Model M14, 7.62 Caliber Rifle, 414 F.3d 416, 418 (6th Cir. 2006); United States v. TRW Rifle 7.26X51MM Caliber, One Model 14 Serial 593006, 447 F.3d 686, 689 (9th Cir. 2006).

26.04 [2][b] When Both CAFRA and pre-CAFRA Law Apply

Section 983 is the statute that contains the reforms enacted by CAFRA. It does not, however, contain all the procedures that govern administrative forfeitures, even when CAFRA applies. Rather, the provisions of Section 983 “supersede preexisting law” only to the extent that the old law is “inconsistent” with its provisions. Otherwise, the old law remains in effect. H. Rep. 106-192, 106^{th} Cong. (1999), at 21.

Thus, in cases where CAFRA applies, Section 983 should generally be looked to first. If Section 983 addresses the issue, it governs. If it is silent or does not apply for some reason, the pre-CAFRA law still applies.

26.04 [3] Limits on AdministrativeForfeiture

Many types of property may be seized and forfeited administratively. There are exceptions. For example, real property may never be forfeited administratively. 18 U.S.C. § 985(a).

Additionally, under Title 18, United States Code Section 1607(a), administrative forfeiture of personal property is also restricted. Personal property can be administratively forfeited only (1) where the value does not exceed $500,000; (2) where its importation is illegal; (3) where the property, regardless of its value, is a vessel, vehicle, or aircraft used to import, export, transport, or store any controlled substance or listed chemical; or (4) where it is currency or a monetary instrument of any value. In all other cases, administrative forfeiture of personal property is not available. 19 U.S.C. § 1610. For the purposes of Section 1610, bank accounts are considered neither currency nor monetary instruments, so are subject to the $500,000 limit.

There is some question whether assets seized simultaneously should be aggregated for the purpose of applying the $500,000 limit. Department of Justice policy requires seizures of personal property to be aggregated for the purposes of the $500,000 requirement if the seizures arose out of the same case or investigation. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § I.A, p.47. (Asset Forfeiture Policy Manual (2013).)

26.04 [4] Notice of Forfeiture

26.04 [4][a] Timing

While pre-CAFRA law required only that forfeiture proceedings be commenced "forthwith" and prosecuted "without delay" once the property was seized, CAFRA set a statutory deadline for commencing an administrative forfeiture proceeding.

Under CAFRA, the government must typically send notice to potential claimants within 60 days of the seizure. 18 U.S.C. § 983(a)(1). Seizure may be deemed to occur at the time the government interferes with the owner's possession, use, or control, even if the government is not in physical possession of the property. ***United State v. Assorted Jewelry***, 386 F. Supp. 2d. 9, 13 (D.P.R. 2005); ***Salmo v. United States***, 2006 WL 2975503, at *2-3 (E.D. Mich. 2006).

When the property is seized by a state or local agency, then turned over to a federal agency for forfeiture under federal law, the federal agency has 90 days to commence an administrative forfeiture proceeding. ***United States v. One Ford Coupe Auto***, 272 U.S. 321, 325 (1926); ***Madewell***, 68 F.3d at 1037. In some instances, state law may require the state or local agency to obtain a judicial order releasing the property from the jurisdiction of the state court before it can be turned over to the federal agency. CAFRA does not provide relief should the state court fail to act in sufficient time for the federal agency to comply with the 90-day notice deadline. In such cases, the government may have to ask the court for an extension of time in which to send the notice.

26.04 [4][a][i] Extension of Deadlines

In some cases, because of the notice requirement, the government may not want to commence administrative forfeiture proceedings within the 60 or 90-day statutory period. The required notice might have potential adverse effects on ongoing criminal investigations. Complying with the requirement could, for example, require the government to notify targets of ongoing investigations before the government is ready to do so.

Section 983(a)(1)(B) provides that the supervisory official in the headquarters office of the seizing agency may extend the period for sending notice by 30 days. The agency can only grant this extension once. Any additional extensions must be sought by requesting an *ex parte* order from the court. The court may extend the deadline for additional 60-day intervals as long as the court deems necessary.

Both the court and the agency supervisory official may only grant extensions if certain criteria are met. These criteria are set forth in Section 983(a)(1)(D). Criteria that may justify extensions include a belief that sending notice will endanger the life or physical safety of an individual, cause flight from prosecution, result in the destruction of evidence or intimidation of a potential witness, or otherwise seriously jeopardize an investigation or unduly delay a trial. 18 U.S.C. § 983(a)(1)(D).

26.04 [4][a][ii] Exceptions

The Section 983(a)(1)(A) notice requirement applies only to "nonjudicial forfeiture under a civil forfeiture statute." It does not apply:

(1) To cases that fall within the scope of Section 983(i) (Customs carve-out).

(2) When property is *not* eligible for administrative forfeiture, such as when the aggregate value of property exceeds $500,000 or the seizing agency lacks administrative forfeiture authority. *See, e.g.*, ***Chaim v. United States***, 692 F. Supp. 2d 461, 466 (D.N.J. 2010); ***DWB Holding Co. v. United States***, 593 F. Supp. 2d 1271, 1272 (M.D. Fla. 2009).

(3) When there is a nonjudicial forfeiture proceeding, because the property was not seized for forfeiture but rather for some other purpose, such as evidence in a criminal case. ***Celata v. United States***, 334 Fed. Appx. 801, 802 (9th Cir. 2009); ***Langbord v. United States Dep't of Treasury***, 2009 WL 2342638, at *4 (E.D. Pa.2009).

(4) If, at the time of the seizure, the government intended to forgo administrative forfeiture and proceeds by civil or criminal forfeiture – even if the property is eligible and seized for the purpose of a forfeiture proceeding. 18 U.S.C. § 983(a)(1)(A)(ii) (civil judicial forfeiture exception), § (a)(1)(A)(iii) (criminal judicial forfeiture exception). (Under this exception, the government must file a civil judicial forfeiture action against the property and provide notice of that action before the 60-day period expires. ***United States v. Vehicle 2007 Mack 600 Dump Truck***, 680 F. Supp. 2d 816, 824 n.6 (E.D. Mich. 2010). Or it must include the property in a criminal indictment within 60 (or 90) days of seizure.)

(5) If the government did not seize the property for the purpose of forfeiting it administratively, whether or not the government commences a civil or criminal forfeiture action within 60 or 90 days of the seizure.

In contrast to a civil judicial forfeiture action, it should be noted that the inclusion of property in a criminal indictment does not automatically terminate an administrative forfeiture action. 18 U.S.C. § 983(a)(3)(C). Rather, the government may continue the administrative forfeiture action to see whether anyone files a claim; if not, the property is forfeited by default. 18 U.S.C. § 1609.

If a claim is filed, the government can proceed with the criminal forfeiture action or file a parallel judicial forfeiture action. If the government continues the administrative forfeiture proceeding notwithstanding the criminal indictment, it must send notice of the administrative forfeiture proceeding as required under Section 983(a)(1)(A)(i): the criminal forfeiture action is not considered sufficient notice for the administrative proceeding because notice is only provided to the defendant at the time of indictment and no third parties are given notice of criminal forfeiture until the defendant is convicted and the court has entered a preliminary order of forfeiture.

26.04 [4][b] Content of Notice

Section 983(a)(1)(A)(i) is silent regarding what the notice of administrative forfeiture must contain. The notice must identify the property, as well as the time and place where it was seized. *See* ***Adames v. United States***, 171 F.3d 728, 730 n.2 (2d Cir. 1999) (noting that government understandably did not argue that notice referring only to amount of currency at issue and the date on which the forfeiture complaint was filed as adequate). The notice should also describe the procedure for contesting the forfeiture, which involves either filing a verified claim under Section 983(a)(2) or filing a remission petition; the notice should explain that the claimant cannot do both. *See* ***Martin v. Leonhart***, 717 F. Supp. 2d 92, 98-99 (D.D.C. 2010). Direct notice to a potential claimant will also generally state the deadline for filing a claim. A least one court has held that the notice need not advise the claimant that a remission petition is not subject to judicial review. ***Laconia Savings Bank v. United States***, 116 F. Supp. 2d 248, 255 (D.N.H. 2000).

As long as the notice is "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,'" ***Lobzun v. United States***, 422 F.3d 503, 507 (7th Cir. 2005) (quoting ***Mullane v. Cent. Hanover Bank & Trust Co.***, 339 U.S. 306, 314 (1950)), the notice may not need to detail the illegal acts or facts supporting the government's theory of recovery. *See* ***Mohammad v. United States***, 169 Fed. Appx. 475, 482 (7th Cir. 2006) (DEA form notice is constitutionally adequate.) At least one court has also held that the required newspaper notification need not name the potential claimants. ***United States v. Latham***, 54 Fed. Appx. 441, 446 (6th Cir. 2002).

26.04 [4][c] Persons to Whom Notice Must Be Sent

Pursuant to 19 U.S.C. § 1607(a), notice of administrative forfeiture must be sent "to each party who appears to have an interest in the seized article." This includes the person from whom the property was seized, the owner of the premises from which it was seized (even if he was not in direct possession), the titled owner of the property, lienholders, and any other person known to the government to have an interest. *See* ***Assorted Jewelry***, 386 F. Supp. 2d at 12-13; ***Kadonsky v. United States***, 3 Fed. Appx. 898, 902-03 (10th Cir. 2001) (party "appear[ed] to have an interest" in the check made out in his name and was entitled to notice); *see also* ***United States v. Ritchie***, 342 F.3d 903, 910-11 (9th Cir. 2003) (all circuits to consider the issue have held that government must make reasonable additional efforts to provide personal notice once it has learned that an initial effort has failed).

The government must send notice even if a person is a fugitive. *See* ***United States v. Gonzalez-Gonzalez***, 257 F.3d 31, 38 (1st Cir. 2001) (reversing, *sua sponte*, dismissal by the district court and remanding for consideration of whether the government knew of the fugitive's whereabouts and failed to direct notice to that location); ***United States v. Rodgers***, 108 F.3d 1247, 1253 (10th Cir. 1997). If the government does not know the fugitive's whereabouts, attempts to send notice by certified mail to the last known address are considered sufficient. ***Latham***, 54 Fed. Appx. at 444-45.

The government is not required to send written notice to persons who deny ownership in the property or whose interest in the property is nil. ***Arango v. United States***, 1998 WL 417601, at *2-3 (N.D. Ill. 1998); ***United States v. Howell***, 425 F.3d 971, 975 (11th Cir. 2005). Nor is the government required to send notice to unsecured creditors whose interest in the property arose after the criminal acts giving rise to the forfeiture. 18 U.S.C. § 983(d)(6)(B)(i); ***United States v. Carmichael***, 440 F. Supp. 2d 1280, 1282 (M.D. Ala. 2006); *but see* ***United States v. $4,224,958.57***, 392 F.3d 1002, 1005 (9th Cir. 2004) (if bank depositors can prove their claims to have been defrauded, they are the beneficiaries of the constructive trust and have, therefore, equitable interests in it, and are consequently entitled to notice of a pending forfeiture action). The government may send notice to a person without that notice being treated as a concession that the intended recipient has standing to contest the forfeiture. *See* ***United States v. BCCI Holdings***, 69 F. Supp. 2d 36, 56 n.22 (D.D.C. 1999).

In some instances, the identity of a person with an interest in the property is not known to the seizing agency at the time of the seizure, but is learned before the agency enters a declaration of forfeiture. In those cases, Section 983(a)(1)(A)(v) provides that the government has another 60 (or 90) days from the date it learns of the identity of the new party to send written notice to that party, in accordance with Section 983(a)(1)(A)(i). The newly-identified party then has the opportunity to file a claim. This additional period is only for the new party, however. It does not reopen the claims period for any other person to whom the government previously sent notice in the initial 60 or 90-day period.

The requirement to reopen the notice period in Section 983(a)(1)(A)(v) only applies if the new party's identity is discovered "before a declaration of forfeiture is entered." If the government learns of a new party after entering a declaration of forfeiture, it may withdraw the declaration and restart the process. It may also decline to do so, in which case the only recourse for the newly-discovered party is to move to set aside the forfeiture pursuant to Section 983(e) on the ground that the notice of the administrative forfeiture was inadequate.

26.04 [4][d] Manner of Sending Notice

Section 983(a)(1)(A)(i) requires notice "be sent in a manner to achieve proper notice." Both pre- and post-CAFRA case law requires that notice be sent in accord with the Supreme Court's decision in ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306 (1950). In ***Mullane***, the Court held that the notice must be reasonably calculated to apprise interested parties of the pendency of the action. 339 U.S. at 315. Further, it must be sent by means and in a manner that would be employed by one actually desirous of achieving notice. *Id.* at 315; ***Dusenbery v. United States***, 534 U.S. 161, 167 2002); ***Gonzalez-Gonzalez***, 257 F.3d at 36-37; ***Rodgers***, 108 F.3d at 1251 (where DEA could reasonably have been aware that person maintained three different residences and mailed notice only to two of the residences, DEA should have mailed a seizure notice to the third residence)**.**

The government is not, however, required to prove that notice was actually received. *See* ***Dusenberry***, 534 U.S. at 172-73 (Due Process Clause does not require heroic efforts by the government; it requires only that the government's effort be reasonably calculated to apprise a party of the pendency of the action); ***Valderrama v. United States***, 417 F.3d 1189, 1197 (11th Cir. 2005). Thus, it is generally sufficient to send notice by certified mail to an address that the government believes is valid. ***Krecioch v. United States***, 221 F.3d 976, 980-81 (7th Cir. 2000); ***United States v. Clark***, 84 F.3d 378, 381 (10th Cir. 1996); ***Albalon v. Gugliotta***, 72 F. Supp. 2d 1362, 1370 (S.D. Fla. 1999). For example, the government is entitled to rely on the address a potential claimant provides when arrested or at the time the property was seized. ***Lobzun***, 422 F.3d at 508-09. The government may assume its efforts were sufficient if the notice was sent by certified mail and it receives a delivery confirmation. ***In re Seizureof $143,265.78***, 384 Fed. Appx. 471, 474-75 (6th Cir. 2010).

When an attorney represents a potential claimant, the majority of courts hold that it is sufficient to send notice of administrative forfeiture to the attorney, in appropriate circumstances. ***Nunley v. Department of Justice***, 425 F.3d 1332, 1139 (8th Cir. 2005); ***Bye v. United States***, 105 F.3d 856, 857 (2d Cir. 1997); ***Allen v United States***, 38 F. Supp. 2d 436, 437 (D. Md. 1999); ***Willis v. United States***, 2010 WL 4735737, at *3 (S.D. Ga. 2010); ***Hernandez Diaz v. United States***, 2006 WL 2853879, at *4 (E.D.N.Y. 2006); ***Arredondo v. United States***, 2004 WL 1171203, at *3 (N.D. Tex. 2004); *but see* ***United States v. $184,505.01***, 72 F.3d 1160, 1164 (3d Cir. 1995) (attorney for claimant was not claimant’s attorney in the forfeiture proceedings at issue); ***United States v. Houshar***, 2006 WL 562206, at *7 n.11 (E.D. Pa. 2006).

When the potential claimant is a prisoner, the government satisfies the notice requirement if the notice is sent to the prisoner where he is incarcerated and the facility has procedures in place to deliver mail to the prisoners. ***Dusenberry***, 534 U.S. at 162; ***United States v. Huggins***, 385 Fed. Appx. 225, 227 (3d Cir. 2010). The government does not have to prove that the prisoner actually received the notice.

With regards to the procedures used by the prison to deliver mail, there is a circuit split regarding what proof the government must offer. Several courts have held that ***Dusenbery*** does not require an inquiry into how each jail handles the mail and that proof of delivery to the potential claimant's jail is sufficient. *See* ***Chairez v. United States***, 355 F.3d 1099, 1101-02 (7th Cir. 2004); ***Collette v. United States***, 247 Fed. Appx. 87, 88-90 (9th Cir. 2007); ***United States v. $13,946.00 in U.S. Currency***, 2011 WL 4499131, at *3 (N.D. Ill. 2011); *see also* ***Perez v. United States,*** 2010 WL 1542171, at *3 (N.D. Tex. 2010) (claimant did not assert or prove that prison mail delivery procedures were inadequate); ***United States v. Daniels***, 2010 WL 5140853, at *4 (E.D. La. 2010). In contrast, the Third Circuit places the burden on the government, when it relies on something less than actual notice, to demonstrate that the prison employs mail distribution procedures that "are reasonably calculated to ensure that notice will be received." ***United States v. One Toshiba Color Television***, 213 F.3d 147, 155-56 (3d Cir. 2000). And the Eight Circuit has adopted a middle-ground holding that there is no presumption of reliability as to the jail's internal delivery system and putting the burden on the prisoner to demonstrate that the procedures are inadequate. ***Nunley***, 425 F.3d at 1137.

If the government has actual knowledge that its attempts to provide notice have been unsuccessful, the government must take additional steps to send notice. ***Jones v. Flowers***, 547 U.S. 220 (2006). Under the Supreme Court's decision in Jones, the government can satisfy due process by re-sending the notice by first class mail or taking other "additional steps" designed to give notice, *id.* at 230, such as checking law enforcement databases for other addresses, contacting the local police department, or sending notice to the potential claimant's attorney. *See* ***VanHorn v. DEA***, 677 F. Supp. 2d 1299, 1310 (M.D. Fla. 2009) (resending notice by regular mail or posting notice on a front door); ***Turner v. Attorney General***, 579 F. Supp. 2d 1097, 1107-08 (N.D. Ind. 2008); ***United States v. Lawrence***, 2010 WL 529490, at *3 (N.D. Cal. 2010); ***Folks v. DEA***, 2006 WL 3096687, at *2 (M.D.N.C. 2006).

26.04 [4][e] Notice by Publication

The government is also required to give public notice of an administrative forfeiture in a newspaper for at least three successive weeks. 19 U.S.C. § 1607. The government may choose a newspaper of general circulation; it does not have to publish the notice in a newspaper distributed in a particular jurisdiction, even if the local newspaper may be more likely to achieve actual notice. ***United States v. Robinson***, 434 F.3d 357, 367-68 (5th Cir.2005). Importantly, newspaper publication alone does not satisfy due process if the identity and whereabouts of a potential claimant are known to the government or could be determined with reasonable effort. *See* ***Robinson v. Hanrahan***, 409 U.S. 38, 40 (1972); ***Garcia v. Meza***, 235 F.3d 287, 292 (7th Cir. 2000); ***Volpe v. United States***, 543 F. Supp. 2d 113, 119-20 (D. Mass. 2008).

26.04 [4][f] Actual Notice

There is no due process violation if the claimant has actual notice of the forfeiture action, be it an administrative or judicial action. *See* ***Nunley***, 425 F.3d at 1139; ***United States v. One 1987 Jeep Wrangler***, 972 F.2d 472, 481 (2d Cir. 1992) (due process satisfied by the claimant's admitted actual knowledge of the seizure); ***Pimentel v. DEA***, 99 F. Supp. 2d 420, 428 n.6 (S.D.N.Y. 2000); *see also* Fed. R. Civ. P. Supp. G(4).

26.04 [5] Sanctions for Failure to Provide Notice

If the government fails to provide the required notice to the person from whom the property was seized within the specified time period and does not obtain an extension in which to do so, the government "shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time." 18 U.S.C. § 983(a)(1)(F). By its terms, Section 983(a)(1)(F) does not require the government to return the property to any other potential claimant, even if it failed to send notice.

If the seizing agency misses the notice deadline and thus loses the option to pursue administrative forfeiture, the agency can still refer the case to the Department of Justice for commencement of a judicial forfeiture action. *See* ***United States v. Real Property Located at 1184 Drycreek Road, Granville, Ohio 43023***, 174 F. 3d 720, 729 (6th Cir. 1999) (inadequate notice does not immunize property from forfeiture); ***Salmo***, 2006 WL 2975503, at *3. Upon such a referral, Department of Justice policy allows the filing of a forfeiture complaint without returning the property. *Asset Forfeiture Policy Manual* (2013), Ch. 2, § I.F, p. 55 (setting forth the recommended procedure for filing a civil judicial forfeiture following the inadvertent failure to commence a timely administrative forfeiture proceeding). (Asset Forfeiture Policy Manual (2013).) *See also* ***In Re Return of Seized Property (Jordan)***, 625 F. Supp. 2d 949, 953-55 (C.D.Cal. 2009); ***Salmo***, 2006 WL 2975503, at *3; ***Manjarrez v. United States***, 2002 WL 31870533, at *1-2 (N.D. Ill. 2002). Alternately, should the seizing agency miss the deadline and pursue an administrative forfeiture anyway, the resulting forfeiture is valid unless the claimant files a claim and seeks redress for the procedural error.

Section 983(a)(1)(F) provides an exception to the return of property rule, under which the government does not have to return "contraband or other property that the person from whom the property was seized may not legally possess." *See* ***Manjarrez***, 2002 WL 31870533, at *1-2. Thus, the seizing agency does not have to return stolen property, smuggled goods/currency, or illegal drugs seized from a drug trafficker. *See ibid.* (if U.S. currency seized from claimant could be traced to drug transactions, government would never have an obligation to return it to him); *see also* ***United States v. An Antique Platter of Gold***, 991 F. Supp. 222, 233 (S.D.N.Y. 1997) (illegally imported goods are contraband).

26.04 [6] Filing a Claim

Sections 982(a)(2)(A) through (E) set out the procedure for filing a claim in an administrative forfeiture proceeding. They substantially supersede the pre-CAFRA procedures in the Customs laws at 19 U.S.C. § 1608. To the extent that Section 983(a)(2) is silent or ambiguous, however, Section 1608 is incorporated by the applicable civil forfeiture statute and applies.

If no party files a valid claim, the seizing agency may enter a declaration of forfeiture that gives clear title to the United States. 19 U.S.C. § 1609. The agency is not required to provide any additional notice; once forfeited, the property may be destroyed unless needed as evidence in a criminal case. *See* ***United States v. McNealy***, 625 F.3d 858, 869-70 (5th Cir. 2010) (government's failure to send notice of a civil forfeiture action to a criminal defendant, and the resulting destruction of property containing potentially useful evidence when he defaulted, was negligent on the government's part, but did not deprive the defendant of due process in the criminal case because there was no showing of bad faith); ***United States v. Connors***, 2002 WL 24520, at *2 (N.D. Ill. 2002) (because no one realized forfeited property would be needed as evidence years later when defendant was indicted, there was no due process violation in destruction of property to which defendant did not file a claim; but Government warned not to destroy property that will be needed as evidence in future criminal cases even if the forfeiture is uncontested).

26.04 [7] Judicial Review

As discussed above, administrative forfeiture is handled solely by the federal law enforcement agency that seized the property. If a person with standing to contest the administrative forfeiture files a timely claim pursuant to 18 U.S.C. § 983(a)(2), the seizing agency must terminate the administrative forfeiture proceeding and refer the case to the United States Attorney's Office, which must either direct the agency to return the property or file a judicial forfeiture action in district court. If the government commences a judicial action, the claimant may then contest forfeiture on any ground provided in the applicable statute(s) or under the Constitution.

A person who chooses not to file a claim waives any judicial review and must accept the seizing agency's determination. *See* ***Malladi Drugs***, 552 F.3d at 889; ***Linarez v. Department of Justice***, 2 F.3d 208, 213 (7th Cir. 1993); ***United States v. Vereda Ltd.***, 271 F.3d 1367, 1375 (Fed. Cir. 2001).

Judicial review of administrative forfeiture is narrow and limited in scope, because a claimant requesting review did not, as he or she could have, file a claim. The primary purpose of judicial review of administrative forfeitures is to ensure that the agency afforded the property owners due process of law. In other words, a court lacks jurisdiction to hear a challenge to the forfeitability of the property on the merits or a challenge based on an alleged violation of a constitutional right (other than a due process claim based on inadequate notice) that the claimant could have raised in district court if he or she had filed a claim. *See* ***United States v. Eubanks***, 169 F.3d 672, 674 (11th Cir. 1999) (generally court lacks jurisdiction to review agency's forfeiture decision, but may exercise jurisdiction if the agency refused to consider a request that it exercise its discretion or may exercise equitable jurisdiction to prevent manifest injustice); ***Chairez***, 355 F.3d at 1102; ***McKinney v. U.S. Dep't of Justice***, 580 F. Supp. 2d 1, 4 (D.D.C. 2008). A district court also lacks jurisdiction to review the denial of a remission petition, when the claimant filed such a petition instead of a claim under Section 983(a)(2). ***Reyna v. United States***, 180 Fed. Appx. 495, 496 (5th Cir. 2006); *but see* ***Tourus Records v. DEA***, 259 F.3d 731, 735 (D.C. Cir. 2001) (collecting cases discussing different standards of review for denials of petitions to remit or mitigate).

26.04 [7][a] Scope of Review

Except for cases that fall within the carve-out of Section 983(i), challenges to administrative forfeitures commenced after August 23, 2000, are governed exclusively by 18 U.S.C. § 983(e). *See* ***United States v. Sims***, 376 F.3d 705, 707 (7th Cir. 2004); ***Valderrama***, 417 F.3d at 1195 (for forfeiture proceedings begun after August 23, 2000, 5 year statute of limitations in 18 U.S.C. § 983(e)(3) applies); ***United States v. Tinajero-Porras***, 378 Fed. Appx. 850, 851 (10th Cir. 2010) (Section 983 is the exclusive vehicle to challenge forfeiture under 22 U.S.C. § 881); ***United States v. Triplett***, 240 Fed. Appx. 736, 736 (8th Cir. 2007)

26.4 [7][b] Section 983(e) Petitions

Section 983(e) only applies to due process challenges that are based on lack of notice. Other challenges are generally treated as actions for equitable relief and treated as they were before enactment of Section 983(e). *See* ***Rodriguez v. United States***, 219 Fed. Appx. 22 (1st Cir. 2007) (district court had jurisdiction over merits of claimant's due process claims); ***United States v. Dacre***, 256 Fed. Appx. 866, 867 (8th Cir. 2007) (because claimant received notice of forfeiture from the DEA, he was not entitled to relief under Section 983(e)). Again, any requests for equitable relief do not go to the merits – only the procedures used by the seizing agency in commencing and concluding the administrative forfeiture proceeding are subject to review.

When a Section 983(e) petition is filed, a threshold matter is whether the moving party has standing to challenge the forfeiture. If so, the court then reviews the efforts the government made to provide notice to the moving party and whether those efforts were constitutionally sufficient. If the notice is found to be inadequate, the court then looks to whether the claimant nevertheless had actual notice of the seizure in sufficient time to file a timely claim.

To prevail on a Section 983(e) petition, the claimant must show that (1) the government knew or should have known of the claimant's interest in the property but "failed to take reasonable steps" to provide the claimant with notice (18 U.S.C. § 983(e)(1)(A)), and (2) the claimant "did not know or have reason to know of the seizure within sufficient time to timely file a claim." 18 U.S.C. § 983(e)(1)(B).

Section 983(e) and pre-CAFRA case law are not clear as to who has the burden of proof on a Section 983(e) motion. Two district courts to consider the matter have both suggested that the claimant has the initial burden of showing that he was entitled to receive notice and that no notice was received. *See* ***United States v. Johnson,*** 2004 WL 2538649, at *5 (S.D. Ind. 2004); ***Foehl v. United States***, 2002 WL 32075774, at *7-8 (E.D. Tex. 2002). On that initial showing, the ***Foehl*** court found that the burden shifted to the government to show what efforts it made to give notice, with the claimant having the ultimate burden to show those efforts were unreasonable under ***Mullane***. ***Foehl***, 2002 WL 32075774, at *7-8. In ***Johnson***, the district court held that the claimant hadthe burden of showing that the government did not take reasonable steps to provide notice and that he did not have reason to know of the seizure with sufficient time to file a timely claim. 2004 WL 2538649, at *5.

A Section 983(e) petition must be filed "not later than 5 years after the date of final publication of notice of seizure of the property." 18 U.S.C. § 983(e). Section 983(e) contains no venue provision. While venue appears to always be proper in the district where the seizure took place, some courts have held that a Section 983(e) petition can also be filed in another district, such as where the claimant is incarcerated. *See****Foehl v. United States***, 238 F.3d 474, 461 (3d Cir. 2001) (case challenging forfeiture was brought under Administrative Procedures Act, and venue was controlled by 28 U.S.C. §§ 1391, 1406); ***Clymore v. United States***, 164 F.3d 569, 574-75 (10th Cir. 1999) (venue proper where seizure took place); ***Polanco v. DEA***, 158 F.3d 647, 655 (2d Cir. 1998).

26.5 CIVIL JUDICIAL FORFEITURE

26.05 [1] Statutory Authority

The main provisions governing civil forfeiture procedure are found in 18 U.S.C. § 983(a)(3), which was enacted as part of CAFRA, and Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. The procedures set forth in 18 U.S.C. § 983(a)(3) apply in cases governed by any statute authorizing civil forfeiture, except those exempted from CAFRA under 18 U.S.C. § 983(i). By contrast, the provisions of Supplemental Rule G applyto all civil judicial forfeiture actions. ***United States v. $11,918.00***, 2007 WL 3037307, at *3 (E.D. Cal. Oct. 17, 2007) (noting that the Advisory Committee Note to Supplemental Rule G extends the Rule to all civil forfeiture actions, even if they are exempted under 18 U.S.C. § 983(i)).

The provisions of the Internal Revenue Code authorizing forfeiture are among those exempted from the 18 U.S.C. § 983(a)(3) deadlines. ***United States v. One TRW, Model M14, 7.62 Caliber Rifle***, 441 F.3d 416, 418 (6th Cir. 2006) (forfeiture cases based on Title 26 offenses are exempt under 18 U.S.C. § 983(i)); ***United States v TRW Rifle 7.26X51MM Caliber, One Model 14 Serial 593006***, 447 F.3d 686, 689 & n.3 (9th Cir. 2006) (same). For discussion of the time limits for filings of civil forfeiture complaints in cases exempt from the 18 U.S.C. § 983(a)(3) deadlines, *see infra*, Section 26.05[2].

26.05 [2] Deadline for Commencing a Civil Forfeiture Action

As explained *supra*, Section 26.04[4], an administrative forfeiture proceeding is terminated when a claimant files a claim. Under 18 U.S.C. § 983(a)(3), when a claim is filed in an administrative forfeiture proceeding governed by CAFRA, the government has 90 days to (1) file a civil forfeiture complaint, (2) list the property in a forfeiture allegation in a criminal indictment, or (3) release the property. The 90-day clock runs from the time the seizing agency receives the claim, not the time the claim ismailed. ***United States v. Real Property Located at 475 Martin Lane***, 545 F.3d 1134, 1141 (9th Cir. 2008). The deadline may be extended by the court for "good cause shown or upon agreement of the parties." 18 U.S.C. § 983(a)(3)(A). The clock does not begin when a claim is filed before the seizing agency has sent the notice required, under 18 U.S.C. § 983(a)(1)(A), of its intent to administratively forfeit seized property. ***United States v. $200,255 in U.S. Currency***, 2006 WL 1687774, at *4-6 (M.D. Ga. 2006); *but see* ***United States v. 1996 Freightliner FLD Tractor***, 634 F.3d 1113, 1117 (9th Cir. 2011) (noting that claimant may shorten the government's deadline to 60 days by filing a cost bond along with the claim under unrepealed pre-CAFRA DEA regulation, which the government conceded remains in effect).

The 90-day clock also does not start running unless the seizing agency receives a valid claim containing the elements enumerated in 18 U.S.C. § 983(a)(2)(C) – the specific property being claimed, a statement of the claimant's interest in the property, and an oath that the claim is subject to penalties of perjury. ***Manjarrez***, 2002 WL 31870533, at *2 (90-day period did not begin to run when claimant did not make claim under penalties of perjury). Department policy calls for seizing agencies to strictly enforce this requirement, but to consult with the U.S. Attorney prior to declaring an administrative forfeiture in situations where it is unclear whether a valid claim has been filed. For further discussion, see the Criminal Division's *Asset Forfeiture Policy Manual* (2013), Chap. 2, §. I.D, p. 51. (Asset Forfeiture Policy Manual (2013).)

When a seizing agency misses the 90-day deadline under 18 U.S.C. § 983(a)(3) for filing a civil forfeiture complaint because the seizing agency believed, mistakenly but in good faith, that a claim was invalid, some courts have held that the deadline may be equitably tolled. *See, e.g.,* ***United States v. $114,143.00 in U.S. Currency***, 609 F. Supp. 2d 1321, 1322-23 (S.D. Fla. 2009); ***Longenette v. Krusing***, 322 F.3d 758, 768 (3d Cir. 2003) (tolling statute of limitations under pre-CAFRA law to allow government to file a judicial forfeiture action where government acted in good faith in rejecting, as untimely, a claim filed in administrative forfeiture proceedings). Department policy calls for asserting that equitable tolling applies under such circumstances. *See Asset Forfeiture Policy Manual* (2013), Chap. 2, § I.D.3, p. 54. (Asset Forfeiture Policy Manual (2013).)

Absent tolling, the effect of failure to comply with the 90-day rule is that the government is forever barred from pursuing civil forfeiture of the property identified in the claim "in connection with the underlying offense." 18 U.S.C. § 983(a)(3)(B). ***Real Property Located at 475 Martin Lane***, 545 F.3d at 1141. The government, however, may still seek criminal forfeiture of the property even if the 90-day rule is violated. *See* ***United States v. Martin***, 662 F.3d 301, 306 (4th Cir. 2011) (holding that illegal seizure of property does not immunize property from forfeiture if the government can sustain the forfeiture with independent evidence).

It is important to remember that the 90-day deadline applies only to cases that begin as administrative forfeitures, ***United States v. 1866.75 Board Feet and 11 Doors and Casings***, 587 F. Supp.2d 740, 751-52 (E.D. Va. 2008), *aff'd sub nom.* ***United States v. Thompson***, 332 Fed. Appx. 882 (4th Cir. 2009), and only to forfeitures authorized by statutes not excepted under 18 U.S.C. § 983(i). In cases to which the 90-day limit does not apply, the only time limitation placed on the filing of a civil forfeiture complaint is that imposed by considerations of due process. In ***United States v. $8,850 in U.S. Currency***, 461 U.S. 555, 564 (1983), a pre-CAFRA case, the Supreme Court adopted the four-part balancing test of ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), in holding that the government's 18-month delay in filing a civil forfeiture action following a complaint did not violate the claimant's due process rights. The factors the Court considered were (1) the length of the delay, (2) the reason for the delay, (3) the claimant's assertion of her right, and (4) prejudice to the claimant. ***$8,850***, 461 U.S. at 564. In cases not subject to CAFRA's 90-day deadline, courts have continued to consider the factors set forth

$8,850 to determine whether judicial forfeiture actions have been timely filed. *See, e.g.*, ***Ancient Coin Collector's Guild v. Customs and Border Protection***, 801 F. Supp. 2d 383, 414-16 (D. Md. 2011), *aff'd* 698 F.3d 171 (4th Cir. 2012); ***United States v. Assets Described in "Attachment A"***, 2010 WL 1893327, at *5-*7 (M.D. Fla. 2010).

Although the due process limitations set forth in ***$8,850*** provide the only legal restriction on the time for commencing judicial forfeiture actions not subject to the 90-day rule under 18 U.S.C. § 983(a)(3), Department policy is that time limits analogous to those in 18 U.S.C. § 983 should be followed in some cases. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.a, p. 58-59. (Asset Forfeiture Policy Manual (2013).) In cases where a forfeiture action could have been initiated as an administrative forfeiture action consistent with the property type and value limitations of 19 U.S.C. § 1607 – detailed *infra*, Section 26.04[3] – but the government has chosen to directly pursue judicial forfeiture of the property, the complaint should be filed within 150 days of the seizure of the property. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.d, p. 60. (Asset Forfeiture Policy Manual (2013).) This time period represents the sum of the 60-day period the government has for giving notice, under 18 U.S.C. § 983(a)(1), and the 90-day deadline, under 18 U.S.C. § 983(a)(3), for filing suit after receiving a claim. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.d, p. 60. (Asset forfeiture Policy Manual (2013).) By contrast, in cases where the government was prohibited from pursuing administrative forfeiture by 19 U.S.C. § 1607, Department policy requires only that suit be initiated within 90 days of receipt of a written request for the property from a claimant. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § G.3.d, p. 60-61. (Asset Forfeiture Policy Manual (2013).)

26.05 [3] Jurisdiction

In a civil forfeiture action, the district court must have both subject matter jurisdiction and *in rem* jurisdiction over the defendant property. Under 28 U.S.C. §§ 1345 and 1355(a), the district courts have subject matter jurisdiction over civil forfeiture actions begun under any provision of federal law. ***United States v. $6,190.00 in U.S. Currency***, 581 F.3d 881, 884 (9th Cir. 2009).

Generally, a district court must have physical possession or constructive control of the defendant property to have *in rem* jurisdiction. ***United States v. One Oil Painting***, 362 F. Supp. 2d 1175, 1182-84 (C.D. Cal. 2005). Ordinarily, the district court obtains *in rem* jurisdiction over the defendant property by issuing an arrest warrant *in rem*, following the procedures set forth in Supplemental Rule G(3). The clerk of the court may directly issue an arrest warrant *in rem* if the property is already in the possession, custody, or control of the government; otherwise, the district court must issue the warrant after making a finding of probable cause. Fed. R. Civ. P. Supp. G(3)(b)(i)-(ii). Procedures for arresting intangible property, however, are found in Supplemental Rule E(4)(c). ***United States v. 3 Parcels in La Plata County***, 919 F. Supp. 1449, 1454 (D. Nev. 1995)

The principal exceptions to the rule that the district court must obtain possession, custody, or control of the defendant property to obtain *in rem* jurisdiction are for real property and for property located abroad. The district court does not need to seize real property to obtain *in rem* jurisdiction over the property. ***United States v. James Daniel Good Real Property***, 510 U.S. 43, 57-58 (1993). The district court obtains *in rem* jurisdiction over real property when the government, in accordance with 18 U.S.C. § 985(c)(1), files a civil forfeiture complaint, posts notice of the complaint on the property, and serves the property owner with notice. 18 U.S.C. § 985(c)(3).

Courts have divided on the issue whether foreign authorities must take property into their possession, custody, or control in order for a district court to obtain *in rem* jurisdiction over the property. At issue is the interpretation of 28 U.S.C. § 1355(b)(2), which provides that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought ...." The majority view is that, by virtue of 28 U.S.C. § 1355(b)(2), the district courts possess *in rem* jurisdiction over any property located in a foreign country, regardless whether foreign authorities have acted to bring the property under their control. ***United States v. Approximately $1.67 Million (U.S.)***, 513 F.3d 991, 996-97 (9th Cir. 2008); ***Contents of Account Number 03001288 Held in the Name of Jalal v. United States***, 344 F.3d 399, 403-05 (3d Cir. 2003)); *see also* ***United States v. All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito)***, 295 F.3d 23, 27 (D.C. Cir. 2002) (agreeing with ***Hong Kong Banking,*** 96 F.3d 20, 22 (2d Cir. 1996), that district courts have jurisdiction to order forfeiture of property in another country and noting that district court issued warrant for arrest *in rem* and a Spanish court restrained the funds); ***United States v. Certain Funds Located at the Hong Kong & Shanghai Banking Corp.***, 96 F,3d 20, 22 (2d Cir. 1996). The minority view, however, was that 28 U.S.C. § 1355(b)(2) merely gives the district court subject matter jurisdiction over foreign property, and that the district court only obtains *in rem* jurisdiction over the property if it is seized by foreign authorities at the request of the United States. ***United States v. All Funds in Any Accounts Maintained in the Names of Meza***, 63 F.3d 148, 152-53 (2d Cir. 1995). It is not clear, however, whether ***Meza*** remains good law even in the Second Circuit. As noted above, in ***Hong Kong Banking***, the Second Circuit held that Section 1355 conferred *in rem* jurisdiction without reference to the necessity of constructive or actual control. ***United States v. $1.67 Million (US) in Cash***, 513 F.3d at 997 & n.3.

Under the "concurrent jurisdiction doctrine," only one court may exercise *in rem* jurisdiction over property at any given time, and jurisdiction lies with the first court to obtain jurisdiction over the property. *See, e.g.*, ***Madewell***, 68 F.3d at 1041 n.13 (8th Cir. 1995) (collecting cases). Thus, so long as property is subject to the *in rem* jurisdiction of a state court, it cannot be forfeited by a federal agency administratively or by the United States in a federal civil forfeiture action. ***Scarabin v. DEA***, 966 F.2d 989, 993-95 (5th Cir. 1992); ***United States v. $490,920 in U.S. Currency***, 911 F. Supp. 720, 728 (S.D.N.Y. 1996). The concurrent jurisdiction doctrine, however, does not prohibit a federal court from ordering forfeiture of property subject to the *in rem* jurisdiction of a state court as part of a defendant's sentence in a federal criminal case. *Cf*. ***United States v. Timley***, 443 F.3d 615, 628 (8th Cir. 2006) (where state court, upon holding that it could not forfeit money from the defendant, ordered money released to the defendant's lawyer, federal district court had jurisdiction as the res had been distributed – defendant could agree in guilty plea to forfeiture.).

26.05 [4] Venue

Under 28 U.S.C. § 1355(b)(1), venue for a civil forfeiture action lies in "the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred," or any other district "specifically provided for" by statute. Other statutes provide that venue also lies in the district where property is found, 28 U.S.C. § 1395(b), and in the district where criminal charges based on the violation giving rise to the forfeiture are pending against the property owner. 18 U.S.C. § 981(h); 21 U.S.C. § 881(j).

26.05 [5] Notice Requirement

The requirements for sending notice of a civil forfeiture action to potential claimants are set forth in Supplemental Rule G(4). Notice by publication is generally required in civil forfeiture actions. Fed. R. Civ. P. Supp. G(4)(a)(i). Publication may be made either by newspaper, or on "an official internet government forfeiture site for at least 30 consecutive days." Fed. R. Civ. P. Supp. G(4)(a)(iv)(C). The Department's policy is to use the official government forfeiture site - www.forfeiture.gov - to satisfy the Supplemental Rule G(4) publication requirement, absent a "compelling reason to use print publication." *Asset Forfeiture Policy Manual* (2013), Chap. 9, § V, p. 134. (Asset Forfeiture Policy Manual (2013).) Print publication, however, may be appropriate in some circumstances involving assets located abroad. *Id.*

The government is also required to send direct notice of a civil forfeiture and a copy of the complaint "to any person who reasonably appears to be a potential claimant . . . ." Fed. R. Civ. P. Supp. G(4)(b)(i). This notice must be sent "by means reasonably calculated to reach the potential claimant," Fed. R. Civ. P. Supp. G(4)(b)(iii)(A), which include sending notice to a claimant's attorney who is representing the claimant with respect to the seizure of the property or related proceedings. Fed. R. Civ. P. Supp. G(4)(b)(iii)(B). Because claimants are not defendants, actual service of the notice satisfying the requirements of Federal Rule of Civil Procedure 4 is not required. ***United States v. $22,050.00 in U.S. Currency***, 595 F.3d 318, 320 n.1 (6th Cir. 2010). When a potential claimant is incarcerated, the notice must be sent to the place of incarceration. Fed. R. Civ. P. Supp. G(4)(b)(iii)(C). The government agency that arrested a potential claimant or that seized property from a potential claimant is permitted to use the last address given by the potential claimant to the agency to send notice to the potential claimant. Fed. R. Civ. P. Supp. G(4)(b)(iii)(D), (E).

Notice of a civil forfeiture action must include the date of the notice, the deadline for filing a claim, the deadline for filing an answer or a motion under Federal Rule of Civil Procedure 12 following filing of a claim, and the name of the government attorney to be served with the claim and answer. Fed. R. Civ. P. Supp. G(4)(b)(ii). As discussed *infra*, Section 26.05[7], different deadlines for filing a claim apply to notice by publication and direct notice, so the deadline in the notice should reflect the type of notice being sent. *See* ***United States v. One 2001 Ford F350***, 2011 WL 147715, at *3 (S.D. Tex. Jan. 18, 2011) (defective notice setting forth incorrect and unclear deadlines effective, although deadlines were incorrect, the date fell within the correct deadline).

26.05 [6] The Complaint

A civil forfeiture complaint must (a) be verified, (b) state the grounds for jurisdiction and venue, (c) "describe the property with reasonable particularity," (d) identify the current location of tangible property, (e) identify the statute under which the action is brought, and (f) "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Fed. R. Civ. P. Supp. G(2).

For a complaint to be "verified," it must be filed under penalties of perjury. ***United States v. 8 Gilcrease Lane***, 587 F. Supp. 2d 133, 138-39 (D.D.C. 2008). Either the government attorney filing the complaint or a federal agent who has prepared an affidavit attached to the complaint may verify under penalties of perjury that the facts set forth in the complaint are true and correct. *Id*. The affiant may qualify this statement by stating that the facts are true to the best of the affiant's "knowledge and belief." *Id.*

Though the government must describe the property it is seeking to forfeit with reasonable particularity, care must be taken when the government chooses to only seek forfeiture of an individual's partial interest in property in which others have an interest. *See, e.g.,* ***United States v. One-Sixth Share***, 326 F.3d 36, 42 (1st Cir. 2003). However, the government is not required to state the fractional interests of various owners when it seeks forfeiture of the entire property, and is not required to state the portion of property subject to forfeiture when it proceeds on a theory – such as a proceeds theory, when property is partially acquired using proceeds of crime – that only supports forfeiture of part of the property. *See* ***United States v. One Parcel of Real Property***, 921 F.2d 370, 375 (1st Cir. 1990).

The requirement under Supplemental Rule G(2)(f) that the complaint "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial" is commonly known as the "particularity requirement." This requirement developed through the caselaw interpreting former Supplemental Rule E(2)(a), *see* ***United States v. Mondragon***, 313 F.3d 862, 865 (4th Cir. 2002), and carried over "without change" when Supplemental Rule G was adopted. 2006 Advisory Committee Note to Supplemental Rule G; ***United States v. All Assets Held at Bank Julius Baer & Co.***, 571 F. Supp. 2d 1, 16 (D.D.C. 2008)***; but see Mondragon***, 313 F.3d at 865 (in light of CAFRA's change in the burden of proof, "it is a bit awkward to say now that Rule E(2)(a) requires the complaint to allege facts sufficient to support a reasonable belief that the government can establish probable cause for forfeiture at trial. We therefore decline to adopt this interpretation," noting that a "useful point survives the pre-CAFRA opinions [sic] . . . most of these opinions begin by recognizing the general standard that a complaint under Rule E(2)(a) must allege sufficient facts to support a belief that the property is subject to forfeiture. We, too, adopt this standard.").

The rationale for the particularity requirement in civil forfeiture cases, by contrast to the notice pleading customary in most other civil actions, is that the filing of a civil forfeiture proceeding generally deprives a claimant of the means to contest the probable cause determination that supported the seizure or otherwise seek return of the property. *See supra*, Section 26.03[2]. Thus, the particularity requirement prevents the Government from "seizing and holding property on the basis of mere conclusory allegations that the property is forfeitable." ***United States v. $8,221,877.16 in U.S. Currency***, 330 F.3d 141, 154 (3d Cir. 2003).

The particularity requirement does not obligate the government to state all of the facts necessary to establish the forfeitability of the property. ***United States v. Real Property Located at 5208 Los Franciscos Way***, 385 F.3d 1187, 1193 (9th Cir. 2004) ("the Government is not required to prove its case simply to get in the courthouse door"); ***One 1974 Learjet***, 191 F.3d at 673-74 (government does not have to establish forfeitability of the property until time of trial); ***Daccarett***, 6 F.3d at 47 (same). The complaint, however, must state facts sufficient to permit a claimant, without further information, to "commence an investigation of the facts" and "frame a responsive pleading." ***Mondragon***, 313 F.3d at 865-66.

The "reasonable belief" requirement of Supplemental Rule G(2)(f) is a lesser standard than the probable cause standard – explained *supra*, Section 26.03[2] – necessary to support a seizure for forfeiture. *See* ***United States v. Lopez-Burgos***, 435 F.3d 1, 2 (1st Cir. 2006); ***United States v. $78,850.00 in U.S. Currency***, 444 F. Supp. 2d 630, 638-39 (D.S.C. 2006). CAFRA, moreover, provides that the burden in a civil forfeiture case remains with the government, 18 U.S.C. § 983(c)(1), and that "no complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property." 18 U.S.C. § 983(a)(3)(D). Thus, for forfeitures subject to CAFRA, most courts have held that a failure to establish probable cause through the allegations in the complaint is not grounds to grant a motion to dismiss. *See* ***United States v. $85,688 in U.S. Currency***, 740 F. Supp. 2d 1284, 1286-87 (D. Utah 2010) (collecting cases). The

Ninth Circuit, however, has held that a showing of probable cause is necessary, in addition to the reasonable belief requirement of Supplemental Rule G(2)(f), on the theory that the probable cause requirement found in 19 U.S.C. § 1615 survived the enactment of CAFRA. ***$493,850.00 in U.S. Currency***, 518 F.3d at 1168, 1168 n.4; *see also* ***$186,410 in U.S. Currency***, 590 F.3d at 954-55 (holding that government had failed to show that it had probable cause to institute its forfeiture action against funds seized from a marijuana clinic; based on the government's pleadings, and as the result of suppressing certain evidence, the court was "left without a clue as to whether currency of an unknown amount discovered at [the clinic] was indeed revenue from the Clinic's operations or was, for instance, a small amount of personal cash that an employee had acquired elsewhere and kept in a locked drawer at work").

26.05 [7] Filing a Claim and Answer

Supplemental Rule G(5) sets forth the rules for filing of claims and answers in civil forfeiture cases. A claim must (A) identify the property claimed, (B) identify the claimant and the claimant's interest in the property, (C) be signed by the claimant under penalties of perjury, and (D) be served on the government attorney identified in the notice the claimant received. Fed. R. Civ. P. Supp. G(5)(a)(i).

A claim must be signed under penalties of perjury by the claimant, not the claimant's attorney. Fed. R. Civ. P. Supp. G(5)(a)(i). Even if a civil judicial forfeiture case begins as an administrative forfeiture, the claimant is required to file a new claim, under penalties of perjury, in connection with the civil forfeiture action. *See* ***United States v. $23,000***, 356 F.3d 157, 162, 165-66 (1st Cir. 2004).

Identification of the claimant's interest in the property requires more than "conclusory or hearsay allegations of some interest in the forfeited property." ***United States v. $100,348***, 354 F.3d 1110, 1118-19 (9th Cir. 2004) (quoting ***Baker v. United States***, 722 F.2d 517, 519 (9th Cir. 1983)). Rather, courts generally require that the claim explain the nature of the claimant's interest and how it arose. *See, e.g.,* ***United States v. $134,750 in U.S. Currency***, 2010 WL 1741359, at *3 (D. Md. Apr. 28, 2010) (granting claimant leave to amend claim, claimant in structuring case was required to explain how he obtained possession of the currency and describe the transaction that generated the currency).

The time limit for filing a claim depends on the type of notice the claimant received. If the claimant received direct notice, the deadline is the deadline stated in the notice. Fed. R. Civ. P. Supp. G(5)(a)(ii)(A). This deadline must be at least 35 days after the notice is sent. Fed. R. Civ. P. Supp. G(4)(b)(ii)(B). If the claimant did not receive direct notice, the deadline is 30 days after the final day of print publication, or 60 days after the first day of publication on the internet. Fed. R. Civ. P. Supp. G(5)(a)(ii)(B).

A claimant must file an answer within 21 days of filing a claim. Fed. R. Civ. P. Supp. G(5)(b). Objections to *in rem* jurisdiction and venue must be raised in the answer, or they are waived. *Id.* The requirements for the answer are otherwise found in Federal Rule of Civil Procedure 8. Fed. R. Civ. P. Supp. G(1); ***2007 Mack 600 Dump Truck***, 680 F. Supp. 2d at 827-28.

26.05 [8] Default Judgments

If no claims are filed within the applicable time limits, or if all claims filed have been dismissed, the government may move, after moving for and receiving an entry of default from the Clerk under Rule 55(a), for entry of a default judgment against anyone who might have filed a claim under Federal Rule of Civil Procedure 55(b). Most courts will grant a default judgment under these circumstances if the government complied with the Supplemental Rule G(4) notice requirements. *See, e.g.,* ***United States v. $16,010.00 in U.S. Currency***, 2011 WL 2746338, at *4-6 (D.N.J. 2011). Some courts, however, have reviewed the allegations in the complaint to see whether, if true, they establish a factual basis for forfeiture prior to entering a default judgment. *See, e.g.,* ***United States v. Approximately $194,752 in U.S. Currency***, 2011 WL 3652509, at *3-4 (N.D. Cal. 2011).

26.5 [9] Advantages and Disadvantages of Civil Forfeiture

As between civil judicial and administrative forfeiture, Department policy is to use administrative forfeiture when the property in question is subject to administrative forfeiture, unless certain exceptions apply. *Asset Forfeiture Policy Manual* (2013), Chap. 2, § I.A, p. 47. (Asset forfeiture Policy Manual (2013).) These exceptions include, *inter alia*, the situation where several items of property that collectively are worth more than $500,000 are subject to judicial forfeiture on the same facts and statutory authority and have a common owner. *Id.*

As between civil and criminal forfeiture, there are several advantages and disadvantages to civil forfeiture that should be considered and weighed before choosing which of the two to pursue, or to pursue both simultaneously. *See infra*, Section 26.07 (discussing parallel civil and criminal forfeitures).

One advantage for the government of using the civil forfeiture procedures is the favorable burden of proof. In a civil forfeiture case, the government need only prove its case – including the underlying crime – by a preponderance of the evidence, not beyond a reasonable doubt as in a criminal forfeiture.

Relatedly, another advantage of civil forfeiture is that the government need not obtain a criminal conviction to forfeit property civilly. *See* ***United States v. One Assortment of 89 Firearms***, 465 U.S. 354, 366 (1984) (acquittal on gun charge does not bar related civil forfeiture action). Thus, civil forfeiture may be the only avenue open to the government when a criminal defendant dies or is a fugitive, when the government is able to prove that property was involved in crime but cannot prove who committed the crime, or when the property belongs to a third party who is not a defendant in the criminal case.

A third advantage of civil forfeiture is that, by contrast to a criminal forfeiture, the forfeiture order is not limited to the property involved in the particular offense of conviction. Thus, civil forfeiture can be used to forfeit property involved in related offenses that were not charged in the criminal indictment.

The main disadvantage of civil forfeiture, as compared to criminal forfeiture, is that the government generally must prove that the defendant property is directly traceable to the underlying criminal offense, and the court, therefore, cannot order forfeiture in the form of a money judgment or of substitute assets as it can in a criminal case. *See infra*, Section 26.06[1] (discussing use of substitute assets in criminal forfeiture). A limited exception exists, however, for cash and electronic funds, which are considered fungible for one year after the offense. 18 U.S.C. § 984.

Another potential disadvantage of civil forfeiture is that it may expose the government to civil discovery that may be detrimental to its successful prosecution of a related criminal case. The government however, is permitted to move for a stay of discovery in the civil forfeiture case on grounds that “civil discovery will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.” 18 U.S.C. § 981(g)(1). The government is also permitted to depose a claimant in a civil forfeiture case, so a claimant who is the subject of a related criminal investigation or case is also permitted to, and often does, move for a stay of a civil forfeiture case on grounds that "continuation of the forfeiture proceeding will burden the right of the claimant against self-incrimination in the related investigation or case." 18 U.S.C. § 981(g)(2)(C).

Other disadvantages of civil forfeiture include the requirement to pay attorney's fees and other litigation expenses to all successful claimants, 28 U.S.C. § 2465(b), and the "death penalty" provision of CAFRA, 18 U.S.C. § 983(a)(3)(B), forever barring forfeiture of property seized for judicial forfeiture when the government fails to timely file suit or timely return the seized property. *See supra*, Section 26.05[2] (discussing filing deadlines).

26.6 CRIMINAL FORFEITURE

26.06 [1] Overview

Criminal forfeiture is part of the defendant's sentence. It is imposed as part of the sentencing process, following conviction of a substantive criminal offense. ***Libretti v. United States***, 516 U.S. 29, 39-41 (1995); ***United States v. Ferrario-Pozzi***, 368 F.3d 5, 8 (1st Cir. 2004); ***United States v. Descent***, 292 F.3d 703, 706 (11th Cir. 2002). It is not a separate crime, nor a separate action against property. Criminal forfeiture deprives defendants of the fruits of their illegal acts and deters future crimes. ***Caplin & Drysdale v. United States***, 491 U.S. 617, 630 (1989); ***United States v. Usery***, 518 U.S. 267, 291 (1996); ***United States v. Martin***, 662 F.3d at 309; ***United States v. Emor***, 850 F. Supp. 2d 176, 215 (D.D.C. 2012).

Unlike civil forfeiture, criminal forfeiture is *in personam*. ***United States v. Lazarenko***, 476 F.3d 642, 647 (9th Cir. 2007); ***United States v. Vampire Nation***, 451 F.3d 189, 202 (3d Cir. 2006). This means that the court can order the defendant to pay a money judgment or to forfeit substitute assets if the directly forfeitable property has been dissipated or cannot be found. In that regard, criminal forfeiture is considered broader and more powerful than civil forfeiture.

Criminal forfeiture requires conviction on a criminal count for which forfeiture is authorized by statute. ***United States v. Baker***, 678 F.3d 858, 897 (10th Cir. 2012); ***United States v. Rosario***, 111 F.3d 293, 301 (2d Cir. 1997). Accordingly, if the defendant's conviction on the forfeiture related count is vacated or overturned on appeal, the forfeiture must generally be vacated too. ***United States v. Harris***, 666 F.3d 905, 910 (5th Cir. 2012); ***United States v. Warshak***, 631 F.3d 266, 333 (6th Cir. 2010); ***United States v. Singh***, 518 F.3d 236, 241 (4th Cir. 2008); ***United States v. Lake***, 472 F.3d 1247, 1250-51 (10th Cir. 2007); ***United States v. Cherry***, 330 F.3d 658, 670 (4th Cir. 2003).

Because different statutes authorize forfeiture of different categories of criminal property, the court must determine what is forfeitable for each defendant, as to each count of conviction. ***United States v. Davenport***, 668 F.3d 1316, 1320 n.7 (11th Cir. 2012); ***United States v. St. Pierre***, 809 F. Supp. 2d 541 (E.D. La. 2011); ***United States v. Wingerter***, 369 F. Supp. 2d 799, 809 n.19 (E.D. Va. 2005).

26.06 [2] Statutory Authority

There is no common-law right to forfeiture. Criminal forfeiture may only be imposed if Congress has specifically authorized forfeiture for the offense of conviction. ***United States v. Anghaie***, 2011 WL 2671242, at *1 (N.D. Fla. 2011); ***United States v. Simon***, 2010 WL 5359708, at *1 (N.D. Ind. 2010). What can be forfeited varies greatly from one offense to another.

For some crimes, Congress has not authorized forfeiture at all. For others, only "proceeds" of the offense itself may be forfeited. 18 U.S.C. § 981(a)(1)(C). And other statutes are broader and permit forfeiture of any property "involved" in the offense. 18 U.S.C. § 981(a)(1)(A), (a)(1).

In 2000, CAFRA amended 28 U.S.C. § 2461(c) to provide that whenever civil forfeiture is authorized in connection with a criminal offense, the government may pursue criminal forfeiture as well, even if there is no criminal forfeiture statute directly applicable to the offense and even if the statute specifically refers to civil forfeiture procedures. ***United States v. Razmilovic***, 419 F.3d 134, 136 (2d Cir. 2006); ***United States v. Black***, 526 F. Supp. 2d 870, 878 (N.D. Ill. 2007). For example, prior to CAFRA, criminal forfeiture for mail and wire fraud offenses was limited to cases in which the fraud "affected a financial institution" or involved a health care fraud or a telemarketing offense. CAFRA authorized civil forfeiture for all types of mail and wire fraud. Through the operation of Section 2461(c), CAFRA also authorized criminal forfeiture in all mail and wire fraud cases. *See* ***Vampire Nation***, 451 F.3d at 199-201;

United States v. Jennings, 487 F.3d 564, 584 (8th Cir. 2007); ***United States v. Day***, 524 F.3d 1361, 1376 (D.C. Cir. 2008).

Thus, because 18 U.S.C. § 981(a)(1)(C) authorizes civil forfeiture of the proceeds of the 250 or so offenses defined as specified unlawful activities in 18 U.S.C. § 1956(c)(7), applying Section 2461(c) means that when a defendant is convicted of any of those 250 offenses, the government can seek criminal forfeiture of the proceeds of the offense. ***United States v. Newman***, 659 F.3d 1235, 1240 (9th Cir. 2011); ***United States v. Taylor***, 582 F.3d 558, 565 (5th Cir. 2009).

The procedure for criminally forfeiting property is codified in Rule 32.2 of the Federal Rules of Criminal Procedure and Title 18, United States Code Section 853. ***Davenport***, 668 F.3d at 1320-21; ***Lazarenko***, 476 F.3d at 647-48; ***United States v. Liquidators of European Federal Credit Bank***, 630 F.3d 1139, 1144-46 (9th Cir. 2011); ***United States v. Posey***, 217 F.3d 282, 283-84 (5th Cir. 2000). Section 2461(c) provides that the procedures relating to criminal forfeiture in 21 U.S.C. § 853, the criminal forfeiture statute for drug trafficking offenses, apply in all criminal forfeiture cases regardless of whether the particular statute authorizing criminal forfeiture contains procedures relating to criminal forfeiture. This includes cases where there is a civil forfeiture provision but no criminal forfeiture provision, cases where the statute authorizes criminal forfeiture but contains no applicable procedures of its own, and cases where the criminal forfeiture provision was enacted with its own set of procedures. In all such cases, the court can restrain property pretrial, order forfeiture of substitute assets, and do all of the other things that a court may do in a case in which the procedures of Section 853 apply. Thus, once Congress enacts a civil forfeiture provision, parallel authority to forfeit property criminally arises pursuant to Section 2461(c), following the procedures in Section 853.

Section 981(a)(1)(C) authorizes forfeiture of "proceeds" of more than 250 different state and federal crimes. The crimes for which forfeiture is authorized by Section 981(a)(1)(C) are listed in 18 U.S.C. § 1956(c)(7).

Proceeds are defined by a "but for" test; they consist of any property that the defendant would not have obtained (or retained) but for the crime. The property may be real or personal, intangible or tangible. Proceeds are not limited to net profits, but encompass the gross proceeds of the offense without a reduction for any overhead expenses or start-up costs. Proceeds also include property derived indirectly from an offense, such as appreciation in the value of property purchased with criminal proceeds. A defendant may, however, avoid forfeiture to the extent he can prove what portions of the property were purchased with legitimate funds. ***United States v. One 1980 Rolls Royce***, 905 F.2d 89, 90 (5th Cir. 1990).

26.06 [3] What is Forfeitable

Property subject to forfeiture must have a nexus to the offense for which the defendant is convicted. ***United States v. Messino***, 382 F.3d 704, 714 (7th Cir. 2004). Generally, only property involved in or derived from the offenses alleged in the indictment may be forfeited. ***United States v. Capoccia***, 503 F.3d 103, 114 (2d Cir. 2007); ***United States v. Adams***, 189 Fed. Appx. 600, 602 (9th Cir. 2006); ***United States v. Bornfield***, 145 F.3d 1123, 1138 (10th Cir. 1998). Proceeds of the crime are always subject to forfeiture, and the government need not make a showing that the money ever legally belonged to the defendant. ***United States v. Evanson***, 2008 WL 3107332, at *3 (D. Utah 2008); *see also* ***United States v. McKay***, 506 F. Supp. 2d 1206, 1211-12 (S.D. Fla. 2007) (court ordered forfeiture for the full amount of the illegal proceeds irrespective of whether the money was in the possession of the defendant at the time of the forfeiture).

Thus, even if the defendant has longstanding involvement in the same or similar criminal conduct, forfeiture cannot be based on uncharged conduct that occurred prior to the offense of conviction. ***United States v. Nava***, 404 F.3d 1119, 1129 n.5 (9th Cir. 2005). The government must prove that the property sought to be forfeited is traceable to the activity underlying the defendant’s conviction, not the defendant’s criminal conduct generally. *See* ***United States v. Juluke***, 426 F.3d 323, 328-29 (5th Cir. 2005) (government failed to produce evidence that seized jewelry was proceeds of drug activity charged in indictment).

A similar principle applies to money judgments or substitute assets; both are limited to the amount of property derived from the offense of conviction. *See* ***Adams***, 189 Fed Appx. at 602-03 (substitute property can be seized in lieu of property traceable to a fraud but only up to the value of funds derived from the offense, without a determination of how much the defendant earned from his fraud during the period covered by the indictment, court could not order forfeiture of substitute asset).

The Sixth Circuit imposes an additional limitation that assets subject to criminal forfeiture are limited to property that the defendant owned at the time of the offense and may not include property that he acquired thereafter, unless there is evidence that the property was involved in criminal activity after the date alleged in the indictment. *See* ***United States v. Jones***, 502 F.3d 388, 394 (6th Cir. 2007) (refusing to forfeit property in the absence of legitimate evidence that criminal activity occurred on the property after the date alleged in the indictment as the end of the offense).

An exception to the general rule against forfeiting proceeds or property for uncharged conduct can be found in cases that charge continuing schemes and conspiracies. In such cases, the amount involved in the entire scheme is forfeitable. A defendant incurs forfeiture liability for the damage or harm caused by the entire conspiracy, including damage caused by conduct in which the defendant was not personally involved. *See* ***United States v. Benevento***, 836 F.2d 129, 130 (2d Cir. 1988); ***United States v. Hatfield***, 795 F. Supp. 2d 219, 227 (E.D.N.Y. 2011) (citing ***United States v. Sanchez***, 419 Fed. Appx. 27, 33 (2d Cir. 2011) *and* ***United States v. Stathakis***, 2008 WL 413782, at *11 (E.D.N.Y. 2008)). Thus, if the defendant is charged with and convicted of conspiracy to launder money, forfeiture may be based on amounts the defendant conspired to launder, even if this includes amounts derived from uncharged substantive conduct or substantive counts for which the defendant was acquitted, if the sentencing court finds by a preponderance of the evidence that the criminal activities occurred. *See* ***United States v. Royer***, 549 F.3d 886, 904 (2d Cir. 2008) (including in forfeiture amount loss caused by securities fraud with respect to counts for which the defendant was acquitted); ***United States v. Genova***, 333 F.3d 750, 762-63 (7th Cir. 2003) (acquittal does not eliminate all possibility of forfeiture based on those activities); ***United States v. Capoccia***, 402 Fed. Appx. 639, 640 (2d Cir. 2010) (district court properly included transactions covered by the conspiracy count regardless of whether the conduct was charged in the substantive counts of conviction); ***Hatfield***, 795 F. Supp. 2d at 227***;*** ***Black***, 526 F. Supp. 2d at 882-83 (fact that the defendant was acquitted of counts does not eliminate all possibility of forfeiture based on those activities, if the government proves that there are proceeds traceable to any offense, in this case, the charged scheme to defraud, forfeiture is appropriate); *but see* ***United States v. Hasson***, 333 F.3d 1264, 1279 n.19 (11th Cir. 2003) ("We do not mean to imply that a court could impose a forfeiture order based on a money laundering offense for which the defendant was not charged or for which he was acquitted.").

Similarly, where a mail or wire fraud case is charged as a continuing scheme, the defendant can be held liable for the full amount derived from the scheme, even if the defendant is only convicted of a few substantive counts. *See* ***United States v. Venturella***, 585 F.3d 1013, 1015-17 (7th Cir. 2009); ***Jennings***, 487 F.3d at 584-86; ***Emor***, 850 F. Supp. 2d at 217; ***United States v. Boesen***, 473 F. Supp. 2d 932, 952-53 (S.D. Iowa 2007); ***United States v. Yass***, 636 F. Supp. 2d 1177, 1185 (D. Kan. 2009); *see also* **Capoccia**, 503 F.3d at 117 (holding that property subject to forfeiture was limited to charged transfers of stolen money, because the defendant was not charged with engaging in a scheme, conspiracy, or racketeering enterprise). The Third Circuit may follow an even broader rule, under which forfeiture extends beyond the counts of conviction to all related conduct, so long as the conduct and the proceeds were foreseeable to the defendant. *See* ***United States v. Plaskett***, 355 Fed. Appx. 639, 644 (3d Cir. 2009) (as long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were gained "'was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment.'") (quoting ***United States v. Fruchter***, 411 F.3d 377, 384 (2d Cir. 2005))**.**

26.06 [3][a] Property Held in a Third Party's Name

The fact that property is held by a third party nominee or transferred to a third party does not preclude criminal forfeiture. In such instances, the government should be prepared to submit evidence during the forfeiture proceeding that the third party is a mere nominee owner and to show the nexus between the property and the charged crimes. *See* ***United States v. Totaro***, 345 F.3d 989, 995-96 (8th Cir. 2003) (noting that straw or nominal owners may not defeat forfeiture, holding that the case did not present the hallmarks of nominee ownership – lack of possession and no exercise of dominion or control over the property); ***United States v. Houlihan***, 92 F.3d 1271, 1299-1300 (1st Cir. 1996); ***United States v. Ida***, 14 F. Supp. 2d 454, 460-61 (S.D.N.Y. 1998) (once government makes a prima facie showing that a third party claimant is a nominee owner, the claimant must present evidence of dominion and control or other evidence of true ownership) (collecting cases).

Additionally, courts may disregard the corporate form and order forfeiture of property titled in the name of a corporation when the court finds a corporation to be the alter ego of a defendant. ***United States v. Peters***, 257 F.R.D. 377, 384-85 (W.D.N.Y. 2009); ***United States v. Segal***, 339 F. Supp. 2d 1039, 1050 n.14 (N.D. Ill. 2004); ***United States v. BCCI Holdings***, 977 F. Supp. 27, 32-33 (D.D.C. 1997); ***United States v. BCCI Holdings***, 795 F. Supp. 477, 479-80 (D.D.C. 1992).

The ownership interest of a third party, if any, is litigated in the ancillary proceeding discussed *infra*, Section 26.06[8]. *See* ***United States v. Shanholtzer***, 492 Fed. Appx. 798, 799 (9th Cir. 2012); ***United States v. Padilla-Galarza***, 351 F.3d 594, 600 (1st Cir. 2003); ***United States v. Cuartes***, 155 F. Supp. 2d 1338, 1342-43 (S.D. Fla. 2001).

26.06 [4] Restraining Orders

In contrast to administrative forfeiture, there is no requirement that the property subject to forfeiture be in the government's possession before the government seeks criminal forfeiture. Rather, Rule 32.2(b) specifically contemplates that the government may take possession of criminally forfeited property for the first time after the criminal case is complete. Fed. R. Crim. P. 32.2(b)(3).

When the property sought to be forfeited is not in the government's custody, the government may apply for a pre-trial restraining order to preserve the property pending the conclusion of the criminal trial. 21 U.S.C. § 853(e); 28 U.S.C. § 2461(c).

26.06 [5] Indictment

To initiate a criminal forfeiture action, a prosecutor must give the defendant notice of the government's intent to forfeit his property by including a forfeiture allegation in the indictment or information.

26.06 [5][a] Rule 32.2 – Forfeiture Notice

Rule 32.2(a) provides that a court may not enter an order of forfeiture in a criminal case "unless the indictment or information contains notice to the defendant that the Government will seek forfeiture of property" as part of the defendant's sentence.

In the indictment or information, forfeiture should not be designated as a "count" because it is not a separate substantive criminal charge. Instead, the government should comply with Rule 32.2 by including a "forfeiture notice" or "forfeiture allegation" in the indictment.

The forfeiture notice should set forth the theory of forfeiture, such as whether the property is forfeitable as "proceeds" or "facilitating property," in the terms of the applicable forfeiture statute. There should be a correct citation in the indictment to the particular forfeiture statute on which the government intends to rely. *But see* ***United***

States v. Silvious, 512 F.3d 364, 369 (7th Cir. 2008); ***United States v. Wall***, 285 Fed. Appx. 675, 684-85 (11th Cir. 2008) (an incorrect statutory citation is harmless if the allegation otherwise adequately informs the defendant that his property will be subject to forfeiture.).

If the indictment contains multiple offenses that each support a different theory of forfeiture, the forfeiture notice should generally contain a separate paragraph for each theory, alleging them in the conjunctive. Similarly, if a single offense supports forfeiture under multiple theories, such as proceeds and facilitating property, the indictment may allege both theories in the conjunctive.

The forfeiture notice need not identify specific property or the amount of any money judgment that the government seeks. Nor does the government have to list property that it intends to forfeit as substitute assets. ***United States v. Misla-Aldarondo***, 478 F.3d 52, 75 (1st Cir. 2007); ***United States v. Parrett***, 530 F.3d 422, 426 (6th Cir. 2008); ***United States v. Bollin***, 264 F.3d 391, 422 & n.21 (4th Cir. 2001)**.** It is sufficient for the notice to track the language of the applicable forfeiture statutes. *See* **Lazarenko**, 504 F. Supp. 2d at 796-97.

26.06 [5][b] Statute of Limitations and Venue

There is no separate statute of limitations for the forfeiture portion of the defendant's sentence. Because forfeiture is part of the sentence, as long as the indictment charging the defendant with the offense giving rise to forfeiture was returned before the statute of limitations expired, the government may supersede at any time after the timely return of an indictment to add a forfeiture notice. *See* ***Jennings***, 487 F.3d at 586-87 (Section 984(b) is not applicable to criminal forfeiture); Lazarenko, 504 F. Supp. 2d at 796.

There is no separate venue for criminal forfeiture. Thus, the defendant's property may be forfeited in a criminal case, with proper venue, in which he is convicted, regardless of where the property was obtained by the defendant or where it was seized.

26.06 [6] Bifurcated Proceeding

At trial, no mention is made of forfeiture unless and until the defendant is convicted. Only then does the court, or jury, hear additional evidence, argument, and instructions regarding forfeiture. The jury is then asked to return a special verdict as to whether that the government, by a preponderance of the evidence, has established the requisite nexus between the property and the crime. Fed. R. Crim. P. 32.2(b). A defendant who pleads guilty is not entitled to a jury trial on forfeiture; rather, any hearing is conducted by the court.

Once the court or jury makes the requisite finding required by the applicable forfeiture statute, the court enters a preliminary order of forfeiture. That preliminary order is made final and included in the judgment of the court at sentencing.

26.06 [7] Final Order of Forfeiture and Sentencing

Because criminal forfeiture is part of sentencing, the court must follow certain procedures when accepting a guilty plea and announcing a defendant's sentence. Under Rule 11(b) of the Federal Rules of Criminal Procedure, the court must advise the defendant of the forfeiture aspect of his sentence at the time he enters a guilty plea. The court must also refer to the forfeiture in the oral announcement of sentence and include the preliminary order of forfeiture, which becomes final as to the defendant at sentencing, in the judgment. Fed. R. Crim. P. 32.2(b)(3).

After the order of forfeiture has become final, the government acquires whatever interest the defendant had in the property. The government also assumes all of the defendant's attendant obligations and liabilities with respect to the property forfeited. ***Hardie v. United States***, 367 F.3d 1288, 1291 (Fed. Cir. 2004).

26.6 [8] Ancillary Proceeding

Any property described in the applicable forfeiture statute may be included in the order of forfeiture, if the government establishes a connection between the property and offense by a preponderance of the evidence. Accordingly, criminal forfeiture is not limited to property owned by the defendant: at the time an order of forfeiture is entered, the defendant's ownership in the property is irrelevant. *See* ***De Almeida v. United States***, 459 F.3d 377, 381 (2d Cir. 2006) (criminal forfeiture is not a measure restricted to property owned by the criminal defendant, it reaches any property that is involved in the offense); *see also* ***United States v. Watts***, 477 Fed. Appx. 816, 817-18 (2d Cir. 2012); ***Padilla-Galarza***, 351 F.3d at 600.

Because third parties are excluded from participating in the defendant's criminal case, there must be a procedure for ensuring that the property subject to criminal forfeiture does not belong to a third party. This procedure is called an ancillary proceeding. It protects a third party's due process rights. And it occurs after the criminal case is concluded. Fed. R. Crim. P. 32.2(b)(2); ***United States v. Grossi***, 482 Fed. Appx. 252, 254-56 (9th Cir. 2012); ***Nava***, 404 F.3d at 1124-26; ***Totaro***, 345 F.3d at 993-94; ***Pacheco v. Serendensky***, 393 F.3d 348, 355-57 (2d Cir. 2004); ***United States v. O'Dell***, 247 F.3d 655, 680 (6th Cir. 2001); ***United States v. Gilbert***, 244 F.3d 888, 919-20 (11th Cir. 2001); ***United States v. BCCI Holdings (Luxembourg) S.A. (Petition of Chawla)***, 46 F.3d 1185, 1190-91 (D.C. Cir. 1995); ***Ida***, 14 F. Supp. 2d at 459-60.

26.7 PARALLEL CIVIL AND CRIMINAL FORFEITURES

26.07 [1] In General

CAFRA expressly authorizes parallel administrative and criminal forfeiture proceedings. *See* 18 U.S.C. § 983(a)(1)(A)(iii)(I). There is, moreover, nothing improper about initially pursuing forfeiture of property civilly and then switching to criminal forfeiture, or *vice versa*. *See* ***United States v. Leyland***, 277 F.3d 628, 632-33 (2d Cir. 2002); (criminal to civil); ***United States v. Candelaria-Silva***, 166 F.3d 19, 43-44 (1st Cir. 1999) (civil to criminal). But care must be taken to comply with required deadlines if switching from civil or criminal forfeiture proceedings.

For example, when the government seizes property for purposes of a criminal forfeiture, the 60 day notice provision under CAFRA is not triggered – it applies only to "nonjudicial civil forfeiture proceeding[s]." 18 U.S.C. § 983(a)(1)(A)(i). If the government initially seizes property planning to seek criminal forfeiture and only later decides to pursue an administrative forfeiture, it may have had possession of the property for longer than 60 days before deciding to pursue administrative forfeiture. In such instances, because the notice requirement cannot be met, the Criminal Division's Asset Forfeiture and Money Laundering Section recommends that a case be brought as a civil judicial forfeiture rather than an administrative forfeiture *See Asset Forfeiture Policy Manual* (2013), Chap. 2, § II.D, p.63-65. (Asset Forfeiture Policy Manual (2013).)

26.07 [2] Issue Preclusion

In many instances, a claimant will be precluded from litigating issues in a civil forfeiture case that were decided in a related criminal case. Claimants can be precluded from relitigating their criminal liability as found by a jury (*see, e.g.,* ***United States v. Two Real Properties Situated in Bluefield***, 2009 WL 3181453, at *4 (S.D. W. Va. 2009)); the forfeitability of property found forfeitable by a special jury verdict (*see, e.g.,* ***United States v. $455,273.72 in Funds***, 813 F. Supp. 2d 124, 129-31 (D.D.C. 2011)); admissions in a guilty plea (*see*, *e.g.*, ***United States v. U.S. Currency ($248,430)***, 2004 WL 958010, at *3 (E.D.N.Y. Apr. 14, 2004)); affirmative defenses rejected by the jury in the claimant's criminal case (***United States v. Beaty***, 245 F.3d 617, 624-25 (6th Cir. 2001)); and a suppression claim rejected in the claimant's criminal case (***Real Property Located in El Dorado County***, 59 F.3d at 979-80). The government may also be precluded from relitigating a forfeiture issue in a criminal case that was decided against it in a civil forfeiture case. *See*, *e.g.*, ***Liquidators of European Federal Credit Bank***, 630 F.3d at 1149.

Issue preclusion, however, does not generally bar the later civil forfeiture of property when the claimant has been acquitted in a related criminal case. ***One Assortment of 89 Firearms***, 465 U.S. at 361-62; ***One Lot Emerald Cut Stones v. United States***, 409 U.S. 232, 234-35 (1972). The government, likewise, is not precluded from bringing a later civil forfeiture action when it elected not to pursue forfeiture in a related criminal case. *See, e.g.*, ***United States v. Wade***, 230 F. Supp. 2d 1298, 1308 n.9 (M.D. Fla. 2002).

26.07 [3] Effect of Civil Forfeiture on a Criminal Case

The procedures set forth in Federal Rule of Criminal Procedure 32.2 only govern criminal forfeitures (***United States v. Daniels***, 2010 WL 5140853, at *2 (E.D. La. Dec. 10, 2010)), and the CAFRA time limits and other procedural provisions generally do not apply to criminal forfeitures (*see* ***United States v. Martin***, 662 F.3d at 305-06). Thus, even if a district court finds that it lacks authority to control property in a criminal case, the property can still be held in connection with the civil case. ***United States v. Ruedlinger***, 1997 WL 808662, at *2 (D. Kan. Dec. 15, 1997). And even if the government fails to meet a statutory deadline in a civil forfeiture case and is therefore barred from pursuing a civil forfeiture, it can still pursue criminal forfeiture. *See supra*, Section 26.05[2].

The fact that property has been civilly forfeited is generally not a ground for a downward departure under the United States Sentencing in a related criminal case. ***United States v. Hoffer***, 129 F.3d 1196, 1204 (11th Cir. 1997); ***United States v. Weinberger***, 91 F.3d 642, 644 (4th Cir. 1996). The Third Circuit, however, has held that voluntary abandonment of a meritorious defense to a forfeiture action may nonetheless provide grounds for a downward departure when it reflects "an extraordinary sense of contrition and desire to make amends for the offense." ***United States v. Faulks***, 143 F.3d 133, 138 (3d Cir. 1998).

The pendency of a civil forfeiture case does not impact the ability of a court to impose a sentence of restitution in a related criminal case. *See* ***United States v. Various Computers***, 82 F.3d 582, 588 (3d Cir. 1996). In criminal tax cases, prosecutors should take care to ensure that any combined use of restitution and forfeiture is consistent with Tax Division policy. *See supra*, Section 26.02.

26.07 [4] Use of Grand Jury Information

Disclosure of grand jury information "to an attorney for the government . . . for use in connection with any civil forfeiture provision of Federal law" is expressly authorized by statute under CAFRA. 18 U.S.C. § 3322(a). CAFRA, however, did not expressly resolve the issue whether an attorney who receives grand jury information pursuant to this provision may in turn disclose that information to the public in a civil forfeiture case without first obtaining a court order authorizing the disclosure. *See id.* The Department's position on this issue is that subsequent disclosure in a civil forfeiture proceeding is authorized by 18 U.S.C. § 3322(a) because such disclosure is part of the "use" of the information within the meaning of the statute. *See Asset Forfeiture Policy Manual* (2013), Chap. 8, § I.B.1, p. 119-21. (Asset Forfeiture Policy Manual (2013).)

However, with respect to disclosure of grand jury information to agency counsel for purposes of an administrative forfeiture action and to government contractors in connection with a civil forfeiture action, if the information has not already been publicly disclosed as part of the civil forfeiture action, the Department takes the opposite position. In such situations, the Department's position is that 18 U.S.C. § 3322 does not authorize disclosure and an order authorizing the disclosure must be obtained pursuant to Federal

Rule of Criminal Procedure 6 prior to disclosure. *See Asset Forfeiture Policy Manual* (2013), Chap. 8, § I.B.2, p. 121. (Asset Forfeiture Policy Manual (2013).)

26.7 [5] Civil Discovery Use in a Criminal Case

There is little case law directly addressing the issue of the use, in the criminal case, of evidence obtained through discovery in a civil forfeiture case. In ***United States v. Kordel***, 397 U.S. 1, 13 (1970), the Supreme Court held that the use of interrogatory answers given in an *in rem* civil condemnation proceeding against a corporation's property in the subsequent criminal prosecution of the corporate officer who answered the interrogatories was consistent with the Fifth Amendment privilege against self-incrimination. Though the Court stated that it agreed with the court of appeals that "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a forfeiture of his property," the Court found no violation of the corporate officer's Fifth Amendment rights. *Id.* at 13. This was so because the corporate officer answering the interrogatories could have refused to answer on Fifth Amendment grounds, but "fail[ed] at any time to assert the constitutional privilege," and did not assert that he was not represented by counsel or that he did not appreciate the possible consequences of the government's criminal investigation. *Id.* at 9-10.

In criminal cases involving discovery obtained in non-forfeiture civil cases, courts have in some instances found that the use of civil discovery in a parallel criminal proceeding was improper where the government used civil discovery in bad faith to obtain evidence for use in a related criminal case. For instance, in ***United States v. Tweel***, 550 F.2d 297 (5th Cir. 1977), the court held that evidence that was obtained from a search of the defendant's records should have been suppressed because the defendant's consent to the search was obtained by literally true but "sneaky" and "shocking" assurance by an IRS revenue agent that no "special agent" was involved, when the IRS civil audit had been commenced at the specific request of the Department of Justice's Organized Crime and Racketeering Section. *Id.* at 298-300. *See also* ***United States v. Scrushy***, 366 F. Supp. 2d 1134, 1135-40 (N.D. Ala. 2005) (suppressing deposition of defendant given in related SEC investigation).

In situations where a prospective deponent in a civil forfeiture proceeding is known to be a target or a subject of a parallel criminal investigation or prosecution, the Criminal Division's Asset Forfeiture and Money Laundering Section suggests that prosecutors consider either deferring the deposition until the completion of the related criminal case, or giving an advisement to the deponent similar to the advisements given in federal grand jury practice. *See Asset Forfeiture Policy Manual* (2013), Chap. 11, § VI, p. 156-57 (providing suggested language for advisements). ([Asset Forfeiture Policy Manual (2013)](#).)

26.8 ADDITIONAL CONSIDERATIONS

26.08 [1] Due Process

The Supreme Court has, on multiple occasions, addressed the issue whether forfeiture of property from a wholly innocent owner is consistent with due process. In ***Calero-Toledo v. Pearson Yacht Leasing Co.***, 416 U.S. 663 (1974), the Court upheld the forfeiture at issue against a due process challenge, but noted in dicta that "it would be difficult to reject the constitutional claim . . . of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* at 689-90.

Later, in ***Bennis v. Michigan***, 516 U.S. 442 (1996), the Court squarely addressed the issue whether forfeiture of property of an innocent owner violates due process. The forfeited property, a vehicle, was jointly owned by the petitioner and her husband; the petitioner's husband used the car as the location for a sexual act with a prostitute, without the petitioner's knowledge. *Id.* at 444-45. The petitioner based her argument on the Court's statement (quoted above) in ***Calero-Toledo***, but the Court rejected this statement as dicta, and held that forfeiture of the vehicle without an offset for petitioner's interest was consistent with due process. *Id.* at 449-50.

Following ***Bennis***, Congress, as part of CAFRA, enacted a statutory innocent owner defense, which largely codified the ***Calero-Toledo*** dicta. *See* 18 U.S.C. § 983(d). This statutory innocent owner defense applies to forfeitures under all federal statutes except those exempted from CAFRA by 18 U.S.C. § 983(i). These exemptions include the forfeiture provisions of the Internal Revenue Code. *See supra*, Section 26.05[1].

The Supreme Court has also addressed whether due process entitles a property owner to a hearing before property is seized for forfeiture. In ***Calero-Toledo***, the Court held that due process did not require pre-seizure notice and opportunity to be heard for the owner of a boat, because, *inter alia*, seizure before notice enables the government to secure the property in question before the owner can conceal, move, or destroy the property. 416 U.S. at 679. However, in ***James Daniel Good Real Property***, 510 U.S. 43, the Court limited ***Calero-Toledo***, and held that, absent exigent circumstances, pre-seizure notice and an opportunity to be heard are necessary for the seizure of real property. 510 U.S. at 56-59. The Court reasoned that real property, unlike the boat at issue in ***Calero-Toledo***, could not readily be moved, concealed, or destroyed, so the government could protect its interest in preserving the property for forfeiture by obtaining a restraining order or filing a *lis pendens*. 510 U.S. at 58. The hearing requirements for seizure of real property set forth in ***James Daniel Good*** were codified when CAFRA was enacted. *See* 18 U.S.C. § 985.

In ***Mullane***, 339 U.S. 306, the Supreme Court held that due process required that notice of the pendency of a forfeiture action be "reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314-15.

Later, in ***Dunsenberry***, 534 U.S. 161, the Supreme Court considered the issue whether mailing notice to known potential claimants was sufficient to satisfy the ***Mullane*** due process standard or whether the government had a further due process obligation to ensure actual receipt of the notice. The ***Dunsenberry*** Court held that no actual verification was required, notwithstanding that the petitioner was incarcerated at the time the notice was sent: mailing notice to the prison, which had a routine mail delivery system, was sufficient. *Id.* at 170.

Due process considerations are also implicated when there is a delay between the time the government seizes property and the time it commences a forfeiture action. *See supra*, Section 26.05[2], for discussion of this topic.

26.08 [2] Eighth Amendment

In ***Austin v. United States***, 509 U.S. 602 (1993), the Supreme Court considered whether civil forfeitures can be subject to limitation under the Excessive Fines Clause of the Eighth Amendment. The Court held that some civil forfeitures are subject to the Eighth Amendment limitation on excessive fines, provided that the purpose of the forfeiture, at least in part, is punitive, and not merely remedial. *Id.* at 610-11. The Court then held that the particular forfeiture provisions at issue – 21 U.S.C. §§ 881(a)(4) and (a)(7), providing for forfeiture of conveyances and real property, respectively – were at least partially punitive, and thus subject to limitation under the Excessive Fines Clause. *Id.* at 621-22. The Court declined, however, to adopt a particular standard for determining whether a civil forfeiture was excessive under the Eighth Amendment. *Id.* at 622-23.

The Court later revisited the issue of the standard for excessiveness of a forfeiture in ***United States v. Bajakajian***, 524 U.S. 321 (1998). Bajakajian pled guilty to failing to report cash over $10,000 to customs agents when leaving the country, and the government sought criminal forfeiture of the entire $357,144 in cash that Bajakajian had in his luggage when he attempted to leave the country. The Court first held that the forfeiture was punitive, rejecting the government's argument that the forfeiture did not implicate the Eighth Amendment because the money was an "instrumentality" of the criminal offense as the forfeiture was criminal rather than civil. *Id.* at 328-34. The Court then considered the question of the appropriate standard for determining whether a forfeiture constitutes an excessive fine. *Id.* at 334. The Court adopted the rule that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id. at 334-35.* Applying this standard, the Court held that the forfeiture of Bajakajian's $357,144 in cash was unconstitutionally excessive, because the money was the proceeds of legal activity and Bajakajian was otherwise subject under law to only minimal punishment for his failure to report the cash. *Id.* at 337-40.

Shortly after ***Bajakajian*** was decided, Congress enacted CAFRA, which largely mooted the tests developed in that case and in ***Austin*** for whether civil forfeitures are subject to the Excessive Fines Clause. Under CAFRA, all civil forfeitures not exempt from CAFRA were made reviewable for being "constitutionally excessive." 18 U.S.C. § 983(g)(1). CAFRA, moreover, essentially applied the ***Bajakajian*** standard for determining excessiveness of a forfeiture, providing that the reviewing court should "compare the forfeiture to the gravity of the offense giving rise to the forfeiture," 18 U.S.C. § 983(g)(2), and that the court should "reduce or eliminate the forfeiture" if it finds it "grossly disproportional to the offense." 18 U.S.C. § 983(g)(4); *see* ***United States v. Ferro***, 681 F.3d 1105, 1114 (9th Cir. 2012) (holding that, under CAFRA, "forfeitable property is subject to review under the Excessive Fines Clause even if it can be considered an 'instrumentality' of an offense").

Though CAFRA subjected most civil forfeitures to review for constitutional excessiveness, courts have generally found that forfeiture of proceeds of a crime is never disproportional to the crime. *See, e.g.*, ***United States v. Betancourt***, 422 F.3d 240, 250-51 (5th Cir. 2005) ("the Eighth Amendment has no application to the forfeiture of property acquired with proceeds"). Lower courts have also distinguished ***Bajakajian*** in cases involving violations of currency reporting requirements where, unlike ***Bajakajian***, the currency reporting violation was related to another offense, including the offense of tax evasion. *See* ***United States v. Six Negotiable Checks***, 389 F. Supp. 2d 813, 823-24 (E.D. Mich. 2005).

26.08 [3] Double Jeopardy

Following the holding in ***Austin*** that civil forfeiture can be a criminal penalty for Eighth Amendment purposes, some courts of appeal extended this holding to the Double Jeopardy Clause of the Fifth Amendment and held that a civil forfeiture following a related criminal proceeding in which no criminal forfeiture was sought constitutes an unconstitutional double punishment for the same offense. *See* ***United States v. $405,089.23 in U.S. Currency***, 33 F.3d 1210, 1220-21 (9th Cir. 1994); ***United States v. Usery***, 59 F.3d 568 (6th Cir. 1995).

The Supreme Court, however, granted certiorari in ***Usery*** and reversed. 518 U.S. 267 (1996). The Court relied partially on *stare decisis* to justify its holding, noting that Congress had long provided for both *in rem* civil forfeiture actions and related criminal prosecutions. *Id.* at 274. The Court then, following its analysis in ***One Assortment of 89 Firearms***, 465 U.S. 354, looked at two factors to determine whether the particular statutes authorizing forfeiture in the case – 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6) and (a)(7), providing for forfeiture of property involved in money-laundering and federal drug felonies – imposed a criminal punishment on the property owner. *Id.* at 277-79. First, the Court looked at Congress's intent, and concluded that Congress intended the forfeiture to be a civil proceeding, because it provided for an *in rem* proceeding and provided that a civil burden of proof and civil procedures would govern the proceeding. ***Id.*** at 288-92. Second, the Court considered whether the civil forfeiture provisions in question were "so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id.* at 290. The Court found that they were not, because "[r]equiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes," and because the provisions "serve[] the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts." *Id.* at 290-91.

With respect to criminal forfeiture, the forfeiture order is part of the defendant's sentence, as explained *supra*, Section 26.06[7]. Accordingly, courts have held that there is no double jeopardy issue with criminal forfeiture because the forfeiture is simply part of the defendant's criminal sentence. *See, e.g.*, ***United States v. Smith***, 656 F.3d 821, 828 (8th Cir. 2011).

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27.00 FALSE RETALIATORY LIENS (18 U.S.C. § 1521)

27.1 STATUTORY LANGUAGE: 18 U.S.C. § 1521

Title 18, Section 1521, provides:

> [w]hoever files, attempts to file, or conspires to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in section 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation, shall be fined under this title or imprisoned for not more than 10 years, or both.

27.2 GENERALLY

Tax defiers and sovereign citizens have developed a strategy of filing false retaliatory liens against government officials for the performance of their official duties. *See* ***Jones v. Caruso***, 569 F.3d 258, 261 (6th Cir. 2009) (citing cases). These retaliatory filings are intended to harass the victims and to divert their attention from their work. The false liens may harm these government officials by damaging their credit and publishing their identifying information; expunging the liens also uses government resources. IRS officials involved in civil audits, collection, and criminal investigations are targeted, as are federal judges, prosecutors, and highly placed government officials. This scheme is an outgrowth of the "redemption scheme," which often involved harassing government officials by filing official, but false, forms (e.g., Forms 1099, Forms 8300, Currency Transaction Reports, and Suspicious Activity Reports). *See* Jennifer E. Ihlo & Melissa E. Schraibman, *Recycled "Redemption": The Latest Illegal Tax Protester Scheme*, 49 UNITED STATES ATTORNEYS' BULLETIN 25, 25-28 (July2001).

In 2007, to address this problem, Congress enacted Section 201 of the Court Security Improvement Act, codified at 18 U.S.C. § 1521, which made it a ten-year felony to file fictitious liens in retaliation for official acts performed by federal officials. The Act "is intended to penalize individuals who seek to intimidate and harass Federal judges and employees by filing false liens against their real and personal property." H.R. REP. NO. 110-218, at 827 (2007).

27.3 ELEMENTS

In order to establish a violation of Section 1521, the government must prove the following beyond a reasonable doubt:

(1) that the defendant filed, attempted to file, or conspired to file, in a public record a false lien or encumbrance against the real or personal property of anindividual;

(2) that such individual was an officer or employee of the United States or of any agency in any branch of the United States government;

(3) that the defendant filed the lien or encumbrance on account of the performance of such individual's official duties; and

(4) that the defendant knew or had reason to know that such lien or encumbrance was false or contained any materially false, fictitious, or fraudulent statement or representation.

27.03[1] Filed a False Lien or Encumbrance Against the Property of an Individual

27.03[1][a] Definition of Lien or Encumbrance

Tax defiers and sovereign citizens often file confusing and oddly named documents, requiring prosecutors to determine whether such a document qualifies as a lien or encumbrance under this statute. In many cases, defendants file false financing statements under the Uniform Commercial Code (UCC) with the Secretary of State, County Recorder of Deeds, or other office in the state where the purported debtor resides. *See* U.C.C. §§ 9-301(1), 9-307(b)(1), (c), and 9-501(a). These Forms are commonly accepted by the office with minimal review. The UCC Financing Statements (Forms UCC-1) typically report that the defendant has a security interest in the real or personal property of a targeted federal official. The federal official is listed as the debtor and the defendant is listed as the creditor. In some cases, the IRS, Department of the Treasury, or other government agency is listed as the debtor, and an amendment is filed adding the name of a government official as debtor. The amount of the debt and collateral purportedly attached are described in the form. Another common type of false retaliatory lien is a "Notice of Claim of Maritime Lien," which purports to be a security document intended to be filed with the United States Coast Guard's National Vessel Documentation Center regarding mortgaged vessels. These maritime notices report the name of the official victim as the name of the "vessel," the Secretary of the Department of Transportation as the owner of the vessel, and the filer as claimant. Other false retaliatory lien documents may be devised by the tax defiers or sovereign citizens themselves, with titles such as "Claim of Injury" or "Notice ofDebt".

Regardless of whether the "lien" is evidenced by a form used commercially or one created out of whole cloth, the debt reported on the form is a fiction. As part of the purported lien filing process, defendants may send demands for payment to the law enforcement victims. After the stated time for payment has expired, defendants declare the victim in default, sometimes offer an "opportunity to cure," then file lien documents reflecting the purported debt arising from the default. Defendants may attach affidavits or other documents that outline the purported basis for the debt to the filed Forms UCC–1.

There is no requirement that a putative lien meet all of the technical requirements of a lien to be charged under Section 1521. That the lien documents are technically incomplete, virtually incomprehensible, or facially absurd is not an impediment to successful prosecution. The broad language of the statute also covers attempts and conspiracies to file false liens, and the fact that the false filing would not have succeeded in perfecting a priority claim as a matter of law is not a defense. ***United States v. Reed***, 668 F.3d 978, 984-985 (8th Cir. 2011); *see also* ***United States v. Neal***, 776 F.3d 645, at 653-54 (9th Cir. 2015) (holding that the validity of a lien document is irrelevant to determining whether Section 1521 has been violated). In ***Reed***, the Eighth Circuit held that:

> [t]he prohibition in 18 U.S.C. § 1521 is triggered by the filing of a false or fictitious lien, whether or not it effectively impairs the government official's property rights or interests. Indeed, legal insufficiency is in the nature of the false, fictitious, and fraudulent liens [] that Congress intended to proscribe.

668 F.3d at 984-85. Likewise, another court has explained that Section 1521

> does not require that the "false lien or encumbrance" meet technical requirements to be a "lien" or "encumbrance." Indeed, the statute punishes the filing of "false liens" not "false [valid] liens" since all false liens are invalid. The words "false lien" must be read together—"bogus records intended to function as liens by burdening and impairing another's interest in property."
>
> The use of the term "fictitious" undermines defendant's argument that the false lien must meet the technical requirements of a "lien."

United States v. Davenport, 2011 WL 1155191, at *1-2 (E.D. Wash. Mar. 29, 2011) (citations omitted). *See also* ***United States v. Hoodenpyle***, No. 10-1457, 2012 WL 375499, at *2-3 (10th Cir. Feb. 7, 2012).

27.03[1][b] Property of Individual

The descriptions of the property belonging to the government official can range from precise descriptions of an official's residence to broad descriptions encompassing all of the official's real and personal property in general terms. One defense that has been raised in lien cases is that the lien document does not specifically describe the property of the official victim. Courts have rejected such a defense, on the ground that the document "description named types of personal property against which valid liens can be filed – 'sliver [sic] coinage' and 'proceeds, products, accounts and fixtures,'" ***Reed***, 668 F.3d at 984, or on the ground that Section 1521 also prohibits attempts to file false liens. The Ninth Circuit rejected a defendant's claim that he could not be convicted under Section 1521 because the collateral identified in the document was not "real or personal property": "The prohibition is triggered by the type of document and resulting harm without regard to the validity or existence of the identified collateral in such documents," and the collateral listed in the lien documents "is not relevant" to whether the statute was violated. ***Neal***, 776 F.3d at 654.

27.03[1][c] The Lien is False

Expert testimony is usually not necessary to prove that the lien is false. Nor is it advisable, especially if it opens the door to expert testimony proffered by a tax-defier or sovereign-citizen defendant, which testimony is especially likely to confuse the jury. ***United States v. Chance***, 2012 WL 5395263, at *11 (4th Cir. Nov. 6, 2012).

27.03[1][d] Filed or Attempted to File

To explain how the lien filing process operates and the effect of such a filing, the government may offer testimony from a representative of the Secretary of State, the County Recorder, or other state office where the documents were filed. Such representatives are generally competent to authenticate the lien documents, as well as to testify about how lien documents are filed, how liens work, who can access lien information, the duration of the lien, and the procedures needed to remove a lien.

The representative may also testify about the possible impact on the "debtor's" credit, but prosecutors should also consider other potential witnesses who may be able to testify on this point, such as a title examiner. Such evidence may be powerful evidence of the criminal intent of the defendant.

27.03[1][e] Unit of Prosecution

Where a defendant files multiple liens against different officials, each lien against a particular individual is a separate count. *United States v. Kozak*, No. 12-344 (D. Neb. Feb. 7, 2014) (unpub.). A defendant may also file a single false lien naming two or more federal officials as debtors. Because 18 U.S.C. § 1521 refers to the filing of a lien against an "individual," if one lien document refers to two victims, it is appropriate to charge each as a separate offense. For example, in ***Reed***, the indictment charged a separate violation of Section 1521 for each victim where the Form UCC-1 listed both the judge and United States Attorney as debtors on the form. ***United States v. Reed***, 668 F.3d 978, 982 (8th Cir. 2011).

Another question that may arise is whether to charge separate offenses if the same false lien document is filed in several locations or filed repeatedly in the same location. Counts are not facially multiplicitous if distinct from one another in time, place, or both. *See* ***United States v. Grant***, 114 F.3d 323, 330 (1st Cir. 1997) (indictment charging defendant with possession of 11 firearms in 2 different cities on 3 different dates is not multiplicitous). As discussed below, the sentencing guidelines provide for a two-level enhancement when more than two liens are filed against the property of the same victim, and for an upward departure when substantially more than two liens are filed against the same victim, to reflect the additional time and resources that are required to remove multiple liens from the public domain. These provisions are consistent with charging lien filings in separate locations as separate offenses. However, if a false lien document was repeatedly filed with the same office, charging each filing in a separate count may be multiplicitous. *See* ***United States v. Graham***, 60 F.3d 463, 467 (8th Cir. 1995) (noting that under the unitary harm rule "repetition of a false statement which does not 'constitute an additional impairment of . . . governmental functions' [citation omitted] should not be charged separately in an indictment."); ***United States v. Salas-Camacho***, 859 F.2d 788, 791-92 (9th Cir. 1988) (holding that identical false statements made to different government agents could each be prosecuted separately if the repetition of the statement constituted an additional impairment of the operations of the government). If the defendant filed more than one lien document at the same time with the same government office—a Form UCC-1 and a Notice of Maritime Claim, for example—that purport to arise from the same underlying "debt," it might be appropriate to charge them either in one Section 1521 count or as separate counts.

27.03[2] Federal Official Defined

Section 1521 prohibits the filing of false liens against federal officials, who are defined in 18 U.S.C. § 1114, as:

> any officer or employee of the United States or of any agency in any branch of the United States Government . . . while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee, in the performance of such duties . . . .

Id.

The filing must claim an interest in the property of a government *official*, not merely a government *agency*, to be within the reach of Section 1521. ***Reed***, 668 F.3d at 983.

In some cases, defendants file a Form UCC-1, naming the United States Treasury or the IRS as the debtor, and then file an amendment adding a government employee as a debtor. Employees of the IRS, including revenue officers, revenue agents, and special agents, are employees of the government for purposes of the statute, and a defendant's arguments to the contrary are frivolous. ***United States v. Hoodenpyle***, 2009 WL 1883919, at *1-2 (D. Colo. June 30, 2009).

27.03[3] Lien Filed In Retaliation for Performance of Official Duties

The first step in proving retaliation is to establish the nature of the relationship between the government official and the defendant. The official nature of the relationship is generally proven by the testimony of the targeted official or another government witness. For example, in tax-related cases, IRS collection officials are often targeted. The collection history with the defendant and correspondence between the defendant and the IRS may be introduced into evidence. In addition to establishing that the government official is being targeted for his or her official actions, the falsity of the lien may be established by testimony that the official did not owe the defendant the money claimed on the forms. *See, e.g.*, ***United States v. Hoodenpyle***, 461 F. App'x 675, 679 (10th Cir. 2012). The official should be able to testify that he or she was assigned to the defendant's tax case in his or her official capacity, had no other relationship with the defendant, did not owe the defendant any money, and did not consent to the filing of the lien.

When highly placed government officials, such as the Commissioner of the IRS, the Comptroller of the Currency, or the Secretary of the Treasury are victims, it may not be practical or advisable to have them testify at trial. It may be possible for other government officials to testify about the defendant's dealings with the IRS and/or relationship to the defendant.

Prosecutors should consider these issues when making charging decisions in cases involving highly placed government officials as victims.

The lien documents themselves may explicitly state why the lien is being filed. The individual filing the lien may, for example, attach a document that recounts the filer's history with the IRS or other problems with the government and explains the rationale for the filing of the liens. The lien document may also refer to tax liens filed by the IRS against the defendant's property, the defendant's tax liability, or some other government action involving the defendant in the section describing the collateral for the purported debt.

The timing of events can also be significant; liens may be filed shortly after the government takes some kind of adverse action against the defendant. For example, in ***Reed***, the government introduced evidence that the day after the district court denied the defendant's motion to dismiss his gun case, the defendant discussed filing retaliatory liens against the judge and others during a recorded telephone call. The next day, liens were filed against the judge and United States Attorney.

Finally, many defendants set up the purported lien by sending documents to the victim alleging violations of the defendant's rights, making a demand for payment, and giving the official a specific amount of time to respond to the defendant's demands. When the official fails to respond, the defendant pronounces the victim to be in default, and then files false retaliatory liens based on these so-called "default judgments." A prosecutor who receives such "notices" should be aware that the defendant may be preparing to file a lien against him or her.

27.3 [4] Knowledge that the Lien is False, Fictitious, or Fraudulent

To establish a violation of Section 1521, the government must prove only that the defendant knew or had reason to know the liens were false, fictitious, or fraudulent. The government does not have to prove that the defendant filed the false lien "willfully." In ***United States v. Williamson***, 746 F.3d 987, 994 (10th Cir. 2014), the defendant contended that the district court had erred in not giving an instruction on good faith, a common defense in crimes requiring "willfulness," arguing "that this error prevented the jury from exonerating him if it found that he honestly believed that he had not filed a false lien." But the Tenth Circuit held that because Section 1521 "prohibits not only filing a false lien 'knowing' that that lien was false, but also filing a false lien 'having reason to know' that it was false," "a defendant can be guilty even if he honestly believed that he filed a proper lien so long as that belief was not a reasonable one." "A good-faith instruction," the court held, "would be inconsistent with the objective component of the having-reason-to-know requirement."

A defendant may argue that he or she lacked knowledge on the basis of a supposed psychiatric condition. Whether such psychiatric evidence is admissible will depend on the facts and may vary from circuit to circuit. *Compare* **United States v. Williamson**, 746 F.3d 987, 990 & 994 (10th Cir. 2014) *with* **United States v. Chance**, 496 Fed. Appx. 302, 304-306 (4th Cir. 2012). Prosecutors may consult *Jen E. Ihlo & Erin Pulice*, "*Prosecuting Tax Defier and Sovereign Citizen Cases—Frequently Asked Questions*," 61 UNITED STATES ATTORNEYS' BULLETIN 45, 52-56 (March 2013), for more specific information regarding psychological issues in tax defier and sovereign citizen cases.

In tax defier cases stemming from collection efforts, defendants frequently submit numerous documents espousing tax defier arguments to the IRS. In some instances, the IRS Frivolous Return Unit will respond to such documents by advising the defendant in writing that the arguments he or she is espousing have been repeatedly rejected by the courts. IRS examination or collection files may contain correspondence sent to the defendant that, among other things, warns the defendant of civil and criminal penalties related to his conduct. Additionally, individuals who have filed false liens against IRS personnel may have been contacted by the Treasury Inspector General for Tax Administration (TIGTA), and warned that the filing of such liens is illegal. Some defendants may admit that they filed the false documents when questioned by TIGTA or other government agents. *See, e.g.*, ***Reed***, 668 F.3d at 982.

In cases involving false retaliatory liens filed by state or federal prisoner, the government may be able to present evidence that the prison officials posted notices or conducted seminars warning the prisoners about the illegality of filing false retaliatory liens. Additionally, defendants may discuss the liens with other prisoners or during jail phone calls with family and friends. For example, in one case, the government introduced evidence that the defendant, who filed retaliatory liens against three federal judges, had ignored warnings by prison officials that the filing of the liens was illegal, a letter from the Texas Attorney General's office advising him that filing false liens was a federal crime, and written warnings by the FBI. ***United States v. Petersen***, No. 09-087 (D. Minn. Dec. 16, 2009) (Docket No. 70). In another case, the government showed that the defendant received but ignored paperwork explaining the illegality of filing retaliatory liens, and that he was heard on jail calls discussing the filing of the retaliatory liens. ***United States v. Leitner***, No. 11-49 (N.D. Fla. Sept. 16, 2011) (No. 13); *see also* ***Reed***, 668 F.3d at 981-82. Admissions made during litigation regarding these liens and court orders expunging the liens and enjoining the defendant from filing additional liens can also be evidence of the defendant's knowledge.

27.4 TAX DEFIER ISSUES

Prosecution of these cases may present other challenging issues because many defendants are tax defiers. For more information about tax defiers and their common defense tactics, see

Chapter 40 and Ihlo & Pulice, "*Prosecuting Tax Defier and Sovereign Citizen Cases—Frequently Asked Questions*," 61 UNITED STATES ATTORNEYS' BULLETIN at 52-56.

27.5 EXPUNGEMENT

Many states allow electronic filing of lien documents, and such documents are commonly accepted with minimal screening. The state offices generally do not have the authority to refuse to file lien documents, even when they are obviously being filed only to harass the named officials. However, the process for removing false liens is not so simple.

As noted by the Court of Appeals for the Third Circuit:

> These liens and judgments, accessible on financing statement forms, are easy to file. Once registered, however, the fraudulent liens are very burdensome to remove. For example, in a New Jersey incident, criminal defendants registered a fraudulent $14.5 million lien with the New Jersey Department of Revenue against a federal prosecutor and a $3.5 million lien against a federal judge for using their "copyrighted" names in court papers and hearings; it took a federal court order to remove them. In addition to the substantial effort and expense required to expunge the liens, the fraudulent filings ruined the victims' creditreports.

Monroe v. Beard, 536 F.3d 198, 203 (3d Cir. 2008) (citing civil and criminal cases involving prisoners filing retaliatory liens against government officials); *see also* ***United States v. Gordon***, 2005 WL 2237640, at *1-2 (S.D. Ga. Aug. 25, 2005) (noting that fictitious filings "are indexed or filed in such a manner that they . . . could in the future affect the credit ratings of the so-called 'lien debtors' as well as their ability to alienate or acquire property"). Also, lien documents often publish personally identifying information of the victims.

In many cases, the government is forced to seek a court order (1) to declare the financing statements ineffective, (2) to order the financing statements or other lien documents expunged from the state records, and (3) to obtain a permanent injunction precluding the defendant from filing liens against other federal officials or employees without leave of the court. *See, e.g.*, ***United States v. McCloud***, 2008 WL 4277302, at *9 (E.D. Mich. Sept. 17, 2008). On rare occasions, a defendant may voluntarily withdraw the lien documents after being approached by investigators. In some cases, immediately after the defendant's conviction, the government has requested that the trial court order that the liens are null and void and that they be expunged. In others, the prosecutors have coordinated with the civil components who have handled the expungement.

It is important to remember that the false lien which is the subject of the prosecution may be only the tip of the iceberg in terms of the number of liens filed by the defendant, and that a defendant may file lien documents in several different counties or states. It is possible to search electronically for liens filed by the defendant (or filed against specific people) by using the "ULJ-all" database in Westlaw, although additional research should also be conducted to determine the complete universe of false lien filings.

Prosecutors who find a lien filed against them, a federal judge or other federal law enforcement official should notify a supervisor. The FBI typically investigates false lien filings against prosecutors and federal judges; TIGTA investigates false lien filings against IRS employees. If a lien is found, the government official victim may want to request a title examination and credit history and should coordinate with the Civil Division of the United States Attorney's office or the Tax Division regarding having the liens expunged.

27.6 VENUE

There are currently no reported cases regarding venue for Section 1521 offenses. Generally, venue is determined by the nature of the crime alleged and the location of the acts constituting it. ***United States v. Anderson***, 328 U.S. 699, 703 (1946). The general venue statute provides that a prosecution can be brought in any district where an offense was begun, continued, or completed. 18 U.S.C. § 3237(a).[1] Therefore, venue should be proper in any district where the lien was prepared or filed.

Defendants may file liens in several different states and judicial districts. In tax cases, the venue for the tax offenses may be different than the district where the liens were filed, making it difficult to establish common venue for the substantive tax and false lien offenses. In ***United States v. Marsh***, 144 F.3d 1229, 1231 (9th Cir. 1998), a large tax defier conspiracy case, the government charged the defendants with impeding and impairing tax administration (26 U.S.C. § 7212(a)) by filing false commercial liens against IRS officials located in the Eastern and Northern Districts of California. The liens were filed in Nevaada and Washington; defendants mailed the lien documents from the Eastern District of California. The case was tried in the Northern District of California, and the jury found that venue existed there. The government argued that venue was proper in the Northern District of California because the lien filings affected IRS officers in that district who were conducting a criminal investigation of the defendants. The Ninth Circuit overturned the conviction, holding that the crime was complete when the endeavor was made, which occurred when the liens were filed. ***Id***. at 1242. The Ninth Circuit noted that "[t]he government did not have to show that its agents abandoned their

[1] Prosecutors may consult this Manual's general venue chapter, Chapter 6.

investigation or even that the agents were anxious about the effect of the liens on their credit. No effect need be proved. The filing of the lien is the crime." ***Id***.

27.7 STATUTE OF LIMITATIONS

The statute of limitations for prosecutions under Section 1521 is five years. *See* 18 U.S.C. § 3282; Criminal Tax Manual Chapter 7. The statute of limitations begins to run when the crime is completed, which is when the defendant files or attempts to file the false lien.

27.8 SENTENCING GUIDELINES

Section 1521 violations are sentenced under United States Sentencing Guidelines § 2A6.1. The base offense level is 12. A two-level increase applies when the offense involves more than two false liens. USSG § 2A6.2(b)(2). Section 2A6.1, Application Note 1, speaks in terms of multiple acts directed toward the same victim for the application of that adjustment. Thus, as charged, each "offense" is victim-specific, which is consistent with the wording of 18 U.S.C. § 1521 (providing for criminal penalties when a lien is filed against "an individual"). An upward departure may be warranted if the offense involved (1) substantially more than two false liens or encumbrances against the same victim, (2) multiple victims, or (3) substantial pecuniary harm to a victim. USSG § 2A6.1, comment. (n.4(B)). The two-level enhancement and upward departure provisions for multiple liens "reflect the additional time and resources required to remove multiple false liens or encumbrances and provide proportionality between such offenses and other offenses referenced to this guideline that involve more than two threats." USSG App. C, Vol. III, 295. Counts involving the same victim should be grouped; counts involving different victims should not. USSG § 2A6.1, comment. (n 3).

When a defendant is convicted of violating 18 U.S.C. § 1521, the Official Victim adjustment (USSG § 3A1.2) should be applied. USSG § 2A6.1, comment (n.2). Section 3A1.2(b) provides that a six-level increase is warranted if the victim was a current or former government officer or employee, the offense was motivated by the victim's official status, and the offense involved a threatening or harassing communication, hoax, or false lien covered by Section 2A6.1. If the defendant filed the lien while on supervised release, and the statutory sentencing enhancement under 18 U.S.C. § 3147 applies, the base offense level should be increased by three. USSG § 3C1.3.

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30.00 SPECIFIC ITEMS

30.1 GENERALLY

The specific items method of proof is a direct method of proof used to establish unreported income. This method of proof differs from the indirect methods of proof (net worth, bank deposits, and expenditures) in that it focuses on specific financial transactions and does not attempt to reconstruct the defendant's overall financial situation. The specific items method primarily relies on direct evidence, although circumstantial evidence may also be introduced.[1] By contrast, the indirect methods generally rely on circumstantial evidence to prove an understatement of income. Using the indirect methods of proof, the government shows "either through increases in net worth, increases in bank deposits, or the presence of cash expenditures, that the taxpayer's wealth grew during a tax year beyond what could be attributed to the taxpayer's reported income, thereby raising the inference of unreported income." ***United States v. Black***, 843 F.2d 1456, 1458 (D.C. Cir. 1988). The government often resorts to indirect methods of proof when the defendant deals in cash and has maintained inadequate records from which the defendant's income can be reconstructed.

The advantages of the specific items method of proof are that it is easy for the prosecutor to present and for the jury to understand, it generally involves less evidence and has relatively simple criminal computations compared to the indirect methods, and the government does not have to follow all of the technical requirements of the indirect methods of proof. The objective of the specific items method is to prove that a defendant earned more money than is reflected on the defendant's tax returns, or that reported deductions, expenses, or credits are either nonexistent or overstated. Both testimonial and documentary evidence may be introduced. This evidence may include admissions of the defendant, the defendant's books and records, bank records, the testimony of inside witnesses (*e.g.*, the defendant's employees and ex-spouse), testimony and documentation of witnesses engaged in the transactions that have been reported inaccurately, and the testimony of the defendant's accountant.

There are four general categories of specific items cases:

[1] . See, e.g., United States v. Marcus, 401 F.2d 563, 565 (2d Cir. 1968) (defendant's income from check cashing service determined by multiplying standard check fee by amount of checks cashed).

1. Unreported income, where the evidence establishes that the total amount of income received is greater than the amountreported;

2. Unreported income, where the evidence establishes that identified items of income were not reported;

3. Failure to report a business or other source of income;[2]

4. Overstated deductions or expenses, including fictitious deductions and legitimate deductions that are inflated.

Generally, specific items cases will deal with income rather than deductions or expenses. The government usually attempts to produce evidence that the defendant received income that was either not shown at all on the return or underreported on the return. ***United States v. Thompson***, 518 F.3d 832, 853 (10th Cir. 2008); ***United States v. Hart***, 70 F.3d 854, 860 n.8 (6th Cir. 1995); ***United States v. Marabelles***, 724 F.2d 1374, 1377 n.1 (9th Cir. 1984); ***United States v. Horton***, 526 F.2d 884, 886 (5th Cir. 1976); *see also* ***United States v. Genser***, 582 F.2d 292, 295-96 n.1 (3d Cir. 1978); ***United States v. Allen***, 551 F.2d 208, 210 (8th Cir. 1977); ***United States v. Bray***, 546 F.2d 851, 856-57 (10th Cir. 1976).

As a practical matter, there are four basic steps to developing a specific items case involving unreported income: (1) proving that the relevant amounts are taxable income to the defendant, (2) proving the income was received by the defendant, (3) proving the income was not reported, and (4) showing the defendant's personal involvement in the failure to report the income and in the disposition of the unreported income.

While the government must show that the defendant received unreported taxable income, it need not show how the defendant spent the money after it became his or her income. ***United States v. Martin***, 525 F.2d 703, 707 (2d Cir. 1975) (district court correctly instructed jury that government had to show that embezzled funds were

[2] . *See* Section 12.00, False Returns, *supra*, for a discussion of cases in which a defendant reports a false source of income, but accurately reports the amount of income and is prosecuted for filing a false income tax return under 26 U.S.C. § 7206(1). *See also* ***United States v. DiVarco***, 484 F.2d 670, 673 (7th Cir. 1973).

unreported taxable income to defendant but that government need not show how defendant spent the money after it became his income).

30.2 UNREPORTED INCOME -- OVERCOMING AMOUNTS REPORTED ON RETURN

In this type of specific items case, the proof establishes that the total income received is greater than the total reported. Thus, the evidence establishes that the defendant failed to report income by proving more income than the amount reported on the return. It is not necessary to show which particular items were not reported. For example, if the defendant reports real estate commissions of $20,000 and the evidence establishes real estate commissions of $60,000, then there is $40,000 in unreported income. It makes no difference whether a particular commission was reported. *See, e.g.*, ***United States v. Marabelles***, 724 F.2d 1374, 1378 & n.2 (9th Cir. 1984) (government proved gross receipts from defendant's painting business substantially in excess of reported amounts); ***United States v. Horton***, 526 F.2d 884, 886 (5th Cir. 1976) (amount of legal fees testified to by attorney-defendant's clients exceeded legal fees reported).

The proof required to overcome reported income can be fairly simple. The prosecutor can call witnesses to testify as to the amount of money paid to the defendant, add the amounts up, and compare the total to that shown on the return. Although there are a number of cases that lend themselves to this approach, it is not always practical. For example, it would impractical to call as witnesses hundreds of a retailer-defendant's customers. Locating enough of the customers to overcome reported income would be doubtful at best. In such a situation, specific items is not an available or practical method of proof. As a rule of thumb, this is usually the case when the defendant has reported a substantial gross income and his or her business is such that the income is derived from large numbers of customers, any one of whom has only paid the defendant a relatively small amount, and there is no available evidence beyond the testimony of the individual witnesses, such as books and records reflecting the amounts received from customers.

30.3 UNREPORTED INCOME -- IDENTIFIED INCOME ITEMS NOT ON RETURN

In this second type of specific items case, the items of income reported on the return can be identified and, therefore, any other items of income necessarily represent unreported income. The unreported income may include an entire category of income, such as capital gains or taxable interest. *See*, *e.g.*, ***Azcona v. United States***, 257 F.2d 462, 464 (5th Cir. 1958) (the defendant reported only his salary from the police department and no other income, where the evidence established that he also received graft payments).

This second group of cases also may include situations where the defendant has reported some, but not all, of the income in a particular category, and the government can identify all of the items that make up the reported amount. Any additional items of income necessarily constitute unreported income.

In this type of specific items case, if the government has obtained the defendant's books and records, a common approach is to reconcile the books and records to the return so as to determine which particular items of income have been reported. Assuming the government has been able to establish that the return reports only those income items recorded in the books and records, any items of income not reflected in the books and records necessarily represent unreported income. Often, the defendant's bookkeeper, office manager, secretary, and return preparer are the key witnesses in the case. The office employees can testify as to the office procedures used to record income, any instructions given to them by the defendant, and any admissions the defendant made regarding unreported income. The return preparer can testify regarding the information used to prepare the return. Generally, the return preparer has been given inaccurate summary documents or incomplete records by the defendant. If the criminal case began with an examination audit, the Revenue Agent may also be called to testify regarding the reconciliation of the books and records to the return. Note that the government is not required to verify or corroborate reported amounts of income. The government may take the defendant's reported income as an admitted amount earned from designated sources. ***United States v. Burkhart***, 501 F.2d 993, 995 (6th Cir. 1974). Reconciliation of the books and records to the return is of great benefit to the government. If the government can prove exactly what was reported and what was not reported, it lends credibility to the government's case.

The return alone often will lend itself to this type of specific items case. Thus, if the return fails to report any interest income, proof of the receipt of interest income will ordinarily establish unreported income. The prosecutor must be wary, however, of the defense that alleged unreported items of income were in fact reported, but in the wrong category or on the wrong line on the return. For example, assume the evidence establishes that the defendant received $3,000 in interest income and did not report any income designated as interest income. If, however, the defendant reported $6,000 in miscellaneous income and the prosecutor is not able to identify the source of the reported miscellaneous income, then the government may have no answer the allegation that the defendant did in fact report the $3,000 in interest income as part of the $6,000 reported as miscellaneous income. For this reason, every effort should be made to document the sources of reported income.

For examples of specific items cases involving identified income items not reported on the return, *see*, *e.g.*, ***United States v. Thompson***, 518 F.3d 832, 851-53(10th Cir. 2008) (foreign commission checks totaling more than $2,800,000 not reported on tax returns), *petition for cert. filed*, 76 U.S.L.W. 3655 (U.S. Jun 09, 2008) (NO. 07-1539); ***United States v. Allen***, 551 F.2d 208, 210-11 (8th Cir. 1977) (rental income and real estate commissions not reported on return); ***United States v. Venditti***, 533 F.2d 217, 219 (5th Cir. 1976) (77 checks representing business income not reported on return); ***United States v. Parr***, 509 F.2d 1381, 1383-86 (5th Cir. 1975) (funds derived from extortion and graft not reported on return); ***Swallow v. United States***, 307 F.2d 81, 82 (10th Cir. 1962) (funds diverted from business not reported on return).

30.4 FAILURE TO REPORT BUSINESS OR SOURCE OFINCOME

When an individual receives and does not report income from a business enterprise during the course of a year, the specific items method of proof can be used to show that the defendant filed a false return or failed to file a required return. The government would have to prove through the testimony of insider and customer witnesses that the defendant operated the business, prove the unreported income through the witnesses' testimony, bank records, and business records, and, if appropriate, show that the defendant did not inform his or her return preparer of the existence of the business. A leading opinion on this type of case is ***Siravo v. United States***, 377 F.2d 469 (1st Cir. 1967). Siravo reported wage income on the tax returns he filed for three of the prosecution years and did not file a return for the fourth year. He did not report gross receipts from a jewelry manufacturing business he operated. Siravo was charged with one count of failing to file a return, in violation of 26 U.S.C. 7203, and with three counts of subscribing to a false return, in violation of 26 U.S.C. 7206(1), in that he "failed and omitted to disclose . . . substantial gross receipts from a business activity." ***Siravo***, 377 F.2d at 471-72.

As to the false return counts, Siravo argued that the failure to attach a Schedule C to his return reporting his gross receipts was not a false statement or misrepresentation of his taxable income but merely an omission. Rejecting this argument, the court said:

> [W]e hold that a return that omits material items necessary to the computation of income is not "true and correct" within the meaning of section 7206. If an affirmative false statement be required, it is supplied by the taxpayer's declaration that the return is true and correct, when he knows it is not.

Siravo, 377 F.2d at 472.

With respect to the failure to file count, the trial court properly instructed the jury that total receipts must be reduced by the cost of goods sold and other costs representing a return of capital to arrive at gross income for the manufacturing business, and that it was sufficient if the government showed that receipts exceeded cost of goods sold by at least $600. But the only evidence respecting the cost of goods sold was testimony that substantially all materials were supplied by the defendant's customers. ***Siravo***, 377 F.2d at 473. Siravo argued that "since labor costs are part of the cost of goods sold and since there was testimony that the volume of business was impossible for one man to handle, the government has not carried its burden of showing that he did not have labor costs offsetting the proved gross receipts." ***Id***. Holding that the government had no such burden, the court said that "[t]he applicable rule here is that uniformly applied in tax evasion cases -- that evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses, if any."***Id***. [3]

Note that if the defendant does come forward with evidence of offsetting costs or expenses in a failure to file case involving a manufacturing business, then the government has the burden of establishing that the costs and expenses either were not allowable or

[3] Defendants may attempt to rely on ***United States v. Francisco***, 614 F.2d 617 (8th Cir. 1980), to support an argument that the prosecution does bear the burden of proving cost of goods sold. In ***Francisco***, the defendant "stipulated to receiving 'gross compensation on sales' for each year in question in amounts in excess of $21,000[,] . . . figures [that] were calculated by subtracting the cost of goods sold from total sales." 614 F.2d at 618. Relying on ***Siravo***, the Eighth Circuit opined that the government has the burden of establishing "that gross receipts exceed the cost of goods sold by an amount sufficient to trigger the reporting requirements. The burden then shifts to the taxpayer to come forward with evidence of offsetting expenses." ***Francisco***, 614 F.2d at 618. Defendants may argue that this language indicates that the government has the burden of proving gross receipts *and* the cost of goods sold. Read in context, however, this language is not nearly that far reaching. Indeed, the court in ***Francisco*** never reached the question of which party bears the burden of proving cost of goods sold, because the defendant and the government entered into a stipulation that reflected those costs. Accordingly, ***Francisco*** does not conflict with ***Siravo***.

were insufficient to reduce gross income below the level triggering the filing requirement. On the other hand, where the charge is filing a false return, as were three of the counts in ***Siravo***, defense evidence as to offsetting costs and expenses would "not go to the materiality of the omitted receipts, but to the lack of mens rea in their omission." ***United States v. Taylor***, 574 F.2d 232, 237 (5th Cir. 1978).

In ***Taylor***, the defendant did not file Schedules F for the first two prosecution years and filed a false Schedule F that understated his livestock receipts for the third year. The court held that proof of unreported gross receipts was sufficient to sustain the conviction. "Requiring the government to prove the omission of gross income comes near to requiring the proof of additional tax liability. Such a definition of 'material' would seriously jeopardize the effectiveness of section 7206(1) as a perjury statute and would imperil the self-assessment nature of our tax system." ***Taylor***, 574 F.2d at236.

In a failure to file case, ***United States v. Schutterle***, 586 F.2d 1201, 1205 (8th Cir. 1978) (*per curiam*), the Eighth Circuit held that evidence of bonus or commission payments from a corporation to the defendants, as local supervisors, was sufficient to establish gross income necessary to trigger the filing requirement. In ***Schutterle***, the government did not prove that the defendants actually sold any products, but proved only that the defendants received bonuses or commissions based on the volume of products purchased, presumably for resale. 586 F.2d at 1205. Rejecting defendants' argument that these payments from the corporation were merely discounts or rebates on volume purchases, the court of appeals stated the defendants had performed services for the corporation, as local distributors, and the payments were made in recognition of these services. Thus, the payments represented commissions that should have been reported as income. ***Id.***

Taking a contrary position on the burden of production, the Tenth Circuit in ***United States v. Brewer***, 486 F.2d 507, 509-10 (10th Cir. 1973), *overruled on other grounds by* ***United States v. Taylor***, 828 F.2d 630, 633 (10th Cir. 1987), reversed one count of a failure to file conviction for what the court characterized as "insufficient" evidence that the defendant earned enough income to trigger the filing requirement. The court stated that the evidence of a $17,000 sale of stock was a capital transaction, which "does not establish anything more than the fact that the defendant was a person of some means. It fell short of establishing that any part of these proceeds constituted income." ***Brewer***, 486 F.2d at 509; *but see* ***United States v. Gillings***, 568 F.2d 1307, 1310 (9th Cir.

1978) (distinguishing ***Brewer*** as involving a sale of stock, not the sale of goods as part of a business); ***United States v. Bahr***, 580 F. Supp. 167, 171 (N.D. Iowa 1983) (holding that where the government establishes the existence of unexplained receipts sufficient to give rise to the filing requirement and follows up reasonable leads as to the cost of goods sold, then the government has made out a *prima facie* case of failure to disclose gross income and it is up to the defendant to establish any offsetting expenses).

In this vein, care should be taken to frame the indictment so as to conform exactly to the evidence to be offered. If the government can only prove the failure to report "gross receipts," then the indictment should allege that the defendant failed to report "gross receipts" and not charge that the defendant did not report "income." *See, e.g.*, ***Taylor***, 574 F.2d at 236.

30.5 OVERSTATED DEDUCTIONS OREXPENSES

30.05[1] Generally

Cases involving overstated deductions or expenses fall into categories similar to cases involving understatements of income. In some, the evidence will establish that the defendant was not entitled to specific deductions claimed on a return. In other cases, the evidence will simply show that the defendant was entitled to a lesser deduction than that claimed on the return. [4]

There are a limited number of cases dealing with false or overstated deductions. Since deductions are subtracted from gross income in arriving at taxable income and the tax due and owing, they are material to the contents of an income tax return. ***United States v. Warden***, 545 F.2d 32, 37 (7th Cir. 1976). Generally, false deduction cases are proven by introducing evidence from the witnesses involved with the defendant in a transaction that is the subject of a deduction and comparing the records maintained by that witness with records maintained by the defendant. Often, the defendant's bank records prove that the deductions claimed were overstated. Many defendants attempt to support their false deductions by altering the amounts of checks or their payees and supplying the checks to the IRS, often with other false documentation, *e.g.*, phony invoices, receipts, and letters. Forensic analysis of these items generally establishes their

[4] Just as reporting a false source of income is prosecutable under section 7206(1) (*see* Section 30.01 n.1, *supra*, so, too, is a willful misstatement on a return as to the source of claimed deductions. *See* ***United States v. Bliss***, 735 F.2d 294, 301 (8th Cir. 1984) (*see also* Section 30.05[2], *infra*).

falsity with relative ease, particularly in the case of checks with altered amounts. Most defendants fail to realize that when checks are negotiated by the bank, the bank encodes the amount of the check on the face of the check, making it easy to determine the actual amount paid. Because the government must prove a negative, *i.e.*, that a claimed expense was not incurred at all or not incurred in the amount shown on the return, false deductions cases may entail problems of proof that are greater than those routinely encountered in cases involving the omission of income.

30.05[2] Individuals and Businesses

Cases involving individual taxpayers and businesses fall into many different fact patterns. The cases with the greatest jury appeal are those in which the defendant has diverted corporate funds to his or her personal use and deducted the diversions on the corporate return as some form of corporate expenses. The tax benefit to the defendant in these cases is twofold: the corporation's tax liabilities are reduced because personal expenses are improperly deducted as business expenses on the corporate tax returns, and the individual receiving the corporate diversion reduces his or her individual tax liabilities by failing to report the diversions as income on his or her individual returns. This was the fact pattern in ***United States v. Helmsley***, 941 F.2d 71, 75-78, 93 (2d Cir. 1991) (corporation's expenditures on its owner's personal estate renovation project improperly deducted as business expenses); ***United States v. Black***, 843 F.2d 1456, 1459-62 (D.C. Cir. 1988) (checks drawn on corporate accounts to pay personal expenses sufficient to sustain tax evasion conviction); ***United States v. Garcia***, 762 F.2d 1222, 1225-26 (5th Cir. 1985) (defendant improperly claimed personal expenses as business deductions); ***United States v. Greenberg***, 735 F.2d 29, 31-32 (2d Cir. 1984) (corporation's payment of owner's personal expenses improperly deducted as business expenses); and ***United States v. Nathan***, 536 F.2d 988, 990-91 (2d Cir. 1976) (defendant expensed Subchapter S corporation's checks that in fact he cashed for himself).

United States v. Bliss, 735 F.2d 294 (8th Cir. 1984), provides a good example of how to use the specific items method to prove that the defendant has claimed false deductions. The defendant wrote checks on his business bank account to a fictitious company, prepared phony invoices, and had his employees cash the checks, returning most of the money to the defendant. ***Id***. at 296. The government introduced the checks, false invoices prepared by the defendant, and the testimony of the employees who admitted that the checks were not for purchases claimed by the defendant. The employees also testified that the defendant told them the money generated by the scheme was "tax free money" and instructed them to lie to the IRS after the investigation began. ***Id***. at 296-97. The Eighth Circuit rejected the defendant's challenge to the sufficiency of the evidence that he had filed false tax returns, describing the evidence of defendant's guilt as "overwhelming." ***Bliss***, 735 F.2d at 301.

Relatively simple examples of overstated deductions or expenses may be found in ***United States v. Ragen***, 314 U.S. 513, 523-24 (1942) (corporate profit distributions, i.e., dividends, were falsely expensed on the corporation's books and returns as commissions, resulting in an understatement of the taxable income and tax liability of the corporation); ***United States v. Pacheco***, 912 F.2d 297, 301 (9th Cir. 1990) (false partnership deductions); ***Spinney v. United States***, 385 F.2d 908, 911 (1st Cir. 1967) (dentist overstated deductions for dentures, dental supplies, and other professional expenses); ***United States v. Wilkins***, 385 F.2d 465, 467-68 (4th Cir. 1967) (defendant claimed $10,000 in deductions, government proved $7,000 were fictitious); ***United States v. Pechenik***, 236 F.2d 844, 845-46 (3d Cir. 1956) (corporation's capital expenditures improperly deducted as operating expenses, thereby understating taxable income); ***Eggleton v. United States***, 227 F.2d 493, 497-98 (6th Cir. 1955) (defendant overstated costs of used cars he purchased for resale); ***United States v. Berger***, 325 F. Supp. 1297, 1303 (S.D.N.Y. 1971) (domestic parent corporation improperly deducted expenses of its foreign subsidiary), *aff'd*, 456 F.2d 1349 (2d Cir. 1972).

30.5 [3] Return Preparers

A large category of specific items cases with false deductions involves return preparers who falsely claim itemized deductions or expenses for their clients and who are prosecuted under Section 7206(2). As with the other false deduction cases, these may include deductions that are totally fictitious or legitimate deductions that are inflated. ***United States v. Damon***, 676 F.2d 1060, 1063-64 (5th Cir. 1982) (false Schedules C overstating business expenses); ***United States v. Haynes***, 573 F.2d 236, 238 (5th Cir. 1978) (false itemized deductions); ***United States v. Warden***, 545 F.2d 32, 37 (7th Cir. 1976) (false itemized deductions). These cases often involve false charitable deductions, child care credits, and Schedule C business expenses. They may also involve fictitious dependents.

30.6 DEFENDANT'S ADMISSIONS

30.06[1] Generally

The importance of the defendant's admissions in a tax case cannot be overstated. Admissions regarding income are available from many sources. Defendants often boast to friends, spouses, and co-workers that they are "cheating on their taxes." Many defendants leave a paper trail of admissions, which presents a view of their financial situation drastically different from that reflected on the income tax returns filed with the IRS. For example, most defendants file financial statements with lenders to obtain mortgages, loans, credit cards, and credit accounts with retailers. In these situations, it is in the best interest of the defendant to portray his or her financial situation as favorably as possible. Consequently, these financial statements can be very helpful in proving that the defendant was well aware he or she had more income than was reported.

Often, the most important admissions are those made on the defendant's income tax returns. The government frequently uses admissions made on income tax returns (1) that the defendant had prepared but never filed with the IRS ("dummy returns"); (2) which were filed delinquently; or (3) which were timely filed and are used to prove income, deductions, and expenses.

30.06[2] Dummy Returns

Many lenders require that tax returns be submitted with credit applications. Defendants often submit "dummy" returns that have not been filed with the IRS and report income substantially in excess of that reported to the IRS. These dummy returns often provide leads as to unreported sources of income, as well as income from known sources that has been underreported. Dummy returns are also extremely valuable in proving that the defendant acted willfully.

30.06[3] Delinquent Returns

A rare type of specific items case is one based on the defendant's own admissions as to income and expenses, corroborated by independent evidence. In a failure to file case, for example, if the defendant has filed delinquent returns that are determined to be correct, the government may be able to sustain its burden of proving that the defendant earned sufficient income to require the filing of returns by introducing the delinquent returns and independent corroborative evidence of the income figures reported on the returns. *See* ***United States v. Bell***, 734 F.2d 1315, 1317 (8th Cir. 1984) (*per curiam*).

In ***Bell***, the defendant was the sole proprietor of a business that provided tip sheets to bettors at racetracks. 734 F.2d at 1317 On appeal, the court, relying on ***United States v. Smith***, 348 U.S. 147 (1954), recognized that the government cannot prove an essential element of a crime through only uncorroborated post-offense extrajudicial admissions of the defendant.[5] The court held, however, that testimony from various witnesses about the defendant's sale of tip sheets and receipt of income was "enough corroboration to render the income statements on his late-filed tax returns admissible." ***Bell***, 734 F.2d at 1317. The Sixth Circuit has suggested that a district court is required to instruct the jury that a defendant may not be convicted solely on the basis of his or her uncorroborated admissions, *see* ***United States v. Marshall***, 863 F.2d 1285, 1287-88 (6th Cir. 1988) (failure to instruct jury that it could not find defendant guilty of distribution of cocaine solely on basis of defendant's uncorroborated admissions was reversible error where "[t]he need for corroboration [was] apparent"), but the District of Columbia, First, and Seventh Circuits have rejected the Sixth Circuit's position, *see* ***United States v. Dickerson***, 163 F.3d 639, 642 (D.C. Cir. 1999) (because "the corroboration rule is undeniably, in part, a rule governing the admissibility of a defendant's out-of-court statements, . . . [a]nd [because] it is well settled that preliminary facts relating to the admissibility of evidence are questions for the court and not for the jury," the jury need not be separately instructed on rule barring conviction solely on defendant's uncorroborated admissions (internal citations omitted)); ***United States v. Singleterry***, 29 F.3d 733, 736 (1st Cir. 1994) (same); ***United States v. Howard***, 179 F.3d 539, 543 (7th Cir. 1999) ("We agree with the circuits that have held that a district court is not obligated to instruct the jury to make a specific finding as to whether the government presented substantial independent evidence to corroborate the defendant's confession" (citing ***Dickerson*** and ***Singleterry***)).

30.6 [4] Timely Filed Returns

The foregoing should be distinguished from the situation in an evasion or false return case where the defendant has timely filed returns. In such a case, the government

[5] The justification for this rule is that post-offense statements made to an official charged with investigating the possibility of wrongdoing are often unreliable. *See* ***Smith v. United States***, 348 U.S. 147, 152-55 (1954). ***Bell*** involved delinquent tax returns filed after the defendant had been interviewed by special agents of the IRS concerning failure to file his returns. ***Bell***, 734 F.2d at 1317.

"may take the taxpayer's reported income as an admitted amount earned from designated sources" and need not corroborate this reported income. ***United States v. Burkhart***, 501 F.2d 993, 995 (6th Cir. 1974). Corroboration is not required because the statements in the defendant's return constitute pre-offense admissions and pre-offense admissions do not have to be corroborated. ***Warszower v. United States***, 312 U.S. 342, 347 (1941); *see* ***United States v. Pennell***, 737 F.2d 521, 536-37 (6th Cir. 1984) (narcotics and firearms); ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984) (use of credit application to establish cash on hand); *see also* ***United States v. Marshall***, 863 F.2d 1285, 1290-91 (6th Cir. 1988) (Krupansky, J., dissenting).

Similarly, in most cases, the government can rely on the deductions and expenses claimed on the defendant's tax return to prove the statutory offsets to gross income. Deductions claimed on a tax return are admissions and can be used to make a prima facie case. Fed. R. Evid. Rule 801(d)(2); ***United States v. Northern***, 329 F.2d 794, 795 (6th Cir. 1964).

Once the government allows the deductions and expenses claimed on the tax return as filed, plus any additional deductions the government can calculate without the defendant's assistance, the burden of going forward falls on the defendant to show any additional allowable deductions. ***United States v. Marabelles***, 724 F.2d 1374, 1383 (9th Cir. 1984); ***United States v. Lacob***, 416 F.2d 756, 760 (7th Cir. 1969); ***Elwert v. United States***, 231 F.2d 928, 933 (9th Cir. 1956); ***United States v. Bender***, 218 F.2d 869, 871-72 (7th Cir. 1955); ***United States v. Link***, 202 F.2d 592, 593-94 (3d Cir. 1953); *see also* ***United States v. Pacheco***, 912 F.2d 287, 303-04 (9th Cir. 1990) (district court did not err in refusing to allow defendant to introduce evidence regarding unclaimed deductions, where deductions were not allowable, as a matter of law); ***United States v. Garguilo***, 554 F.2d 59, 62 (2d Cir. 1977); ***United States v. Nathan***, 536 F.2d 988, 991 (2d Cir. 1976).

30.7 NO BURDEN TO FOLLOW REASONABLE LEADS

In specific items cases, the government has no burden to follow reasonable leads provided by the defendant, as it does in indirect method of proof cases. *See* ***United States v. Marabelles***, 724 F.2d 1374, 1379 n.3 (9th Cir. 1984); ***United States v. Lawhon***, 499 F.2d 352, 356-57 (5th Cir. 1974); ***United States v. Suskin***, 450 F.2d 596, 598 (2d Cir. 1971); ***United States v. Shavin***, 320 F.2d 308, 311-12 (7th Cir. 1963); ***Swallow***

v. United States, 307 F.2d 81, 84 (10th Cir. 1962); ***United States v. Nemetz***, 309 F. Supp. 1336, 1339 (W.D. Pa. 1970), *aff'd*, 450 F.2d 924 (3d Cir. 1971). "[W]here the government's case is based on evidence showing specific items of unreported income, the safeguards required for indirect methods of proof are not necessary, as the possibility that the defendant may be convicted because non-taxable income is mistakenly presumed to be taxable income, or because cash expenditures are mistakenly assumed to be made from taxable income, is not present." ***United States v. Black***, 843 F.2d 1456, 1459 (D.C. Cir. 1988).

30.8 PROPER CHARACTERIZATION OF METHOD OF PROOF

The government must be careful to characterize the method of proof properly in cases in which unreported income is proven by bank records. In many cases, the unreported income is proven by the introduction of checks which the defendant received or converted but did not report on the tax return. If the government can show by direct proof that each check was taxable income to the defendant, the method of proof is properly termed specific items.

For example, in ***Black***, 843 F.2d 1456 (D.C. Cir. 1988), the defendant wrote checks on corporate accounts for personal expenses. The defendant claimed that these corporate diversions were not taxable income but were nontaxable loans. 843 F.2d at 1459. Although the government's method of proof was specific items (the specific items being the company checks diverted for the defendant's personal use), the defendant argued that the method of proof was actually bank deposits/cash expenditures and that his conviction should be reversed because the government did not prove that the expenditures were not made with funds from non-taxable sources. ***Id***. at 1458. The D.C. Circuit rejected the defendant's argument even though the prosecutor, the government's expert witness, and the trial judge occasionally referred to the method of proof as the "personal expenditures method." ***Black***, 843 F.2d at 1461. The court concluded that "[i]f the statements by the prosecutor, the testimony of the Government's tax witness, and the trial judge's instructions to the jury, are each considered in light of the evidence actually submitted, it is clear that the Government presented direct proof that Black received specific items of taxable income and did not pay tax on that income." ***Id***. at 1460[6] ; *see*

[6] As described by the court: "[I]n the Government's view, Black received taxable income each time he wrote a check . . . to cover his personal expenses . . . [and] at no point in the trial was it suggested to the jury that evidence of personal expenditures, without more, would be sufficient to convict." ***Black***, 843 F.2d at 1459-61.

also ***United States v. Wilson***, 887 F.2d 69, 77 (5th Cir. 1989) (district court properly refused to give bank deposits instruction in specific items case in which proof of unreported income was based on the "transfer of specific and substantial funds" to defendants' bank accounts).

Similarly, direct evidence as to cash transactions could, in some circumstances, be a specific item of unreported income. For example, if witnesses testified that they paid the defendant in cash for services, those items could be included as income. However, the mere deposit of cash into a bank account without evidence that the cash was income to the defendant would not be sufficient to prove unreported income in a specific items case.

30.9 CRIMINAL COMPUTATIONS

30.09[1] Method Of Accounting

In computing the defendant's taxable income and tax for each prosecution year, the government generally is required to follow the accounting method used by the defendant. If the defendant was on the cash basis during the prosecution year, then the government's proof also must be computed on the cash basis, under which income is reported when it is received, and expenses are deducted only in the year in which they are actually paid. *See* ***United States v. Wiese***, 750 F.2d 674, 677 (8th Cir. 1984) (a bank deposits case stating the general rule that a cash basis taxpayer must report income in the taxable year of actual or constructive receipt). *See also* Treas. Reg. § 1.446-1(a)(1) & (c)(1)(i).

Similarly, if the defendant used a hybrid method of accounting, with some items treated on a cash basis and other items treated on an accrual basis, then the government also must use the same hybrid method in doing its computations. ***United States v. Marttila***, 434 F.2d 834, 836-37 (8th Cir. 1970).

The defendant also is bound by the accounting method used during the prosecution year when preparing computations for trial. In ***Clark v. United States***, 211 F.2d 100, 105 (8th Cir. 1954), the defendant had reported income during the prosecution years on the cash basis. The trial court excluded testimony from the ~~defendant's expert on what the~~ effect on taxable income would have been had the returns been prepared on the accrual basis, instead of the cash basis, on the ground that such testimony had no probative value. ***Id***. The court of appeals affirmed, agreeing with the district court that "any hypothesizing of facts which had no probative basis was . . . wholly irrelevant and incompetent as a defense to the charge." ***Clark***, 211 F.2d at 105. Similarly, in ***United States v. Helmsley***, 941 F.2d 71, 85 (2nd Cir. 1991), the defendant followed one depreciation method during the prosecution years but argued at trial that allowable deductions would have offset tax deficiencies under another method. The court held that having selected a particular depreciation method, the defendant was not free to recalculate her taxes under another depreciation method. ***Id.***; *see also* ***United States v. Lisowski***, 504 F.2d 1268, 1275 (7th Cir. 1974) ("[w]hen the taxpayer has employed a hybrid or unauthorized accounting method, he is hardly in a position to complain when the computation employing that method is introduced to prove specific items of omitted income." (quoting ***Morrison v. United States***, 270 F.2d 1, 4 (4th Cir. 1959)); ***Fowler v. United States***, 352 F.2d 100, 106 (8th Cir. 1965).

30.09[2] Proper Income Allocation

The government cannot establish a tax deficiency by attributing income to a year in which it does not belong. ***United States v. Wilkins***, 385 F.2d 465, 469-71 (4th Cir. 1967).

30.9 [3] Treatment of Known Deductions

Although there is no requirement in a specific items case that the government follow all reasonable leads provided by the defendant, see Section 30.07, *supra*, if, during its investigation, the government discovers unclaimed deductions or offsets, such as deductible purchases, salaries paid, interest expenses, or errors in the books and records in the defendant's favor, they must be allowed in the government's criminal computations of the amount of tax due and owing, even though not reported on the defendant's return. *See* ***United States v. Link***, 202 F.2d 592, 593-94 (3d Cir. 1953).

30.10 USING MULTIPLE METHODS OF PROOF

Proof of specific items of omitted income may be corroborated by circumstantial proof, such as the net worth method of proof. *See, e.g.,* ***Holland v. United States***, 348 U.S. 121, 126 (1954) (citing cases); ***United States v. Cramer***, 447 F.2d 210, 217-18 (2d Cir. 1971); ***Eggleton v. United States***, 227 F.2d 493, 497-98 (6th Cir. 1955); ***Lloydv. United States***, 226 F.2d 9, 14 (5th Cir. 1955); ***Heasley v. United States***, 218 F.2d 86, 90 (8th Cir. 1955). The specific items method also may be corroborated by the bank deposits method, *see, e.g.*, ***United States v. Tafoya***, 757 F.2d 1522, 1528 (5th Cir. 1985); ***United States v. Horton***, 526 F.2d 884, 886-87 (5th Cir. 1976); ***Canton v. United States***, 226 F.2d 313, 322-23 (8th Cir. 1955), or the expenditures method of proof, *see, e.g.*, ***United States v. McGuire***, 347 F.2d 99, 101 (6th Cir. 1965) (expenditure on large items); *see also* ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986) (the government may also use a combination bank deposits and expenditures method ofproof).

It has been held that, when an indirect method is used as corroboration only, the government may not have a duty to comply with all of the technical requirements of the indirect method, such as tracking down all leads in a net worth analysis. ***Tafoya***, 757 F.2d 1522; ***Cramer***, 447 F.2d at 218. Furthermore, it has been held that the use of an indirect method of proof as corroboration is permissible even though the government has stated in a bill of particulars that it would rely on the specific items method. ***Horton***, 526 F.2d at 887; ***McGuire***, 347 F.2d at 101. Common sense dictates, however, that the corroborating method of proof be designated as such in a bill of particulars to avoid needless argument and the possibility of an adverse ruling.

When an indirect method of proof is used to corroborate specific items, the jury should be instructed to limit its consideration of the indirect analysis to corroboration of the specific items proof only. ***Horton***, 526 F.2d at 887-88. Although failure to give such a limiting instruction may later be determined to be harmless error, there is always the risk that an appellate court could find otherwise.

The government also may use direct and indirect methods of proof in combination with each other in the same case. For example, in a three-year case, the government could prove unreported income in the first year by the specific items method, while proving unreported income for the next two years by the net worth method. ***United States v. Dawson***, 400 F.2d 194, 203 (2d Cir. 1968). Additionally, both direct and indirect methods can be used for the same year. *See* ***United States v. Scott***, 660 F.2d 1145, 1147-48 (7th Cir. 1981) (specific items and net worth); ***United States v. Rodriguez***, 545 F.2d 829, 832 (2d Cir. 1976) (specific items and expenditures methods); *see also* ***United States v. Hart,*** 70 F.3d 854, 860-61 (6th Cir. 1995) (specific items and expenditures methods); ***United States v. Smith,*** 890 F.2d 711, 717 (5th Cir. 1989) (part of income proven by specific items and part proven by bank deposits); ***United States v. Citron,*** 783 F.2d 307, 310 & n.4 (2d Cir. 1986); ***United States v. Meriwether***, 440 F.2d 753, 755-56 (5th Cir. 1971) (net worth and specific items); ***United States v. Lacob***, 416 F.2d 756, 759-60 (7th Cir. 1969) (bank deposits and specific items); ***Chinn v. United States***, 228 F.2d 151, 153-54 (4th Cir. 1955) (net worth and specific items for one year, specific items alone for another year); ***United States v. Bahr***, 580 F. Supp. 167, 170 (N.D. Iowa 1983) (bank deposits and specific items, with a percentage computation to calculate cost of goods sold).

In ***Meriwether***, for example, the government used two separate and distinct methods of proof in attempting to establish corrected taxable income -- the net worth and specific items methods of proof. 440 F.2d at 755. Neither method was used only as corroboration for the other, and the jury was instructed that it could rely on either method. ***Id***. at 756. [7] However, the government failed to establish the defendant's opening net worth with reasonable certainty. ***Id***. at 755-56. Because there was no way to determine which of the two methods of proof the jury relied upon in reaching its verdict, the conviction was reversed. ***Meriwether***, 440 F.2d at 755, 756-57. It is doubtful, however, that the holding of ***Meriwether*** survives ***Griffin v. United States***, 502 U.S. 46 (1991). In ***Griffin***, the Supreme Court held that a general jury verdict of guilty on a multiple-object conspiracy does not have to be set aside when the evidence is insufficient to support the conviction as to one object. ***Id.*** at 49. The Court reasoned that a general jury verdict is valid so long as it is legally supportable on one of the submitted grounds, even though that gives no assurance that a valid ground, rather than an invalid one, is the basis for the jury's verdict. ***Id. Griffin's*** reasoning would appear to apply to the situation encountered in ***Meriwether***.

[7] Where two methods of proof are used, the jury must be properly instructed on each method. ***Meriwether***, 440 F.2d at 756-57.

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31.00 NET WORTH

31.1 OVERVIEW

The net worth method of proof is an indirect method of proof. An indirect method of proof is used to reconstruct taxable income when the government is unable to establish income through direct evidence. The specific item method of proof discussed in detail in Chapter 30, *supra*, proves income with direct evidence -- testimony and records that document money paid for services rendered or products sold. When a defendant purposely fails to maintain books and records, or when a defendant does not use bank accounts to deposit receipts or to pay business expenses, the government must use other evidence to prove an individual had taxable income for a given tax year. The basic premise of the net worth method of proof is that if a defendant has more wealth at the end of a given year than at the beginning of that year, and the increase does not result from nontaxable sources such as gifts, loans, and inheritances, then the increase is a measure of taxable income for that year. ***Holland v. United States***, 348 U.S. 121, 125 (1954); ***United States v. Giacalone***, 574 F.2d 328, 331-32 (6th Cir. 1978); *see also* ***United States v. Gomez-Soto***, 723 F.2d 649, 655 (9th Cir. 1983); ***United States v. Schafer***, 580 F.2d 774, 777 (5th Cir. 1978).

The government must conduct a very thorough financial investigation, including a search for readily identifiable gifts, loans, inheritances, or other nontaxable sources which may account for accumulated wealth during the year. Since the government is estimating the defendant's income using circumstantial evidence, there are heightened requirements in the net worth method of proof to ensure that the government's evidence is sufficiently reliable to prove beyond a reasonable doubt that the defendant had taxable income. When proving income for a particular year by showing an increase in a defendant's net worth, the government is also saying that the defendant did not buy any of the identified assets with savings or money earned, and taxed, in a prior year.

A net worth computation reveals not only that the defendant had income but how that income was spent. In essence, the computation depicts the financial life of a defendant, both prior to and during the prosecution period. *See* ***Holland***, 348 U.S. at 125, 132-33; ***United States v. Mastropieri***, 685 F.2d 776, 778 (2d Cir.1982). It is important when constructing a net worth computation to include only items or transactions that have tax consequences. For this reason, under the net worth method, nontaxable items received during a prosecution year must be eliminated from the computation of additional taxable income.

The following is a simplified example of a net worth calculation:

SIMPLIFIED NET WORTH FORMULA

	Assets		$650,000
Less:	Liabilities	-	$200,000
	Net worth at end of 2010		$450,000
Less:	Net worth at beginning of 2010	-	$150,000
	Increase in net worth - 2010		$300,000
Add:	Personal, non-deductible expenditures		$100,000
Less:	Nontaxable sources of income	-	$ 50,000
	Potential taxable income		$350,000
Less:	Taxable income reported 2010 tax return		$125,000
	Unreported taxable income - 2010		**$225,000**

31.2 DESCRIPTION OF NET WORTH METHOD

The First Circuit described the net worth method as follows:

> The Government makes out a prima facie case under the net worth method of proof if it establishes the defendant's opening net worth (computed as assets at cost basis less liabilities) with reasonable certainty and then shows increases in his net worth for each year in question which, added to his nondeductible expenditures and excluding his known nontaxable receipts for the year, exceed his reported taxable income by a substantial amount. The jury may infer that the defendant's excess net worth increases represent unreported taxable income if the Government either shows a likely source, or negates all possible nontaxable sources .

> . . . [T]he jury may further infer willfulness from the fact of underreporting coupled with evidence of conduct by the defendant tending to mislead or conceal.

United States v. Sorrentino, 726 F.2d 876, 879-80 (1st Cir. 1984) (citations omitted); *see also* **Holland v. United States**, 348 U.S. 121, 125 (1954); ***United States v. Terrell***, 754 F.2d 1139, 1144 (5th Cir. 1985); ***United States v. Wirsing***, 719 F.2d 859, 871 (6th Cir. 1983); ***United States v. Greene***, 698 F.2d 1364, 1370 (9th Cir. 1983); ***United States v. Goldstein***, 685 F.2d 179, 181-82 (7th Cir. 1982); ***United States v. Goichman***, 547 F.2d 778, 781 (3d Cir. 1976) (*per curiam*); ***United States v. O'Connor***, 273 F.2d 358, 361 (2d Cir. 1959).

The Fifth Circuit summarized the steps necessary to establish income when applying the net worth method of proof:

> The government established its case through the "net worth" approach, a method of circumstantial proof which basically consists of five steps: (1) calculation of net worth at the end of a taxable year, (2) subtraction of net worth at the beginning of the same taxable year, (3) addition of non-deductible expenditures for personal, including living, expenditures, (4) subtraction of receipts from income sources that are non-taxable, and (5) comparison of the resultant figure with the amount of taxable income reported by the taxpayer to determine the amount, if any, of underreporting.

United States v. Schafer, 580 F.2d 774, 775 (5th Cir. 1978).

31.3 USE OF NET WORTH METHOD

31.03[1] Inadequate Books and Records

The net worth method of proof frequently is used when it would be difficult or impossible to establish the defendant's taxable income by direct evidence. ***United States v. Dwoskin***, 644 F.2d 418, 423 (5th Cir. Unit B 1981). Sometimes a defendant will intentionally fail to keep books documenting his income and expenses. In such a case, "willfulness may be inferred by the jury from that fact coupled with proof of an understatement of income." ***Holland***, 348 U.S. at 128.

At other times, a defendant's books and records are inadequate, false, or not available to the government. *See, e.g.*, ***United States v. Shetty***, 130 F.3d 1324, 1331-32 (9th Cir. 1997); ***United States v. Notch***, 939 F.2d 895, 897-98 (10th Cir. 1991); ***United States v. Stone***, 531 F.2d 939, 940 n.1 (8th Cir.1976); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1240 (9th Cir. 1971). Although a defendant's books and records can be helpful, they are not essential. "[I]n a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability," seeks to establish taxable income by the net worth method. ***Holland v. United States***, 348 U.S. 121, 125 (1954); ***United States v. Ayers***, 924 F.2d 1468, 1475 (9th Cir. 1991) (quoting ***Holland***); ***United States v. Blandina***, 895 F.2d 293, 295 (7th Cir. 1988) (same); ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987) (same).

31.03[2] Adequate Books and Records

The government may use the net worth method in situations in which the defendant had "adequate" books and records. As the Supreme Court stated in ***Holland v. United States***:

> The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. Petitioners' accounting system was appropriate for their business purposes; and, admittedly, the Government did not detect any specific false entries therein. Nevertheless, if we believe the Government's evidence, as the jury did, we must conclude that the defendants' books were more consistent than truthful, and that many items of income had disappeared before they had even reached the recording stage. . . . To protect the revenue from those who do not 'render true accounts', the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

348 U.S. at 131-32. Thus, the state of the defendant's records has no bearing on whether the net worth method of proof may be used. *See also* ***McGrew v. United States***, 222 F.2d 458, 459 (5th Cir. 1955) (*per curiam*) (rejecting defendant's claim that the government's use of the net worth method of proof was improper because the government did not make a preliminary showing regarding the state of the defendant's records); ***United States v.***

Vanderburgh, 473 F.2d 1313, 1314 (9th Cir. 1973) (*per curiam*) (government may use the net worth method of proof even where the defendant contends that he maintained an allegedly complete and adequate set of books of account).

31.3 [3] Use With Other Methods

The government is not limited to a single method of proof and may use the net worth method in conjunction with other methods of proof. *See, e.g.*, ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986) ("The government may choose to proceed under any single theory of proof or a combination method, including a combination of circumstantial and direct proofs"); *see also* ***United States v. Smith***, 890 F.2d 711, 713 (5th Cir.1989) (net worth and specific items methods of proof combined in a section 7201 prosecution).

31.4 PROOF OF NET WORTH -- REQUIREMENTS

In using the net worth method, the government must:

1. Establish an opening net worth with reasonable certainty, *i.e.*, the defendant's net worth at the beginning of the prosecution year.

2. Establish the defendant's net worth at the end of the prosecution year, with any excess over opening net worth representing the net worth increase.

3. Establish a likely source of taxable income from which the jury could find the net worth increase sprang; or, in the alternative, negate nontaxable sources of funds.

4. Negate "reasonable explanations" by the defendant inconsistent with guilt.

Holland v. United States, 348 U.S. 121, 125, 132-38 (1954); ***United States v. Massei***, 355 U.S. 595, 595 (1958) (*per curiam*) ("should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source" of income); ***United States v. Notch***, 939 F.2d 895, 898 (10th Cir. 1991); ***United States v. Blandina***, 895 F.2d 293, 301 (7th Cir. 1989); ***United States v. Koskerides***, 877 F.2d

1129, 1137 (2d Cir. 1989); ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987) (quoting ***Holland***); ***United States v. Scott***, 660 F.2d 1145, 1147 (7th Cir. 1981); ***United States v. Dwoskin***, 644 F.2d 418, 419-22 (5th Cir. Unit B 1981); ***United States v. Hamilton***, 620 F. 2d 712, 714 & n.1 (9th Cir. 1980); ***United States v. Goichman***, 547 F.2d 778, 781 (3d Cir. 1976) (*per curiam*); ***United States v. Bethea***, 537 F.2d 1187, 1188-89 (4th Cir. 1976); ***McGarry v. United States***, 388 F.2d 862, 864 (1st Cir. 1967).

31.5 OPENING NET WORTH

31.05[1] Proof -- "Reasonable Certainty"

Net worth increases are determined by establishing a defendant's net worth at the beginning of a given year and then comparing this opening net worth with the defendant's net worth at the end of the year. December 31 of the year preceding the first prosecution year (the opening net worth) is the point from which net worth increases are measured. For example, if the first prosecution year, or the year to be measured, is 2007, then the defendant's net worth as of December 31, 2006, would be the opening net worth from which to determine whether the defendant's net worth increased or decreased in 2007. The defendant's 2007 ending net worth would in turn become the opening net worth for 2008, and so on.

The establishment of an opening net worth is like the foundation of a house. Each asset purchased or personal expenditure made is a brick added on top of the foundation. In criminal tax cases, the defendant's specific intent to violate the law is proved through circumstantial evidence. Often, no one piece is conclusive; rather, it is the accumulation of many bricks over several years that proves the government's case beyond a reasonable doubt. Since the net worth increase for a particular year is determined by subtracting the opening net worth from the ending net worth, the accuracy of the opening net worth can not be understated. The Supreme Court described the need to establish an opening net worth, and the standard of proof required to do so:

> [A]n essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.

Holland v. United States, 348 U.S. 121, 132 (1954).

While every effort should be made to obtain all of the assets and liabilities of the defendant at the starting point, the government does not have to establish the starting point, or opening net worth, to a mathematical certainty. ***Holland***, 348 U.S. at 138; ***United States v. Gardner***, 611 F.2d 770, 775 (9th Cir. 1980). It is sufficient if the government establishes the defendant's opening net worth with reasonable certainty -- more than this is not required. ***Holland***, 348 U.S. at 132; ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir. 1985); ***United States v. Sorrentino***, 726 F.2d 876, 879 (1st Cir. 1984); ***United States v. Greene***, 698 F.2d 1364, 1372 (9th Cir. 1983); ***United States v. Goldstein***, 685 F.2d 179, 181 (7th Cir. 1982); ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir. 1980) (*per curiam*); ***United States v. Carriger***, 592 F.2d 312, 313 (6th Cir. 1979); ***United States v. Honea***, 556 F.2d 906, 908 (8th Cir. 1977) (*per curiam*); ***United States v. Goichman***, 547 F.2d 778, 781 (3d Cir. 1976) (*per curiam*).

Once the government has established the defendant's opening net worth with reasonable certainty, the defendant remains silent "at his peril." ***United States v. Stone***, 531 F.2d 939, 942 (8th Cir. 1976); *see also* ***Holland***, 348 U.S. at 138-39. In its net worth calculation, the government deducts all known nontaxable sources of funds. A thorough financial investigation will check for possible loans by subpoenaing financial institutions, and for potential inheritances received from family members by checking local probate records. If the defendant received money from a source of which the government is not aware, the defendant must provide that information to the government for verification. It is in the defendant's interest to disclose such information to the government, since a nontaxable source of funds that eliminates the taxable income for a particular year may leave the government unable to prove an element of tax evasion: additional tax due and owing. For example, perhaps a defendant was the favorite nephew of his aunt who lived in Italy, and upon her death he received $100,000 in stocks in 2002. An investigation into the defendant's 2003, 2004, and 2005 taxable income must include this $100,000 in the opening net worth figure. IRS special agents are trained to ask about potential nontaxable sources of income when they do an initial interview of the target at the beginning of their criminal investigation.

31.05[2] Thorough Investigation a Necessity

An extremely thorough investigation is crucial in proving that the government established the defendant's opening net worth with reasonable certainty. When the government chooses to proceed against a defendant using the net worth method of proof, "the Government assumes a special responsibility of thoroughness and particularity in its investigation and presentation." ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981); ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir. 1985) (the government must conduct a meticulous investigation, and the investigation techniques and figures are subject to close scrutiny). "The Government must affirmatively prove an initial amount available to the taxpayer, with evidence that excludes the possibility that the defendant relied on previously accumulated assets rather than unreported taxable income . . ., without refuting all possible speculation as to sources of funds . . . ." ***United States v. Breger***, 616 F.2d 634, 635-36 (2d Cir. 1980) (citing ***United States v. Marshall***, 557 F.2d 527, 530 (5th Cir. 1977)).

A good example of a thorough and detailed investigation is found in ***United States v. Terrell***, 754 F.2d 1139 (5th Cir. 1985), in which the defendant was convicted of evasion for the years 1976 through 1979, and the government began its investigation of Terrell's funds with the year 1967. Noting that "we can only be surprised by appellant's attack on the thoroughness of the Government's investigation," the court described the investigation as follows:

> The investigation consumed three and one-half years. Approximately 20 agents canvassed public records to determine the extent of appellant's holdings. Thirty banks were contacted, and twenty banks produced documents or witnesses. Nearly 300 potential witnesses were interviewed, many of them several times. IRS agents identified in excess of 70 assets purchased and sold by Terrell, and questioned third parties involved in these transactions. Additionally, every expenditure made by Terrell was traced, including all cashier's checks traced back to their sources to determine how they were purchased.

Terrell, 754 F.2d at 1147-48. For another example of the detailed steps required to conduct a net worth investigation, *see* ***United States v. Sorrentino***, 726 F.2d 876, 880 (1st Cir. 1984).

The consequences of a less than thorough financial analysis are suggested by ***United States v. Smith***, 890 F.2d 711, 713 (5th Cir. 1989), in which the Fifth Circuit stated that "[w]e join the Seventh Circuit in observing that sloppy or mediocre financial and accounting evaluation upon which a conviction is obtained can be the genesis for reversal." (citing ***United States v. Achilli***, 234 F.2d 797 (7th Cir.1956)).

If after a thorough investigation, the government is unable to establish an opening net worth with reasonable certainty, the net worth method of proof may not be used to prove unreported income.

31.05[3] Evidence Establishing Opening Net Worth

A legally sufficient opening net worth computation requires an extensive and thorough investigation by the Internal Revenue Service. The opening net worth must include all of the defendant's assets that are reasonably discoverable, including assets derived from nontaxable sources of funds such as gifts, loans, and inheritances, as well as assets derived from taxable income. It is critical to identify assets purchased in the years preceding the first prosecution year, both for an accurate opening net worth figure and as the potential source of funds to purchase assets in the prosecution years. Similarly, if assets derived from nontaxable sources were omitted from the opening net worth, but included in the first year's computation, the taxable income for the first year would be incorrectly inflated.

For example, assume that the prosecution year is 2005 and in 2004 the defendant inherited $100,000, which is not accounted for in the opening net worth. Stated another way, the 2005 opening net worth is understated by $100,000. If the defendant purchases a house for $100,000 in 2005, which is reflected on the defendant's 2005 net worth as an asset, the net worth computation would incorrectly attribute a net worth increase of $100,000 to the defendant in 2005. The effect of this error would be to overstate the defendant's income because the defendant had the $100,000 on hand at the end of 2004, and the spending of those funds should not be attributed to income earned in 2005. It is important that loans, gifts, inheritances, and other nontaxable sources of funds be identified for both the years prior to the initial prosecution year as well as during the years for which taxable income is being computed. The funds in prior years affect the opening net worth, while nontaxable sources of funds obtained during a prosecution year are subtracted from the net worth increase to compute corrected taxable income for that year.

In ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir.1980) (*per curiam*), the defendant had been convicted of tax evasion and filing false income tax returns for the years 1972 through 1974. In upholding the starting point established by the government at trial, the court commented:

> We think the Government met its burden here. It used information gleaned from a 1969 mortgage application, traced a real estate and cash inheritance from appellant's mother in 1968, and investigated bond statements and checking accounts in order to ascertain appellant's access to funds as of January 1, 1972. We note that appellant adduced no specific evidence, such as a cash hoard, to suggest that the starting point was inaccurate or misleading.

Breger, 616 F.2d at 636.

Prior income tax returns of a defendant are relevant and can play a significant role in developing a defendant's opening net worth. In ***United States v. Mackey***, 345 F.2d 499, 504 (7th Cir. 1965), the starting point of the net worth computation was December 31, 1955, and the court upheld the prosecution's use of "the income tax returns of defendant and his wife from 1929 through December 31, 1955, as a guide in determining defendant's net worth at the starting point." Additionally, net worth statements submitted by the defendant either to the government or to financial institutions can be particularly helpful in establishing an opening net worth. *See, e.g.*, ***United States v. Dwoskin***, 644 F.2d 418, 420 (5th Cir. Unit B 1981); ***United States v. Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968), *vacated on other grounds*, 395 U.S. 710 (1969), *reaff'd on remand*, 436 F.2d 1212 (7th Cir. 1971).

In ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir. 1982), the court noted that less stringent standards with respect both to establishing opening net worth and to negating nontaxable income sources were justified in a case where the defendants were shown to have gone to great lengths to conceal their unreported increases in wealth. While the court observed that the investigation in that case should not be regarded as a model, the case does furnish an example of a number of the steps that must be taken to establish an opening net worth. ***Mastropieri***, 685 F.2d at 779, 783.[1]

For additional cases holding that the government's evidence was sufficient to establish the defendant's opening net worth with reasonable certainty, *see* ***United States v. Greene***, 698 F.2d 1364, 1372 (9th Cir. 1983) (jury could draw adverse inferences from the late stage at which defense evidence was disclosed in spite of a motion for reciprocal discovery, defendant's failure to reveal the existence of a Liechtenstein bank account to his return preparers, and defendant's claim to have retained no records with respect to $100,000 he testified he had sent to a third party who had purportedly later returned the funds to defendant); ***United States v. Goldstein***, 685 F.2d 179, 181 (7th Cir. 1982) (evasion charged for three years, conviction on only one year, sufficient if opening net worth established for year of conviction); ***United States v. Dwoskin***, 644 F.2d 418, 420 (5th Cir. Unit B 1981) (opening net worth based on a financial statement signed by the defendant and submitted to a bank); ***United States v. Schafer***, 580 F.2d 774, 778-80 (5th Cir. 1978); ***United States v. Giacalone***, 574 F.2d 328, 331-33 (6th Cir. 1978); ***United States v. Honea***, 556 F.2d 906, 907-08 (8th Cir. 1977); ***United States v. Mancuso***, 378 F.2d 612, 616-17 (4th Cir. 1967), *amended on other grounds on rehearing*, 387 F.2d 376 (4th Cir. 1967); ***United States v. Goichman***, 407 F. Supp. 980, 987-88 (E.D. Pa. 1976), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

31.5 [4] Opening Net Worth Not Established

In a relatively small number of cases, the courts have found the government's proof of the defendant's opening net worth insufficient to support a conviction. For the most part, these are earlier cases, but they furnish examples of pitfalls that must be avoided if the opening net worth is to be established with reasonable certainty.

For an example of an erroneous opening net worth computation, *see* ***United States v. Achilli***, 234 F.2d 797 (7th Cir. 1956), *aff'd on other grounds*, 353 U.S. 373 (1957). In ***Achilli***, one count of a three-count conviction was reversed because the value of a residence sold by the defendant in the first prosecution year was erroneously omitted

[1] As an evidentiary matter, the ***Mastropieri*** court criticized the fact that the record did not contain the "form of letter or letters" which the special agent sent to the banks, brokerage firms, and lending institutions that he canvassed as a part of the investigation. ***Mastropieri***, 685 F.2d at 779 n.3. This concern suggests that care should be taken in drafting such letters, because they may be used later to demonstrate the effort made to locate the defendant's assets and liabilities.

from the opening net worth computation and the error accounted for almost 80 percent of the deficit shown by the government's computation. 234 F.2d at 804.[2] Since the tax return was the only evidence with respect to the time when the defendant acquired the property, the government conceded that the property should have been included as an asset in the computation of the defendant's net worth as of December 31, 1945. ***Achilli***, 234 F. 2d at 804; *see also* ***United States v. Keller***, 523 F.2d 1009, 1011 (9th Cir. 1975) (because the government failed to pursue leads provided by defendants to support their claim that the basis in their property was $20,000 higher than that assumed by the government, the opening net worth for 1967 was not reasonably certain and the evidence as to the 1967 count was insufficient to go to the jury).

When using the net worth method of proof to prove unreported income, the IRS agent should be asked if every known asset is included in the net worth computation. On occasion, the agent will intentionally omit items from the net worth schedules. One example would be an asset purchased prior to the prosecution years, owned throughout the prosecution years, and still owned at the end of the years at issue. This asset would be valued at cost each year, even if it significantly appreciated during the prosecution years. The direct examination of the agent should include a discussion of what items were omitted and what effect, if any, the omission had on the soundness of the government's net worth computation.

31.6 CASH ON HAND

31.06[1] Definition -- Need to Establish

As one court observed, "the most frequent challenge to the government's computations in a net worth case is the opening cash balance." ***United States v. Schafer***, 580 F.2d 774, 779 (5th Cir. 1978). A defendant's claim of cash on hand is commonly referred to as a cash hoard defense. A typical cash hoard defense asserts that the defendant in earlier years received money from such sources as gifts from family members or friends, or an inheritance, which he or she then spent during the prosecution period. The Supreme Court described the cash hoard defense as follows:

[2] The error seems to have resulted from an oversight by the government, because the sale of the residence omitted from the defendant's opening net worth was reported in the capital gains schedule of the defendant's 1946 return. 234 F.2d at804.

> Among the defenses often asserted is the taxpayer's claim that the net worth increase shown by the Government's statement is in reality not an increase at all because of the existence of substantial cash on hand at the starting point. This favorite defense asserts that the cache is made up of many years' savings which for various reasons were hidden and not expended until the prosecution period. Obviously, the Government has great difficulty in refuting such a contention.

Holland v. United States, 348 U.S. 121, 127 (1954).

While it is often difficult to disprove the existence of a cash hoard, the government can often prove acts that are inconsistent with a person's having had a substantial amount of currency available to spend. Such proof might include evidence that the defendant took out of a high interest rate loan to purchase a vehicle or home furnishings or that the defendant made frequent ATM withdrawals in small increments. While some of these facts make the existence of a cash hoard less likely, the government must still establish, with reasonable certainty, the amount of cash that the defendant had in his or her possession at the beginning of the tax period. ***United States v. Wilson***, 647 F.2d 534, 536 n.1 (5th Cir. 1981) (*per curiam*). The necessity for establishing cash on hand "with reasonable certainty" is well summarized in ***United States v. Terrell***, 754 F.2d 1139, 1146-47 (5th Cir. 1985):

> The question of whether a defendant has a substantial amount of cash-on-hand at the beginning of the indictment period must be carefully investigated because the existence of a cash hoard could greatly distort the net worth evaluation. Unaccounted for funds that surface during the course of the net worth evaluation might be explained by the fact that a defendant accumulated large sums of cash which he kept on hand and began to spend during the indictment period.

See also ***United States v. Pinto***, 838 F.2d 426, 431 (10th Cir. 1988). If a cash hoard is the source of funds used to accumulate assets, then the purchase of the assets should not be considered taxable income in the year during which the funds were spent.

One of the most common explanations for spending of unexplained wealth is a loan or inheritance from a relative. One way to defeat a claim that a relative or friend was the source of unexplained funds is to show that the alleged donor did not have sufficient resources to give the defendant the amount claimed. This may be done in two ways: 1) review the tax filing history of the relative and 2) construct a basic net worth of the relative. If the relative bought a house and only put 5% down and obtained a mortgage at a high interest rate, it is unlikely that that person had a cash hoard, since one likely would have been used toward a larger down payment on the house. Similarly, research of vehicles purchased and amounts of liens on those vehicles will give a snapshot as to the relative's basic financial status. *See* ***United States v. Breger***, 616 F.2d 634, 636 (2d Cir.1980) (*per curiam*).

While cash on hand does include the money that a defendant habitually carries in his pocket, the concept of cash on hand is more expansive. It includes all monies or cash readily available to the defendant that are not deposited in a bank or other institution. Thus, cash on hand can include monies that the defendant had in his safe or his business (*see* ***United States v. Calderon***, 348 U.S. 160, 162 (1954)) and cash kept in a safe deposit box and money buried in the defendant's backyard (*see* ***United States v. Bethea***, 537 F.2d 1187, 1190 (4th Cir. 1976); ***United States v. Carter***, 462 F.2d 1252, 1255-56 (6th Cir. 1972)).

If the defendant claims during the investigation to have had a cash hoard, the IRS agent will ask very detailed questions to attempt to learn the amount of this cash hoard, its source, when it was received, where it was kept, who else was aware of its existence, the denomination of the bills, and whether it was always kept in the same place. The defendant should be asked to identify which particular assets were purchased with the funds from this cash hoard so the government can contact the seller-witness to verify that currency was in fact exchanged during the sale. It is important to note that a cash hoard is only relevant if the defendant used those funds to purchase assets or make expenditures during the prosecution years. If the cash hoard remained the same throughout the prosecution period, it had no effect on the defendant's net worth analysis. *See* ***United States v. Giacalone***, 574 F.2d 328, 331-33 (6th Cir. 1978).

When assets are included in a net worth schedule, the source of funds used to purchase the asset will be known. If a cashier's check was used, the bank can be subpoenaed to see whether the funds were withdrawn from a customer's bank account or if currency was provided. If the cashier's check is more than $10,000 and was funded with currency, Title 31 requires the bank to complete a Currency Transaction Report (CTR) which is filed with the IRS through FinCen (Financial Crimes Enforcement

Network). If currency was used to purchase an asset and that currency cannot be traced to a withdrawal from a known bank account, then the government must produce evidence from which an inference can be drawn that the cash hoard was not utilized during the indictment period. Otherwise, any available cash on hand must be subtracted from the computation reflecting the net worth increase and nondeductible expenditures. If it cannot be established that the cash hoard remained constant throughout the prosecution period, then it must be assumed that any computed net worth increase and nondeductible expenditures were funded by the spending of funds in the cash hoard. *See* ***McGarry v. United States***, 388 F.2d 862, 866-67 (1st Cir. 1967).

31.06[2] Jury Question -- Burden of Proof

The existence of cash on hand at the beginning of the prosecution period presents a factual issue for determination by the jury. *See* ***Holland v. United States***, 348 U.S. 121, 134 (1954); ***United States v. Calderon***, 348 U.S. 160, 162-63 (1954); ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir. 1980) (*per curiam*); ***United States v. Carter***, 462F.2d 1252, 1256 (6th Cir. 1972); ***McGarry v. United States***, 388 F.2d 862, 868 (1st Cir. 1967); ***United States v. Vardine***, 305 F. 2d 60, 64-65 (2d Cir. 1962) (conflicting testimony left to the jury and government properly based its net worth summary on its version of the facts); ***Fowler v. United States***, 352 F.2d 100, 107 (8th Cir. 1965).

The foregoing cases demonstrate that as long as there is evidence from which a jury can conclude that the government has established the amount of cash on hand with reasonable certainty, the defendant is not entitled to a judgment of acquittal on this issue. *See, e.g.*, ***United States v. Blandina***, 895 F.2d 293, 302 (7th Cir. 1989); ***United States v. Wilson***, 647 F.2d 534, 536 n.1 (5th Cir. 1981).

Once the government has established that a thorough investigation failed to uncover evidence of cash on hand, the burden shifts to the defendant to come forward with evidence of cash; the defendant remains silent at his or her peril. ***United States v. Mackey***, 345 F.2d 499, 506 (7th Cir. 1965). This burden arises because "[w]hether defendant had substantial sums of cash at the starting point is a matter within defendant's knowledge." ***Mackey***, 345 F.2d at 506; *see also* ***Holland***, 348 U.S. at 138-39; ***Fowler***, 352 F.2d at 107; ***United States v. Holovachka***, 314 F.2d 345, 354 (7th Cir. 1963).

31.6 [3] Amount of Cash on Hand

The net worth computation must reflect the amount of the defendant's cash on hand for each year. After the initial cash on hand has been established, the government must, for each subsequent year, determine the amount of any prior cash that the defendant still had on hand as well as any additional cash the defendant received during the particular year. Any cash on hand acquired during a prosecution year which is still on hand at the end of that year will increase the defendant's net worth (unless the cash on hand was derived from a nontaxable source, such as a gift or inheritance).

In some instances, cash on hand may be appropriately reflected as zero. *See, e.g.*, ***United States v. Mastropieri***, 685 F.2d 776, 779 (2d Cir.1982); ***United States v. Goichman***, 407 F. Supp. 980, 986 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976). In other instances, the evidence may be such that cash on hand can be reflected as a nominal amount. *See, e.g.*, ***United States v. Carriger***, 592 F.2d 312, 314 (6th Cir. 1979) (cash on hand had no effect on the defendant's net worth because the evidence established that the defendant had $500 in cash on hand at the beginning of the prosecution period and $500 on hand at the end of the prosecution period); ***United States v. Goldstein***, 685 F.2d 179, 181 (7th Cir. 1982) ($100).

The facts of a case may be such that the evidence justifies an assumption that any cash on hand that did exist remained constant, though unknown, throughout the period covered. This situation arose in ***United States v. Giacalone***, 574 F.2d 328 (6th Cir. 1978). In ***Giacalone***, the defendant was a professional gambler, and the net worth statement assumed the existence of a bank roll of cash which remained approximately the same throughout the period covered. 574 F.2d at 332. In its computation, the government used a dash rather than a dollar amount to represent the cash on hand. The dashes symbolized an unknown, presumably constant, amount. ***Id***. at 331-32. The court concluded that the use of dashes did not invalidate the net worth statement and that "[t]he effect of using the dashes is no different from the use of zeroes approved in ***United States v. Goichman***, [407 F. Supp. 980 (E.D. Pa. 1976), *aff'd*, 547 F.2d 778 (3d Cir. 1976)]." ***Giacalone***, 574 F.2d at 333. Reflecting cash on hand with dashes was a practical solution because it avoided "the untenable assumption that a professional gambler could operate without any cash." ***Giacalone***, 574 F.2d at 333. *Accord*, ***United States v. Scrima***, 819 F.2d 996, 999

(11th Cir. 1987) (floating cash or "dash" method approved in prosecution of a marijuana smuggler).[3]

The government need not prove the cash on hand at the beginning of each year with evidence independent of the other years. ***United States v. Goldstein***, 685 F.2d 179, 181 (7th Cir. 1982); *accord* ***United States v. Pinto***, 838 F.2d 426, 431-32 (10th Cir. 1988).

31.7 EVIDENCE OF CASH ON HAND

31.07[1] Effective Rebuttal to Cash Hoard Defense

Evidence developed during the course of a thorough financial investigation may be used to prove actions inconsistent with a cash hoard. For example, an individual with a cash hoard would not

- withdraw money at ATMs in $20-$40-$60 increments;
- obtain high interest rate loans;
- borrow relatively small amounts of money from friends/relatives to buy assets or pay bills;
- pay high fees to cash checks;
- be charged NSF fees for bounced checks in his or her bank account;
- pay over time for appliances, furniture, carpeting, etc.; or
- engage in other spending, or manifest a *lack* of spending, inconsistent with a person who had access to significant sums of currency.

In establishing cash on hand and disproving a claim of a cash hoard, the government may use circumstantial evidence. In ***Holland v. United States***, 348 U.S. 121, 132 (1954), the defendants claimed opening cash on hand of $113,000, and the government allowed $2,153.09. The government did not introduce any direct evidence to

[3] There also may be instances where the government investigation indicates a negative cash position, *i.e.*, that an analysis of the defendant's financial transactions in years prior to the prosecution period indicates that the defendant spent more than was available on the basis of his prior returns.

dispute the defendant's claim. Instead, the government relied on the inference that anyone who had the cash the defendants claimed to have had would not have "undergone the hardship and privation endured by the Hollands all during the late 20's and throughout the 30's." ***Id***. at 133. The case also provides an excellent example of a thorough investigation, in which the government traced the financial picture of the Hollands as far back as 1913 (the first prosecution year was 1948), and serves as a model for the type of circumstantial evidence that is admissible to refute a cash hoard defense. Another example of the government's defeating a cash hoard defense by "painstakingly" tracing the defendant's finances over a period of years is in ***Friedberg v. United States***, 348 U.S. 142, 143 (1954) (decided the same day as ***Holland***); *see also* ***United States v. Carter***, 462 F.2d 1252, 1255-56 (6th Cir. 1972); ***United States v. Ford***, 237 F.2d 57, 59-63 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957); ***Gariepy v. United States***, 189 F.2d 459, 461-62 (6th Cir. 1951).

It is not sufficient for the government to prove that the defendant was poor at an early point in his life; the government must introduce evidence that demonstrates the defendant's financial history up to the opening net worth of the first prosecution year, the starting point for the net worth computation.

31.07[2] Admissions of Defendant

In establishing an opening net worth, the government will often rely on statements made by the defendant to third parties as well as to investigating agents. *See, e.g.*, ***United States v. Goldstein***, 685 F.2d 179, 182 (7th Cir. 1982) (admissions in the form of financial statements); ***Holland v. United States***, 348 U.S. 121, 128 (1954) (statements made to agents). Statements made by a defendant regarding his financial assets may be introduced at trial as admissions. Fed. R. Evid. 801(d)(2)(A).

A defendant's loan applications and financial statements provided to financial institutions are excellent evidence to establish cash on hand prior to prosecution years and to rebut a cash hoard defense. A distinction must be made, however, between admissions made by a defendant prior to the crime (pre-offense admissions) and admissions made after the crime (post-offense admissions).

31.07[2][a] Pre-Offense Admissions

Admissions made by a defendant prior to the crime do not have to be corroborated. ***Warszower v. United States***, 312 U.S. 342, 347 (1941); ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984); ***United States v. Hallman***, 594 F.2d 198, 200-01 (9th Cir. 1979) (*per curiam*) (corroboration not required of admission in financial statement filed by the defendant with a bank prior to the investigation conducted by the Internal Revenue Service); ***Fowler v. United States***, 352 F.2d 100, 107 (8th Cir. 1965) (loan application was filed before crimes in controversy occurred, and admissions made on application need not be corroborated).

31.07[2][b] Post-Offense Admissions

As a general rule, post-offense admissions must be corroborated. ***United States v. Calderon***, 348 U.S. 160, 163-65 (1954); ***Smith v. United States***, 348 U.S. 147, 152-53 (1954). Generally speaking, in a criminal tax case, a post-offense admission would be a statement made after the filing of a false tax return or, if no return was filed, after the tax return was due.

In ***Smith***, the defendant's opening net worth was based on a signed net worth statement given to the investigating agents by the defendant, as well as other extrajudicial admissions made by the defendant. 348 U.S. at 152. The Court found that the government could corroborate the defendant's statement in one of two ways: either (1) by substantiation of the opening net worth directly or (2) by independent evidence as to the defendant's conduct during the prosecution years "which tends to establish the crime of tax evasion without resort to the net worth computation." ***Smith***, 348 U.S. at 157-58. The government successfully relied on the second method to corroborate the defendant's post-offense admissions in ***Calderon***, by showing a substantial increase in the defendant's assets that were sufficiently at variance with his reported income to support an inference of tax evasion. ***Calderon***, 348 U.S. at 166-67.

Corroborative evidence of post-offense statements by a defendant regarding cash on hand is sufficient if it shows a substantial income deficiency for the overall prosecution period. It is not necessary for the corroborative evidence, as opposed to the evidence as a whole, to establish that there was a deficiency for each of the years in issue. ***Calderon***, 348 U.S. at 168; *accord* ***United States v. Vardine***, 305 F.2d 60, 64-65 (2d Cir. 1962) (evidence that defendant periodically borrowed money to meet payrolls and other indebtedness and that there were frequently judgments outstanding against him tended to corroborate figures defendant gave to agents).[4]

The Fifth Circuit, however, has held that it is not always necessary to corroborate post-offense admissions as to cash on hand. In ***United States v. Normile***, 587 F.2d 784, 786 (5th Cir. 1979), proof of cash on hand was based on the defendant's statement to the agent that "he kept no more than $100 in cash because he did not feel safe having larger amounts around." In response to the defendant's claim that the government failed to corroborate this statement, the court stated that it "was not necessary for the government to seek to corroborate the taxpayer's statement; indeed the inherent secrecy of the cash hoard makes it impossible for any but the keeper to know even of its existence, let alone the amount." ***Normile***, 587 F.2d at 786. Nevertheless, the court found that independent evidence of substantial bank accounts did "tend to corroborate" the defendant's admission, even though the government introduced no evidence to corroborate the admission directly. ***Id***. at 786-87; *see* ***United States v. Terrell***, 754 F.2d 1139, 1147 (5th Cir. 1985) (corroboration requirement does not necessarily extend to admissions relating to cash-on-hand); ***United States v. Scrima***, 819 F.2d 996 n.3 (11th Cir. 1987) ("the government is not required to corroborate the taxpayer's statement with respect to his cash on hand at the beginning of the tax period. After everything possible is done to verify the opening net worth, the issue of the amount of the defendant's cash hoard is properly submitted to the jury."); ***United States v. Wilson***, 647 F.2d 534, 536 n.1 (5th Cir. 1981) (*per curiam*); *but see* ***United States v. Meriwether***, 440 F.2d 753, 756-57 (5th Cir. 1971) (reversing for instructional error where "[t]he jury, if properly instructed, might well have failed to find any sufficient corroboration of [the defendant's] cash on hand").

31.07[3] Tax Returns As Admissions

"Statements made in an income tax return constitute admissions." ***United States v. Dinnell***, 428 F. Supp. 205, 208 (D. Az. 1977), *aff'd without published opinion*, 568 F.2d 779 (9th Cir. 1978); *see* ***United States v. Hornstein***, 176 F.2d 217, 220 (7th Cir. 1949) (cost of goods sold). Items reported on tax returns that are the subject of the prosecution, as well as tax returns filed in prior years, are pre-offense admissions which do not have to be corroborated. ***United States v. Burkhart***, 501 F.2d 993, 995 (6th Cir. 1974) (citing

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[4] Where corroboration is required, the jury should be instructed on that requirement. *See* ***United States v. Marshall***, 863 F.2d 1285, 1288 (6th Cir. 1988) (reversing a jury verdict because the jury was not instructed that a defendant's extrajudicial statements must be corroborated with independent evidence).

cases). The government may take the defendant's reported income as an admitted amount earned from designated sources. A defendant's tax returns are admissible as statements under Fed. R. Evid. 801(d)(2)(A).

The defendant's income tax returns are frequently used in a net worth case as a guide in determining the defendant's net worth at the starting point. *See, e.g.*, ***United States v. Mackey***, 345 F.2d 499, 504 (7th Cir. 1965). Admissions found in the defendant's tax returns for earlier years can be particularly helpful in negating a cash hoard defense when the returns show that reported income in previous years was insufficient to enable the defendant to save any appreciable amount of money. ***Friedberg v. United States***, 348 U.S. 142, 143-44 (1954); ***Holland v. United States***, 348 U.S. 121, 133-34 (1954); ***United States v. Terrell***, 754 F.2d 1139, 1147 (5th Cir. 1985); ***United States v. Hamilton***, 620 F.2d 712, 715 (9th Cir. 1980); ***United States v. Bush***, 512 F.2d 771, 772 (5th Cir. 1975) (*per curiam*) (defendant's tax return reflecting zero cash on hand supported government position); ***United States v. Ross***, 511 F.2d 757, 761 (5th Cir. 1975); ***United States v. Carter***, 462 F.2d 1252, 1255-56 (6th Cir. 1972); ***United States v. Northern***, 329 F.2d 794, 795 (6th Cir. 1964) (*per curiam*) (value of machines in inventory taken from defendant's tax return); ***Leeby v. United States***, 192 F.2d 331, 333 (8th Cir. 1951).

31.07[4] Statements Given to Financial Institutions

Loan applications and financial statements given to financial institutions are valuable evidence to prove a defendant's cash on hand and to identify other assets and liabilities. In ***United States v. Dwoskin***, 644 F.2d 418, 420 (5th Cir. Unit B 1981), the government established the defendant's opening net worth, including cash on hand and cash unrestricted in banks, based on a signed financial statement the defendant had submitted to a bank. The government did not include in its cash on hand figure $11,000 in an account on which the defendant held as a trustee for his children because there was no evidence that the defendant used the funds. ***Id***.

Financial statements also can be used to impeach a defendant testifying at trial. Thus, in ***Bateman v. United States***, 212 F.2d 61, 67 (9th Cir. 1954), the defendant testified that he had $13,000 in cash, and the government introduced, "as competent impeaching evidence," a financial statement that the defendant had given a bank showing cash of only $100.

31.07[5] Defendant's Books and Records

The defendant's business books and records may be introduced as admissions and as records of a regularly conducted business activity pursuant to Fed. R. Evid. 803(6). *See* ***United States v. Hornstein***, 176 F.2d 217, 220 (7th Cir. 1949). The defendant's books and records may be used to establish the value of assets and liabilities in the opening net worth computation as well as to refute an attack on the computation of cash on hand. For example, in ***United States v. Mackey***, 345 F.2d 499, 505-06 (7th Cir. 1965), an annual statement of the defendant's corporation revealed that the corporation had less cash than the amount claimed by the defendant. Finally, the defendant's books and records are useful to establish the defendant's financial status in years prior to prosecution and the defendant's business activities during the prosecution years.

31.7 [6] Statements of Accountants and Attorneys

When the defendant directs the investigating agents to his or her accountant or bookkeeper for questions relating to taxes, any statements made by the accountant or bookkeeper constitute admissions of the defendant under Rule 801(d)(2)(D) of the Federal Rules of Evidence, irrespective of whether the defendant has authorized the making of the particular statement. *See* ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974) (*per curiam*). And because admissions by a party opponent do not constitute hearsay, the investigating agents may properly testify at trial about those statements. ***United States v. Diez***, 515 F.2d 892, 896 n.4 (5th Cir. 1975); ***Hayes v. United States***, 407 F.2d 189, 192 (5th Cir. 1969). Statements of the defendant's bookkeeper or accountant when authorized by the defendant to make a statement concerning the subject are also admissible. Fed. R. Evid. 801(d)(2)(C); ***Parks***, 489 F.2d at 90.

These cases relied upon the absence of an accountant-client privilege because the defendant, knowing that mandatory disclosure of much of the information therein is required on an income tax return, had no reasonable expectation of privacy in documents and information provided to return preparers. ***Couch v. United States***, 409 U.S. 322, 333-34 (1973). The Court in ***Couch*** also noted that no confidential accountant-client privilege exists under federal law and that no state-created privilege has been recognized in federal cases. 409 U.S. at 335.

Note that the cases discussed above were decided prior to the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (the Act). Section 7525 of the Internal Revenue Code now provides:

> Confidentiality privileges relating to taxpayer communications
>
> (a) Uniform application to taxpayer communication with federally authorized practitioners.--
>
> > (1) General rule.--With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.
> >
> > (2) Limitations.--Paragraph (1) may only be asserted in --
> >
> > > (A) any noncriminal tax matter before the Internal Revenue Service; and
> > >
> > > (B) any noncriminal tax proceeding in Federal court brought by or against the United States.
> >
> > (3) Definitions.--For purposes of this subsection--
> >
> > > (A) Federally authorized tax practitioner.--The term 'federally authorized tax practitioner' means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.
> > >
> > > (B) Tax Advice.--The term 'tax advice' means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph(A).

Thus, by its own terms, the Act does not create an unlimited accountant-client privilege. The Act provides that the privilege may only be asserted in (A) any non-criminal tax matter before the Internal Revenue Service and (B) any non-criminal tax proceeding in Federal court brought by or against the United States. IRC § 7525(2)(A) &

(B). Furthermore, it only applies to communications between a defendant and a federally authorized practitioner. Thus, the privilege is not available in a criminal investigation or criminal court proceeding, but would apply in the context of a civil audit.

Additionally, the Act specifically excludes from the privilege any written communications regarding corporate tax shelters. 26 U.S.C. § 7525(b). That Section provides:

> (b) Section not to apply to communications regarding corporate tax shelters.--The privilege under subsection (a) shall not apply to any written communication which is--
>
> (1) between a federally authorized tax practitioner and--
>
> (A) any person,
>
> (B) any director, officer, employee, agent, or representative of the person, or
>
> (C) any other person holding a capital or profits interest in the person, and
>
> (2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662(d)(2)(C)(ii)).

"Person" is defined under Internal Revenue Code Section 7701(a)(1) as "an individual, a trust, estate, partnership, association, company or corporation." Tax shelters are defined under § 6662(d)(2)(C)(ii):

> (ii) Tax shelter....... [T]he term 'tax shelter' means--
>
> (I) a partnership or other entity,
>
> (II) any investment plan or arrangement, or
>
> (III) any other plan or arrangement,
>
> if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.

26 U.S.C. § 6662(d)(2)(C)(ii). Thus, *written* communications with a representative of a corporation in connection with efforts to persuade the corporation to participate in a tax shelter are excluded from the privilege.

In cases in which the accountant has been employed by the defendant's attorney to assist the attorney in communicating with the client and rendering legal advice, statements of the accountant may fall within the attorney-client privilege. *See* ***United States v. Gurtner***, 474 F.2d 297, 298-99 (9th Cir. 1973); ***United States v. Mierzwicki***, 500 F. Supp. 1331, 1335 (D. Md. 1980). The most familiar situation occurs when the attorney hires an accountant to assist the attorney's representation of the defendant. *See* ***United States v. Kovel***, 296 F.2d 918, 920-23 (2d Cir. 1961). A ***Kovel*** accountant is protected by an extension of the attorney-client privilege.

In the case of attorneys, statements made by a defendant's attorney may be admissible as admissions of a party-opponent pursuant to Fed. R. Evid. 801(d)(2) if it is shown that the statements are not barred by the attorney-client privilege. A statement by a defendant's attorney is not privileged if it was authorized by the client and concerned the subject authorized. ***United States v. Ojala***, 544 F.2d 940, 945-46 (8th Cir. 1976). In ***Ojala***, the court admitted into evidence the attorney's statement that the defendant's failure to file was not the result of his political beliefs. ***Id***. at 945. The court found that the "statements were made in an unequivocal manner by one who was acting as the appellant's attorney at the time, and that they referred to a matter within the scope of the attorney's authority." ***Id***. at 946. The court also noted that the defendant was present when the statement was made and voiced no objection. ***Id.***

Another court admitted into evidence a statement by a defendant's attorney which contradicted the defendant's assertion that he had filed his tax returns. ***United States v. O'Connor***, 433 F.2d 752, 755 (1st Cir. 1970). The ***O'Connor*** court observed that the attorney's statement did not exceed the scope of the attorney's actual authority. ***Id***. at 756. The court further observed that it might rule otherwise if there had been evidence that the defendant told his attorney not to make the statement or to "confine himself to the position adopted by defendant." ***Id***. The court found that it was "clearly within the power and duty of the attorney to do what he could, in his own best judgment, [to aid the defendant]." ***Id.***

Note, however, that courts have generally held that the preparation of tax returns does not constitute legal advice within the scope of the attorney-client privilege. ***United States v. Frederick***, 182 F.3d 496, 500-01 (7th Cir. 1999); ***In Re Grand Jury Investigation (Schroeder)***, 842 F.2d 1223, 1224 (11th Cir. 1987) (collecting cases); ***United States v. Lawless***, 709 F.2d 485, 487-88 (7th Cir. 1983); ***United States v. El Paso***, 682 F.2d 530, 539 (5th Cir. 1982); ***United States v. Gurtner***, 474 F.2d 297, 298-99 (7th Cir. 1973); *but see* **Colton v. United States**, 306 F.2d 633, 637 (2d Cir. 1962) ("There can, of course, be no question that the giving of tax advice and the preparation of tax returns . . . are basically matters sufficiently within the professional competence of an attorney to make them prima facie subject to the attorney-clientprivilege.").

31.07[7] Accountant's Workpapers

An accountant's workpapers can be useful in establishing opening net worth figures for cash on hand, other assets, and liabilities. An accountant's workpapers are records that the accountant kept in the ordinary course of business, and they should be admissible as exceptions to the hearsay rule pursuant to Fed. R. Evid. 803(6). Ordinarily, the accountant will testify that he or she obtained the information upon which he or she relied either from the defendant directly or from an employee providing information on the defendant's behalf.

31.7 [8] Analysis of Source and Application of Funds to Establish Opening Cash on Hand

Another method of establishing an opening cash on hand figure is to analyze the defendant's available finances for the years leading up to the starting point. This method is known as a source and application of funds. Using this method, the government determines the amount of money available to the defendant during the earlier years and the amount that the defendant spent.

For example, if the evidence demonstrates that the defendant had $100,000 available from all sources, both taxable and nontaxable and that the defendant spent $90,000, this would leave only $10,000 as cash on hand. This was the approach taken in ***United States v. Terrell***, 754 F.2d 1139, 1143 (5th Cir. 1985), in which, on the basis of a source and application of funds analysis showing that the defendant's expenditures in prior years exceeded his reported income plus nontaxable gifts by $229,000, the defendant was not credited with any cash on hand. As in the case of establishing opening net worth, a thorough investigation is required to support a source and application of funds analysis sufficient to establish cash on hand with reasonable certainty. ***Terrell***, 754 F.2d at 1146-47; ***United States v. Goichman***, 407 F. Supp. 980, 994-95 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

31.8 NET WORTH ASSETS

31.08[1] Reflected at Cost -- Generally

As a general rule, when establishing the net worth of a defendant, assets are reflected at cost and not at fair market value. Thus, if a defendant buys a house for $350,000, the house is reflected as a net worth asset at $350,000, even though the house may be worth $600,000 in the year for which the defendant's net worth is being determined. This is because the net worth method is concerned with actual costs and expenditures; an increase in value may result from appreciation rather than the receipt of taxable income. ***United States v. O'Connor***, 237 F.2d 466, 473 n.6 (2d Cir. 1956). *See* ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir. 1985) (using a cost basis to determine net worth means that assets preexisting the indictment period are a source of nontaxable funds only to the extent of basis); ***Hayes v. United States***, 407 F.2d 189, 193 (5th Cir. 1969) (cost of partially constructed apartments taken from defendant's income tax return; and cost of land based on information furnished by the defendant's accountant).

As an exception to this general rule, cost is not used when the Internal Revenue Code dictates that a basis other than cost be used in determining tax consequences. Some examples of situations where an asset would be reflected at a figure other than cost are inheritances (*see* 26 U.S.C. § 1014(a)(1), basis of property acquired from a decedent is the fair market value of the property at the date of the decedent's death) and gifts (*see* 26 U.S.C. § 1015, basis of property acquired by gifts and transfers in trust shall be the same as it would be in the hands of the donor/grantor). Additionally, if services are paid for in property, then the fair market value of the property is included as compensation in gross income. Treas. Reg. § 1.61-2(d). In this situation, property received in exchange for services would be reflected at its fair market value in the net worthcomputation.

31.08[2] Across-the-BoardAssets

An across-the-board asset is an asset the defendant owned in the opening year and continued to own throughout the prosecution years, with no increase or decrease in the cost of the asset. Since a net worth computation measures changes, an across-the-board asset does not affect a defendant's net worth. For example, assume that the prosecution years are 2005 through 2008 and the defendant purchased stock for $10,000 in 2004 and still owned the same stock at the end of 2008. There would be no change in the basis of the stock, and the effect on the defendant's net worth would be zero. Because an across-the-board asset does not affect the net worth computation, it has been held that it is not error to leave such an asset out of the net worth computation. ***United States v. Mackey***, 345 F.2d 499, 505 (7th Cir. 1965).

It is sufficient for the government to identify with reasonable specificity the basis in every asset, including cash, with respect to which a purchase or sales transaction occurred in the tax years in question. It is not necessary for the government to establish the basis for every asset the defendant owns. ***United States v. Schafer***, 580 F.2d 774, 778 (5th Cir. 1978). As long as omitted assets were across-the-board assets, there would be no affect on the net worth computation.

In ***United States v. Tolbert***, 406 F.2d 81, 84 (7th Cir. 1969), the government's net worth computation reflected the defendant's accounts receivable as an across the board asset for all of the years in question. The government figure was based on a statement the defendant had given the agents. ***Id***. There was testimony at the trial that the accounts receivable had increased during the prosecution years. ***Id***. The court rejected the defendant's argument that it was reversible error not to reflect the alleged increase, observing that if the accounts receivable did increase during the prosecution years, the error in failing to reflect the increase was in the defendant's favor and did not prejudice him. ***Id***. The court determined that there would be prejudice only if the evidence showed that the accounts receivable had decreased during the prosecution years (because this would have been a source of funds for cash received or spent during the prosecution years). ***Tolbert***, 406 F.2d at 84; *see also* ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987) ("government employed the floating cash or dash formula where cash is an unknown but constant factor throughout the net worth period"); ***United States v. Terrell***, 754 F.2d 1139, 1145 (5th Cir. 1985); ***United States v. Dwoskin***, 644 F.2d 418, 421 (5th Cir. Unit B 1981).

31.08[3] Bank Accounts and Nominee Accounts

Money in the bank represents an asset in a net worth computation. In the usual situation, it is a relatively simple matter to determine how much money the defendant had in the bank at the end of each year, with the balance being reflected in the net worth statement. A bank reconciliation must be done to subtract outstanding checks and to add in transit deposits to properly reflect the balance at the end of the year.

When tax fraud is taking place, it is quite common for the defendant to intentionally maintain bank accounts that are not in his or her own name, instead placing them in the names of friends, relatives, or business entities. From an analysis of the deposits made and checks written on the account, the government may be able to establish that the funds are actually the defendant's and that the name on the bank account is nothing more than an attempt to conceal the defendant's control of the account. In such an instance it is proper to include the bank account as an asset in the defendant's net worth computation. In ***United States v. Balistrieri***, the Seventh Circuit rejected the defendant's attack on the propriety of including in his net worth computation cash that had been deposited into a joint bank account held in the defendant's name and the name of his nineteen-year- old son. The court found that the jury had ample grounds to believe that the money was in fact the defendant's, since the government proved that the defendant controlled the account and withdrew a substantial amount from it. ***Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968), *vacated and remanded on other grounds*, 395 U.S. 710 (1969), *aff'd after remand*, 436 F.2d 1212 (7th Cir. 1971); *see also* **Talik v. United States**, 340 F.2d 138, 141 (9th Cir. 1965) (attributing to defendant entire balance in joint bank account held in names of defendant and defendant's daughter was justified because either the account belonged to defendant or any money belonging to daughter was a gift from her parents).

31.08[4] Assets and Liabilities of Husband and Wife or Children

In determining a defendant's opening net worth, consideration must be given to assets and liabilities of a non-defendant spouse and children to determine whether or not they should be included in the net worth computation. If the net effect of inclusion would be *de minimis*, such assets and liabilities need not be included in the government's computation. *See* ***United States v. Goichman***, 407 F. Supp. 980, 995-96 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976). A failure to conduct such an investigation of the defendant's spouse resulted in a reversal in ***United States v. Meriwether***, 440 F.2d 753 (5th Cir. 1971). The court held that the government failed to establish with reasonable certainty a definite opening net worth of the joint income of Meriwether and his wife, saying that the government "came near ignoring Mrs. Meriwether." ***Meriwether***, 440 F.2d at755-57.

In contrast, the Ninth Circuit held that the government is not required to establish the net worth of the defendant's spouse as part of its prima facie case. ***United States v. Hallman***, 594 F.2d 198, 200 (9th Cir. 1979) (*per curiam*). Instead, the government's duty to investigate spousal assets arises only under its obligation to negate reasonable explanations or leads furnished by the defendant. ***Id***. A thorough financial investigation should always consider the assets and liabilities of a spouse.

A somewhat different issue is whether the government can use a joint net worth statement for both husband and wife. The Fifth and Sixth Circuits have answered in the affirmative. In ***United States v. Brown***, 667 F.2d 566 (6th Cir. 1982) (*per curiam*), both husband and wife were tried and convicted of income tax evasion. The court concluded that the government's use of a joint net worth statement was "justified in this case," even though the wife was the nominal owner of the business that was the source of the unreported income, because "the financial affairs of the two defendants were so intertwined as to justify a joint reconstruction of their income." ***Brown***, 667 F.2d at 568. In a non-defendant spouse case, ***United States v. Giacalone***, 574 F.2d 328, 333 (6th Cir.1978), the government's evidence showed that the defendant's wife earned no income prior to and during the prosecution years, that she made some nondeductible expenditures with funds furnished by her husband, and that she and her husband filed joint returns. Because the defendant was charged with attempting to evade taxes owed by both him and his wife and "her financial transactions were intertwined with those of her husband," the court approved the government's use of a joint net worth statement. ***Id***. In ***United States v. Smith***, 890 F.2d 711, 714 (5th Cir. 1989), the Fifth Circuit relied on ***Brown*** and ***Giacalone*** in rejecting a defendant's claim that the government was required to exclude assets of the defendant's spouse and child to ensure the accuracy of the net worth analysis. In ***Smith***, the government excluded both the income of the defendant's daughter and gifts to the defendant's wife and daughter before arriving at a final net worth determination of the defendant and his spouse. 890 F.2d at 714. The court of appeals approved the government's action, stating that the "fabric of the financial blanket is so closely woven that a computation of net worth on the joint income of the spouses is clearly permissible." ***Id***.

31.08[5] Real Property

Real property is reflected in the net worth computation at cost. Direct evidence of the cost is commonly established through the transfer tax charged when the deed was recorded, as the tax is usually a percentage of the sales price. Certified copies of public records such as deeds and mortgages are admissible as hearsay exceptions. Fed. R. Evid. 803(14). In addition, escrow files of title companies should be obtained to identify the source of funds used to purchase the real estate. These records would also be admissible under the business records hearsay exception. Fed. R. Evid. 803(6).

31.08[6] Partnership Interest

When the defendant has invested money in a partnership, the defendant's share of the partnership capital is reflected as an asset. ***United States v. Mancuso***, 378 F.2d 612, 614-15 (4th Cir.), *amended*, 387 F.2d 376 (4th Cir. 1967). In ***Mancuso***, the government had little direct evidence to establish the percentage interest the defendant had in the partnership. 378 F.2d at 615. Therefore, the government allocated an equal share of the partnership capital to all the partners, including the defendant, which corresponded to the distribution of profits as reported on the partnership tax returns. ***Id***. at 615-16. The government agent testified that this "conformed to the ordinary legal presumption that in absence of evidence of an agreement to the contrary the partners' interests are equal." ***Id***. at 616.

31.8 [7] Errors in Net Worth Computation

If there is an error in the net worth computation for one of the prosecution years, the error will not necessarily affect other prosecution years. ***United States v. Keller***, 523 F.2d 1009, 1012 (9th Cir. 1975) (error did not carry over to a subsequent year since the asset was disposed of in the prior prosecution year). Moreover, even if an error does affect all of the prosecution years, the government is not required to prove its case to a mathematical certainty. If a substantial understatement remains after accounting for the error, then a guilty verdict will be upheld. ***Id***.

31.9 LIABILITIES

The government must present evidence of a defendant's liabilities. These liabilities are subtracted from assets in arriving at the defendant's net worth. As with assets, the defendant's liabilities must be established with reasonable certainty. For examples of evidence establishing liabilities, *see* ***United States v. Schafer***, 580 F.2d 774, 780 (5th Cir. 1978). Testimony by the investigating agent as to the amount of an asset, a liability, or any item in the net worth computation, is inadmissible hearsay without independent documentation or third-party testimony. *See* ***United States v. Morse***, 491 F.2d 149, 153-55 (1st Cir. 1974) (a bank deposits case, but the principle is applicable to a net worth case).

Conversely, when the agent's investigation reveals that there were no liabilities, the agent can testify about his or her personal efforts to identify liabilities and inability to find any liabilities. Such testimony is based upon what action was taken and thus is not hearsay. ***United States v. Dwoskin***, 644 F.2d 418, 423 (5th Cir. Unit B 1981); ***Morse***, 491 F.2d at 154 n.8; ***United States v. Lanier***, 578 F.2d 1246, 1255 (8th Cir. 1978); ***United States v. Robinson***, 544 F.2d 110, 114-15 (2d Cir. 1976); ***United States v. Jewett***, 438 F.2d 495, 497-98 (8th Cir. 1971); ***United States v. DeGeorgia***, 420 F.2d 889, 891-92 (9th Cir. 1969); ***Charron v. United States***, 412 F.2d 657, 660 (9th Cir. 1969); ***McClanahan v. United States***, 292 F.2d 630, 637 (5th Cir. 1961) ("[t]his, in fact, is frequently the only way in which a negative fact can be proved"). *See also* Fed. R. Evid. 803(7) and 803(10).

31.10 NONDEDUCTIBLE EXPENDITURES

31.10[1] Added to Net Worth Increase

When the ending net worth is subtracted from the opening net worth, the result is called the net worth increase. This amount is further adjusted by adding the defendant's nondeductible expenditures during the year, including living expenses, for items which are not reflected as assets on the net worth statement. ***Holland v. United States***, 348 U.S. 121, 125 (1954); ***United States v. Terrell***, 754 F.2d 1139, 1144 (5th Cir. 1985); ***United States v. Hamilton***, 620 F.2d 712, 714 n.1 (9th Cir. 1980); ***United States v. Skalicky***, 615 F.2d 1117, 1119 (5th Cir. 1980) (citing ***Holland***); ***United States v. Hiett***, 581 F.2d 1199, 1200 n.1 (5th Cir. 1978). "The taxpayer's nondeductible expenditures are added to the adjusted net values of the defendant's assets at the end of the subject year and, consequently, increase the figure to be compared with the opening net worth." ***Hamilton***, 620 F.2d at 716; *see also* ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987).

31.10[2] Burden on Government

The government has the burden of establishing that the expenditures added to the net worth increase are nondeductible expenditures, as opposed to deductible expenses such as business expenses. Any addition to the net worth increase must be limited to nondeductible expenditures. ***Fowler v. United States***, 352 F.2d 100, 103 (8th Cir. 1965). The government must establish the nature of an expenditure by independent documentary or testimonial evidence. Admissions by the defendant may establish whether expenditures are personal or business. Checks with a notation of "personal" written on them constitute a pre-offense admission. ***Fowler***, 352 F.2d at 103; *see also* **United States *v. Altruda***, 224 F.2d 935, 939-40 (2d Cir. 1955) (admitted personal living expenses added to the net worth increase). It is improper to designate an expenditure as personal based solely on a review of the defendant's checks by the investigating agent and the agent's testimony that a check is either for a personal or business purpose. The agent's testimony is inadmissible hearsay. ***Greenberg v. United States***, 280 F.2d 472, 476-77 (1st Cir. 1960).

A nondeductible expenditure made by or on behalf of a spouse, child, or any third party can be added to the defendant's net worth increase, where it can be shown that the defendant furnished the funds for the expenditure. ***United States v. Giacalone***, 574 F.2d 328, 333 (6th Cir. 1978) (government proof traced a number of nondeductible expenditures by the wife to funds furnished by the defendant); *cf.* ***United States v. Lawhon***, 499 F.2d 352, 355-56 (5th Cir. 1974) (defendant provided funds for certificates of deposit held in the names of children); ***United States v. Balistrieri***, 403 F.2d 472, 479 (7th Cir. 1968) (funds deposited by defendant into bank account in name of defendant and his minor son), *vacated and remanded on other grounds*, 395 U.S. 710 (1969), *aff'd after remand*, 436 F.2d 1212 (7th Cir. 1971).

31.10[3] Nondeductible Expenditures -- Examples

> Proof of non-deductible expenditures such as food, clothing, shelter and gifts is one factor in the net worth and expenditures method of proof Government tax experts routinely add living expenses to their net worthschedules.

United States v. Scott, 660 F.2d 1145, 1173 (7th Cir. 1981); *see* ***United States v. Hamilton***, 620 F.2d 712, 716 (9th Cir. 1980).

In ***Scott***, the only daily living expense the government included in its net worth calculation was food. As Attorney General of the State of Illinois, Scott traveled on state business, and his travel vouchers were used as a basis for arriving at his unreimbursed food expenditures. ***Scott***, 660 F.2d at 1151. In addition to food expenses, the government's net worth computation included cash travel expenses for personal trips that the government was able to document and the purchases of a stamp collection and a diamond ring. ***Scott***, 660 F.2d at 1150-51.

Living expenses may be based on information provided by the defendant, often at an initial interview by investigating agents. A juror will know what the basic cost of living is in his or her own judicial district, but the government should document the expenditures by issuing subpoenas and conducting interviews. Sources of information could include the landlord or mortgage holder, the telephone company, the internet service provider, the cable company or satellite dish company, a health care provider, lienholder on vehicle, and a landscaping or pool cleaning service. With the prevalence of debit cards, it is important to remember that many retail outlets permit the cardholder to get cash back. Therefore bank statements in and of themselves are not sufficient to document funds spent on groceries -- a $100 withdrawal may be $50 in groceries and $50 cash back. Subpoena the records of each entity on the bank statement to determine the amount of the withdrawal that was actually used to obtain goods or services. Personal insurance premiums and federal income taxes paid by a defendant may also be added to the net worth increase. ***Dawley v. United States***, 186 F.2d 978, 980 (4th Cir. 1951). In ***Armstrong v. United States***, 327 F.2d 189, 192-93 (9th Cir. 1964), nondeductible expenditures included living expenses, payment of insurance premiums, fees paid to an attorney, bond premiums, and other nondeductible expenditures. Travel expenses were added to the net worth increase as nondeductible expenditures in ***United States v. Sorrentino***, 726 F.2d 876, 880 (1st Cir. 1984). Gifts, vacation trips, payments for a maid, and gifts for a spouse and third parties are further examples of nondeductible expenditures. ***United States v. Goichman***, 407 F. Supp. 980, 989 (E.D. Pa.), *aff'd*, 547 F.2d 778 (3d Cir. 1976).

Where the government is unable to trace expenditures for household goods or services, personal entertainment, or personal care items, the jury can properly conclude that the defendant must have incurred some expenses for these items and that such expenses would have added to the defendant's net worth increase and expenditures, beyond what the government proved. ***Scott***, 660 F.2d at 1151. Permitting the government's expert witness to testify that she did not take into consideration the defendant's personal expenditures for food and clothing in the net worth calculations does not permit the jury to improperly speculate as to the defendant's personal expenses. ***United States v. Notch***, 939 F.2d 895, 900 (10th Cir. 1991). In ***Notch***, the Tenth Circuit recognized that "[t]his conservative approach to the net worth computation made the analysis appear more credible" and can be viewed "as showing that the jury need not consider personal expenses in order to conclude that defendant understated his income." ***Id***.

31.11 REDUCTIONS IN NET WORTH

The purpose of the net worth computation is to arrive at taxable income, so the computation must reflect only items with tax consequences. Therefore, nontaxable items received by the defendant during the prosecution period must be eliminated or accounted for in the net worth computation. The following types of nontaxable items must be subtracted from the total reflecting the net worth increase and nondeductible expenditures: gifts received, inheritances, nontaxable pensions, the nontaxable portion of capital gains, veterans' benefits, dividend exclusions, tax-exempt interest, proceeds from life insurance, and any other nontaxable items.

An example of the treatment of such an item is found in ***United States v. Holovachka***, 314 F.2d 345 (7th Cir. 1963). In that case, the defendant had purchased bonds for investment purposes and received monies during the prosecution year representing the repayment of principal and nontaxable interest:

> Government treated the principal repayments as a tax free return of capital which correspondingly decreased defendant's investments in such bonds for those years. The yearly interest payments received on these bonds were considered to be tax free and were accordingly deducted from defendant's net worth. The trial court properly instructed the jury that the repayments of principal and the earned interest constituted non-taxable income.

Holovachka, 314 F.2d at 355.

Technical items and items that are clearly mistakes and not due to fraud are also deducted from the defendant's computed net worth. In a criminal tax case the purpose of the net worth computation is to measure the unreported taxable income based on intentional acts of the defendant. Thus, the underreporting of an income item as the result of an inadvertent error of the defendant, or of the defendant's accountant, should not be included in the defendant's net worth computation.

In ***United States v. Altruda***, 224 F.2d 935, 940 (2d Cir. 1955), the defendant's accountant explained to the examining agent prior to trial that the defendant had made "errors" in underreporting income from realty holdings, and the defendant was given credit for those amounts in the government's net worth computation. In ***United States v. Allen***, 522 F.2d 1229, 1231 (6th Cir. 1976), a technical adjustment was made, reducing the net worth computation to allow for an error discovered in one of the adding machine tapes used in preparing the defendant's return. The net effect was that the adjustment allowed the entire deduction claimed by the defendant on his return, and the defendant was not charged with the error in the net worth computation. ***Id***.

31.12 ATTRIBUTING NET WORTH INCREASES TO TAXABLE INCOME

31.12[1] Generally

The net worth method of proof requires evidence supporting "the inference that the defendant's net worth increases are attributable to currently taxable income." ***Holland v. United States***, 348 U.S. 121, 137 (1954); ***United States v. Dwoskin***, 644 F.2d 418, 422 (5th Cir. Unit B 1981); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1241 (9th Cir. 1971); ***United States v. Mackey***, 345 F.2d 499, 506 (7th Cir. 1965). "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income." ***Holland***, 348 U.S. at 137-38.

There are two ways of supporting an inference that net worth increases are attributable to currently taxable income:

1. Proof of a likely source of taxable income. ***Holland***, 348 U.S. at 137-38.

2. Negating non-taxable sources of income. ***United States v. Massei***, 355 U.S. 595, 595-96 (1958) (*per curiam*).

Either method is sufficient. *See* ***United States v. Sorrentino***, 726 F.2d 876, 879-80 (1st Cir. 1984); ***United States v. Scott***, 660 F.2d 1145, 1151 (7th Cir. 1981); ***Dwoskin***, 644 F.2d at 422; ***United States v. Grasso***, 629 F.2d 805, 808 (2d Cir. 1980); ***United States v. Hiett***, 581 F.2d 1199, 1201 (5th Cir. 1978). Nonetheless, in order to convince the jury that the government's financial investigation was very thorough, it may be wise to try to do both if possible.

31.12[2] Proof of Likely Source of Taxable Income

The government can establish a likely source of taxable income through direct or circumstantial evidence. The applicable rule requires "proof of a likely source, from which the jury could reasonably find that the net worth increases sprang." ***Holland v. United States***, 348 U.S. 121, 138 (1954). It is not necessary for the government to prove by direct evidence that the unreported income reflected by the net worth computation actually came from the likely source established. ***United States v. Mackey***, 345 F.2d 499, 506-07 (7th Cir. 1965); *see also* ***United States v. Smith***, 890 F.2d 711, 714 (5th Cir. 1989) (likely source of income could be indicated by business operations; investments in mineral interests, real estate, stocks, bonds, and commodities; and gambling activities); ***United States v. Greene***, 698 F.2d 1364, 1373 (9th Cir. 1983) (the government need not prove a specific source, but only a likely source, and evidence established real estate sales, interest income on loans, and unreported securities transactions as likely sources of taxable income); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1241-42 (9th Cir. 1971) (grocery store ownership provided likely source).

The government is not limited to showing a single likely source of taxable income but can introduce evidence of as many possible sources of taxable income as the investigation has developed. *See, e.g.*, ***Feichtmeir v. United States***, 389 F.2d 498, 502 (9th Cir. 1968) (evidence showed that the defendant had interests in eight operating businesses, investments in real estate, a trust deed, a joint venture, stocks and bonds, and an undisclosed Mexican source of income).

Likewise, the government does not have to show that the likely source was capable of generating the entire amount of unreported income charged in the indictment. ***United States v. Costanzo***, 581 F.2d 28, 33 (2d Cir. 1978). The court found that extensive proof supported the inference that the defendant's bakery was a likely source of unreported taxable income because the bakery was large enough to generate substantial amounts of unreported cash receipts. ***Id***.

Once the government has introduced evidence of a likely source of taxable income, the government has no burden to negate *all* possible nontaxable sources of the unreported income. Nonetheless, the government has an obligation in net worth cases to conduct a thorough financial investigation, which would include searching for common nontaxable sources of funds.

Evidence of specific items of unreported income is admissible to show a likely source from which the net worth increases may have come. ***United States v. Schafer***, 580 F.2d 774, 777 n.5 (5th Cir. 1978) (citing ***Holland***, 348 U.S. at 138). In ***United States v. Hagen***, 470 F.2d 110, 111 (10th Cir. 1972), the defendant claimed surprise and argued that the government introduced evidence as to specific items of unreported income to an extent that the specific items proof "changed the theory of the case or in any event overshadowed the net worth proof." Although the court agreed that the specific items evidence assumed such a large role at the trial that "at the end it became difficult to say whether it still was a net worth case," the court found no error. ***Id***. at 112. The court concluded that "the Government followed and met the requirements of ***Holland v. United States***. The evidence of specific items was proper as indicated to show willfulness, but it was also proper to show a likely source under ***Smith v. United States***, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 [(1954)] and ***United States v. Calderon***, 348 U.S. 160, 75 S.Ct. 186, 99 L.Ed. 202 [(1954)]." ***Hagen***, 470 F.2d at 113.

Confusion as to the government's method of proof can be avoided by clearly designating in a response to a motion for a bill of particulars and in proposed jury instructions the method of proof to be relied upon by the government. For example, net worth method and specific items method, or net worth method corroborated by specific items of unreported income.

31.12[3] Illegal Sources of Income

There is no requirement that the likely source of income be a legal source. ***James v. United States***, 366 U.S. 213 (1961). "[G]ross income means all income from whatever source derived ...." 26 U.S.C. § 61.

When illegal activity is the source of unreported income and the government can prove the crime of the illegal activity, it is advisable to indict both the tax crime and the crime that is the likely source of the unexplained wealth. If it is not charged, the court may limit the evidence to prove the illegal source of income, because of the possibility of undue prejudice. *See*, *e.g.*, ***United States v. Tunnell***, 481 F.2d 149, 151 (5th Cir. 1973) (likely source of the defendant's net worth increases could have been income from prostitution activities at a motel the defendant operated).

It must be clear that the purpose of introducing evidence of illegal activities is to establish a likely source of income, and the evidence must not be introduced or alluded to in a manner calculated to inflame the jury. In ***United States v. Abodeely***, 801 F.2d 1020, 1022 (8th Cir. 1986), the government presented evidence that the defendant derived his unreported income from illegal prostitution and from legal gambling activities. After a lengthy discussion of the Rule 403 probative value/prejudice balancing test, the court concluded that it had

> no conceptual difficulty with the evidence concerning prostitution. While it is certainly prejudicial, it is highly probative of unreported taxable income. The gambling evidence, while having less direct probative value, is much less prejudicial, and indeed if its admission was error (which this court does not conclude), the error was harmless beyond a reasonable doubt. After all, having been shown that Abodeely ran a bar and a brothel, even the most straitlaced Iowa jury could hardly have been adversely affected by a showing of his participation in the legal, though perhaps sinful and worldly in the eyes of a midwestern jury, activity of gambling in Nevada.

Abodeely, 801 F.2d at 1026; *see also* **United States v. Smith**, 890 F.2d 711, 716 (5th Cir. 1989) (defendant not unfairly prejudiced by introduction of evidence concerning his gambling activities); ***United States v. Tafoya***, 757 F.2d 1522, 1526-28 (5th Cir. 1985) (income from payments for attempted assassinations; bank deposits case); ***United States v. Vannelli***, 595 F.2d 402, 405-06 (8th Cir. 1979) (evidence of defendant's prior misdemeanor convictions of misappropriation of funds held admissible to show intent, opportunity, scheme, or plan from which unreported income could be derived and to show potential source of unreported income; bank deposits case); ***United States v. Windham***, 489 F.2d 1389, 1391 (5th Cir. 1974) (evidence of defendant's income from performing illegal abortions). The illegal sources for generating income are virtually limitless. *See, e.g.*, ***United States v. Dall***, 918 F.2d 52, 53 (8th Cir. 1990) (*per curiam*) (illegal importation of veterinary drugs); ***Clinkscale v. United States***, 729 F.2d 940, 942 (8th Cir. 1984) (*per curiam*) (prostitutes turned over to defendant income he failed to report).

Skimming of business receipts is another example of a likely source of taxable income which a jury could conclude accounts for the defendant's increase in net worth. *See* ***United States v. Koskerides***, 877 F.2d 1129, 1137-38 (2d Cir. 1989) (two diners operated as cash businesses may be likely source of unreported income where previous owner had much higher revenue than defendant and testimony indicated the possibility of skimming); ***United States v. Sorrentino***, 726 F.2d 876, 880 (1st Cir. 1984); ***United States v. Hamilton***, 620 F.2d 712, 715 (9th Cir. 1980) (jury could have found that the likely source of taxable funds was the illegal diversion of money from slot machinerevenues)[5] .

Testimony of customers can establish the source of income for narcotics traffickers. *See* ***United States v. Scrima***, 819 F.2d 996, 999 (11th Cir. 1987); ***United States v. Palmer***, 809 F.2d 1504, 1505 (11th Cir. 1987); ***United States v. Lewis***, 759 F.2d 1316, 1328, 1336 (8th Cir. 1985); ***United States v. Horvath***, 731 F.2d 557, 563 (8th Cir. 1984); ***United States v. Heyward***, 729 F.2d 297, 301 (4th Cir. 1984);[6] ***United States v. Enstam***, 622 F.2d 857, 860 (5th Cir. 1980); ***United States v. Browning***, 723 F.2d 1544, 1547 (11th Cir. 1984).

When the defendant has an illegal source of income and is not charged with the crime that gave rise to the income, the government should ensure that the jury instructions clearly state that the defendant is on trial for the particular tax offense, not for the illegal activity that is or may be the source of unreported income. *See* ***Windham***, 489 F.2d at 1389 (commenting that this was done in ***United States v. Tunnell***, 481 F.2d 149 (5th Cir. 1973)). Limiting instructions are also advisable. *See* ***Palmer***, 809 F.2d at 1505 (11th Cir. 1987) (trial court properly maintained jury's focus on tax issues and properly minimized any possible prejudice by giving clear limiting and final instructions).

[5] In ***Hamilton***, 620 F.2d 712 (9th Cir. 1980), the court upheld as admissible, and found most convincing, the testimony of a statistical expert who had examined the slot machines, reviewed their reported performance, compared their performance with similar machines at other casinos and with the manufacturer's built-in specifications, and concluded that the odds against the machines' performing as poorly as the records indicated were greater than two billion to one. ***Hamilton***, 620 F.2d at 715.

[6]This case is of particular interest because the court admitted evidence that the defendant's plane was found in Georgia in 1980 loaded with over 4,000 pounds of marijuana and the prosecution years were 1978 and 1979. ***Heyward***, 729 F.2d at301.

31.12[4] Negating Nontaxable Sources of Funds

It is well established that "[s]hould all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source." ***United States v. Massei***, 355 U.S. 595, 595 (1958) (*per curiam*). The Fifth Circuit summarized the government's burden where the defendant has failed to provide any leads as to nontaxable sources of funds:

> We therefore hold that in an income tax evasion case based on the net worth method of proof, when the taxpayer gives no leads as to nontaxable sources, the government satisfies its burden of negating all possible nontaxable sources within the meaning of ***Massei*** by showing that it conducted a thorough investigation that failed to reveal any nontaxable source.

United States v. Hiett, 581 F.2d 1199, 1202 (5th Cir. 1978). In response to the defendant's argument that the government must negate every possible source of nontaxable funds, the court in ***Hiett*** noted that this would be an impossible task because:

> [It] would require the government to exhaust the inexhaustible to conduct an absolutely limitless investigation. It would cast the government in the role of a conjurer, forcing it to pull nontaxable sources out of a hat. Appellant would require the government to embark on a Magellan-like expedition in order to prove that the unreported income was taxable. Not only would the government have to circle the globe in its search, it would also have extraorbital responsibility, since appellant's position requires it to prove a cosmic negative. To state appellant's position is to establish its absurdity. If ***Massei*** and ***Holland*** are to have viability in our jurisprudence, they cannot be read to sanction such aresult.

Id. at 1201; *accord* ***United States v. Notch***, 939 F.2d 895, 899 (10th Cir. 1991); ***United States v. Schipani***, 362 F.2d 825, 830 (2d Cir.) (government can meet its burden under ***United States v. Massei*** by negating all *reasonably* possible sources of nontaxable funds), *vacated and remanded on other grounds*, 385 U.S. 372 (1966). The investigating agent may testify that his investigation failed to uncover any sources of nontaxable funds. ***United States v. Dwoskin***, 644 F.2d 418, 423 (5th Cir. Unit B 1981); ***United States v. Penosi***, 452 F.2d 217, 219 (5th Cir. 1971).

Consequently, it is sufficient if the government's evidence establishes that there was a thorough investigation "which removes any reasonable doubt that the defendant's unreported income came from non-taxable sources." ***United States v. Hiett***, 581 F.2d 1199, 1202 (5th Cir. 1978); *see also* **United States v. Smith**, 890 F.2d 711, 714 (5th Cir. 1989).[7]

31.13 REASONABLE LEADSDOCTRINE

31.13[1] Duty to Investigate Reasonable Leads

Defendants frequently give the government's agents leads indicating the specific sources from which claimed cash on hand was derived, "such as prior earnings, stock transactions, real estate profits, inheritances, gifts, etc." ***Holland v. United States***, 348 U.S. 121, 127 (1954). The ***Holland*** reasonable leads doctrine places on the government the duty of "effective negation of reasonable explanations by the taxpayer inconsistent with guilt" -- a duty limited to the investigation of "leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." ***Holland***, 348 U.S. at 135-36.

Thus, the government's duty to investigate leads provided by the defendant hinges on the presence of two factors: (1) the defendant's explanation must be relevant and reasonable, and (2) the explanation must be reasonably susceptible of being checked. ***Holland***, 348 U.S. at 135-36; ***United States v. Anderson***, 642 F.2d 281, 285 (9th Cir. 1981) (loan from acquaintance in Nigeria not a reasonable lead and not reasonably susceptible of being checked).

The government meets its burden when it "investigates reasonably possible sources of non-taxable income and explores whatever leads the taxpayers or others may proffer." ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir. 1982). The government is not required to do the impossible. ***United States v. Greene***, 698 F.2d 1364, 1371 (9th Cir. 1983). Once the government establishes a prima facie case, the defendant "'remains quiet at his peril.'" ***Mastropieri***, 685 F.2d at 785 (quoting ***Holland***, 348 U.S. at 139); *accord* **United States v. Goldstein**, 685 F.2d 179, 182 (7th Cir.1982) (information

[7]The Second Circuit has suggested that "less stringent standards with respect both to establishing opening net worth and to negating non-taxable income sources are justified in a case like this where defendants were shown to have gone to such lengths to conceal their unreported increases in wealth." ***United States v. Mastropieri***, 685 F.2d 776, 785 (2d Cir. 1982).

on nontaxable sources should be supplied by the defendant). Although the burden of proof never shifts from the government, the defendant has the *burden of production* regarding any reasonable leads. ***United States v. Vardine***, 305 F.2d 60, 63 (2d Cir. 1962). It is up to the defendant to furnish the reasonable leads. ***United States v. Notch***, 939 F.2d 895, 899 (10th Cir. 1991); ***United States v. Caswell***, 825 F.2d 1228, 1234 (8th Cir. 1987). The government is not required to pursue "phantom clues as to some mysterious sources and assets." ***United States v. Hamilton***, 620 F.2d 712, 715 (9th Cir. 1980).

For cases in which the court found that the defendant's explanations were not reasonable or reasonably capable of being checked, *see* ***United States v. Londe***, 587 F.2d 18, 20 (8th Cir. 1978) (lead found to be completely lacking in credibility and did not warrant follow-up beyond the production of the individual as a government witness, which did occur); ***United States v. Potts***, 459 F.2d 412, 414 (7th Cir. 1972) (the government's failure to investigate leads from witnesses whose credibility was tenuous did not require a reversal); ***United States v. Hom Ming Dong***, 436 F.2d 1237, 1242-43 (9th Cir. 1971) (when leads are "sketchy" and the defendant furnishes little useful information, there is less of a burden on the government); ***United States v. Ford***, 237 F.2d 57, 64 (2d Cir. 1956) (claims of gifts so vague that they were not susceptible of further investigation), *vacated as moot*, 355 U.S. 38 (1957); ***Smith v. United States***, 236 F.2d 260, 267 (8th Cir. 1956) (defendant's explanation that his funds came from old mailbags and old iron pots not reasonably susceptible of being checked).

Moreover, there is "at least a minimal burden upon the taxpayer, once he chooses to furnish leads to the government, to aid in the investigation of the purported nontaxable source." ***Hom Ming Dong***, 436 F.2d at 1242-43; ***United States v. Terrell***, 754 F.2d 1139, 1146 (5th Cir. 1985) (defendant has a burden to furnish leads, and the government cannot be faulted for failure to identify any possible basis in cattle, where the government was diligent in following up on all leads relating to the cattle, despite fact that defendant was uncooperative in providing leads); *see also* ***United States v. Blandina***, 895 F.2d 293, 302-03 (7th Cir. 1989) (scope of government's investigation of reasonable leads does not require government to subpoena records that defendant refused to turn over).

For examples of adequate government investigations of leads that were provided by defendants and were susceptible to investigation, *see* ***United States v. Smith***, 890 F.2d 711, 714-15 (5th Cir. 1989) (court rejected a "reasonable leads" challenge regarding gifts to the defendant); ***United States v. Koskerides***, 877 F.2d 1129, 1138 (2d. Cir. 1989) (government negated defendant's claim that he had received nontaxable funds from family and friends in Greece).

When the defendant advances a specific explanation of the source of funds expended and that explanation is proved false, the government need not pursue possible nontaxable sources. ***Feichtmeier v. United States***, 389 F.2d 498, 503 (9th Cir. 1968). However, if the government fails to investigate reasonable leads provided by the defendant that might reasonably explain his or her net worth increase in a manner inconsistent with guilt, the trial judge can consider such leads as true and find the case insufficient to go to the jury. ***Holland***, 348 U.S. at 135; ***Vardine***, 305 F.2d at 63. The court can direct a verdict on any count where there would not be a substantial tax deficiency if the lead is assumed to be true. ***United States v. Keller***, 523 F.2d 1009, 1011 (9th Cir. 1975) (because the government failed to pursue leads that were reasonably susceptible of being checked, the opening net worth for 1967 was not reasonably certain, and the evidence as to the 1967 count was insufficient to go to the jury).

The failure to track down reasonable leads, however, is not always fatal to the government's case. If the uninvestigated lead is assumed to be true and there remains a substantial unexplained tax deficiency, then reversal of a conviction (or a directed verdict) is not warranted. *See* ***Scanlon v. United States***, 223 F.2d 382, 388-89 (1st Cir. 1955) (government's failure to investigate this lead would require acquittal of the defendant if the government's case turned on that evidence but even assuming this lead to be true, the government's evidence was sufficient to convict); ***United States v. Anderson***, 642 F.2d 281, 285-86 (9th Cir. 1981) (even if the defendant's explanation were true, there would be more than $100,000 of unexplained income, and this difference would be sufficient to support the conviction).

The Ninth Circuit has held that if there is a challenge to the sufficiency of the government's investigation, it becomes a jury question whether or not the government was unreasonable in its failure to investigate alleged leads. ***United States v. Greene***, 698 F.2d 1364, 1371 (9th Cir. 1983).

The government's failure to investigate leads by the defendant has also been challenged unsuccessfully in the grand jury context. One court refused to dismiss an indictment, finding the defendant's contention that the government failed to exhaust leads during the grand jury investigation insufficient to warrant dismissal of the indictment.

United States v. Todaro, 610 F. Supp. 923 (W.D.N.Y. 1985). In ***Todaro***, the court held that the pre-trial motion to dismiss was premature because the matter was for trial. 610 F. Supp. at 925 (citing ***Holland***, 348 U.S. 121, and ***United States v. Scott***, 660 F.2d 1145, 1167 n.42 (7th Cir. 1981)).

31.13[2] Leads Must Be Reasonable and Timely

In addition to furnishing leads that are reasonable and reasonably susceptible of being checked, the defendant must furnish the leads in a timely manner. Timeliness is measured by whether the government has sufficient time to investigate the leads prior to trial. *See* ***United States v. Dwoskin***, 644 F.2d 418, 423 n.4 (5th Cir. Unit B 1981) (had leads been provided during the investigative process, the government would have had an obligation to pursue them to the extent that they were relevant and reasonably susceptible of being checked); ***United States v. Sorrentino***, 726 F.2d 876, 881 n.2 (1st Cir. 1984); ***Smith v. United States***, 236 F.2d 260, 263-64 (8th Cir. 1956).

If there is no evidence that the defendant gave leads to the government before trial and the defendant testifies at trial that the net worth increase was attributable to nontaxable sources, the issue is one for the jury. ***United States v. Vardine***, 305 F.2d 60, 65 (2d Cir. 1962). Similarly, a lead furnished "on the eve of indictment" is too late. ***United States v. Procario***, 356 F.2d 614, 617 (2d Cir. 1966) (a bank deposits case, but the same principle applies in a net worth case).

31.14 NET WORTH SCHEDULES

At the close of its case, the government typically calls a summary expert witness who summarizes the evidence and introduces schedules reflecting the government's net worth computation. The testifying agent need not be involved in the investigation or original preparation of the government's case, but may be recruited specifically to testify as an expert at trial. It is well established that a government agent can summarize the evidence and introduce into evidence computations and schedules reflecting the defendant's net worth. ***Costello v. United States***, 350 U.S. 359, 360 (1956); ***United States v. Johnson***, 319 U.S. 503, 519 (1943); ***United States v. Lewis***, 759 F.2d 1316, 1329 n.6 (8th Cir. 1985) (summary exhibit used to verify the net worth theory); ***United States v. Sorrentino***, 726 F.2d 876, 884 (1st Cir. 1984); ***United States v. Skalicky***, 615 F.2d 1117, 1120 (5th Cir. 1980); ***United States v. Gardner***, 611 F.2d 770, 776 (9th Cir. 1980);

United States v. Allen, 522 F.2d 1229, 1234 (6th Cir. 1975); ***United States v. O'Connor***, 237 F.2d 466, 475 (2d Cir. 1956); Fed. R. Evid. 1006.

The net worth schedules must be based upon evidence in the record; otherwise, the schedules are not admissible. *See*, *e.g.*, ***Sorrentino***, 726 F.2d at 884; ***Allen***, 522 F.2d at 1234; ***United States v. Diez***, 515 F.2d 892, 905 (5th Cir. 1975); ***O'Connor***, 237 F.2d at 475; *see also* ***United States v. Thompson***, 518 F.3d 832, 859-60 (10th Cir. 2008) (specific items case), *petition for cert. filed*, 76 U.S.L.W. 3655 (Jun 09, 2008) (NO. 07-1539); ***United States v. Bishop***, 264 F.3d 535, 547 (5th Cir. 2001) (specific items case); ***United States v. Citron***, 783 F.2d 307, 316 (2d Cir. 1986) (cash expenditures method).

The government's net worth computation is not required to give effect to contentions of the defendant. Rather, the government's summary or net worth computation is based on a selection of evidence that supports the government's contentions. It is a summary of evidence tending to prove guilt, and it reflects the government's version of the facts. ***United States v. Diez***, 515 F.2d at 905; ***United States v. Lawhon***, 499 F.2d 352, 357 (5th Cir. 1974) (jury was instructed that the summary chart presented only the government's view of the case); ***Holland v. United States***, 209 F.2d 516, 523-24 (10th Cir.) (charts purporting to graphically show the government's case based upon the government's version of the evidence used in closing argument to the jury), *aff'd*, 348 U.S. 121 (1954); *see also* ***Bishop***, 264 F.3d at 547 (citing ***Flemister v. United States***, 260 F.2d 513, 517 (5th Cir.1958)). As a matter of tactics, however, there may be situations where the evidence is in conflict and the government computation will reflect the view that is more favorable to the defendant.

31.15 JURY INSTRUCTIONS

In a net worth case, detailed, comprehensive jury instructions on the method of proof are essential. "Charges should be especially clear, including, in addition to the formal instructions, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused." ***Holland v. United States***, 348 U.S. 121, 129 (1954); ***United States v. Wirsing***, 719 F.2d 859, 861-62 n.4 (6th Cir. 1983) (citing ***Holland***).

Convictions have been reversed where the trial judge failed to give full explanatory instructions on the net worth method. ***United States v. Tolbert***, 367 F.2d 778, 781 (7th Cir. 1966); ***United States v. O'Connor***, 237 F.2d 466, 472-73 (2d Cir. 1956); *see* *also* ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981) (bank deposits case). "[T]he complete lack of any instruction on the nature of the [net worth] method and its concomitant assumptions and inferences affects a substantial right of the accused and constitutes plain error. . . and requires a reversal despite the lack of an objection by the defendant to such omission." ***Tolbert***, 367 F.2d at 781.

For sample net worth jury instructions, *see* the section on jury instructions, *infra*.

31.16 SAMPLE NET WORTH SCHEDULE

On the next page is a sample net worth computation contained within the materials used to train IRS special agents in the net worth method of proof.

ASSETS	**12/31/2007**	**12/31/2008**
Cash on Hand	$1,000.00	$1,000.00
Cash in Account 1st Northern Bank Acct. #000-000-0	2,200.00	-
Series EE Savings Bonds	0.00	-
Securities	4,000.00	12,000.00
Business Inventory (merchandise)	7,500.00	12,500.00
Bar Equipment	11,000.00	11,000.00
Booths (Bar)	0.00	6,000.00
Land and Building	0.00	90,000.00
Goodwill	32,000.00	32,000.00
Cadillac	16,250.00	16,250.00
TOTAL ASSETS	**$73,950.00**	**$180,750.00**
LIABILITIES		
Buyer & Company (margin account)	$0.00	($3,600.00)
William Barker (note)	(31,000.00)	(19,000.00)
Mortgage (1st Northern)	0.00	(40,000.00)
Accumulated Depreciation	0.00	(10,838.00)
TOTAL LIABILITIES	**($31,000.00)**	**($73,438.00)**
NET WORTH	**$42,950.00**	**$107,312.00**
Less: Prior Year's Net Worth		($42,950.00)
Net Worth Increase		$64,362.00
Add:		

Federal Income Taxes Paid	1,200.00
Life Insurance Premium	2,325.00
Personal Interest	33.34
Less: 1/2 SE Tax Deduction	(4,807.60)
ADJUSTED GROSS INCOME	**$ 63,112.74**
Less:	
Standard Deduction	(9,700.00)
Exemptions	(6,200.00)
CORRECTED TAXABLE INCOME	**$ 47,212.74**
Less: Taxable Income per Return	(2,439.00)
ADDITIONAL TAXABLE INCOME	**$ 44,773.74**

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32.00 EXPENDITURES

32.1 GENERALLY

The expenditures method of proof measures spending that exceeds reported income in a given tax year. In contrast with the net worth method of proof, the taxpayer is not accumulating assets, but is spending money on items such as clothing, travel, vacations, restaurant meals, vacations, entertainment, and the like. Yet the expenditures method of proof and the net worth method of proof are very similar. The two computations are merely accounting variations of the same basic approach, with the expenditures method being an outgrowth of the net worth method. Many of the principles and foundational requirements of the net worth method of proof apply to the expenditures method. ***United States v. Breger***, 616 F.2d 634, 635 (2d Cir. 1980); ***Taglianetti v. United States***, 398 F.2d 558, 562 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969); ***United States v. Caserta***, 199 F.2d 905, 906 (3d Cir. 1952). Accordingly, when the theory of prosecution is based on an expenditures case, reference should be made to Section 31.00, *supra*, which examines the net worth method of proof.

The validity of the expenditures method of proving tax fraud has long been acknowledged by the courts. In ***United States v. Johnson***, 319 U.S. 503, 517-18 (1943), the Supreme Court expressly approved the use of the expenditures method to establish unreported income. Subsequently, in ***Caserta***, the Third Circuit defined the expenditures method of proof as follows:

> It starts with an appraisal of the taxpayer's net worth situation at the beginning of a period. He may have much or he may have nothing. If, during that period, his expenditures have exceeded the amount he has reported as income and his net worth at the end of the period is the same as it was at the beginning (or any difference accounted for), then it may be concluded that his income tax return shows less income than he has in fact received. Of course it is necessary, so far as possible, to negative nontaxable receipts by the taxpayer during the period in question.

Caserta, 199 F.2d at 907.

The expenditures method of proof tracks a taxpayer's expenditures for consumable goods and services (*i.e.*, items which do not increase one's net worth), instead of for assets (*i.e.*, items such as stocks, bonds, or real estate) that increase one's net worth. Furthermore, the expenditures method is distinct from the examination of cash expenditures in support of the bank deposits method of proof. *See*, *e.g.*, ***United States v. Conaway***, 11 F.3d 40, 43 (5th Cir. 1993); ***United States v. Abodeely***, 801 F.2d 1020, 1024 (8th Cir. 1986).

One advantage of using the expenditures method of proof, as distinct from the net worth method, is well summarized by the ***Taglianetti*** court:

> The government proceeded on a 'cash expenditure' theory. This is a variant of the net worth method of establishing unreported taxable income. Both proceed by indirection to overcome the absence of direct proof. The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailing against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year.

Taglianetti, 398 F.2d at 562 (footnotes omitted).

32.2 REQUIREMENTS FOR ESTABLISHING AN EXPENDITURES CASE

The requirements for establishing an expenditures case are similar to those required for establishing a net worth case. Thus, in an expenditures case, the government must:

1. Establish an **opening net worth** with reasonable certainty **and** demonstrate that the taxpayer's expenditures **did not result from cash on hand**, **or the conversion of assets on hand** at the beginning of the period;

2. Establish through independent evidence that the expenditures charged to the taxpayer are **non-deductible**;

3. Establish a **likely source of income** from which the expenditures sprang, or **negate nontaxable sources** of income; and

4. Investigate all relevant, **reasonable leads** which are reasonably susceptible of being checked.

Taglianetti v. United States, 398 F.2d 558, 562-63 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969) (cited in ***United States v. Sutherland***, 929 F.2d 765, 780 (1st Cir. 1991)); ***United States v. Caswell***, 825 F.2d 1228, 1231-35 (8th Cir. 1987); ***United States v. Breger***, 616 F.2d 634, 635-36 (2d Cir. 1980); ***United States v. Gay***, 567 F.2d 1206, 1207 (2d Cir. 1978); ***United States v. Marshall***, 557 F.2d 527, 529-30 (5th Cir. 1977); ***United States v. Fisher***, 518 F.2d 836, 841-42 & n.7 (2d Cir. 1975); ***United States v. Penosi***, 452 F.2d 217, 219-20 (5th Cir. 1971); ***United States v. Caserta***, 199 F.2d 905, 907 (3d Cir. 1952); *see also* ***United States v. Pinto***, 838 F.2d 426, 431-32 (10th Cir. 1988); ***United States v. Marrinson***, 832 F.2d 1465, 1469-70 (7th Cir. 1987); ***United States v. Citron***, 783 F.2d 307, 315-16 (2d Cir.1986).

Reference should be made to Section 31.00, *supra*, in which the net worth method of proof is discussed.

It should also be noted that the Seventh Circuit and the District of Columbia Circuit have approved a variation of the expenditures method, which is called the cash method of proof. ***United States v. Hogan***, 886 F.2d 1497, 1508-11 (7th Cir. 1989); ***United States v. Khanu***, 662 F.3d 1226 (D.C. Cir. 2011). This method "focuses on the taxpayer's sources and uses of income." ***Hogan*** at 1509; ***Khanu*** at 1229. When using this method, the government is required to present evidence relating to the taxpayer's cash expenditures. ***Khanu*** at 1229 *citing* ***United States v. Touchin***, 899 F.2d 617, 619 (7th Cir. 1989). In this method of proof, the government compares the defendant's cash expenditures with her or his known cash sources, including cash on hand, for each tax period. ***Hogan*** at 1509; ***Khanu*** at 1229. If such expenditures exceed sources, the excess is presumed to be unreported income. ***Touchin*** at 620; ***Khanu*** at 1229.

32.3 CONCEPTS APPLICABLE TO EXPENDITURES CASES

Although the government has essentially the same burden in an expenditures case that it has in a net worth case, there are some differences that require discussion.

32.03[1] Opening Net Worth

The requirement that the government must establish the defendant's opening net worth with reasonable certainty is derived from ***Holland v. United States***, 348 U.S. 121, 132 (1954). However, the government's method of proving an expenditures case is slightly different from the net worth method employed in ***Holland***. This distinction was examined by the ***Taglianetti*** court:

> In a typical net worth case, as ***Holland***, precise figures would have to be attached to opening and closing net worth positions for each of the taxable years to provide a basis for the critical subtraction. In a cash expenditures case reasonable certainty may be established without such a presentation, as long as the proof . . . makes clear the extent of any contribution which beginning resources or a diminution of resources over time could have made to expenditures.

Taglianetti, 398 F.2d 558, 565 (1st Cir. 1968), *aff'd*, 394 U.S. 316 (1969).

Thus, the government must prove not only that yearly expenditures exceeded reported income, but also, either directly or inferentially, that those expenditures were made with currently taxable income. Unless both requirements are met, a conviction cannot stand. *See*, *e.g.*, ***United States v. Marshall***, 557 F.2d 527, 529 (5th Cir. 1977). It is critical to the expenditures method that the government present evidence establishing that the defendant did not liquidate assets acquired in a previous year or deplete a cash hoard to make the expenditures in issue.

Once the government establishes a starting point for the first prosecution year, it should then proceed to compute the total taxable and nontaxable receipts for each of the following consecutive years to prove its case. ***Marshall***, 557 F.2d at 530. In ***United States v. Bianco***, 534 F.2d 501, 504 (2d Cir. 1976), the government attempted to show that Bianco's beginning resources were nonexistent and thus could not have contributed at all to his expenditures during the tax years. The court described the extensive investigation by the government into Bianco's financial background, and concluded that the "totality of this evidence clearly was sufficient for the jury to have concluded that Bianco had insufficient assets at the beginning of the prosecution period to have supported his expenditures in any of those years." ***Bianco***, 534 F.2d at 505; *see also* ***United States v. Fisher***, 518 F.2d 836, 841-42 (2d Cir. 1975) (government introduced evidence that Fisher had $30,000 in bank accounts and that Fisher and his wife possessed no other assets).

There is no requirement in an expenditures case, as there is in a net worth analysis, to reflect the opening and closing net worth position of the taxpayer in a formal net worth statement. Thus, the prosecution may establish reasonable certainty of the taxpayer's opening financial position without such a presentation, as long as the expenditures analysis accounts for the extent to which any expenditure during the prosecution years could have been financed by resources available at the beginning of the period or by the subsequent conversion of such resources to cash. ***Taglianetti***, 398 F.2d at 565. In a footnote, the ***Taglianetti*** court discussed various expenditures cases and the absence of any requirement that the prosecution introduce a formal net worth statement. ***Taglianetti***, 398 F.2d at 565 n.7.

32.03[2] Cash on Hand

Although strictly speaking, proof of a formal statement of net worth is not required in an expenditures case, *see* **United States v. Conaway,** 11 F.3d 40, 43 (5th Cir. 1993), it is essential that the government establish the taxpayer's opening cash on hand. *See* ***United States v. Citron***, 783 F.2d 307, 316 (2d Cir. 1986) (agent's investigation into the truth of a cash hoard defense was sufficient in establishing cash on hand). This requirement is recognized as the most difficult component of proof in such tax prosecutions. ***Citron***, 783 F.2d at 316. (Note that in ***Citron***, the Second Circuit reversed the convictions because the district court admitted into evidence a summary chart containing figures not demonstrably supported by the evidence. ***Citron***, 783 F.2d at 317.)

32.03[3] Cash Hoard Defense

Just as in net worth cases, the cash hoard defense is commonly raised in expenditures cases. In asserting a cash hoard defense, the taxpayer contends that expenditures during the relevant years were made with previously accumulated funds (cash on hand) and not with currently taxable receipts. *See* Sections 31.06 and 31.07, *supra*.

In ***United States v. Radseck***, 718 F.2d 233, 239 (7th Cir. 1983), the government rebutted a cash hoard defense with testimony from the special agent "that in his experience in investigating thirty-five to forty attempted income tax evasion cases, people who have five bank accounts, thirteen savings and loan accounts and two brokerage accounts do not keep substantial amounts of cash on hand." The court found that the inference that the defendant did not keep cash at home was a permissible one.

In ***United States v. Gay***, 567 F.2d 1206, 1207 (2d. Cir. 1978), the defendant testified at trial that he had a cash hoard of more than $100,000 in spite of the fact that he had told the investigating agents that he and his wife had no more than $13,000. The $13,000 figure was used in the opening net worth computation. The court stated that "the jury was entitled to infer, as it apparently did, that appellant's 'cash hoard' testimony was a belated and blatant concoction which was not entitled to any credit." ***Gay***, 567 F.2d at 1207.

32.03[4] Duplication of Expenditures

In establishing a taxpayer's expenditures, the prosecution must take care to refrain from a duplication of expenditures. In ***United States v. Caserta***, 199 F.2d 905, 907 (3d Cir. 1952), the court of appeals ordered a new trial because of the government's duplication of expenditures. The prosecution had included in its calculation of unreported income both cash withdrawals from a bank account and expenditures for individual items, and failed to establish that the cash withdrawals were not applied to the cash purchases. ***Id***. For a detailed explanation of such an error, *see* ***Caserta***, 199 F.2d at 906-08. The error is not always fatal. *Cf.* ***United States v. Radseck***, 718 F.2d 233, 238 (7th Cir. 1983) (the duplication of $2,766 as both a personal expenditure and an increase in assets did not render the government summary exhibits inadmissible, because this error and others were revealed to the jury during cross-examination of the government's summary witness and acknowledged by the government during closingargument).

32.03[5] Likely Source of Income

In an expenditures case, as in a net worth case, the government must establish a likely source of taxable income or eliminate the possibility that the cash expenditures (or increases in net worth) were financed with nontaxable sources of revenue. *See*, *e.g.*, ***United States v. Marrinson***, 832 F.2d 1465, 1472 (7th Cir. 1987); ***United States v. Bianco***, 534 F.2d 501, 506-07 (2d Cir. 1976). From a purely legal standpoint, the government need not negate nontaxable sources when it has already established a likely source of taxable income. However, as a matter of trial strategy, it is advisable not only to establish a likely source of taxable income, but also to eliminate any nontaxable sources for the funds. Such an approach makes a good impression on both judge and jury, and enhances confidence in the verdict on review. And as noted above, the government is responsible for investigating leads of nontaxable sources that are reasonably susceptible of being checked. ***Holland v. United States***, 348 U.S. 121, 135 (1954). Nevertheless, "[o]nce expenditures are established, the government cannot be expected to conduct an exhaustive nationwide investigation when the defendant supplies no relevant leads as to where he got the money he admittedly spent." ***United States v. Penosi***, 452 F.2d 217, 220 (5th Cir. 1971). *See also* Section 31.12, *supra*. Still, if the investigation includes both approaches, the government's case will be that much stronger.

32.3 [6] Summary Exhibits

In an expenditures case, the government is not required to include the defendant's version of the facts in its summary exhibits. ***United States v. Radseck***, 718 F.2d 233, 239 (7th Cir. 1983). This is also true in net worth cases. *See* Section 31.14, *supra*.

32.4 JURY INSTRUCTIONS

Just as in a net worth prosecution, it is essential in an expenditures case that the charge to the jury be "especially clear, including, in addition to the formal instructions, a summary of the nature of the . . . method [of proving income], the assumptions on which it rests, and the inferences available both for and against the accused." ***Holland v. United States***, 348 U.S. 121, 129 (1954); *accord* ***United States v. Hall***, 650 F.2d 994, 998 (9th Cir. 1981); ***United States v. Tolbert***, 367 F.2d 778, 780-81 (7th Cir. 1966); ***United States v. O'Connor***, 237 F.2d 466, 472-73 (2d Cir. 1956); *see also* ***United States v. Meriwether***, 440 F.2d 753, 756-57 (5th Cir. 1971) (reversing § 7201 conviction because trial court failed to instruct jury on method of proof).

A conviction on one count was reversed in ***United States v. Carter***, 721 F.2d 1514 (11th Cir. 1984), *abrogated on other grounds by United States v. Lightney*, 886 F.2d 304

(11th Cir. 1989), where the court held that it was plain error to fail to instruct the jury on the expenditures method of proof:

> We find that the omission of the required explanatory instructions concerning the cash expenditures method of proof in this case 'goes to the very basis of the jury's ability to evaluate the evidence,' ***Hall***, 650 F.2d at 999, and to the very core of the deliberative process necessary to guarantee the fairness of the proceedings. We therefore hold that the omission of the explanatory instructions required by ***Holland*** concerning the cash expenditure method of proof constituted plain error affecting appellant's substantial rights.

Carter, 721 F.2d at 1539 (citations omitted).

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33.00 BANK DEPOSITS

33.01 GENERALLY

The bank deposits method of proof is one of the primary indirect methods of proof used by the government in computing taxable income. ***United States v. Boulet***, 577 F.2d 1165 (5th Cir. 1978), contains a good description of the mechanics of a bank deposits computation:

> Under this method, all deposits to the taxpayer's bank and similar accounts in a single year are added together to determine the gross deposits. An effort is made to identify amounts deposited that are non-taxable, such as gifts, transfers of money between accounts, repayment of loans and cash that the taxpayer had in his possession prior to that year that was deposited in a bank during that year. This process is called "purification." It results in a figure called net taxable bank deposits.
>
> The government agent then adds the amount of expenditures made in cash, for example, in this case, cash the doctor received from fees, did not deposit, but gave to his wife to buy groceries. The total of this amount and net taxable bank deposits is deemed to equal gross income. This is in turn reduced by the applicable deductions and exemptions. The figure arrived at is considered to be "corrected taxable income." It is then compared with the taxable income reported by the taxpayer on his return.

Boulet, 577 F.2d at 1167.

The bank deposits method of proof has certain features in common with the net worth method of proof. *See* Section 31.00, *supra*. Both methods are approximations that seek to show by circumstantial means the defendant had income that was not reported. ***Holland v. United States***, 348 U.S. 121, 129 (1954); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981) (*per curiam*); ***United States v. Bray***, 546 F.2d 851, 856 (10th Cir. 1976) ("the bank deposits method of proof is not an exact science").

However, unlike the net worth method, which considers year-end bank balances, asset acquisitions, and liabilities, the focus in a bank deposits case is on funds deposited during the tax year. "Although the mechanics of arriving at an income figure are different, both methods involve similar underlying assumptions and afford much the same inferences for and against the accused." ***Hall***, 650 F.2d at 999.

33.01[1] Consistently Approved Method of Proof

The bank deposits method of proof was approved in ***Gleckman v. United States***, 80 F.2d 394, 399-401 (8th Cir. 1935). Since that time, the bank deposits method of proof has "received consistent judicial approval." ***United States v. Morse***, 491 F.2d 149, 151 (1st Cir. 1974); *see also* ***United States v. Slutsky***, 487 F.2d 832, 840 (2d Cir. 1973); ***United States v. Nunan***, 236 F.2d 576, 587 (2d Cir. 1956); ***United States v. Venuto***, 182 F.2d 519, 521 (3d Cir. 1950); ***Morrison v. United States***, 270 F.2d 1, 2 (4th Cir. 1959); ***Stinnett v. United States***, 173 F.2d 129, 129-30 (4th Cir. 1949); ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993); ***United States v. Normile***, 587 F.2d784, 785 (5th Cir. 1979); ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974); ***United States v. Moody***, 339 F.2d 161, 162 (6th Cir. 1964); ***United States v. Ludwig***, 897F.2d 875, 878 (7th Cir. 1990); ***United States v. Esser***, 520 F.2d 213, 216 (7th Cir. 1975); ***United States v. Stein***, 437 F.2d 775, 779 (7th Cir. 1971); ***United States v. Lacob***, 416 F.2d 756, 759-60 (7th Cir. 1969); ***United States v. Mansfield***, 381 F.2d 961, 965 (7th Cir. 1967); ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986);***United States v. Vannelli***, 595 F.2d 402, 404 (8th Cir. 1979); ***United States v. Stone***, 770 F.2d 842, 844 (9th Cir. 1985); ***United States v. Soulard***, 730 F.2d 1292, 1296 (9th Cir. 1984); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981); ***United States v. Helina***, 549 F.2d 713, 720 & n.2 (9th Cir. 1977); ***United States v. Mounkes***, 204 F.3d 1024,1028 (10th Cir. 2000); ***United States v. Bray***, 546 F.2d 851, 855-57 (10th Cir. 1976); *see also* ***United States v. Carter,*** 721 F.2d 1514, 1538 (11th Cir. 1984) (recognizing bank deposits method as one method of indirect proof used in tax cases); ***United States v. Black***, 843 F.2d 1456, 1458-59 (D.C. Cir. 1988) (recognizing bank deposits method in order to distinguish it from the specific items method used in that case).

33.01[2] Used Alone or With Other Methods

Proof of unreported income by the bank deposits method alone is sufficient. It is not necessary to use another method of proof as corroboration. ***United States v. Stein***, 437 F.2d 775, 779 (7th Cir. 1971); *see also* ***Mansfield***, 381 F.2d at 965; ***Moody***, 339 F.2d at 162; ***Stinnett***, 173 F.2d at 129-30; ***United States v. Procario***, 356 F.2d 614, 618 (2d Cir. 1966); ***Hoyer v. United States***, 223 F.2d 134, 136 (8th Cir. 1955); ***Holbrook v. United States***, 216 F.2d 238, 240-41 (5th Cir. 1955); ***United States v. Graves***, 191 F.2d 579, 582 (10th Cir. 1951).

The bank deposits method can, however, be used as corroboration of other methods of proof. For example, in ***United States v. Tafoya***, 757 F.2d 1522, 1528 (5th Cir. 1985), the primary method of proof was the specific items method, and "bank deposits evidence was admitted only to corroborate the evidence of specific payments." Similarly, in ***United States v. Horton***, 526 F.2d 884, 887 (5th Cir. 1976), a specific items prosecution, "evidence of total bank deposits during the years in question was properly admissible as corroborative evidence " Where the bank deposits method of proof is used as corroboration, however, the jury should be instructed to limit its consideration of the bank deposits evidence to corroboration of the other method of proof. ***Tafoya***, 757 F.2d at 1528; ***Horton***, 526 F.2d at 887.

In ***United States v. Hall***, 650 F.2d 994 (9th Cir. 1981) (*per curiam*), "the prosecution elicited testimony [at trial] from its experts establishing appellants' income by both the 'net worth' and the 'bank deposits' methods of proof." ***Id***. at 996-97 (footnotes omitted). The conviction was reversed, not because two methods of proof were used, but because of a failure to give explanatory instructions to the jury on the indirect methods of proof used by the government. ***Id***. at 999. Additionally in ***United States v. Meriwether***, 440 F.2d 753 (5th Cir. 1971), the Fifth Circuit held that, when using two methods of proof, if there is a deficiency in either method, the conviction must be reversed because there is no way to determine the method upon which the jury relied. ***Id***. at 755-57. It is doubtful, however, that the holding in ***Meriwether*** survives ***Griffin v. United States***, 502 U.S. 46, 49 (1991), which holds that a general jury verdict of guilty on a multiple-object conspiracy does not have to be set aside when evidence is insufficient to support the conviction as to one object, even though such a rule gives no assurance that a valid ground rather than an invalid one is the basis for the jury'sverdict.

Many cases use the bank deposits method of proof in conjunction with the specific items method. For example, in ***United States v. Procario***, 356 F.2d 614 (2d Cir. 1966):

> The government relied for proof partly on direct evidence from patients and their cancelled checks, and partly on the bank deposit method, modified so as to yield the rest of appellant's professional income.

Procario, 356 F.2d at 616; *see also* **United States v. Nunan**, 236 F.2d 576, 582, 586 (2d Cir. 1956) (where the government introduced evidence in the form of the bank deposits method of proof and also introduced evidence of specific items of taxable income that had been omitted from the defendant's returns, the "proof relative to the specific items of taxable income which were omitted from the returns in the light of the evidence as a whole was of itself sufficient to support the verdict.")

33.1 [3] Cross Reference

It will help in understanding the following discussion of the bank deposits method of proof if reference is made to the sample bank deposits computation reproduced in Section 33.12, *infra*.

Reference also should be made to Section 31.00, *supra*, discussing the net worth method of proof since, as noted above, a number of the underlying assumptions in the bank deposits method of proof are the same as those in the net worth method of proof.

Finally, reference should be made to the Manual chapter addressing the specific violation under consideration, since the bank deposits method of proof merely concerns the computation of income and not the other elements of a given offense.

33.2 PRELIMINARY FOUNDATION FOR USE

The classic bank deposits case is ***Gleckman v. United States***, 80 F.2d 394 (8th Cir. 1935). As noted in ***Gleckman***, "the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax on the amount; nor would the bare fact that he received and cashed a check for a large amount, in and of itself, suffice to establish that income tax was due on account of it." ***Id***. at 399. The court in ***Gleckman*** went on to describe the foundation for using the bank deposits method of proof as follows:

> On the other hand, if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his

> account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.

Gleckman, 80 F.2d at 399.

The teaching of ***Gleckman*** and its progeny is that to use the bank deposits method of proof, the government must initially introduce evidence showing that:

1. The taxpayer was engaged in a business or income-producing activity from which the jury can infer that the unreported income arose;

2. Periodic and regular deposits of funds were made into accounts in the taxpayer's name or over which the taxpayer had dominion and control;

3. An adequate and full investigation of those accounts was made in order to distinguish between income and non-income deposits;

4. Unidentified deposits have the inherent appearance of income, *e.g.*, the size of the deposits, odd or even amounts, fluctuations in amounts corresponding to seasonal fluctuations of the business involved, source of checks deposited, dates of deposits, accounts into which deposited, etc.

See ***United States v. Abodeely***, 801 F.2d 1020, 1023 (8th Cir. 1986); ***United States v. Stone***, 770 F.2d 842, 844 (9th Cir. 1985); ***United States v. Helina***, 549 F.2d 713, 720 (9th Cir. 1977); ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974); ***United States v. Slutsky***, 487 F.2d 832, 841-42 (2d Cir. 1973); ***United States v. Venuto***, 182 F.2d 519, 521 (3d Cir. 1950).

33.3 BUSINESS OR INCOME-PRODUCING ACTIVITY

In the first instance, it must be shown that during the tax years in question, the defendant was engaged in an income-producing business or calling. This is relatively simple and ordinarily does not present a problem -- the defendant was or was not involved in an income-producing activity.

Cases using the bank deposits method have involved a wide range of income-producing activities. *See, e.g.*, ***United States v. Soulard***, 730 F.2d 1292, 1296 (9th Cir. 1984) (ice cream franchises); ***United States v. Hall***, 650 F.2d 994, 996 (9th Cir. 1981) (clothing, jewelry, and antiques retailer); ***United States v. Fowler***, 605 F.2d 181, 182 (5th Cir. 1979) (gravestone dealer); ***United States v. Boulet***, 577 F.2d 1165, 1167 (5th Cir. 1978) (medical doctor); ***United States v. Esser***, 520 F.2d 213, 215 (7th Cir. 1975) (medical doctor); ***United States v. Slutsky***, 487 F.2d 832, 835 (2d Cir. 1973) (partners in a resort hotel in the Catskill Mountains); ***United States v. Stein***, 437 F.2d 775, 776 (7th Cir. 1971) (wholesale meat dealer); ***United States v. Lacob***, 416 F.2d 756, 758 (7th Cir. 1969) (personal injury attorney); ***Percifield v. United States***, 241 F.2d 225, 226 (9th Cir. 1957) (operator of a gambling casino); ***United States v. Nunan***, 236 F.2d 576, 579 (2d Cir. 1956) (attorney, politician, and former Commissioner of Internal Revenue); ***Graves v. United States***, 191 F.2d 579, 581 (10th Cir. 1951) (retail drug stores); ***United States v. Venuto***, 182 F.2d 519, 520 (3d Cir. 1950) (operator of a retail meat store, slaughterhouse, and rental properties).

The income-producing business can be an illegal activity. *See, e.g.*, ***United States v. Abodeely***, 801 F.2d 1020, 1025 (8th Cir. 1986) (prostitution); ***United States v. Tafoya***, 757 F.2d 1522, 1526-27 (5th Cir. 1985) (freelance assassin); ***United States v. Vannelli***, 595 F.2d 402, 404 (8th Cir. 1979) (embezzlement); ***Malone v. United States***, 94 F.2d 281, 287-88 (7th Cir. 1938) (bribes). Caution must be exercised, however, in the use and presentation of evidence relating to an illegal source of income. *See* Section 31.12[3], *supra*, for a further discussion of issues involving illegal sources ofincome.

33.4 ANALYSIS OF DEPOSITS

33.04[1] Generally

The basic underlying assumption in the bank deposits method of proof is that if a taxpayer is in an income-producing activity, and regularly and periodically makes deposits to bank accounts, then those deposits, after adjustments, constitute taxable income. ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974); ***Gleckman v. United States***, 80 F.2d 394, 399 (8th Cir. 1935).

Heavy reliance is placed on an analysis of deposits in establishing a relationship between the deposits and the income-producing activity. The composition of each deposit is determined, to the extent possible, based on obtainable bank records, third-party records, and any admissions of the defendant.

The government then generally shows by direct evidence that a number of the deposited items are, in fact, taxable receipts. The number so verified varies from case to case. For example, in ***United States v. Venuto***, 182 F.2d 519, 520 (3d Cir. 1950), in addition to evidence that receipts from the defendant's businesses were deposited regularly and currently, government agents testified that they analyzed the bank accounts and the defendant's check stubs and cancelled checks, verifying through third-party suppliers actual purchases of merchandise bought for sale. The defendant's real estate income was verified through statements of receipts and disbursements prepared by the real estate firm that managed the defendant's business. *See also* ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993); ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975).

There is, however, no fixed requirement that the government verify a certain percentage of the defendant's deposits as income items. All that the government has to prove is that the defendant was engaged in an income-producing business, that regular deposits of funds having the appearance of income were in fact made to bank accounts during the year in question, and that the government did everything that was fair and reasonable to identify and deduct any non-income items. ***Esser***, 520 F.2d at 217. Obviously, the jury may feel more comfortable with a higher percentage of verified deposits.

For an example of an investigation involving a sampling of total deposits, *see* ***United States v. Stone***, 770 F.2d 842 (9th Cir. 1985). In ***Stone***, IRS agents obtained bank copies of signature cards, monthly statements, and deposit slips for the defendant's checking and savings accounts, and contacted a number of insurance companies requesting copies of checks issued to the defendant, a doctor, for medical services and claim forms submitted for medical services. ***Id***. at 844. The agents then analyzed the bank records of the checks deposited into the defendant's accounts:

> In order to discover what portion of Stone's total deposits represented payment for medical services rendered, the IRS selected 12 large deposits -- one for every other month in 1976 and 1977 -- as a representative sample, and had the bank produce a copy of every check deposited with those deposits.

> The IRS attempted to verify that these checks were payments for medical services rendered by writing or calling the makers of the checks. Although the IRS was only able to verify a small portion of the checks, almost all the checks so verified in the sampling process were payments for medical services. Checks that were for nonincome items were identified by the IRS and excluded from gross receipts from the medical practice.

Stone, 770 F.2d at 844.

33.04[2] Currency Deposits

The usual bank deposits case will involve a mixture of check and cash deposits. If the case does include currency deposits, then any cash withdrawals or checks made payable to cash or to the defendant and subsequently cashed must be deducted from the total amount of deposits, unless it can be shown that the cash withdrawals and the checks cashed were not used to make the currency deposits. If the defendant is not given credit under these circumstances for such potential redeposits, a duplication can result, yielding an inflated figure for taxable income.

For example, assume that during the year, the defendant earned $25,000, which was in the form of $15,000 in checks and $10,000 in cash, all of which was deposited into the defendant's bank account. Assume further that during the year the defendant made out checks to cash totalling $7,000 and deposited the resulting cash into the account. The total amount of deposits would be $32,000 ($25,000 plus $7,000), indicating gross receipts of $32,000. This inflated amount is caused by a duplication -- the $7,000 was counted when it was deposited initially and again when it was redeposited, after having been withdrawn. In the example given, it would be necessary to deduct $7,000 from the total deposits in order to prevent duplication, *i.e.*, $32,000 minus $7,000 equals $25,000, which is what the defendant earned. Note that if the defendant had issued checks to cash totaling only $3,000, then it would be necessary to subtract only $3,000 from total deposits, since $3,000 would be the maximum amount of currency that could have been redeposited.

Additionally, if the defendant had checks to cash totaling $12,000, then it would not be necessary to subtract that amount. At most, $10,000 could have been redeposited, since that was the total amount of currency deposits for the year, and only $10,000 need be subtracted. However, this situation would leave the defendant with an additional

$2,000 in cash that could be redeposited in a subsequent year and create a duplication. If the $2,000 cannot be accounted for in an expenditure and the defendant has currency deposits in the following year, then depending on the circumstances of the case, this $2,000 may have to be subtracted from total currency deposits the following year.

On the other hand, there would be no duplication and no need to subtract cash withdrawn from the total of the deposits if there were no currency deposits made during the year, since any checks to cash were obviously not cashed and deposited in the account. And even where there are currency deposits, it is still not necessary to subtract cash withdrawals from the total currency deposits if the resulting cash can be traced to a use other than the redepositing of the funds. Thus, if it can be shown that all currency deposits for the year precede the dates of any cash withdrawals or checks to cash, then no elimination is required. The timing establishes that the source of the currency deposits must have been funds other than those withdrawn from the account. In a similar fashion, no elimination of currency deposits is necessary if it can be shown that cash withdrawals were used for specific purposes (e.g., food, clothing, etc.), and thus were not funds redeposited in the defendant's bank account. *See* ***Beard v. United States***, 222 F.2d 84, 87-88 (4th Cir. 1955).

Although ***United States v. Caserta***, 199 F.2d 905 (3d Cir. 1952), is an expenditures case, the principles discussed are applicable to bank deposits cases. ***Caserta*** contains an excellent explanation of the duplication that can occur in an expenditures case when deposits and withdrawals are not properly accounted for. In the words of the court:

> If a man has a bank account and puts everything he receives into the account, his expenditures are pretty well shown by what he spends it for in checking it out. But suppose he withdraws from his bank account a sum in cash, a check made payable to himself or an impersonal payee. Does that show expenditure? It may well do so if we proceed on the ordinary assumption that people do not draw money from bank accounts unless they are going to spend the money for something. On the other hand, suppose a man writes a check to "cash" for $500 and the same day buys an overcoat for $100 and a suit of clothes for the same amount. Now what do we charge him with, an expenditure of $700? If cash withdrawals from a bank account are to be treated as cash receipts to a person, surely it is incorrect to charge individual items for which he has paid cash to his list of expenditures unless it is shown that the cash bank withdrawals had nothing to do with the individual items.

> Otherwise, a man doubles his taxable income when he writes a check for "cash" and spends the money he gets from his bank. This would be a very happy way of increasing one's income if it could be done.

Caserta, 199 F.2d at 907 (internal punctuation altered).

For the same reasons given in the ***Caserta*** case, it is error to charge a defendant in a bank deposits case with currency deposits, unless it can be shown that the source of the currency deposits was not funds previously withdrawn from the defendant's bank account.

33.4 [3] Missing or Incomplete Bank Records

An effort obviously should be made to obtain all of the bank records for a given year. But this is not always possible. The effect of missing or unavailable records will depend on the nature of the missing records, and whether a thorough government investigation and analysis can overcome the gap in records.

In ***Beard v. United States***, 222 F.2d 84, 86 (4th Cir. 1955), there were currency deposits made to one of the defendant's accounts, and the government agents were unable to identify withdrawals from this account, since they did not have access to the defendant's cancelled checks. In affirming the conviction, the court pointed out that the agents conducted an "exhaustive search to ascertain what deductions should be made for possible duplications, business expenses and amounts not attributable to the defendant's gambling operations"; and, in addition, an extensive investigation was conducted to demonstrate the source of deposited items. ***Beard***, 222 F.2d at 87-88.

In ***United States v. Esser***, 520 F.2d 213, 216 (7th Cir. 1975), "it was virtually impossible to introduce the deposit slips due to their poor quality, unreliability, and unavailability." The government introduced the bank statements and passbooks as the most reliable evidence available. On cross-examination, the defendant attempted to establish that the deposit slips and underlying items were capable of retrieval. The question was left as one of fact for the jury. The court rejected the argument that a failure by the government to specifically identify and analyze the defendant's deposit slips and underlying items was fatal to the government's case. The full investigation of the deposits and underlying items, and the taking of reasonable steps to identify and deduct non-income items was sufficient. ***Esser***, 520 F.2d at 217; *accord* ***United States v. Abodeely***, 801 F.2d 1020, 1025 (8th Cir. 1986).

Similarly, the defendant in ***United States v. Soulard***, 730 F.2d 1292, 1297 (9th Cir. 1984), argued that the trial court erroneously admitted the government's bank deposits analysis because the government failed to establish that it had introduced into evidence complete sets of the defendant's bank records. The Ninth Circuit rejected the argument, holding that the issue of the completeness of bank records goes to the jury's determination of the weight of the evidence, not its admissibility. ***Soulard***, 730 F.2d at 1298; *see also* ***United States v. Stone***, 770 F.2d 842, 844-45 (9th Cir. 1985) (IRS selected twelve large deposits as a representative sample and had the bank produce a copy of every check deposited with those deposits).

33.5 ELIMINATION OF NON-INCOMEITEMS

33.05[1] Generally

An adequate and full investigation of the defendant's accounts must be conducted to distinguish between income and non-income deposits to support the inference that the unexplained excess in deposits is currently taxable income. ***United States v. Lawhon***, 499 F.2d 352, 356 (5th Cir. 1974); ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974); *see also* ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993).

The government is not required, however, to negate every possible non-income source of each deposit, particularly where the source of the funds is uniquely within the knowledge of the defendant and the government has checked out those explanations given by the defendant that are reasonably susceptible of investigation. ***United States v. Conaway***, 11 F.3d at 43-44; ***United States v. Boulet***, 577 F.2d 1165, 1171 (5th Cir. 1978).

The adequacy of the investigation necessarily turns on the circumstances of each case. ***United States v. Slutsky***, 487 F.2d 832, 841 (2d Cir. 1973). The rule is one of practicality. Although the government is not required to negate all possible non-income sources of deposits to the defendant's accounts, *see* ***Slutsky***, 487 F.2d at 841, "the agent does have an overall burden to prove that he has done the best he can to discover, and exclude, all non-income items from the reconstructed income," ***Morse***, 491 F.2d at 154. For examples of the investigative steps taken to distinguish between income and non-income deposits, *see* ***United States v. Hall***, 650 F.2d 994, 1000 (9th Cir. 1981); ***United States v. Helina***, 549 F.2d 713, 720 (9th Cir. 1977); ***United States v. Stein***, 437 F.2d 775, 778 (7th Cir. 1971); ***United States v. Venuto***, 182 F.2d 519, 520 (3d Cir. 1950); *see also* ***Choi v. Comm'r***, 379 F.3d 638, 640 (9th Cir. 2004) (discussion of calculation of non-income items for a grocery store).

33.05[2] Proof of Non-Income Items

If the analysis categorizes certain deposits as "non-income," the direct evidence the agent relied upon to make that determination must be introduced. It is error to rely merely on hearsay testimony of the investigating agent. ***United States v. Morse***, 491 F.2d 149, 152-55 (1st Cir. 1974); *see also* **Greenberg v. United States,** 295 F.2d 903, 908 (1st Cir. 1961).

In ***Morse***, the agent testified that after completing a thorough investigation, he identified non-income deposits into the defendant's bank accounts from loan proceeds, inter-bank transfers, proceeds from the transfer of land, and proceeds from the sale of a truck. ***Morse***, 491 F.2d at 153. However, the government did not introduce any of the documents upon which the agent had relied, stating that since the items were a credit to the defendant, no prejudice would result. The appellate court reversed, holding that there actually was the potential for prejudice to the defendant if the government did not accurately calculate the amounts of the non-income deposits. ***Morse***, 491 F.2d at 154. The court concluded that "[w]here direct evidence is available as to the[] existence and magnitude [of non-income items], there is no need to rely on the agent's hearsay assertion that they were no larger than he had accounted for." ***Id***.; *see also* **Greenberg**, 295 F.2d at 908. In ***Morse***, although bank ledger cards were available to prove loan proceeds, the government did not introduce them, depriving the court and jury of any knowledge of the particular banks from which the defendants received the loans, the dates of the loans, and the amount of each loan. 491 F.2d at 154. Similarly, the court pointed out that the agent's hearsay testimony also affected non-income deposits regarding inter-bank transfers, returned checks, and sales proceeds. ***Morse***, 491 F.2d at 155 n.10.

The foregoing should be distinguished from the situation in which the investigation does not disclose any non-income deposits or any non-income deposits in addition to those allowed. "To be sure, the court must rely on mere assertion when the agent testifies that he could find no evidence of other non-income items, but then, of course, no better evidence would exist." ***Morse***, 491 F.2d at 154 n.8.

33.5 [3] Good Faith Errors

In a bank deposits computation, as in any other tax case, unreported income which results from good faith accounting errors and the like (*i.e.*, a mathematical error by an accountant) should not be included in the computation of unreported income. ***United States v. Stein***, 437 F.2d 775, 777 (7th Cir. 1971); *see also* ***United States v. Allen***, 522 F.2d 1229, 1231 (6th Cir. 1975); ***United States v. Altruda***, 224 F.2d 935, 940 (2d Cir. 1955). *See* Section 31.11, *supra*.

33.6 UNIDENTIFIED DEPOSITS

After an effort to identify the sources of the bank deposits, those deposits that have not been established as either income or non-income deposits are denominated as "unidentified deposits." To the extent that such unidentified deposits have the inherent appearance of current income, they are included with identified income deposits in determining the defendant's income.

In ***Gleckman v. United States***, 80 F.2d 394, 397 (8th Cir. 1935), the bank deposits computation included over $92,000 in untraceable cash deposits and unidentified deposits. The defendant argued that those deposits "may just as well have been drawn from nontaxable transactions as from services or business." ***Gleckman***, 80 F.2d at 399. Rejecting this argument, the court pointed out that there was substantial circumstantial evidence in the record that the defendant had an unreported business, and that some of the deposits were derived from this business. Thus, the deposits were sufficiently shown to be of a taxable nature. ***Gleckman***, 80 F.2d at 399-400. Note that in ***Gleckman***, the government demonstrated that the defendant had an illegal business apart from the business described in his tax return, that property statements showed that the defendant's net worth had increased, and that the government auditor had spent weeks with the defendant's agent in unsuccessfully attempting to find explanations for the deposits that would justify eliminating them from taxable income. ***Gleckman***, 80 F.2d at400.

United States v. Slutsky, 487 F.2d 832, 841 (2d Cir. 1973), involved approximately $18 million in total deposits over a three-year period. Of the $12.3 million charged as income for that period, approximately $8.6 million was in unidentified deposits and $1 million was in currency. ***Id***. The court held that the government's investigation was sufficient to support the inference that unexplained excess receipts were attributable to currently taxable income and that the government was not required to negate all possible non-income sources of the deposits. ***Slutsky***, 487 F.2d at 841. Holding that the government's investigation was "clearly sufficient under the particular circumstances of the case," the court found that the investigation included a detailed check of every item in an amount greater than $1,000, with very few specified exceptions, and a random check of 1447 items in amounts less than $1,000, with the analyzed items found to constitute income in virtually every instance. ***Slutsky***, 487 F.2d at 841-42. In addition, almost every item in an amount under $1,000 was reflected by a check with a room number encircled on the back (the defendants operated a resort hotel in the Catskill Mountains). ***Slutsky***, 487 F.2d at 842. Commenting on the government investigation, the court concluded:

> To hold the government to a stricter duty of investigation than it performed here would be to ignore both the 'reasonableness' and 'fairness' strictures that have been imposed; it would also result in an exercise in diminishing returns in terms both of the provision of relevant information to the fact-finder and of the protection of the rights of taxpayers.

Slutsky, 487 F.2d at 842.

In ***United States v. Lacob***, 416 F.2d 756, 758 (7th Cir. 1969), the court upheld as adequate an investigation involving total deposits of $99,000 in one year by a lawyer who specialized in personal injury claims and received fees of 20% or 33 1/3% of the recovery obtained, depending on whether the case was a worker's compensation claim or a personal injury claim. There was approximately $39,000 in unidentified and unexplained checks deposited. The defendant was charged with income equal to 20% of these checks, based on the assumption, in the absence of other proof, that these were the proceeds of the defendant's cases and that his fee was the lower of the two fee bases he used. Similarly, in ***United States v. Procario***, 356 F.2d 614, 617-18 (2d Cir. 1966), the defendant was a doctor, and more than one-third of the total alleged professional receipts were in the form of deposits not identified by the government. Rejecting the defendant's argument that there was no evidence from which the jury could have inferred that the unidentified deposits represented income from professional services, the courtsaid:

> The government relied on the fact that it excluded all possible dividends, on the small size and relative frequency of the deposits, similar to deposits and other income proven to be professional receipts, and on the fact that appellant had patients other than those whose payments were included in Items 4 and 6, the directly proven items of income. This was sufficient.

Procario, 356 F.2d at 618.

The basis of the government's case in ***Graves v. United States***, 191 F.2d 579, 581-82 (10th Cir. 1951), was that the defendant, who operated drug stores, realized income that was not deposited in the store bank accounts, not entered in the books, and not reported on his return. The purported income was represented by currency deposits in various special and personal bank accounts of the defendant and his wife, the purchase of government bonds, the sale of cattle, a loan of money, and a personal check from a store manager representing store receipts. The court agreed with the defendant that currency deposits in the defendant's bank account, standing alone, did not prove unreported income but went on to say that "currency deposits from unidentified sources which are not reflected in the books and records from which income tax returns are made and tax liability determined are substantial evidence of an under-statement of income and it is incumbent upon the taxpayer to overcome the logical inferences which may be drawn from these proven facts." ***Graves***, 191 F.2d at 582.

In ***United States v. Ludwig***, 897 F.2d 875, 882 (7th Cir. 1990), the Seventh Circuit upheld a conviction based partly on unidentified deposits that the defendants claimed were "irregular, not specifically identified as coming from any income source, were made to a personal rather than business account and were placed in an account that [one defendant] had no control over." The court of appeals held that the jury was properly instructed that the "duty to reasonably investigate applies only to suggestions or explanations made by the defendant or to reasonable leads which otherwise turn up. The Government is not required to investigate every conceivable source of non-taxable funds." ***Ludwig***, 897 F.2d at 882.

On the other hand, it is necessary that the facts and circumstances put in evidence by the government justify, by reasonable inference at least, that unidentified deposits represent income items. *See* ***Kirsch v. United States***, 174 F.2d 595, 601 (8th Cir. 1949). In reversing the conviction in ***Kirsch***, the court criticized the failure of the government to make any effort to investigate unidentified deposits at issue. The agent testified at the trial that he was aware that all of the deposits were not income but, instead of making an effort to find out the amounts of nonincome deposits, simply assumed that all deposits were income. In doing so, he shifted the burden to the defendant to show how much was not income or suffer the consequences. This procedure, said the court, "cannot be approved." ***Kirsch***, 174 F.2d at 601; *see also* ***Paschen v. United States***, 70 F.2d 491, 497 (7th Cir. 1934). Ultimately, whether unidentified deposits are accepted as current receipts will depend on the strength of the evidence supporting the relationship of the deposits to an income-producing activity, the completeness of the analysis of deposits, and the thoroughness of the investigation conducted.

33.7 BANK DEPOSITS PLUS UNDEPOSITED CURRENCY EXPENDITURES

33.07[1] Generally

In some cases, it will be found that a defendant who was engaged in a business or income-producing activity made regular and periodic deposits to a bank account and, in addition, made a number of cash expenditures by using cash that was never deposited into the defendant's bank account. In this situation, as explained in ***United States v. Boulet***, 577 F.2d 1165, 1167 (5th Cir. 1978), after the bank deposits have been added together and nontaxable amounts are eliminated, the amount of expenditures made in cash (but not deposited) is added to derive gross income. Applicable deductions and exemptions are then subtracted, resulting in corrected taxable income. ***Boulet***, 577 F.2d at 1167; *see* ***United States v. Mounkes***, 204 F.3d 1024, 1028 (10th Cir. 2000); ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993); ***United States v. Abodeely***, 801 F.2d 1020, 1024 (8th Cir. 1986); ***United States v. Ayers***, 673 F.2d 728, 730 (4th Cir. 1982); ***United States v. Berzinski***, 529 F.2d 590, 592 (8th Cir. 1976); ***United States v. Morse***, 491 F.2d 149, 152 (1st Cir. 1974) (after totaling deposits and eliminating non-income items, "[t]he government then includes any additional income which the taxpayer received during the tax year but did not deposit in any bank account"); ***Morrison v. United States***, 270 F.2d 1, 23 (4th Cir. 1959); ***Percifield v. United States***, 241 F.2d 225, 229 n.7 (9th Cir. 1957); ***United States v. Nunan***, 236 F.2d 576, 580 (2d Cir. 1956); ***Bostwick v. United States***, 218 F.2d 790, 794 (5th Cir. 1955); *see also* ***Choi v. Comm'r***, 379 F.3d 638, 640 (9th Cir. 2004) (discussion of bank deposits plus cash expenditures method used in a civil case).

The underlying theory in including expenditures made with cash that did not go through the bank account in the analysis is that it may be inferred that the cash expenditures were made with current income, unless they are shown to have been made from non-income sources. *But see* ***Abodeely***, 801 F.2d at 1024 (government must demonstrate beyond a reasonable doubt that the unreported income came from a taxable source). ***Abodeely*** does not, however, require the government to negate absolutely all possible sources of non-taxable income. Quoting ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975), the court stated in ***Abodeely*** that the government must "'do everything that is reasonable and fair [in] the circumstance to identify any non-income transactions and deduct them from total deposits.'" ***Abodeely***, 801 F.2d at 1025. Alternatively, the government may prove a likely source of the income. ***Id.*** Technically, it should not be necessary to establish cash on hand in a bank deposits case, because the method is grounded on the concept that if the defendant is in an income-producing business and makes regular and periodic deposits to a bank account, any deposits remaining after eliminating non-income items represent taxable income. The cases indicate, however, that where cash expenditures are added to deposits, the government must establish the amount of cash the defendant had on hand at the start of the prosecution period. *See* **United States v. Soulard**, 730 F.2d 1292, 1298 (9th Cir. 1984); ***Boulet***, 577 F.2d at 1168; ***United States v. Slutsky***, 487 F.2d 832, 842 (2d Cir. 1973). This is done to prevent charging the defendant with income for expenditures made not with current income but with nontaxable prior accumulated funds. *See also* Section 33.08, *infra*, for a discussion of cash on hand.

The "bank deposits and cash expenditures" method is not an amalgamation of the "bank deposits" method and the "expenditures" method. ***Abodeely***, 801 F.2d at 1024. There is no need to show net worth when using the bank deposits method. ***Conaway***, 11 F.3d at 43; ***Abodeely***, 801 F.2d at 1023-24; ***Boulet,*** 577 F.2d at 1167 & n.3; ***Percifield***, 241 F.2d at 230; ***United States v. Brickey,*** 289 F.3d 1144, 1151-52 (9th Cir. 2002).

33.7 [2] Amount of Cash Expenditures

There are two ways of establishing the amount of cash expenditures. The first is direct proof of specific currency expenditures from undeposited funds uncovered during the investigation. The second is the indirect method of comparing known total disbursements for specific categories claimed on the tax return (*e.g.*, business expenses) with checks written for such disbursements, with any amount claimed on the return in excess of check expenditures treated as a currency expenditure. As to cash expenditures uncovered during the investigation, the proof consists of merely establishing that the currency expenditures were made with nondeposited funds. Thus, either through testimony or documents, it is established that the defendant made expenditures in cash and not through a checking account. If the defendant has withdrawn cash from a bank account during the year, however, then any such cash withdrawals must be subtracted from the currency expenditures unless it can be shown that the withdrawn cash was not used to make a currency expenditure. Once this is done, the theory is that the undeposited currency expenditures were made with and represent current taxable income, after the elimination of any non-income items, in the same way that deposits represent taxable income.

The indirect method of establishing undeposited currency expenditures is to start with an expenditure claimed by the defendant on the tax return and compare this amount with checks written for the expenditure. If it can be shown that the defendant's checks do not account for all or a part of the expenditure, then any amount not paid by check must have been paid in cash. For example, if the taxpayer has claimed business expenses of $20,000, and checks can be shown as accounting for only $12,000 in business expenses, then it follows that the remaining $8,000 was paid in cash. Under these circumstances, the $8,000 paid in cash would be added to deposits in arriving at taxable income. For an example of the application of this method of establishing cash expenditures, *see* ***Greenberg v. United States***, 295 F.2d 903, 907 (1st Cir. 1961):

> This leads us into the serious evidentiary objections. [Special Agent] Gray's theory of building up the company's gross receipts by deducting from the merchandise expense item on the returns the amount paid for merchandise by check and attributing the balance to non-bank account cash, which, in turn, he labelled additional gross receipts, was entirely fair.

The conviction in ***Greenberg*** was reversed, however, because of hearsay testimony by the case agent. Thus, in ***Greenberg***, the government sought to prove the purpose of checks drawn by the defendant solely through the conclusory testimony of the IRS Special Agent that the checks he selected represented payments for merchandise and that any excess amount claimed on the return as a merchandise expense represented a cash expenditure. ***Greenberg***, 295 F.2d at 906. The Special Agent's analysis of the checks was based on inquiries he had made previously to the payees of the checks. No payee or other third party, however, testified at the trial. Further, no records or admissions of the defendant as to the purposes of the checks was introduced. ***Greenberg***, 295 F.2d at 904. The court held that it was elementary that the purpose of a check could not be established by what third parties had told the agent out of court or by the agent's testimony of what he concluded from his examination of the checks. ***Greenberg***, 295 F.2d at 908. In the example given above, it would thus be error for the agent merely to review and classify certain checks as being for business purposes. It would be necessary to call the third-party payees as witnesses or to introduce other testimonial or documentary evidence establishing the purposes of the checks.

Note that where the agent has interviewed the defendant and the defendant states the purpose for which a check was issued, this constitutes an admission, and it is not necessary to call in the third parties. *See* Fed. R. Evid. 801(d)(2)(A). In this situation, it is common for the agent to prepare a check spread on the basis of the defendant's admissions and introduce the schedule, as an admission, into evidence.

33.8 CASH ON HAND

33.08[1] Generally

The rationale of the bank deposits method of proof supports the reasoning that affirmative proof as to opening cash on hand is not necessary. Opening net worth need not be established in a bank deposits case. ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993); *see also* ***United States v. Brickey,*** 289 F.3d 1144, 1151-52 (9th Cir. 2002); ***United States v. Abodeely***, 801 F.2d 1020, 1024 (8th Cir. 1986); ***United States v. Boulet***, 577 F.2d 1165, 1167 & n.3 (5th Cir. 1978). Therefore, cash on hand should be relevant not as an asset, but as a potential source of deposits. The underlying evidence introduced to establish the relationship between deposits and the income-producing activity is often sufficient to support a finding that the deposits are current receipts. This argument is strongest when a substantial number of deposits are identified as income and there are not significant currency deposits or cash expenditures involved in the bank deposits analysis.

In ***United States v. Slutsky***, 487 F.2d 832, 842 (2d Cir. 1973), the Second Circuit, in affirming a conviction for tax evasion, suggested that an essential element in all bank deposits cases is the establishment of cash on hand. However, the need for an adequate starting point was necessary in ***Slutsky*** because the case involved both currency deposits and the existence of a "cash on hand account" in the proof of unreported receipts. It would not seem appropriate to extend the rationale of ***Slutsky*** to all bank deposits cases, especially those cases not involving currency deposits or a cash on hand account. Indeed, a blind adherence to ***Slutsky*** can lead to an unrealistic and fanciful result. For example, in ***United States v. Birozy***, 74-2 T.C. 9564 (E.D.N.Y. 1974), the trial judge entered a judgment of acquittal on the basis that the government failed to establish a starting cash on hand amount for the defendant. However, the record indicates that cash deposits amounted to only $2,300, while total deposits apparently amounted to some $200,000; even if the $2,300 in cash deposits had been eliminated, there still would have existed a substantial tax due and owing.

For a more realistic approach, *see* ***Scanlon v. United States***, 223 F.2d 382, 388-89 (1st Cir. 1955) (even if reasonable lead is assumed to be true, it accounted for only $3,000 out of $23,466, and the evidence was therefore sufficient to convict). The better and correct view would seem to be that whether the government must establish the defendant's cash on hand will depend on the circumstances of a given case. Generally speaking, if the bank deposits computation does not include any currency deposits and undeposited cash expenditures are not added to deposits in arriving at taxable income, then it should not be necessary to establish the defendant's cash on hand. Under such circumstances, a cash hoard defense would be irrelevant because, even if there were a cash hoard, it could not have played a role in the bank deposits computation.

There can be exceptions to this general rule, depending on the facts of a given case. For example, in theory, a defendant could have a cash hoard, purchase a cashier's check with the cash hoard and then deposit that check into his bank account. While this is a theoretical possibility, unless the defendant volunteers such an explanation, the government should not have a duty to refute it. "'[T]he government is not required to negate all possible non-income sources of the deposits, particularly where the source of the income is uniquely within the knowledge of the taxpayer'" and it is shown that a thorough investigation was conducted. ***United States v. Boulet***, 577 F.2d 1165, 1168-69 (5th Cir. 1978) (quoting ***Slutsky***, 487 F.2d at 841); *see also* ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993).

On the other hand, the cases indicate that if the bank deposits computation includes currency deposits, the government must establish a beginning cash on hand figure. The underlying principle is that if the defendant deposited pre-existing cash into his or her bank accounts during the tax years in question, then this could explain the "excessive" deposits and reduce or eliminate the claimed understatement of income. ***United States v. Soulard***, 730 F.2d 1292, 1298 (9th Cir. 1984); ***United States v. Shields***, 571 F.2d 1115, 1120 (9th Cir. 1978). Similarly, cash on hand must be established where expenditures of undeposited cash are added to deposits in arriving at taxable income, unless it can be demonstrated clearly that any pre-existing cash on hand was not the source of the expenditures. *See* ***Boulet***, 577 F.2d at 1168.

33.8 [2] Proof Of Cash On Hand

The government is not obligated to prove cash on hand "with mathematical exactitude." ***United States v. Mounkes***, 204 F.3d 1024, 1028 (10th Cir. 2000); *see also* ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993); ***United States v. Boulet***, 577 F.2d 1165, 1170 (5th Cir. 1978). It is only required that the government prove cash on hand "with reasonable certainty." ***Mounkes***, 204 F.3d at 1028; ***United States v. Slutsky***, 487 F.2d 832, 842 (2d Cir. 1973); ***United States v. Normile***, 587 F.2d 784, 785 (5th Cir. 1979) (government need not corroborate defendant's statement that he kept no more than $100 on hand). Where a thorough government investigation does not develop any evidence of cash on hand, it is proper to "use a cash on hand figure of zero." ***United States v. Shields***, 571 F.2d 1115, 1120-21 (9th Cir. 1978). In the final analysis, the existence of any cash on hand presents a factual issue for determination by the jury. ***United States v. Parks***, 489 F.2d 89, 90 (5th Cir. 1974).

For an extended discussion of concepts relating to cash on hand, reference should be made to Sections 31.06 and 31.07, *supra*.

33.9 REASONABLE LEADS

The government must investigate any reasonable, relevant leads furnished by a defendant that are reasonably susceptible of being checked and which, if true, would establish the defendant's innocence. ***United States v. Conaway***, 11 F.3d 40, 43-44 (5th Cir. 1993); ***United States v. Ludwig***, 897 F.2d 875, 882 (7th Cir. 1990); ***United States v. Hall***, 650 F.2d 994, 1000 (9th Cir. 1981); ***United States v. Boulet***, 577 F.2d 1165, 1169 (5th Cir. 1978); ***United States v. Esser***, 520 F.2d 213, 217 (7th Cir. 1975); ***United States v. Slutsky***, 487 F.2d 832, 843 n.14 (2d Cir. 1973) ("[t]he contention that the 'leads' doctrine should be confined to a net worth case is no longer tenable"); ***United States v. Ramsdell***, 450 F.2d 130, 132 (10th Cir. 1971); ***United States v. Stein***, 437 F.2d 775, 778 (7th Cir. 1971).

If the government fails to investigate a reasonable lead timely furnished by the defendant, the trial court may consider the defendant's version as true and so instruct the jury. ***Hall***, 650 F.2d at 1000; *see also* ***Holland v. United States***, 348 U.S. 121, 136 (1954) ("When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."). There is, however, a rule of reason, and "the government's investigators are not obliged to track down every conceivable lead offered by the taxpayer to justify the non-income designation of a particular item." ***Esser***, 520 F.2d at 217. *See also* ***Ludwig***, 897 F.2d at 882; ***United States v. Normile***, 587 F.2d 784, 786 (5th Cir. 1979) (agents not obliged to check every bank in the area nor to check every deposit slip in defendant's account to find "lead" to wife's account); ***United States v. Lenamond***, 553 F. Supp. 852, 855, 860 (N.D. Tex. 1982) (agents obliged to check lead regarding correctness of reported inventory figures because lead was provided more than two years before trial and was reasonably verifiable, and the reported inventory figures were "astonishing" and "truly anomalous").

Leads furnished by a defendant must be both timely and reasonably susceptible of being checked. ***Conaway***, 11 F.3d at 43-44 ("We cannot reasonably expect the government to find secret cash hoards without taxpayer assistance."); ***Normile***, 587 F.2d at 786 ("[t]he government was not obliged to bay down rabbit tracks"); ***United States v. Procario***, 356 F.2d 614, 617 (2d Cir. 1966) (leads furnished "on the eve of indictment" were too late). While the jury must be instructed on the government's duty to investigate reasonable leads, on appeal the issue is reviewed only for sufficiency of evidence. ***United States v. Ludwig***, 897 F.2d 875, 879 (7th Cir. 1990) ("'leads' is a factor we must consider in determining whether there was sufficient evidence"); ***United States v. Soulard***, 730 F.2d 1292, 1298-99 (9th Cir. 1984).

In considering questions concerning the reasonable leads doctrine, reference should be made to Section 31.13, *supra*.

33.10 USE OF SUMMARY CHARTS AND SCHEDULES

In a bank deposits case, just as in a net worth case, at the close of its case the government calls to the stand a summary expert witness who summarizes the evidence and presents schedules reflecting the government's bank deposits computation.

It is well established that a government agent can summarize the evidence and present computations and schedules reflecting the bank deposits computations. ***United States v. Soulard***, 730 F.2d 1292, 1300 (9th Cir. 1984) (summary charts are not to be admitted in evidence or used by the jury during deliberations but can be used as "testimonial aids" during the agent's testimony and during closing arguments); ***United States v. Morse***, 491 F.2d 149, 152-53 & n.4 (1st Cir. 1974); ***United States v. Stein***, 437 F.2d 775, 780-81 (7th Cir. 1971) ("challenges advanced by defendant to the use of such summaries have been long since considered and rejected by the Supreme Court"); ***United States v. Lacob***, 416 F.2d 756, 762 (7th Cir. 1969); ***Graves v. United States***, 191 F.2d 579, 584 (10th Cir. 1951) (government agent's schedule "was clearly admissible").

The agent's schedules must be based on evidence in the record and should not contain captions that are "any more conclusionary or impressive than required to make the summaries understandable." ***Lacob***, 416 F.2d at 762; ***Esser***, 520 F.2d at 218 ("the record shows that the summary witness relied only upon the evidence received during the trial and that he was available for full cross-examination").

The testifying agent need not be involved in the investigation or original preparation of the government's case. Thus, a "summary expert" can be called to the witness stand to present the government's bank deposits analysis as long as the witness is qualified as an expert. ***Soulard***, 730 F.2d at 1299.

The same principles applicable to schedules and summaries in a net worth case are also applicable in a bank deposits case. ***Stein***, 437 F.2d at 780. Accordingly, reference should be made to Section 31.16, *supra*, Sample Net Worth Schedule.

33.11 JURY INSTRUCTIONS

The defendant is "clearly entitled to a special explanatory charge" when the government proceeds on the bank deposits method of proof. ***Greenberg v. United States***, 295 F.2d 903, 907 (1st Cir. 1961); ***United States v. Wiese***, 750 F.2d 674, 678 (8th Cir. 1984) ("[w]hen the government uses the bank deposit method, a trial court should instruct the jury on the nuances of that method of accounting"); ***United States v. Hall***, 650 F.2d 994, 999 (9th Cir. 1981) (*per curiam*) ("comprehensive explanatory instructions must be given when the bank deposits method of proof is used, just as is required by ***Holland*** for the net worth method"). The Eighth Circuit has upheld bank deposit jury instruction language that "an inference arises" that periodic deposits represent income, against a challenge that such language created an unconstitutional presumption that effectively relieved the government of its burden of proving every element of a crime. ***Karras v. Leapley,*** 974 F.2d 71, 72-74 (8th Cir. 1992). For a sample bank deposits jury instruction, *see* the section on jury instructions, *infra*.

33.12 SAMPLE BANK DEPOSITS COMPUTATION

Reproduced on the page which follows is a hypothetical bank deposits summary computation. Note that ancillary schedules such as an analysis of deposits are not included in the example.

SAMPLE BANK DEPOSITS SUMMARY COMPUTATION

Bank Deposits plus Cash Expenditures and Specific Items Not Deposited

2010 Tax Year

Total Bank (Brokerage) Account Deposits		$100,675.00
Less: *Nontaxable receipts*		
Transfers from other accounts	$1,500.00	
Redeposits (Bad checks)	200.00	
Proceeds from borrowing (Loans)	1,000.00	
Proceeds from repayment of loan	500.00	
Gift	200.00	
Inheritance	2,000.00	
Other deposits – eliminated	1,500.00	-$ 6,900.00
Net Deposits		$ 93,775.00
Plus: Cash expenditures	$10,200.00	
Specific Items of Income –		
Not Deposited	5,100.00	15,300.00
Gross Receipts		$109,075.00

Less: Business Expenses	*-21,000.00
Net Profit From Business	$ 88,075.00
Less: Itemized deductions	*-5,075.00
	$ 83,000.00
Less: Exemptions (4) x $2,650	-10,600.00
Corrected Taxable Income	$ 72,400.00
Less: Taxable Income per return	-41,000.00
Unreported Taxable Income	$ 31,400.00

* Generally determined from tax return filed. However, if investigation establishes amounts greater than those claimed on return(s) the larger amounts are used for criminal computation purposes.

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40.00 TAX DEFIERS (also known as illegal tax protesters)[1]

40.1 GENERALLY

Over the past fifty years, tax defiers have advanced frivolous arguments and developed numerous schemes to evade their income taxes and frustrate the Internal Revenue Service, under the guise of constitutional and other meritless objections to the tax laws.[2] Individuals who merely express dissatisfaction with the income tax system are not criminally prosecuted. However, the right to freedom of speech is not so absolute as to protect conduct that otherwise violates or incites a violation of the tax laws. ***United States v. Citrowske,*** 951 F.2d 899, 901 (8th Cir. 1991); *see also* ***United States v. Fleschner,*** 98 F.3d 155, 158-159 (4th Cir. 1996) (denying instruction on First Amendment defense where defendants' "words and acts were not remote from the commission of the criminal acts"); ***United States v. Kuball,*** 976 F.2d 529, 531 (9th Cir. 1992) ("First Amendment does not protect those who go beyond mere advocacy and assist in creation and operation of tax evasion schemes.")

Tax defier schemes range from simply failing to file tax returns, to concealing financial transactions and assets in warehouse banks and trusts, to filing frivolous liens to interfere with IRS investigations. These schemes give rise to charges under all of the criminal tax statutes. Thus, this chapter should be read in conjunction with those chapters of this Manual that discuss the various substantive offenses in detail. *See* Chapters 8.00 through 25.00, *supra*.

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[1] The IRS Restructuring Act of 1998, Section 3707, precludes the IRS from labeling a taxpayer as an "illegal tax protester" or using any other similar designation. The Department of Justice is not included in this legislation, and the preclusion therefore does not apply to it. Prosecutors, however, should be careful not to elicit from an IRS employee testimony characterizing a person as an "illegal tax protester" or a similar designation.

[2] The IRS has published guidance describing and rebutting frivolous arguments taxpayers have used. *See The Truth About Frivolous Tax Arguments* (February 16, 2012) at http://www.irs.gov/pub/irs-utl/friv_tax.pdf.

40.2 SCHEMES

40.02[1] Paper Terrorism

40.02[1][a] Harassment Schemes

Tax defiers have employed various schemes designed to harass IRS employees and agents, as well as prosecutors and judges, and to interfere with audits and criminal investigations. An early harassment scheme involved filing with the IRS false Forms 1099 reporting that an IRS agent, judge, or prosecutor had been paid large amounts of money. This scheme was designed to trigger an IRS audit during which the Form 1099 recipient would have to explain the discrepancy between the income reported on his or her return and that reported on the Form 1099. *See, e.g.*, ***United States v. Van Krieken***, 39 F.3d 227, 228 (9th Cir. 1994); ***United States v. Citrowske***, 951 F.2d 899, 900 (8thCir. 1991).

Form 1099 schemes have been prosecuted under a variety of criminal tax statutes. *See, e.g.*, ***United States v. Bowman***, 173 F.3d 595, 600 (6th Cir. 1999) (26 U.S.C. § 7212(a) is appropriate charge in Forms 1099/1096 scheme); ***United States v. Winchell,*** 129 F.3d 1093, 1098-99 (10th Cir. 1997) (26 U.S.C. §§ 7212(a) and 7206(1)); ***United States v. Heckman,*** 30 F.3d 738 (6th Cir. 1994) (discussing application of sentencing guidelines in Form 1099 scheme charged under 26 U.S.C. § 7206(1)); ***United States v. Dykstra***, 991 F.2d 450 (8th Cir. 1993) (26 U.S.C. §§ 7206(1) and 7212(a)); ***UnitedStates v. Rosnow***, 977 F.2d 399, 410-11 (8th Cir. 1992) (filing false tax forms 1096 or 1099 with IRS prosecuted under 26 U.S.C. § 7206(1)); ***United States v. Kuball***, 976 F.2d 529, 530-531 (9th Cir. 1992) (26 U.S.C. §§ 7206(1) and 7212(a)); ***United States v. Parsons***, 967 F.2d 452, 453-454, 456 (10th Cir. 1992) (18 U.S.C. §§ 287 and 1001); ***United States v. Hildebrandt***, 961 F.2d 116, 117 (8th Cir. 1992) (18 U.S.C. § 1001); ***United States v. Yagow***, 953 F.2d 423, 424 (8th Cir. 1992) (26 U.S.C. §§ 7206(1) and 7212(a)); ***United States v. Citrowske***, 951 F.2d 899, 900 (8th Cir. 1991) (18 U.S.C. § 1001); ***United States v. Telemaque***, 934 F.2d 169, 170 (8th Cir. 1991) (18 U.S.C. § 371).

A resurrection of the so-called “Redemption” scheme in the late 1990s and early 2000s involved the filing of false Forms 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business), Forms 4789 (Currency Transaction Reports (CTRs)), and Suspicious Activity Reports (SARs) for harassment purposes.[3] Forms 8300 are IRS reporting forms covered by the confidentiality provisions of 26 U.S.C. § 6103.[4] Forms 4789 and SARs are Financial Crimes Enforcement Network (FinCEN) documents not subject to tax information confidentiality requirements.

Essentially, the "Redemption" scheme involves filing one of these forms with the IRS to report that a large amount of cash, sometimes foreign currency, was paid to the named recipient. IRS agents, federal and state prosecutors and judges, state troopers, and private creditors are often targeted. Typically, the tax defier will send his or her victim an IRS Form W-9, requesting a Social Security number. Even without the target's Social Security number, the tax defier will file the Form 8300, which often triggers a letter to the target from the IRS, or other contact, in which the IRS requests additional information and warns of possible penalties for incomplete information. More recently, tax defiers have used IRS Forms 1099-OID (Original Issue Discount) rather than Forms 1099-Misc to harass IRS employees, prosecutors, and judges. IRS Criminal Investigation (CI) investigates such false document filings involving non-IRS employees, while Treasury Inspector General for Tax Administration (TIGTA) has jurisdiction over filings against IRS personnel. All cases, whether investigated by CI or TIGTA, require authorization for prosecution from the Tax Division.

There are several ways to prosecute these schemes. First, the prosecutor should determine whether the tax defier has attempted to pass any fraudulent sight drafts or other fictitious financial instruments. This inquiry may require consultation with other federal law enforcement agencies, such as the U.S. Secret Service and/or the Federal Bureau of Investigation. If the tax defier has filed false Forms 8300 or Forms 1099 *and* used fictitious financial instruments, the prosecutor should consider charging the fictitious financial instrument(s) under 18 U.S.C. § 514[5] (*see* § 40.02[1][b], *infra*), using the false

[3] Typically, perpetrators of the "Redemption" scheme filed these forms in conjunction with filing bogus financial instruments, entitled "sight drafts" or "bills of exchange." *See* § 40.02[1][b], *infra*.

[4] Section 6103(l)(15) authorizes the Secretary of Treasury, upon written request, to disclose to officers and employees of any federal agency, any agency of a State or local government, or any agency of the government of a foreign country, information contained on Forms 8300, on the same basis, and subject to the same conditions, as apply to disclosures of information on reports filed under 31 U.S.C. § 5313, except that no disclosure shall be made for purposes of the administration of any tax law.

[5] Section 514 essentially punishes anyone who, with the intent to defraud, uses a fictitious instrument appearing to be an actual security or financial instrument.

Forms 8300 or 1099 as evidence of intent. If the tax defier has filed a large number of false Forms 8300 or 1099, 26 U.S.C. § 7212(a) is a possible charge. *See*, *e.g.*, ***United States v. Pansier***, 576 F.3d 726 (7th Cir. 2009); ***United States v. Saldana***, 427 F.3d 298, 301-02 (5th Cir. 2005) (convictions under § 7212 and 18 U.S.C. § 1001 for two defendants who, respectively, filed with the IRS 12 and 16 Forms 8300 that targeted various individuals who were connected with state or federal government). On plain error review, the Fifth Circuit held that a defendant acts "corruptly" under § 7212 by seeking an unlawful advantage or benefit for oneself or another, and it *need not* be with regard to the tax laws. *Id.* at 304-05. Because Forms 8300 are signed under penalties of perjury, they may also be charged as violations of 26 U.S.C. § 7206(1). Forms 4789 and 1099 and SARs do not contain jurats (text regarding the filer's signing under penalties of perjury), so they cannot form the bases for Section 7206(1) charges.

In some cases, it may be best to simply use the false Forms 8300 or 1099 as evidence to support an obstruction enhancement at sentencing. *See, e.g.,* ***United States v. Veral Smith***, 3:99-CR-00025 (D. Idaho 2000) (district court considered false Forms 8300 filed against prosecutors and judge as evidence supporting obstruction enhancement).

Tax defiers have also filed frivolous liens against the property of federal employees to harass them, or have employed similar acts of interference. The tax defier files with the local county recorder a lien against the federal employee's real property for a large amount of money. The purpose of the lien is to encumber the property. This tactic is designed to disrupt IRS audits and investigations by personally targeting the financial affairs of IRS personnel involved in the tax defier's case. The tax obstruction statute, 26 U.S.C. 7212(a), may be a viable charge in this kind of case. *See*, *e.g.*, ***United States v. McBride***, 362 F.3d 360, 372-373 (6th Cir. 2004) (conviction under § 7212 for filing a false petition for IRS employee's involuntary bankruptcy); ***United States v. Boos,*** Nos. 97-6329, 97-6330, 1999 WL 12741, at *1-2, 8 (10th Cir., Jan. 14, 1999) (conviction under 18 U.S.C. § 372 and 26 U.S.C. § 7212(a)); ***United States v. Gunwall***, Nos. Nos. 97-5108, 97-5123, 1998 WL 482787 (10th Cir., Aug. 12, 1998); ***United States v. Bowman***, 173 F.3d 595, 600 (6th Cir. 1999) (upholds § 7212(a) conviction for false 1096, 1099s); ***United States v. Trowbridge***, Nos. 96-30179, 96-30180, 1997 WL 144197, at *2 (9th Cir., Mar. 26, 1997); ***Kuball***, 976 F.2d at 531 (upholding Section 7212(a) conviction for sending threatening letters to IRS employees); ***United States v. Reeves***, 782 F.2d 1323, 1326 (5th Cir. 1986) (upholding Section 7212(a) conviction for filing false liens against IRS agent) ("***Reeves II***").

Tax defiers also have sued agents, prosecutors, and judges, and threatened "arrest" and "prosecution" in so-called "common-law" courts. "Common-law" courts -- which have no legal standing -- are often set up by anti-government groups. In some instances, they "indict" and "convict" individuals.

"Common-law" documents -- ranging from "promissory notes," to "arrest warrants," to "criminal complaints" -- are created to resemble authentic legal documents, but are bogus documents designed to harass IRS employees. *See, e.g.*, ***United States v. Hart***, 701 F.2d 749, 750 (8th Cir. 1983); ***United States v. Knudson***, 959 F. Supp. 1180, 1185-1186 (D. Neb. 1997); ***United States v. Van Dyke***, 568 F. Supp. 820 (D. Or. 1983). Depending on the circumstances, use of the documents may give rise to 26 U.S.C. § 7212(a) charges. *See, e.g.*, ***United States v. Wells***, 163 F.3d 889, 896-97 (4th Cir. 1998); ***Reeves***, 782 F.2d at 1323, 1326. Because defendants' use of "common law" documents often begins during investigation and continues during prosecution, their use is evidence of willfulness for substantive tax charges or the basis for an obstruction of justice or other enhancement at sentencing. *See, e.g.*, ***United States v. Lindsay***, 184 F.3d 1138, 1143-1144 (10th Cir. 1999) (upholding denial of acceptance of responsibility for obstructive conduct such as filing numerous frivolous documents); ***Wells***, 163 F.3d at 894, 898-900 (upholding upward departure for "domestic terrorism" for, *inter alia*, active participation in "Freemen's court" to try IRS agents, and preparation of future harm by group).

It should be noted that the Court Security Improvements Act of 2007 provides another statute to consider when charging the filing of false liens in retaliation against federal officers or employees. *See* 18 U.S.C. § 1521 (10-year felony for retaliating against a federal judge or federal law enforcement officer by false claim or slander of title).[6]

Tax defiers have also filed frivolous lawsuits or criminal complaints against prosecutors and agents in legitimate state and federal courts. Cases based on these filings are rarely authorized for prosecution because such lawsuits and criminal complaints are difficult to distinguish from the host of frivolous cases filed in courts all the time -- thus

[6] Where a violation of 18 U.S.C. § 1521 arises under the internal revenue laws (*see* 28 CFR § 0.70), Tax Division authorization of such charges is required. It is the conduct, not the charging statute, that controls Tax Divisionjurisdiction.

making it difficult to overcome a defense based on the right to petition for a redress of grievances.

40.2 [1][b] Fictitious Financial Instruments

For years, tax defiers have submitted bogus financial instruments to "pay" their tax liabilities and obtain erroneous IRS refunds, and to "pay" private creditors. These instruments are designed to deceive the IRS and financial institutions into treating them as authentic checks or real money orders. For example, a tax defier will submit a large bogus check to the IRS or a creditor for an amount in excess of the amount owed and request a refund of the difference. If the IRS or creditor rejects the bogus check, the tax defier may respond with threatening letters to force acceptance of the bogus payment. Over the years, these bogus financial instruments have had various titles. Early versions were entitled "Certified Money Order," "Certified Bankers Check," "Public Office Money Certificate," or "Comptroller Warrant."

Several groups have promoted the use of such bogus financial instruments. One of the earliest "bogus money order schemes" was perpetrated by an organization in Wisconsin known as "Family Farm Preservation." *See*, *e.g.*, ***United States v. Stockheimer,*** 157 F.3d 1082, 1084-1086. 1089-90 (7th Cir. 1998) (describing Family Farm Preservation scheme and noting that the potential loss calculation exceeded $80 million; government asserted $180 million). An organization known as "USA First" learned of the scheme and sold over 800 "Certified Money Orders" (CMOs) with a face value of $61 million. *See* ***United States v. Mikolajczyk***, 137 F.3d 237, 239-240 (5th Cir. 1998); ***United States v. Moser***, 123 F.3d 813, 818-819 (5th Cir. 1997). The Montana Freemen are perhaps the most notorious group to promote this scheme. *See, e.g.,* ***United States v. Wells***, 163 F.3d 889, 893 (4th Cir. 1998); ***United States v. Hanzlicek***, 187 F.3d 1228, 1231-1232 (10th Cir. 1999); ***United States v. Switzer***, Nos. 97-50265, 97-50293, 97-50442, 1998 WL 750914 (9th Cir. Oct. 19, 1998).

The "redemption" scheme involves the use of fictitious financial instruments, sometimes called "Sight Drafts," "Bills of Exchange," or other titles, as well as the filing of Forms 8300, 4789, and 1099 and SARs. *See* § 40.02[1][a], *supra*.

The fictitious financial obligation component of the "Redemption" scheme is based on the premise that, when the United States went off the gold standard in 1933, the government began to be funded with debt instruments secured with the energy of current and future inhabitants. The theory is that a fictitious identity or “straw man” was created for all Americans and the value of a person’s birth certificate became the collateral for United States currency. Supposedly, the value of an individual’s birth certificate is determined by the number of times it is traded on the world futures market, and the amount is purportedly maintained in a Treasury Direct Account under that person’s social security number.

A participant in the scheme attempts to reclaim his or her “straw man” and therefore the value of the fictitious identity by redeeming his or her birth certificate. The participant sometimes files a Form UCC-1 with the Secretary of State in any State, claiming title and a security interest in his or her social security, driver’s license, and birth certificate numbers. The individual then writes “acceptance for value,” “non-negotiable charge back,” or other prescribed language diagonally on a government paper and returns it to the government official who issued it. Typically, the types of documents used for redemption include anything from a traffic ticket to a federal indictment. The “charge back” allegedly creates a “treasury direct account” that contains the amount assigned to the charge back, which the participant purportedly can then draw upon by writing a fictitious check. These fictitious financial obligations are then written for varying amounts, some as high as trillions of dollars. A Form UCC-3 indicating the partial release of collateral in the amount of each sight draft may be filed with the same Secretary of State who accepted the Form UCC-1.

These bogus financial instruments purport to be drawn on the United States Treasury Department. They are of very high print quality and usually contain some reference to HJR 192, the House Joint Resolution that took the United States off the gold standard in 1933.

Historically, fictitious financial instrument cases involving private creditors were prosecuted under a variety of statutes, such as

- 18 U.S.C. § 371 (Conspiracy),
- 18 U.S.C. § 1341 (Mail fraud),
- 18 U.S.C. § 472 (Uttering a false security), and
- 18 U.S.C. § 513 (Possessing and uttering a counterfeit security).

See, e.g., ***United States v. Pullman***, 187 F.3d 816, 818, 820-821 (8th Cir. 1999); ***Hanzlicek***, 187 F.3d at 1230-31; ***Wells***, 163 F.3d 892; ***Stockheimer***, 157 F.3d at 1086; ***Moser***, 123 F.3d 813.

Cases involving bogus financial instruments presented to the IRS can be prosecuted under 18 U.S.C. § 371 **(*Klein*** conspiracy), 18 U.S.C. § 287 (false claims for refunds), and 18 U.S.C. § 514 (fictitious financial obligations). To bring a false claim charge, a prosecutor should have evidence that the tax defier expected a refund from the IRS as a result of submitting the instrument. Such evidence might include (1) the tax defier's written request for a refund; (2) proof that the tax defier received an IRS notice of tax due and owing and, in response, submitted a bogus check for a significant amount over the amount owed; and (3) proof that the tax defier learned of this scheme in a seminar that advertised it would teach participants how to obtain tax refunds. Submission of a bogus financial instrument may also be used as an affirmative act of evasion (26 U.S.C. § 7201).

In 1996, Congress passed 18 U.S.C. § 514 specifically in reaction to the use of comptroller warrants. Noting that anti-government groups used fictitious financial instruments to commit economic terrorism against government agencies, private businesses, and individuals, Congress enacted Section 514 as a Class B felony, which carries a maximum prison sentence of 25 years.[7] *See* 18 U.S.C. 514(a); 142 Cong. Rec. S10155-02, S1013 (daily ed. Sept. 10, 1996). Section 514 provides in part:

> Whoever, with the intent to defraud –
>
> (1) draws, prints, processes, produces, publishes, or otherwise makes, or attempts or causes the same, within the United States;
>
> (2) passes, utters, presents, offers, brokers, issues, sells, or attempts or causes the same, or with like intent possesses, within the United States; or
>
> (3) utilizes interstate or foreign commerce, including the use of the mails or wire, radio, or other electronic communication, to transmit, transport, ship, move, transfer, or attempts or causes the same, to, from, or through the United States, any false or fictitious instrument, document,

[7] *See* 18 U.S.C. § 3581(b)(2).

> or other item appearing, representing, purporting, or contriving through scheme or artifice, to be an actual security or other financial instrument issued under the authority of the United States, a foreign government, a State or other political subdivision of the United States, or an organization, shall be guilty of a class Bfelony.

Section 514 of Title 18 of the United States Code is the obvious charge when prosecuting a case involving a fictitious financial instrument. Before deciding which charges to bring in cases involving fictitious financial obligations, a prosecutor should determine how often the tax defier used a fictitious financial obligation and whether he or she also filed false Forms 8300, Forms 1099, CTRs, or SARs.

In ***United States v. Howick***, 263 F.3d 1056, 1066 (9th Cir.2001), the Ninth Circuit addressed the scope of § 514 and concluded that § 514's coverage for "false or fictitious" obligations is intended to be different from "counterfeit" obligations under 18 U.S.C. 472. Section 472 addresses bogus or counterfeit documents that appear similar to *existing* documents. ***Howick***, 253 F.3d at 1067. In contrast, § 514 encompasses a fictitious document that "bears a family resemblance to genuine financial instruments," but need not be similar to any existing financial obligation in particular. *Id*. at 1068. Moreover, while the document must contain some "hallmarks and indicia of financial obligations" so as to appear within the family, the "likeness" need not meet the higher standard of "similitude" required for § 472. *Id*. at 1067. Instead, the document will be considered under § 514 in light of the "idea of verisimilitude -- the quality of appearing to be true or real." *Ibid*.

The analysis in ***Howick*** is the starting point for several succeeding opinions. *See* ***United States v. Salman***, 531 F.3d 1007 (9th Cir. 2008); ***United States v. Heath***, 525 F.3d 451 (6th Cir. 2008); ***United States v. Morganfield***, 501 F.3d 453, 457-61 (5th Cir. 2007) (relying on ***Howick***'s determination that § 514 encompasses nonexistent instruments, court concluded that § 514 did not encompass legitimate or "real" checks drawn on bank account opened under false pretenses and with insufficient funds); ***United States v. Anderson***, 353 F.3d 490, 500-501 (6th Cir. 2003) ("sight drafts" properly charged as fictitious financial instruments under § 514).

In ***Salman***, 531 F.3d at 1011-12, the Ninth Circuit reiterated that a fictitious document under § 514 is a "nonexistent instrument" and that ***Howick*** imposed a "low threshold for what constituted a credibly fictitious financial instrument." The Ninth

Circuit rejected the defendant's claim that the IRS may not be a victim under § 514, based on the "plain language of the statute and [the court's] holding in ***Howick***." *Id.* at 1012. The Ninth Circuit rejected the defendant's assertion that § 514 and ***Howick***'s analysis limited fictitious financial instruments to negotiable instruments. *Id*. at 1012-14. In ***Salman***, 531 F.3d at 1012-13, the court concluded that ***Howick*** specifically focused on negotiable instruments because that was the type of instrument in issue in that case, but that § 514 encompassed documents that appear to be either a negotiable or non-negotiable instrument. The Ninth Circuit noted the broad breadth Congress intended for § 514: the court decided that to accept Salman's argument that § 514 was limited to fictitious, negotiable instruments "would unnecessarily limit the scope of § 514, contrary to what Congress said in its statutory language, and would reopen a loophole . . . that Congress purposely closed when it enacted § 514." *Id*. at 1013. Finally, the Ninth Circuit rejected Salman's claim that the fictitious sight drafts did not appear sufficiently genuine to violate § 514. 531 F.3d at 1014-15. Again, the court stated that ***Howick*** provided a "nonexhaustive" list of attributes for negotiable instruments, but did not identify all criteria for an instrument to be deemed a fictitious document that appeared to be "a member of the family of actual financial instruments." *Id*. at 1014-1015. Moreover, the court stated that the "context in which the fictitious sight drafts were presented is not wholly irrelevant." *Id*. at 1015.

In ***United States v. Heath***, 525 F.3d 451, 455 (6th Cir. 2008), the district court had granted a motion under Fed. R. Crim. P. 29 to dismiss one § 514 charge because the face of the instrument stated it was "not negotiable." This dismissal was not appealed, however. In addition, in instructing on Section 514, the district court stated, "To trigger liability, the document must credibly hold itself out as [a] negotiable instrument." *Id*. at 459. In reading the instructions to the jury, the district court also told the jurors to consider whether the document was free of "disqualifying remarks," as opposed to "disqualifying marks." The Sixth Circuit held that this misstatement did not amount to plain error. In discussing that issue, the Sixth Circuit noted the Ninth Circuit's comment in ***Howick*** "that 'the document need only credibly hold itself out as a negotiable instrument' and be 'free of disqualifying marks, such as for example, a statement that the document is not negotiable.'" There is no indication, however, that the instrument at issue in ***Heath*** purported to be anything but a negotiable instrument, and it therefore appears that the court had no reason to address the question whether § 514 reaches a document that does not purport to be a negotiable instrument. Thus, it is the Tax Division's position that ***Heath*** does not stand for the proposition that § 514 reaches only bogus documents purporting to be negotiable instruments, and that a purported non-negotiable instrument may fall within the statute. *Cf.* ***Salman***, 531 F.2d at 1012 (sight drafts with text "non-negotiable" were within purview of § 514).[8]

A common issue in fictitious financial instrument cases involves the discrepancy between "intended loss" and "actual loss," and the impact on sentencing. Often, little or no actual loss results from the use of a bogus financial instrument. In ***United States v. Ensminger***, 174 F.3d 1143, 1145 (10th Cir. 1999), the court was faced with a scheme to obtain ownership of real property through submission of bogus financial instruments. The district court enhanced Ensminger's mail fraud sentence under the Sentencing Guidelines based on an intended loss of $540,700, the uncontested value of the property. *Ibid.* The facts in ***Ensminger***, however, showed that there was no way the scheme could have succeeded, because the properties Ensminger attempted to obtain had already been sold to third parties. *Id*. at 1146. Based on these facts and two previous decisions (***United States v. Galbraith***, 20 F.3d 1054 (10th Cir. 1994); ***United States v. Santiago***, 977 F.2d 517 (10th Cir. 1992)), the court held that a ten-level enhancement was clearly erroneous. ***Ensminger***, 174 F.3d at 1146. The ***Ensminger*** court noted that the Fifth, Seventh, Ninth, Eleventh, and District of Columbia Circuits, relying on application note 10 to section 2F1.1 of the Guidelines (authorizing a downward departure where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it), disagreed with its analysis. *Id.* at 1146-47. In ***United States v. Flanders***, 491 F.3d 1197, 1218 (10th Cir. 2007), the Tenth Circuit distinguished ***Ensminger,*** stating that that decision focused on the absence of possibility of success, while Flanders' "furtive" actions had led to "near success" in creating a $2 million loss.

On the other hand, in a case specifically involving use of bogus financial instruments, the Fifth Circuit upheld sentencing based on the face value of fictitious financial instruments, titled "Certified Money Orders," even though there was no actual loss. *See* ***Moser***, 123 F.3d at 830 (distinguishing intended loss based on the face value of property or investments from intended loss of zero when the defendant intends to repay a loan). *See also* ***United States v. Ismoila***, 100 F.3d 380, 396-97 (5th Cir. 1996) (intended losses considered); ***United States v. Switzer***, Nos. 97-50265, 97-50293, 97-50442, 1998 WL 750914 (9th Cir. Oct. 19, 1998) (upholding sentence based on intended loss); ***United States v. Lorenzo,*** 995 F.2d 1448, 1460 (9th Cir. 1993).

[8] Counsel should note that in ***Salman***, 531 F.2d at 1010, an employee from the Office of the Comptroller testified about elements of checks versus sight drafts and the meaning of "non-negotiable."

On November 1, 2001, Part F of the Guidelines was deleted and consolidated with the provisions of § 2B1.1 by Amendment 617. *See* USSG §2B1.1 (Nov. 2001). Significantly, Guideline § 2B1.1 (2007), comment. 3, states that subject to specific exclusions, "loss is the greater of actual loss or intended loss." Moreover, "intended loss . . . includes intended pecuniary harm that would have been impossible or unlikely to occur." USSG § 2B1.1, comment. (n.3(A)(ii)). However, the Application Notes further acknowledge, "There may be cases in which the offense level determined under these guidelines substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted." USSG § 2B1.1, comment. (n.19(B)).

This amendment and the discussion of measuring loss under § 2B1.1 overruled some circuits' precedent that rejected sentences based on intended losses that were unrelated to economic reality or possibility. *See, e.g.,* ***United States v. McBride***, 362 F.3d 360, 374 (6th Cir. 2004). Notwithstanding § 2B1.1's statement regarding consideration of intended loss as being broadly defined, the debate continues on whether, or to what extent, intended loss based on the use of fictitious financial instruments should be considered at sentencing. *See* ***McBride***, 362 F.3d at 373-78 (remanded for sentencing based on the district judge's apparent misunderstanding of his authority to grant a downward departure under § 2B1.1 for bankruptcy fraud). Relying heavily on ***United States v. Roen***, 279 F. Supp. 2d 986, 990 (E.D. Wis. 2003), the Sixth Circuit engaged in a lengthy discussion of factors that may affect a court's decision to depart downward because of impossibility, after intended loss is calculated. *Id.* at 375-76.

40.02[2] Warehouse Banks

"Warehouse banks" were common in mid-1980's abusive tax shelter schemes, and they continue to be used by tax defiers to hide assets and income from the IRS. Typically, the warehouse bank operates as a subsidiary or service wing of a broader collective or association. One must be a member of the association to use the warehouse bank services. *See, e.g.,* ***United States v. Meek***, 998 F.2d 776, 778 (10th Cir. 1993).

A warehouse bank maintains total privacy of all "account holders" by commingling the funds of numerous depositors in a single bank account held at a legitimate bank. The depositor's privacy is achieved through the use of arbitrarily numbered accounts, tracked by the warehouse bank operator. Using only the account number, the depositor endorses all checks to the warehouse bank association. *See* *generally* ***Strough v. United States***, 326 F. Supp. 2d 1118, 1121-22 (C.D. Cal. 2003) (upholding third-party summons for bank records to investigate warehouse bank scheme).

Depositors retrieve their funds by requesting cash via registered mail or by instructing the warehouse bank operator to pay specific bills from the warehouse bank account. Some warehouse bank promoters also sell gold and silver to members and claim to hold all deposit balances in gold or silver. *See* ***United States v. Hawley***, 855 F.2d 595, 597 (8th Cir. 1988). The warehouse bank promoter asserts that only records of the current balance and immediately preceding transaction are maintained in order to avoid revealing records in the event of a subpoena or search warrant.

Some depositors also use trusts and unincorporated business organizations (UBOs) to further conceal their identities. For example, a warehouse bank customer might request that his or her paychecks be made payable in the name of a trust or UBO, which then endorses the check to the warehouse bank association. This method ensures that the original check deposited will not have the name of the depositor. It can be traced back to a specific individual only if the name of the trust or UBO being used by that individual is known.

Operators of warehouse banks have been prosecuted on ***Klein*** conspiracy charges (26 U.S.C. § 371), with varied results. *See, e.g.*, ***United States v. Caldwell***, 989 F.2d 1056, 1058-1061 (9th Cir. 1993) (reversing conspiracy conviction for failure to prove or instruct jury that use of deceitful and dishonest means was an element of conspiracy charge); ***United States v. Stelten***, 867 F.2d 446 (8th Cir. 1989) (convictions of conspiracy and tax evasion charges upheld; appeal challenged search warrant); ***United States v. Cote***, 929 F. Supp. 364, 366-68 (D. Or. 1996) (relying on ***Caldwell***, conspiracy indictment dismissed for failure to allege an essential element of the crime, *i.e.*, deceitful and dishonest means, and for failure to so instruct the grand jury).

Warehouse bank operators also have been charged with violating currency transaction reporting requirements. *See* ***Hawley***, 855 F.2d at 599-601 (upholding instruction that allowed jury to find that the Exchange was a "financial institution" because it was a "private bank").

Account holders have been charged with tax evasion, in violation of 26 U.S.C. § 7201, and willful failure to file, in violation of 26 U.S.C. § 7203. *See* ***United States v. Dack***, 987 F.2d 1282, 1283 (7th Cir. 1993) (tax evasion); ***Meek***, 998 F.2d at 777-778 (failure to file and tax evasion); ***United States v. Becker,*** 965 F.2d 383, 385 (7th Cir. 1992) (evasion and failure to file).

Use of a warehouse bank is one factor that supports a "sophisticated means" enhancement at sentencing. ***United States v. Frandsen***, No. 99-30159, 2000 WL 366272, at *2 (9th Cir. Apr. 10, 2000) (purchasing cashier's checks from a warehouse bank one factor supporting "sophisticated means" enhancement); ***Becker,*** 965 F.2d at 390. *See also* ***United States v. O'Doherty,*** 643 F.3d 209, 220 (7th Cir. 2011).

Caution is advised during any investigation of a warehouse bank, however, because of the danger of treading on First Amendment freedom of association rights. Prosecutors must take care to avoid overly broad searches or subpoenas. *See, e.g.,* ***United States v. Ford***, 184 F.3d 566, 576-78 (6th Cir. 1999) (where search warrant authorizes a broader search than is reasonable given facts in supporting affidavit, warrant is invalid, and conviction based on improperly seized documents reversed); ***National Commodity and Barter Ass'n v. United States***, 951 F.2d 1172, 1174-75 (10th Cir. 1991) (government must meet burden of showing "substantial relationship between the subpoenaed records and its compelling interest in the criminal investigation" to overcome *prima facie* showing of First Amendment infringement); ***Stelton***, 867 F.2d at 450-51 (evidence seized pursuant to overbroad warrant may be used if officers acted in "objectively reasonable reliance" on warrant (citing ***United States v. Leon***, 468 U.S. 897 (1984)); ***In re First National Bank***, 701 F.2d 115, 118 (10th Cir. 1983) (reversing enforcement order regarding grand jury supboena duces tecum and remanding for an evidentiary hearing to assess First Amendment claim). The remedy for an overbroad warrant is severance of the excess portions from those that are sufficiently particular. ***Ford***, 184 F.3d at 578; ***United States v. Blakeney***, 942 F.2d 1001, 1027 (6th Cir. 1991).

40.02[3] Trusts

Another well-known and frequently-promoted tax defier scheme is the use of sham trusts, both foreign and domestic, to hide assets and property. A valid trust is a legal arrangement whereby a grantor transfers property into a trust and a trustee holds legal title to property for the benefit of another person, the beneficiary. In order for a trust to be regarded as a valid trust for income tax purposes, the trustee must manage and control the property for the beneficiary's benefit. The beneficiary cannot manage or control the property. Treas. Reg. §301.7701-4(a)&(b). Every trust that has over $600 in gross income, regardless of the amount of taxable income, must file a tax return and must pay taxes on taxable income. 26 U.S.C. § 6012(a)(4); 26 U.S.C. § 641.

A trust is invalid for Federal income tax purposes if (1) the grantor retains the same relationship to the property both before and after the trust is established, *or* (2) the trustee does not have independent control over the property in the trust, *or* (3) the beneficiary did not receive an economic interest in the property. 26 U.S.C. §§ 671-677; Treas. Reg. § 1.671-1 *et seq*; ***Zmuda v. Commissioner***, 79 T.C. 714, 720-722 (1982), *aff'd*, 731 F.2d 1417 (9th Cir. 1984); ***Markosian v. Commissioner***, 73 T.C. 1235 (1980); ***Hanson v. Commissioner***, T.C. Memo 1981-675 (1981), *aff'd*, 696 F.2d 1232 (9th Cir. 1983).

The use of "trusts" and "unincorporated business organizations" is promoted on Internet web sites, by word-of-mouth, and through seminars. Trust scheme promoters can be charged with a variety of offenses, including ***Klein*** conspiracy (18 U.S.C. § 371), aiding and abetting tax evasion (26 U.S.C. § 7201 & 18 U.S.C. § 2), aiding in preparation of false tax returns (26 U.S.C. § 7206(2)), tax obstruction (26 U.S.C. § 7212(a)), and tax evasion (26 U.S.C. § 7201) if they knowingly used the trusts to evade taxes.

However, some trust scheme users may have a valid reliance defense if the promoters present the trust scheme as a legal way to avoid taxes. *See* § 40.05[1][a] and [b], *infra*, for more discussion of the reliance defense.

40.02[4] Church Schemes

40.02[4][a] Generally

Some tax defiers claim tax exempt status by feigning ordination in a church. Many become ministers in mail-order churches, such as the Universal Life Church, the Basic Bible Church of America, or the Life Science Church. Typically, officers and members of the congregation include only the tax defier and his or her immediate family.

Using church rubric, the tax defier usually adopts one of two schemes. Under the first, the tax defier takes a sham vow of poverty and purportedly assigns all income and worldly possessions to the church. The tax defier then contends that his or her income is the church's income and, therefore, not taxable to the minister, even though he or she used the funds to pay personal and other expenses just as he or she did before taking the sham vow of poverty. *See*, *e.g.*, ***United States v. Masat***, 948 F.2d 923 (5th Cir. 1991); ***United States v. Dube***, 820 F.2d 886 (7th Cir. 1987); ***United States v. Zimmerman***, 832 F.2d 454 (8th Cir. 1987); ***United States v. Ebner***, 782 F.2d 1120 (2d Cir. 1986).

Under the second scheme, the tax defier supposedly makes charitable contributions of 50 percent of his or her adjusted gross income (the maximum amount that can be deducted as a charitable contribution) to a church. 26 U.S.C. § 170(b). The "contribution" is then deposited into "the church's" bank account, and the tax defier claims a deduction on his or her individual return, even though the "donated" funds are used for his or her personal purposes. ***See United States v. Heinemann***, 801 F.2d 86, 88 (2d Cir. 1986).

40.02[4][b] Vow of Poverty

Generally, in a vow of poverty scheme, the government introduces evidence proving the tax defier's putative vow of poverty was not fulfilled in practice -- *i.e.*, the tax defier lived and carried out his or her economic and financial affairs exactly as in the past. See ***United States v. Peister***, 631 F.2d 658 (10th Cir. 1980), which upheld Peister's conviction for filing a false "withholding exemption certificate form W-4." Peister formed a church, with himself as minister and his wife and parents as trustees, took a vow of poverty, supposedly gifted all his worldly possessions to the church, set up church checking accounts, and used the funds in those accounts for personal purposes. *Id.* at 660. The government's evidence showed that "the church was a shell entity, fully controlled by Peister and his wife, . . . together with Peister's parents. The vow of poverty was one in form only, and had no substantive effect on defendant's lifestyle." *Id.* at663.

40.02[4][c] Charitable Contributions

In a charitable contribution scheme, the tax defier purports to donate 50 percent of adjusted gross income (the maximum allowable amount for a charitable contribution deduction) to his or her church. 26 U.S.C. §§ 170(a)(1); 170(b)(1)(A), (E). The tax defier then uses the "donated" funds for personal purposes. *See* ***United States v. Michaud***, 860 F.2d 495 (1st Cir. 1988). In such a case, the government must prove that either no contribution or gift to the church was made or that it was not made to a qualified church under 26 U.S.C. § 170(c)(2)(C), which requires that "no part of the net earnings . . . [inure] to the benefit of any private shareholder or individual."

There is no true charitable gift or contribution where a donor does not totally relinquish dominion and control over his or her property. *See* ***Pollard v. Commissioner***, 786 F.2d 1063, 1066-67 (11th Cir. 1986); ***Stephenson v. Commissioner***, 748 F.2d 331 (6th Cir. 1984); ***Macklem v. United States***, 757 F. Supp. 6 (D.Conn. 1991); ***Gookin v. United States***, 707 F. Supp. 1156 (N.D. Cal. 1988). If a gift is made with the incentive of anticipated economic benefit, no deduction is available even if the payment is made to a tax-exempt organization. *See* ***Transamerica Corp. v. United States***, 902 F.2d 1540 (Fed. Cir. 1990); ***DeJong v. Commissioner***, 309 F.2d 373 (9th Cir. 1962); ***Hess v. United States***, 785 F. Supp. 137 (E.D. Wash. 1991); ***Dew v. Commissioner***, 91 T.C. 615 (1988) (members of Universal Life Church made contributions to church with understanding that church was to pay all personal bills incurred by the"contributor").

A tax defier church is not organized and operated exclusively for religious purposes; therefore, it is not exempt from taxation. 26 U.S.C. § 501(c)(3). To enjoy tax-exempt status under section 501(c)(3), an organization must satisfy three criteria: (1) it must be organized and operated exclusively for an exempt purpose ("the organizational test"); (2) no part of its net earnings may inure to the benefit of any private shareholder or individual ("the operational test"); and (3) no substantial part of its activity may include carrying on propaganda, or otherwise attempting to influence legislation, or participating or intervening in any political campaign. 26 U.S.C. § 501(c)(3). *See also* ***Ecclesiastical Order of Ism of Am v. Commissioner***, 80 T.C. 833, 838 (1983), *aff'd*, 740 F.2d 967 (6th Cir. 1984); ***Unitary Mission Church of Long Island v. Commissioner***, 74 T.C. 507, 512 (1980), *aff'd*, 647 F.2d 163 (2d Cir. 1981).

If a minister uses the religious organization's funds for personal purposes or receives an excessive or unreasonable salary from the net earnings of the church, there is deemed to be private inurement, and the church will fail the operational test. ***United States v. Daly***, 756 F.2d 1076, 1083 (5th Cir. 1985). *See also* ***Hall v. Commissioner***, 729 F.2d 632, 634 (9th Cir. 1984); ***United States v. Dykema***, 666 F.2d 1096, 1101 (7th Cir. 1981).

40.2 [4][d] First Amendment Considerations

Tax defiers often attempt to use the Freedom of Religion Clause of the First Amendment to prevent the government from questioning the integrity of alleged religious beliefs. The courts have long held, however, that the Freedom of Religion Clause cannot be used as a blanket shield to prevent the government from inquiring into the possible existence of criminal activity. ***Davis v. Beason***, 133 U.S. 333, 342-43 (1890), *overruled in part on other grounds*, ***Romer v. Evans***, 517 U.S. 620, 634 (1996); ***Cohen v. United States***, 297 F.2d 760, 765 (9th Cir. 1962). Thus, although the validity of religious beliefs cannot be questioned, the sincerity of the person claiming to hold such beliefs can be examined. ***United States v. Seeger***, 380 U.S. 163, 184-85 (1965). *See also* **United States v. Ward**, 989 F.2d 1015, 1018 (9th Cir. 1992) ("focus of judicial inquiry is not definitional, but rather devotional . . . That is, "is [the defendant] sincere? Are his beliefs held with the strength of traditional religious convictions?"); ***United States v. Daly***, 756 F.2d 1076, 1081 (5th Cir. 1985); ***United States v. Moon***, 718 F.2d 1210, 1227 (2d Cir. 1983); ***United States v. Peister***, 631 F.2d 658, 665 (10th Cir. 1980). In ***Moon***, the defendant argued that the trial court was required to charge the jury that it must accept as conclusive the Unification Church's definition of what it considered a religious purpose. The Second Circuit flatly rejected the defense argument, citing ***Davis v. Beason***, 133 U.S. 333 (1890), and explaining:

> The "free exercise" of religion is not so unfettered. The First Amendment does not insulate a church or its members from judicial inquiry when a charge is made that their activities violate a penal statute. Consequently, in this criminal proceeding the jury was not bound to accept the Unification Church's definition of what constitutes a religious use or purpose.

Moon, 718 F.2d at 1227.

A similar argument was rejected in ***United States v. Jeffries***, 854 F.2d 254 (7th Cir. 1988). In ***Jeffries***, the defendant argued that the IRS should not be permitted to define what constituted a church, because to do so would result in the creation of a "federal church, which would restrict a person's individual religious beliefs." ***Jeffries***, 854 F.2d at 256. In rejecting this argument, the court stated:

> [T]here is no need to try to resolve any conflict there may be between a person's personal view of what constitutes a church and that which the tax law recognizes as a church qualifying it for tax exempt status, even if we could. For tax purposes the tax law prevails.

Jeffries, 854 F.2d at 257.

The courts also have held that the Internal Revenue Code sets forth objective requirements or criteria (*e.g.*, 26 U.S.C. §§ 170 and 501), which enable the Internal Revenue Service to determine whether an organization qualifies as a tax-exempt organization or whether an individual's contribution qualifies as a deductible charitable contribution, without entering into the type of subjective inquiry that is prohibited by the First Amendment. ***Dykema***, 666 F.2d at 1099-1100; ***Hall v. Commissioner***, 729 F.2d 632, 635 (9th Cir. 1984).

Further, there is no First Amendment right to avoid federal income taxes on religious grounds. ***United States v. Indianapolis Baptist Temple***, 224 F.3d 627, 629-32 (7th Cir. 2000); ***United States v. Ramsey***, 992 F.2d 831-833 (8th Cir. 1993). Therefore, the defendants' religious objections to filing tax returns signed under penalty of perjury do not eliminate the requirement to file tax returns. ***See Hettig v. United States***, 845 F.2d 794 (8th Cir. 1988); ***Borgeson v. United States***, 757 F.2d 1071, 1073 (10th Cir. 1985). *But see* ***Ward***, 989 F.2d at 1019 (conviction of tax defier overturned because trial court refused to allow him to swear oath of his own creation; "the court's interest in administering its precise form of oath must yield to Ward's First Amendment rights").

An order requiring a defendant to comply with federal income tax laws as a condition of probation does not violate the First Amendment. ***Ramsey***, 992 F.2d at 833.

40.3 TRIALTACTICS/CONSIDERATIONS

40.03[1] Criminal Summons

The government has the option, in misdemeanor cases, to charge the defendant by filing a criminal information and issuing the defendant a summons instead of arresting him pursuant to a warrant. Tax defiers have argued that a showing of probable cause is required under Fed. R. Crim. P. 9 and 4(a) for issuance of a summons. The courts, however, have held to the contrary. *See* **United States v. Birkenstock**, 823 F.2d 1026, 1030-31 (7th Cir. 1987); **United States v. Bohrer**, 807 F.2d 159, 161 (10th Cir. 1986). *See also* **United States v. Saussy**, 802 F.2d 849, 851-52 (6th Cir. 1986). *Cf.* ***UnitedStates v. Kahl***, 583 F.2d 1351, 1355-56 (5th Cir. 1978) (holding that an arrest warrant, rather than a summons, issued on the basis of an information violates the requirements of Fed. R. Crim. P. 9 if not supported by oath or affirmation.)

40.03[2] 26 U.S.C. § 6103(h)(5) Juror Audit Information (REPEALED)

Prior to August 5, 1997, Section 6103(h)(5) allowed any party in a tax administration proceeding to obtain audit information about a prospective juror. The information was limited to a "yes" or "no" answer to the inquiry about whether a "prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation" by the IRS. 26 U.S.C. § 6103(h)(5) (REPEALED). This provision was repealed on August 5, 1997. The repeal applies to "judicial proceedings commenced after the date of enactment." Pub.L.No. 105-34, § 1283 (The Taxpayer Relief Act of 1997).

40.03[3] IRS Agents' Authority

Tax defiers have asserted that IRS agents cannot investigate tax offenses or appear in court, because they are not agents of the United States government but are agents of an alien foreign principal, the International Monetary Fund (IMF). *See* ***United States v. Rosnow***, 977 F.2d 399, 413 (8th Cir. 1992). This argument is based on the premise that the United States has been in bankruptcy since the gold standard was eliminated. Because of the alleged bankruptcy, the United States purportedly has no standing to demand money or file liens. Instead, the IMF was supposedly given the power to collect income taxes, with the IRS as its depository and fiscal agent. The theory is that the income taxes collected by the IRS do not go into the United States Treasury but instead are deposited into the Federal Reserve Bank for the benefit of the IMF. *See* ***DeLaRosa v. Agents for International Money Fund Internal Revenue Service, et al.***, No. CIV-S951170DFLGGH, 1995 WL 769345, at *3 (E.D. Cal. Oct. 16, 1995). This argument has been deemed "completely without merit [and] patently frivolous." ***United States v. Jagim***, 978 F.2d 1032, 1036 (8th Cir. 1992); *see also* ***McNeil v. United States***, 78 Fed. Cl. 211, 219 (Fed. Cl. 2007); ***United States v. Higgins***, 987 F.2d 543, 545 (8th Cir. 1993); ***Steinman v. Internal Revenue Service***, No. CIV 95-1889 PHX EHC, 1996 WL 512333, at *1 (D. Ariz. June 5, 1996)**.**

40.03[4] Indictment Not Sufficient Notice of Illegality

Tax defiers sometimes argue that an indictment is insufficient because it fails to cite 26 U.S.C. § 6012, the section that requires a return to be filed, or other Internal Revenue Code sections containing provisions for tax liabilities. *See* ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006, at *1 (11th Cir. Sept. 10, 2008) (rejecting argument that information was insufficient because it did not specifically reference §

6012). As long as the indictment contains the elements of the offense charged, fairly informs the defendant of the charge against which he or she must defend, and enables him or her to "plead an acquittal or conviction in bar of future prosecution for the same offense," the indictment is constitutionally sufficient. ***United States v. Vroman***, 975 F.2d 669, 670-71 (9th Cir. 1992) (quoting ***Hamling v. United States***, 418 U.S. 87, 117 (1974)). The government need not specifically cite 26 U.S.C. § 6012 in an indictment alleging willful failure to file in violation of 26 U.S.C. § 7203. ***Vroman***, 975 F.2d at 671; ***United States v. Kahl***, 583 F.2d 1351, 1355 (5th Cir. 1978). *See also* **United States v. *Jackson***, 2008 WL 4150006, at *1 ("an information is sufficient when it alleges that the defendant earned enough to require her to file a return and she willfully failed to do so." (*citing* ***Kahl***)).

In a similar vein, the Ninth Circuit rejected the argument that an indictment charging a violation of 26 U.S.C. § 7206 and setting forth the elements of the offense was insufficient because the CFR provisions dealing with the enforcement of section 7206 reference the Bureau of Alcohol, Tobacco and Firearms, an agency unrelated to the case against the defendant. ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993). An indictment need only provide "the essential facts necessary to apprise a defendant of the crime charged; it need not specify the theories or evidence upon which the government will rely to prove those facts." *Ibid*.

40.03[5] Filing of Protest Documents: Is the Document Filed a Tax Return?

40.03[5][a] Generally

Tax defiers frequently fail to file tax returns, or file return forms that are unsigned or signed with the jurat crossed out, report no financial information, and/or espouse tax defier rhetoric. *See, e.g.*, ***Morgan v. Commissioner***, 807 F.2d 81, 83 (6th Cir. 1986) (no error to conclude that tax forms containing only name, address, filing status and exemptions with other lines stamped "OBJECT 5TH AMEND." are not returns); ***Mosher v. Internal Revenue Service***, 775 F.2d 1292, 1294 (5th Cir. 1985) (upholding frivolous return penalty for striking the jurat on filed tax form); ***Edwards v. Commissioner***, 680 F.2d 1268, 1269-70 (9th Cir. 1982); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (tax forms that are blank except for signature and printed asterisks are not "returns"; no Fifth Amendment protection for filing a protest return); ***United States v.***

Pilcher, 672 F.2d 875, 877 (11th Cir. 1982); ***Lovelace v. United States***, No. 89-375TD, 1990 WL 284740, at *1 (W.D. Wash. Oct. 18, 1990), *aff'd*, 951 F.2d 360 (9th Cir. 1991).

40.03[5][b] What Is a Tax Return?

A tax return consists of an IRS Form 1040 (or other relevant form) containing enough information about the taxpayer's income to compute the tax. ***United States v. Saussy***, 802 F.2d 849, 854 (6th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 121 (7th Cir. 1985); ***United States v. Grabinski***, 727 F.2d 681, 686-687 (8th Cir. 1984); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir. 1980); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979); ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977); ***United States v. Daly***, 481 F.2d 28, 29 (8th Cir. 1973); ***United States v. Porth***, 426 F.2d 519, 523 (10th Cir. 1970).

A taxpayer who submits a form containing only his or her name, address, and arguments supposedly excusing him or her from filing tax returns has not filed a "return" within the meaning of the Internal Revenue Code. In ***Porth*** and ***Daly***, *supra*, defendants filed Forms 1040 containing only their names, addresses, and references to various constitutional provisions that purportedly excused them from filing tax returns. Appellate courts upheld convictions in both cases. In ***Porth***, the court held:

> The return filed was completely devoid of information concerning his income as required by the regulations of the IRS. A taxpayer's return which does not contain any information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code or the regulations adopted by the Commissioner.

426 F.2d at 523 (citations omitted).

It is well established that tax forms reporting objections or nominal amounts in the blanks provided for income and expenses do not constitute legal returns. *See, e.g.*, ***United States v. Kimball***, 925 F.2d 356, 357 (9th Cir. 1991) (*en banc*) (form filed with lines containing asterisks and signed by the taxpayer not a return); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986) (form filed with lines containing objections based on fourth and fifth amendments and only bottom line assertions as to amount of taxable income not a return); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir. 1986) (form filed with lines containing the word "object" not a return); ***United States v.***

Grabinski, 727 F.2d 681, 686-87 (8th Cir. 1984) (form filed with only a bottom line nominal figure for taxable income with no information as to how the reported taxable income was derived, such as the source of the income, the amount of gross income and deductions, and the number of exemptions claimed, not a return); ***United States v. Vance***, 730 F.2d 736, 737-38 (11th Cir. 1984) (forms filed with lines containing objections and zeros not a return); ***United States v. Heise***, 709 F.2d 449, 450-51 (3d Cir. 1983) (return without information to determine tax liability is not a return; here, only constitutional objections noted on the form; cases cited); ***United States v. Stillhammer***, 706 F.2d 1072, 1073-74, 1075 (10th Cir. 1983) (form filed with lines containing objections and signed by the taxpayer not a return); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir. 1982) (form filed containing only the amount of withheld employment tax, claiming refund, not a return); ***United States v. Verkuilen***, 690 F.2d 648, 654 (7th Cir. 1982); ***United States v. Edelson***, 604 F.2d 232, 233-34 (3d Cir. 1979) (form filed with lines containing assertions of fifth amendment privilege and total income figure based on his interpretation of "constitutional dollars" not a return); ***United States v. Brown***, 600 F.2d 248, 251-52 (10th Cir. 1979) (form filed with lines containing objections and word "unknown" not a return); ***United States v. Schiff***, 612 F.2d 73, 77 (2d Cir. 1979) (form filed nearly blank and with assorted constitutional objections on some lines not a return).

Most courts that have considered the issue have held that tax forms that report only the number zero in each line are not valid returns. *See, e.g.,* ***Hamzik v. United States***, 64 Fed. Cl. 766, 768 (Fed. Cl. 2005); ***United States v. Mosel***, 738 F.2d 157, 158 (6th Cir. 1984); ***United States v. Smith***, 618 F.2d 280, 281 (5th Cir. 1980); ***United States v. Rickman***, 638 F.2d 182, 183-84 (10th Cir. 1980); ***Taylor v. United States***, 2001 WL 721850, *1 (D.D.C. 2001). Additionally, *see* ***United States v. Marston***, in which the Eight Circuit, in *dicta*, reiterated the established principle that a form filed with lines containing zeroes is not a tax return. 517 F.3d 996, 1001 (8th Cir. 2008). In ***Marston***, the court did not directly address the issue of whether a zero return constitutes a tax return; instead, it affirmed convictions for tax evasion, filing false returns, and aiding and abetting the filing of false tax returns, based on tax return forms filed by the defendant and others which contained zeros. *Id*. at 1000. The ***Marston*** court held that in a prosecution under sections 7206(1) and (2), the government was not required to prove that the defendant had filed a "tax return" in order to prove what it had alleged -- that the defendant had filed and aided and assisted in the filing of a number of specified documents -- false tax return forms. *Id*. at 1001-02.

On this issue, the Ninth Circuit has taken a minority position that forms filed with lines containing the number zero, as opposed to blank lines or lines containing objections which lack numerical significance, *are* tax returns because the number zero constitutes "information relating to the taxpayer's income from which the tax could be computed . . . just as it could if [the taxpayer] had entered other numbers." ***United States v. Long***, 618 F.2d 74, 75 (9th Cir. 1980). The court explained that a form containing false information could still constitute a tax return if "some computation was possible." *Id.*; *cf.* ***Kimball***, 925 F.2d at 358 (an asterisk, unlike a zero, contains no information from which a computation can be made).

"[T]he test is whether the defendants' returns themselves furnished the required information for the IRS to make the computation and assessment, not whether the information was available elsewhere." ***United States v. Stillhammer***, 706 F.2d 1072, 1075 (10th Cir. 1983). The Ninth Circuit has interpreted that test broadly, finding that a filed Form 1040 with no computational figures except for a refund claim for the total amount of withheld tax was a return because the defendant had filed the Form 1040 with Forms W-2 that contained figures from which the tax could be computed. ***United States v. Crowhurst***, 629 F.2d 1297, 1300 (9th Cir. 1980).

Omission of isolated information, such as a taxpayer's social security number or names of dependent children, which does not impede the IRS's ability to check a taxpayer's asserted tax liability, does not disqualify the document as a valid a return. ***United States v. Grabinski***, 727 F.2d 681, 686-87 (8th Cir. 1984).

The Sixth Circuit has held, in a bankruptcy case, that a return filed *after* the IRS assesses deficiencies is not a return because it no longer serves a tax purpose and has no legal effect. ***In re Hindenlang***, 164 F.3d 1029, 1034-1035 (6th Cir. 1999).

40.03[5][c] What Is or Is Not a Tax Return: A Matter of Law or Fact?

Some courts have held that the determination of whether a return is valid for section 7203 purposes is a question of law for the court to decide. *See* ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Malquist***, 791 F.2d 1399, 1401 (9th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 121-22 (7th Cir. 1985); ***United States v. Grabinski***, 727 F.2d 681, 686 (8th Cir. 1984). "This determination . . . in no way removes from the jury fact questions regarding whether a defendant was required to file a return, . . . actually failed to make a return, . . . and whether a failure to file was willful." *Ibid; see also* ***Green***, 757 F.2d at 121.

Other courts caution that a jury should decide whether or not the filing met the definition of a return. For example, the Sixth Circuit held that the trial court should only "properly state[] the law respecting the definition of a return, and [leave] it to the jury to decide whether [the] defendant had properly filed a return." ***United States v. Saussy***, 802 F.2d 849, 854 (6th Cir. 1986). In ***Saussy***, the court found the following jury instruction proper:

> A document which does not contain sufficient information relating to the taxpayer's income from which the tax can be computed is not a return within the meaning of the Internal Revenue Code and the Regulations thereunder. Whether any document submitted by the defendant constitutes [a] tax return[] is a matter for the jury to decide.

Ibid.

Similarly, the Eleventh Circuit determined that, although a trial court's ruling that "alleged tax returns which do not contain any financial information are not 'returns' within the meaning of section 7203" was correct, the court exceeded its authority and invaded the province of the jury by concluding that the forms submitted were not returns. ***United States v. Goetz***, 746 F.2d 705, 707-09 (11th Cir. 1984); *see also* **United States v. *Grote***, 632 F.2d 387, 391 (5th Cir. 1980) (upholding jury instruction that "taxpayer's return which does not contain financial information enabling the Internal Revenue Service to determine the party's tax liability, if any, is not a return within the meaning of the Internal Revenue Code" and leaving jury to conclude whether the document filed met the definition reported). While noting that some courts held otherwise, the Eleventh Circuit emphatically stated that a court may not find any element of a charged offense, even if "the evidence seems overwhelming in favor of the government." *Id*. at 708. A trial court's ruling on a verdict, in whole or in part, is not harmless error. *Id*. at709.

40.03[6] Discovery of IRS Master Files

Each individual who has filed a tax return with the IRS has a record in the IRS master computer under his or her social security number. The IRS Individual Master File (IMF) is the transcript generated by the IRS master computer. It contains coded information about the individual's tax history, including the filing of federal income tax forms, payment of taxes, refunds due, audits, and IRS notices sent to the individual. Certificates of Assessments and Payments (IRS Forms 4340) -- certified IRS records reflecting filings and payments by an individual that are generally introduced at trial -- are prepared from the information contained in the IMF.

Rule 16 of the Federal Rules of Criminal Procedure does not require the government to provide the IMF in discovery, absent some showing of materiality. *See* ***United States v. Pottorf***, 769 F. Supp. 1176, 1180-1181 (D. Kan. 1991); ***United States v. Huebner***, 48 F.3d 376, 383 (9th Cir. 1994) (no "demonstration of unfair prejudice nor taht any information would have been exculpatory). When portions of the IMF are relevant, however, it may be sufficient to provide just those relevant parts of the IMF in discovery. *See* ***United States v. Fusero***, 106 F. Supp. 2d 921, 925 (E.D. Mich.2000).

When materiality has been established, it is an abuse of discretion for the district court to fail to conduct an *in camera* review of the IMF. ***United States v. Buford***, 889 F.2d 1406, 1408 (5th Cir. 1989). ***Buford*** was a prosecution for aiding and assisting in the preparation of false returns and conspiracy to defraud the United States. *Id*. at 1407. At trial, the government introduced evidence, for impeachment purposes only, that the defendant failed to file individual tax returns for several years. ***Id.*** at 1407-08. On cross-examination, the defendant testified that he had filed individual returns for the years in question. *Id*. at 1408. In rebuttal, the government called an IRS records custodian, who based her testimony on the Certificates of Assessments and Payments, which had been prepared using information taken from the IMF. *Ibid*. After eliciting, on cross-examination of the IRS custodian, evidence that contradicted the information in the Certificates of Assessments and Payments, the defendant repeatedly asked for an *in camera* review of the IMF. *Ibid*. During trial, the district court ordered the government to produce the IMF for *in camera* inspection. *Id*. at 1407. The government complied with the order, but the court was unable to decipher the IMF without the production of the relevant code book. *Ibid*. The court then ordered production of the code book, but the trial continued to verdict before the government produced the book. *Ibid*. The Fifth Circuit reversed the defendant's conviction and remanded for a new trial, finding that the district court abused its discretion in denying the defendant's pretrial discovery request for the IMF and failing to provide the *in camera* review of the IMF. *Id*. at 1408.

40.03[7] Motions in Limine

In many tax defier cases, the defendant will attempt to present "evidence" or argument relating to what the law should be, the constitutionality and validity of the tax laws, or alternative interpretations of the tax laws on which he or she did not rely. In such a case, it may be useful to file a motion *in limine* requesting an order to prevent the defendant from presenting inappropriate and irrelevant materials that could confuse the jury. The text of a sample motion in limine is set out in an appendix at the end of this chapter.

40.03[8] Attorney Sanctions

Attorneys representing tax defiers will sometimes repeatedly make frivolous arguments or behave inappropriately in court. However, as noted by the Tenth Circuit,

> the sixth amendment does not encompass a defendant's effort to transform judicial proceedings into a forum for the advancement of political, economic or social views and the obfuscation of the legal and factual questions at issue. A criminal trial is, first and foremost, a vehicle for the structured discovery of truth. Advocacy which contravenes the truth-seeking function of the criminal trial and deliberately misrepresents the legal authority governing the proceeding has no place in a court of law.

United States v. Collins, 920 F.2d 619, 633 (10th Cir. 1990). As a result, sanctions may be appropriate. *See id.* (upholding district court's revocation of defense counsel's *pro hac vice* status after counsel, who had a "past reputation for hijacking judicial proceedings onto his tax protester bandwagon," filed several legally frivolous pre-trial motions); *see also* ***In re Becraft***, 885 F.2d 547, 550 (9th Cir. 1989) (ordering defense counsel to pay $2,500 in damages, pursuant to Fed. R. App. Proc. 38, for filing frivolous petition for rehearing); ***United States v. Summet***, 862 F.2d 784, 786-87 (9th Cir. 1988) (upholding district court's formal censure of defense attorney and revocation of his *pro hac vice* status when defense counsel violated local rules by continuously challenging the court's authority and ignoring repeated warnings of the court); ***United States v. Howell***, 936 F. Supp. 774, 775-76 (D. Kan. 1996) (denying defense attorney's motion for reconsideration of order revoking his *pro hac vice* admission because he failed to appear at a pretrial motions hearing, made false and misleading statements regarding his past disciplinary proceedings to magistrate judge, and failed to disclose all past disciplinary proceedings in an affidavit submitted to the court).

Prosecutors should take care to ensure that any contempt proceeding is brought under the appropriate section of Rule 42 of the Federal Rules of Criminal Procedure. For example, the Ninth Circuit upheld a three-year suspension from practice imposed in one district after defense counsel asserted during opening statement that his client believed that the court was engaged in a conspiracy to defraud the American people and made additional "various disrespectful and confrontational remarks" to the court. ***United States v. Engstrom***, 16 F.3d 1006, 1010-12 (9th Cir. 1994). However, also in ***Engstrom***, the Ninth Circuit overruled the trial court's finding of contempt that the trial court had imposed summarily due to counsel's opening statement with assertions about a judicial conspiracy. *Id*. at 1010. The Ninth Circuit clarified that summary contempt proceedings are appropriate only when the conduct is exceptional. *Ibid***.** Contemptuous conduct is exceptional if it poses such an "open, serious threat to orderly procedure that instant and summary punishment, as distinguished from due and deliberate procedures, is necessary . . . to protect the judicial institution itself." *Ibid.* The court further stated that ordinary contemptuous conduct must not be handled summarily and noted that the district court was not precluded from addressing on remand defense counsel's conduct under a non-summary contempt proceeding at which evidence would be presented. *Id*. at 1011.

Even *pro se* defendants can be the subject of criminal contempt orders, so long as the requisite written orders are made. *See* ***United States v.*** **Cohen**, 510 F.3d 1114, 1119-1120 (9th Cir. 2007) (remanding criminal contempt conviction of Irwin Schiff, who was representing himself, in order for the court to file the requisite contempt order.)

40.03[9] Evidentiary Issues

40.03[9][a] Prior or Subsequent Tax Protest Activities: Rule 404(b)

Evidence of a defendant's tax defier activities prior or subsequent to the criminal conduct charged may be admissible at trial as either "intrinsic" or "extrinsic" evidence. Intrinsic evidence will arise out of the same transaction or series of transactions in issue, will be "inextricably intertwined with the evidence of the charged offense," or is necessary to complete the story of the crime on trial. ***United States v. Gonzales***, 110 F.3d

936, 942 (2d Cir. 1997) (thwarted burglary close in time admissible as intrinsic evidence). Evidence that is intrinsic is not subject to Fed. R. Evid. 404(b), although, as with all relevant evidence, it also must satisfy the balancing test under Fed. R. Evid. 403. ***United States v. Hilgeford***, 7 F.3d 1340, 1345 (7th Cir. 1993). We may assert that evidence is "intrinsic" or "intricately related to the facts of the case" because it is directly probative of an element of the tax crime charged, such as willfulness. *Ibid.* In ***Hilgeford***, the defendant's prior failed litigation established his knowledge that he no longer owned property that was once his. *Id*. at 1342. Accordingly, his submission of returns that included accounts receivable based on this alleged (false) ownership that he knew was not his was evidence of willfulness. *Id*. at 1346; ***see also United States v. Tutiven***, 40 F.3d 1, 5-6 (1st Cir. 1994) (possession of VIN-altering tools intrinsic to charge of sale of stolen vehicles).

Prosecutors in the Third and Seventh Circuits, however, need to be aware that the "inextricably intertwined" analysis has been rejected in those circuits. *See* ***United States v. Green***, 617 F.3d 233, 248 (3d Cir.), *cert. denied*, 131 S. Ct. 363 (2010) and ***United States v. Gorman***, 613 F.3d 711, 719 (7th Cir. 2010) (abandoning the inextricable-intertwinement test because it has "become overused, vague, and quite unhelpful"). In ***Green***, the Third Circuit held that the "intrinsic" label applies to only "two narrow categories of evidence." ***Id.*** at 248. The first category is evidence of uncharged acts that "directly proves" the charged offense. ***Id.*** The second category is evidence of "'uncharged acts performed contemporaneously with the charged crime' " that " facilitate the commission of the charged crime.' " ***Id.*** at 249 (*quoting* ***United States v. Bowie***, 232 F.3d 923, 929 (D.C. Cir. 2000)). While not specifically rejecting the "inexplicably intertwined" test, the D.C. Circuit in Bowie questioned the helpfulness of the test and language used in other circuits. ***Bowie*** at 928.

An act may be intrinsic to the charged offense if the act arose out of the same series of transactions as the charged offense, even if it occurred outside the time period of the crime charged. ***United States v. Loayza***, 107 F.3d 257, 263-64 (4th Cir. 1997).

Alternatively, if it is determined that the evidence of other crimes or acts is extrinsic to the case, the evidence may be admissible under Fed. R. Evid. 404(b) to show "intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Generally, the purpose of Rule 404(b) is to prevent a defendant's conviction for "general bad character" rather than commission of the specific, charged offense. ***Hilgeford***, 7 F.3d at 1345. Other act evidence may be admitted under Rule 404(b) if the following four requirements are met: (1) the evidence is offered for a proper purpose, a purpose other than to prove the character of the defendant in order to show action in conformity therewith; (2) the evidence is relevant; (3) the trial court makes a Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the district court submits a limiting instruction, if requested. ***Huddleston v. United States***, 485 U.S. 681, 691-92 (1988); ***United States v. Grissom,*** 44 F.3d 1507, 1513 (10th Cir. 1995); ***United States v. Zapata***, 871 F.2d 616, 620 (7th Cir. 1989); *see also* ***United States v. Queen***, 132 F.3d 991, 997 (4th Cir. 1997) (explaining that evidence of prior acts is admissible if the court determines that: (1) the evidence is relevant to issue, such as element of offense, and must not be offered to establish general character of defendant; (2) the evidence is probative of an essential claim or element of offense; (3) the evidence is reliable; and (4) evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in sense that it tends to subordinate reason to emotion in fact-finding process).

Under ***Huddleston***, "[t]he threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." 485 U.S. at 686. To be probative, evidence must have "some special relevance in determining a disputed material fact." ***United States v. Hadfield***, 918 F.2d 987, 994 (1st Cir. 1990). Evidence has special relevance if the evidence "would allow a juror to make at least one inference probative" of a material issue such as knowledge, intent, opportunity, plan, preparation, or motive. ***United States v. Nickens***, 955 F.2d 112, 124-25 (1st Cir. 1992) (citations omitted) (affirming admission of defendant's prior narcotics convictions; concluding that a reasonable jury could have inferred that the defendant's prior experience selling cocaine made it more likely that he knew how drug traffickers operate and therefore less likely that he had been duped by two friendly young men who, according to defendant, had planted drugs in his suitcase); *see also* ***United States v. Moccia***, 681 F.2d 61, 63 (1st Cir. 1982) (explaining that a jury can "infer that one who lives on a farm with marijuana in the freezer room and under the chicken coop and has a prior possession conviction is more likely to know about the presence of marijuana than one who lives on such a farm and does not have a past possession conviction").

Evidence of other similar acts is relevant only if the evidence is sufficient to support a jury finding that the defendant committed the similar act. ***Huddleston***, 485 U.S.

at 689 (citing ***United States v. Beechum***, 582 F.2d 898, 912-913 (5th Cir. 1978)); ***Zapata***, 871 F.2d at 620; *see also* ***United States v. Ayers***, 924 F.2d 1468, 1473 (9th Cir. 1991) (articulating four-part test for admission under 404(b) -- (1) sufficient evidence must exist for jury to find defendant committed other acts; (2) other acts must be introduced to prove a material issue; (3) other acts must not be too remote in time; and (4) if admitted to prove intent, other acts must be similar to offense charged).

A defendant's prior or subsequent tax defier activities, filing and payment history, or participation in civil tax court proceedings often will be relevant in criminal tax cases, especially where the defendant raises a good faith defense. See, for example:

- ***United States v. Daraio***, 445 F.3d 253, 264-65 (3d Cir. 2006) (in section 7201 prosecution, evidence of defendant's prior non-compliance with tax laws admissible and relevant to prove willfulness);

- ***United States v. Bok***, 156 F.3d 157, 165-66 (2d Cir. 1998) (in prosecution under sections 7201 and 7206(1), evidence of failure to file state and federal individual and corporate returns in years prior to the prosecution period admissible to prove willfulness circumstantially because such evidence is "indicative of an intent to evade the taxsystem");

United States v. Wisenbaker, 14 F.3d 1022, 1028 (5th Cir. 1994) (in excise tax prosecution, prior state tax convictions relevant to prove willfulness and to negate defendant's assertion of good faith defense);

- ***United States v. McKee***, 942 F.2d 477, 480 (8th Cir. 1991) (in section 7201 prosecution, testimony concerning prior IRS audit and defendant's prior filing of false exempt Form W-4 relevant to issues of intent or absence of mistake under Fed. R. Evid. 404(b));

- ***United States v. Fingado***, 934 F.2d 1163, 1165 (10th Cir. 1991) (in section 7203 prosecution, evidence of defendant's failure to file in prior years admissible pursuant to Fed. R. Evid. 404(b) to provewillfulness);

- ***United States v. Johnson***, 893 F.2d 451, 453-54 (1st Cir. 1990) (in section 7201 prosecution, evidence that defendant submitted Form W-4 claiming more allowances than he was entitled to and failed to file a return both in the year immediately following the charged years relevant to show willfulness and absence of mistake in filing false Schedule C forms during charged years);

United States v. Poschwatta, 829 F.2d 1477, 1484 (9th Cir. 1987) (prior tax conviction admissible generally to show defendant's knowledge and intent; no error to admit conviction and bar testimony to explain conviction), overruled on other grounds by *Cheek v. United States*, 498 U.S. 192, 201 (1991) (see ***United States v. Powell***, 936 F.23d 1056, 1064 n.3 (9th Cir. 1991);

- ***United States v. Birkenstock***, 823 F.2d 1026, 1027-28 (7th Cir. 1987) (in section 7203 prosecution, defendant's prior "pseudo-dollar/gold standard" returns and attempts to create a "family trust" admissible to show intent and absence of mistake)

United States v. Grosshans, 821 F.2d 1247, 1253 (6th Cir. 1987) (in section 7201 prosecution, defendant's attendance at "tax protester" meetings admissible to show that she knew what she was doing and knew she had an obligation to pay taxes);

- ***United States v. Bergman***, 813 F.2d 1027, 1029 (9th Cir. 1987) (in section 7203 prosecution, filing of false exempt Form W-4 admissible under Fed. R. Evid. 404(b) to show willfulness);

United States v. Blood, 806 F.2d 1218, 1222 (4th Cir. 1986) (in prosecution under sections 7201 and 7206(1) in which defendant had represented himself and testified in prior Tax Court proceedings, prior Tax Court decision admissible to show intent and pattern of taxavoidance);

- ***United States v. Upton***, 799 F.2d 432, 433-434 (8th Cir. 1986) (in section 7203 prosecution, evidence that defendant had sent "tax protestor" materials to the IRS and had failed to comply with tax laws in prior and subsequent years admissible and probative of willfulness);

United States v. Ausmus, 774 F.2d 722, 727-728 (6th Cir. 1985) (in prosecution under § 7203 for failure to pay, evidence that defendant failed to pay income taxes for years prior to and following years charged was admissible to show pattern, plan and scheme indicating that failure to pay taxes was not the result of accident, negligence or inadvertence); and

- ***United States v. Heise***, 709 F.2d 449, 451 (3d Cir. 1983) (prior tax returns admissible under Rule 404(b) to show knowledge of duty to file for § 7203 prosecution for willful failure to file).

But see ***United States v. Mikolajczyk***, 137 F.3d 237, 244-245 (5th Cir. 1998) (in mail fraud prosecution for submission of USA First "Certified Money Orders," trial court erred in allowing government to cross-examine defendant on her prior filing of public notice "rescinding" tax returns, because there was no compelling evidence that defendant had protest motive in submitting the "Certified Money Orders"; however, erroneous admission of impeachment evidence held harmless).

40.03[9][b] IRS Agent's Testimony and Sequestration

IRS agents usually testify during the course of a tax trial. Often their testimony will consist of summarizing the government's documentary evidence and providing tax requirements and calculations based on that testimony. Provided the agent has been properly qualified as an expert witness, would be helpful to the jury, and does not offer any opinion on the ultimate issue of guilt, such testimony is fully admissible pursuant to Fed. R. Evid. 702. *See* ***United States v. West***, 58 F.3d 133, 140-41 (5th Cir. 1995) (admission of testimony of IRS expert witness testimony, which included summary of testimony given by other government witnesses, was not error because the agent referred to other evidence when necessary to explain her analysis); *see also* ***United States v. Moore***, 997 F.2d 55, 57-58 (5th Cir. 1993) (IRS summary witness may summarize facts that indicate criminal tax violation without reaching the ultimate issue of whether defendant intended to commit criminal tax violation); ***United States v. Mohney***, 949 F.2d 1397, 1406 (6th Cir. 1991) (IRS summary witness may give opinion as to whether tax is due and owing without reaching the ultimate issue of whether or not defendant is guilty); ***United States v. Beall***, 970 F.2d 343, 347-348 (7th Cir. 1992) (IRS expert's summary of documentary evidence and testimony regarding tax consequences of subcontractor relationship within agent's area of expertise); ***United States v. DeClue***, 899 F.2d 1465, 1473 (6th Cir. 1990) (IRS special agent with accounting degree, regular IRS training and experience spanning seven years qualified to testify as expert about tax due and owing);

United States v. Bosch, 914 F.2d 1239, 1242 (9th Cir. 1990) (IRS summary witness who had specialized narcotics training permitted to give opinion as to whether defendant's conduct aided and assisted drug distribution because testimony did not include an opinion as to defendant's state of mind -- a jury issue); ***United States v. Mann***, 884 F.2d 532, 539-40 (10th Cir. 1989) (IRS summary witness permitted to summarize previously admitted evidence in order to compute defendant's tax liability); ***United States v. Marchini***, 797 F.2d 759, 765-66 (9th Cir. 1986) (IRS expert summary witness permitted to summarize evidence for purpose of tax analysis). *But see* ***United States v. Benson***, 941 F.2d 598, 603-06 (7th Cir. 1991) (conviction reversed where IRS expert gave opinions that the appellate court determined were not helpful to the jury because those opinions were not based on any special knowledge or skill).

Rule 615(2) of the Federal Rules of Evidence allows an investigatory case agent designated as the representative of the government to remain in the courtroom during all witness testimony. Rule 615(3) extends that privilege to an IRS agent who testifies as an expert or summary witness, once the government has shown that the witness is essential to the presentation of the government's case. *Id.*; *see, e.g.,* ***United States v. Lussier***, 929 F.2d 25, 30 (1st Cir. 1991) (case agent who was summary witness allowed to remain in courtroom during witness testimony); *see also* ***United States v. Avalos***, 506 F.3d 972, 978 (10th Cir. 2007); ***United States v. Charles***, 456 F.3d 249, 257 (1st Cir. 2006); ***United States v. Rivera***, 971 F.2d 876, 889-890 (2d Cir. 1992); ***United States v. Gonzalez***, 918 F.2d 1129, 1138 (3rd Cir. 1990); ***United States v. Adamo***, 882 F.2d 1218, 1235 (7th Cir. 1989); ***United States v. Parodi***, 703 F.2d 768, 773 (4th Cir. 1983); ***United States v. Butera***, 677 F.2d 1376, 1381 (11th Cir. 1982); ***United States v. Cueto***, 611 F.2d 1056, 1061 (5th Cir. 1980); ***United States v. Cline***, 188 F. Supp. 2d 1287, 1299 (D. Kan. 2002).

Some courts have specified that the government must identify only one agent for each subsection of Rule 615. *See, e.g.,* ***United States v. Pulley***, 922 F.2d 1283, 1285-86 (6th Cir. 1991) (allowing one agent under Rule 615(2) and one agent under Rule 615(3)); ***United States v. Farnham***, 791 F.2d 331, 334-36 (4th Cir. 1986) (conviction reversed where court failed to exclude one of two case agents during trial). In ***United States v. Neely***, 76 F.3d 376 (4th Cir. 1996) (unpublished), the Fourth Circuit reaffirmed its holding in ***Farnham*** and reconciled its decision in ***United States v. Kosko***, 870 F.2d 162, 164 (4th Cir. 1989), in which an IRS agent had been allowed to remain in the courtroom along with a DEA agent after the IRS agent had testified as an expert witness, because, according to the Fourth Circuit in ***Kosko***, the agents' testimony did not overlap and, thus, their "mutual presence during trial could not have undermined the integrity of the fact-finding process." ***Neely***, 76 F.3d at **12-13. In ***Neely***, under facts similar to ***Kosko***, the Fourth Circuit confirmed that the district court had committed error in failing to exclude one of two designated case agents but held that the error was harmless because the defendant could not demonstrate prejudice due to the agents' non-overlapping testimony. *Id*. *But see* **United States v. Jackson**, 60 F.3d 128, 134 (2d Cir. 1995) (declining to follow ***Pulley*** and ***Farnham***; holding that trial court has discretion to exempt from the rule against presence of witnesses more than one witness under each subsection of Rule 615).

40.03[9][c] Admissibility of IRS Computer Records

Computer data evidence is often introduced in tax cases to show the defendant's filing history, to prove that the defendant did not file returns as required, or to show that the defendant received notices about his tax liabilities. The introduction of the actual Individual Master File (IMF) transcript of account through a witness can open the witness to cross-examination by the defense about every code and data item contained in the transcript. In order to avoid this problem, it may be wiser to offer IRS computer records at trial in the form of Certificates of Assessments and Payments (IRS Forms 4340) or Certificate of Lack of Record (IRS Forms 3050), which are certified documents that summarize specific information regarding a taxpayer's filings and payment history.

Tax defiers often challenge the admissibility of computer records, and courts routinely reject such challenges. Certified transcripts, whether Forms 4340 or 3050, may be admitted under Federal Rule of Evidence 803(6) as business records or under Rule 803(10) as certificates of lack of official records. *See* ***Perez v. United States***, 312 F.3d 191, 195 (5th Cir. 2002) (certificate of assessments and payments is *prima facie* evidence of taxpayer's assessed liabilities and the IRS's notice thereof); ***Hughes v. United States***, 953 F.2d 531, 535 (9th Cir. 1992) (certificate of assessments and payments is proof of fact that federal tax assessments actually were made); ***United States v. Spine***, 945 F.2d 143, 148-149 (6th Cir. 1991) (certificates of assessments and payments, which showed defendant filed no returns, admissible under Rule 803(10)); ***United States v. Bowers***, 920 F.2d 220, 223 (4th Cir. 1990) (IRS records admissible as certificates of lack of official record under Rule 803(10)). Such records may be self-authenticating under Rule 902(1) if under seal, or they may be authenticated by an IRS employee. *See* Fed. R. Evid. 902. No showing of the accuracy of the computer system needs to be made to introduce the documents. *See* ***United States v. Ryan***, 969 F.2d 238, 240 (7th Cir. 1992) (certified copies of master file transcripts admissible as self-authenticating documents). summarize specific information regarding a taxpayer's filings and payment history.

Prosecutors in the Sixth Circuit should be aware of ***United States v. Maga***, 475 Fed. Appx., 538 (6th Cir. 2012), an unpublished decision. In ***Maga***, the court held that a Form 4340 is testimonial,triggering confrontation rights, under the reasoning of ***Melendez-Diaz v. Mass***., 557 U.S. 305 (2009) In so ruling, the court noted that the certified transcripts in a Form 4340 are not exact copies of the data the IRS ordinarily maintains in its master files. Here, for example, generating a Form 4340 involved searching through raw data and returning the result, "NO RECORD OFRETURN FILED," as opposed to copying a preexisting record. Therefore, the proper witness to authenticate the Form 4340 is the individual who actually generated the form.

40.03[10] Use of Pseudonyms by IRS Revenue Agents and Officers

Criminal prosecutors should be aware that IRS Revenue Agents and Officers are permitted to use officially issued pseudonyms in their dealings with the public. Although IRS procedure requires that case referrals identify employees using a pseudonym and all documents in the file that reflect the use of a pseudonym, prosecutors, nevertheless, should ask IRS employee witnesses whether the employee uses his or her true name or a pseudonym. As part of the IRS Restructuring Act of 1997, Congress codified the use of pseudonyms, which had been permitted administratively since March 1992. Pub.L. 105-206, Title III, Section 3706, July 22, 1998, 112 Stat. 778.

Use of pseudonyms is intended to prevent personal harassment of IRS employees by taxpayers and other members of the public, especially tax defiers. According to a 1988 Federal Bureau of Investigation Report, more IRS enforcement officers suffered assaults than any other federal law enforcement group.

In using pseudonyms, IRS employees are only required to identify themselves by last name. Moreover, if an employee believes that, because of the unique nature of his or her last name and/or the nature of the office locale, the use of the last name will still identify him or her, he or she may "register" a pseudonym with his or her supervisor. The IRS Restructuring and Reform Act of 1997 requires that an employee give "adequate justification . . . including protection of personal safety" and obtain prior approval from his or her supervisor before using a pseudonym.

The registered pseudonym may be issued only in place of the employee's last name; the real first name must be used. Once a pseudonym is issued, it is used by that employee at all times while on duty, whether working in the field or in the office. All history sheets, liens, levies and summonses are signed using the pseudonym. Pocket commissions (credentials) are issued in the pseudonym only.

Although IRS employees are permitted to use pseudonyms, government attorneys, as officers of the court, should never submit a declaration or affidavit signed by an IRS employee using a pseudonym without informing the court that a pseudonym is being used. An IRS employee may sign a declaration under a pseudonym if it is disclosed in the body of the declaration or affidavit that the name is a pseudonym and that the use of the pseudonym is in accordance with IRS procedures. Absent such a statement, the document must be signed with the declarant's true name and generallyshould be filed under seal.

There has been very little litigation concerning the use of pseudonyms, and what has occurred involves summons enforcement. Generally, courts have not found fault with the practice. *See, e.g.*, ***Sanders v. United States***, No. 94-1497, 1995 WL 257812 (10th Cir. May 2, 1995) (IRS employee's use of a pseudonym in signing declaration failed to establish a factual question as to the validity of the declaration); ***Springer v. Internal Revenue Service***, Nos. S-97-0091 WBS GGH, S-97-0092 WBS GGH, S-97-0093 WBS GGH, 1997 WL 732526, *5 (E.D. Cal. Sept. 12, 1997) (agent's use of pseudonym on summonses does not render it unenforceable); ***United States v. Wirenius***, No. CV 93-6786 JGD, 1994 WL 142394, at *n.2 (C.D. Cal. Feb. 11, 1994) ("the Court finds no legal basis for attacking the practice"); ***Dvorak v. Hammond***, Civ. No. 3-94-601, 1994 WL 762194, at *n.1 (D. Minn. Dec. 5, 1994) ("Revenue Officers assigned to investigate tax defiers and other potentially dangerous individuals are authorized to use professional pseudonyms to protect themselves and their families from harassment and reprisal").

Caution always should be exercised when tendering any witness who is using a pseudonym, and particularly if the witness is the summary witness/IRS expert witness.[9] In those instances, the witness should either relinquish the pseudonym or not be used as a witness. Employees must testify in court using their true names, unless, prior to giving

[9] Generally, the initial decision whether to testify under a pseudonym should be left to the IRS employee, although the prosecutor should explain that the court will make the ultimate determination. Where the prosecutor determines that the use of the pseudonym would prejudice the Government's position in the litigation, the IRS employee should be advised to use his or her real name. The prosecutor also should evaluate whether an IRS employee's testifying under a pseudonym may cause the fact finder to question the witness's veracity or may otherwise prejudice the government's case.

testimony, the court has been informed and consents to the employee's use of a pseudonym. *See IRM 1.2.4.7(3)* (9-28-2000)." When an IRS agent using a pseudonym testifies in court, the court and opposing counsel should be notified in advance of the testimony. It is prudent to file a motion raising the matter in advance of the trial or hearing rather than to advise the court immediately prior to the testimony. At least one court has refused to allow an IRS Revenue Agent to testify using a pseudonym. ***United States v. Nolens***, 4:96-CV-934-A (N.D. Texas, 1997). If an agent is permitted to testify using a pseudonym, it may be advisable for the agent to respond, after being sworn as a witness and asked to state his or her name for the record, "My pseudonym is . . ." and explain why a pseudonym is used.

In a jury trial, both the agent's real name and pseudonym should be included on the witness list and disclosed to the jurors during voir dire. As potential jurors are asked whether they know any of the witnesses, parties or attorneys involved in the case, it is important that the employee's real name be disclosed. A failure to disclose the real name could result in a mistrial if it later turned out that a member of the jury knew the employee under his or her real name. Prosecutors always should consult with their supervisors and the IRS about how best to proceed in these instances.

40.3 [11] Jury Nullification

"Jury nullification" is the concept that a jury has the right to ignore a judge's instructions on the law, if it feels the law is unjust, and acquit the defendant even if the government has proven guilt beyond a reasonable doubt. Tax defiers have argued that the authors of the Bill of Rights intended the Sixth Amendment to incorporate such a right. There is, however, no constitutional right to a jury nullification instruction. ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***United States v. Krzyske***, 836 F.2d 1013, 1021 (6th Cir. 1988) (upholding court's response to jury's inquiry about meaning of "jury nullification" that "[t]here is no such thing as valid jury nullification. Your obligation is to follow the instructions of the court as to the law given to you"); ***United States v. Drefke***, 707 F.2d 978, 982 (8th Cir. 1983); ***United States v. Buttorff***, 572 F.2d 619, 627 (8th Cir. 1978). *See also* ***United States v. Dougherty***, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972), for a thorough discussion of the issue of jury nullification and its historical origins.

40.4 WILLFULNESS

Willfulness, the voluntary, intentional violation of a known legal duty (***Cheek v. United States***, 498 U.S. 192, 201 (1991)), may be proved entirely by circumstantial evidence. ***United States v. Hills***, 618 F.3d 619, 639 (7th Cir. 2010); ***United States v. Stierhoff***, 649 F.3d 19, 26 (1st Cir. 2008); ***United States v. McCaffrey***, 181 F.3d 854, 856 (7th Cir. 1999); ***United States v. Threadgill***, 172 F.3d 357, 368 (5th Cir.1999); ***United States v. Tucker***, 133 F.3d 1208, 1218 (9th Cir. 1998); ***United States v. King***,126 F.3d 987, 993 (7th Cir. 1997); ***United States v. Rosario***, 118 F.3d 160, 164 (3d Cir. 1997); ***United States v. Klausner***, 80 F.3d 55, 62 (2d Cir. 1996); ***United States v. Wynn***, 61 F.3d 921, 925 (D.C.Cir. 1995); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v. Fingado***, 934 F.2d 1163, 1167 (10th Cir. 1991); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984); ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Schiff***, 612 F.2d 73, 77-78 (2d Cir. 1979); ***Hellman v. United States,*** 339 F.2d 36, 38 (5th Cir. 1964).

> [T]rial courts should follow a liberal policy in admitting evidence directed towards establishing the defendant's state of mind. No evidence which bears on this issue should be excluded unless it interjects tangential and confusing elements which clearly outweigh its relevance.

United States v. Collorafi, 876 F.2d 303, 305 (2d Cir. 1989).

In tax defier cases, admissible evidence of willfulness may include the following:

1. Tax protest activities and philosophies. ***United States v. McKee***, 506 F.3d 225, 249 (3d Cir. 2007; ***United States v. Eargle***, 921 F.2d 56, 58 (5th Cir. 1991); ***United States v. Grosshans***, 821 F.2d 1247, 1253 (6th Cir. 1987); ***United States v. Bergman***, 813 F.2d 1027, 1029 (9th Cir. 1987); ***United States v. Turano***, 802 F.2d 10, 11-12 (lst Cir. 1986); ***United States v. Marchini***, 797 F.2d 759, 766 (9th Cir. 1986).[10] *But see* ***United States v. Knapp***, 25 F.3d 451, 456 n.1 (7th Cir. 1994) (declining to review propriety of court's instruction that tax protestor status could be

[10] A tax defier may rebut a charge of willfulness by testifying about or quoting from materials on which he allegedly based his good faith belief. ***United States v. Nash***, 175 F.3d 429, 435 (6th Cir. 1999) (defendant may briefly mention or quote from documents forming basis for his belief, but court need not admit documents themselves); ***United States v. Gaumer***, 972 F.2d 723, 724-725 (6th Cir. 1993) (defendant entitled to read into evidence legal materials he claimed support his beliefs). *But see* ***United States v. Hauert***, 40 F.3d 197, 201-202 (7th Cir. 1994) ("defendant's beliefs about the propriety of his filing returns and paying taxes . . . are ordinarily not a proper subject for lay witness opinion testimony"); ***United States v. Willie***, 941 F.2d 1384, 1395 (10th Cir. 1991) (no error to exclude confusing documents).

considered in determining willfulness because issue not raised below).

2. Filing blatantly false IRS Forms W-4. ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); *see also* ***United States v. Brooks***, 174 F.3d 950, 955 (8th Cir. 1999); ***United States v. Mal***, 942 F.2d 682, 685 & n.3 (9th Cir. 1991); ***United States v. Sloan***, 939 F.2d 499, 502 (7th Cir. 1991); ***United States v. Connor***, 898 F.2d 942, 945 (3rd Cir. 1990); ***United States v. Johnson***, 893 F.2d 451, 453 (1st Cir. 1990); ***United States v. Ferguson***, 793 F.2d 828, 831 (7th Cir. 1986); ***Granado v. Commissioner***, 792 F.2d 91, 93-94 (7th Cir. 1986); ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986); ***United States v. Carpenter***, 776 F.2d 1291, 1295 (5th Cir. 1985).

3. Prior taxpaying history, such as the prior filing of valid tax returns followed by the filing of a protest return and receipt of a letter from the Internal Revenue Service telling a defendant that his or her return "did not comply with tax laws and might subject him to criminal penalties." ***United States v. Shivers***, 788 F.2d 1046, 1048 (5th Cir. 1986). *See also* ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v. Fingado***, 934 F.2d 1163, 1165, 1168 (10th Cir. 1991); ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 123-24 (7th Cir. 1985); ***United States v. Grumka***, 728 F.2d 794, 796-797 (6th Cir. 1984); ***Hayward v. Day***, 619 F.2d 716, 717 (8th Cir. 1980); ***United States v. Francisco***, 614 F.2d 617, 618 (8th Cir. 1980); ***United States v. Karsky***, 610 F.2d 548, 551 (8th Cir. 1979).

4. Subsequent taxpaying conduct. ***United States v. Upton***, 799 F.2d 432, 433 (8th Cir. 1986); ***United States v. Sempos***, 772 F.2d 1, 2 (1st Cir. 1985); ***United States v. Richards***, 723 F.2d 646, 648-649 (8th Cir. 1983); ***United States v. Serlin***, 707 F.2d 953, 959 (7th Cir. 1983).

5. The amount of a defendant's gross income. ***Fingado***, 934 F.2d at 1168; ***United States v. Bohrer***, 807 F.2d 159, 161-62 (10th Cir. 1986); ***United States v. Payne***, 800 F.2d 227 (10th Cir. 1986). The higher the defendant's gross income, the less likely the defendant was unaware of the filing requirement and the more likely the defendant's failure was intentional rather than inadvertent.

> 6. Proof that knowledgeable persons warned the defendant of tax improprieties. ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***Fingado***, 934 F.2d at 1168; ***United States v. Collorafi***, 876 F.2d 303, 305-306 (2d Cir. 1989); ***United States v. Sempos***, 772 F.2d 1, 2 (1st Cir. 1985); ***United States v. Grumka***, 728 F.2d 794, 797 (6th Cir. 1984).

40.5 DEFENSES

40.05[1] Good Faith

A defendant's conduct is not willful if it resulted from "ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." ***Cheek v. United States***, 498 U.S. 192, 202 (1991). Cheek claimed that he did not file tax returns because he believed that he was not a taxpayer within the tax laws, that wages were not income, that the Sixteenth Amendment did not authorize the taxation of individuals, and that the Sixteenth Amendment was unenforceable. ***Cheek***, 498 U.S. at 195. The Courtexplained:

> In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

Cheek, 498 U.S. at 202. The Supreme Court held the trial court's jury instructions that Cheek's good faith beliefs or misunderstanding of the law would have to be objectively reasonable to negate willfulness were erroneous:

> It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be.

Cheek, 498 U.S. at 203.

The trial court did not err, however, in instructing the jury not to consider Cheek's claims that the tax laws are unconstitutional. A claim that the tax laws are unconstitutional or otherwise invalid, or mere disagreement with the tax laws, do not constitute a good-faith defense:

> We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance.

Cheek, 498 U.S. at 206. *See also* ***United States v. Simkanin***, 420 F.3d 397, 404 (5th Cir. 2005); ***United States v. Ambort***, 405 F.3d 1109, 1115-1116 (10th Cir. 2005) (no error to strike testimony regarding defendant's beliefs on legal means to challenge validity of tax laws; "[h]e cannot disguise his knowing disregard of well-established legal principles and duties as a good faith procedural effort to evade those principles and duties"); ***United States v. Saussy***, 802 F.2d 849, 853-854 (6th Cir. 1986); ***United States v. Kraeger***, 711 F.2d 6, 7 (2d Cir. 1983); ***United States v. Karsky***, 610 F.2d 548, 550 & n.4 (8th Cir. 1979).

The ***Cheek*** Court stated that a jury considering a good faith belief claim

> would be free to consider any admissible evidence from any source showing that [the taxpayer] was aware of his [duties under the tax laws], including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretations of the tax law, of authoritative rulings of the Internal Revenue Service, or of any contents of the personal income tax return forms and accompanying instructions . . . .

Cheek, 498 U.S. at 202.

In determining whether a subjective good faith belief was held, a jury should not be precluded from considering the reasonableness of the taxpayer's interpretation of the law:

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

Cheek, 498 U.S. at 203-04. After remand and retrial, the Seventh Circuit upheld Cheek's conviction, ***United States v. Cheek***, 3 F.3d 1057 (7th Cir. 1993), holding that it was proper for the trial court to instruct that the jury could "consider whether the defendant's stated belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith." ***Cheek***, 3 F.3d at 1063. *See also* ***United States v. Dean,*** 487 F.3d 840, 850-851 (11th Cir. 2007)**;** ***United States v. Pensyl,*** 387 F.3d 456, 459 (6th Cir. 2004)**;** ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992); ***United States v. Powell***, 955 F.2d 1206, 1212 (9th Cir. 1992).

Tax defiers often claim to have conducted a careful study of legal decisions, statutes, and legal treatises, and they attempt to introduce the materials that they claim underlie their beliefs into evidence. In order to do so, the taxpayer must lay a sufficient foundation that he or she actually relied on the materials in forming his or her claimed belief. *See, e.g.*, ***United States v. Marston***, 517 F.3d 996, 1003 (8th Cir. 2008); ***United States v. Delfino***, 510 F.3d 468, 470-71 (4th Cir. 2007).

Even if the tax defier lays such a foundation, the materials may be excluded because of other competing interests. For example, there is a high probability that such evidence may confuse the jury as to the actual state of the law or contradict the court's instructions regarding the law. *See* ***United States v. Gustafson***, 528 F.3d 587, 592 (8th Cir. 2008); ***United States v. Simkanin,*** 420 F.3d 397, 412 (5th Cir. 2005); ***United States v. Middleton,*** 246 F.3d 825, 839 (6th Cir. 2001)**;** ***United States v. Payne***, 978 F.2d 1177, 1181-82 (10th Cir. 1992); ***United States v. Willie***, 941 F.2d 1384, 1395-97 (10th Cir. 1991); ***United States v. Flitcraft,*** 803 F.2d 184, 186 (5th Cir. 1986)**;** ***United States v. Gleason***, 726 F.2d 385, 388 (8th Cir. 1984); ***United States v. Kraeger***, 711 F.2d 6, 7-8 (2d Cir. 1983).

It is not necessary to admit such materials into evidence, because the defendant may still present his defense through testimony about his asserted beliefs and how he allegedly arrived at them. *See* ***Simkamin***, 420 F.3d at 412; ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991); ***United States v. Hairston***, 819 F.2d 971, 973

(10th Cir. 1987). Indeed, the defendant's testimony regarding the basis for his beliefs is *more* probative than the materials themselves. *Id*.; ***United States v. Mann***, 884 F.2d 532, 538 (10th Cir.1989). If the defendant testifies regarding his beliefs and is permitted to read relevant materials to the jury, the materials themselves may be excluded as cumulative. *See*, *e.g.,* ***United States v. Willis***, 277 F.3d 1026, 1033 (6th Cir. 2002); ***United States v. Barnett***, 945 F.2d 1296, 1301 (5th Cir. 1991).

Although the prosecutor may object to the materials' being sent back to the jury, the defendant should generally be permitted to read relevant materials to the jury. Appellate courts have found error when defendants were not permitted to testify regarding the materials. *E.g.*, ***United States v. Gaumer***, 972 F.2d 723, 725 (6th Cir. 1992).

Restraint should be exercised where appropriate so as not to jeopardize convictions on appeal. This is particularly true where the defendant has made a specific claim of reliance on a relatively limited amount of material. *See* ***Barnett***, 945 F.2d at 1301 n.3. In such a situation, the prosecutor should consider requesting a limiting instruction rather than opposing the admission of the evidence.

Additionally, if the defendant advances an erroneous interpretation of the tax laws as an explanation for his or her conduct, the prosecutor may request that the trial court instruct the jury on the correct interpretation of the tax laws, so long as that instruction does not direct the jury's verdict on an essential element of any offense. *See* ***United States v. Simkanin,*** 420 F.3d 397, 406-08 (5th Cir. 2005); ***United States v. Middleton,*** 246 F.3d 825, 840-41 (6th Cir. 2001).

For examples of jury instructions on willfulness and the good faith defense that have been upheld, *see* ***United States v. Dean,*** 487 F.3d 840, 850-51 (11th Cir. 2007)**;** ***United States v. Dykstra***, 991 F.2d 450, 452-53 (8th Cir. 1993); ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***United States v. Becker***, 965 F.2d 383, 388 (7th Cir. 1992); ***United States v. Droge***, 961 F.2d 1030, 1037-38 (2d Cir. 1992); ***United States v. Masat***, 948 F.2d 923, 931 n.15 (5th Cir. 1991); ***United States v. Collins***, 920 F.2d 619, 622-23 (10th Cir. 1990).

40.05[1][a] Reliance on Return Preparer/Accountant

Evidence that the defendant relied on the advice or instructions of an accountant or other qualified tax return preparer may negate the element of willfulness.[11] *See, e.g.*, ***United States v. Moran***, 493 F.3d 1002, 1013 (9th Cir. 2007); ***United States v. Charroux***, 3 F.3d 827, 831 (5th Cir. 1993); ***United States v. Civella***, 666 F.2d 1122,1126 (8th Cir. 1981); ***United States v. Brimberry***, 961 F.2d 1286, 1290 (7th Cir. 1992).

To claim third-party reliance successfully, a defendant must show that he or she truthfully and completely disclosed all relevant facts to the preparer or accountant and relied in good faith on the preparer's or accountant's advice -- that is, that the defendant had no reason to believe that the return was not correct. ***Charroux***, 3 F.3d at 831***;*** *see also* ***United States v. DeSimone,*** 488 F.3d 561, 570-71 (1st Cir. 2007); ***United States v. Bishop,*** 291 F.3d 1100, 1107 (9th Cir. 2002); ***United States v. Masat***, 948 F.2d 923, 930 (5th Cir. 1991); ***United States v. Wilson***, 887 F.2d 69, 73 (5th Cir. 1989); ***United States v. Michaud***, 860 F.2d 495, 500 (1st Cir. 1988); ***United States v. Meyer***, 808 F.2d 1304, 1306 (8th Cir. 1987); ***United States v. Whyte***, 699 F.2d 375, 379-80 (7th Cir. 1983); ***United States v. Samara***, 643 F.2d 701, 703 (10th Cir. 1981); ***United States v. Lisowski***, 504 F.2d 1268, 1272 (7th Cir. 1974); ***United States v. Stone***, 431 F.2d 1286, 1288-1289 (5th Cir. 1970).

"In a tax evasion case in which the defendants assert that blind reliance on their accountant, not criminal intent, caused an underreporting, the critical datum is not whether the defendants ordered the accountant to falsify the return, but, rather, whether the defendants knew when they signed the return that it understated their income." ***United States v. Olbres***, 61 F.3d 967, 970-71 (1st Cir. 1995). A defendant who knew the return's contents and knew that the return understated income or was otherwise incorrect cannot claim to have blindly relied on a preparer. *Ibid.* "A jury may permissibly infer that a taxpayer read his return and knew its contents from the bare fact that he signed it." *Id.* at 971.

Counsel should be careful in raising hearsay objections to a defendant's testimony regarding an accountant or other professional's advice. *See* ***United States v. Moran***, 493 F.3d 1002, 1013 (9th Cir. 2007). In ***Moran***, *ibid*., the Ninth Circuit held that the district court abused its discretion in barring defendant's testimony information she had received

[11] Some cases refer to reliance as an "affirmative defense." Reliance is not a classic affirmative defense; rather, it is a specific defense that negates the element of willfulness. Prosecutors should be careful not to suggest to the jury that the ultimate burden of persuasion has shifted to the defendant; the burden always remains with the government to prove that the defendant did not act in good faith.

regarding an accountant's advice, since the testimony was not offered for the truth of the advice, but to rebut the charge of her willfulness. The court held that the exclusion of the testimony was not harmless. Rather than challenging the admissibility of such testimony, counsel should request a limiting instruction by the court that notes to the jury that the accountant (or other professional's) testimony is not offered for the truth of the matter asserted, but for its impact on the defendant.

Good faith reliance on third parties is an issue to be determined by the jury. ***United States v. Duncan,*** 850 F.2d 1104, 1117 (6th Cir. 1988), *overruled in part on other grounds,* ***Schad v. Arizona***, 501 U.S. 624, 634-35 (1991). Therefore, a jury instruction on this issue should be submitted if credible evidence of third-party reliance is presented at trial. A defendant who demonstrates that he made full disclosure of all pertinent facts and relied in good faith on the advice received is entitled to a reliance-on-advice-of-accountant jury instruction. ***United States v. Ford***, 184 F.3d 566, 579 (6th Cir. 1999). A reliance-on-advice-of-accountant instruction may be warranted "even without *per se* testimony that the defendant relied on the accountant's advice, so long as the circumstances support an inference that he did so rely." *Ibid.; see also* **Duncan**, 850 F.2d at 1115-19.

Where there is no evidentiary basis for a reliance defense, however, a defendant is not entitled to a jury instruction. ***Ford***, 184 F.3d at 579-80 (insufficient evidence to support reliance instruction); ***United States v. Evangelista***, 122 F.3d 112, 118 (2d Cir. 1997); ***United States v. Brimberry***, 961 F.2d 1286, 1290-91 (7th Cir. 1992).

The defendant's education, sophistication, and degree of reliance are relevant to a reliance defense. *See* ***United States v. Estate Preservation Services***, 202 F.3d 1093, 1103 (9th Cir. 2000) (defense unavailable in a civil action seeking an injunction where the defendant was a physicist who received training in taxation at the University of Southern California Law School). A defendant will not succeed in asserting third-party reliance if he or she seeks advice but, to further his scheme, chooses to ignore advisors skeptical of the legality of his statements and to follow the advice of others who unquestioningly agree. *Ibid.*

Furthermore, a taxpayer may not successfully assert the reliance defense where certain pertinent information, such as filing deadlines, is common knowledge. *See* ***United***

States v. Boyle, 469 U.S. 241, 251-52 (1985) (defense unavailable in action seeking to overturn civil penalty).

40.05[1][b] Reliance on Advice of Counsel

Reliance on the advice of an attorney in the preparation of income tax returns, including incomplete or "Fifth Amendment" returns, may negate willfulness. Reliance on counsel also may negate *mens rea* for other types of criminal charges, such as fraud. *See, e.g.,* ***United States v. Van Allen***, 524 F.3d 814, 823 (7th Cir. 2008); ***United States v. Rice***, 449 F.3d 887, 897 (8th Cir. 2006); ***United States v. Wenger***, 427 F.3d 840, 853 (10th Cir. 2005); ***United States v. West***, 392 F.3d 450, 457 (D.C. Cir. 2004); ***United States v. Petrie***, 302 F.3d 1280, 1287 (11th Cir. 2002); ***United States v. Butler***, 211 F.3d 826, 833 (4th Cir. 2000); ***United States v. Kenney***, 911 F.2d 315, 322 (9th Cir. 1990). The elements of the defense are the same regardless of the crime charged, but the effect depends on the applicable *mens rea*.

The Seventh Circuit, in ***United States v. Cheek***, 3 F.3d 1057, 1061 (7th Cir. 1993), used the following test to determine whether Cheek was entitled to a reliance-on-counsel defense instruction:

> In order to establish an advice of counsel defense, a defendant must establish that: "(1) before taking action, (2) he in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible futureconduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

(quoting ***Liss v. United States***, 915 F.2d 287, 291 (7th Cir. 1990)). The Seventh Circuit held that Cheek was not entitled to the instruction because he did not seek advice on possible future conduct, but "merely continued a course of illegal conduct begun prior to contacting counsel." ***Cheek***, 3 F.3d at 1062. Cheek did not make a full disclosure to his attorney nor follow his attorney's advice that he should obey the tax laws until told by a court that the laws were not valid. *Ibid.*

If evidence supporting the defense is presented at trial, the court should instruct the jury that the defendant's conduct is not "willful" if he acted with a goodfaith misunderstanding based on the advice of counsel. However, no instruction should be given if the defendant does not present evidence to support the defense. *See* ***United States v. Bostian*****,** 59 F.3d 474, 480 (4th Cir. 1995) **(**upholding refusal to give instruction where the attorney was hired to advise a third party not the defendant); ***United States v. Becker***, 965 F.2d 383, 387-88 (7th Cir. 1992) (upholding refusal to give reliance instruction where there was no testimony that the defendant told lawyer everything about his situation, received specific advice in response, and followed that advice); ***United States v. Snyder***, 766 F.2d 167, 169 (4th Cir. 1985) (testimony not sufficient to justify instruction concerning good faith reliance).

The defense requires that the defendant be seeking advice regarding the lawfulness of future conduct. ***United States v. Polytarides*****,** 584 F.2d 1350, 1352-53 (4th Cir. 1978) (no error to reject reliance defense when evidence shows illegal acts before advice was sought). Additionally, if the defendant subsequently acquires information that indicates the advice was not valid, that may negate reliance. ***United States v. Benson*****,** 941 F.2d 598, 614 (7th Cir. 1991), *amended*, 957 F.2d 301 (7th Cir. 1992).

If the criteria to present evidence regarding reliance on counsel are met, the prosecutor should be mindful of the testimony and, where appropriate, request a limiting instruction regarding the counsel's advice. See § 40.05[1][a], *supra*.

40.05[1][c] No Defense in Non-Tax Cases

In ***Cheek v. United States***, 498 U.S. 192, 199-201 (1991), the Supreme Court carefully limited the "good faith" defense to tax cases, emphasizing the complexity of the Internal Revenue Code**,** the average citizen's difficulty in comprehending duties it imposes, and the construction of "willfulness" in the tax context.

Various appellate courts have confirmed ***Cheek's*** limited application. *See* ***In re Air Disaster at Lockerbie Scotland***, 37 F.3d 804, 818 (2d Cir. 1994), *overruled in part on other grounds*, ***Zicherman v. Koran Air Lines Co.***, 516 U.S. 217 (1996); ***United States v. Chaney***, 964 F.2d 437, 446 n.25 (5th Cir. 1992) (bank fraud); ***United States v. Dockray*****,** 943 F.2d 152, 155-156 (1st Cir. 1991) (mail and wire fraud).

The defense of reliance on advice of counsel may be available in some non-tax cases, but the effect of the defense will be determined by the *mens rea* of the crime charged.

40.05[2] Constitutional Challenges

40.05[2][a] Fourth Amendment -- Unreasonable Search and Seizure

The government's use at trial of a defendant's filed income tax returns or Forms W-4 does not violate the Fourth Amendment right against unreasonable searches and seizures. ***United States v. Amon***, 669 F.2d 1351, 1357-1358 (10th Cir. 1981); ***United States v. Warinner***, 607 F.2d 210, 211-13 (8th Cir. 1979).

The IRS has authority to obtain evidence through the execution of search warrants. ***United States v. Rosnow***, 977 F.2d 399, 409 n.17 (8th Cir. 1992). In ***Rosnow***, *ibid.*, the court noted that "Congress has given the IRS wide authority to conduct criminal investigations, including the execution of search warrants, regarding those individuals suspected of violating tax laws." *See also* ***United States v. Scott***, 975 F.2d 927, 928 (1st Cir. 1992) (IRS systematic search, seizure, and reconstruction of shredded documents from garbage bag in front of defendant's home did not violate Fourth Amendment); ***United States v. Dunkel***, 900 F.2d 105, 106 (7th Cir. 1990), *vacated on other grounds*, 498 U.S. 1043 (1991) (use of financial records obtained from taxpayer's dumpster does not violate Fourth Amendment).

40.05[2][b] Fifth Amendment -- Due Process; Freedom from Self-incrimination

Tax defiers' claims that taxes constitute a "taking" of property without due process of law in violation of the Fifth Amendment have been rejected. *See* ***Schiff v. United States***, 919 F.2d 830, 832 (2d Cir. 1990). The Supreme Court has held that the government's need for revenues justifies use of summary procedures to collect taxes. ***Phillips v. Commissioner***, 283 U.S. 589, 595 (1931).

Tax defiers often submit tax returns on which they refuse to provide any financial information, asserting their Fifth Amendment right against self-incrimination. U.S. CONST. amend. V. However, the Supreme Court has long held that the statutory requirement to file tax returns does not violate the Fifth Amendment. ***United States v. Sullivan***, 274 U.S. 259, 263-264 (1927).

Return forms containing little or no financial information from which a tax can be computed are sometimes referred to as "Fifth Amendment returns." The filing of a so-called Fifth Amendment return may constitute an affirmative act for the purpose of proving evasion. *See* ***United States v. Waldeck***, 909 F.2d 555, 559 (1st Cir. 1990) ("fifth amendment" or "no information" return and false W-4s are evidence of willful attempt to evade and defeat assessment of taxes); ***United States v. DeClue***, 899 F.2d 1465, 1471 (6th Cir. 1990) (filing of return with no financial information, on which was typed, "object: self-incrimination," was evidence of willfulness for tax evasion).

In ***United States v. Sullivan***, 274 U.S. 259, 263 (1927), the Supreme Court held that the privilege against compulsory self-incrimination is not a defense to prosecution for the complete failure or refusal to file a tax return. The Court, *id.* at 263, stated, however, that the privilege could be claimed against *specific disclosures* sought on a return:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.

The Court further stated, "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the *amount* of his income because it had been made in crime." *Id.* at 263-64 (emphasis added); *see* ***Garner v. United States,*** 424 U.S. 648, 650 (1976).

In ***Garner***, *id.* at 649-50, 656, the Court held that the admission of a defendant's prior Forms 1040, which reported his occupation as "professional gambler," did not violate his Fifth Amendment rights, since he had waived the privilege by supplying this information on his Forms 1040. The Court further stated what it deemed "implicit in the dictum of ***Sullivan***" -- that is, "a § 7203 conviction cannot be based on a valid exercise of the [Fifth Amendment] privilege." ***Garner***, 424 U.S. at 662. Moreover, the Court noted that it need not decide "what types of information are so neutral that the privilege could rarely, if ever, be asserted to prevent their disclosure." *Id*. at 650 n. 3. However, the Court specially limited its discussion of the privilege to a fear of self-incrimination *other than* under the tax laws. *Ibid*.

Sullivan is frequently cited for the proposition that a taxpayer may not use the Fifth Amendment to justify the failure to file any return at all. *See, e.g.,* ***Garner***, 424 U.S. at 650 n.3 ("nothing we say here questions the continuing validity of ***Sullivan***'s holding that returns must be filed"); ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006, at *2 (11th Cir. Sept. 10, 2008); ***United States v. Dack***, 987 F.2d 1282, 1284 (7th Cir.

1993) (upholding jury instruction summarizing ***Sullivan***); ***United States v. Stillhammer***, 706 F.2d 1072, 1076-77 (10th Cir. 1983); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir. 1982). Although not specifically citing ***Sullivan***, other courts hve held the same. *See* ***United States v. Leidendeker***, 779 F.2d 1417, 1418 (9th Cir. 1986); ***United States v. Lawson***, 670 F.2d 923, 927 (10th Cir. 1982) (cases cited); ***United States v. Reed***, 670 F.2d 622, 623-24 (5th Cir. 1982); ***United States v. Edelson***, 604 F.2d 232, 234 (3d Cir. 1979).

The Court has held that disclosure of routine financial information on a tax return ordinarily does not, in itself, incriminate an individual and does not violate one's Fifth Amendment right against self-incrimination. ***Garner***, 424 U.S. at 660-61; *see* ***California v. Byers***, 402 U.S. 424, 428, 430 (1971) ("the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure"). The Court has distinguished the filing of tax returns with questions that are neutral on their face for the public at large from a form's requirements that are directed to a discrete group who are "inherently suspected of criminal activity." ***Garner***, 424 U.S. 660-61; ***Albertson v. Subversive Activities Control Board***, 382 U.S. 70, 79 (1965) (distinguishing tax forms from registration queries directed to members of communist organization); ***Marchetti v. United States***, 390 U.S. 39, 52 (1968).

Courts will reject a defendant's Fifth Amendment claim if the defendant does not include any substantive tax information on Forms 1040 and fails to assert any clear threat of self-incrimination to warrant the absence of such information. *See, e.g.,* ***United States v. Warner***, 830 F.2d 651, 655-56 (7th Cir. 1987) (no legitimate Fifth Amendment claim based on fear of inaccurate return and income earned legitimately); ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir. 1983) (no privilege recognized when no data provided on Form 1040); ***United States v. Drefke***, 707 F.2d 978, 982-83 (8th Cir. 1983); ***Lawson***, 670 F.2d at 927; ***Reed***, 670 F.2d at 623-24 (pending criminal investigation, income from legitimate activities and potential civil liability are insufficient bases to assert Fifth Amendment privilege); ***United States v. Carlson***, 617 F.2d 518, 520-523 (9th Cir. 1980) (rejecting Fifth Amendment privilege as means to cover up past tax crimes; here, false Form W-4 previously filed by defendant); ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir. 1980) (assertion of privilege on 25 specific queries on Form 1040 rejected under extensive, multi-factor Fifth Amendment analysis); ***United States v. Schiff***, 612 F.2d 73, 77, 83 (2d Cir. 1979) (rejecting Fifth Amendment claim for entire return); ***Edelson***, 604 F.2d at 234; ***United States v. Irwin***, 561 F.2d 198, 201 (10th Cir. 1977); *See also*

United States v. Saussy, 802 F.2d 849, 854-55 (6th Cir. 1986); ***United States v. Green***, 757 F.2d 116, 122-23 (7th Cir. 1985) (affirming jury instruction that stated, *inter alia*, that reporting income from legitimate activities would not fall within the Fifth Amendment privilege).

As noted, a Fifth Amendment claim may be asserted as to specific line items on tax forms. ***Sullivan***, 274 U.S. at 263. There are, however, few successful assertions of the Fifth Amendment privilege in this context. *See* ***Marchetti v. United States***, 390 U.S. 39, 49-52 (1938) (Fifth Amendment privilege protected gamblers from statutory obligations to register and pay occupational tax for wager). While rejecting defendants' broader claims, several courts, following ***Sullivan***, have recognized that a taxpayer may assert a Fifth Amendment privilege with respect to the *source* of income, although he may not assert the privilege with respect to the *amount* of income. *See* ***United States v. Harting***, 879 F.2d 765, 770 (10th Cir. 1989) (approving jury instruction that taxpayer is obliged to report the *amount* of income but may assert Fifth Amendment privilege regarding the *source* of income); ***United States v. Shivers***, 788 F.2d 1046, 1049 (5th Cir. 1986) (amount of taxpayer's income not privileged though source may be); *see also* ***United States v. Turk***, 722 F.2d 1439, 1441 (9th Cir. 1983) (invalid claim of privilege for entire return when taxpayer asserted information substantiating deductions might be incriminating).

In order to validly assert a Fifth Amendment privilege against self-incrimination, a defendant must do the following:

(1) claim the privilege on his or her return in response to a specific question (***Garner***, 424 U.S. at 665; ***United States v. Neff***, 615 F.2d 1235, 1238 (9th Cir. 1980));

(2) demonstrate a real and substantial danger of self-incrimination (***Neff***, 615 F.2d at 1239-40; ***Daly v. United States***, 393 F.2d 873, 878 (8th Cir. 1968)); and

(3) submit the claim to the reviewing court for resolution. (***Garner***, 424 U.S. at 663-65 (rejecting defendant's assertion that privilege claim must be resolved by court before § 7203 charges are pursued); ***Neff***, 615 F.2d at 1240). *See* ***Saussy***, 802 F.2d at 855.

A defendant must make some affirmative or "colorable" showing that providing the withheld data could subject him to prosecution. ***United States v. Verkuilen***, 690 F.2d

648, 654 (7th Cir. 1982). But, while a bald assertion that he is excising this right is insufficient, a defendant need not admit to the crime he seeks to avoid admitting. ***Green***, 757 F.2d at 123; ***United States v. Goetz***, 746 F.2d 705, 710 (11th Cir. 1982).

A court's determination that the defendant's claim of the Fifth Amendment privilege against self-incrimination is invalid does *not*, however, prohibit the defendant from offering evidence that he or she believed in good faith that providing the challenged information could subject him or her to criminal prosecution. ***Garner***, 424 U.S. at 663, n.18; *see* ***United States v. Neff***, 615 F.2d 1235, 1238-41 (9th Cir. 1980) (extensive discussion of standard for Fifth Amendment claim). Such a good-faith claim, even if erroneous, is a valid defense to the element of willfulness under § 7203. *Id.* at 663 n.18; *see also* ***Saussy***, 802 F.2d at 854-855; ***Shivers***, 788 F.2d at 1049; ***United States v. Heise***, 709 F.2d 449, 451 (6th Cir. 1983) (no good faith reliance on the Fifth Amendment by a tax defier who "attempted to frustrate the tax laws by use of the fifth amendment" in not providing substantive information on a Form 1040). A defendant cannot intentionally and knowingly violate an obligation to file under § 7203 if he or she believes, albeit erroneously, that the Fifth Amendment privilege protects him or her from the obligation to file.

Whether the defendant validly exercised the privilege against self-incrimination is a question of law for the court. ***Turk***, 722 F.2d at 1440. On the other hand, whether the defendant asserted the privilege in good faith, thereby entitling the defendant to acquittal, is a question of fact for the jury to resolve. ***Goetz***, 746 F.2d at 711-12; ***United States v. Smith***, 735 F.2d 1196, 1198 (9th Cir. 1984); ***Turk***, 722 F.2d at 1441.

Further, Section 6702 of Title 26 of the United States Code ("Frivolous Tax Submissions") imposes a civil penalty against any individual who, based on "a position [which is] frivolous" or "reflects a desire [which appears on the purported return] to delay or impede the administration of Federal tax laws," files an incomplete return. Courts repeatedly have upheld frivolous return penalties for taxpayers who assert Fifth Amendment privilege claims on incomplete forms. *See* ***Sochia v. Commissioner***, 23 F.3d 941, 942, 944 (5th Cir. 1994) (return frivolous where defendant supplied only names, address, and claimed Fifth Amendment privilege by inserting phrase: "Object -- Fifth Amend"); ***Eicher v. United States***, 774 F.2d 27, 29 (1st Cir. 1985) (blanket claim of privilege on return frivolous); ***Ricket v. United States***, 773 F.2d 1214, 1215 (11th Cir. 1985) (return containing only signature and date and invoking privilege was "frivolous");

Peeples v. Commissioner, 771 F.2d 77, 78-79 (4th Cir. 1984) (words "refused" and Fifth Amendment claim rendered return frivolous); ***Hudson v. United States***, 766 F.2d 1288, 1291 (9th Cir. 1985) (taxpayer's statement that complete return could be used to prosecute potential false claims action insufficient to invoke Fifth Amendment protection).

40.05[2][c] Tax Laws Are Unconstitutionally Vague

Sections 7203, 7205 and 7206 have withstood challenges that they are unconstitutionally vague. ***United States v. Cochrane***, 985 F.2d 1027, 1031 (9th Cir. 1993) (§ 7206) ("The void-for-vagueness doctrine requires [only] that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" (citation omitted)); ***United States v. Dunkel***, 900 F.2d 105, 107-108 (7th Cir. 1990) (§ 7203) ("It is enough that a reasonable person can see what Congress is driving at"), *vacated on other grounds*, 498 U.S. 1043 (1991); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (§ 7205); ***United States v. Pederson***, 784 F.2d 1462, 1463-64 (9th Cir. 1986) (§ 7203); ***United States v. Parshall***, 757 F.2d 211, 215 (8th Cir. 1985) (§ 7203); ***United States v. Damon***, 676 F.2d 1060, 1063 (5th Cir. 1982) (§ 7206(2)); ***United States v. Annunziato***, 643 F.2d 676, 677-78 (9th Cir. 1981) (§ 7205); ***United States v. Russell***, 585 F.2d 368, 370 (8th Cir. 1978) (§ 7203); ***United States v. Buttorff***, 572 F.2d 619, 624-25 (8th Cir. 1978) (§ 7205); ***United States v. Lachmann***, 469 F.2d 1043, 1046 (lst Cir. 1972) (§ 7203).

40.05[2][d] Sixteenth Amendment Never Ratified

Tax defiers have claimed that the Sixteenth Amendment, which grants Congress the power to collect income taxes without apportionment, is not part of the United States Constitution. See Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar -- Whatever His Demands*, 32 Gonz. L. Rev. 291, 301-302 (1997) (reciting litany of tax defier arguments).

The Supreme Court has stated that assertions regarding proper ratification of Constitutional Amendments are political questions for Congress to decide and are beyond federal court jurisdiction. *See* ***Coleman v. Miller***, 307 U.S. 433, 450-56 (1939) (Black, J., concurring). The Secretary of State's certification that the required number of states have ratified an amendment is binding on the courts. *See* ***Leser v. Garnett***, 258 U.S. 130, 137 (1922) (Secretary of State's certification that the Nineteenth Amendment had been ratified by the requisite number of state legislatures was conclusive upon the courts); ***United States v. Stahl***, 792 F.2d 1438, 1439 (9th Cir. 1986) (Secretary of State's certification that the Sixteenth Amendment was properly ratified was conclusive upon the courts); *accord* ***United States v. Thomas***, 788 F.2d 1250, 1253-54 (7th Cir.1986).

In ***United States v. House***, 617 F. Supp. 237, 240 (W.D. Mich. 1985), the district court rejected the defendant's argument that the Sixteenth Amendment is not a part of the Constitution. Chief Judge Miles stated that the "sixteenth amendment and the tax laws passed pursuant to it have been followed by the courts for over half a century. They represent the recognized law of the land." *Id*. In 1989, citing ***McDougal v. Commissioner***, 818 F.2d 453, 455 (5th Cir. 1987), the Ninth Circuit found the Sixteenth Amendment argument to be in "direct conflict with 'firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification (citation omitted)." ***In re Becraft***, 885 F.2d 547, 549 (9th Cir. 1989).

Courts have consistently rejected the contention that the Sixteenth Amendment was never properly ratified and that the federal government therefore lacks authority to collect an income tax. *See* ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990) (sixteenth amendment argument devoid of any arguable basis in law); ***Axmann v. Ponte***, 892 F.2d 761, 761 (8th Cir. 1990); ***In re Becraft***, 885 F.2d 547, 548-49 (9th Cir. 1989) (recognizing patent absurdity and frivolity of claim that "Sixteenth Amendment does not authorize a direct non-apportioned income tax on resident United States citizens and thus such citizens are not subject to the federal income tax law"); ***Miller v. United States***, 868 F.2d 236, 240-41 (7th Cir. 1989); ***United States v. Sitka***, 845 F.2d 43, 45-47 (2d Cir. 1988) (rejecting clerical errors argument); ***Pollard v. Commissioner***, 816 F.2d 603, 604-05 (11th Cir. 1987) (rejecting as frivolous claim that Sixteenth Amendment was never ratified); ***United States v. Stahl***, 792 F.2d 1438, 1439-40 (9th Cir. 1986); ***Coleman v. Commissioner***, 791 F.2d 68, 70 (7th Cir. 1986); ***Sisk v. Commissioner***, 791 F.2d 58, 60-61 (6th Cir. 1986) (rejecting clerical errors and "Ohio not a State" arguments); ***United States v. Thomas***, 788 F.2d 1250, 1253 (7th Cir. 1986) (rejecting argument that states had to approve exactly the same text Congress transmitted to them); ***Knoblauch v. Commissioner***, 749 F.2d 200, 201-202 (5th Cir. 1984) (variant wording in state ratification resolution without consequence; "Ohio not a State" argumentrejected).

40.05[3] Selective Prosecution and Freedom of Speech

40.05[3][a] Generally

Tax defiers have asserted that their prosecutions violated their First Amendment rights to freedom of speech. Defiers argued that they were being prosecuted merely because they were outspoken, prominent critics of the Internal Revenue Code. This is actually a selective prosecution defense, not a First Amendment defense. There is consensus among the circuits that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment. ***United States v. Rowlee***, 899 F.2d 1275, 1279 (2d Cir. 1990) (collecting cases); ***United States v. Holecek***, 739 F.2d 331, 334-335 (8th Cir. 1984).

On the other hand, in certain limited instances, a First Amendment freedom of speech issue may be presented where a tax defier is prosecuted on an aiding and abetting or conspiracy charge and the tax defier claims that his or her counseling or advice to others was limited to speech, without action, and is therefore protected by the First Amendment.

40.05[3][b] Selective Prosecution Defense

"A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." ***United States v. Armstrong***, 517 U.S. 456, 463 (1996).

The test for selective prosecution is rigorous. In order to overcome a presumption of prosecutorial regularity, a defendant must present "clear evidence" that the decision to prosecute was based on "an unjustifiable standard, such as race, religion, or other arbitrary classification" or that the "administration of a criminal law is 'directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive' that prosecution amounts to 'a practical denial' of equal protection of the law." ***Armstrong***, 517 U.S. at 464-65 (quoting ***Oyler v. Boles,*** 368 U.S. 448, 456 (1962) and ***Yick Wo v. Hopkins,*** 118 U.S. 356, 373 (1886)). The defense that tax defiers are being selectively prosecuted because they are outspoken opponents of the Internal Revenue Code rarely succeeds.

The defendant who asserts selective prosecution carries a heavy burden. In ***United States v. Berrios***, 501 F.2d 1207, 1211 (2d Cir. 1974), the Second Circuit set out the two prongs of the test that the defendant must satisfy:

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Other circuits have also adopted this rigorous standard. *See* ***United States v. Sutcliffe,*** 505 F.3d 944, 954 (9th Cir. 2007); ***United States v. Khan***, 461 F.3d 477, 498 (4th Cir. 2006); ***United States v. Hedaithy***, 392 F.3d 580, 607 (3d Cir. 2004); ***United States v. Alameh,*** 341 F.3d 167, 172-74 (2d Cir. 2003); ***United States v. Smith***, 231 F.3d 800, 807-08 (11th Cir. 2000); ***United States v. Hastings***, 126 F.3d 310, 313-14 (4th Cir. 1997) (tax case); ***United States v. Michaud***, 860 F.2d 495, 499-500 (lst Cir. 1988) (tax case); ***United States v. McMullen***, 755 F.2d 65, 66-67 (6th Cir. 1984) (tax case); ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984) (tax case); ***United States v. Holecek***, 739 F.2d 331, 333-34 (8th Cir. 1984) (tax case); ***United States v. Mangieri***, 694 F.2d 1270, 1273 (D.C. Cir. 1982); ***United States v. Damon***, 676 F.2d 1060, 1064-1065 (5th Cir. 1982) (tax case); ***United States v. Amon***, 669 F.2d 1351, 1356 n.6 (10th Cir. 1981) (tax case).

Absent clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties, and a defendant bears the burden of establishing a prima facie case of selective prosecution. ***United States v. Armstrong***, 517 U.S. at 464; ***United States v. Lewis***, 517 F.3d 20, 25 (1st Cir. 2008); ***United States v. Deberry,*** 430 F.3d 1294, 1299 (10th Cir. 2005). The defendant bears the burden of production before he or she is entitled to an evidentiary hearing or discovery. ***United States v. Lewis***, 517 F.3d at 25; ***United States v. Darif,*** 446 F.3d 701, 708 (7th Cir. 2006); ***United States v. Deberry,*** 430 F.3d at 1299.

Courts use different terms to describe the evidentiary showing that the defendant must make to be entitled to an evidentiary hearing or discovery; in general, the defendant need not completely establish his prima facie case, but must present some evidence on both prongs of the test. The standard requires that the defendant make a "credible showing" on the elements of his or her claim; the standard is intentionally "rigorous" and intended to be "a significant barrier to the litigation of insubstantial claims." ***United States v. Armstrong***, 517 U.S. at 470, 468, 464; *see also* ***United States v. Lewis***, 517 F.3d at 25; ***United States v. Alcaraz-Arellano***, 441 F.3d 1252, 1264 (10th Cir. 2007); ***United States v. Hedaithy***, 392 F.3d at 607; ***United States v. Alameh,*** 341 F.3d at 173-74; ***United States v. Hastings***, 126 F.3d at 313-14; ***United States v. Hayes,*** 236 F.3d 891, 895 (7th Cir. 2001). The defendant must present "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." ***United States v. Berrios***, 501 F.2d 1207, 1211-12 (2d Cir. 1974); *see also* ***United States v. Bohrer***, 807 F.2d 159, 161 (10th Cir. 1986); ***United States v. Moon***, 718 F.2d 1210, 1229 (2dCir. 1983); ***United States v. Ness,*** 652 F.2d 890, 892 (9th Cir. 1981).

As a practical matter, the government should resist discovery or an evidentiary hearing on this issue until the defendant has made the requisite showing. Defendants may use frivolous claims of selective prosecution to obtain documents, such as internal government memoranda, they otherwise would not be entitled to under Fed. R. Crim. P. 16.

If the defendant makes the required showing, the burden shifts to the government to show that there was no selective prosecution.

Generally, courts have upheld government targeting of vocal tax defiers for prosecution against defendants' selective prosecution attacks. "The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. . . . Selection, moreover, is not impermissible solely because it focuses upon those most vocal in their opposition to the law which they are accused of violating. The fact that tax protestors are vigorously prosecuted for violation of the tax laws demonstrates nothing more than a legitimate interest in punishing flagrant violators and deterring violations by others." ***United States v. Johnson***, 577 F.2d 1304, 1309 (5th Cir. 1978) (citations omitted); *see also* ***United States v. Amon***, 669 F.2d 1351, 1355-57 (10th Cir. 1981). The government's initiation of prosecution because of a defendant's "great notoriety" as a tax defier would not, as a matter of law, be an impermissible basis for prosecution. ***United States v. Hazel***, 696 F.2d 473, 475 (6th Cir. 1983). Indeed, "selection for prosecution based in part on the potential deterrent effect on others serves a legitimate interest in promoting more general compliance with the tax laws. Since 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 likely to receive, the attention of the media." ***United States v. Catlett***, 584 F.2d 864, 868 (8th Cir. 1978); *see also* ***United States v. Hastings***, 126 F.3d at 314-15; ***United States v. Kelley***, 769 F.2d 215, 218 (4th Cir. 1985) ("There is no impermissible selectivity in a prosecutorial decision to prosecute the ringleader and instigator, without prosecuting his foolish followers, when a prosecution of the instigator can be expected to bring the whole affair to an end.").

"[S]elective enforcement of the law is not in itself a constitutional violation, in the absence of invidious purpose. * * * 'The government's prosecution of tax protesters as a group merely indicates a valid interest in punishing violators who flagrantly and vocally break the law.'" ***United States v. Rice,*** 659 F.2d 524, 527 (5th Cir. 1981) (quoting ***United States v. Tibbetts,*** 646 F.2d 193, 195 (5th Cir. 1981)).

The fact that some tax evaders and defiers elude prosecution is insufficient to establish selective prosecution. ***United States v. Brewer***, 681 F.2d 973, 974 (5th Cir. 1982). The defendant must show that others similarly situated were not prosecuted *and* that her or his prosecution was based on some impermissible consideration, such as race or religion. *See* ***United States v. Hastings***, 126 F.3d at 314-16; ***United States v. Amon***, 669 F.2d at 1356-57. Furthermore, the IRS is not required to treat similarly all who engage in roughly the same conduct. ***United States v. Michaud***, 860 F.2d at 499. Vigorous prosecution is not selective prosecution. ***United States v. Brewer***, 681 F.2d at 974.

"Unless one can show that the tax laws are deployed against protesters in retaliation for the exercise of their rights, a selective prosecution argument will fail." ***United States v. Wilson***, 639 F.2d 500, 505 (9th Cir. 1981).

Absent special circumstances, a selective prosecution claim must be raised prior to trial, or the claim will be deemed waived. Fed R. Crim. P. 12(b)(3)(A); 12(e); ***United States v. Huber***, 404 F.3d 1047, 1054 (8th Cir. 2005); ***United States v. Gary***, 74 F.3d 304, 313 (1st Cir. 1996); ***United States v. Bryant***, 5 F.3d 474, 476 (10th Cir. 1993).

40.05[3][c] Freedom of Speech

In ***Brandenburg v. Ohio***, 395 U.S. 444, 447 (1969), the Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Where a person's activity is limited to the mere advocacy of non-compliance with the tax laws and the defendant does not prepare or assist in the preparation of tax returns, there may be a viable First Amendment defense.

Where a defendant's speech is combined with action, however, as when a defendant encourages and is actually involved in the preparation of false or fraudulent returns for others, the defendant has gone beyond the protection of the First Amendment and may be subject to criminal prosecution. *See, e.g.,* ***United States v. Fleschner***, 98 F.3d 155, 158-59 (4th Cir. 1996) (First Amendment lends no protection to speech which urges the listener to commit violations of current law); ***United States v. Knapp***, 25 F.3d 451, 457 (7th Cir. 1994); ***United States v. Citrowske***, 951 F.2d 899, 901 (8th Cir. 1991); ***United States v. Rowlee***, 899 F.2d 1275, 1279-80 (2d Cir. 1990); ***United States v. Kelley***, 769 F.2d 215, 217 (4th Cir. 1985); ***United States v. Damon***, 676 F.2d 1060, 1062 (5th Cir. 1982); *cf.* ***United States v. Freeman***, 761 F.2d 549, 551-552 (9th Cir. 1985) (reversing convictions on twelve counts because district court failed to allow jury to consider First Amendment defense; conviction on two counts affirmed since defendant directly participated in preparation of returns).

A taxpayer cannot claim protection under the First Amendment by simply characterizing his filing of false information and tax returns as "petitions for redress." ***United States v. Kuball***, 976 F.2d 529, 532 (9th Cir. 1992); *see also* ***United States v. Ambort***, 405 F.3d 1109, 1117 (10th Cir.2005); ***United States v. Barnett***, 667 F.2d 835, 842 (9th Cir. 1982) ("The first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegalpurpose.").

In ***United States v. Buttorff***, 572 F.2d 619, 624 (8th Cir. 1978), the Eighth Circuit held that the defendant's activities went beyond the scope of protection of the First Amendment:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal

> syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and, as discussed above, was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.

See also ***United States v. Fletcher,*** 322 F.3d 508, 515 (8th Cir. 2003); ***United States v. Moss***, 604 F.2d 569, 571 (8th Cir. 1979); *but see* ***Freeman***, 761 F.2d at 551-552 (convictions on section 7206(2) charges based on Freeman's instructional seminars reversed because of trial court's failure to instruct that First Amendment defense was a question of fact for the jury).

In ***United States v. Fleschner***, 98 F.3d 155, 158-59 (4th Cir. 1996), the Fourth Circuit discussed some of the factors that made the First Amendment defense inapplicable:

> The evidence in this case, however, does not support a First Amendment defense. The defendants' words and acts were not remote from the commission of the criminal acts. The evidence shows that the defendants held meetings and collected money from attendees whom they instructed and advised to claim unlawful exemptions and not to file income tax returns or pay tax on wages in violation of the United States Tax Code. The evidence shows that the attendees followed the instruction and advice of the defendants, that the attendees' unlawful actions were solicited by the defendants, and that the defendants were aware that the attendees were following their instructions and advice. The evidence discloses that a purpose of the meetings was to encourage people to unlawful actions by convincing them that it was legal to claim false exemptions, to hide income, and to refuse to file income tax returns or pay income tax.

"Counseling is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone." ***Freeman***, 761 F.2d at 552 (citations omitted). *See also* ***Kelley***, 769 F.2d at 217.

"[S]peech is not protected by the First Amendment when it is the very vehicle of the crime itself." ***United States v. Varani***, 435 F.2d 758, 762 (6th Cir. 1970) (citing statutes criminalizing perjury, bribery, extortion, threats, and conspiracy). "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." ***United States v. O'Brien***, 391 U.S. 367, 376 (1968); *see also* ***New York v. Ferber***, 458 U.S. 747, 761-62 (1982)("It has rarely been suggested that the constitutional freedom for speech . . . extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."); ***Cox v. Louisiana***, 379 U.S. 559, 563 (1965); ***Giboney v. Empire Storage & Ice Co.***, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." (citing ***Fox v. Washington***, 236 U.S. 273, 277 (1915)).

The necessity of "maintaining a sound tax system" is a compelling governmental interest. *See* ***United States v. Lee***, 455 U.S. 252, 260 (1982); ***United States v. Malinowski***, 472 F.2d 850, 857-58 (3d Cir. 1973). "[N]oncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment." ***Welch v. United States***, 750 F.2d 1101, 1108 (1st Cir. 1985); *cf.* ***United States v. Rowlee***, 899 F.2d 1275, 1279 (2d Cir. 1990) ("The consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by invoking the First Amendment.").

Applying ***O'Brien***, the Court of Appeals for the Second Circuit has found that, as to charges of conspiracy to violate the tax laws, the charged conduct "was not protected by the First Amendment merely because, in part, it may have involved the use of language." ***United States v. Rowlee***, 899 F.2d 1275. 1278 (2d Cir. 1990). Additionally, the Fifth Circuit has held that because the defendant must have acted corruptly, that is, with the intent to secure an unlawful advantage or benefit, 26 U.S.C. § 7212(a) does not infringe on First Amendment rights. ***United States v. Reeves***, 752 F.2d 995, 1001 (5th Cir. 1985).

Additionally, prosecutors should bear in mind that evidence of the defendant's tax protest activities, advocacy, and beliefs may be admissible to show willfulness, *see* ***United States v. McKee***, 506 F.3d 225, 249 (3d Cir. 2007); ***United States v. Hogan***, 861

F.2d 312, 316 (1st Cir. 1988); ***United States v. Bergman***, 813 F.2d 1027, 1029 (9th Cir. 1987); ***United States v. Reed***, 670 F.2d 622, 623 (5th Cir. 1982), and that the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent, ***Wisconsin v. Mitchell***, 508 U.S. 476, 489 (1993).

In ***United States v. Turano***, 802 F.2d 10, 12 (1st Cir. 1986), for example, the defendant in a section 7203 failure-to-file case claimed that his First Amendment rights had been violated by the introduction of evidence of his "tax protest" activities and instructions to the jury about "tax protesters." The court rejected this argument, explaining that the defendant

> was not convicted of speaking out against taxation or for encouraging others not to file, but rather for willfully failing to file his own returns. In order to determine his state of mind, the jury was entitled to know what he said and did regarding Federal income taxation. The First Amendment protects the appellant's right to express beliefs and opinions; it does not give him the right to exclude beliefs and opinions from a jury properly concerned with his motivations for failing to file.

40.05[4] District Court Lacks Jurisdiction over Title 26 Offenses

40.05[4][a] Generally

Despite tax defiers' claims to the contrary, it is clear that United States District Courts have jurisdiction over criminal offenses enumerated in the Internal Revenue Code, notwithstanding the absence of a statute within Title 26 conferring such jurisdiction. Section 3231 of Title 18 of the United States Code gives the district courts original jurisdiction over "all offenses against the laws of the United States," and the Internal Revenue Code defines offenses against the laws of the United States. *See* ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006 (11th Cir. Sept. 10, 2008); ***United States v. Chisum***, 502 F.3d 1237, 1243 (10th Cir. 2007); ***United States v. Rosnow***, 977 F.2d 399, 412 (8th Cir. 1992); ***Salberg v. United States***, 969 F.2d 379, 384 (7th Cir. 1992); ***United States v. Huguenin***, 950 F.2d 23, 25 n.2 (1st Cir. 1991); ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991); ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990) ("it defies credulity to argue that the district court lacked jurisdiction to adjudicate" 26 U.S.C. § 7201 action); ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987); ***United States v. Bressler***, 772 F.2d 287, 293 n.5 (7th Cir. 1985); ***United States v.***

Isenhower, 754 F.2d 489, 490 (3d Cir. 1985); ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984); ***United States v. Eilertson***, 707 F.2d 108, 109 (4th Cir. 1983); *see also* ***United States v. McMullen***, 755 F.2d 65, 67 (6th Cir. 1984); *see generally* ***United States v. Daraio***, 445 F.3d 253, 259 (3d Cir. 2006).

There is no merit to the argument that the United States has jurisdiction only over the District of Columbia, federal enclaves and territories, and possessions of the United States. *See* 26 U.S.C. §§ 7701(a)(9) ("The term 'United States' when used in a geographical sense includes only the States and the District of Columbia") and 7701(c) ("The term 'includes' . . . when used in a definition contained in this title shall not be deemed to exclude other things otherwise within the meaning of the term defined"); ***United States v. Mundt***, 29 F.3d 233, 237 (6th Cir. 1994) (argument that district court lacks jurisdiction over Michigan resident "completely without merit and patently frivolous"); ***United States v. Collins***, 920 F.2d at 629; ***Lonsdale v. United States***, 919 F.2d 1440, 1448 (10th Cir. 1990); ***United States v. Ward***, 833 F.2d at 1539.

40.05[4][b] The Gold-Fringed Flag ("The American Maritime Flag of War")[12]

Various litigants, including tax defiers, argue that the placement in a court room of a gold-fringed American flag denotes (1) admiralty jurisdiction, (2) suspension of constitutional governmental functions, and/or (3) martial law. This frivolous argument merits little response by the prosecutor.

Litigants call the gold-fringed American flag the "maritime flag of war" and claim its display signifies "[d]eprivation of rights under color of law." ***McCann v. Greenway***, 952 F. Supp. 647, 649 (W.D. Mo. 1997). They maintain that a court that flies a gold-fringed flag (1) lacks jurisdiction over those coming before it and (2) deprives the litigant of due process rights. Not surprisingly, courts uniformly reject such claims. *See* ***Salman v. Nevada***, 104 F. Supp. 2d 1262, 1266 (D. Nev. 2000) ("Plaintiff's argument that the gold fringe around an American flag in a courtroom designates admiralty jurisdiction is . . . wholly frivolous"); ***Schneider v. Schlaefer***, 975 F. Supp. 1160, 1161-64 (E.D. Wis. 1997) (contention that court proceedings were conducted unconstitutionally because of flag form rejected; claims or defenses based upon preeminence of American "flag of peace" over all other flags frivolous and sanctionable); ***United States v. Greenstreet***, 912 F. Supp. 224, 229 (N.D. Tex. 1996) (rejecting argument that display of fringed flaglimits

[12] ***McCann v. Greenway***, 952 F. Supp. 647, 648-49 (W.D. Mo. 1997).

federal court to admiralty jurisdiction); ***Moeller v. D'Arrigo***, 163 F.R.D. 489, 491 & n.1 (E.D. Va. 1995); ***Vella v. McCammon***, 671 F. Supp. 1128, 1129 (S.D.Tex. 1987) (rejecting contention that federal court flying fringed flag lacks jurisdiction to impose penalty for criminal contempt).

"[I]n the interests of killing this argument for good, and to facilitate appellate review," Judge Whipple of the United States District Court for the Western District of Missouri provided a history of the flag and concluded that the litigant's claims of constitutional deprivation

> must be dismissed because his factual predicate is incorrect as a matter of law. Even if the Army or Navy do display United States flags surrounded by yellow fringe, the presence of yellow fringe does not necessarily turn every such flag into a flag of war. Far from it: in the words of the Adjutant General of the Army, "[i]n flag manufacture a fringe is not considered to be a part of the flag, and it is without heraldic significance." . . . If fringe attached to the flag is of no heraldic significance, the same is true *a fortiori* of an eagle gracing the flagpole. Nor are the fringe or eagle of any legal significance. Jurisdiction is a matter of law, . . . , not a child's game wherein one's power is magnified or diminished by the display of some magic talisman.

McCann v. Greenway, 952 F. Supp. at 650-651 (citations omitted).

Trial attorneys responding to a motion to dismiss based on a gold-fringed-flag jurisdictional argument should utilize Judge Whipple's history and analysis.

40.05[5] Filing Income Tax Returns Is Voluntary, Not Mandatory

In ***Flora v. United States***, 362 U.S. 145, 176 (1960), a case in which the Supreme Court held that the government *could*, if it so desired, collect taxes by distraint, the Court noted that "[o]ur tax system is based upon voluntary assessment and payment and not upon distraint." Tax defiers, taking the Court's observation out of context, have argued that the filing of income tax returns is purely voluntary, a claim that has been repeatedly rejected by the courts. *See* ***United States v. Gerads,*** 999 F.2d 1255, 1256 (8th Cir. 1993) ("Appellants' claim that payment of federal income tax is voluntary clearly lacks substance"); ***Lonsdale v. United States***, 919 F.2d 1440, 1448 (10th Cir. 1990); ***Wilcox v. Commissioner***, 848 F.2d 1007, 1008 (9th Cir. 1988); ***Newman v. Schiff***, 778 F.2d 460, 467 (8th Cir. 1985); ***United States v. Hartman***, 915 F. Supp. 1227 (M.D. Fla. 1996) ("Any assertion that the payment of income taxes is voluntary is without merit"); *see also* ***United States v. Schiff***, 379 F.3d 621, 629 (9th Cir. 2004) (finding that a tax defier's books that promoted a tax scheme that fraudulently claimed that payment of federal taxes was voluntary was properly enjoined).

The word "voluntary" as used in ***Flora*** and other cases refers to our system of allowing taxpayers to determine the correct amount of tax and complete the appropriate returns rather than having the government determine tax for them. *See* ***United States v. Schiff***, 876 F.2d 272, 275 (2d Cir. 1989) ("To the extent that income taxes are said to be 'voluntary,' however, they are only voluntary in that one files the returns and pays the taxes without the IRS first telling each individual the amount due and then forcing payment of that amount."). The filing of tax returns and the payment of tax are not voluntary. The obligation to pay tax is described in 26 U.S.C. § 6151, which requires taxpayers to submit payment with their tax returns. Section 6012(a)(1)(A) of Title 26 U.S.C. requires that every individual who earns a threshold level of income must file a tax return. If the taxpayer received more than the statutory amount of gross income, then he or she is obligated to file a return. See 26 U.S.C. §§ 1, 6012; ***United States v. Tedder***, 787 F.2d 540, 542 (10th Cir. 1986), *abrogated on other grounds as stated in* ***United States v. Collins***, 920 F.2d 619 (10th Cir.1990); ***United States v. Richards***, 723 F.2d 646, 648 (8th Cir. 1983); *see also* ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir. 1982) ("Every income earner is required to file an income tax return"); ***United States v. Hurd***, 549 F.2d 118, 119 (9th Cir. 1977).

A taxpayer who does not file faces both civil and criminal penalties: "In assessing income taxes, the Government relies primarily upon the disclosure by the taxpayer of the relevant facts . . . in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions . . . criminal or civil." ***Helvering v. Mitchell***, 303 U.S. 391, 399 (1938).

Prosecutors should note, however, that pursuant to the Supreme Court's decision in ***Cheek v. United States***, 498 U.S. 192 (1991), a defendant may, of course, present evidence that he holds a good faith belief that the payment of taxes is "voluntary." *See* ***United States v. Willis***, 277 F.3d 1026, 1033 (8th Cir. 2002); ***United States v. Dunkel***, 927 F.2d 955, 956 (7th Cir. 1991). However, when a tax defier claims a good-faith belief that filing tax returns or paying taxes is voluntary, it is not error for the district court to correctly instruct the jury that the word “voluntary” does not mean “optional.” *See* ***United States v. Middleton***, 246 F.3d 825, 841 (6th Cir. 2001). In ***Middleton***, the Court gave the following instruction based upon the Second Circuit’s decision in ***Schiff***, 876 F.2d at 275:

> The word voluntary is not the equivalent of optional. To the extent that income taxes are said to be voluntary, they are only voluntary in that one files the returns and pays the taxes without the IRS first telling each individual the amount due and then forcing payment of that amount. The payment of income taxes is not optional.

246 F.3d at 840. The defendant argued that the jury instruction undermined his good-faith defense because it was an improper substitution of the court’s view of the validity of the defendant’s good-faith defense. *Id*. at 841. The Sixth Circuit rejected that argument, holding that the court’s instruction was a correct statement of the law that the jury was obligated to consider in evaluating the credibility of the defendant’s asserted good-faith belief. *Id*.

40.05[6] Wages Are Not Income

A common defense raised by tax defiers is that salaries and wages are not “income” within the meaning of the Sixteenth Amendment, which grants Congress the power “to lay and collect taxes on incomes, from whatever source derived.”

The Supreme Court has defined income as “the gain derived from capital, from labor, or from both combined . . . .” ***Eisner v. Macomber***, 252 U.S. 189, 207 (1920). Section 61(a) of Title 26 of the United States Code defines gross income as “all income from whatever source derived, including . . . (1) Compensation for services ” Wages or salaries received in exchange for services rendered are income that must be reported on a tax return. *See* ***Commissioner v. Glenshaw Glass Co.***, 348 U.S. 426, 429-33 (1955); ***Commissioner v. Smith***, 324 U.S. 177, 181 (1945); ***Robertson v. Commissioner***, 190 F.3d 392, 395 (5th Cir. 1999); ***United States v. Sloan***, 939 F.2d 499, 500 (7th Cir. 1991); ***Capp v. Eggers***, 782 F.2d 1341, 1343 (5th Cir. 1986); ***Perkins v. Commissioner***, 746 F.2d 1187, 1188 (6th Cir. 1984)***; Funk v. Commissioner***, 687 F.2d 264, 265 (8th Cir. 1982); ***United States v. Lawson***, 670 F.2d 923, 925 (10th Cir. 1982); ***United States v. Romero***, 640 F.2d 1014, 1016 (9th Cir. 1981). Courts uniformly interpret “income” to include wages and salaries. *See* ***Connor v. Commissioner***, 770 F.2d 17, 20 (2d Cir. 1985)

("The argument that they are not has been rejected so frequently that the very raising of it justifies the imposition of sanctions."

40.05[7] Defendant Not A "Person" or "Citizen"; District Court Lacks Jurisdiction Over Non-Persons and State Citizens

40.05[7][a] Generally

Tax Defiers often argue that they are not liable for federal income taxes because they are not "persons" subject to taxation under the Internal Revenue Code. A citizen or resident of the United States is included in the Internal Revenue Code's definition of a United States person. 26 U.S.C. § 7701(a)(30)(A). The not-a-person argument has been dismissed by the courts as "frivolous," "patently frivolous," "fatuous," and "obviously incorrect." ***See Lonsdale v. United States***, 919 F.2d 1440, 1448 (10th Cir. 1990); ***United States v. Karlin***, 785 F.2d 90, 91 (3d Cir. 1986); ***Biermann v. Commissioner***, 769 F.2d 707, 708 (11th Cir. 1985); ***United States v. Rice***, 659 F.2d 524, 528 (5th Cir. 1981); ***United States v. Romero***, 640 F.2d 1014, 1016 (9th Cir. 1981). Similar arguments asserting that the defendant was an "individual" and therefore not a "taxpayer" have also been rejected. *See* ***United States v. Collins***, 920 F.2d 619, 629 (10th Cir. 1990); ***Lonsdale***, 919 F.2d at 1448; ***United States v. Ward***, 833 F.2d 1538, 1539 (11th Cir. 1987); ***United States v. Studley***, 783 F.2d 934, 937 (9th Cir. 1986); ***Lovell v. United States***, 755 F.2d 517, 519 (7th Cir. 1984) ("All individuals, natural or unnatural, must pay federal income tax on their wages").

Another popular tax defier argument is that the defier is not subject to federal law because he or she is not a citizen of the United States, but a citizen of a particular "sovereign" state. This argument seems to be based on a misinterpretation of 26 U.S.C. § 3121(e)(2), which states in part: "The term 'United States' when used in a geographical sense includes the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa." The not-a-citizen assertion directly contradicts the Fourteenth Amendment, which states "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This argument has been consistently rejected by the courts. *See* ***United States v. Cooper***, 170 F.3d 691, 691(7th Cir. 1999) ("These arguments, frivolous when first made, have been rejected in countless cases. They are no longer merely frivolous; they are frivolous squared"); ***United States v. Mundt***, 29 F.3d 233, 237 (6th

Cir. 1994) (rejecting "patently frivolous" argument that defendant was not a resident of any "federal zone" and therefore not subject to federal income tax laws); ***United States v. Hilgeford***, 7 F.3d 1340, 1342 (7th Cir. 1993) (rejecting "shop worn" argument that defendant is a citizen of the "Indiana State Republic" and therefore "an alien beyond the jurisdictional reach of the federal courts"); ***United States v. Gerads***, 999 F.2d 1255, 1256-57 (8th Cir. 1993) (imposed $1,500 sanction for frivolous appeal that included the argument that defendants were "not citizens of the United States, but rather 'Free Citizens of the Republic of Minnesota' and, consequently, not subject to taxation"); ***United States v. Silevan***, 985 F.2d 962, 970 (8th Cir. 1993) (rejected as "plainly frivolous" defendant's argument that he was not a "federal citizen"); ***United States v. Jagim***, 978 F.2d 1032, 1036 (8th Cir. 1992) (rejected as "imaginative" argument that defendant could not be punished under the tax laws of the United States because he was a citizen of the "Republic" of Idaho, claiming "asylum" in the "Republic" of Colorado); ***United States v. Masat***, 948 F.2d 923, 934 (5th Cir. 1991) (rejected as frivolous argument that court lacked personal jurisdiction over defendant who claimed "non-citizen," "non-resident," "freeman" status); ***United States v. Sloan***, 939 F.2d 499, 500-01 (7th Cir. 1991) (rejecting "strange argument" that defendant is not subject to jurisdiction of the laws of the United States because "he is a freeborn, natural individual, a citizen of the State of Indiana, and a 'master'-not 'servant'-of his government"); ***United States v. Price***, 798 F.2d 111, 113 (5th Cir. 1986) (citizens of the State of Texas are subject to the provisions of the Internal Revenue Code).

40.05[7][b] Filing U.S. Nonresident Alien Income Tax Return (Form 1040NR)

Some tax defiers who argue that they are citizens of a "sovereign state" also claim to be exempt from federal taxes because they are nonresident aliens. This argument is flawed because (1) persons who were born in a state within the United States are citizens of the United States, not nonresident aliens (U.S. Const., Amend. XIV, § 1, and (2) nonresident alien individuals are taxed on income from sources within the United States and on sources outside the United States effectively connected with a trade or business in the United States (26 U.S.C. § 871; Treas. Reg. §1.871-1(b)).. Courts have ruled that the non-resident alien arguments put forth by individuals born in the United States are frivolous. *See* ***United States v. Ambort***, 405 F.3d 1109, 1114 (10th Cir. 2005) (noting that "Ambort does not, and cannot, argue that he has a good faith belief that he is a nonresident alien not subject to taxation. We have specifically said as much, and Ambort concedes that his argument has been repeatedly rejected"); ***United States v.***

Hanson, 2 F.3d 942, 945 (9th Cir. 1993) (rejecting appellant's contention "that as a natural born citizen of Montana he is a nonresident alien and, thus, is not . . . subject to the tax laws"); ***Betz v. United States,*** 40 Fed. Cl. 286, 294-96 (1998); ***United States v. LaRue***, 959 F. Supp. 959, 961 (C.D. Ill. 1997) (imposing Rule 11 sanctions upon determining that "Plaintiffs' claim that they are nonresident aliens and thus not subject to the income tax is not 'warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law'"); ***In re Weatherley***, 169 B.R. 555, 558-59 (1994) (rejecting debtor's contention that he was a non-resident alien not subject to federal income tax, and noting that debtor's "argument, or variants thereof . . . has been uniformly rejected by thecourts").

Sometimes tax defiers file false Forms 1040NR (U. S. Nonresident Alien Income Tax Return), claiming to be exempt from federal income taxation. *See, e.g.*, ***United States v. Ambort***, 405 F.3d 1109, 1113 (10th Cir. 2005)*;* ***United States v. Ambort,*** 193 F.3d 1169, 1170-71 (10th Cir. 1999) (dismissal of interlocutory appeal of denial of motion to dismiss indictment charging defendants with violations of 18 U.S.C. § 371 and 26 U.S.C. § 7206(2) for teaching seminar attendees how to complete false Forms 1040NR). One way to prove the tax defier's willfulness and lack of good faith belief is to show that the defendant did not file state tax returns or pay state or local taxes. Another way is to show the tax defier's admission of U.S. citizenship when such admission conferred a benefit, including passport applications, job applications, federal voting records, or receipt of social security or other benefits (including the application for the Alaska Permanent Fund Dividend).

Depending on what information is included on the Form 1040NR, the filing of a false Form 1040NR may be charged as a false claim for refund (18 U.S.C. § 287), a false income tax return (26 U.S.C. § 7206(1)), or a false statement (18 U.S.C. § 1001). For further guidance on whether the Form 1040NR filed in a particular case can be charged as a false return, see § 40.03[5], *supra*, discussing what constitutes a return. A violation of 18 U.S.C. § 1001 can be an appropriate charge for a false Form 1040NR when the form either lacks the required signature or does not include enough information to constitute a tax return. For a discussion of section 1001, *see* Chapter 24.00,*supra*.

40.05[8] IRS Has Duty to Prepare Returns for Taxpayer (26 U.S.C. § 6020(b))

Tax defiers have argued that 26 U.S.C. § 6020(b)(1)[13] obligates the Internal Revenue Service to prepare a tax return for an individual who does not file. There is no merit to this claim. Section 6020(b)(1) merely provides the Internal Revenue Service with a civil mechanism for assessing the tax liability of a taxpayer who has failed to file a return. The civil mechanism is often referred to as the preparation of a "substitute for return," or "SFR." Section 6020(b) does not require the Internal Revenue Service to prepare tax returns for individuals who fail to file, nor does it excuse the taxpayer from criminal liability for that failure. *See* ***Deutsch v. Commissioner,*** 478 F.3d 450, 452 (2d Cir. 2007); ***United States v. Schiff,*** 919 F.2d 830, 832-33 (2d Cir. 1990) ("There is no requirement that the IRS complete a substitute return"); ***Selgas v. Commissioner***, 475 F.3d 697, 700 (5th Cir. 2007); ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993) ("[A]lthough [§ 6020(b)] authorizes the Secretary to file for a taxpayer, the statute does not require such a filing"); ***United States v. Cheek***, 3 F.3d 1057, 1063 (7th Cir. 1993); ***Geiselman v. United States***, 961 F.2d 1, 5 (1st Cir. 1992); ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992); ***In re Bergstrom***, 949 F.2d 341, 343 (10th Cir. 1991); ***United States v. Barnett***, 945 F.2d 1296, 1300 (5th Cir. 1991); ***United States v. Verkuilen***, 690 F.2d 648, 657 (7th Cir. 1982); ***United States v. Tarrant***, 798 F. Supp. 1292, 1302-03 (E.D. Mich. 1992); *see also* ***Laing v. United States***, 423 U.S. 161, 174 (1976) ("Where there has been no tax return filed, the deficiency is the amount of tax due").

When a defendant raises this argument during trial, the court may properly instruct the jury that while Section 6020(b) "authorizes the Secretary to file for a taxpayer, the statute does not require such a filing, nor does it relieve the taxpayer of the duty to file." ***United States v. Stafford***, 983 F.2d 25, 27 (5th Cir. 1993); *accord* ***United States v. Powell***, 955 F.2d 1206, 1213 (9th Cir. 1992). However, an instruction pertaining to Section 6020(b) "must not be framed in a way that distracts the jury from its duty to consider a defendant's good faith defense." ***Powell***, 955 F.2d at 1213. It would be wise to request that an instruction on the meaning of Section 6020(b) be coupled with a reminder to the jury that the issue in a criminal tax case is not the validity of the defendant's interpretation of Section 6020(b), but whether the defendant had a good faith belief that his or her actions were in compliance with the tax laws. ***Powell***, 955 F.2d at 1213 ("The proper response to the jury's question regarding the IRS's ability to file a tax return on behalf of the taxpayer was to couple an instruction on the meaning of § 6020(b) with a

[13] Section 6020(b)(1) of the Code (Title 26) provides that if a person fails to make a return required by law, then the Internal Revenue Service "shall" make a return based on information available to it.

strong reminder that the validity or invalidity of the [defendants'] interpretation of that section was not at issue: all that mattered was whether the [defendants] had a good faith belief that the law did not require them to file their own tax returns").

40.05[9] Violation of the Privacy Act

Courts have also rejected Privacy Act (5 U.S.C. § 552(a)) challenges to the IRS Form 1040 instruction booklet and to Forms W-4. *See* ***United States v. Bressler***, 772 F.2d 287, 292 (7th Cir. 1985) ("the IRS notice . . . adequately and clearly informs taxpayers that filing [a tax return] is mandatory. The notice need not inform the taxpayer of the specific criminal penalty that may be imposed to comply with Privacy Act requirements"); ***United States v. Dack***, 747 F.2d 1172, 1176 n.5 (7th Cir. 1984); ***United States v. Bell***, 734 F.2d 1315, 1318 (8th Cir. 1984) ("We have considered this Privacy Act argument in other appeals of convictions for willful failure to file tax returns and rejected it as meritless"); ***United States v. Wilber***, 696 F.2d 79, 80 (8th Cir. 1982) ("the Privacy Act does not require notice of a specific criminal penalty which might be imposed on the errant taxpayer"); ***United States v. Annunziato***, 643 F.2d 676, 678 (9th Cir. 1981) (same); ***United States v. Rickman,*** 638 F.2d 182, 183 (10th Cir. 1980) (Form 1040 instructions adequate); ***United States v. Gillotti***, 822 F. Supp. 984, 988 (W.D. NY 1993).

40.05[10] Federal Reserve Notes Are Not Legal Tender

Another argument raised by tax defiers is that because their wages were paid in Federal Reserve Notes, *i.e.,* U.S. currency, they need not pay tax on those wages. The tax defiers assert that the Constitution requires coins in gold and silver and that Federal Reserve Notes are therefore not valid currency or legal tender. Accordingly, those who are paid in Federal Reserve Notes cannot be subject to a tax on them. *See* ***United States v. Ellsworth***, 547 F.2d 1096, 1097 (9th Cir. 1976). This argument has been consistently rejected in numerous opinions. *See* ***Sanders v. Freeman***, 221 F.3d 846, 849, 855 (6th Cir. 2000); ***Schiff v. United States***, 919 F.2d 830, 831-32 (2d Cir. 1990); ***Zuger v. United States***, 834 F.2d 1009, 1010 (Fed. Cir. 1987); ***United States v. Davenport***, 824 F.2d 1511, 1521 (7th Cir. 1987); ***Jones v. Commissioner,*** 688 F.2d 17, 18 (6th Cir. 1982) ("this claim is clearly without merit and has been rejected in numerous opinions"); ***United States v. Ware***, 608 F.2d 400, 402-03 (10th Cir. 1979); ***United States v. Rifen***, 577 F.2d 1111, 1112-13 (8th Cir. 1978); ***Mathes v. Commissioner***, 576 F.2d 70, 71 (5th

Cir. 1978); ***United States v. Gardiner***, 531 F.2d 953, 955 (9th Cir. 1976); ***United States v. Whitesel***, 543 F.2d 1176, 1180-81 (6th Cir. 1976); ***United States v. Scott***, 521 F.2d 1188, 1192 (9th Cir. 1975); ***United States v. Daly***, 481 F.2d 28, 30 (8th Cir. 1973); ***United States v. Condo***, 741 F.2d 238, 239 (9th Cir. 1984) ("The Ninth Circuit has repeatedly rejected this theory as frivolous"); ***United States v. Moore***, 627 F.2d 830,832-33 (7th Cir. 1980) ("the courts have consistently rejected these views as totally frivolous").

Congress is empowered "[t]o coin Money, regulate the value thereof, and of foreign coins, and fix the Standard of weights and measures" (U.S. Const. art. I, § 8, cl. 5). "United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues." 31 U.S.C. § 5103; *see also* 12 U.S.C. § 411. Further, the Supreme Court long ago held that "[t]he constitutional authority of Congress to provide a currency for the whole country is now firmly established." ***The Legal Tender Cases (Julliard v. Greenman)***, 110 U.S. 421, 446 (1884). "Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the nation [sic] government or private individuals." ***Id***. at 448; *see also* ***The Legal Tender Cases (Knox v. Lee***), 79 U.S. 457, 462 (1871); ***United States v. Anderson***, 584 F.2d 369, 374 (10th Cir. 1978); ***Rifen***, 577 F.2d at 1112.

40.05[11] Form W-2 As Substitute for Form 1040

Some tax defiers have claimed reliance on a long-defunct 1946 Federal Register regulation which allowed the filing of a Form W-2 in lieu of a Form 1040 tax return; the tax defiers argue that they were not required to file a return because their employers sent the IRS copies of their Forms W-2. This argument has been rejected. *See* ***Bachner v. Commissioner***, 81 F.3d 1274, 1281 (3d Cir. 1996) (collecting cases) ("[W]e cannot find a single federal court decision to have addressed the competence of Forms W-2 as tax returns without also rejecting the same"); ***United States v. Lussier***, 929 F.2d 25, 31 (1st Cir. 1991); ***United States v. Birkenstock***, 823 F.2d 1026, 1030 (7th Cir. 1987); ***Manka v. United States***, No. CIV.A.89N49, 1993 WL 268386, at *4 (D. Colo. Apr. 6,

1993) ("merely allowing one's employer to file a W-2 form does not fulfill the requirements set forth by the treasury regulations in this area. *See* Treas.Reg. § 1.6011-1(b) ").

The court in ***Birkenstock*** noted two problems with this argument. First, the 1946 Federal Register regulation was no longer the law, having been eliminated when the Federal Register was codified in the 1949 Code of Federal Regulations (CFR). Second, even if the 1946 regulation survived the CFR codification, the regulation provided that the employee's *original* Form W-2 can substitute for a Form 1040, so the employee would be required to file the W-2 form; the employer's filing of a *copy* of the W-2 would not suffice. ***Birkenstock***, 823 F.2d at 1030 (emphasis added).

Even though the 1946 regulation argument is frivolous, the court should permit the defendant, upon the establishment of proper foundation, to testify regarding his good faith reliance on the regulation in deciding not to file a return. *See* ***Lussier***, 929 F.2d at 31. Importantly, the 1946 regulation itself is inadmissible as a defense exhibit unless the defendant can establish relevance. *Id*. In ***Lussier***, the 1946 regulation

> was properly excluded because the exhibits lacked a foundation of evidence or offer of proof to link them to the willfulness issue. The exhibits would have been relevant only insofar as they supported other evidence offered to negate the element of willfulness, for example, testimony that [the defendant] knew of the 1946 regulation and relied on it when he decided not to file a tax return, or that he attempted to consult the tax code and was led astray by its bulk and confusing language. But no evidence to that effect was introduced or proffered. Absent such a foundation, the exhibits could only have confused the jury.

Id.

40.05[12] Paperwork Reduction Act ("PRA") Defense

The Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.* ("PRA"), was enacted to minimize the paperwork burden on the public. The "Public Protection" provision of the PRA states that "no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if -- (1) the collection of information does not display a valid control number assigned by the Director [of the Office of Management and Budget (OMB)] in accordance with this subchapter; or (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). The statute further provides: "The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable thereto." 44 U.S.C. § 3512(b).

Tax defiers argue that they cannot be penalized for failing to file Form 1040, because the instructions and regulations associated with the form do not display an OMB control number. "[E]every court that has considered the argument that the regulations and the instruction books promulgated by the IRS are within the scope of the PRA has rejected it." ***Salberg v. United States***, 965 F.2d 379, 384 (7th Cir. 1992). Some courts have simply noted that the PRA applies to the forms themselves, not to the instruction booklets, and because the Form 1040 does have a control number, there is no PRA violation. *See* ***United States v. Patridge***, 507 F.3d 1092, 1094 (7th Cir. 2007) (holding that the IRS has complied with the PRA by placing a control number on tax forms); ***United States v. James***, 970 F.2d 750, 753 n.6 (10th Cir. 1992) (noting that the lack of an OMB number on IRS notices and forms does not violate PRA); ***Salberg v. United States***, 969 F.2d at 383-84; ***United States v. Holden***, 963 F.2d 1114, 1116 (8th Cir. 1992) (holding that tax form instruction books are not an agency request for information subject to the PRA); ***United States v. Dawes***, 951 F.2d 1189, 1191-93 (10th Cir. 1991); ***United States v. Wunder***, 919 F.2d 34, 38 (6th Cir. 1990).

Courts have also held that Congress created the duty to file returns in 26 U.S.C. § 6012(a) and that "Congress did not enact the PRA's public protection provision to allow OMB to abrogate any duty imposed by Congress." ***United States v. Neff***, 954 F.2d 698, 699 (11th Cir. 1992); ***Patridge***, 507 F.3d at 1094-95 (holding that the obligation to file a tax return stems from 26 U.S.C. § 7203, not from an agency demand for information, and thus the PRA did not repeal § 7203 by implication); *see also* ***United States v. Jackson***, No. 08-10651, 2008 WL 4150006 (11th Cir. Sept. 10, 2008); ***United States v. James***, 970 F.2d 750, 753 n.6 (10th Cir. 1992) (lack of OMB number does not violate PRA); ***Salberg v. United States***, 965 F.2d 379, 383-84 (7th Cir. 1992); ***United States v. Hicks***, 947 F.2d 1356, 1359 (9th Cir. 1991) ("PRA" not enacted "to create loophole in the tax code"); ***United States v. Bentson***, 947 F.2d 1353, 1355 (9th Cir. 1991) (defendant convicted of violating a statute requiring him to file, not a regulation lacking OMB number); ***United States v. Kerwin***, 945 F.2d 92 (5th Cir. 1991) (*per curiam*) (defendant was convicted under statutory requirement that he file return, and since statute is not an information request, there is no violation of the PRA); ***Lonsdale v. United States***, 919 F.2d 1440, 1443-45 (10th Cir. 1990). In ***United States v. Chisum***, the Tenth Circuit held that the PRA protects a person only "for *failing* to file information. It does not protect one who files information which is false." 502 F.3d 1237, 1243-44 (10th Cir. 2007) (quoting ***United States v. Collins***, 920 F.2d 619, 630 n.13 (10th Cir. 1990)).

Section 3507(g) of Title 44 provides that OMB "may not approve a collection of information for a period in excess of 3 years." Tax defiers have claimed that tax forms do not comply with this provision of the PRA and that prosecution therefore is barred because the OMB control number on a Form 1040 does not have an expiration date. Courts have rejected this argument. ***Patridge***, 507 F.3d at 1095 (holding that there is no requirement that the control number on a tax form be changed every three years because "[s]ection 3507 requires periodic review, not a periodic change in control numbers"); ***Salberg***, 969 F.2d at 384 (7th Cir. 1992) (holding that the failure to display an expiration date on a tax form containing a control number does not violate the PRA and does not preclude criminal prosecution).

Tax defiers should not be able to argue that their failure to provide information collected during an investigation is excused because any IRS form or regulation does not comply with the PRA. In a civil tax case, the Tenth Circuit held that the Paperwork Reduction Act is inapplicable to "information collection request" forms issued during an investigation against an individual to determine his or her tax liability. ***Lonsdale v. United States***, 919 F.2d 1440, 1444-45 (10th Cir. 1990).

40.05[13] Lack of Publication in the Federal Register

Tax defiers have occasionally argued that Form 1040 and its instructions constitute a "rule" for purposes of the Administrative Procedure Act (APA) and therefore must be published in the Federal Register. This defense has been held to be "meritless." ***United States v. Bentson***, 947 F.2d 1353, 1355-56 (9th Cir. 1991); ***United States v. Hicks***, 947 F.2d 1356, 1360 (9th Cir. 1991).

The Internal Revenue Code itself, a statute and not a regulation, imposes the duty to file a return. *See* 26 U.S.C. 6012; ***United States v. Clayton***, 506 F.3d 405, 409 (5th Cir. 2007) (Section 6012, being a congressionally enacted federal statute, is not the rule of an "agency" as the term agency is defined by the APA); *see also* ***Hicks***, 947 F.2d at 1360 (noting that the Form 1040 does not add to a taxpayer's basic substantive duty to file a tax return and thus is not a "rule" within the meaning of the APA); ***United States v. Bowers***, 920 F.2d 220, 221-23 (4th Cir. 1990) (APA protects only those with no notice: "[t]o reverse their convictions, we would have to conclude that (i) the statutes provide no notice of the obligation to pay income taxes, (ii) the IRS forms and offices are secret though known to over two hundred million Americans, (iii) the [defendants] somehow forgot about the forms and offices after filing their 1979 return, and (iv) all of this secrecy and forgetfulness would be rectified by printing a notice in a publication read by, and perhaps even known to, only a handful of the population"); ***United States v. Kahn***, 753 F.2d 1208, 1222 n.8 (3d Cir. 1985) (claim that IRS failure to publish interpretive guidelines in Federal Register violates 5 U.S.C. §§ 552 and 706(2)(D), was "totally devoid of merit").

In ***Clayton***, the Fifth Circuit rejected a tax defier's argument that Section 6012 was not a valid law requiring the filing of a tax return. 506 F.3d at 409-410. The defendant argued that § 6012 did not validly impose a duty to file a tax return because it contained a formula for establishing the exemption amount that incorporated the Consumer Price Index ("CPI"), which was compiled by the Department of Labor and not promulgated pursuant to the APA. *Id*. Rejecting the defendant's claim, the Fifth Circuit reiterated the settled rule that the obligation to file a tax return was statutory and held that the APA was not implicated, because there was no requirement that the CPI, an objective numerical standard validly incorporated by reference in § 6012, be itself an enforceable rule of law. *Id*.

40.05[14] Taxpayer's Name in Capital Letters or Misspelled

A tax defier will sometimes argue that she or he is not the individual named in the indictment or in court proceedings because her or his name is capitalized in court documents. Similarly, the defier will sometimes add strange punctuation to his name, again claiming that because the indictment and other documents do not use the same punctuation, the indictment and other documents describe a different individual.

In ***United States v. Lindsay***, 184 F.3d 1138, 1144 (10th Cir. 1999), the court of appeals affirmed a district court's decision not to accord such a tax defier a sentencing reduction for acceptance of responsibility, where, claiming not to be the named party, he refused to (1) comply with court procedures, (2) review court correspondence on which his name appeared in all capital letters, and (3) respond to questions the court posed. *See also* ***United States v. Washington***, 947 F. Supp. 87, 92 (S.D.N.Y. 1996) (rejecting defendant's "baseless" contention that the indictment must be dismissed because his name, spelled in capital letters, "is a fictitious name used by the government to tax him improperly as a business").

As a practical matter, the prosecutor should have certified copies of public documents, such as the defendant's birth certificate, passport application, or driver's license, to rebut assertions that the defendant is not the person named in the proceedings.

40.5 [15] Protest Against Government Spending

Generally, a taxpayer's beliefs do not entitle him to refuse to file his tax returns or to pay his taxes. *See* ***United States v. Lee***, 455 U.S. 252, 260 (1982) ("[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief"), *superseded by statute on other grounds*, Exemption Act of 1988, 26 U.S.C. § 3127;[14] ***Autenrieth v. Cullen***, 418 F.2d 586, 588-89 (9th Cir. 1969); *see also* ***Packard v. United States***, 7 F. Supp. 2d 143, 144-45 (D. Conn. 1998), *aff'd*, 198 F.3d 234 (2d Cir. 1999) (discussing general rule that taxpayers must file and pay taxes regardless of their beliefs.)

In Packard, the court stated:

> There has been a long history of cases in which citizens have contested their obligation to pay taxes on religious grounds. Almost thirty years ago, the Ninth Circuit rejected such religious objections finding that the Income Tax Acts do not aid a particular religion or punish anyone for their religious beliefs. It commented that "[o]n matters religious, it is neutral" and noted that the ability of the Government to function could be impaired if persons could refuse to pay taxes because they disagreed with the Government's use of tax revenues. ***Autenrieth v. Cullen***, 418 F.2d 586, 588-89 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036, 90 S. Ct. 1353, 25 L. Ed. 2d 647 (1970). The Supreme Court took the same tack in ***United States v. Lee***, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982), by holding that the payment of social security taxes

[14] *See* ***United States v. Bauer***, 75 F.3d 1366, 1375 (9th Cir. 1996) (discussing the Exemption Act of 1988, 26 U.S.C. § 3127, which provides a special Social Security tax exemption for employers and their employees who apply for and are recognized by the Commissioner as members of "a recognized religious sect," for example, the Old Order Amish, whose "established tenets" oppose participation in the Social Security Act program).

> was compulsory even if it violated Amish religious beliefs and interfered with their free exercise of religion. Earlier attempts by Quakers to object to the collection of taxes through withholding were also rejected. ***United States v. American Friends Serv. Comm.***, 419 U.S. 7, 95 S. Ct. 13, 42 L. Ed. 2d 7 (1974); *see also* ***United States v. Philadelphia Yearly Meeting of Religious Soc'y of Friends***, 753 F. Supp. 1300 (E.D. Pa. 1990) (enforcing IRS levies against the salaries of two members of a Quaker organization). Congress has also rejected these "war tax deductions" as illustrated by its passage in 1982 of section 6702 of the Internal Revenue Code assessing an immediate civil penalty of $500 against taxpayers filing frivolous returns such as claiming a war tax deduction

Id.

Failure to furnish information on income tax returns cannot be justified by an asserted disagreement with tax laws or in protest against government policies. *See* ***United States v. Dack***, 987 F.2d 1282, 1285 (7th Cir. 1993); ***United States v. Pilcher***, 672 F.2d 875, 877 (11th Cir. 1982) (citing ***United States v. Smith***, 618 F.2d 280, 282 (5th Cir. 1980)). A taxpayer who contends that paying taxes would require him to violate his pacifist religious beliefs cannot take refuge in the First Amendment, because there is "no First Amendment right to avoid federal income taxes on religious grounds." ***United States v. Ramsey***, 992 F.2d 831, 833 (8th Cir. 1993).

A defier who contends that his refusal to pay taxes or file tax returns is justified by his disagreement with government policies or spending plans is not entitled to a jury instruction on his theories. It is well established that arguments challenging the constitutionality or validity of the tax laws are precluded as irrelevant to the issue of willfulness, because those arguments, rather than reflecting innocent mistakes caused by the Code's complexity, reveal full knowledge of the provisions at issue and a studied conclusion that those provisions are invalid and unenforceable. ***Cheek v. United States***, 498 U.S. 192, 204-05 (1991).

APPENDIX

Sample Motion *in Limine*

GOVERNMENT'S MOTION <u>IN LIMINE</u> TO EXCLUDE CERTAIN EXHIBITS AND LIMIT CERTAIN TESTIMONY

The United States, by and through undersigned counsel, hereby moves *in limine* to exclude arguments, exhibits, and testimony regarding matters which are irrelevant to the factual determinations to be made by the jury in the instant case and which will also be substantially more prejudicial than probative. Based on the Defendant's pretrial motions, as well as discovery items recently provided by the Defendant to the United States, the government anticipates that the Defendant will try to present legal arguments and evidence that challenge [INSERT A SUMMARY OF WHATEVER ARGUMENTS OR EVIDENCE THE DEFENDANT WILL PRESENT, I.E., "the constitutionality or legal authority of the Sixteenth Amendment, the Internal Revenue Code, and the Treasury regulations"]. Such exhibits, testimony, and arguments constitute incorrect statements of the law and invade the province of the Court to instruct the jury on the law. Allowing such arguments and evidence will confuse the jury as to their true role of determining the factual issues before them as opposed to making determinations on the law. The United States respectfully asks the Court, therefore, to limit the jury's exposure to arguments that are not relevant to the factual issues the jury must decide. The United States seeks to prevent the defense from arguing or presenting evidence regarding:

1) incorrect interpretations of the law;

2) self-serving hearsay; or

3) speculation from witnesses regarding the contents of the Defendant's mind.

I. Defendant Should Not Argue Incorrect Interpretations of the Law During Opening Statement and Closing Arguments.

As a preliminary matter, the courts have made it clear that a defendant should not be allowed to confuse the jury with incorrect interpretations of the law, including the Constitution, the Internal Revenue Code, and Treasury regulations. [INCLUDE BASIS FOR WHAT ARGUMENTS THE DEFENDANT IS EXPECTED TO MAKE. FOR EXAMPLE: "On June 30, 2006, the defendant filed two motions that made frivolous legal arguments, based upon the Paperwork Reduction Act ("PRA") and the Administrative Procedure Act ("APA"), challenging one of the statutes under which he was indicted. This Court, in accordance with other courts, found that these legal arguments lacked merit. The government fully expects the defendant to raise these frivolous arguments again before the jury. In addition, the government expects that the defendant will attempt to raise the "861 argument"[15] before thejury.

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[15] The Third Circuit adopted the following summary of the frivolous 861 (or U.S. Sources) argument:

> The Internal Revenue Code defines "gross income" as "all income from whatever source derived." 26 U.S.C. § 61(a). [The defendant] claims that the word "source" in section 61 is defined in the "Source Rules and Other General *Rules Relating to Foreign Income*." 26 U.S.C. §§ 861-865 (emphasis supplied). Section 861 states that certain "items of gross income shall be treated as income from sources within the United States. " 26 U.S.C. § 861(a). According tothe [defendant's 861] argument, domestically earned wages of U.S.

"The PRA, APA, and 861 arguments are all meritless and, as a matter of law, presenting them to a jury would be highly improper. The PRA and APA arguments are meritless for the reasons set forth in the government's consolidated response motion of July 10, 2006. Furthermore, Courts have invariably held that the "861 argument" is frivolous. *See* ***United States v. Bell***, 414 F.3d 474, 475-76 (3rd Cir. 2005) (calling the 861 argument "universally discredited").]

"In our judicial system the court instructs the jury on the applicable law, and directs the jury to determine the facts from the evidence and to apply the law as given by the court to those facts. The law is neither introduced as evidence nor presented through witnesses at trial." ***United States v. Garber***, 589 F.2d 843, 849 (5th Cir. 1979). Moreover, "it is within the sole province of the court 'to determine the applicable law and to instruct the jury as to that law.'" ***United States v. Hill***, 167 F.3d 1055, 1069 (6th Cir. 1999) (*quoting* ***In re Air Crash Disaster***, 86 F.3d 498, 523 (6th Cir. 1996); ***see also United States v. Mann***, 884 F.2d 532, 538 (10th Cir. 1989) ("It is the district court's peculiar province to instruct the jury on the law........"). "The law is given to the jury by the court

> citizens are not taxable because such wages are not specifically mentioned in the list of items of gross income that "shall be treated as income from sources within the United States." See 26 U.S.C. § 861(a). ......[S]ection 861 plainly provides that "compensation for labor or personal services performed in the United States ... " shall be treated as income from sources within the United States. 26 U.S.C. § 861(a)(3).

United States v. Bell, 414 F.3d 474, 475 n.1 (3d Cir. 2005) (*quoting* ***United States v. Bell***, 238 F. Supp. 2d 696, 699 (M.D. Pa.2003)).

and not introduced as evidence Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be . . . . Juries only decide facts, to which they apply the law given to them by the judge." ***United States v. Willie***, 941 F.2d 1384, 1396 (10th Cir. 1991) (quoting numerous cases, including ***Cooley v. United States***, 501 F.2d 1249, 1253-54 (9th Cir. 1974)) (internal citations omitted).

The defendant's arguments must be limited to the facts presented during trial and the instructions given by this Court. The defendant is permitted to argue that he lacked the requisite willfulness to commit the crimes with which he is charged, based upon a good faith misunderstanding of his duty under the law. *See* ***Cheek v. United States***, 498 U.S. 192, 202 (1991) (government required to rebut claim of good faith misunderstanding or ignorance of the law); ***United States v. Whiteside***, 810 F.2d 1306, 1311 (5th Cir. 1987) (approving of jury instruction stating that "[t]he defendant's conduct is not willful if he acted through negligence, inadvertence, justifiable excuse, mistake, or due to his good faith misunderstanding of the requirements of the law."). A disagreement with the law, however, is not a defense to the crimes alleged in the indictment since one has to know what the law is in order to disagree with it. The Defendant is not permitted to blur the line between factual evidence about his state of mind and the actual law. *See* Fed. R. Evid. 103(c). Moreover, if the Defendant interjects into the proceedings his disagreements with the law, the Supreme Court in ***Cheek*** indicated that it would be proper for the Court to issue an instruction to to disregard them. ***Cheek***, 498 U.S. at 206. A reading of the language of ***Cheek*** supports the following instruction:

> A person's opinion or belief that the tax laws are invalid or violate his constitutional rights is not a defense to the crime charged in this case. Mere disagreement with the law does not constitute a good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Any evidence that you have heard to the contrary in this regard is irrelevant and should be ignored.

See ***Cheek***, 498 U.S. 192, 202-206. If the defendant has legal arguments regarding the interpretation of the Internal Revenue Code, he can present such arguments to the Court in a trial brief or through proposed jury instructions. The Court can then determine the law and present it to the jury after all evidence has been presented.

II. Evidence Which has Been Found to be Irrelevant to the Issue of Willfulness.

Under the Federal Rules of Evidence, the jury shall not be exposed to inadmissible evidence. Fed. R. Evid. 103(c). “[E]vidence which is not relevant is not admissible.” Fed. R. Evid. 402. “Relevant evidence,” moreover, is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

The primary issue in this case will be the Defendant’s willfulness. Thus, the relevance of most evidence will depend on how probative it is of the Defendant’s state of mind. The Defendant likely will argue that certain evidence is necessary to demonstrate that he held a good faith belief that he was not required to [INSERT BRIEF SUMMARY OF CASE, SUCH AS "file 1999 through 2004 income tax returns and that he honestly believed he was entitled to a refund of taxes paid for the 1997 and 1998 years."] The Defendant, however, is only permitted to introduce *factual* evidence upon which he relied during those years to form his opinions about the tax laws.

Thus, evidence presented by the Defendant in support of his interpretation of the law should be excluded, unless the Defendant lays a proper foundation to reveal: 1) the evidence was seen prior to the Defendant forming his views (as opposed to after the views were already formed); (2) an explanation of how such evidence helped form his views in order to prove such information was relied upon by the Defendant and was instrumental in forming his views; and 3) the evidenc is not self-serving hearsay which the Defendant helped create in support of his already existing views. A document or conversation is not relevant to the Defendant's state of mind unless he relied upon it in making his decision not to file tax returns. Moreover, such conversations and documents are only relevant if the defendant was exposed to them prior to the date he committed the crime. Furthermore, only the defendant can lay the proper foundation for the above-mentioned evidence, and he must do it by testifying in court.

A. Testimony of Expert Witnesses

Among the evidence that the courts have ruled should be excluded is "expert" testimony regarding alternative interpretations of the tax laws, especially where the defendant did not actually rely on the expressed views of the expert at the time they committed the offenses charged. ***United States v. Burton***, 737 F.2d 439, 443 (5th Cir. 1984). In ***Burton***, the Court affirmed the exclusion of a tax professor's proposed “expert” testimony that defendant’s theory and belief that wages were not taxable income was not implausible. *Id*. The district court had excluded the testimony pursuant to Rule 403 after weighing its “marginal contribution” with regard to the Section 7203 charges to the “potential prejudice and confusion, keeping in mind that the judge remains the jury's source of information regarding the law.” *Id*. The Court indicated that “[t]estimony such as that offered by Burton's ‘expert’ is not admissible as an explication of plausible readings of the statutory language.” *Id*. In so ruling, the Court noted that the defendant did not in his proffer suggest that he actually relied upon the expressed views of the tax professor in failing to file tax returns. *Id*. at 444.

B. Testimony of Lay Witnesses

The government anticipates that the defendant may wish to introduce testimony of two types of lay witnesses: those who knew the defendant personally, and those who share the Defendant’s views of the tax system. It is not permissible for witnesses of the first type to express their opinion as to what the Defendant purportedly believed as this calls for **speculation** regarding the true contents of the Defendant’s mind. The issue of whether the Defendant truly believed, albeit mistakenly, that he was not required to file tax returns and pay income taxes is an ultimate issue of fact, for the jury alone to decide. *See* ***United States v. Hauert***, 40 F.3d 197, 201-202 (7th Cir. 1994) (“bythe nature of a tax protestor case, defendant's beliefs about the propriety of his filing returns and paying taxes, which are closely related to defendant's knowledge about tax laws and defendant's state of mind in protesting his taxpayer status, are ordinarily not a proper subject for lay witness opinion testimony absent careful groundwork and special circumstances . . . "); ***United States v. Rea***, 958 F.2d 1206, 1216 (2d Cir. 1992) (witness testimony regarding a defendant's observations, what the defendant was told, and what the defendant said or did "will often not be 'helpful' within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant knew."); ***United States v. Phillips***, 600 F.2d 535, 538-539 (5th Cir. 1979) (opinion of lay witness that defendant indicated he "understood" what he was doing gave no objective basis for jury to determine defendant's state of mind).

Witnesses of the second type should be precluded from testifying as to their own subjective beliefs regarding the 861 arguments as this is irrelevant to the subjective beliefs of the Defendant. Only the Defendant's subjective beliefs are at issue. The jury will not be asked to determine whether other individuals in good faith believed that 861 eliminated a legal duty to pay taxes on domestic earnedincome.[16]

C. Documents Created by the Defendant are Inadmissible Hearsay.

Materials created by the Defendant are inadmissible as lacking evidentiary foundation and are self-serving hearsay. See Fed. R. Evid. 801(c); *see also* ***United States***

[16] This is not to say that the jury may not use its common sense in assessing the reasonableness of the 861 argument for the purpose of determining whether the Defendant actually believed whathe purports to believe. *See* ***Cheek v. United States***, 498 U.S. 192, 206 (1991).

v. Bond, 87 F.3d 695, 699-700 (5th Cir. 1996) (defendant's self-recorded tape was self-serving hearsay and inadmissable). In the instant case, the Defendant was active in the 861 movement and helped create materials in support of his views. The "Theft by Deception" videotape, which Defendant has indicated they plan to introduce at trial, was created with the financial assistance of the Defendant and specifically mentions the Defendant's web site in support of the 861 argument. As such, these materials are self-serving hearsay and are not reliance materials as they were created in support of Defendant's already existing views in support of the 861 argument. They also present an incorrect statement of the law to the jury which invades the province of the Court. Should the defendant testify, the documents remain hearsay and, moreover, are inferior to his own testimony. Regardless of whether the defendant testifies, admission of the documents into evidence would be unduly prejudicial, as they would contain incorrect interpretations of the law. See discussion, Part III.B, *infra*.

In addition to being self-serving hearsay, such materials do not address the issue of willfulness. "A normative belief that the law *should not* apply to him leaves [the defendant] fully aware of his legal obligations and simply amounts to a disagreement with his known legal duty and 'a studied conclusion . . . that [the law is] invalid and unenforceable.'" ***Willie***, 941 F.2d at 1392. As such, documents created by the defendant are irrelevant.

III. Evidence that is More Prejudicial than Probative.

Even if certain evidence is relevant, the Court may exclude the evidence if its "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Absent abuse of discretion, a district court's ruling under Rule 403 is final. *See* ***United States v. Burton***, 737 F.2d 439, 443 (5th Cir. 1984).

The government anticipates that the Defendant will attempt to introduce prejudicial and superfluous legal and pseudo-legal materials during the trial. Defense counsel has indicated in a letter dated June 22, 2006, that he may introduce "reliance materials" that were found at the Defendant's home, including documents and videocassettes. Such materials are highly likely to be confusing to the jury, cumulative of the Defendant's own testimony, and prejudicial in that the legal arguments presented are contrary to the law. In addition, the referenced videocassettes were created **after** the Defendant had already formed his views.

A. The Defendant Should Not Invade the Province of the Court by Publishing Court Opinions, Statutes, or Regulations to the Jury.

Some of the reliance materials the Defendant likely will offer into evidence include current and obsolete case law, Internal Revenue Code sections, and corresponding regulations. These materials should be excluded as confusing to the jury and invasive of the Court's province. ***United States v. Simkanin***, 420 F.3d 397, 404 (5th Cir. 2005) ("[T]he district court must be permitted to prevent the defendant's alleged view of the law from confusing the jury as to the actual state of the law. . ."). Juries may not decide what the law is and should not be given the opportunity to do so. ***Hill***, 167 F.3d at 1069. Admission of written copies of court opinions, statutes, and regulations amounts to legal instruction and only serves to confuse the jury as to the law and invites disagreement with the Court's final instructions. *See* ***United States v. Flitcraft***, 803 F.2d 184, 186 (5th Cir. 1986) (holding that case law and other documents offered by the defendant as evidence of reliance were properly excluded as they suggested to the jury that the law was unsettled and that the jury should resolve the legal uncertainty); *see also* ***Simkanin***, 420 F.3d at 412 (*quoting* ***Flitcraft***). *But see* ***United States v. Powell***, 955 F.2d 1206, 1214 (9th Cir. 1992) ("statutes or case law upon which the defendant claims to have *actually relied* are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance").

The Defendant may, of course, testify as to how he interpreted a particular code section or regulation and how such interpretation formed his purported beliefs. He may, in addition, read portions of "reliance materials" into the record, with proper foundation and a limiting instruction from the court.[17] *See* ***United States v. Gaumer***, 972 F.2d 723, 724-25 (6th Cir. 1992) (opining that defendant should be permitted to read relevant

[17] The danger of confusing the jury with excerpts of official legal source material quoted out of context is especially great, as the source itself is authoritative and the average juror will have no idea how to interpret the quoted language within the context of relevant case law, statutes, and underlying regulations. Moreover, if the Defendant were permitted to quote legal authorities in support of a legal argument, the government would be obliged to rebut the Defendant's misstatements of the law with other legal authority. To avoid confusing the jury and wasting time, the Court exclusively should provide legal instruction to the jury. If the Court is inclined to allow the Defendant to quote from official source materials, the government respectfully requests that the Court provide a limiting instruction or provide the jury with a correct statement of the law *vis a vis* the quoted excerpt.

excerpts of reliance materials into the record). Such a distinction provides the Defendant with a full opportunity to present facts to rebut the government's evidence of willfulness without inviting the danger of jurors debating the law while deliberating.

B. Third Party "Reliance Materials" Are Less Probative than Defendant's Testimony.

In addition to official legal sources, the Defendant likely will attempt to introduce third party materials. Many of these materials contain statements of the law and interpretations thereof. The defendant's purpose in presenting these documents, as with the official sources, is to attempt to erroneously instruct the jury on the law. As with the official sources, third party materials are only relevant for the purpose of rebutting evidence of willfulness.

The Defendant may quote portions of third party materials, if such materials are relevant to the issue of willfulness and are contemporaneous with the prosecution years. *See* ***Gaumer***, 972 F.2d 723, 724-25 (6th Cir. 1992) (opining that defendant should be permitted to read relevant excerpts of reliance materials into the record). As with the official source material, however, it is not necessary for the Court to allow publication of legal authorities to the jury or offer them into evidence to rebut the government's evidence that he was willful. *See* ***Simkanin***, 420 F.3d at 412 (quoting ***Flitcraft***, 803 F.2d at 185-86 (holding that introduction of cases and documents are cumulative in light of defendant's own testimony)); *see also* ***United States v. Nash***, 175 F.3d 429, 436 (6th Cir. 1999) (affirming district courts refusal to physically admit certain reliance materials, where defendant was permitted to mention and quote from them); ***Gaumer***, 972 F.2d at 725 (opining that trial court need not physically admit hundreds of pages of tax protest documents); ***Willie***, 941 F.2d at 1395; ***United States v. Hairston***, 819 F.2d 971, 973 (10th Cir. 1987) (holding that defendant's testimony, which included reading portions of tax protest materials, was more probative than the materials themselves). Moreover, although a jury may consider any evidence in determining whether the Defendant truly believed that what he was doing was legal, the court need not admit every piece of evidence the Defendant offers. *See* ***Willie***, 941 F.2d at 1394-95.

C. Testimony of Defendant

The Defendant may choose to testify in his own defense. As part of a ***Cheek*** defense, the Defendant can testify, for example, that he honestly believed that he was not required to file tax returns, as he believed that his domestically earned income was not taxable under section 861 *et seq*. The Defendant may not, however, be permitted to give legal opinions during his testimony, nor quote legal precedent to support his testimony. Testimony containing a legal conclusion is generally unhelpful to the trier of fact. "The problem with testimony containing a legal conclusion is in conveying the witnesses' unexpressed, and perhaps erroneous, legal standards to the jury." ***Torres v. County of Oakland***, 758 F.2d 147, 150 (6th Cir. 1985); *see also* **Owen v. Kerr-McGee Corp.**, 698 F.2d 236, 240 (5th Cir. 1983) It is the Court's domain to instruct the jury on the law, not the witness's. *See* ***Torres***, 758 F.2d 147 at 150.

It is sometimes difficult, however, to determine whether testimony contains a legal conclusion. *See, e.g.*, ***United States v. Parris***, 243 F.3d 286, 288-289 (6th Cir. 2001) (holding that testimony opining that defendant's tax scheme was illegal was fair, as the defendant's conduct was so outrageous that the influence on the jury of such legal characterization was inconsequential); ***Owen***, 698 F.2d at 240 (holding that attorney's questioning about the cause of an accident was improper when the factual cause was already clear; attorney was seeking a legal conclusion). One way to screen for testimony that might invade the Court's province is to determine whether terms used by witnesses have different legal and vernacular meanings. *See* ***Torres***, 758 F.2d at 151 (*citing* ***United States v. Hearst***, 563 F.2d 1331, 1351 (9th Cir. 1977) (finding no objection to testimony containing legal terms that had same essential meaning to the average layman). If a term has a distinctive legal meaning, the Court should prevent any lay witnesses from giving an opinion couched in such terms.

With respect to evidence presented to the jury that amounts to a disagreement with the law, the government requests that the Court give a limiting instruction, such as the one suggested in Part I, *supra*. *See, e.g.*, ***Hairston***, 819 F.2d at 973 n.4 (court instructed jury as to proper use of testimony).

IV. The Defendant Should Not Ask Questions During Cross Examination That Would Require a Fact Witness to Give a Legal Opinion.

The government also moves to limit the scope of the Defendant's cross-examination to the facts of the case. The Defendant should be prohibited from asking questions to fact witnesses as a method of confusing the jury as to the state of the law. *See* ***United States v. Middleton***, 246 F.3d 825, 838 (6th Cir. 2001). Such questioning would also go beyond the scope of direct examination. Such prohibition should include questioning IRS employees about constitutional and legal interpretations of the law (which invades the province of the Court). The Court has the power to limit such confusing questions. *See* ***Delaware v. Van Arsdall***, 475 U.S. 673, 679-80 (1986) (holding that the Confrontation Clause is not absolute and it is within a court's discretion to limit inappropriate questioning); ***Kittelson v. Dretke***, 426 F.3d 306, 319 (5th Cir. 2005); ***Norris v. Schotten***, 146 F.3d 314, 329 (6th Cir. 1998). "[A] defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." ***Cheek***, 498 U.S. at 206.

V. CONCLUSION

For the above-stated reasons, the government respectfully requests that the Court exclude evidence or testimony on direct or cross-examination that is irrelevant to the issue of willfulness or substantially more prejudicial than probative.

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41.00 OBTAINING FOREIGN EVIDENCE AND OTHER TYPES OF ASSISTANCE FOR CRIMINAL TAX CASES

41.1 INTRODUCTION

This section provides a detailed analysis of the various means available to federal prosecutors for obtaining foreign evidence and other types of international assistance in criminal tax cases. The means analyzed here include mutual legal assistance treaties (MLATs) and similar processes, tax information exchange agreements (TIEAs) and tax treaties, court-sponsored procedures for taking foreign depositions, including letters rogatory, and the use of unilateral compulsory measures, such as subpoenas.

Obtaining foreign evidence and other types of international assistance under the various processes described here usually requires considerable amounts of time and can cause significant delays in an investigation or trial proceeding. Thus, a prosecutor should initiate seeking such evidence or assistance through the appropriate process as soon as possible.

It is extremely important to remember that no United States investigator or prosecutor should contact foreign authorities or witnesses, whether by telephone or other means, or undertake foreign travel, without obtaining the proper clearances or authorizations. For example, the Assistant Attorney General, Tax Division, must approve all authorizations for foreign travel by Tax Division attorneys and country clearance must be obtained from the Department of State before traveling abroad on official business. For further details regarding foreign travel and foreign assistance in tax cases, contact Frank P. Cihlar, Senior Counsel for International Tax Matters, Tax Division, at (202) 514-2839.

41.2 OBTAINING FOREIGN EVIDENCE OR OTHER TYPES OF ASSISTANCE UNDER MUTUAL LEGAL ASSISTANCE TREATIES

41.02[1] Background

Mutual Legal Assistance Treaties (MLATs) create a routine channel for obtaining a broad range of legal assistance for criminal matters generally, including, *inter alia*, taking testimony or statements of persons, providing documents and other physical evidence in a form that would be admissible at trial, and executing searches and seizures. These treaties are concluded by the United States Department of Justice (primarily the Criminal Division) in conjunction with the United States Department of State. An MLAT creates a contractual obligation between the treaty partners to render to each other assistance in criminal matters in accordance with the terms of the treaty. It is designed to facilitate the exchange of information and evidence for use in criminal investigations and prosecutions. Unfortunately, while many of the MLATs currently in force cover most U.S. tax felonies, several others have only limited coverage at best, for tax offenses.

41.02[2] MLATs Currently in Force

As of August 1, 2008, the United States has MLATs in force with the following jurisdictions: Anguilla, Antigua & Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Brazil, the British Virgin Islands, Canada, the Cayman Islands, Cyprus, the Czech Republic, Dominica, Egypt, Estonia, France, Greece, Grenada, Hong Kong, Hungary, India, Isle of Man, Israel, Italy, Jamaica, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Montserrat, Morocco, the Netherlands, Nigeria, Panama, the Philippines, Poland, Romania, Russia, St. Christopher and Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, South Korea, Spain, Switzerland, Thailand, Trinidad & Tobago, Turkey, the Turks and Caicos Islands, Ukraine, the United Kingdom, and Uruguay.

In addition, the United States has Mutual Legal Assistance Agreements (MLAAs) in force with China, Hong Kong, and Taiwan. The MLAAs are executive agreements, not treaties, but are similar to MLATs in scope and operation.

The United States also has signed MLATs with Colombia, the European Union (EU), Germany, Ireland, Malaysia, Sweden, and Venezuela. The MLATs with the EU, Malaysia, and Sweden are pending in the Senate and may be ratified in the near future.

41.02[3] The Extent of Tax Coverage in MLATs

The MLATs with Antigua & Barbuda, Argentina, Australia, Austria, Barbados, Belgium, Belize, Brazil, Canada, Cyprus, the Czech Republic, Dominica, Egypt, Estonia, France, Greece, Grenada, Hong Kong, Hungary, India, Israel, Italy, Jamaica, Latvia, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, Nigeria, the Philippines, Poland, Romania, Russia, St. Christopher and Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, South Korea, Spain, Thailand, Trinidad & Tobago, Turkey, Ukraine, and the United Kingdom cover all criminal tax felonies under the Internal Revenue Code. The remaining MLATs contain a variety of restrictions regarding assistance for tax offenses. Thus, the Swiss MLAT excludes tax and similar fiscal offenses from its scope except in cases involving organized crime. However, assistance is available from the Swiss under one of their domestic international mutual assistance in criminal matters (IMAC) statutes in any tax matter where a foreign tax authority can establish "tax fraud" as the term is used under Swiss law. [1] Historically, the Swiss had considered the conduct underlying most

[1] Indeed, the Swiss authorities and legal scholars are accustomed to referring to the term "tax evasion" as a civil matter, even if the conduct involved would constitute a felony under our law, such as the act of filing a false federal income tax return where there are no other badges of fraud involved. Thus, when the Swiss refer to fiscal crimes, they use theterm

U.S. criminal tax felonies as civil in nature, and establishing "tax fraud" as the term is used under Swiss law had been a considerably difficult task. But with the advent of the new income tax treaty with Switzerland, the concept of tax fraud has been expanded, and this expansion applies to requests made for mutual legal assistance under an IMAC. *See* Note 1, *supra*. The Liechtenstein MLAT is likewise restricted to cases of "tax fraud."[2]

The Cayman and Bahamian MLATs generally exclude offenses relating to tax laws except for tax matters arising from unlawful activities otherwise covered by the MLATs.[3] Furthermore, these MLATs, as well as the Swiss MLAT, contain specific limitations on the use of evidence obtained for covered offenses; thus, evidence obtained for some other offense is generally not available for tax purposes in civil or criminal investigations or proceedings which are subsequently conducted.[4] However, there are tax information exchange agreements (TIEAs), discussed below, now in force with both the Cayman Islands and the Bahamas that do not contain such restrictions. For years to which they apply, these TIEAs offer a way to secure useful evidence in all civil and criminal tax cases.

41.02[4] Designation of a Central Authority to Administer the MLAT for Each Treaty Partner

Every MLAT specifies Central Authorities to act on behalf of each treaty partner to make requests, to receive and execute requests, and to generally administer the treaty relationship. Under all of the MLATs to which the United States is a party, the Central Authority designated for the United States is the Director, Office of International Affairs (OIA), Criminal Division, U.S. Department of Justice. 28 C.F.R. § 0.64-1. The Central Authority for the treaty partner is generally an entity located within the ministry of justice or its equivalent agency.

"tax fraud," which, until the new tax treaty with Switzerland was negotiated, had a much more restricted meaning under Swiss law than under U.S. law. *See*, *e.g.*, Swiss MLAT, Art. 1, § 1(a); *id.*, Art. 2, §§ 1 & 2; James I. K. Knapp, ***Mutual Legal Assistance Treaties as a Way to Pierce Bank Secrecy***, 20 Case W. Res. J. Int'l L. 405, 405-08, 418-20 (1988); James P. Springer, ***An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases***, 22 Geo. Wash. J. Int'l L. & Econ. 277, 303-08 (1988); Maurice Aubert, ***The Limits of Swiss Banking Secrecy under Domestic and International Law***, 2 Int'l Tax & Bus. Law. 273, 286-288 (1984). However, the Protocol to the new Income Tax Treaty with Switzerland expands the concept of tax fraud to include many of the badges of fraud set forth in ***Spies v. United States***, 317 U.S. 492, 499 (1943), and the Memorandum of Understanding for the new Income Tax Treaty with Switzerland makes this expanded concept of tax fraud applicable to requests for mutual legal assistance made under an IMAC.

[2] Liechtenstein MLAT, Art. 1, § 4.

[3] Cayman MLAT, Art. 19; Bahamian MLAT, Art. 2.

[4] Swiss MLAT, Art. 5; Cayman MLAT, Art. 7; Bahamian MLAT, Art. 8.

41.02[5] Public Law Enforcement Purpose of MLATs

The Central Authorities make requests under MLATs on behalf of law enforcement and judicial authorities in their respective countries who are legally responsible for investigating and prosecuting criminal conduct. For the United States, such authorities include federal and state prosecutors, as well as governmental agencies responsible for investigating criminal conduct, or government agencies responsible for matters ancillary to criminal conduct, such as civil forfeiture. Private parties are not permitted to make requests under MLATs.

41.02[6] Matters for Which Assistance Is Available under MLATs

Assistance is available under the MLAT once an investigation or prosecution has been initiated by an appropriate law enforcement or judicial authority in the requesting state. Thus, the United States may initiate a request for assistance under an MLAT when a criminal matter is at the trial stage, or is under investigation by (1) a prosecutor, (2) a grand jury, (3) an agency with criminal law enforcement responsibilities, such as Internal Revenue Service Criminal Investigation, or (4) an agency with regulatory responsibilities, such as the Securities and Exchange Commission.

41.2 [7] Types of Assistance Available under MLATs

Generally, MLATs provide for the following types of assistance:

a. serving documents in the requested state;

b. locating or identifying persons or items in the requested state;

c. taking testimony or statements from persons in the requestedstate;

d. transferring persons in custody in either state to the other for testimony or other purposes deemed necessary or useful by the requestingstate;

e. providing documents, records, and articles of evidence located in the requested state;

f. executing requests for searches and seizures in the requested state;

g. immobilizing assets located in the requested state;

h. assisting in proceedings related to forfeiture and restitution; and

i. any other form of assistance not prohibited bythe laws of the requested state.

MLATs are specifically designed to override local laws in the requested states pertaining to bank secrecy and to ensure the admissibility in proceedings in the requesting state of the evidence obtained. Thus, for example, MLATs typically contain provisions which, in conjunction with certain statutes, are directed at securing the admissibility of business records, or establishing chain of custody over an evidentiary item, without having to adduce the in-court testimony of a foreign witness.

41.02[8] Procedures for Making Requests for Assistance

To make a request for assistance under a particular MLAT, a prosecutor or investigator should contact OIA at (202) 514-0000, request to speak to the attorney in charge of the country from which assistance will be requested, and collaborate on the preparation of the request. But do not hesitate to contact Frank Cihlar, Senior Counsel for International Tax Matters, at (202) 514-2839, for assistance with and guidance on the specifics of your case. Once the Director of OIA signs a request, it must be translated into the official language of the requested state, unless the particular MLAT provides otherwise. The request will then be submitted in both language versions (English and the official language of the requested state) to the Central Authority of the requested state.

41.2 [9] Contents of a Request

Generally, MLATs require that a request contain the following information:

a. the name of the authority conducting the investigation, prosecution, or other proceeding to which the request relates;

b. a description of the subject matter and the nature of the investigation, prosecution, or proceeding, including the specific criminal offenses that relate to the matter;

c. a description of the evidence, information, or other assistance sought; and

d. a statement of the purpose for which the evidence, information, or other assistance is sought.

In addition, MLATs require that the following information be provided to the extent that such information is available:

e. information on the identity and location of any person from whom evidence is sought;

f. information on the identity and location of a person to be served, that person's relationship to the proceeding, and the manner in which service is to bemade;

g. information on the identity and whereabouts of a person to belocated;

h. a precise description of the place or person to be searched and of the items tobe seized;

i. a description of the manner in which any testimony or statement is to be taken and recorded;

j. a list of questions to be asked of a witness;

k. a description of any particular procedure to be followed in executing therequest;

l. information as to the allowances and expenses to which a person asked to appear in the requesting state will be entitled; and any other information that may be brought to the attention of the requested state to facilitate execution of the request.

41.02[10] Limitations on Use of Evidence or Information Obtained

Generally, MLATs have provisions restricting the use of information or evidence furnished under their provisions, including conditions of confidentiality. Accordingly, the law enforcement authorities of the requesting state must comply with these restrictions in using the information or evidence in the course of an investigation or prosecution. Although some MLATs are more restrictive, generally, once the information or evidence properly used in the investigation or prosecution becomes a matter of public record in the requesting state, it may be used for any purpose.

41.2 [11] Obligation to Return the Items Provided

Generally, MLATs provide that all original documents, records, or articles of evidence provided pursuant to an MLAT request must be returned as soon as possible to the state providing such items unless that state waives the right to have the items returned. Items are typically returned by the prosecutor through the Central Authority. Generally, copies of documents provided under an MLAT need not be returned unless the state which provides such copies specifically requests their return.

41.3 MUTUAL LEGAL ASSISTANCE UNDER FOREIGN STATUTES WHERE NO FORMAL TREATY RELATIONSHIP EXISTS

New, effective approaches have recently been developed for obtaining assistance from countries with which the U.S. has no MLAT relationship. As a result, letters rogatory issued by a court are no longer the exclusive means of securing formal legal assistance from a country with which the United States has no MLAT. Thus, there are a number of non-MLAT countries with which OIA has established a practice of making and receiving formal legal assistance requests, dealing directly with its counterpart office in the foreign ministry of justice. Such requests typically follow a format similar to that employed under MLATs, and are sometimes referred to as “MLAT-type” requests. Legal assistance in these circumstances is provided to the extent permitted by relevant domestic legislation. Countries in this category include Ireland, Japan, and New Zealand. Contact the appropriate OIA Team at (202) 514-0000 for further details.

41.4 OBTAINING FOREIGN EVIDENCE UNDER TAX INFORMATION EXCHANGE AGREEMENTS AND TAX TREATIES

41.04[1] Background

Tax information exchange agreements (TIEAs) and income tax treaties constitute bases for obtaining foreign-based documents and testimony, often in admissible form, for criminal and civil tax cases and investigations. These pacts are concluded by the United States Department of Treasury, with the assistance of the Internal Revenue Service and the Tax Division of the Department of Justice, and are administered by the Deputy Commissioner (International) of the

Large & Mid-Size Business Division of the IRS. For the purposes of obtaining foreign evidence, TIEAs are more specialized and effective than tax treaties.

41.04[2] Tax Information Exchange Agreements (TIEAs)

TIEAs are agreements that specifically provide for mutual assistance in criminal and civil tax investigations and proceedings. This assistance comprises obtaining foreign-based documents, including bank records, and testimony in admissible form. TIEAs are statutory creatures of the Internal Revenue Code. *See* 26 U.S.C. § 274(h)(6)(C). This statutory framework initially authorized the Secretary of Treasury to conclude agreements with countries in the Caribbean Basin (thereby qualifying such countries for certain benefits under the Caribbean Basin Initiative), but later expanded this authority to permit the Secretary to conclude TIEAs with any country.

41.04[3] TIEAs Currently in Force

As of July 15, 2008, the United States has TIEAs in force with the following countries: Antigua & Barbuda, Aruba, Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Costa Rica, Dominica, the Dominican Republic, Grenada, Guernsey, Guyana, Honduras, Isle of Man, Jamaica, Jersey, the Marshall Islands, Mexico, the Netherlands Antilles, Peru, St. Lucia, and Trinidad & Tobago.[5]

41.04[4] Information Exchange under Tax Treaties

The United States has income tax treaties with many countries. There are two principal purposes of these treaties: (1) to reduce or eliminate double taxation of income earned by residents of either country from sources within the other country and (2) to prevent avoidance and evasion of the income taxes of the two countries party to the treaty. To address the latter purpose, almost all U.S. income tax treaties contain a provision for exchanging information, similar in concept to TIEAs. The Treasury Department places great importance on information exchange in these tax treaties and will not enter into a treaty relationship with any country that cannot meet the minimum standards of information exchange.

[5] On March 31, 2001, and on March 20, 2007, the United States signed TIEAs with, respectively, Colombia and Brazil that are not yet in force.

41.04[5] Tax Treaties Currently in Force

The United States has income tax treaties in force -- including exchange of information provisions -- with the following countries: Armenia, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belarus, Belgium, Bermuda, Canada, China, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Georgia, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Mexico, Morocco, the Netherlands, New Zealand, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, Russia, the Slovak Republic, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, the United Kingdom, and Venezuela. The Treasury Department is very active in the negotiation of new income tax treaties, as well as the renegotiation of income tax treaties currently in force. Thus, new treaty partners should be added to this list regularly.

41.04[6] Scope of TIEAs and Income Tax Treaties

Under most of the TIEAs and tax treaties to which the United States is a party, requests for assistance may be made for any civil or criminal tax investigation or proceeding regarding any tax year not barred by the statute of limitations of the state seeking the information.

41.04[7] Designation of a Competent Authority to Administer TIEAs and Tax Treaties for Each Party

Every TIEA and tax treaty specifies Competent Authorities to act on behalf of each party to make requests, to receive and execute requests, and to administer generally the treaty or TIEA relationship. The Deputy Commissioner (International) of the Large & Mid-Size Business Division, Internal Revenue Service, has been designated to act as the Competent Authority (CA) for exchanging information under TIEAs and Tax Treaties, under the authority of the Secretary of Treasury. The CA for the other party is generally an entity located within the ministry of finance or its equivalent agency.

41.04[8] Procedures for Making Requests For Information

If you wish to explore making a request for evidence or information under a TIEA or tax treaty, contact Frank Cihlar, Senior Counsel for International Tax Matters, at (202) 514-2839, for assistance with and guidance on the specifics of your case. He will put you in touch with the appropriate IRS representative or attaché responsible for the country where the information is located who, in turn, will specify the applicable procedures for making a request for information.[6] Usually, the investigator or prosecutor in charge of the case will draft the initial version of the request and forward this draft to the appropriate IRS representative or attaché for review. Subsequently, the request is formalized and sent to the foreign Competent Authority for execution.

41.4 [9] Contents of a Request

A request under a TIEA or income tax treaty should contain, *inter alia*, the following:

a. The taxpayer's (defendant's) name and address, and, if applicable, social security number, place and date of birth, and whether the taxpayer is a citizen of the United States;

b. The names and addresses of pertinent entities affiliated with the taxpayer and the nature of such affiliations;

c. A brief resume of the case with particular reference to the tax issues;

d. A detailed statement of the information sought and whyit is needed;

e. A statement of the efforts made to secure the desired information prior to the request and why the efforts were not successful (including comment on any relevant data supplied by the taxpayer and the reasons for considering such datainadequate);

f. If the records of a foreign affiliate of the taxpayer are to be examined, the name and address of the custodian of the records and a document authorizing the custodian to permit the examination or an explanation as to why the authorization was not obtained;

g. All pertinent names, addresses, leads, and other information that may be helpful in complying with the request (requests for bank account information should specify the particular branch).

To the extent known, the following information should also be transmitted with the request:

[6] The IRS has personnel in Washington, DC, and Plantation, Florida, as well as attachés at a number of U.S. embassies abroad, who act on behalf of the U.S. Competent Authority vis-à-vis the countries for which they have been given responsibility.

i. Date upon which a response is required (*e.g.*, for statute of limitations purposes) or any other facts indicating the urgency of the information;

j. Information concerning the importance of the case and any other facts which make the case unusual or worthy of preferential treatment; and

k. The taxable years and approximate tax liability or additional incomeinvolved.

41.04[10] Confidentiality of Information Obtained

All of our TIEAs, and virtually all of our tax treaties, contain language requiring that information obtained under such agreements be used only for tax purposes. Obviously, such language can raise troublesome issues for a prosecutor conducting a grand jury investigation directed at both tax and non-tax offenses. Indeed, certain treaty partners recently have resisted executing requests for information made in such cases based on their view that the obligation of confidentiality forbids use of the information by a grand jury considering non-tax crimes. To address this situation, the Treasury Department and the Justice Department jointly decided to undertake using cautionary instructions to the grand and petit juries in such cases. Under this approach, the prosecutor would caution the grand jury, as would the trial judge the petit jury, that the evidence obtained under the tax agreement could not be used to draw inferences of guilt regarding the non-tax offenses. This approach would also require the trial judge to ignore the evidence for the purposes of a defendant's motion to dismiss under Rule 29 of the Federal Rules of Criminal Procedure.

41.4 [11] Possible Problems with Exchanging Information under TIEAs and Tax Treaties

Although exchanging information under TIEAs and tax treaties has been relatively successful, there are a variety of problems that can arise. For example, officials of some countries having civil law systems balk at executing tax treaty requests in criminal tax cases, especially those arising from grand jury investigations. This hesitancy arises from the belief that tax treaties, which they consider to be part of an *administrative* governmental process, should not be used for *judicial* matters. This problem can be aggravated where non-tax offenses are also under investigation, given the ever-present provision in these agreements dealing with confidentiality. *See* § 41.04[10], *supra*. Also, certain countries will provide treaty partners only with information that currently exists in their tax files regarding a given taxpayer, and will not undertake to gather information from other sources, including third parties. Finally, some treaty partners, even if they will undertake to gather information from sources other than their tax files, will not obtain and provide financial information such as bank records because of bank secrecy laws.

41.5 USING LETTERS ROGATORY AND OTHER JUDICIAL PROCEDURES TO OBTAIN EVIDENCE IN CRIMINAL TAX CASES

41.05[1] Background

Before the advent of tax treaties, MLATs, TIEAs, and other types of mutual assistance agreements, law enforcement authorities, just as private litigants, primarily relied upon deposition by stipulation, deposition by notice, deposition by commission, and letters rogatory, all judicially sponsored procedures, to obtain evidence abroad in both civil and criminal cases. *See* Fed. R. Crim. P. 15. This section briefly explores the basics of these various procedures and their limitations, especially in criminal tax cases.

41.05[2] Deposition by Stipulation, Notice, or Commission

Federal Rule of Criminal Procedure 15 governs the taking of depositions in criminal cases. In general, a deposition is to be taken and filed in the same manner as a deposition in a civil action. Fed. R. Crim. P. 15(e). In contrast to the practice in civil cases, however, where depositions may be taken as a matter of right by notice without permission of the court (*see* Fed. R. Civ. P. 26-32), Rule 15 provides that depositions in criminal cases can only be taken by order of the court. Moreover, unless the criminal rules or a court order provides otherwise, (1) a defendant may not be deposed without that defendant's consent, (2) the scope and manner of the deposition examination and cross-examination must be the same as allowed during trial, and (3) the government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial. Fed. R. Crim. P. 15(e). By virtue of this interplay between the criminal and the civil rules, there are three ways in which a U.S. prosecutor can obtain foreign source testimony without the assistance of foreign authorities, assuming the witness is willing to testify voluntarily and the foreign country's laws permit taking testimony without the involvement of the foreignauthorities.

First, the parties to the litigation may agree to take testimony abroad by stipulation. *See* Fed. R. Crim. P. 15(h); Fed. R. Civ. P. 29. Under this procedure, the parties simply agree as to the necessary circumstances of the deposition, *i.e.*, the official before whom the testimony will be taken, the time and place of the deposition, the type of notice to be given, the manner in which the deposition is to be conducted. If the parties can so agree, the stipulation procedure is the most expeditious method of taking foreign testimony.

Second, a litigant may take a foreign deposition by notice. Under this procedure, the moving party may arrange a deposition "on notice, before a person authorized to administer oaths either by federal law or by the law in the place of the examination . . . ." *See* Fed. R. Civ. P. 28(b)(1)(C). The moving party must make the necessary arrangements for the deposition, such as assuring the presence of the witness, scheduling the services of an appropriate foreign official, a reporter for the transcript, and, if necessary, an interpreter.

Third, a litigant may take a foreign deposition by commission. Under this procedure, the moving party may arrange a deposition "before a person commissioned by the court to administer any necessary oath and take testimony." Fed R. Civ. P. 28(b)(1)(D). This procedure is similar to the notice procedure except that the court appoints the person, *i.e.*, the commissioner, before whom the deposition is to be taken.

Each of these procedures is available to United States prosecutors handling criminal tax cases, but, as mentioned above, only where the foreign-based witness voluntarily submits to the deposition and the particular country permits the taking of evidence within its borders in a manner consistent with the three methods outlined above. The latter condition may become prohibitive if the state in question is a civil law country. Such jurisdictions are inclined to regard evidence taking by any person other than their own legal authorities as violative of their judicial sovereignty. Where such circumstances bar any of these three approaches and no treaties or agreements for assistance are available, the last resort is usually to letters rogatory transmitted via diplomatic channels to obtain evidence abroad in a manner consistent with the law and regulations of the jurisdiction.

41.05[3] Depositions by Letters Rogatory

The traditional method used by United States litigants to enlist the assistance of foreign authorities to obtain evidence abroad, in both civil and criminal cases, is a letter rogatory, also known as a letter of request.

Basically, a letter rogatory is a formal request from one court in which an action is pending, to a foreign court to perform some judicial act. If the foreign court honors the request, it does so based on comity rather than any sort of strict obligation. As this definition suggests, a letter rogatory can usually only be used in a proceeding that has actually commenced, such as in the post-indictment stages of a criminal case or the post-complaint stages of a civil case, but this is not an iron-clad rule.[7] The route of a letter rogatory is quite circuitous and involves many diverse entities in an uncoordinated process. Typically, a litigant initiates the process by applying to the court before which the particular action is pending for the issuance of a letter rogatory, supporting the application with a set of complicated and formalistic pleadings.

Upon signature by the court, the letter rogatory must be transmitted through diplomatic channels, which involves not only the U.S. State Department but also the foreign ministry of the country involved. The foreign ministry delivers the request to the country's ministry of justice, which in turn delivers it to the foreign court originally contemplated to execute the letter request. If the request is successfully executed, the evidence must retrace the path of the request.

41.05[4] Procedures for Obtaining Assistance by Letters Rogatory

The procedures for utilizing the letters rogatory process, once a prosecutor has secured the court's leave to do so under Federal Rule of Criminal Procedure 15, are not as well defined or standardized as those for obtaining assistance under MLATs, TIEAs, and tax treaties. For example, the channel for sending a "letter request" (the term often employed for a letter rogatory request,

[7] *See, e.g.*, United Kingdom Evidence (Proceedings in Other Jurisdictions) Act 1975, §§ 1 & 5 (allowing for compulsory process to obtain evidence in the United Kingdom for judicial requests of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted); Evidence Ordinance of Hong Kong, CAP. 8, Part VIII, §§ 75 & 77B (allowing for compulsory process to obtain evidence in Hong Kong for judicial requests of foreign courts in civil proceedings which have been instituted or are "contemplated" and in criminal cases which have been instituted or are likely to be instituted if the evidence is obtained); ***United States v. Reagan***, 453 F.2d 165, 171-74 (6th Cir. 1971) (affirming district court's issuance of a letter rogatory to court in West Germany even though criminal case was in pre-indictment stage, but noting some contrary authority).

especially for the countries following the common law system) to certain countries is the State Department, as generally described above. However, for certain countries, such as the United Kingdom and Hong Kong, OIA has developed an expedited channel for transmitting letter requests, eliminating certain stopping points along the way of the traditional channel, thereby speeding up the overall process. Also, the form of the letter request can vary according to the country of destination. Thus, the best approach for initiating a letter request is to contact OIA (202-514-0000) and request to speak to the attorney in charge of the country from which assistance is sought.

41.05[5] Problems with the Letters Rogatory Process Generally

While the letter rogatory procedure is the traditional method of obtaining assistance abroad, it is certainly not without its flaws. For example, there is no obligation that the foreign country honor the request; the foreign country's enabling legislation, if any, may not provide any exceptions to that country's bank secrecy laws; there are no mutually agreed upon procedures to ensure that any evidence obtained will be in admissible form; the multiple stages of the process, involving diverse entities, generate serious time delays; and the procedure may not be available at all crucial stages of a proceeding when it may be needed most, *e.g.*, the investigation of a criminal offense. To address these critical problems, law enforcement authorities developed new methods to gather foreign evidence, such as the MLAT.

41.5 [6] Specific Problems with the Letters Rogatory Process When Used in Criminal Tax Cases

In addition to the problems which afflict the letters rogatory process generally, prosecutors seeking to obtain foreign evidence through this process for tax cases may face a unique roadblock in jurisdictions following the common law tradition of England and Wales.[8] This possible obstacle is the international rule of comity, the so-called "revenue rule," that one nation will not directly or indirectly enforce the revenue laws of another nation.[9]

In its most basic form, the revenue rule is that the courts of one country will not enforce a judgment for taxes issued by the court of another country.[10] The rule seems to have originated in two opinions of Lord Mansfield in 1775 and 1779[11] However, the modern bedrock of the rule seems to be the House of Lords' decision in ***Government of India v. Taylor*** [1955] A.C. 491 (H.L.) (hereinafter ***India v. Taylor***),[12] where the tax authorities of India sued to collect moneys in the United Kingdom based on a tax judgment issued by an Indian court. While most common law jurisdictions, including the United States, seem to accept this basic form of the rule as elementary and without dispute,[13] its application beyond this realm has varied.[14] In one of its broader forms,

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[8] The number of countries that follow the English common law tradition is quite large, since both the present and former dependencies of the United Kingdom generally fall into this category. For example, the judiciaries of the Bahamas, Singapore, the Cayman Islands, and Hong Kong continue to regard English judicial precedents as highly persuasive.

[9] What constitutes "indirect" enforcement of another nation's revenue laws was addressed in ***Pasquantino v. United States***, 544 U.S. 349, 359-70 (2005). The Supreme Court reviewed the history of the revenue rule in the course of concluding that the rule did not bar the United States from prosecuting the defendants for wire fraud in connection with a scheme to evade Canadian liquor importation taxes. ***Id***.

[10] ***Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson***, 597 F.2d 1161, 1162-63 (9th Cir. 1979) (hereinafter***Gilbertson***).

[11] *See* ***Gilbertson***, 597 F.2d at 1164.

[12] For authorities relying primarily on ***India v. Taylor***, *see, e.g.*, ***State of Norway's Application*** [1987] 1 Q.B. 433, 445-46 (C.A.); ***R. v. Chief Metropolitan Stipendiary Magistrate,*** *ex parte* ***Home Secretary*** [1988] 1 W.L.R. 1204, 1207, 1214-15; *see also* ***United States v. First Nat'l City Bank***, 379 U.S. 378, 395-96 & n.16 (1965) (Harlan, J., dissenting on other grounds).

[13] *See, e.g.*, ***First Nat'l City Bank***, 379 U.S. at 396 ; ***Gilbertson***, 597 F.2d at 1163-66.

[14] *See, e.g.*, ***R. v. Chief Metropolitan Stipendiary Magistrate*** [1988] 1 W.L.R. at 1207, 1214-15 (distinguishing permissible extradition of a Norwegian national for tax-related charges from impermissible assistance in the recovery of taxes for a foreign state). Also compare dicta in ***State of Norway's Application*** [1987] 1 Q.B. at 448 (stating that simply providing evidence to another state for its civil determination of a tax liability is the enforcement, albeit indirect, of another state's revenue laws) with ***Re Request for International Judicial Assistance***, 102 D.L.R.3d 18, 38 (Can. 1979) (rejecting broader application of rule and stating that granting assistance to United States in criminal tax case is not tantamount to the collection of taxes for that state).

the rule prohibits one country from granting another country's request for information or evidence for any tax-related proceeding in the requesting country, in either a civil[15] or criminal[16] matter.

Until the decision was overturned, there had been serious fallout from the decision of the Court of Appeal of England and Wales in ***In re State of Norway's Application*** [1987] 1Q.B. 433 (C.A.), where that court construed the rule to operate in the broader sense. Thus, England and Wales and the common law countries that follow English and Welsh legal precedent were rejecting the letter rogatory requests of tax authorities based on the *dicta* in that decision. Fortunately for United States prosecutors seeking foreign evidence in tax cases, the House of Lords, the highest court of the United Kingdom, reversed the Court of Appeal in ***In re State of Norway's Application*** [1989] 1A.C. 723 (H.L.) (consolidated appeals and cross appeals), holding that simply providing evidence to another state for that state to use to enforce its revenue laws does not constitute the direct or indirect enforcement of another state's revenue laws. This decision should dramatically enhance mutual assistance from countries following English Common Law in civil and criminal tax cases, especially between governmental authorities.

41.6 USING COMPULSORY MEASURES TO OBTAIN FOREIGN EVIDENCE

41.06[1] Background

The United States tax authorities do not always have an effective mutual assistance means available to them for obtaining evidence abroad. Even if an MLAT or income tax treaty is in force, it may be so restricted in coverage as to be of little or no use.[17] Thus, the United States may have to resort to unilateral action, such as a subpoena, to obtain the needed evidence. This Section explores the various types of unilateral compulsory process that can be directed at obtaining foreign-based evidence.

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[15] ***State of Norway's Application*** [1987] 1 Q.B. at 445-46.

[16] ***In re the Criminal Proceedings before the U.S. District Court for the District of Kansas Concerning Marcel Samuel Lambert and Arloho Mae Pinto***, No. 962 (Bahamas Sup. Ct. 1986).

[17] TIEAs are a different matter. The United States will not enter into a TIEA that does not provide for the exchange of information in all civil and criminal tax cases, a policy that it has now extended to new tax treaties.

41.06[2] The Use of Subpoenas or Summonses to Obtain Foreign Evidence Directly

One form of process used by government attorneys to obtain evidence abroad is the subpoena power applied directly to a domestically based entity having some relationship to the foreign-based entity holding the records.[18] If a Department of Justice attorney or an Assistant United States Attorney wants to use a grand jury or criminal trial subpoena to obtain evidence located in a foreign country, the prosecutor must obtain the concurrence of the OIA, Criminal Division, before both issuing and enforcing the subpoena.[19] In determining whether to concur in such actions, OIA considers the following factors: (1) the availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory; (2) the indispensability of the records to the success of the investigation or prosecution; and (3) the need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.[20] Once the concurrence of OIA to issue and enforce a subpoena for foreign records has been obtained, the prosecutor will then be required to plead a so-called comity analysis, and the enforcement court will be required to balance the comity factors in favor of the government before the subpoena can be properly enforced.[21]

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[18] *See, e.g.*, ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 740 F.2d 817, 821, 832-33 (11th Cir. 1984); ***In re Marc Rich & Co., A.G.***, 736 F.2d 864, 867 (2d Cir. 1984); ***Matter of Marc Rich & Co., A.G.***, 707 F.2d 663, 667-68 (2d Cir. 1983); ***In Re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384, 1385-86 (11th Cir. 1982); ***In Re Grand Jury 81-2***, 550 F. Supp. 24, 27 (W.D. Mich. 1982); *cf.* ***United States v. First Nat'l Bank***, 699 F.2d 341, 342-43 (7th Cir. 1983); ***United States v. Vetco, Inc.***, 691 F.2d 1281, 1285-86 (9th Cir. 1981); ***Garpeg, Ltd. v. United States***, 588 F. Supp. 1240, 1242-43 (S.D.N.Y. 1984); ***United States v. Chase Manhattan Bank, N.A.***, 584 F. Supp. 1080, 1083-87 (S.D.N.Y. 1984); ***Garpeg, Ltd. v. United States***, 583 F. Supp. 789, 791 (S.D.N.Y. 1984); ***United States v. Toyota Motor Corp.***, 561 F. Supp. 354, 355-56, 358 (C.D. Cal. 1983); ***S.E.C. v. Banca Della Svizzera Italiana***, 92 F.R.D. 111, 112 (S.D.N.Y. 1981); *but see* ***In Re Sealed Case***, 825 F.2d 494, 497-99 (D.C. Cir. 1987).

[19] USAM 9-13.525 (September 1997).

[20] USAM 9-13.525; Criminal Resource Manual 279.

[21] To resolve jurisdictional conflicts that may arise from an order for the production of foreign documents, U.S. courts apply the so-called comity analysis under Section 442(1)(c) of the Restatement (Third) of Foreign Relations Law of the United States (1987). *See* ***Societe Nationale Industrielle Aerospatiale v. United States District Court***, 482 U.S. 522, 543-44 & n.28 (1987); ***Richmark Corp. v. Timber Falling Consultants***, 959 F.2d 1468, 1474-79 (9th Cir. 1992).

Section 442(1)(c)

of The Restatement (Third) of Foreign Relations Law provides as follows:

41.06[3] The Use of Subpoenas to Obtain Testimony of a Nonresident Temporarily in the United States

Prosecutors assisting federal grand juries in their investigations can subpoena critical witnesses, such as foreign bankers, who are temporarily found in the United States.[22] United States courts have held that the principle of comity between nations does not require one state to relinquish its compulsory process on a potential witness temporarily within that state, simply because his testimony may subject him to criminal prosecution in the other state.[23] Furthermore, such a witness must produce documentary evidence notwithstanding claims that the attorney-client relationship of the other state is broader than that of the jurisdiction issuing thesubpoena.[24]

41.06[4] The Use of Compelled Directives to Obtain Disclosure of Financial Matters Covered by Foreign Secrecy Laws

Prosecutors can obtain court orders compelling an account holder to direct a foreign bank or other institution to disclose to the prosecutor matters protected by foreign financial secrecy laws.[25] The Supreme Court has ruled that an order directing an account holder to sign a hypothetically-

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> In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; *the availability of alternative means of securing the information*; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located. (Emphasis added.)

The Third Restatement of Foreign Relations Law of the United States introduced "the availability of alternative means of securing the information" as a factor in comity analysis. Accordingly, the courts will now inquire into whether mutual assistance alternatives to subpoenas exist, before ordering enforcement. *See* ***Richmark***, 959 F.2d at 1475-76.

[22] *See*, *e.g.*, **United States v. Bowe**, 694 F.2d 1256, 1258 (11th Cir. 1982); ***In Re Grand Jury Proceedings (United States v. Field)***, 532 F.2d 404, 409 (5th Cir. 1976).

[23] ***In Re Grand Jury Proceedings (United States v. Field)***, 532 F.2d at 407.

[24] ***Bowe***, 694 F.2d at 1258.

[25] *See*, *e.g.*, ***Doe v. United States***, 487 U.S. 201, 215-18 (1988); ***United States v. Lehder-Rivas***, 827 F.2d 682, 683 (11th Cir. 1987); ***In Re N.D.N.Y. Grand Jury Subpoena #86-0351-S,*** 811 F.2d 114 (2d Cir. 1987); ***United States v. Davis***, 767 F.2d 1025, 1039-40 (2d Cir. 1985); ***In Re Grand Jury Proceedings, Western District of Louisiana (Juan A. Cid)***, 767 F.2d 1131, 1132-33 (5th Cir. 1985); ***United States v. Ghidoni***, 732 F.2d 814, 818-19 (11th Cir. 1984); *but see* ***In Re ABC Ltd.***, 1984 CILR 130 (Grand Court of the Cayman Islands, 1984).

framed disclosure directive does not violate his Fifth Amendment privilege against self-incrimination.[26]

Foreign courts have had mixed reactions to these directives. A court of the Cayman Islands, a dependency of the United Kingdom, has held that such compelled disclosure directives do not constitute voluntary and freely given consent for disclosure as required under the secrecy laws of that jurisdiction.[27] For other countries that do not have such stringent secrecy statutes and that follow the English and Welsh common law, there is authority that such disclosure directives do constitute valid consent under the common law duty of a banker to keep the financial affairs of an account holder confidential. [28]

Prosecutors have enjoyed widespread success in using *compelled* disclosure directives to obtain financial records from most countries, and, indeed, have used *voluntary* disclosure directives to gather financial records from virtually every country. The use of disclosure directives is preferred over the use of compulsory process directed against U.S.-based branches or offices of financial institutions to obtain financial records located abroad, because using disclosure directives involves no real jurisdictional conflicts (except when seeking evidence in countries like the Cayman Islands) and lessens the inclination of most foreign countries to block production of the evidence.

41.06[5] The Use of Subpoenas Issued to United States Citizens or Residents Abroad

Prosecutors can also use compulsory process to obtain documents or testimony from U.S. citizens or residents located in foreign countries.[29] Thus, federal law enforcement attorneys may issue court-ordered subpoenas to any such individuals in any federal proceedings, criminal or civil, under the provisions of 28 U.S.C. § 1783 and seek sanctions under 28 U.S.C. § 1784 if there is any failure to appear or produce documents.

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[26] ***Doe v. United States***, 487 U.S. at 206-218.

[27] ***In Re ABC Ltd.***, 1984 CILR 130, 134-35 (Grand Court of the Cayman Islands, 1984).

[28] ***Tournier v. Nat'l Provincial & Union Bank*** [1924] 1 K.B. 461 (C.A.).

[29] 28 U.S.C. §§ 1783-84.

41.6 [6] Jurisdictional Conflicts Arising from the Use of Certain UnilateralMeasures

The use of certain of these unilateral measures, especially the subpoenas on domestic financial institutions for foreign-based records, is controversial and leads to protracted litigation that often fails to secure the intended result. Indeed, these jurisdictional controversies led the Justice Department to adopt § 9-13.525 of the United States Attorneys' Manual (USAM), which requires the concurrence of OIA for both the issuance and enforcement of such subpoenas in Department criminal matters. When U.S. authorities resort to the enforcement of such subpoenas, they encounter strong opposition from many different quarters. For example, the financial institutions served with process typically resist strenuously and raise every possible issue for resolution, including the bedrock of their position, the jurisdictional conflict between the laws of the two countries involved. Even when these institutions suffer an adverse decision of the U.S. courts, they often choose to be subject to sizeable contempt sanctions rather than produce the subpoenaed or summonsed records. *See, e.g.*, ***In re Grand Jury Proceedings (Bank of Nova Scotia)***, 691 F.2d 1384, 1391 (11th Cir. 1982) (affirming district court's imposition of contempt sanctions on foreign bank where bank failed to comply with subpoena). Officials of foreign jurisdictions also object to the use of these measures by, *inter alia*, instructing their foreign ministries to complain to the U.S. State Department, entering *amicus* appearances in the protracted litigation, and sometimes directing their own law enforcement authorities to take blocking measures, which may include the seizure of the foreign-based records to thwart production.[30] Needless to say, production of the evidence sought by the use of certain of these unilateral measures is not a foregone conclusion.

At all events, as mentioned above, before a ***Bank of Nova Scotia***-type subpoena can be authorized by the Criminal Division (*see* USAM., Section 13.525 or enforced by a district court, a prosecutor will need to establish that no alternative methods exist for obtaining the foreign records sought.

[30] *See, e.g.*, ***In re Marc Rich & Co., A.G.***, 736 F.2d 864, 866 (2d Cir. 1984).

41.7 SUSPENSION OF STATUTE OF LIMITATIONS: OFFICIAL REQUEST FOR FOREIGN EVIDENCE

Criminal tax prosecutions increasingly involve the use of evidence obtained from foreign sources. Section 3292 of Title 18 provides for the suspension of the statute of limitations to permit the United States to obtain foreign evidence. This statute provides, in pertinent part:

> (a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.
>
> . . . . .
>
> (b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.
>
> (c) the total of all periods of suspension under this section with respect to anoffense--
>
> (1) shall not exceed three years; and
>
> (2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

18 U.S.C. § 3292.

Letters rogatory, requests under a treaty or convention, or any other request made by a court or law enforcement authority of the United States will qualify as an "official request." 18 U.S.C. § 3292(d). The statute does not require that the "request expressly list by citation the alleged statutory violations in order for a foreign evidence request to pass muster under 18 U.S.C. § 3292." ***United States v. Neill***, 952 F. Supp. 831, 832 (D.D.C. 1996).

While the maximum period for which the statute of limitations may be suspended for an offense is three years, the period begins to run when the government requests evidence from a foreign government. "[T]he starting point for tolling the limitations period is the official request for evidence, not the date the § 3292 motion is made or granted." ***United States v. Bischel***, 61 F.3d 1429, 1434 (9th Cir. 1995).

Likewise, the period ends when the foreign court or authority takes final action on the request. *See* ***Bischel***, 61 F.3d at 1434 ("'[F]inal action' for purposes of § 3292 means a dispositive response by the foreign sovereign to both the request for records and for a certificate of authenticity of those records, as both were identified in the 'official request.'"). The government's satisfaction with the evidence provided is not determinative of whether there has been a final action. "[W]hen the foreign government believes it has completed its engagement and communicates that belief to our government, that foreign government has taken a 'final action' for the purposes of § 3292(b)." ***United States v. Meador***, 138 F.3d 986, 992 (5th Cir. 1998). Such a communication from a foreign government does not preclude further inquiry by the United States. "If dissatisfied with a dispositive response from a foreign authority, the prosecutor need only file another request and seek a further suspension of the limitations period, subject to the ultimate three-year limitation on the suspension period." *Id.* at 993 (footnote omitted).

Note that the Eleventh Circuit found in ***United States v. Trainor***, 376 F.3d 1325, 1327 (11th Cir. 2004), that an unsworn application accompanied by only a copy of the evidentiary request sent to the foreign government does not satisfy § 3292. The statute requires the government to demonstrate, by a preponderance of the evidence, that evidence concerning the charged offense reasonably appears to be located in the foreign country. 376 F.3d at 1327. In essence, the court in ***Trainor*** found that the statute contemplated the submission of factual information, under oath or otherwise verified, that supported the two findings required to be made by the court -- (1) that an official request has been made to a foreign government for evidence (within the statutory period); and (2) that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, located in the foreign country. (The Solicitor General decided against further review.)[31] A copy of the *Trainor* Memorandum and a sample declaration in support of the suspension of the running of the statute of limitations, motion to suspend the running of the statute

[31]While we are not aware of any challenges to applications under the Speedy Trial Act, 18 U.S.C. § 3161(h)(9), for the exclusion of time when an official request to obtain foreign evidence has been made, language of this provision is virtually identical to that of § 3292. Accordingly, we would urge that a declaration or sworn affidavit be used with all applications under § 3161(h)(9) aswell.

of limitations, and order suspending the statute of limitations can be found in the Appendix to this Chapter.

41.8 CONCLUSION

New law enforcement treaties and agreements are continually being negotiated and concluded by the various responsible authorities. Accordingly, new means for obtaining foreign evidence may appear on the horizon following publication of this analysis. For further details regarding the matters set forth herein, or for developments following publication, contact Thomas Sawyer, Senior Counsel for International Tax Matters, Tax Division, Department of Justice, at (202) 514-8128.

APPENDIX

U.S. Department of Justice

Tax Division

EJO'C:REL

Washington, D.C. 20530

November 17, 2004

MEMORANDUM

To: The Chiefs, Criminal Enforcement Sections, for Distribution to all Criminal Enforcement Attorneys

From: Robert E. Lindsay
Chief, CATEPS

Re: Final Advice re Tolling the Statute of Limitations under 18 U.S.C. 3292 and 3161 - The *Trainor* Decision

On September 29, 2004, I issued a memorandum is to give interim advice regarding the Court of Appeals decision in United States v. Trainor, 376 F.3d 1325 (11th Cir. 2004). This decision has significant ramifications, i.e., the dismissal of indictments, for federal prosecutors seeking to toll the statute of limitations (SOL) under 18 U.S.C. 3292 [1] (and, indeed, 18

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[1] 18 U.S.C. 3292 provides as follows:

§ 3292. Suspension of limitations to permit United States to obtain foreign evidence

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(continued...)

U.S.C. 316l(h)(9)) pending the execution of an official request for evidence located in a foreign country.The purpose of this memorandum is to pass on the final advice on this matter given that the Office of International Affairs (OIA), Criminal Division. As was the case for my interim advice, this final advice should be considered for cases where no application or motion under Section 3292 has yet been filed, as well as cases where, even if such pleadings have been filed, there has not yet been an indictment. OIA's final advice and my interim advice are entirely consistent.

OIA has issued the following final advice re Trainor:

Attached are model pleadings to be used when making application to the court to toll the statute of limitations based upon an official U.S. request to obtain foreign evidence (18 U.S.C. § 3292). The application, declarationand order are drafted to conform to the ruling of the Eleventh Circuit in *United States v. Trainor,* 376 F.3d 1325 (11thCir.2004),which found that an unsworn application accompaniedby only a copy of the evidentiary request sent to the foreign government does not satisfy § 3292 which requires the Government to demonstrate, **by a preponderance of the evidence**, that evidence concerning the charged offense reasonably appears to be located in the foreign country. 376 F. 3d at 1327. In essence, the court in *Trainor* found that the statute contemplated the submission of factual information, **under oath or otherwise verified**, that supported the two findings required to be made by the court: (1) that an official request has been made to a foreign government for evidence (within the statutoryperiod); and (2) that it reasonably appears, or reasonably appeared at the time the

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[1](…continued)
(c) The total of all periods of suspension under this section with respect to an offense--

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term ''official request'' means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

request was made, that such evidence is, or was, located in the foreign country. (The Solicitor General decided against further review.) These pleadings are consistent with the recommendations sent to all Coordinators following the initial district court decision. *United States v. Trainor*, 277 F.Supp2d. 1278 (S.D.Fl. 2003), (Coordinator Update E-004, August 5, 2003). The declaration and any attachments, filed with the application, would clearly constitute evidence for the court's consideration.

While we are not aware of any challenges to applications under the Speedy Trial Act, 18 U.S.C. § 3161 (h)(9), asking for the exclusion of time when an official request to obtain foreign evidence is made, language of this provision is virtually identical to that of § 3292. We would urge that a declaration or sworn affidavit be used with all applications under § 3161 (h)(9) as well.

Please ensure that your office is aware of the ruling in *Trainor*, and that a declaration or sworn affidavit is used when seeking relief under these statutes. Andy Levchuk [(202) 353 3622] in OIA can provide assistance if needed.

UNITED STATES DISTRICT COURT
______________DISTRICT OF ________________

IN RE: GRAND JURY INVESTIGATION MISC. NO.

[***investigation number***]

DECLARATION IN SUPPORT OF APPLICATION FOR SUSPENSION
OF RUNNING OF THE STATUTE OF LIMITATIONS

I, KENNETH JONES, state the following:

1. I am an Assistant United States Attorney for the ____________of_________________, and I submit this Declaration in support of the accompanying application pursuant to 18 U.S.C. § 3292 to suspend the running of the statute of limitations for offenses arising out of this district's Grand Jury investigation of ***[potential defendant(s)].***

2. My colleagues_______________and I have been conducting the investigation of the above-mentioned individual(s)/ entities for the following offenses: ***[list charges with statutory references}***. No

indictment has been returned by the Grand Jury.

3. I believe that evidence of the offenses presently being investigated is located in a foreign jurisdiction, specifically _______________. The investigation to date has revealed ***[brief account of the facts of the case. The facts should provide*** **a**

***reasonable basis for believing that there is evidence in* a**

***foreign jurisdiction.*]**

4. Based on the above, and at the request of my office, on ***[date official request was made]*,** the United States Department of Justice Office of International Affairs made an official request for legal assistance in obtaining evidence from the Central Authority of ***[Requested State], [under the mutual legal* assistance *treaty between* the *United States* of *America* and the *[Requested State]] .*** The request is being incorporated herein by reference and is attached hereto as Attachment #_______ ***[If you do* not *wish to* attach the *entire request, you* may *simply attach and reference the OIA transmittal letter].***

5. To date, [the Requested State] has not provided a response to the Department of Justice.

I declare under penalty of perjury that the foregoing is true and correct.

Dated:_______________ Assistant United States Attorney

UNITED STATES DISTRICT COURT
______________DISTRICT OF ___________________

IN RE: GRAND JURY INVESTIGATION MISC. NO.

[investigation name or number]

EX PARTE MOTION TO SUSPEND THE
RUNNING OF STATUTE OF LIMITATIONS

The United States of America, by and through its undersigned attorneys, applies to this Court pursuant to Title 18, United States Code, Section § 3292, to suspend the running of the statute of limitations for offenses arising out of the Grand Jury's investigation of ***[potential defendant(s)]***. In support of this application, the government represents the following:

1. A Grand Jury duly impaneled in this District has been conducting an investigation of ***potential defendant(s)]*** for the following possible criminal offenses:***[l ist charges with statutory references]*** . No indictment has been returned.2.

Title 18, United States Code, Section 3292(a)(1), provides

as
follows:

> Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

3. Section 3292(d) defines an ''official request'' to include "a request under a treaty or convention" or a request by "an authority of the United States having criminal law enforcement responsibility'' to an "authority of a foreign country.''

4. As described in the Declaration of [the undersigned Assistant United States Attorney or Special Agent , attached as Exhibit A and incorporated herein, the investigation to date has revealed that ***[give brief account of the f acts o f the ca se - - summary o f that contained in the declaration. The f acts in the declaration should provide a "reasonable basis" for believing that there is evidence in a foreign jurisdiction.]*** Based on the above, it reasonably appears that evidence of the above offenses is located in______________________ ***[A table m a y be useful in complex cases involving several foreign jurisdictions].***

5. On ***[d a t e of f icia l r eq u es t wa s m ad e]*** , the Office of International Affairs of the United States Department of Justice made an official request for legal assistance in obtaining evidence from the Central Authority of ***[Requested State],*** under the Treaty between the United States of America and the ***[Requested State]*** on Mutual Assistance in Criminal Matters. ***[Or by letters rogatory issued by a court or by letter o£ request. Again, in the ca se of multiple requests, a table may***

be useful]. A copy of the letter transmitting the request is attached hereto as Exhibit B. ***[OIA* recommends *against attaching the request itself. The statute does not require it* and *the facts set forth in the request* may *go far beyond the conduct that is ultimately the basis £or the indictment.*** *1*

WHEREFORE, based on the above, this Court should allow the government's application for a suspension of the statute of limitations in accordance with the time limits set forth in Section 3292(c).

Respectfully

submitted, JANE SMITH
United States Attorney

By: ______________________________
Kenneth Jones
Assistant U.S. Attorney

Dated
:

UNITED STATES DISTRICT COURT

_______________DISTRICT OF _____________________

____

IN RE: GRAND JURY INVESTIGATION MISC. NO. _________________

[investigation name or number]

____

ORDER GRANTING EX PARTE APPLICATION FOR
SUSPENSION OF RUNNING OF STATUTE OF LIMITATIONS

Based on the Application submitted by the United States of America, and the accompanying Declaration of Assistant U.S. Attorney_______________ , the Court makes the following findings:

1. A duly impaneled Grand Jury in this District is conducting an investigation of ***[potential defendants]*** for the following offenses: ***[list charges with statutory references]***.

2. The United States has filed an *ex parte* Application for an order suspending the statute of limitations in accordance with the provisions of Title 18, United States Code, Section 3292.

3. The Application is accompanied by the Declaration of

Assistant U.S. Attorney__________________, sworn to on _____________

which summarizes the relevant facts uncovered during the course of the investigation.

4. It reasonably appears, based on a preponderance of evidence presented to the Court, that evidence of the offense(s) under investigation is located in __________________;

5. It further appears, based on a preponderance of evidence presented to the Court, that an official request, as defined in 18 U.S.C. § 3292(d), was made to the Central Authority of ______________ by the Office of International Affairs, United States Department of Justice, on ___________________;

BASED ON THE ABOVE, IT IS HEREBY ORDERED that the government's *Ex Parte* Application for Suspension of the Running of the Statute of Limitations is hereby GRANTED; and

IT IS FURTHER ORDERED that the running of the statute of limitations for the offenses set forth in the government's ex *parte* application is hereby SUSPENDED for the period indicated in 18 U.S.C. § 3292(c).

____
U.S. District Judge

TABLE OF CONTENTS

42.1 RESTRICTIONS ON OBTAINING AND USING "TAX RETURNS," "TAXPAYER RETURN INFORMATION," AND "RETURN INFORMATION"

42.1 STATUTORY LANGUAGE: 26 U.S.C. § 6103(a)

Confidentiality and disclosure of returns and return information

(a) General rule. -- Returns and return information shall be confidential, and except as authorized by this title --

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section,and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information . . . [pursuant to certain provisions of this section],

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

42.2 GENERALLY

Section 6103 of the Internal Revenue Code generally prohibits the disclosure of "tax returns" and other "tax return information" outside the Internal Revenue Service (IRS) unless the disclosure falls within one of the specific provisions of Section 6103(c) through (o). In cases involving "tax administration" (*e.g.*, criminal tax prosecutions or other criminal cases that have been specifically designated as "related" to tax administration) that have been referred to the Department of Justice, the IRS may, at its discretion, disclose to the Department of Justice prosecutors handling the case the tax returns and tax return information that "may" relate to the case (section 6103(h)(2) & (3)). Under section 6103(h)(2), the prosecutors may use the returns and return information for investigative purposes. Section 6103(h)(4) authorizes the prosecutor to introduce into evidence at trial a return or piece of return information that is relevant to the case.

In non-tax criminal cases, federal prosecutors may obtain and use for investigative purposes returns and other information filed with the IRS by a taxpayer only through an *ex parte* order of a United States district court based upon an application (that must be signed by the United States Attorney) showing that the information is relevant to an ongoing criminal prosecution. *See* Appendix immediately following this chapter for samples of both an application for a Section 6103(i)(1) order and an order under Section 6103(i)(1). The prosecutor may use that information at trial (*e.g.*, introduce it into evidence or otherwise make it public in the proceeding) only upon a showing to the court that the information is "probative of an issue" in the case. 26 U.S.C. § 6103(i)(4)(A)(i).

A willful violation of the provisions of section 6103 is punishable as a felony and by dismissal from Federal service, *see* 26 U.S.C. 7213(a)(1), while a negligent violation subjects the United States to a suit for damages. *See* 42.06, *infra*.

42.3 THE STATUTORY STRUCTURE

42.03[1] Generally

Section 6103(a) requires officers and employees of the United States to keep tax returns and return information confidential, and prohibits them from disclosing such information, except as authorized by the Internal Revenue Code. The term "disclosure" means the "making known to any person in any manner whatever a return or return information." 26 U.S.C. § 6103(b)(8). Section 6103(b) also defines "return," "return information," and "taxpayer return information." Sections 6103(c) - (o) contain the exceptions that allow disclosure of returns and return information to taxpayers, the Department of Justice, and other governmental entities. Section 6103(p) provides rules and procedures for the handling, storage, and disposition of return information by the IRS and by those within the Department to whom return information has been disclosed. Section 6103(p) imposes an obligation upon agencies and individuals that receive returns and return information to restrict access to the information to only those individuals authorized to use it, to safeguard the information in the manner prescribed by the IRS, to handle copies in the same manner as originals, to maintain the information in a secure location, and to return the information to the IRS or destroy it when it is no longer needed. 26 U.S.C. § 6103(p)(4).

42.3 [2] Status of Return Information With Respect to the Non-Disclosure Rules of § 6103 After the Information Has Been Made Public

Section 6103 contains no language that lifts the prohibition against disclosure after return information has been disclosed in public, such as in a judicial proceeding. There is a split of authority as to whether the disclosure restrictions of Section 6103 nevertheless cease to apply once return information has been made public in a judicial proceeding. The cases are described in IRS Publication 4639, *Disclosure & Privacy Law Reference Guide* at 2-26 - 2-28 (Oct. 2007):

> 1. The Ninth Circuit has held that tax information actually placed in and made a part of the public record is no longer subject to section 6103's disclosure restrictions.
>
> > a. William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir. 1991) (information contained in Notice of Federal Tax Lien and bankruptcy petition are no longer confidential, therefore disclosure did not violate section 6103), *cert. denied*, 502 U.S. 1066 (1992).
> >
> > b. Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (once tax return information is made a part of the public domain, that taxpayer can no longer claim a right of privacy in that information), *cert. denied*, 490 U.S. 1034 (1989). The Ninth Circuit's opinion affirmed three district court decisions: Peinado v. United States, 669 F. Supp. 953 (N.D. Cal. 1987); Lampert, 1987 WL 48210 (N.D. Cal. Apr. 8, 1987); and Figur v. United States, 662 F. Supp. 515 (N.D. Cal. 1987).
> >
> > c. Tanoue v. IRS, 904 F. Supp. 1161 (D. Haw. 1995) (only those items of information actually placed in and made a part of the public record are no longer subject to section 6103's disclosure restrictions).
>
> 2. The Sixth Circuit has held that tax information that has been made public in connection with recording a federal tax lien is no longer protected by section 6103, but has not ruled with respect to disclosures made in judicial proceedings. *See* Rowley v. United States, 76 F.3d 796, 801-02 (6th Cir. 1996) (general rule of confidentiality not applicable

where information was disclosed in tax lien filings and later disclosed in notices of sale which were made for tax administration purposes).

3. The Fourth Circuit has relied on the absence of an express exception in section 6103 to find that the otherwise unauthorized release of previously publicized return information violates section 6103. Mallas v. United States, 993 F.2d 1111, 1120-21 (4th Cir. 1993) (even to the extent that the revenue agent's reports repeated information otherwise available to the public, they still fell within the broad definition of returninformation).

4. The Seventh Circuit has adopted a hybrid test referred to as the "immediate source" test, i.e., "that the definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return, as these terms are defined in § 6103(b)(2), and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns." Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989) (IRS's release of court's opinion in tax case to newspaper which then published article based on the decision was not an unauthorized disclosure because the information was obtained from the court's opinion).

5. The Third Circuit has not ruled on this issue in a published opinion. It issued a summary opinion in Barnes v. United States, 17 F.3d 1428 (table cite) (3d Cir. 1994), affirming the district court's adoption of the Magistrate's Report and Recommendation. *See* 1991 U.S. Dist. LEXIS 21633, at **14-15 (W.D. Pa. Aug. 2, 1991) (magistrate's recommendation), adopted at 1991 U.S. Dist. LEXIS 12883 (W.D. Pa. Aug. 27, 1991). The Magistrate, citing Cox and Lampert, concluded that a press release announcing an indictment issued by the U.S. Attorney's office was not an unauthorized disclosure because the information was already a matter of public record.

6. The Eighth Circuit cited Thomas, in an unpublished opinion with little analysis or discussion, to approve of disclosures based upon public record information. Noske v. United States, 998 F.2d 1018, 1993 WL 264531 (8th Cir. Jul. 15, 1993) (no unauthorized disclosure of return information when the IRS provided a copy of a district court opinion to the local paper).

7. The Tenth Circuit has adopted the Seventh Circuit approach. *See* Rice v. United States, 166 F.3d 1088, 1091(10th Cir.) (press release issued based on public affairs officer's attendance at trial, and not on IRS documents, was not an unauthorized disclosure), *cert. denied*, 528 U.S. 933 (1999). *But see* Rodgers v. Hyatt, 697 F.2d 899, 904, 906 (10th Cir. 1983) (an IRS Agent's in court testimony at a summons enforcement

hearing did not authorize the agent's subsequent out of court statements to a third party regarding an ongoing investigation where the agent actually obtained his confidential information from the taxpayer's tax return and not at the public hearing).

8. The Fifth Circuit also applies the "immediate source" test, thereby implicitly adopting the Seventh Circuit's approach in Thomas v. United States.

> a. Johnson v. Sawyer, 120 F.3d 1307, 1323 (5th Cir. 1997) (IRS permitted to issue a press release from court documents or proceedings, however, where information in press release came from IRS records, an unauthorized disclosure has occurred).
>
> b. Harris v. United States, No. 01-20543, 35 Fed. Appx. 390, 2002 WL 760887 (5th Cir. Apr. 17, 2002) (revenue officer who disclosed that the plaintiffs had a judgment filed against them for a specific amount had acted in a good faith belief that the disclosure was permitted as a disclosure of information in the public record), *cert. denied*, 538 US 922 (2003).

The IRS has taken the following position with respect to public record information:

Although section 6103 bars disclosure of tax information taken directly from IRS files, it does not ban the disclosure of information that is taken from the public court record. The IRS's legal position has confined the disclosure of public record information to tax information that has been made a matter of public record in connection with tax administration activity. The following provides a framework for analyzing public record information.

A. Return information loses any confidential status if it becomes a matter of public record. Returns and return information that have become public as a result of actions taken by, or on behalf of, the IRS are no longer subject to the confidentiality provisions of the Code and may be provided to a third party requester. Great care should be exercised in determining whether tax information has actually become a matter of public record, as information supplemental to that which has become public is subject to the confidentiality provisions. . . .

B. Information made public by a taxpayer or third party does not affect the confidentiality of identical return or return information in the possession of the IRS. Thus, the IRS cannot use return information to confirm information made public by any other party unless specifically authorized to do so by section 6103. For example, if a Fortune 500 company announces that the IRS is auditing its inventory accounting practices for purposes of determining income, the IRS cannot confirm that announcement because there is no statutory authority permitting the IRS's disclosure.

C. Information that has become public, which is not publicly connected with tax administration, remains confidential in the hands of the IRS. The IRS draws a distinction between general public record information (*e.g.*, decrees of divorce, mortgage deeds of trust) and return information that has become a matter of public record through tax administration activity in determining whether the information can be disclosed. By permitting the release of return information only after it has become a matter of public record in connection with tax administration, the IRS avoids linking otherwise innocuous public information with a person's taxliability.

D. See IRM 11.3.11.13 (5/2005), Information Which Has Become Public Record, for further explanation.

To avoid problems under Section 6103, prosecutors should not make any out-of-court disclosures of return information received from the Internal Revenue Service, whether or not the information has lawfully been made public. Prosecutors should exercise great care to ensure that any case information provided to the press or any other proper recipient comes only from publicly available information, such as an indictment. *See*, *e.g.*, Memorandum to All United States Attorneys from Loretta Argrett, Assistant Attorney General, Tax Division, re: *Press Releases in Cases Involving the IRS* (October 15, 1997), found in Chapter 3, *supra*.

42.4 "RETURN INFORMATION" DEFINED: 26 U.S.C. § 6103(b)

42.04[1] Generally

Section 6103(b) defines three categories of information: "returns," "return information," and "taxpayer return information." A "return" is any tax or information return filed with the Internal Revenue Service by, on behalf of, or with respect to a taxpayer. 26 U.S.C. § 6103(b)(1). "Return information" is essentially any information that relates to a taxpayer and that has been received by, recorded by, prepared by, furnished to, or collected by the Internal Revenue Service. 26 U.S.C. § 6103(b)(2). This category includes virtually all information about a taxpayer's dealings with the IRS, including whether a particular person is a taxpayer, the amount of any liability, and whether the taxpayer is, will be, or has been investigated. In short, this category includes all information about a taxpayer and his or her liability in the possession of the IRS. *See* ***Mallas v. United States***, 993 F.2d 1111, 1118 (4th Cir. 1992) (information contained in a revenue agent's report considered "return information"); ***Chamberlain v. Kurtz***, 589 F.2d 827, 840 (5th Cir. 1979) ("return information" is any information concerning a taxpayer's liability that the IRS has collected). "Taxpayer return information" is "return information" that is filed with, or furnished to, the IRS by or on behalf of the taxpayer to whom the return information relates. *See* 26 U.S.C. § 6103(b)(3). It would include, for example, financial statements, offers in compromise, "defier" letters, and similar documents.

42.4 [2] Information Obtained from Non-IRS Sources Is Not "ReturnInformation"

Return information does ***not*** include information that does not come from IRS files. Thus, information that a prosecutor gathers as part of a grand jury investigation is not "return information," because it is not information "collected by" the IRS. This is true even in a grand jury investigation into tax offenses. Under Federal Rule of Criminal Procedure 6(e)(3)(A)(ii), IRS agents working on a grand jury investigation are "assist[ing] . . . [the] attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The information that they gather at the direction of the Assistant United States Attorney (AUSA) or under the authority of the grand jury is being collected by the Attorney General and the grand jury. It is not information being "collected by" the IRS and thus is not "return information" under the Section 6103(b) definition. *See* ***Baskin v. United States***, 135 F.3d 338, 342 (5th Cir. 1998) (copies of checks obtained by grand jury not return information); ***Ryan v. United States***, 74 F.3d 1161, 1163 (11th Cir. 1996) (financial information independently obtained by prosecutor not "return information," as it did not come from IRS files); ***Stokwitz v. United States***, 831 F.2d 893, 894-97 (9th Cir. 1987) (taxpayer's retained copies of returns seized from his desk by Navy investigators not "returns" or "return information" under Section 6103 because they did not come from IRS files).

42.5 PERMISSIBLE DISCLOSURES OF RETURNS AND RETURN INFORMATION

42.5 [1] Generally

Subsections 6103(c) through (o) set out the situations in which returns and return information may be disclosed. The subsections authorizing disclosure to the Department of Justice for use in litigation, §§ 6103(h) and 6103(i), are discussed in detail below. The other eleven subsections under which disclosure of taxpayer returns and return information may be authorized are as follows:

> 1. Section 6103(c) -- Disclosure of returns or return information at the taxpayer's request. *See, e.g.,* ***Tierney v. Schweiker***, 718 F.2d 449, 454-55 (D.C. Cir. 1983).
>
> 2. Section 6103(d) -- Release of returns and return information to State tax officials and State and local law enforcement agencies charged with the administration of State tax laws to assist in the administration of such laws. *See* ***Huckaby v. Internal Revenue Service***, 794 F.2d 1041, 1046 (5th Cir. 1986).[1]
>
> 3. Section 6103(e) -- Disclosure of a taxpayer's returns and return information to individuals who have a material interest in that information. The section lists those persons who will be deemed to have a material interest in such information (*e.g.*, either the husband or the wife in the case of a joint return, a partner in a partnership, a stockholder owing more than 1 percent of the outstanding stock of a corporation in the case of a corporate return, etc.). *See, e.g.*, ***Solargistic Corp. v. United States***, 921 F.2d 729, 731 (7th Cir. 1991) (concluding that investors in tax shelter may be advised of audit); ***Martin v. IRS***, 857 F.2d 722, 724 (10th Cir. 1988) (partnership returns).
>
> 4. Section 6103(f) -- Disclosure of returns and return information to committees of Congress. *See* ***Church of Scientology v. Internal Revenue Service***, 484 U.S. 9, 15 (1987).
>
> 5. Section 6103(g) -- Disclosure of returns and return information to the President or employees of the White House designated by the President.

[1] There is no other provision authorizing the disclosure of returns and return information to State or local officials. Thus, returns and return information *may not* be disclosed to state agents or officers who maybe working on task forces or otherwise assisting prosecutors in investigating or prosecuting Federal crimes. Disclosure for the sole and limited purpose of assisting the Federal criminal investigation may be appropriate to those State police officers or agents who have been deputized as Deputy United States Marshals. *See* 28 C.F.R. § 0.112 (empowering Director of the U.S. Marshals Service to deputize "[s]elected . . . state [] or local law enforcement officers whenever the law enforcement needs of the U.S. Marshals Service so require")

6. Section 6103(j) -- Disclosure of returns and return information to be used in structuring the census and conducting related statistical analyses.

7. Section 6103(k) -- Disclosure of returns and return information for tax administration purposes. Section 6103(k)(6) permits the disclosure of return information by Service employees for investigative purposes. Agents and other employees may "disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available." *See* ***Vote v. United States***, 753 F. Supp. 866, 870 (D. Nev. 1990), *aff'd*, 930 F.2d 31 (9th Cir. 1991).

8. Section 6103(l) -- Disclosure of returns and return information for purposes other than tax administration -- *e.g.*, programs administered by the Social Security Administration, Railroad Retirement Board, Department of Labor, etc.

9. Section 6103(m) -- Disclosure of taxpayer identity information to various agencies and individuals.

10. Section 6103(n) -- Disclosure of returns and return information as necessary in conjunction with the "processing, storage, transmission, and reproduction" of returns and return information; and for purposes of "programming, maintenance, repair, testing and procurement of equipment." *See* ***Wiemerslage v. United States***, 838 F.2d 899, 901-04 (7th Cir. 1988).

11. Section 6103(o) -- Disclosure of returns and return information relating to alcohol, tobacco, and firearms taxes, and returns and return information relating to the wagering excise tax for limited purposes.

42.05[2]Section 6103(h) -- Disclosure to Certain Federal Officers and Employees for Purposes of Tax Administration, etc.

Section 6103(h) is one of two provisions that authorize disclosure of returns and return information to the Department of Justice for use in investigating and prosecuting criminal cases. Section 6103(h) governs the disclosure of return information to specified federal officers and employees for purposes of tax administration, including criminal and civil tax litigation. Section 6103(h)(1) provides authority for employees of the

Department of the Treasury to have access to returns and return information as needed for tax administration purposes. S*ee* ***Gardner v. United States***, 213 F.3d 735, 738-39 (D.C. Cir. 2000); ***First Western Govt. Securities, Inc. v. United States***, 796 F.2d 356, 360 (10th Cir. 1986). Unlike many other sections of the statute, § 6103(h)(1) does not require a written request for disclosure: "Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes." 26 U.S.C. § 6103(h)(1).

42.5 [3] Disclosures to the Department of Justice for Tax Administration

Section 6103(h)(2), which governs the disclosure of return information to officers and employees of the Department of Justice in tax cases, states:

> In a matter involving *tax administration*, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) *personally and directly engaged in, and solely for their use in*, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if –
>
>> (A) the taxpayer is or may be a *party* to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;
>>
>> (B) the treatment of an *item* reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or
>>
>> (C) such return or return information relates or may relate to a *transactional relationship* between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation. (Emphasis added.)

The italicized portions of the statutory language indicate the circumstances under which returns and return information may be disclosed to Department attorneys. First, the matter must involve "tax administration." That term is defined in section 6103(b)(4) to include the enforcement and litigation of the tax laws and "related statutes." Preparing for, and conducting, grand jury investigations and prosecuting tax offenses, or offenses charged under statutes that have been determined to be "related to" tax administration, are activities that are part of "tax administration." For cases involving the interpretation of "tax administration," *see* ***Hobbs v. United States ex rel. Russell***, 209 F.3d 408, 401-11 & n.2 (5th Cir. 2000) ("The courts that have considered whether certain activities qualify as 'tax administration' uniformly have defined the term broadly"); ***Tavery v. United States***, 32 F.3d 1423, 1429 n.7 (10th Cir. 1994); ***Rueckert v. Internal Revenue Service***, 775 F.2d 208, 209-12 (7th Cir. 1985); ***United States v. Mangan***, 575 F.2d 32, 40 (2nd Cir. 1978).

Second, the disclosure may be made only to those attorneys who are "personally and directly" involved in a proceeding, or investigation that may lead to a proceeding, regarding a tax matter, and not to the Department of Justice itself. Thus, the individual prosecutors or attorneys handling a case or matter are responsible for controlling and managing the returns and return information and for any subsequent disclosures. Those individuals are permitted to disclose the returns and return information to their supervisors and to support staff assisting with an investigation or judicial proceeding. Treas. Reg. § 301.6103(h)(2)-1.

Finally, the information to be disclosed to Department attorneys must meet one of the criteria set out in subparagraphs (A), (B), and (C), which are commonly referred to as the "party," "item," and "transaction" tests respectively. Department attorneys may have access to the return information of any taxpayer who is or may be a party to a tax case, or whose liability gives rise to a case under the federal tax laws. ***United States v. Michaelian***, 803 F.2d 1042, 1044, 1048-49 (9th Cir. 1986) (disclosure to obtain search warrant); ***United States v. Olson***, 576 F.2d 1267, 1270 (8th Cir. 1978) (taxpayer as party to case). Second, under the "item" test, prosecutors may obtain those items on a third party's return that are or may be related to a pending case or investigation. Finally, Department attorneys involved in a tax case may be given access to third party return information that reflects a transaction between the taxpayer and the third party, if the information pertaining to the transaction is or may be related to a pending case or investigation. ***Davidson v. Brady***, 559 F. Supp. 456, 461 (W.D. Mich. 1983), *aff'd on other grounds*, 732 F.2d 552 (6th Cir. 1984). Under both the item test and the transaction test, access to return information is limited to those portions of the third party return that reflect the relevant item or transaction. *See* S. Rep. No. 94-938(I), at 324-26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 3753-56.

42.05[3][a] Procedures for Disclosure

Section 6103(h)(3) provides two different methods by which taxpayer and third party return information may be released to the Department of Justice. The first method is used in any case that has been “referred” to the Department. Upon referral, the Internal Revenue Service may disclose returns and return information pertaining to the referred case to the Department attorneys responsible for the case. *See* 26 U.S.C. § 6103(h)(3)(A); ***United States v. Bacheler***, 611 F.2d 443, 447 (3d Cir. 1979). The section contains no definition of a "referral,"[2] but the legislative history of the statute indicates that for purposes of Section 6103(h), “the referral of a tax matter by the IRS to the Justice Department would include those disclosures made by the IRS to the Justice Department in connection with the necessary solicitation of advice and assistance with respect to a case prior to a formal referral of the entire case to the Justice Department for defense, prosecution or other affirmative action.” Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976, 322 (1976), quoted in* ***McQueen v. United States***, 5 F. Supp. 2d 473, 488 n.31 (S.D. TX 1998), *aff’d*, 176 F.3d 478 (5th Cir. 1999). In ***McQueen***, the court held that there had been a referral under Section 6103(h) where an IRS agent had made a disclosure to an Assistant United States Attorney solely for the purpose of helping the IRS obtain a search warrant for an IRS administrative investigation of a possible criminal violation of the Internal Revenue Code. 5 F. Supp. 2d at 488-89 & n.31. Further, a formal referral by the IRS does not lose its character as a “referral” merely because an investigation originates with the Department of Justice rather than the Internal Revenue Service. ***United States v. Batcheler***, 611 F.2d 443, 448 (3d Cir. 1979).

In those instances in which no "referral" has been made, the Department may obtain tax returns and return information by a written request to the Secretary of the Treasury from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General. [3] The written request must set forth the need for disclosure of the

[2] A definition of “referral” applicable to the use of administrative summonses is set forth in 26 U.S.C. § 7602(d) (“A Justice Department referral is in effect with respect to any person if -- (i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or (ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.”)

[3] The specificity of the statute suggests that the authority to request returns and return information by letter is limited to the specified officials and cannot be delegated. *See* ***United States v. Mangan***, 575 F.2d 32, 39 (2d Cir. 1978) (“When Congress chooses to speak with such specificity, courts must heed its language.” (*citing* ***United States v. Giordano***, 416 U.S. 505 (1974))).

specific return or specific return information. Upon such a request, the Secretary "shall disclose" the return or return information. 26 U.S.C. § 6103(h)(3)(B).

42.05[3][b] Joint Tax/Non-Tax Criminal Investigation

Section 6103 does not explicitly provide for the use, in the non-tax portion of a joint tax/non-tax investigation, of returns and return information obtained under Section 6103(h). However, an IRS regulation, Treas. Reg. § 301.6103(h)(2)-1, does provide for such use under specific limited conditions. The regulation authorizes the use of returns and return information in the non-tax portion of an investigation pursuing both tax and non-tax charges where (1) the return information has been obtained for use in, and is being used in, the tax portion of the case; (2) the tax portion of the investigation has been duly authorized by the Tax Division; and (3) the non-tax portion of the investigation involves or arises out of the particular facts and circumstances giving rise to the tax portion of the case. Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). The regulation also provides that if the tax administration portion of the investigation is terminated, the prosecutor cannot continue to use the returns and return information without obtaining an order under section 6103(i). Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). Because of the statute's silence on the use of returns and return information addressed by Treas. Reg. § 301.6103(h)(2)-1, the Tax Division believes that the most prudent course for prosecutors is to obtain an order under Section 6103(i) before using returns or tax return information in their possession for the non-tax portion of a joint tax/non-taxinvestigation.

42.05[3][c] Investigative Disclosures

Section 6103(h) contains no specific provision for investigative disclosures by federal prosecutors. However, the regulations do allow disclosure of returns and return information by federal prosecutors under certain circumstances. Authorized disclosures include, but are not limited to, disclosures made (1) to accomplish any purpose or activity of the nature described in Section 6103(k)(6) (*i.e.*, obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of the Internal Revenue Code); (2) to interview, and obtain relevant information from, a taxpayer or third-party witness who may be called in the proceeding; or (3) to conduct plea or settlement negotiations, or to obtain stipulations of facts. Treas. Reg. § 301.6103(h)(2)-1(b). Disclosure of return or taxpayer return information for such purposes is permitted only in those instances in which the proper purpose of section 6103(h) cannot be accomplished without the disclosure.[4]

42.05[3][d] Disclosure in Judicial and Administrative Tax Proceedings

Section 6103(h)(4) governs the Department's dissemination of a tax return or tax return information in judicial and administrative tax proceedings. The Section allows disclosure under "party," "item," and "transaction" tests similar to those in Section 6103(h)(2). 26 U.S.C. § 6103(h)(4)(A), (B), (C). It also authorizes disclosure "to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure," but permits the court "to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title." 26 U.S.C. § 6103(h)(4)(D). The statute further provides, however, that "such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation." 26 U.S.C. § 6103(h)(4).

Since the bases for disclosure are worded in the disjunctive, a return or return information may be disclosed in a judicial proceeding, pursuant to section 6103(h)(4), as long as any one of the four listed criteria is met. *See, e.g.*, ***Tavery v. United States***, 32 F.3d 1423, 1430 (10th Cir. 1994); ***Hobbs v. United States ex rel. Russell***, 209 F.3d 408, 411 (5th Cir. 2000) (holding that district court did not err in concluding that plaintiff could not maintain a suit for violation of Section 6103, because IRS properly disclosed his tax return information under Section 6103(h)(4)(A)); ***Rice v. United States***, 166 F.3d 1088, 1092 (10th Cir. 1999) (holding that revelation of return information in trial proceedings was proper "under the exception to § 6103 allowing such disclosure in federal court where the taxpayer is a party to the proceedings. 26 U.S.C. §

[4] Prosecutors should be aware that investigative disclosures have come under fire in the courts, sometimes with bizarre results. For example, in ***Snider v. United States***, 468 F.3d 500 (8th Cir. 2006), a decision as to which the IRS issued an action on decision stating its nonacquiescence, action on dec., 2007-03, 2007 WL 2172814 (Jul. 23, 2007), a panel of the Eighth Circuit held that an agent violates section 6103 "when he or she identifies the subject of his or her investigation." 468 F.3d at 507. The panel found that "[t]he government has neither shown that the disclosure of the Taxpayers' identity was necessary nor does the record reveal any necessity for the disclosures." Id. The panel did not explain, however, how, without disclosing the identity of the taxpayer under investigation, an agent could avoid confusing a third-party witness about the nature and scope of the investigation or how the absence of such a disclosure would not have an adverse impact on accuracy and reliability of the information provided by the third-party witness. See Action on Decision 2007-03 (discussion of issue 1). Decisions such as Snider add uncertainty and risk to the use of disclosures of return and return information in investigations.

6103(h)(4)(A)”). The authority in Section 6103(h)(4) extends only to judicial and administrative tax proceedings; it does not allow disclosures to the public or for any other purpose.

Note that Sections 6103(h)(4)(A) - (C) contain more stringent tests for disclosure than the parallel tests in Sections 6103(h)(2)(A) - (C). Under subsection (h)(2), the IRS is permitted to disclose returns and return information to the Department of Justice if the taxpayer "is or may be" a party to the proceeding, the treatment of an item on the return “is or may be” related to the resolution of an issue in the proceeding or investigation, or such return or return information “relates or may relate” to a transactional relationship between a person who is or may be a party and the taxpayer. However, under Section (h)(4), the disclosure of the information by the Department is limited to those instances in which a “taxpayer *is* a party,” the information “*is* directly related to” the resolution of an issue in the proceeding or investigation, or such return or return information “directly relates to” a transactional relationship between a person who is a party and the taxpayer. *See* ***Tavery v. United States***, 32 F.3d 1423, 1429 (10th Cir. 1994) (containing a discussion of "directly related"); ***United States v. Tsanas***, 572 F.2d 340, 348 (2d Cir. 1978).

Finally, Section 6103(h)(4)(D) allows the prosecutor to produce returns and return information when ordered to do so by a court to meet the government’s discovery obligations. Standing court rules providing for discovery should be sufficient to meet the requirement for a court order, but we are not aware of any cases on point. Although Section 6103(h)(4)(D) specifically refers only to Federal Rule of Criminal Procedure 16 and 18 U.S.C. § 3500, it has been held that the statute does not preclude the disclosure of exculpatory information under ***Brady v. Maryland,*** 373 U.S. 83 (1963), and ***United States v. Giglio***, 405 U.S. 150 (1972). ***United States v. Dawes***, Nos. 88-10002-01, 90-10036-01 and 88-10002-02, 1990 WL 171074, at *4 (D. Kan. Oct. 15, 1990) (“If the United States Attorney has knowledge of and access to IRS records showing certain government witnesses, whose testimony and credibility are material to the guilt of the defendants, are the subject of a current IRS audit or investigation, those records should be disclosed as ***Brady*** material.). Further, the IRS generally complies with court orders requiring disclosure of exculpatory information under ***Brady*** and ***Giglio***. *See* IRS Publication No. 4639, *Disclosure and Privacy Law Reference Guide* at 12-18 (Oct. 2007 ed.). In Publication No. 4639, the IRS advises that, where there is such an order, “the United States should request the court to conduct an *in camera* review of any third party return information located. If, after *in camera* review, the court rules that the Constitution requires information to be provided to the defendant, the United States should request a disclosure order that also imposes upon the parties conditions restricting the use of the information solely to the instant case, and preventing dissemination by any person in any manner outside the instant proceeding. For sample language of an appropriate protective order, *see* ***United States v. Moriarty***, 1969 U.S. Dist. LEXIS 12657, at *1 (E.D. Wis. Jan. 3, 1969)."

42.05[4] Section 6103(i) - Disclosure to Federal Officers or Employees for Administration of Federal Laws Not Related to Tax Administration

42.05[4][a] Generally

Section 6103(i) authorizes the disclosure of tax returns and return information to Department of Justice prosecutors for use in non-tax criminal investigations and prosecutions under certain conditions. The statute distinguishes between information obtained from the taxpayer or his representative and other return information. Section 6103(i) provides that a federal agency enforcing a non-tax federal criminal law must obtain an *ex parte* order in order to obtain a tax return or taxpayer return information. Other return information can be obtained through a written request by a specifically designated federal official.

42.05[4][b] Disclosure Pursuant to Court Order: Tax Returns and Taxpayer Return Information

Section 6103(i)(1) provides that "*any* return or return information . . . shall, *pursuant to and upon the grant of* an *ex parte* order by a Federal district court judge or magistrate," be disclosed to officers and employees of any federal agency (not to the agency itself) for non-tax criminal investigation purposes. 26 U.S.C. § 6103(i)(1) (emphasis added). The purposes for which the return information may be used are limited to (1) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute (not involving tax administration) to which the United States or the federal agency is or may be a party; (2) any investigation which may result in such a proceeding; or (3) any federal grand jury proceeding pertaining to enforcement of a federal non-tax criminal statute.

42.05[4][c]   Application for the Order

Section 6103(i)(1)(B) specifies that only the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a criminal division organized crime strike force may authorize application for an order seeking disclosures of returns and return information in non-tax criminal cases. Acting officials may also authorize applications pursuant to Section 6103(i)(1). *See* ***United States v. Bledsoe***, 674 F.2d 647, 669-70 (8th Cir. 1982). However, that authority may not be delegated.

An application pursuant to Section 6103(i) must establish (1) reasonable cause to believe that a specific non-tax criminal violation has occurred, 2) reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of the crime, 3) that the return or return information will be used solely for the criminal investigation of the referenced crime, and 4) that such information cannot reasonably be obtained from another source. 26 U.S.C. § 6103(i)(1)(B)(i)-(iii); *see also* ***In re Hampers***, 651 F.2d 19, 21 (1st Cir. 1981). A copy of a sample application and proposed order are attached.

As noted above, Section 6103(i) also provides a mechanism for the release of return information that is not taxpayer return information. *See* 26 U.S.C. § 6103(i)(2).[5] Under Section 6103(i)(2), non-taxpayer return information may be disclosed pursuant to a simple written request. The request must include (1) the name and address of the taxpayer to whom the requested information relates, (2) the taxable periods to which the return information relates, (3) the statutory authority under which the case or investigation is proceeding, and (4) the specific reason why disclosure is or may be relevant. 26 U.S.C. § 6103(i)(2)(B). Officials authorized to make the written request are the head of any federal agency or its Inspector General, and, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of

[5] As with respect to disclosure of tax returns and return information, the purposes for which the return information that is not taxpayer return information may be used are limited to (1) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute (not involving tax administration) to which the United States or the federal agency is or may be a party; (2) any investigation which may result in such a proceeding; or (3) any federal grand jury proceeding pertaining to enforcement of a federal non-tax criminal statute. 26 U.S.C. § 6103(i)(2)(A)(i)-(iii).

Investigation, the Administrator of the Drug Enforcement Administration, any United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, and any attorney in charge of a criminal division-organized crime strike force. *See* 26 U.S.C. § 6103(i)(2)(A); ***United States v. Chemical Bank***, 593 F.2d 451, 457 (2d Cir. 1979).

42.05[4][d] Use or Further Disclosure of Returns and Return Information in Judicial Proceedings

42.05[4][d][i] Returns and Taxpayer Return Information

Under Section 6103(i)(4)(A), returns and taxpayer return information obtained by way of an *ex parte* court order pursuant to 26 U.S.C. 6103(i)(1) or 26 U.S.C. 6103(i)(7)(C)[6] may be disclosed in non-tax criminal cases or related civil forfeiture proceedings upon a finding by the court that the information is probative of an issue in the proceeding or upon issuance of an order requiring production of the information under the Jencks Act (18 U.S.C. § 3500) or Rule 16 of the Federal Rules of Criminal Procedure.

42.05[4][d][ii] Other Return Information Obtained by Letter

Section 6103(i)(4)(B) provides that return information other than taxpayer return information may be disclosed without an order in a non-tax criminal case or related civil forfeiture proceeding to which the United States or a federal agency is a party. Even if such other return information was obtained along with taxpayer return information under an (i)(1) order, the statute does not require any further order or other permission to use and disclose the non-taxpayer return information in the criminal trial or civil forfeiture proceeding.

42.05[4][d][iii] Withholding Return Information and Suppression

No return or return information shall be admitted into evidence under Section 6103(i)(4) if the Secretary of the Treasury determines, and notifies the Attorney General or his or her delegate or the head of the federal agency concerned, that such admission would reveal the identity of a confidential informant or would otherwise impair a tax

[6] Section 6103(i)(7)(C), which relates to disclosures pursuant to an *ex parte* court order of return information relating to terrorist activities, expired effective December 31, 2007, but legislation that would make the subsection permanent is currently pending in Congress. See paragraph 42.05[5], *infra*.

investigation. *See* 26 U.S.C. § 6103(i)(4)(C). Any improper admission of evidence under the subsection is not, as such, reversible error. *See* 26 U.S.C. § 6103(i)(4)(E).

Section 6103(i) does not permit the IRS to disclose return information for use in a civil case or a civil forfeiture case. ***United States v. $57,303 in U.S. Currency***, 737 F. Supp. 1041, 1042 (C.D. Ill. 1990). However, return information obtained by a prosecutor for use in a non-tax criminal investigation or prosecution may subsequently be used in a "related" civil forfeiture proceeding if the requirements of Section 6103(i)(4) are met (*i.e.*, the court must determine that the material is "probative" of an issue in the proceeding). ***United States v. 3814 N.W. Thurman Street***, 1996 WL 453043 (D. Ore. 1996); ***$57,303 in U.S. Currency***, 737 F. Supp. at 1043.

The imposition of the exclusionary rule is not warranted for a disclosure of return information that violates Section 6103. Congress has specifically provided civil (26 U.S.C. 7431) and criminal (26 U.S.C. 7213) penalties for violations of Section 6103 and, absent specific reference to an exclusionary rule, it is not appropriate for courts to read such a provision into the act. *See* ***United States v. Orlando***, 281 F.3d 586, 595-95 (6th Cir. 2002) (criminal case); ***Nowicki v. Commissioner***, 262 F.3d 1162, 1163-64 (11th Cir. 2001) (civil case); ***United States v. Thompson***, 936 F.2d 1249, 1250-51 (11th Cir. 1991) (in criminal case, government's failure to comply with a statute does not warrant application of exclusionary rule).

42.05[4][d][iv] Disclosure of Return Information For Other Purposes

Return information may be disclosed, upon application of a specified person for an *ex parte* court order, for the purpose of locating a fugitive charged with a federal felony. *See* 26 U.S.C. § 6103(i)(5). Only persons named in section 6103(i)(1) may make an application for disclosure to locate a fugitive. However, return information is not to be disclosed if it will result in the identification of a confidential informant or will otherwise seriously impair a tax investigation. *See* Section 6103(i)(6).

Under Section 6103(i)(3)(A), return information that is evidence of a possible violation of any federal law not involving tax administration may be disclosed to the extent necessary to make the appropriate federal agency aware of the potential violation. ***In re Grand Jury Investigation***, 688 F.2d 1068, 1071 (6th Cir. 1982). In addition, under Section 6103(i)(3)(B), disclosure of return information (other than taxpayer return information) is authorized in emergency situations, such as those involving a risk of death or physical injury, or flight from federal prosecution.

42.5 [5] Disclosure of Return Information Relating to Terrorist Activities

The Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, amended Section 6103 to provide for disclosure of return information for responding to or investigating terrorist incidents, threats, or activities, and for analyzing intelligence concerning terrorist incidents, threats, or activities. *See* 26 U.S.C. §§ 6103(i)(3)(C) & 6103(i)(7). The authority under these provisions terminated, however, on December 31, 2007. 26 U.S.C. §§ 6103(i)(3)(C)(iv) & 6103(i)(7)(E). Legislation that would eliminate the sunset provisions is currently pending in Congress. *See* H.R. 6049, 110th Cong. (2d Sess.) § 251 (2008); S. 3125, 110th Cong. (2d Sess.) § 251 (2008). Unless and until legislation eliminating the sunset provisions is enacted, disclosure of return information relating to terrorist activities is not permitted, unless such disclosure falls under one of the other provisions of 26 U.S.C. § 6103.

Section 6103(i)(3)(C) permitted the Secretary of the Treasury to disclose, in writing, return information (other than taxpayer return information) that might be related to a terrorist incident, threat, or activity to the extent necessary to apprise the head of the appropriate federal law enforcement agency responsible for investigating or responding to that terrorist incident, threat, or activity. In turn, the head of the agency was allowed to disclose such return information to agency officers and employees to the extent necessary to investigate or respond to the terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(3)(C)(i). Information also was permitted to be provided under this provision to the Attorney General to the extent necessary for, and solely for use in preparing, an application under 26 U.S.C. § 6103(i)(7)(D), for an *ex parte* disclosure order. 26 U.S.C. § 6103(i)(3)(C)(ii). However, return information was not to be disclosed if it would result in the identification of a confidential informant, or would otherwise seriously impair a tax investigation. *See* Section 6103(i)(6).

Section 6103(i)(7) provided for disclosure of return information (other than taxpayer return information) relating to terrorist activities upon written request to the Secretary of the Treasury by certain officers and employees of a federal law enforcement agency or federal intelligence agency. The officers and employees to whom disclosure was made were required to be personally and directly engaged in an investigation of, response to, or analysis of intelligence and counterintelligence information concerning any terrorist incident, threat, or activity. These officers and employees were permitted to use this information solely in the investigation, response, or analysis, and in any judicial, administrative, or grand jury proceeding, pertaining to any such terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(A) - (B). However, return information was not to be disclosed if it would result in the identification of a confidential informant or would otherwise seriously impair a tax investigation. *See* 26 U.S.C. §6103(i)(6).

A request by a federal law enforcement agency had to be made by the head of the federal law enforcement agency (or delegate) involved in the response to or investigation of any terrorist incident, threat, or activity. The request was required to set forth the specific reason(s) why the requested disclosure might have been relevant to a terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(A)(iii).

For a disclosure to an intelligence agency, the request was required to be made by a Presidentially appointed and Senate-confirmed officer or employee of the Department of Justice or the Department of the Treasury, or by the Director of the United States Secret Service. In addition, this official had to be responsible for the collection and analysis of intelligence and counterintelligence information concerning any terrorist incident, threat or activity. The request was required to set forth the specific reason(s) why the disclosure sought might have been relevant to a terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(B)(ii)-(iii).

Section 6103(i)(7)(C) also provided for disclosure of returns or return information relating to a terrorist incident, threat or activity, pursuant to an *ex parte* order. The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, or any United States Attorney was permitted to authorize an application to a Federal district court judge or magistrate for an order under this Section. A Federal district court judge or magistrate judge was permitted to grant an *ex parte* order if, based on the facts submitted, he or she determined (1) that there was reasonable cause to believe, based upon information believed to be reliable, that the return or return information might have been relevant to a matter relating to the terrorist incident, threat, or activity; and (2) that the return or return information was sought exclusively for use in a federal investigation, analysis, or proceeding concerning any terrorist incident, threat, or activity. 26 U.S.C. § 6103(i)(7)(C)(ii).

This information was permitted to be disclosed (but only to the extent necessary as provided in the order) to officers and employees of the appropriate federal law enforcement or intelligence agency responsible for investigating or responding to a terrorist incident, threat, or activity to respond to such terrorist incident, threat, or activity. Use of the information was limited to the federal investigation or analysis concerning the terrorist incident, threat, or activity. 26 U.S.C. §6103(i)(7)(C)(i).

Finally, Section 6103(i)(7)(D) provided a special rule for *ex parte* disclosures by the IRS. In those instances, the Secretary of the Treasury was permitted to authorize an application to a federal district court judge or magistrate for an *ex parte* order under 26 U.S.C. § 6103(i)(7)(C)(i) to disclose information to the extent necessary to apprise the head of the appropriate federal law enforcement agency responsible for investigating or responding to a terrorist incident, threat, or activity and solely for use in a federal investigation, analysis or proceeding concerning any terrorist incident, threat, or activity.

42.6 REMEDIES FOR VIOLATIONS OF §6103

42.06[1] Criminal Sanctions

Section 7213 of the Internal Revenue Code provides for criminal penalties for willful violations of Section 6103, and Section 7213A provides for criminal penalties for willfully inspecting any return or return information, except as authorized by the Code.

Section 7213 provides that a willful violation of the non-disclosure provisions of section 6103 is a felony, punishable with up to five years in jail, or a fine, or both. *See* ***United States v. Richey***, 924 F.2d 857 (9th Cir. 1991).[7] In the case of federal employees and officers, Section 7213 also mandates dismissal or discharge upon conviction. The statute of limitations for prosecutions brought under the Section is three years. *See* 26 U.S.C. § 6531.

Section 7213A is a misdemeanor offense and governs the unauthorized examination of return information, without regard for whether the "examiner" discloses the information to others. To secure a conviction under Section 7213A, the government must establish that (1) an officer or employee of the United States, any person described in Section 6103(n) of the Code, or any state or other employee described in Section

[7] Under the penalty provisions of 18 U.S.C. § 3571, the fine may be as high as $250,000.

7213A(a)(2) of the Internal Revenue Code (2) willfully inspected (3) any return or return information (4) in a manner not authorized by the Code. A violation of Section 7213A is punishable by a fine of up to $100,000 (pursuant to 18 U.S.C. § 3571), imprisonment of up to one year, and, if the offender is a federal employee, mandatory discharge from employment.

The unauthorized examination of computerized taxpayer information may also be prosecuted under 18 U.S.C. § 1030(a)(2)(B), which provides that any person who intentionally accesses a computer "without authorization or exceeds authorized access, and thereby obtains . . . information from any department or agency of the United States" may be imprisoned for a year, or fined, or both.

42.6 [2] Civil Remedies

Section 7431 of the Internal Revenue Code provides for a civil remedy against the United States for a taxpayer who has been injured by the unlawful disclosure or inspection of his or her tax information by an employee of the United States. Suit may be brought only against the United States; the individual employee who made the improper disclosure or inspection is neither personally liable nor a proper party to the suit. ***Diamond v. United States***, 944 F.2d 431, 435 (8th Cir. 1991). The United States is not civilly liable for unauthorized disclosures or inspections made by former employees. *See* 26 U.S.C. § 7431(a)(1) (referring only to conduct by "any officer or employee of the United States"). A two-year statute of limitations, which begins to run at the time the taxpayer discovers the disclosure or inspection, applies to actions brought under Section 7431. 26 U.S.C. § 7431(d).

In order to make a case for recovery under section 7431, a taxpayer must show (1) that an unauthorized examination or disclosure of return information was made, (2) that the examination or disclosure was knowing or was the result of negligence, and (3) that the examination or disclosure violated 26 U.S.C. § 6103. *See* 26 U.S.C. § 7431(a). No liability shall attach, however, if the United States shows either that the disclosure or inspection resulted from a good faith, but erroneous, interpretation of Section 6103, or that the disclosure or inspection was requested by the taxpayer. 26 U.S.C. § 7431(b); *see, e.g.*, ***Barrett v. United States***, 51 F.3d 475, 479 (5th Cir. 1995) (disclosure of taxpayer information not in good faith when IRS employee did not review Section 6103 and did not secure approval of supervisor before circulating taxpayer's return information).

If successful, the aggrieved taxpayer may recover the greater of actual damages or $1,000 per improper disclosure, plus court costs. *See* 26 U.S.C. § 7431(c)(1). There is a split of circuit authority as to whether a single act of disclosure to multiple people counts as multiple acts of disclosure. *Compare* ***Siddiqui v. United States***, 359 F.3d 1200, 1202-03 (9th Cir. 2004) (holding that agent's disclosure to 100 people in one room at one time constituted single act of disclosure), ***Miller v. United States***, 66 F.3d 220, 223-24 (9th Cir. 1995) (disclosure to newspaper reporter deemed single act of disclosure, even though reporter disseminated information to wider audience), *and* ***Rorex v. Traynor***, 771 F.2d 383, 387 (8th Cir. 1985) (liquidated damages of $1000 awarded for a single act of unauthorized disclosure which included numerous improperly disclosed items); *with* ***Snider v. United States***, 468 F.3d 500, 508-09 (8th Cir. 2006) (rejecting government's arguments that a disclosure to more than one person at a time amounts to one act of disclosure and that a disclosure of more than one piece of return information in a single interview constitutes a single act of disclosure), *action on dec. (nonacq.)*, 2007-03 (Jul. 23, 2007), *and* ***Mallas v. United States***, 993 F.2d 1111, 1124-25 (4th Cir. 1993) (holding that single mailing of information to two addressees counted as two acts of disclosure).

In a case in which the unauthorized disclosure or inspection was willful or was the result of gross negligence and the taxpayer presents proof of actual damages, the taxpayer may also recover punitive damages. *See* 26 U.S.C. § 7431(c)(1)(B)(ii); ***Siddiqui***, 359 F.3d at 1204.

APPENDIX

Sample Application For Section 6103(i)(1) Order

IN THE UNITED STATES DISTRICT COURT

FOR THE_______________DISTRICT OF _______________

IN RE:	)	No. ____________
Investigation of__________________	)	
	)	
	)	APPLICATION FOR EX PARTE
	)	ORDER FOR DISCLOSURE OF
	)	RETURNS AND RETURN
	)	INFORMATION

The UNITED STATES OF AMERICA, through its attorney, ____________________, United States Attorney, **[or________________, Assistant United States Attorney,]** [[8]] hereby makes application to the Court for an Ex Parte Order directing the Internal Revenue Service (IRS) to disclose to applicant (and others hereinafter named) all returns and return information relating to thefollowing:

[Set forth the following as to each person or entity]

Name:

Address:

Social Security No. or

[8] The U.S. Attorney's authority to authorize an application for an order under section 6103(i) may *not* be delegated. The U.S. Attorney either must *personally* sign the section 6103(i) application or authorize the application.

Employer Identification No.:

Taxable Period(s):

In support of this application, the applicant alleges and states as follows:

1. There is reasonable cause to believe, based upon information believed to be reliable, that violations of a specific criminal act or acts have been committed, to wit, violations of Title , United States Code, Section_______ **[cite statute and describe offense, e.g., "Section 1344 (bank fraud")]**. This reasonable cause is based upon information supplied to the United States Attorney's Office by the **[agency]**, which applicant believes to be reliable, **[and/or information developed pursuant to a Grand Jury investigation,]** which is summarized as follows:

[state facts sufficient to allow court to find reasonable cause to believe that statute has been violated and, where necessary, the basis for believing that the information is reliable.]

2. There is reasonable cause to believe that the above-described returns and return information are or may be relevant to a matter relating to the possible violations of said criminal statutes. **[State the connection between the material requested to be disclosed and the matter in issue related to the commission of the crime and facts sufficient for the court to find that such connection exists.]**

3. The returns and return information are sought exclusively for use in a Federal criminal investigation or proceeding concerning the possible violations of the criminal statutes described above, **[including a Grand Jury investigation now pending [or which is anticipated to commence] in this District.]**

4. The returns and return information cannot reasonably be obtained under the circumstances from any other source.

5. Applicant is the United States Attorney **[or an Assistant United States Attorney]** for theDistrict of and is personally and directly engaged in the investigation and prosecution of matters related to the enforcement of the above- mentioned violations of Title **[cite title]** of the United States Code, to which the

United States is or may be a party. The information sought herein is solely for use for that purpose. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. § 6103 and 26 C.F.R. § 301.6103(i)-1.

6. In addition to applicant, the followingindividuals are personally and directly engaged in the investigation of the above-mentioned violations, and applicant therefore requests that disclosure be permitted to thefollowing:

> **[State names and titles of the agents and any other AUSAs involved in the investigation.]**
>
> **NOTE: State and local police and other non-Federal agents who may be working on the investigation or task force may *not* be given access to returns and return information, unless they have been deputized as Deputy United States Marshals and are supervised by a Federal employee.]**

7. Applicant further states that the subject of this Application is the subject of a pending investigation in this District, publication of the Application and Order would compromise that investigation, and the failure to seal the Application and Order would result in the public disclosure of confidential information relating to the identified taxpayer and entities related to him.

WHEREFORE, the Applicant respectfully requests this Court to enter an Order under seal granting disclosure by the Internal Revenue Service of the returns and return information specified in this Application, and further ordering that this Application be filed and maintained under seal.

Respectfully submitted,

____
United States Attorney
[Assistant United States Attorney]

[As noted, the United States Attorney must *personally* sign the section 6103(i) application or authorize the application for the (i) order. Some districts follow the practice of having an Assistant United States Attorney apply for the order and having the United States Attorney sign an authorization for the application. A

sample of such an authorization appears below. The Tax Division recommends that this practice be followed where an Assistant United States Attorney applies for the (i) order.]

AUTHORIZATION FOR EX PARTE APPLICATION

The undersigned, being the United States Attorney for the ________________ District of______________, pursuant to Title 26, United States Code, Section 6103(i)(1), hereby authorizes the foregoing Application for Ex Parte Order for Disclosure of Tax Returns and Return Information.

Dated: ____________________ ________________________

United States Attorney

Sample 6103(i)(1) Order

IN THE UNITED STATES DISTRICT COURT
FOR THE__________DISTRICT OF ________________

IN RE:	)	Case No. ____________
Investigation of__________________	)	
	)	
	)	ORDER (UNDER SEAL)

The Court having received and considered the Application of the United States for an Ex Parte Order, pursuant to Title 26, United States Code, Section 6103(i), directing the Internal Revenue Service to disclose certain returns and return information in connection with the above-referenced investigation, and good cause appearing, the Court FINDS:

1. There is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act or acts have been committed, namely, **[cite statutes violated]**.

2. There is reasonable cause to believe that the return and return information are or may be relevant to a matter relating to the commission of such act oracts.

3. The returns and return information are sought exclusively for use in a federal criminal investigation and proceeding concerning such act or acts, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

4. Applicant, United States Attorney ___________________**[or Assistant United States Attorney________________]** and **[any other AUSAs and agents]** are employees of the United States Department of Justice **[and, in the case of deputized**

state or local personnel, are acting under the direction and control of Applicant] and are personally and directly engaged in, and the information sought is solely for their use in, the investigation of possible violations of the above-mentioned criminal statutes.

IT IS, THEREFORE, ORDERED that the Internal Revenue Service (1) disclose such returns and return information of:

> **[Set forth the persons, entities, social security numbers and taxable periods]**

as have been filed and are on file with the Internal Revenue Service; (2) certify where returns and return information described above have not been filed or are not on file with the Internal Revenue Service; and (3) disclose such returns and return information described above as may come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than **[Set forth number of days up to one year, usually 90 days]** days thereafter.

IT IS FURTHER ORDERED that the Applicant, or any other officers or employees of any federal agency, shall use the returns and return information disclosed solely in investigating the alleged violations specified and preparing the matter for trial, and that no disclosure shall be made to any other person except in accordance with the provisions of Title 26, United States Code, Section 6103.

IT IS FURTHER ORDERED that the Clerk of Court shall seal both the Application and this Order, and that the Application and Order shall remain under seal unless and until further order of this Court.

DATED this___________day of ___________, 20 .

____
United States Magistrate Judge
United States Court
District of _______________

Sample Motion for a Protective Order

IN THE UNITED STATES DISTRICT COURT
FOR THE____________DISTRICT OF ________________

UNITED STATES OF AMERICA	)
	)
v.	) Case No. _____________
	)
______________________________	)
Defendant(s)	)
	)

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER REGARDING DISCOVERY

The United States, through undersigned counsel, respectfully moves the Court, pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure, to enter an order prohibiting the unauthorized disclosure of certain discovery material or information contained therein to non-litigants. In support of this motion, the government states as follows:

1. Defendant(s) [identify defendant(s) and describe charges in indictment].

2. The voluminous [or describe scope of discovery] discovery materials in this case contain, among other things, private financial information about numerous individuals; other private information, including social security numbers, addresses, and birth dates; and confidential tax returns and taxpayer return information within the meaning of Title 26, United States Code, Section 6103(b). Disclosure of such tax return and taxpayer return information is governed by Title 26 United States Code, Section 6103(a), which mandates that return and return information will be confidential except as authorized by Section 6103. Section 6103(h)(4)(D) permits disclosure to the defense of such tax return

and taxpayer return information in accord with Rule 16 of the Federal Rules of Criminal Procedure and Title 18, United States Code, Section 3500, but further disclosure of this tax return and taxpayer return information by defendants or their attorneys is restricted by Section 6103.

3. The government has followed all requirements of Rule 16, and will follow the requirements of Title 18, United States Code, Section 3500. The government asks the Court to ensure that the defendant(s) is/are informed about the limitations of Federal Rule of Criminal Procedure 6(e), regarding grand jury transcripts [if appropriate], and Title 26, United States Code, Section 6103(a), regarding tax returns and taxpayer return information, and the appropriate legal purposes for which certain discovery may be used.

4. The government believes that because of the volume and nature of the discovery in this case, it is appropriate for the Court to enter a Protective Order containing the following provisions (when the term "defendant" is used, said term encompasses an attorney for the defendant):

A. Many of the materials provided as discovery (hereinafter discovery materials), which were produced by the government in preparation for or in connection with any stage of the proceedings in this case, including, but not limited to: individuals' records, investigators or agency memoranda or reports, grand jury transcripts, witness statements, tapes, computer disks, transcripts, applications, affidavits, computer or electronic records, memoranda of interview, tax returns, correspondence with the Internal Revenue Service, internal books and records of a witness's or defendant's business, bank records, and any documents and tangible objects provided by the government other than trial exhibits (i.e., items actually admitted during the trial and made part of the record), are not public information. Accordingly, these discovery materials and all copies thereof should be protected from unnecessary dissemination.

B. Such discovery materials provided by the United States should be utilized by the defendant(s) solely in connection with the defense of this case and for no other purpose and in connection with no other proceeding.

C. Such discovery materials and their contents, and any notes or other record of such materials or their contents, should not be disclosed either directly or indirectly to any person or entity other than the defendant(s), defendant(s)' counsel, persons employed to assist in the defense, individuals who are interviewed as potential witnesses in the case, or such other persons as to whom the Court may authorize disclosure.

D. Such discovery materials should not be copied or reproduced except as necessary to provide copies of the material for use by an authorized person as described above to prepare or assist in the defense, and all such copies and reproductions will be treated in the same manner as the original matter.

E. [Each] Defendant's counsel should inform the defendant of the provisions of the Protective Order, and direct him/her not to disclose or use any information contained in the government's discovery in violation of the Protective Order. However, nothing contained in the Protective Order will preclude any party from applying to the Court for further relief or for modification of any provision hereof.

Respectfully submitted,

____
United States Attorney
[Assistant United States Attorney]

Sample Proposed Protective Order

IN THE UNITED STATES DISTRICT COURT
FOR THE__________DISTRICT OF ________________

UNITED STATES OF AMERICA	)
	)
v.	) Case No. ____________
	)
______________________________	)
Defendant(s)	)
	)

ORDER

THIS MATTER having come before the Court on the motion of the United States of America, by and through its undersigned counsel, and the Court having found that entering a Protective Order regarding discovery materials is appropriate, and for good cause shown,

IT IS on this_______day of________, 20_____,

ORDERED,

1. The government has produced voluminous discovery materials in this case that contain, among other things, individually identifiable information and other private information about numerous individuals, as well as confidential tax returns and taxpayer return information, within the meaning of Title 26, United States Code, Section 6103(b). Disclosure of such tax return and taxpayer return information is governed by Title 26 United States Code, Section 6103(a), which mandates that return and return information will be confidential except as authorized by Section 6103. Section 6103(h)(4)(D) permits disclosure to the defense of such tax return and taxpayer return information in accord

with Rule 16 of the Federal Rules of Criminal Procedure, but further disclosure of this tax return and tax return information by defendant(s) or his/her/their attorney(s) is restricted by Section 6103.

2. The discovery materials will also include information which is governed by Rule 6(e) of the Federal Rules of Criminal Procedure.

3. The materials produced by the government may be used by the defendant(s), defendant(s)'s counsel and any employees or agents of defendant(s)'s counsel solely in the defense of this case.

4. Defendant(s)'s counsel and defendant(s) will not disclose the tax return information or other private information contained in the discovery material directly or indirectly to any person except those assisting the defense, persons who are interviewed as potential witnesses, potential experts, or other authorized persons, during the course of the investigation and defense of this case.

5. The discovery material produced by the government will not be copied or reproduced unless the material is copied or reproduced for authorized persons to assist in the defense, and in the event copies are made, the copies shall be treated in the same manner as the original material.

6. When providing the discovery materials to an authorized person, the defendant(s)'s counsel must inform the authorized person that the materials are provided subject to the terms of this Protective Order and that the authorized person must comply with the terms of this Protective Order.

7. [Each] defendant(s)'s counsel will inform the defendant of the provisions of this Protective Order, and direct him/her/them not to disclose or use any information contained in the government's discovery in violation of this Protective Order. However, nothing contained in the Protective Order will preclude any party from applying to the Court for further relief or for modification of any provision hereof.

Date

_________________________,
Judge
United States District Judge

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43.00 SENTENCING: TAX DIVISION POLICIES AND GUIDELINES

43.1 GENERALLY

In 2005, the Supreme Court significantly altered the federal sentencing landscape when it decided ***United States v. Booker***, 543 U.S. 220 (2005). From 1987 until 2005, federal sentencing had been governed by the mandatory application of the United States Sentencing Guidelines (the Guidelines). The Guidelines required judges to find a number of facts at sentencing, to calculate the appropriate range of imprisonment, and to impose a sentence within the appropriate range. In ***Booker***, the Supreme Court held that the mandatory application of the Guidelines violated the Sixth Amendment. The Court elected to remedy this defect by making the Guidelines advisory. Sentencing judges must now impose sentences in accordance with 18 U.S.C. § 3553(a), which describes Congress's federal sentencing goals and lists the factors that sentencing judges must consider.

Both Supreme Court precedent and 18 U.S.C. § 3553(a)(4) require district courts to consider the applicable Guidelines range at sentencing. Although the Guidelines are no longer mandatory, a district court must still use the Guidelines to calculate a defendant's sentencing range and must consider this range when devising a sentence. ***Gall v. United States***, 552 U.S. 38, 49 (2007) ("[T]he Guidelines should be the starting point and the initial benchmark"); ***Rita v. United States***, 551 U.S. 338, 349-350 (2007); ***Booker***, 543 U.S. at 245-46. Thus, in calculating the advisory Guidelines range, the sentencing judge must make factual findings using the preponderance of the evidence standard, just as before ***Booker***. *See* ***Rita***, 551 U.S. at 350-351 (holding that the judicial fact-finding necessary to calculate the advisory Guidelines range does not violate the Sixth Amendment).

Accordingly, although the Guidelines are now advisory, calculating the Guidelines range remains a significant part of federal sentencing. The Supreme Court has recognized that the Sentencing Commission continues to play an important role at sentencing, because the Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'" ***Kimbrough v. United States***, 522 U.S. 85, 108-09 (2007) (quoting ***United States v. Pruitt***, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J.,

concurring)). Accordingly, "in the ordinary case, the Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.'" ***Id***. at 109 (quoting ***Rita***, 551 U.S. at 350). Moreover, because every sentencing court must consider the sentencing range recommended by the Guidelines, the Guidelines range is the sole means available for assuring some measure of uniformity in sentencing. Thus, a non-Guidelines sentence runs the risk of creating unwarranted disparities in sentencing, a result that conflicts with 18 U.S.C. § 3553(a)(6). A majority of the courts of appeals have held that sentences that fall within the properly calculated Guidelines range are entitled to a presumption of reasonableness on appeal. *See* ***United States v. Dorcely***, 454 F.3d 366, 376 (D.C. Cir. 2006); ***United States v. Green***, 436 F.3d 449, 457 (4th Cir. 2006); ***United States v. Alonzo***, 435 F.3d 551, 554 (5th Cir. 2006); ***United States v. Williams***, 436 F.3d 706, 708 (6th Cir. 2006); ***United States v. Mykytiuk***, 415 F.3d 606, 608 (7th Cir. 2005); ***United States v. Lincoln***, 413 F.3d 716, 717 (8th Cir. 2005); ***United States v. Kristl***, 437 F.3d 1050, 1053-1054 (10th Cir. 2006) (*per curiam*). The Supreme Court upheld the use of this appellate presumption in ***Rita***, 551 U.S. at 347. The Court made clear, however, that the presumption of reasonableness may only apply on appeal and that "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." ***Id***. at351.

After calculating the advisory Guidelines range, the Court must consider that range along with all the factors listed in 18 U.S.C. § 3553(a) before arriving at the final sentence. These factors include the following:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed--
>
>> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>>
>> (B) to afford adequate deterrence to criminal conduct;
>>
>> (C) to protect the public from further crimes of the defendant; and
>>
>> (D) to provide the defendant with needed educational or vocational training, medical care, or

> other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) . . . the sentencing range established . . . [by the Guidelines];
>
> (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . that . . . is in effect on the day of sentencing[;]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). Although a district court need not address each of these factors at length, "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." ***Rita***, 551 U.S. at 356; ***Gall***, 552 U.S. at 50 (explaining that sentencing court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing").

43.2 GUIDELINES APPLICATIONPRINCIPLES

43.02[1] Select the Appropriate Guidelines Manual

Section 1B1.11(a) of the Sentencing Guidelines mandates that a court "shall use the Guidelines Manual in effect on the date that the defendant is sentenced." *See* ***United States v. Fitzgerald***, 232 F.3d 315, 318 (2d Cir. 2000); ***United States v. Zagari***, 111 F.3d 307, 323 (2d Cir. 1997); *see also* ***United States v. Bailey***, 123 F.3d 1381, 1403-1406 (11th Cir. 1997). The same is true of policy statements. ***United States v. Schram***, 9 F.3d 741, 742 (9th Cir. 1993). If the court determines, however, that the use of the current Manual would violate the *ex post facto* clause by recommending a longer sentence, the court "shall use the Guidelines Manual in effect on the date that the offense was committed." USSG §1B1.11(b)(1); *see also* ***Fitzgerald***, 232 F.3d at 318-19; ***Zagari***, 111 F.3d at 323; ***United States v. Nelson***, 36 F.3d 1001, 1003 (10th Cir. 1994). Thus, if the sentencing guideline in effect at the time the offense was committed is more favorable to the defendant than the guideline in effect at the time of sentencing, the court must apply the more favorable guideline. ***United States v. Chasmer***, 952 F.2d 50, 52 (3d Cir. 1991).

Although the Guidelines are now advisory rather than mandatory, *ex post facto* principles largely still apply to the selection of the appropriate Guidelines Manual. Most of the courts of appeals have continued to require the use of the Manual in effect at the time the crime was committed if the use of the current Manual would disadvantage the defendant. *See* ***United States v. Cruzado-Laureano***, 404 F.3d 470, 488 (1st Cir. 2005); ***United States v. Kilkenny***, 493 F.3d 122, 127-30 (2d Cir. 2007); ***United States v. Iskander***, 407 F.3d 232, 242-43 (4th Cir. 2005); ***United States v. Wood***, 486 F.3d 781, 791 (3d Cir. 2007); ***United States v. Reasor***, 418 F.3d 466, 479 (5th Cir. 2005); ***United States v. Harmon***, 409 F.3d 701, 706 (6th Cir. 2005);[1] ***United States v. Larrabee***, 436 F.3d 890, 894 (8th Cir. 2006); ***United States v. Lopez-Solis***, 447 F.3d 1201, 1204-05(9th Cir. 2006); ***United States v. Foote***, 413 F.3d 1240, 1248-49 (10th Cir. 2005). The Seventh Circuit is the only court to have held that, post-***Booker***, *ex post facto* principles do not apply to the selection of the Guidelines Manual. ***United States v. Demaree***, 459 F.3d 791, 794-95 (7th Cir. 2006).[2] After the Supreme Court's decisions in ***Gall v. United States,*** 522 U.S. 38 (2007); ***Kimbrough v. United States,*** 552 U.S. 85 (2007); and ***Irizarry v. United States***, 553 U.S. 708, 128 S. Ct. 2198 (2008), the Solicitor General determined that, in light of district courts' significant discretion to vary from the advisory Guidelines range, the government should take the position that the *Ex Post Facto* clause does not prevent the use of a post-offense Guidelines amendment that increases the advisory Guidelines range. In any event, even if the district court begins its sentencing deliberations with an earlier version of the Guidelines, the sentencing court may now consider subsequent changes to the Guidelines as part of its analysis of the 18 U.S.C. § 3553(a) factors. ***Larrabee***, 436 F.3d at 894; ***Demaree***, 459 F.3d at 795.

Generally, for *ex post facto* purposes, the completion date of the offense determines which version of the Sentencing Guidelines is to be employed. USSG

[1] Although the Sixth Circuit suggested in ***Harmon*** that *ex post facto* analysis continues to apply to the Guidelines post-***Booker***, in a later opinion the court suggested the contrary in a footnote. *See* ***United States v. Barton***, 455 F.3d 649, 655 n.4 (6th Cir. 2006).

[2] The government confessed error in ***Demaree***, but the court of appeals rejected the government's position and found no error. 459 F.3d at 793,795.

§1B1.11, comment (n.2); ***Bailey***, 123 F.3d at 1406; ***Zagari***, 111 F.3d at 324; ***United States v. Cooper***, 35 F.3d 1248, 1251 (8th Cir. 1994), *vacated*, 514 U.S. 1094 (1995), *reinstated*, 63 F.3d 761 (8th Cir. 1995). When a revised edition of the Guidelines is applied to offenses that predate and postdate the revision, the Fourth Circuit has determined that such use does not violate the *ex post facto* clause. ***United States v. Lewis***, 235 F.3d 215, 217-18 (4th Cir. 2000); *see also* ***United States v. Sullivan***, 255 F.3d 1256, 1262 (10th Cir. 2001).

Section 1B1.11(b)(2) establishes the "one book" rule. This rule provides that the "Guidelines Manual in effect on a particular date shall be applied in its entirety." Thus, a court cannot pick and choose or apply guidelines sections piecemeal. *See* USSG §§1B1.11(b)(2) & 1B1.11, comment. (backg'd); *see also* ***Fitzgerald***, 232 F.3d at 319; ***United States v. Keller***, 58 F.3d 884, 890 (2d Cir. 1995) ("A version of the sentencing guidelines is to be applied in its entirety. A sentencing court has no authority to pick and choose, taking one provision from an earlier version of the guidelines and another from a later version."); ***Nelson***, 36 F.3d at 1003-04; ***United States v. Springer***, 28 F.3d 236, 237 (1st Cir. 1994); ***United States v. Lance***, 23 F.3d 343, 344 (11th Cir. 1994). The Guidelines also provide, "If the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." USSG §1B1.11(b)(3). The commentary to this provision explains that the use of a later version of the Guidelines does not violate the *ex post facto* clause, "[b]ecause the defendant completed the second offense after the amendment to the guidelines took effect." USSG §1B1.11(b)(3), comment. (backg'd). However, some courts have disapproved of the use of the one book rule and Section 1B1.11(b)(3) on *ex post facto* grounds. ***See United States v. Ortland***, 109 F.3d 539, 546 (9th Cir. 1997); ***United States v. Seligsohn***, 981 F.2d 1418, 1424 (3d Cir. 1992), *superseded on other grounds*, USSG App. C, amend. 474.

When a court applies an earlier edition of the Guidelines Manual, the court also must apply subsequent amendments to the extent that such amendments represent merely clarification rather than substantive changes. USSG §1B1.11(b)(2); *see also* ***United States v. Isabel***, 980 F.2d 60, 62 (1st Cir. 1992); ***United States v. Caballero***, 936 F.2d 1292, 1299 n.8 (D.C. Cir. 1991); ***United States v. Perdomo***, 927 F.2d 111, 116-17 (2d Cir. 1991); ***United States v. Howard***, 923 F.2d 1500, 1504 n.4 (11th Cir. 1991). Some offenses, such as conspiracy, attempted evasion, escape, and continuing criminal enterprise, are continuing offenses. For continuing offenses, a revised version of the Guidelines applies if the offense continues until after the effective date of the Guidelines revisions. Thus, in these so-called "straddle cases," there is no *ex post facto* violation in applying the version of the Guidelines that was in effect when the last affirmative act occurred, rather than the earlier version in effect when the conspiracy began, even though the later version specified a higher offense level for the same conduct. ***United States v. Barker***, 556 F.3d 682, 689 (8th Cir. 2009) ("Because tax evasion is a continuing offense, the date of the defendant's last act of evasion is the 'date of the offense of conviction' in determining the appropriate version of the guidelines under U.S.S.G. § 1B1.11."); ***United States v. Hirschfeld***, 964 F.2d 318, 325 (4th Cir. 1992); ***United States v. Stanberry***, 963 F.2d 1323 (10th Cir. 1992)***; United States v. Walton***, 908 F.2d 1289, 1299 (6th Cir.1990); ***United States v. Walker***, 885 F.2d 1353, 1354 (8th Cir. 1989).

43.2 [2] Guidelines Calculation

After determining which Guidelines Manual applies to the case, the prosecutor should next follow the steps outlined in the Manual in order to calculate the appropriate guideline range:

(a) Determine the applicable offense guideline from Chapter Two. *See* USSG §1B1.2 (Applicable Guidelines). The Statutory Index (Appendix A) provides a listing to assist in this determination.

(b) Determine the base offense level and apply any appropriate specific offense characteristics contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

See USSG §1B1.1. Finally, the prosecutor must also check to make sure that the calculation complies with Department of Justice policies. For example, compute the possible guideline range for each count of an indictment or information prior to accepting a plea to a single count to ensure that the plea is consistent with the Tax Division's major count policy.[3]

43.3 CALCULATING THE BASE OFFENSE LEVEL IN TAX CASES

Consistent with the overall plan of the sentencing guidelines, each tax guideline begins with a base offense level. Part T of Chapter Two of the Sentencing Guidelines contains the provisions governing most tax crimes. In determining the starting point for the base offense level, most guidelines in Part T of Chapter Two refer to the dollar amount of the "tax loss" attributable to the defendant. Once the sentencing court determines the total tax loss attributable to a defendant, the tax loss table contained in

[3] *See* United States Attorneys' Manual § 6-4.310.

Section 2T4.1 then provides the base offense level of the defendant. ***United States v. Powell***, 124 F.3d 655, 663 n.7 (5th Cir. 1997).[4]

43.03[1] Tax Loss

Section 2T1.1 defines tax loss for 26 U.S.C. §§ 7201, 7203 (with a minor exception), 7206(1) (with a minor exception), and 7207.[5] As provided in Section 2T4.1, a defendant's base offense level varies with the amount of tax loss. USSG §2T1.1(a)(1). If there is no tax loss, the base offense level is 6. USSG §2T1.1(a)(2).

For cases involving income tax evasion and filing false returns or statements, the tax loss is "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Section 2T1.1 also defines tax loss for failure to file offenses in Section 2T1.1(c)(2), failure to pay offenses, Section 2T1.1(c)(3); and offenses involving an improperly claimed refund, Section 2T1.1(c)(4). Section 2T1.1 further describes "presumptions" that the sentencing court should employ when calculating the tax loss in various situations involving tax evasion offenses, false return or statement offenses, and failure to file a return offenses. USSG §2T1.1(c)(1)(A)-(C); USSG §2T1.1(c)(2)(A)-(B). Specifically, these presumptions provide that the tax loss should equal a certain percentage of the unreported gross income, or improperly claimed deductions or exemptions at issue, plus all false credits claimed against tax, "unless a more accurate determination of the tax loss can be made." USSG §2T1.1(c)(1)(A)-(C); USSG §2T1.1(c)(2)(A)-(B).

The commentary to Section 2T1.1 explains that these presumptions are not binding, but rather serve as general formulas:

> In determining the tax loss attributable to the offense, the court should use as many methods set forth in subsection (c) and this commentary as are necessary given the circumstances of the particular case. If none of the methods of determining the tax loss set forth fit the circumstances of the particular case, the court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss that would have resulted had the offense been successfully completed.

[4] Most guidelines also contain "specific offense characteristics," which allow the base offense level to be increased on the basis of certain aggravating facts. *See* § 43.03[2], *infra*.

[5] Section 2T1.4 defines tax loss for 26 U.S.C. § 7206(2), and Section 2T1.9 defines tax loss for 18 U.S.C. § 371, although both sections refer back to Section 2T1.1.

USSG §2T1.1, comment. (n.1). Likewise, the commentary states that a court should use an applicable presumption, unless one of the parties "provides sufficient information for a more accurate assessment of tax loss." ***Id**.; see also* ***United States v. Barski***, 968 F.2d 936, 937 (9th Cir. 1992) (*per curiam*) (rejecting due process challenge to tax loss presumption contained within now-deleted Section 2T1.3; presumption did not establish irrebuttably that tax loss was 28 percent of unreported taxable income, but merely established "the legally operative fact as the amount of unreported income"); ***United States v. Hoover***, 178 F.3d 1365, 1367-68 (7th Cir. 1999) (affirming use of 28 percent presumption when defendant's lack of records did not permit more accurate calculation).

Ultimately, "[i]n some instances, such as when indirect methods of proof are used, the amount of the tax loss may be uncertain; the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts." USSG §2T1.1, comment. (n.1); *see also* ***United States v. Pesaturo***, 476 F.3d 60, 73 (1st Cir. 2007) (estimation of tax loss was necessary when defendant did not keep accurate records); ***United States v. Hart***, 324 F.3d 575, 578 (8th Cir. 2003); ***United States v. Bishop***, 291 F.3d 1100, 1114-15 (9th Cir. 2002) (finding no error where the court based its sentence on the government's calculation of tax loss and concluding, "It is not the government's or the court's responsibility to establish the defendants' itemized deductions, if no itemized deduction information was offered by the defendants."); ***United States v. Spencer***, 178 F.3d 1365, 1368 (10th Cir. 1999) (recognizing that, although government has the burden of proof, "neither the government nor the court has an obligation to calculate the tax loss with certainty or precision"); ***United States v. Bryant***, 128 F.3d 74, 75-76 (2d Cir. 1997) (*per curiam*) (relying on Section 2T1.1 commentary to uphold tax loss estimation for defendant convicted of assisting in the preparation of numerous false returns; estimation included tax loss extrapolated from unaudited returns). *But see* ***United States v. Mehta***, 594 F.3d 277, 283 (4th Cir. 2010) (finding extrapolation inappropriate in that case because extrapolation would require a threshold finding that the trend in the known sample was likely to be present in the larger group of all tax returns prepared by the defendant during the relevant period and that the known sample was a random sample).

When the parties contest the amount of tax loss, the sentencing court must hold an evidentiary hearing to resolve factual issues, unless the court presided over a trial and can base its findings upon the trial record. ***United States v. Marshall***, 92 F.3d 758, 760 (8th Cir. 1996). The government must prove the amount of tax loss by a preponderance of the evidence. USSG §6A1.3, comment. In the wake of ***Booker***, every court of appeals has held that judicial fact-finding at sentencing by the preponderance of the evidence standard remains the proper way to calculate the advisory Guidelines range. ***United States v. Leahy***, 473 F.3d 401, 413 (1st Cir. 2006); ***United States v. Singletary***, 458 F.3d 72, 80 (2d Cir. 2006); ***United States v. Grier***, 475 F.3d 556, 561 (3d Cir. 2007) (*en banc*); ***United States v. Washington***, 404 F.3d 834, 848 (4th Cir. 2005); ***United States v. Mares***, 402 F.3d 511, 519 (5th Cir. 2005); ***United States v. Kosinski***, 480 F.3d 769, 775-77 (6th Cir. 2007); ***United States v. Bryant***, 420 F.3d 652, 656 (7th Cir. 2005); ***United States v. Garcia-Gonon***, 433 F.3d 587, 593 (8th Cir. 2006); ***United States v. Hagege***, 437 F.3d 943, 959 (9th Cir. 2006); ***United States v. Magallanez***, 408 F.3d 672, 685 (10th Cir. 2005); ***United States v. Lindsey***, 482 F.3d 1285, 1294 (11th Cir. 2007); ***United States v. Coles***, 403 F.3d 764, 768 (D.C. Cir. 2005).

In determining the base offense level, a court must include all relevant conduct. USSG §1B1.3(a). Hence, in calculating the tax loss, a court may consider both charged and uncharged conduct. ***United States v. Bove***, 155 F.3d 44, 47-48 (2d Cir. 1998); ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997); ***United States v. Meek***, 998 F.2d 776, 781 (10th Cir. 1993). A court also may account for acquitted conduct when calculating the tax loss. *See generally* ***United States v. Watts***, 519 U.S. 148, 157 (1997) (*per curiam*) (Guideline range may rest on uncharged conduct or conduct underlying acquitted charges, if court finds conduct proven by a preponderance of evidence); ***United States v. Kelly***, 147 F.3d 172, 178 (2d Cir. 1998). The Supreme Court's holding in ***Booker*** did not overrule ***Watts***, and, as a majority of the circuits have held, district courts may continue to consider acquitted conduct at sentencing. *See* ***United States v. Gobbi***, 471 F.3d 302, 313-14 (1st Cir. 2006); ***United States v. Vaughn***, 430 F.3d 518, 525-27 (2d Cir. 2005); ***United States v. Mendez***, 498 F.3d 423, 426-27 (6th Cir. 2007); ***United States v. Hurn***, 496 F.3d 784, 788 (7th Cir. 2007); ***United States v. High Elk***, 442 F.3d 622, 626 (8th Cir. 2006); ***United States v. Mercado***, 474 F.3d 654, 656-57 (9th Cir. 2007); ***United States v. Magallanez***, 408 F.3d 672, 684-85 (10th Cir. 2005); ***United States v. Duncan***, 400 F.3d 1297, 1304-05 (11th Cir. 2005); ***United States v. Dorcely***, 454 F.3d 366, 372-73 (D.C. Cir. 2006). Further, a court may compute tax loss by including tax loss from years barred by the statute of limitations. ***United States v. Valenti***, 121 F.3d 327, 334 (7th Cir. 1997); ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994). Self-employment taxes may be properly included in the tax loss computation, ***United States v. Twieg***, 238 F.3d 930 (7th Cir. 2001), as may delinquent social security taxes, ***United States v. Martin-Rios***, 143 F.2d 662 (2d. Cir.1998).

Moreover, a court may include state tax losses in the tax loss computation, if the state tax loss constitutes relevant conduct under Section 1B1.3. ***United States v. Maken***, 510 F.3d 654, 657-59 (6th Cir. 2007); ***United States v. Baucom***, 486 F.3d 822, 829 (4th Cir. 2007), *vacated on other grounds*, ***Davis v. United States***, 552 U.S. 1092 (2008); ***United States v. Fitzgerald***, 232 F.3d 315, 320-21 (2d Cir. 2000) (adding federal, state, and local tax losses was a proper application of guidelines under Section 1B1.3(a)(2) where they all were part of the relevant conduct to the offense of conviction); ***United States v. Schilling,*** 142 F.3d 388, 390 (7th Cir. 1998) (state excise tax loss included in tax loss calculation); ***Powell***, 124 F.3d at 664-65 (when computing tax loss arising from federal motor fuel excise tax scheme, district court properly considered state excise tax loss); s*ee also* ***United States v. Fuentes***, 107 F.3d 1515, 1526 (11th Cir. 1997) (state offenses that are part of the same course of conduct as federal offenses and part of a common scheme or plan must be considered relevant conduct); ***United States v. Newbert,*** 952 F.2d 281, 284 (9th Cir. 1991) (holding that nonfederal offenses may be considered for sentence enhancement under Section 1B1.3). Inclusion of the state tax loss may increase the defendant's sentence under the Guidelines, and prosecutors are encouraged to include it as relevant conduct whenever practicable. Generally, the government's summary witness can testify as to the calculation of the state tax loss.[6] In some cases, the testimony of state taxing authorities will be required, which necessitates the cooperation of the state officials. Some states are reluctant to cooperate because of state privacy laws. Other states are willing to disclose their audit and investigatory files. The guideline provisions which simplify the determination of tax loss by using a percentage of the defendant's income, like Sections 2T1.1(c)(1) and (2), may be unavailable to determine state tax losses because of wide variations between the guideline rates and state tax rates.

Generally, the tax loss computation is not confined to the amount the government actually lost in taxes, ***United States v. Tandon***, 111 F.3d 482, 490 (6th Cir. 1997); ***United States v. Kraig***, 99 F.3d 1361, 1370-71 (6th Cir. 1996); ***United States v. Hunt***, 25 F.3d 1092, 1095-96 (D.C. Cir. 1994); ***United States v. Lorenzo***, 995 F.2d 1448, 1459-60 (9th Cir. 1993), or the amount of tax money the IRS actually could recover, ***United States v. Clements***, 73 F.3d 1330, 1339 (5th Cir. 1996); ***United States v. Brimberry***, 961 F.2d 1286, 1292 (7th Cir. 1992). Likewise, the tax loss is not reduced by payment of taxes after notification of an investigation, ***Tandon***, 111 F.3d at 490; ***United States v.***

[6] Defendants who are prosecuted for failing to report business income often fail to accurately report sales to the state, so state sales taxes, in addition to state income taxes, may also be relevant conduct for sentencing purposes.

Gassaway, 81 F.3d 920, 921-22 (10th Cir. 1996), or by payment before sentencing, ***United States v. Mathis***, 980 F.2d 496, 497 (8th Cir. 1992); ***United States v. Pollen***, 978 F.2d 78, 90-91 (3d Cir. 1992); *see also* USSG §2T1.1(5) (stating that "[t]he tax loss is not reduced by any payment of tax subsequent to the commission of the offense"). Ultimately, the tax loss is based upon the loss intended by the defendant, ***Clements***, 73 F.3d at 1339; ***United States v. Moore***, 997 F.2d 55, 59-62 (5th Cir. 1993), regardless of whether the intended loss occurred or was realistic, ***Moore,*** 997 F.2d at 61; ***Lorenzo***, 995 F.2d at 1459-60. *See* USSG §2T1.1.

Previously, the federal circuit courts were in conflict regarding whether a sentencing court calculating tax loss as defined in Section 2T1.1 could consider previously unclaimed credits, deductions, and exemptions that the defendant legitimately could have claimed if he or she had filed an accurate tax return. The Sentencing Commission resolved this conflict by adding an Application Note, effective November 1, 2013, explaining that the sentencing court "should account for the standard deduction and personal and dependent exemptions to which the defendant was entitled." USSG §2T1.1, comment. (n.3); USSG App. C, amend. 774. In addition, the Note explains that the court "should account for any unclaimed credit, deduction, or exemption that is needed to ensure a reasonable estimate of the tax loss," but only to the extent that three conditions are met.

First, the credit, deduction, or exemption must be related to the tax offense and have been claimable at the time the tax offense was committed. The Commission explained when submitting the amendment to Congress that defendants "should not be permitted to invoke unforeseen or after-the-fact changes or characterizations—such as offsetting losses that occur before or after the relevant tax year or substituting a more advantageous depreciation method or filing status—to lower the tax loss."[7] Second, the credit, deduction, or exemption must be "reasonably and practicably ascertainable." Third, the defendant must present "information to support the credit, deduction, or exemption sufficiently in advance of sentencing to provide an adequate opportunity to evaluate whether it has sufficient indicia of reliability to support its probable accuracy."

Moreover, the court is not to account for "payments to third parties made in a manner that encouraged or facilitated a separate violation of law," such as "under the table" payments to employees or expenses incurred to obstruct justice. The defendant

[7] http://www.ussc.gov/Legal/Amendments/Official_Text/20130430_Amendments.pdf

bears the burden of establishing any such credit, deduction, or exemption by a preponderance of the evidence.

Even though a defendant may attempt to reduce the amount of tax loss attributable to his offense by introducing evidence of unclaimed expenses or deductions, the court ultimately may reject the assertions of the defendant based upon the particular facts. *See* ***United States v. Hoskins***, 654 F.3d 1086, 1096 (10th Cir. 2011) (sentencing court did not err in declining to accept defendants' proposed deductions, which were self-serving, based on a short and non-representative period of time, and where court could not independently verify the proposed figures); ***United States v. Valenti***, 121 F.3d 327, 333-34 (7th Cir. 1997) (upholding refusal of sentencing court to give defendant convicted of tax evasion and failing to file tax returns credit for asserted legitimate business expenses when sentencing court determined that testimony of defendant was speculative and incredible); ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997) (defendants convicted of tax fraud conspiracy under 18 U.S.C. § 371 were not entitled to charitable deductions for sham distributions to "nonprofit" corporation).

A court, however, may not base the tax loss for sentencing purposes upon civil tax liability. ***Pierce***, 17 F.3d at 150; ***Meek***, 998 F.2d at 783; *see also* **Harvey**, 996 F.2d at 922 (interpreting ***United States v. Daniel***, 956 F.2d 540, 544 (6th Cir. 1992), as indicating that civil tax liability is not an adequate substitute for "tax loss").

Generally, a tax loss calculation cannot include penalties or interest. An exception applies, however, in evasion of payment cases and failure to pay cases. *See* USSG §1T1.1(c)(1). The commentary to that section provides that "[t]he tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203." The First Circuit addressed this issue in ***United States v. Thomas***, 635 F.3d 13, 16-17 (1st Cir. 2011). The ***Thomas*** court analyzed whether penalties and interest could be included as tax loss in a case where the defendant pleaded guilty to evasion of assessment. The court looked at relevant conduct and determined that the defendant's evasion of payment conduct in years preceding the evasion of assessment charge to which the defendant pleaded guilty was relevant conduct. Observing that the prior years' conduct was an attempt to evade payment of taxes, the court determined that it could properly include penalties in its tax loss calculation. ***Id.*** *Accord* ***United States v. Josephberg***, 562 F.3d 478, 502-03 (2d Cir. 2009) and ***United States v. Barker***, 556 F.3d 682 (8th Cir. 2009).

43.03[1][a] Section 7201

Section 2T1.1 provides that if there is a tax loss, the base offense level for tax evasion offenses derives from Section 2T4.1, the Tax Table, according to the amount of tax loss. USSG §2T1.1(a)(1). Otherwise, the base offense level is 6. USSG §2T1.1(a)(2). The current version of Section 2T1.1 defines tax loss for the purposes of evasion offenses as "the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Section 2T1.1 further describes presumptions that a court should employ when calculating the tax loss in various situations involving tax evasion offenses. Generally, these presumptions provide that the tax loss should equal 28 percent of the unreported gross income or improper deductions or exemptions at issue (unless the taxpayer is a corporation, in which case the applicable percentage is 34 percent), plus 100 percent of any falsely claimed credits against tax. USSG §2T1.1(c)(1)(A)-(C). These percentages apply "unless a more accurate determination of the tax loss can be made." *Id.; see* 43.03[1], *supra.*

43.03[1][b] Section 7203

Section 2T1.1 governs the base offense level for violations of Section 7203 that involve a willful failure to file a return, supply information, or pay tax. §2T1.1; USSG Appendix A. Under Sections 2T1.1(c)(2) and (3), "tax loss" for offenses involving the failure to file a return or to pay tax is "the amount of tax that the taxpayer owed and did not pay"; however, "[i]f the offense involved failure to file a tax return, the tax loss shall be treated as equal to 20% of the gross income (25% if the taxpayer is a corporation) less any tax withheld or otherwise paid, unless a more accurate determination of the tax loss can be made." §2T1.1(c)(2)(A). The guideline commentary indicates that sentencing courts should employ the tax loss formula in cases in which the tax loss may not be "reasonably ascertainable," but should disregard the formula if either party provides sufficient information for a more accurate assessment of the tax loss. USSG §2T1.1, comment. (n.1).

In ***United States v. Valenti***, 121 F.3d 327, 333-34 (7th Cir. 1997), the district court employed the formula in USSG §2T1.1(c)(2)(A), when sentencing a defendant for failing to file returns, concluding that the tax loss simply equaled twenty percent of the defendant's unreported gross income. The defendant objected that this method failed to produce the most accurate determination of the tax loss and that the district court had failed to account for his evidence of his legitimate business expenses. ***Id***. The ***Valenti*** court rejected this claim and upheld the sentence imposed under Section 2T1.1(c)(2), noting that the district court had found that the defendant's evidence was speculative and incredible, that the government had tried to measure the business expenses accurately, and that it was likely that the defendant had "got[ten] off easy" because additional unreported income probably existed. ***Id.*** at 334; *see also* ***United States v. Sullivan***, 255 F.3d 1256, 1263-64 (10th Cir. 2001) (upholding use of 20 percent presumption when district court lacked information to make a more accurate determination).

The single exception to the use of Section 2T1.1 to determine the base offense level for offenses under Section 7203 is willful failure to file a Form 8300 reporting the receipt of more than $10,000 in a business transaction. *See* 26 U.S.C. § 6050I. For that offense, the base offense level is determined pursuant to USSG §2S1.3.

43.03[1][c] Section 7206(1)

Section 2T1.1 governs offenses involving fraudulent or false returns and provides that the base offense level for fraudulent or false return offenses is the level from Section 2T4.1 (the Tax Table), corresponding to the amount of tax loss. USSG §2T1.1(a)(1). Otherwise, the base offense level is 6. USSG §2T1.1(a)(2). As with offenses involving tax evasion, Section 2T1.1 now defines tax loss for the purposes of fraudulent or false return offenses as "the total amount of the loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)." USSG §2T1.1(c)(1). Section 2T1.1 further describes presumptions that a court should employ when calculating the tax loss in various situations involving fraudulent or false return offenses. Generally, these presumptions provide that the tax loss should equal 28 percent of the unreported gross income or improperly claimed deductions or exemptions at issue (unless the taxpayer is a corporation, in which case the applicable percentage is 34 percent), plus 100 percent of any falsely claimed credits against tax. USSG §2T1.1(c)(1)(A)-(C). These percentages apply "unless a more accurate determination of the tax loss can be made." *Id.*

The section regarding the calculation of base offense levels for tax offenses in general, *see* §43.03[1], *supra*, outlines in detail the principles that currently govern the calculation of the base offense level under Section 2T1.1 for violations of Section 7206(1).

43.03[1][d] Section 7206(2)

Section 2T1.4 governs the sentencing of defendants who have aided, assisted, procured, counseled, or advised tax fraud. The base offense level is the level from Section 2T4.1 (the Tax Table), corresponding to the amount of tax loss. USSG §2T1.4(a)(1). Otherwise, the base offense level is 6. USSG §2T1.4(a)(2). This provision defines tax loss as "the tax loss, as defined in §2T1.1, resulting from the defendant's aid, assistance, procurance or advice." USSG §2T1.4(a). If the defendant advises others to violate their tax obligations by filing returns which have no support in the tax law (such as by promoting a fraudulent tax shelter scheme), and if such conduct results in the filing of false returns, the misstatements in all such returns will contribute to one aggregate tax loss. USSG §2T1.4, comment. (n.1). This aggregation occurs regardless of whether the taxpayers realized that the returns were false. *Id.*

A sentencing court does not necessarily have to calculate the amount of tax loss attributable to a false return scheme with full certainty or precision. ***United States v. Bryant***, 128 F.3d 74, 75-76 (2d Cir. 1997) (*per curiam*). In ***Bryant***, the defendant ran an income tax "mill," assisting in the preparation of 8,521 individual tax returns from 1991 to 1993. ***Id***. at 76. The defendant was convicted of violating Section 7206(2) by assisting in the preparation of 22 false tax returns, each of which resulted in an average tax loss of $2,435. ***Id***. Over 99 percent of all returns prepared by the defendant resulted in refunds. ***Id***. The IRS audited more than 20 percent of the returns prepared by the defendant, discovering that 1,683 of them yielded an average tax loss of $2,651 each. ***Id***. During sentencing, the district court calculated the tax loss under Sections 2T1.4 and 2T4.1 as equaling at least $5,115,203. ***Id***. at 75. This sum was based upon $53,570 in loss from the 22 returns underlying the counts of conviction, $4,461,633 in loss from the audited returns, and at least $600,000 in estimated loss from unaudited returns prepared by the defendant. *Id*. The defendant complained on appeal that the $600,000 in tax loss attributed to the unaudited returns was speculative and unfair. Noting that this sum rested upon an average tax loss of less than $100 per unaudited return, the ***Bryant*** court rejected this argument, explaining:

> The §2T1.1 commentary, which is applicable to a violation of § 7206(2), states that "the amount of the tax

> loss may be uncertain," and it envisions that "indirect methods of proof [may be] used. . . ." It states expressly that "the guidelines contemplate that the court will simply make a reasonable estimate based on the available facts."
>
> . . . [Therefore,] it is permissible for the sentencing court, in calculating a defendant's offense level, to estimate the loss resulting from his offenses by extrapolating the average amount of tax loss from known data and applying that average to transactions where the exact amount of loss is unknown. . . .
>
> We see no reason why [estimation of total tax loss through extrapolation] may not be used in a § 7206(2) case in which, as here, the defendant has been convicted of assisting in the preparation of numerous fraudulent tax returns, and government records show many more such instances. Although extrapolation might not be reasonable if, for example, there were few instances of fraud, or if the returns audited constituted a minuscule percentage of the total that the defendant prepared or in whose preparation he assisted, we see no unreasonableness here.

Bryant, 128 F.3d at 75-76 (internal citations omitted); *cf.* ***United States v. Marshall***, 92 F.3d 758, 760-61 (8th Cir. 1996) (trial record supported determination that tax loss equaled $2,004,961 because defendant admitted that he had prepared more than 1,200 returns, admitted that he controlled all employees in his return preparation business, and returns submitted during sentencing contained the same improprieties as returns underlying Section 7206(2) convictions).

As with other tax crimes, the tax loss arising from a Section 7206(2) violation includes the attempted or intended tax loss, rather than the tax loss actually suffered by the government. ***United States v. Hunt***, 25 F.3d 1092, 1095-96 (D.C. Cir. 1994); ***United States v. Moore***, 997 F.2d 55, 59-61 (5th Cir. 1993); ***United States v. Brimberry***, 961 F.2d 1286, 1292 (7th Cir. 1992). Tax loss calculations in cases arising under Section 7206(2) may be based upon IRS interviews with taxpayers, even if there was no opportunity for the defendant to cross-examine the taxpayers. ***United States v. Goosby***, 523 F.3d 632, 639 (6th Cir. 2008).

43.03[1][e] Section 7212(a)

The omnibus clause of 26 U.S.C. § 7212(a) prohibits an individual from corruptly obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the internal revenue laws. The statutory index to the Guidelines, Appendix A, provides that either Section 2J1.2, the guideline applying to obstruction of justice, or Section 2T1.1 normally governs Section 7212(a) violations involving the omnibus clause. The index also states that Section 2A2.4, which applies to obstruction of officers, ordinarily governs Section 7212(a) violations not involving the omnibus clause.

Because the statutory index identifies both Sections 2J1.2 and 2T1.1 as appropriate guideline provisions for Section 7212(a) omnibus clause violations, a sentencing court must determine which guideline is the most appropriate provision for the particular omnibus clause violation at issue. The Guidelines provide that, in selecting the appropriate provision, the sentencing court should apply "the most analogous guideline." USSG §1B1.2(a); *see also* USSG §2X5.1. Accordingly, if the offense conduct at issue resembles a tax evasion scheme, Section 2T1.1 will normally apply. Similarly, Section 2J1.2 will govern offense conduct that primarily aims to disrupt IRS procedures. Section 2J1.2 establishes a base offense level of 14, subject to certain enhancements for specific offense characteristics. Section 2T1.1, however, establishes a base offense level of either 6, if there is no tax loss, or a higher base offense level, corresponding to the specific tax loss under the Tax Table. Under the current tax loss table, a tax loss of more than $30,000, but no more than $80,000, results in a base offense level of 14. USSG §2T4.1. Accordingly, Section 2J1.2 ordinarily will yield a higher base offense level than Section 2T1.1 if the tax loss is $30,000 or less, whereas Section 2T1.1 ordinarily will yield a higher base offense level than Section 2J1.2 if the tax loss exceeds $80,000.

43.03[1][f] 18 U.S.C. Sections 286 and 287

18 U.S.C. § 287 prohibits the knowing presentation of false, fictitious, or fraudulent claims to the government. Similarly, 18 U.S.C. § 286 prohibits conspiracies to defraud the government by obtaining or aiding to obtain the payment of any false, fictitious, or fraudulent claim. In the criminal tax context, these statutes generally apply to individuals who file income tax returns claiming false or fraudulent refunds of income tax. The general sentencing guideline pertaining to fraud, Section 2B1.1, governs sentencings for Section 286 and 287 violations, including false claims for tax refunds.

USSG Appendix A. Section 2B1.1 establishes a base offense level of 6 for crimes involving fraud or deceit, USSG §2B1.1(a), and provides for an increase in the base offense level corresponding to the amount of loss exceeding $5,000, as calculated by the sentencing court. USSG §§2B1.1(b)(1)(A)-(P). Loss under Section 2B1.1 need only be a "reasonable estimate" and includes the intended loss attributable to the offense or scheme. USSG §2B1.1, comment. (n.3).

Although the statutory appendix indicates that Section 2B1.1 governs violations of Sections 286 and 287, some courts have held that it may be appropriate to apply Section 2T1.1 to cases involving the filing of a false claim for a tax refund. ***UnitedStates v. Brisson***, 448 F.3d 989, 991-92 (7th Cir. 2006); *see also* ***United States v. Barnes***, 324 F.3d 135, 139-40 (3rd Cir. 2003); ***United States v. Aragbaye***, 234 F.3d 1101, 1105-06 (9th Cir. 2000).

Defendants who pursue false claim for refund schemes may be responsible at sentencing for the total sum of refunds claimed, even if the taxpayers in whose names the false returns were filed might have been able to claim legitimate refunds. In ***United States v. Fleming***, 128 F.3d 285 (6th Cir. 1997), the defendant was convicted of 25 counts of violating Section 287, based upon his preparation of tax returns containing false claims for refunds in the names of third-party taxpayers. ***Id.*** at 286. The district court sentenced the defendant according to the total dollar amount of refunds claimed in the 25 returns underlying his convictions, as well as refunds claimed in 32 additional false returns introduced at sentencing. ***Id.*** The defendant challenged this tax loss calculation, arguing that the district court had enhanced his sentence improperly because the government had not established the employment or income status of the 32 taxpayers associated with the returns introduced at sentencing. ***Id.*** He also argued that up to five of the taxpayers associated with the returns underlying his counts of conviction actually had earned legitimate income. ***Id.*** The ***Fleming*** court rejected the defendant's claims, finding that any portion of the total loss that the third-party taxpayers might have been entitled to claim legally was irrelevant to the loss computation, because the defendant had fabricated every W-2 form, dependent, and employer associated with the returns. ***Id.*** at 288-89. As the Sixth Circuit observed, "[i]t was simply fortuitous that some of those whom Mr. Fleming preyed upon were employed . . . . Their actual income and employment status did not influence his choice when he recruited them; he cannot use those facts now to narrow the scope of the fraud he designed." ***Id.***

Likewise, a defendant involved in a conspiracy to file numerous false claims for tax refunds will be held accountable at sentencing for the entire amount of loss which was reasonably foreseeable to the defendant. ***United States v. Okoronkwo***, 46 F.3d 426, 438 (5th Cir. 1995) (holding that evidence supported finding that defendant was responsible for 75 percent of all false claims filed through certain tax preparation office, including false claims filed by other coconspirators, because defendant joined conspiracy early and had a central role); ***United States v. Atkins***, 25 F.3d 1401, 1403-04 (8th Cir. 1994) (rejecting claim that defendant was responsible for only four of thirty false claims for refund filed; involvement of defendant in every level of the conspiracy, coupled with her close working relationship with coconspirator, indicated that loss arising from all thirty false returns was reasonably foreseeable); ***United States v. Mickle***, 464 F.3d 804, 808-09 (8th Cir. 2006) (holding codefendant responsible for full amount of loss resulting from conspiracy to file false claims). The government, however, carries the burden of supporting through sufficient evidence any contested sentencing increase based upon the amount of loss. *See*, *e.g.*, ***United States v. Rice***, 52 F.3d 843, 848 (10th Cir. 1995).

43.03[1][g] 18 U.S.C. Section 371

Section 2T1.9 of the Sentencing Guidelines governs conspiracies to "defraud the United States by impeding, impairing, obstructing and defeating . . . the collection of revenue." USSG §2T1.9, comment. (n.1) (quoting ***United States v. Carruth***, 699 F.2d 1017, 1021 (9th Cir. 1983)). This guideline applies to what is commonly called a "*Klein* conspiracy," as described in ***United States v. Klein***, 247 F.2d 908 (2d Cir. 1957). This guideline does not apply to taxpayers, such as husband and wife, who jointly evade taxes or file a fraudulent return. USSG §2T1.9, comment. (n.1). Section 2T1.9 directs the court to use the base offense level determined by Sections 2T1.1 or 2T1.4, according to which guideline most closely addresses the underlying conduct, if that offense level is greater than 10. USSG §2T1.9, comment. (n.2). If Section 2T1.1 or 2T1.4 does not provide an offense level greater than 10, the base offense level under Section 2T1.9 is 10. ***Id.*** *But cf.* ***United States v. Goldberg***, 105 F.3d 770, 777 (1st Cir. 1997) (commenting in *dicta* that government "sensibly" chose not to appeal downward departure based upon view of district court that base offense level of 8 under Section 2T1.4 was "more reflective" of defendant's conduct than base offense level of 10 under Section 2T1.9 because tax loss was only $3,000 to $5,000).

When calculating the tax loss attributable to a defendant convicted of a ***Klein*** conspiracy, the court should hold the defendant "responsible for 'all reasonably foreseeable acts and omissions . . . in furtherance of the jointly undertaken criminal activity.'" ***United States v. Ladum***, 141 F.3d 1328, 1346 (9th Cir. 1998) (quoting USSG §1B1.3(a)(1)(B)). "This requires a determination of 'the scope of the criminal activity the particular defendant agreed to jointly undertake (*i.e.*, the scope of the specific conduct and objectives embraced by the defendant's agreement).'" *Id.* (quoting USSG §1B1.3, comment. (n.2)). Accordingly, a court should sentence a defendant according to the tax loss which he directly caused, as well as the tax loss which his coconspirator caused, if that tax loss was reasonably foreseeable to the defendant. ***United States v. Clark***, 139 F.3d 485, 490 (5th Cir. 1998) (citing ***United States v. Charroux***, 3 F.3d 827, 838 (5th Cir. 1993)); *see also* ***United States v. Fleschner***, 98 F.3d 155, 160 (4th Cir. 1996) (tax loss finding was not confined to assessing only conduct which occurred when coconspirators were physically together or acting in unison). Further, "[i]n assessing the amount of tax loss, the district court is to make a 'reasonable estimate' of the amount of the loss that the defendant intended to inflict, not the actual amount of the government's loss." ***United States v. Kraig***, 99 F.3d 1361, 1370-71 (6th Cir. 1996). Whether the conspirators actually completed the offense is irrelevant to calculating the offense level. ***United States v. Dale***, 991 F.2d 819, 855 (D.C. Cir. 1993). At sentencing, a district court applies the preponderance of the evidence standard when determining the duration of a conspiracy. ***United States v. Furkin***, 119 F.3d 1276, 1281 (7th Cir. 1997).

If a defendant is convicted of a count charging a conspiracy to commit more than one offense, a sentencing court should treat that conviction "as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." ***Dale***, 991 F.2d at 854 (quoting §1B1.2(d)). After calculating the offense level for each such "separate" conspiracy, the court then must group the various offenses, "such that instead of sentencing the defendant[] for each object offense, the court would sentence the defendant[] on the basis of only one of the offenses." ***Id.*** (citing §3D1.2). The court then must sentence according to the offense level for the most serious counts constituting the group. ***Id.*** (citing §3D1.3).

Consistent with general sentencing guideline law, loss computations for *Klein* conspiracies may rest upon conduct which was uncharged, or for which the defendant was acquitted. For example, in ***United States v. Seligsohn***, 981 F.2d 1418, 1420 (3d Cir. 1992), *superseded on other grounds*, USSG App. C, amend. 474, the defendants paid cash as part of wages earned by employees, underreported their total payroll, filed false reports with the IRS regarding withholding taxes, and deprived a union welfare plan of contributions to which it was entitled. Although the indictments charged only a conspiracy with respect to the personal returns, the defendants' sentences were based upon a tax loss attributable to the defendants' companies, rather than only the amount of individual tax loss. ***Id***. at 1427. The court found that the tax fraud conspiracy was "clearly intended to encompass the tax losses attributable to the employees of the defendants' companies as well as the losses from the defendants' own personal tax evasion." ***Id***. The Fifth Circuit has held that a defendant who has been acquitted of conspiracy may be held liable as a coconspirator for sentencing purposes. ***United States v. Hull***, 160 F.3d 265, 269-70 (5th Cir. 1998).

Finally, a sentencing court should make specific findings regarding the amount of reasonably foreseeable tax loss. In ***Ladum***, the sentencing court found that one defendant participated for ten years in a thirteen-year tax fraud scheme which involved the under-reporting of gross business receipts from several stores. ***Ladum***, 141 F.3d at 1346-47. The sentencing court further found that this defendant was responsible for the entire tax loss attributable to the conspiracy, which exceeded $550,000. ***Id***. The district court, however, failed to make a specific factual finding regarding whether the tax loss that occurred when the defendant was not participating in the conspiracy was reasonably foreseeable to him. ***Id***. at 1347. Stating that it was not "self-evident" that the defendant would have foreseen the tax loss arising from stores that did not exist when he ceased participating in the conspiracy, or from the stores that had existed when he left the conspiracy, the Ninth Circuit remanded so that the district court could make specific factual findings regarding the reasonably foreseeable tax loss. ***Id***.

43.03[2] Specific Offense Characteristics

In addition to determining the base offense level, the sentencing court must adjust the offense level according to the specific offense characteristics of each subsection.

43.03[2][a] Illegal Source Income

The guideline governing violations of 26 U.S.C. §§ 7201, 7203, 7206 (with the exception of Section 7206(2)), and 7207 requires an increase in the base offense level if the defendant failed either to report or correctly identify the source of income of over

$10,000 in any year resulting from criminal activity. USSG §2T1.1(b)(1). The phrase "criminal activity" means "any conduct constituting a criminal offense under federal, state, local, or foreign law." USSG §2T1.1, comment. (n.3).

Courts have upheld illegal source income enhancements in a variety of circumstances. *See, e.g.*, ***United States v. Ellis***, 440 F.3d 434, 437-38 (7th Cir. 2006) (enhancement proper when defendant, a church bishop, took money from the church's Sunday collections for his personal use); ***United States v. Fitzgerald***, 232 F.3d 315, 321 (2d Cir. 2000) (enhancement proper where defendant intentionally converted more than $107,000 from union welfare fund and defrauded medical specialists of such funds); ***United States v. Parrott***, 148 F.3d 629, 633-34 (6th Cir. 1998) (enhancement proper when defendant misappropriated $282,000 of clients' funds, thereby committing theft under state law); ***United States v. Ladum***, 141 F.3d 1328, 1343 (9th Cir. 1998) (enhancement proper when defendants obtained facially valid firearms license by making false statements on license application and license enabled defendants to sell more than $10,000 in guns); ***United States v. Karterman***, 60 F.3d 576, 582-83 (9th Cir. 1995) (enhancement proper when defendant distributed several pounds of cocaine per month, earned limited income from legitimate business, and lived expensive lifestyle); *cf.* ***United States v. Griggs***, 47 F.3d 827, 829 (6th Cir. 1995) (noting uncontested finding by sentencing court that enhancement applied because defendant had failed to identify source of approximately $475,000 in embezzled funds).

The illegal source income enhancement requires the defendant to have received more than $10,000 from criminal activity "in any year." In ***United States v. Barakat***, 130 F.3d 1448, 1453-54 (11th Cir. 1997), the sentencing court had imposed a §2T1.1(b)(1) enhancement upon the defendant who had received and deposited in December 1988 a $5,000 check derived from criminal activity and had received and deposited in January 1989 another check for $10,000, similarly derived from criminal activity. Observing that the propriety of the enhancement depended upon the definition of a "year" under Section 2T1.1(b)(1), the ***Barakat*** court employed the definition of "calendar year" contained in 26 U.S.C. § 441. In the case of this defendant, a personal income tax filer who did not keep accounting records, the court interpreted "calendar year" to mean "taxable year." ***Id.*** at 1453. Because the defendant was convicted of filing a false tax return for the calendar year 1989 and because he had not received more than $10,000 from criminal activity in 1989, the ***Barakat*** court reversed the Section 2T1.1(b)(1) enhancement. ***Id.*** at 1454; *see also* ***United States v. Schmidt***, 935 F.2d 1440, 1451-52 (4th Cir. 1991) (reversing enhancement when defendant received no more than $8,000 in income from criminal activity in 1987 and received no more than $2,000 in such income in 1988), *abrogated on other grounds by* ***United States v. Delfino***, 510 F.3d 468, 473 (4th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3569 (U.S. Apr 07, 2008) (No. 07-1273).

The $10,000 threshold of the illegal source income enhancement does not refer to profit; rather, the terms of Section 2T1.1(b)(1) refer broadly to "income." In ***Ladum***, the defendant claimed that the enhancement was inapplicable because there was no evidence that he had realized more than $10,000 from his illegal firearms trade once the district court had accounted for overhead and the costs of goods. ***Ladum***, 141 F.3d at 1343. The Ninth Circuit rejected this argument by noting that the cost of goods sold had already been accounted for in determining the illegal source income figure and that "nothing in the Guidelines requires the government to determine and deduct the portion of overhead expenses fairly allocable to gun sales." ***Id.***[8]

As with any enhancement, the government must provide the court with a factual basis on which to find by a preponderance of the evidence that a contested enhancement for illegal source income applies. ***United States v. Hagedorn***, 38 F.3d 520, 522-23 (10th Cir. 1994) (remanding for factual inquiry regarding applicability of illegal source income enhancement when charging document to which the defendant pled guilty did not establish intent for racketeering offense and sentencing court relied solely upon contents of charging document). In at least one case, however, the error of the district court in relying solely upon the presentence report as the factual basis for a contested illegal source income enhancement was harmless: by pleading guilty to one count of filing a false tax return, the defendant thereby admitted that money he secretly took from his clients and did not report on his tax return was income to himself. ***Parrott***, 148 F.3d at 633-34. Accordingly, the defendant implicitly and necessarily admitted that he had committed theft of property under state law and that the money did not constitute a loan. ***Id***.

In ***United States v. Karterman***, 60 F.3d at 580-81, the Ninth Circuit held that, although a conviction for the income-producing criminal offense is not necessary for an illegal source income enhancement, such an enhancement may not rest upon conduct of which the defendant was acquitted or upon facts that the jury necessarily rejected.

[8] The opinion contains an apparent error, stating that the income figure "was derived by subtracting sales price from cost of goods sold," 141 F.3d at 1343, thereby reversing the calculation.

However, the Supreme Court subsequently ruled that a sentencing court may take into account relevant conduct of which a defendant was acquitted, so long as the government has proven the acquitted conduct by a preponderance of the evidence. *See* ***United States v. Watts***, 519 US. 148, 157 (1997) (*per curiam*). Therefore, the holding in ***Karterman*** no longer appears to be good law. *See also* ***Barakat***, 130 F.3d at 1442 (under ***Watts***, Section 2T1.1(b)(1) enhancement may rest upon income-producing criminal conduct of which the defendant was acquitted); ***United States v. Sherpa***, 97 F.3d 1239, 1245 (9th Cir.), *amended*, 110 F.3d 656 (9th Cir. 1996) (noting that Supreme Court overruled certain other Ninth Circuit decisions by holding in ***Koon v. United States***, 518 U.S. 81, 106-08 (1996), that sentencing court could consider facts that jurynecessarily rejected).

43.3 [2][b] Sophisticated Means

The tax guidelines for violations of 26 U.S.C. §§ 7201, 7203, 7206, 7207, and 7212(a) provide for a two-level enhancement of the base offense level if "the offense involved sophisticated means." USSG §§2T1.1(b)(2); 2T1.4(b)(2).

> "[S]ophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ordinarily indicates sophisticated means.

USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3). The Guidelines further provide that, "[a]lthough tax offenses always involve some planning, unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes." USSG §2T1.1, comment.(backg'd).[9]

Conduct need not involve banking or financial methods in order to constitute sophisticated means. ***United States v. Friend***, 104 F.3d 127, 130 (7th Cir. 1997). Even if certain acts would not constitute sophisticated means when considered in isolation, such acts may constitute sophisticated means when viewed in the aggregate. ***United States v.***

[9] Prior to 1998, the Guidelines referred to "sophisticated concealment" in tax cases, rather than "sophisticated means." The Commission made clear, however, that the change was a clarification, rather than a substantive change, designed to align the language in the tax guidelines with the language in the fraud guideline (USSG §2B1.1). We do not believe that there is all that much difference between "sophisticated concealment" and "sophisticated means." Consequently, cases interpreting either concept should inform interpretation of the other.

Tandon, 111 F.3d 482, 491 (6th Cir. 1997***).*** *Accord* ***United States v. Ghaddar***, 678 F.3d 600 (7th Cir. 2012). Further, the sophisticated conduct at issue may occur during the actual commission of the tax offense because "the guideline contemplates enhancement based on the degree of sophistication, not necessarily whether it came after the conclusion of the operative portion of the tax scheme." ***United States v. Hunt***, 25 F.3d 1092, 1097 (D.C. Cir. 1994).

Courts have upheld the application of this enhancement for a variety of reasons. Specifically, courts have found that indicia of sophisticated means include the following:

1. Use of shell corporations. USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); ***United States v. Roush***, 466 F.3d 380, 387 (5th Cir. 2006); ***United States v. Cianci***, 154 F.3d 106, 110 (3d Cir. 1998); ***United States v. Whitson***, 125 F.3d 1071, 1075 (7th Cir. 1997); ***United States v. Kraig***, 99 F.3d 1361, 1371 (6th Cir. 1996); ***United States v. Paradies***, 98 F.3d 1266, 1292 (11th Cir. 1996).

2. Use of cash transactions. ***United States v. Gricco***, 277 F.3d 339, 360 (3d Cir. 2002); ***United States v. Middleton***, 246 F.3d 825, 848 (6th Cir. 2001); ***Cianci***, 154 F.3d at 110; ***United States v. Furkin***, 119 F.3d 1276, 1285 (7th Cir. 1997).

3. Failure to record income or inventory. ***Cianci***, 154 F.3d at 110; ***Furkin***, 119 F.3d at 1285. *But see* ***United States v. Hart***, 324 F.3d 575, 579-80 (2d Cir. 2003) (indicating that the failure to keep records does not constitute sophisticated means).

4. Destruction of records. ***Furkin***, 119 F.3d at 1285; ***United States v. Hammes***, 3 F.3d 1081, 1083 (7th Cir. 1993).

5. Deposit of funds in a trust account. ***United States v. Sabino***, 274 F.3d 1053, 1075-76 (6th Cir. 2001), *amended in part on other grounds on rehearing*, 307 F.3d 446 (6th Cir. 2002); ***United States v. Minneman***, 143 F.3d 274, 283 (7th Cir. 1998); *but cf.* ***United States v. Barakat***, 130 F.3d 1448, 1457-58 (11th Cir. 1997) (remanding for reconsideration of whether use of trust account justified enhancement, and directing district court to consider only evidence that related to tax offense conviction).

6. Deposit of funds in a bank account not directly attributable to the defendant. ***United States v. Campbell***, 491 F.3d 1306, 1315-16 (11th Cir. 2007); ***Tandon***, 111 F.3d at 490; ***United States v. Lewis***, 93 F.3d 1075, 1081-83 (2d Cir. 1996); ***United States v.***

Clements, 73 F.3d 1330, 1340 (5th Cir. 1996); ***United States v. Wu***, 81 F.3d 72, 74 (7th Cir. 1996); ***Hammes***, 3 F.3d at 1083; ***United States v. Becker***, 965 F.2d 383, 390 (7th Cir. 1992).

7. Use of offshore bank accounts. USSG §§2T1.1, comment. (n.4); 2T1.4, comment. (n.3); ***Whitson***, 125 F.3d at 1075; ***Kraig***, 99 F.3d at 1371; ***Hammes***, 3 F.3d at 1083.

8. Use of false documents. ***Cianci***, 154 F.3d at 110; ***United States v. Madoch***, 108 F.3d 761, 766 (7th Cir. 1997); ***Lewis***, 93 F.3d at 1081; ***Wu***, 81 F.3d at 74; ***United States v. Jagim***, 978 F.2d 1032, 1042 (8th Cir. 1992).

9. Use of fictitious names, ***Tandon***, 111 F.3d at 491; ***Madoch***, 108 F.3d at 766; ***Wu***, 81 F.3d at 74; ***Hammes***, 3 F.3d at 1083, or fictitious entities, ***United States v. Allan***, 513 F.3d 712, 716 (10th Cir. 2008); ***Lewis***, 93 F.3d at 1082; ***United States v. Veksler***, 62 F.3d 544, 550-51 (3d Cir. 1995).

10. Use of multiple corporate names. ***Minneman***, 143 F.3d at 283.

11. Manipulation of ownership of income-producing assets. ***Tandon***, 111 F.3d at 491.

12. Arranging for the IRS to mail multiple refund checks to several different addresses. ***Madoch***, 108 F.3d at 766.

13. Befriending and bribing an IRS employee in order to provide insurance against detection of tax scheme. ***Friend***, 104 F.3d at 130.

14. Depositing receipts in non-interest bearing business bank accounts. ***Middleton***, 246 F.3d at 848.

15. Using unauthorized social security numbers, filing false tax returns, and having tax refund checks mailed to mail drop. ***United States v. Aragbaye***, 234 F.3d 1101, 1107-08 (9th Cir. 2000).

The above list is not an exhaustive description of acts which may justify an enhancement for sophisticated means. Courts also have upheld the application of this enhancement on the basis of other circumstances. *See, e.g.*, ***United States v. Ambort***, 405 F.3d 1109, 1120 (10th Cir. 2005) (defendant helped operate a tax defier program that instructed participants to file "non-resident alien" returns and to omit Social Security numbers from their returns); ***United States v. Guidry***, 199 F.3d 1150, 1158-59 (10th Cir. 1999) (defendant's embezzled money came from checks made payable to bank, which checks defendant then converted to cash to purchase personal items, and defendant never took more than $10,000 in one day to avoid filing of Currency Transaction Reports); ***United States v. Powell***, 124 F.3d 655, 666 (5th Cir. 1997) (defendant purchased ethanol plant to facilitate scheme to avoid fuel excise taxes); ***United States v. Pierce***, 17 F.3d 146, 151 (6th Cir. 1994) (defendant provided inapplicable IRS publication to employer to exempt himself from withholding taxes, used several different mailing addresses in different IRS regions, changed excessive number of withholding deductions in accordance with changes in IRS regulations, and directed wife to file misleading returns); ***United States v. Ford***, 989 F.2d 347, 351 (9th Cir. 1993) (defendant used foreign corporation to generate corporate foreign tax payments in order to claim foreign tax credits on domestic personal income tax returns).

Merely making misrepresentations on a tax return likely does not justify an enhancement for sophisticated means. ***Powell***, 124 F.3d at 666; ***United States v. Rice***, 52 F.3d 843, 849 (10th Cir. 1995) (enhancement inapplicable because defendant only claimed that he had paid taxes which he had not); *see also* ***United States v. Stokes***, 998 F.2d 279, 282 (5th Cir. 1993) (stating that "[t]here is nothing sophisticated about simply not disclosing income to youraccountant").

Although this enhancement should not apply if the defendant uses sophisticated means solely to commit a crime in order to obtain the income at issue in the tax offense conviction, this enhancement can rest upon sophisticated conduct which served both as means to obtain income and to further the tax crime relating to that income. "[T]he mere fact that the scheme might have been more sophisticated or may have had some uncomplicated elements does not preclude the enhancement." ***United States v. Utecht***, 238 F.3d 882, 889 (7th Cir. 2001). While it is apparent that some degree of concealment is inherent in every tax fraud case, "'sophistication' must refer not to the elegance, the 'class,' the 'style' of the defrauder – the degree to which he approximates Cary Grant – but to the presence of efforts at concealment that go beyond . . . the concealment inherent in tax fraud." ***United States v. Kontny***, 238 F.3d 815, 820-21 (7th Cir. 2001). For example, in ***United States v. Mankarious***, 151 F.3d 694, 710-11 (7th Cir. 1998), the Seventh Circuit held that the enhancement applied because the scheme at issue had the dual effect of creating illicit gain and hiding that gain from the IRS. Likewise, in ***Cianci***, the Third Circuit held that the enhancement applied because, although the sophisticated methods of the defendant impeded the discovery of his embezzlement offense, those methods also facilitated the concealment of the income which he derived from the embezzlement. ***Cianci***, 154 F.3d at 109.

In ***Stokes***, however, the defendant deposited money embezzled from her employer into two separate bank accounts. She then wrote checks to herself and transferred the money into money orders. ***Stokes***, 998 F.2d at 280. The Fifth Circuit reversed the district court's application of the sophisticated means enhancement, finding that the defendant had used sophisticated methods to commit the crime of embezzlement, but not the crime of tax evasion. ***Id***. at 282. The Fifth Circuit stated that the defendant had hidden the money which she had embezzled because she did not want her employer to discover her embezzlement, not because she wanted to avoid paying her taxes. ***Id***.

Despite the implication by the Fifth Circuit in ***Stokes*** that this enhancement is inapplicable unless the sophisticated conduct pertains solely to the tax offense of conviction, or unless the defendant employs sophisticated methods for the specific and sole purpose of concealing his or her tax status, the Seventh Circuit has held that this enhancement may apply even if the defendant did not intend specifically to hinder the ability of the IRS to discover the tax offense at issue. In ***Mankarious***, the Seventh Circuit upheld an application of this enhancement because, "[w]hether or not the defendants consciously intended it, the [underlying fraud] scheme would have thwarted IRS from successfully auditing the defendants and determining their real income." 151 F.3d at 711. Accordingly, "the scheme constituted a sophisticated means of tax fraud, even if that was not its primary purpose." ***Id***.; *see also* **Barakat**, 130 F.3d at 1457 (distinguishing ***Stokes*** by characterizing opinion as holding only that mere concealment of income from accountant cannot constitute sophisticated means).

Finally, a sentencing court may impose simultaneous enhancements for use of sophisticated means and for being in the business of preparing or assisting in the preparation of tax returns, under Section 2T1.4(b)(1)(B). ***Hunt***, 25 F.3d at 1098. Similarly, a sentencing court may impose simultaneous enhancements for use of sophisticated means and for obstruction of justice, under Section 3C1.1, *see* ***Friend***, 104 F.3d at 130-31; ***Furkin***, 119 F.3d at 1284-85, so long as separate conduct forms the factual basis for each enhancement. ***Friend***, 104 F.3d at 131.

In ***United States v. Newell***, 239 F.3d 917, 922 (7th Cir. 2001), the doctrine of judicial estoppel did not bar application of the sophisticated means enhancement when the prosecutor argued in closing that the defendant's scheme was "not particularly sophisticated," because the argument did not provide a ground for conviction and was not inconsistent with the position taken by the prosecutor at sentencing.

43.3 [2][c] Substantial Portion of Income Derived From Criminal Scheme

Section 2T1.4(b)(1)(A), the guideline governing aiding, assisting, procuring, counseling, or advising of tax fraud in violation of 26 U.S.C. §7206(2), provides for a two-level enhancement of the offense level if "the defendant committed the offense as part of a pattern or scheme from which he derived a substantial portion of his income." This enhancement applies, for example, to defendants who derive a substantial portion of their income through the promotion of fraudulent tax shelters. USSG §2T1.4, comment. (n.2).

The Fifth Circuit has upheld a sentencing court's use of the quasi-formula from the Guidelines' criminal livelihood provision, Section 4B1.3, in determining whether to impose an enhancement under Section 2T1.4(b)(1)(A). *See* ***United States v. Welch***, 19 F.3d 192, 194-95 (5th Cir. 1994). Under Section 4B1.3, "engaged in as a livelihood" means that

> (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period *(e.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).§4B1.3, comment. (n.2). In ***Welch***, the defendant argued that use of §4B1.3 was improper because §2T1.4 does not explicitly authorize the sentencing court to refer to §4B1.3 when determining whether to enhance under §2T1.4(b)(1)(A). 19 F.3d at 194. Rejecting this claim, the Fifth Circuit noted that the guidelines do not specify what constitutes a "substantial portion" of one's income and that the court previously had upheld application of §4B1.3 to other specific offenses, even though the guidelines governing those specific offenses did not refer to §4B1.3. ***Id***. at 194-95. The court further observed that the wordings of §2T1.4(b)(1)(A) and §4B1.3 are nearly identical. ***Id***. at 195 n.6. Applying the §4B1.3 formula to the facts of the case, the ***Welch*** court upheld the §2T1.4(b)(1)(A) enhancement

> imposed by the sentencing court because the fraudulent return scheme created a tax loss of at least $29,000 and because the defendant was unable to show any evidence of any legitimate employment or source of income. ***Id***. at 195; *see also* ***United States v. Searan***, 259 F.3d 434, 448-49 (6th Cir. 2001) ($16,970 in gross income from tax service qualifies for enhancement where record reflects no non-tax fraud sources of income).

43.03[2][d] Business of Preparing or Assisting in the Preparation of Tax Returns

The sentencing guideline governing aiding, assisting, procuring, counseling, or advising tax fraud also provides for a two-level enhancement of the offense level if "the defendant was in the business of preparing or assisting in the preparation of tax returns." USSG §2T1.4(b)(1)(B). This enhancement applies to defendants "who regularly prepare or assist in the preparation of tax returns for profit." USSG §2T1.4, comment. (n.2).

This enhancement "does not, by language or logic, purport to focus only on persons for whom tax-return preparation is a primary business." ***United States v. Phipps***, 29 F.3d 54, 56 (2d Cir. 1994). Likewise, this enhancement is not limited to defendants who "hang out a shingle" as professional tax return preparers. ***United States v. Welch***, 19 F.3d 192, 196 (5th Cir. 1994) (upholding imposition of enhancement when defendant, who argued that his primary occupation was as a sports agent, showed no other gainful employment, filed five fraudulent tax returns for four clients over the span of three years, and once misrepresented himself as a CPA). Nor is the enhancement limited to only those tax preparers with a legitimate tax preparation business who commit tax fraud. ***United States v. Aragbaye***, 234 F.3d 1101, 1106-07 (9th Cir. 2000) (upholding application of 2T1.4(b)(1)(B) enhancement to defendant whose tax preparation business consisted solely of preparing fictitious tax returns). Rather, the focus of this enhancement is on whether the defendant "regularly" prepared or assisted in the preparation of tax returns for profit. ***Phipps***, 29 F.3d at 56. Accordingly, the sentencing court may impose this enhancement if the defendant's tax-return preparation activity was not occasional or sporadic, and if the defendant received payment for his services. ***Id***. Because this provision "was intended, in part, to reach paid preparers whose activities are sufficiently extensive to expose the government to the risk of loss of significant revenues," the term "regularly" does not mean necessarily "'year-round,' especially when dealing with a business so clearly seasonal as the filing of personal income tax returns." ***Phipps***, 29 F.3d at 56 (upholding imposition of enhancement when defendant prepared at least 155 fraudulent tax returns over period of five or six consecutive years for fee of $90 to $200 per return).

Finally, this enhancement may apply even though the sentencing court also applies an enhancement under Section 2T1.4(b)(2) for use of sophisticated means. ***United States v. Hunt***, 25 F.3d 1092, 1098 (D.C. Cir. 1994); *see also* **United States v. Ambort**, 405 F.3d 1109, 1119-20 (10th Cir. 2005) (affirming sentence that included enhancements for both tax preparation and sophisticated means); ***Aragbaye***, 234 F.3d at 1106-08 (same). This enhancement cannot apply, however, if the sentencing court applies an enhancement under Section 3B1.3 for abuse of position of trust or use of special skill. USSG §2T1.4, comment. (n.2); ***United States v. Young***, 932 F.2d 1510, 1514 n.4 (D.C. Cir. 1991).

43.03[2][e] Planned or Threatened Use of Violence

The guideline governing conspiracies to impede, impair, obstruct or defeat a tax, in violation of 18 U.S.C. § 371, provides for a four-level enhancement of the offense level "[i]f the offense involved the planned or threatened use of violence to impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." USSG §2T1.9(b)(1). Section 2T1.9 includes this enhancement because of the potential danger that tax fraud conspiracies may pose to law enforcement agents and the public. USSG §2T1.9, comment. (backg'd). Although there appears to be extremely limited case law regarding this provision, the Eleventh Circuit has upheld an enhancement under Section 2T1.9(b)(1) in a case in which the defendant and his brother threatened a witness with a gun during the course of a conspiracy to evade income taxes. *See* ***United States v. Pritchett***, 908 F.2d 816, 824 (11th Cir. 1990).

43.3 [2][f] Encouragement of Others to Violate Tax Code

Section 2T1.9(b)(2) also provides for a two-level enhancement of the offense level for conspiring to impede, impair, obstruct or defeat a tax under 18 U.S.C. § 371 "[i]f the conduct was intended to encourage persons other than or in addition to co-conspirators to violate the internal revenue laws or impede, impair, obstruct, or defeat the ascertainment, computation, assessment, or collection of revenue." The application notes to Section 2T1.9 explain that this provision "provides an enhancement where the conduct was intended to encourage persons, other than the participants directly involved in the offense, to violate the tax laws (*e.g.*, an offense involving a 'tax protest' group that encourages persons to violate the tax laws, or an offense involving the marketing of fraudulent tax shelters or schemes)." USSG §2T1.9, comment. (n.4). The sentencing court should not apply this enhancement, however, if an adjustment is applied under Section 2T1.4(b)(1), which provides an enhancement for a defendant who derived a substantial portion of his income from a tax fraud scheme or who was in the business of preparing or assisting in the preparation of tax returns. USSG§2T1.9(b)(2).

This provision apparently applies even if the persons encouraged by the defendant to violate the tax code are government agents. In ***United States v. Sileven***, 995 F.2d 962 (8th Cir. 1993), the Eighth Circuit held that the district court did not clearly err by enhancing the defendant's sentence under Section 2T1.9(b)(2), because the evidence indicated that the defendant through his actions and words repeatedly encouraged two other individuals to hide income. ***Id.*** at 970. Although the status of the other individuals whom the defendant had encouraged was not an issue on appeal, the facts of the case indicate that these individuals (one private party and one IRS agent) were acting at the direction of the IRS. ***Id.*** at 964. Further, this provision applies when the defendant simply encourages others to disguise the defendant's own tax status. ***United States v. Rabin***, 986 F. Supp. 887, 890-91 (D.N.J. 1997) (defendant encouraged girlfriend and attorney to hide defendant's income).

43.4 RELEVANT CONDUCT

Section 1B1.3 of the Guidelines permits a sentencing court to consider all of a defendant's relevant conduct in determining the base offense level, specific offense characteristics, and Chapter Three adjustments. That provision specifically authorizes a court to consider "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." USSG §1B1.3(a)(1)(A). The court may additionally consider "in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." USSG §1B1.3(a)(1)(B). These acts may have "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." USSG §1B1.3(a)(1). Moreover, solely with respect to offenses of a character for which Section 3D1.2(d) would require grouping of multiple counts (tax offenses among others), all acts and omissions of the sort described in Section 1B1.3(a)(1) that were part of the same course of conduct or common scheme or plan as the offense of conviction should be grouped. USSG §1B1.3(a)(2). *See also* USSG §§1B1.3(a)(3) and (4).

As discussed above, the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), did not alter a district court's obligation to consider relevant conduct at sentencing. As long as the court treats the resulting Guidelines range as advisory, rather than mandatory, consideration of a defendant's relevant conduct does not violate the Sixth Amendment. ***United States v. Rita***, 551 U.S. 338, 349-350 (2007) (holding that the judicial fact-finding necessary to calculate the advisory Guidelines range does not violate the Sixth Amendment). Moreover, consideration of relevant conduct accords with the requirement under 18 U.S.C. § 3553(a) that the sentencing court consider the history and characteristics of the defendant and the seriousness of the offense. 18 U.S.C. § 3553(a)(1).

Generally, the government bears the burden of persuasion on the issue of relevant conduct, by a preponderance of the evidence. USSG §6A1.3, comment.; ***United States v. Watts***, 519 U.S. 148, 156 (1997) (*per curiam*); ***United States v. De La Rosa***, 922 F.2d 675, 679 (11th Cir. 1991). Note, however, that the Supreme Court has specifically left open the question whether, under exceptional circumstances in which the sentencing enhancement was "a tail which wags the dog of the substantive offense," due process might require the relevant conduct to be proven by clear and convincing evidence. ***Watts***, 519 U.S. at 156-57 n.2 (internal quotation omitted). The Guidelines' relevant conduct provisions are consistent with the long-standing principle that "both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." ***Williams v. New York***, 337 U.S. 241, 246 (1949); *accord* ***Witte v. United States***, 515 U.S. 389, 402 (1995) ("'[V]ery roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment.'") (quoting ***United States v. Wright***, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.)).

This principle was codified at 18 U.S.C. § 3661, which provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense

> which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C. § 3661; *see also* ***Watts***, 519 U.S. at 152. Thus, "[a]s a general proposition a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." ***Watts***, 519 U.S. at 152. The commentary to Section 1B1.3 specifically provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range." §3B1.3, comment. (backg'd.). And every court of appeals to address the question has held that the Supreme Court's decision in ***Booker*** did not alter or overrule the Court's reasoning in *Watts*. ***United States v. Vaughn***, 430 F.3d 518, 526-27 (2d Cir. 2005); ***United States v. Farias***, 469 F.3d 393, 399-400 (5th Cir. 2006); ***United States v. Mendez,*** 498 F.3d 423, 426-27 (6th Cir. 2007); ***United States v. Hurn,*** 96 F.3d 784, 788 (7th Cir. 2007); ***United States v. High Elk***, 442 F.3d 622, 626 (8th Cir. 2006); ***United States v. Mercado***, 474 F.3d 654, 656-57 (9th Cir. 2007); ***United States v. Magallanez***, 408 F.3d 672, 684-85 (10th Cir. 2005); ***United States v. Duncan,*** 400 F.3d 1297, 1304-05 (11th Cir. 2005); ***United States v. Bras***, 483 F.3d 103, 107 (D.C. Cir. 2007).

A sentencing court may consider acquitted conduct without running afoul of the Double Jeopardy Clause, which "prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." ***Witte***, 515 U.S. at 389 (quoting ***Helvering v. Mitchell***, 303 U.S. 391, 399 (1938)) (emphasis omitted). The Supreme Court determined that sentencing enhancements "do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." ***Watts***, 519 U.S. at 154; ***Witte***, 515 U.S. at 402-03. The Court based its decision on the premise that "'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.'" ***Watts***, 519 U.S. at 156 (quoting ***Dowling v. United States***, 493 U.S. 342, 349 (1990)); *see also* ***United States v. Averi***, 922 F.2d 765, 766 (11th Cir. 1991).

A sentencing court may also rely on conduct that occurred outside the statute of limitations. ***United States v. Williams***, 217 F.3d 751, 754 (9th Cir. 2000); ***United States v. Valenti***, 121 F.3d 327, 334 (7th Cir. 1997); ***United States v. Behr***, 93 F.3d 764 (11th Cir. 1996); ***United States v. Silkowski***, 32 F.3d 682, 687 (2d Cir. 1994); ***United States v. Neighbors***, 23 F.3d 306, 310-11 (10th Cir. 1994); ***United States v. Pierce***, 17 F.3d 146, 150 (6th Cir. 1994); ***United States v. Wishnefsky***, 7 F.3d 254, 256-57 (D.C. Cir. 1993); ***United States v. Lokey***, 945 F.2d 825, 840 (5th Cir. 1991).

Additionally, a sentencing court may rely on uncharged conduct or charges that have been dismissed. ***United States v. Bove***, 155 F.3d 44, 47-48 (2d Cir. 1998) (relevant conduct "clearly encompasses both charged and non-charged conduct"); ***United States v. Georges***, 146 F.3d 561, 562 (8th Cir. 1998) (court included as relevant conduct deposit of loan repayment to a personal account and deduction of loan as these acts were inextricably tied to long pattern of conduct to conceal income); ***Valenti***, 121 F.3d at 334; ***United States v. Noske***, 117 F.3d 1053, 1060 (8th Cir. 1997); ***United States v. Fine***, 975 F.2d 596, 602-03 (9th Cir. 1992) (*en banc*); ***United States v. Johnson,*** 971 F.2d 562, 576 n.10 (10th Cir. 1992) (funds associated with uncharged instances of money laundering can be included to determine the offense level under Section 2S1.1 if those acts are within the scope of relevant conduct under Section 1B1.3(a)(2)).

The Guidelines also permit a defendant to be sentenced for acts committed by others during the course of jointly undertaken criminal activities, when those acts were in furtherance of the activity and reasonably foreseeable. USSG §1B1.3(a)(1)(B); ***United States v. Guerra***, 113 F.3d 809, 819 (8th Cir. 1997); ***United States v. House***, 110 F.3d 1281, 1284-85 (7th Cir. 1997) (all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity would be attributable to defendant found to have reasonably foreseen the scope of the conspiracy); ***United States v. Lorenzo***, 995 F.2d 1448, 1460 (9th Cir. 1993); ***Johnson,*** 971 F.2d at 574-75. In ***United States v. Logan,*** 250 F.3d 350 (6th Cir. 2001), the Sixth Circuit found that fraudulent claims submitted by coconspirators are correctly included as relevant conduct in determination of the total loss, even if those claims were not charged in the indictment. ***Id***. at 371-72.

The Guidelines themselves note that "[b]ecause a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the criminal activity jointly undertaken by the defendant . . . is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant." USSG §1B1.3, comment. (n.2). The relevant inquiry focuses upon the scope of criminal activity agreed upon by the defendant. ***United States v. Ladum***, 141 F.3d 1328, 1346 (9th Cir. 1998) (inquiry requires determination of the scope of the specific conduct and objects embraced by the defendant's agreement). The

Ladum court noted that the principles and limits of criminal liability are not always the same as the principles and limits of sentencing accountability. Therefore, the focus is on specific acts and omissions for which a defendant is accountable in determining the applicable guideline range, which requires "a determination of the scope of the criminal activity the particular defendant agreed to jointly undertake." ***Id***. (citation and punctuation omitted). The Second Circuit held that under §1B1.3(a)(1), a defendant "may be held accountable for (i) any tax evasion in which he had a direct, personal involvement and (ii) as to jointly undertaken criminal activity, any reasonably foreseeable tax losses." ***United States v. Martinez-Rios***, 143 F.3d 662, 674 (2d Cir. 1998) (punctuation and citation omitted). The "reasonable foreseeability" requirement "applies only to the conduct of others." ***Id***.

43.05 ROLE IN THE OFFENSE

The Guidelines authorize the sentencing court to adjust a defendant's offense level based upon the court's assessment of each offender's actions and relative culpability in the offense. The court may enhance the offense level by up to four levels upon a finding that the defendant played a leadership role. USSG §3B1.1. Upon a finding that a defendant was a "minimal" or "minor" participant in the offense, the court may reduce the defendant's offense level by up to four levels. USSG §3B1.2. If the court finds that the defendant abused a position of public or private trust, or used a special skill, in order to significantly facilitate the commission or concealment of the offense, the court may enhance the defendant's offense level by two levels. USSG §3B1.3.

The introductory commentary to Chapter 3, Part B declares that "[t]he determination of a defendant's role in the offense is to be made on the basis of all conduct within the scope of §1B1.3 (Relevant Conduct), *i.e*., all conduct included under §1B1.3(a)(1)-(4), and not solely on the basis of elements and acts cited in the count of conviction." A sentencing court therefore may consider uncharged relevant conduct, or even relevant conduct underlying an acquitted charge, when determining whether to an adjust a defendant's offense level on the basis of his or her role in the offense. *See* ***United States v. Watts***, 519 U.S. 148, 151-57 (1997) (*per curiam*) (holding that Section 1B1.3 permits sentencing court to determine applicable guideline range by relying upon uncharged conduct or conduct underlying acquitted charges, so long as conduct has been proven by preponderance of the evidence); *see also* ***United States v. Ramos-Oseguera***, 120 F.3d 1028, 1039 (9th Cir. 1997) (under ***Watts***, court may enhance base offense level for aggravated role in the offense by relying upon conduct underlying count for which jury acquitted defendant); ***United States v. Thomas***, 114 F.3d 228, 261-62 (D.C. Cir. 1997) (holding the same). Note, however, that at least one opinion issued subsequent to the Supreme Court's decision in ***Watts*** has concluded that an abuse of trust enhancement may rely only upon conduct involved in an offense of conviction. *See* ***United States v. Barakat***, 130 F.3d 1448, 1455 (11th Cir. 1997); *but see* ***United States v. Cianci***, 154 F.3d 106, 111 (3d Cir. 1998) (declining to follow *Barakat* and holding that an abuse of trust enhancement may rest upon facts outside the offense of conviction).

43.05[1] Aggravating Role in the Offense

Section 3B1.1 permits an increase in the offense level as follows: (a) an increase of four levels if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; (b) an increase of three levels if the defendant was a manager or supervisor of such a criminal activity; or (c) an increase of two levels if the defendant was an organizer, leader, manager or supervisor in any criminal activity other than that described in (a) or (b). The term "participant" refers to a person who is criminally responsible for the commission of the offense; the term includes persons not convicted of an offense, but excludes undercover law enforcement officers. USSG §3B1.1, comment. (n.1). When assessing whether an organization is "otherwise extensive," courts should consider all persons involved during the course of the entire offense, including unwitting outsiders used by the criminal participants. USSG §3B1.1, comment. (n.3); ***United States v. Randy***, 81 F.3d 65, 68-69 (7th Cir. 1996). Any particular title the defendant may have had, i.e., "kingpin" or "boss," is not determinative of whether the defendant acted as an organizer or leader, as opposed to a mere manager or supervisor. USSG §3B1.1, comment. (n.4). Rather, courts should consider the following factors when deciding whether a defendant was an organizer orleader:

> [T]he exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. The purpose of Section 3B1.1 is to account for the relative responsibilities of the participants in a scheme and to deter those persons who are most likely to present a greater danger to the public and/or recidivate. USSG §3B1.1, comment. (backg'd). An appellate court will review factual findings regarding the applicability of this enhancement for clear error only. ***United States v. Powell***, 124 F.3d 655, 667 (5th Cir. 1997).

Section 3B1.1 defines "organizer or leader" broadly, and a defendant may have acted as an organizer even if he or she did not control others in the organization directly. ***United States v. Morris***, 18 F.3d 562, 569 (8th Cir. 1994); *see also* ***United States v. Ervasti***, 201 F.3d 1029, 1041 (8th Cir. 2000) ("While control of other participants is an important factor, section 3B1.1 focuses on the 'relative responsibility within a criminal organization.'") (citations omitted). Further, there can be more than one organizer in a criminal operation. USSG §3B1.1, comment. (n.4); ***Morphew v. United States***, 909 F.2d 1143, 1145 (8th Cir. 1990). Likewise, a defendant may be a manager or supervisor even if he or she is not at the top of a criminal scheme. ***United States v. Goldberg***, 105 F.3d 770, 777 (1st Cir. 1997). Moreover, a defendant may qualify for a §3B1.1(b) enhancement so long as he or she had a managerial or supervisory role in illegal conduct involving five or more persons; the defendant does not have to manage or supervise five other persons directly. ***United States v. Kraig***, 99 F.3d 1361, 1369-70 (6th Cir. 1996). Even if the defendant did not have an aggravating role during the commission of the offense, he or she still may qualify for an enhancement if he or she assumed a dominant role during a later cover-up. ***United States v. Mankarious***, 151 F.3d 694, 710 (7th Cir. 1998). And more than one codefendant with varying degrees of culpability may qualify for an aggravating role enhancement. ***United States v. Mickle***, 464 F.3d 804, 808 (8th Cir. 2006).

Courts often have upheld the application of an aggravating role enhancement in cases involving tax crimes. *See, e.g.,* ***United States v. Radke***, 415 F.3d 826, 845 (8th Cir. 2005) (Section 3B1.1(c) enhancement proper for business owner who expressly authorized employees to use illegal checks and who received disproportionate share of profits derived from the illegal scheme); ***Ervasti***, 201 F.3d at 1041-42 (upholding Section 3B1.1(c) enhancement for husband defendant who "was not just [company's] CEO in title, he was its leader in all respects"(internal quotation omitted)); ***Mankarious***, 151 F.3d at 710 (upholding Section 3B1.1(c) enhancement for defendant who directed and paid underling to conceal scheme to commit money laundering, wire fraud, and filing of false tax returns); ***Powell***, 124 F.3d at 667 (distributor of gasoline and diesel fuel, convicted of evading federal fuel excise taxes, qualified for Section 3B1.1(c) enhancement because he supervised in-house accountant's work on false tax returns regarding fuel sales); ***United***

States v. Madoch, 108 F.3d 761, 767 (7th Cir. 1997) (CPA, convicted of corruptly endeavoring to obstruct government from collecting taxes, qualified for Section 3B1.1(a) enhancement because five other individuals helped him further scheme, according to his directions); ***Goldberg***, 105 F.3d at 777 (defendant, convicted of conspiring to defraud the IRS and aiding the filing of false tax returns, qualified for Section 3B1.1(c) enhancement; although bookkeeper whom defendant supervised was not a culpable participant, defendant also managed receipt of false tax documents by straw employees); ***Kraig***, 99 F.3d at 1370 (lawyer, convicted of conspiring to defraud the IRS, qualified for Section 3B1.1(b) enhancement because he recruited lawyers and accountants to participate in scheme to conceal assets of client); ***United States v. Brinkworth***, 68 F.3d 633, 641-42 (2d Cir. 1995) (defendant, convicted of filing false return, qualified for Section 3B1.1(c) enhancement because he directed and provided records to criminally responsible accountant); ***United States v. Dijan***, 37 F.3d 398, 403-04 (8th Cir. 1994) (defendants, convicted of conspiring to bribe IRS agent, qualified for Section 3B1.1(a) enhancement because criminal activity involved more than five people, including indicted and unindicted coconspirators, and because decision to attempt bribe rested with defendants); ***United States v. Leonard***, 37 F.3d 32, 37-39 (2d Cir. 1994) (corporate vice-president, convicted of conspiring to defraud the IRS, qualified for Section 3B1.1(b) enhancement because he organized and managed efforts of other employees to skim cash from corporation, even though he did so at the behest of another individual).

43.05[2] Mitigating Role in the Offense

Section 3B1.2(a) provides that a court may reduce by four the offense level of a defendant who was "a minimal participant in any criminal activity." This reduction, which covers "defendants who are plainly among the least culpable of those involved in the conduct of a group," applies infrequently. USSG §3B1.2, comment. (n.4). A minimal participant will have "a lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others." *Id.* Section 3B1.2(b) similarly provides that a court may reduce by two the offense level of a defendant who was "a minor participant in any criminal activity." Under Section 3B1.2(b), a minor participant is any participant "who is less culpable than most other participants, but whose role could not be described as minimal." USSG §3B1.3, comment. (n.5). A defendant whose role in the criminal activity was greater than "minimal," but less than "minor," may receive an intermediate reduction of three levels. USSG §3B1.2.

A defendant bears the burden of proving that he or she played only a minimal or minor role in the offense. ***United States v. Searan***, 259 F.3d 434, 447-48 (6th Cir. 2001); ***United States v. Atanda***, 60 F.3d 196, 198 (5th Cir. 1995) (*per curiam*). When assessing whether a defendant qualifies for a mitigating role reduction, the sentencing court "must take into account the broad context of the defendant's crime." *Id.* A finding that a defendant did or did not have a minimal or minor role is reviewed for clear error because such a determination depends heavily upon the facts of the particular case. ***Searan***, 259 F.3d at 447; ***United States v. Ladum***, 141 F.3d 1328, 1348 (9th Cir. 1998). A defendant does not qualify for a mitigating role reduction simply because he or she is less culpable than other codefendants. ***Ladum***, 141 F.3d at 1348 (upholding refusal to apply mitigating role reduction when defendant, although acquitted of false tax return charges, nonetheless played instrumental role in bankruptcy fraud scheme); ***Atanda***, 60 F.3d at 198 n.1. Generally, a reduction for minimal participation is reserved for those individuals who play "'a single, limited role in a very large organization.'" *See* ***United States v. Tilford***, 224 F.3d 865, 869 (6th Cir. 2000) (quoting ***United States v. Williams***, 940 F.2d 176, 180 (6th Cir. 1991)).

A defendant who already has received a lower offense level because he or she has been convicted of an offense significantly less serious than his actual criminal conduct ordinarily cannot qualify for any mitigating role reduction. USSG §3B1.3, comment. (n.3). Likewise, a defendant cannot qualify for a reduction when his or her sentence rests solely upon criminal activity in which he or she actually participated, even though the defendant's role in a larger conspiracy may have been minor or minimal. ***Atanda***, 60 F.3d at 199 (upholding refusal to apply mitigating role reduction when defendant was convicted of both filing a false claim for tax refund in own name and participating in broad conspiracy to file false claims for tax refunds; although defendant's role in overall conspiracy was relatively small, his sentence was based only upon the tax loss arising out of the single false claim filed by defendant in his own name); ***United States v. Lampkins***, 47 F.3d 175, 180-81 (7th Cir. 1995); ***United States v. Lucht***, 18 F.3d 541, 555 (8th Cir. 1994).

43.05[3] Abuse of Position of Trust or Use of a Special Skill

Section 3B1.3 permits a sentencing court to increase the defendant's base offense level by two levels if the court finds that the defendant abused a position of public or private trust or used a special skill in a manner that significantly facilitated the commission or concealment of the offense. Section 3B1.3, however, prohibits use of this enhancement when the base offense level or the specific offense characteristics of the guideline being applied already include an abuse of trust or special skill. Section 3B1.3 further indicates that an adjustment based upon an abuse of trust may accompany an additional adjustment based upon an aggravating role in the offense under Section 3B1.1, but that an adjustment based solely upon the use of a special skill may not accompany an additional adjustment under Section 3B1.1. An appellate court reviews *de novo* a sentencing court's interpretation of the meanings of the terms "position of trust" and "special skill," but reviews the sentencing court's application of those terms to the facts for clear error. ***United States v. Noah***, 130 F.3d 490, 499 (1st Cir. 1997); ***United States v. Bhagavan***, 116 F.3d 189, 192 (7th Cir. 1997); ***United States v. Young***, 932 F.2d 1510, 1512 (D.C. Cir. 1991).

The Guidelines define a position of "public or private trust" as "a position of public or private trust characterized by professional or managerial discretion (*i.e.*, substantial discretionary judgment that is ordinarily given considerable deference)." USSG §3B1.3, comment. (n.1). For example, the enhancement would apply to a fraudulent loan scheme by a bank executive, but not to embezzlement by an ordinary bank teller. *Id.* The purpose of this enhancement is "to penalize defendants who take advantage of a position that provides them freedom to commit or conceal a difficult-to-detect wrong." ***United States v. Koehn***, 74 F.3d 199, 201 (10th Cir. 1996). Courts assess whether a defendant occupied a position of trust from the perspective of the victim of the crime. ***United States v. Brickey***, 289 F.3d 1144, 1154-55 (9th Cir. 2002) (defendant's position as border inspector for the INS constituted position of trust because defendant had discretion to allow vehicles to cross border without inspection, thereby facilitating defendant's collection of payments from drug smugglers and his failure to report that income); ***United States v. Guidry***, 199 F.3d 1150, 1159-60 (10th Cir. 1999); ***United States v. Garrison***, 133 F.3d 831, 837 (11th Cir. 1998); ***United States v. Ragland***, 72 F.3d 500, 502 (6th Cir. 1996). The concept of "trust" under Section 3B1.3 resembles the degree of discretion traditionally accorded a trustee or fiduciary. ***Ragland***, 72 F.3d at 502-03.

Some courts have held that an enhancement under Section 3B1.1 may be appropriate in a criminal tax case even if the defendant did not occupy a position of trust in relation to the federal government. For example, the Seventh Circuit has held that the majority shareholder of a corporation qualified for the abuse of trust enhancement when he used his position to divert corporate income in order to facilitate the crime of personal income tax evasion. ***Bhagavan***, 116 F.3d at 193-94. Although the dissent in ***Bhagavan*** argued that the enhancement was inapplicable because the victims of the defendant's abuse of trust, the minority shareholders, were not the victims of the actual crime of conviction, tax evasion, ***id***. at 194-95 (Cudahy, J., dissenting), the majority determined that "[i]t is enough that identifiable victims of Bhagavan's overall scheme to evade his taxes put him in a position of trust and that his position 'contributed in some significant way to facilitating the commission or concealment of the offense.'" ***Id***. at 193 (quoting USSG §3B1.3, comment. (n.1)); *see also* ***United States v. Kay***, 513 F.3d 432, 460 (5th Cir. 2007) ("We have never held . . . nor do the guidelines explicitly require, that the determination whether a defendant occupied a position of trust must be assessed from the perspective of the victim." (internal quotation omitted)), *cert. denied*, 129 S. Ct. 42 (2008); ***United States v. Cianci***, 154 F.3d 106, 111-13 (3d Cir. 1998) (high-ranking corporate official facilitated crime of individual income tax evasion by abusing position of trust and diverting embezzled corporate property in exchange for kickbacks; enhancement was proper even though the victim of defendant's abuse of trust was not the victim of the offense of conviction). However, other courts have indicated that a §3B1.1 enhancement is only appropriate in a tax case if "the defendant is a government employee or exercises directly delegated public authority." ***United States v. Technic Services, Inc.***, 314 F.3d 1031, 1051 (9th Cir. 2002); *see also* ***United States v. Ebersole***, 411 F.3d 517, 536 (4th Cir. 2005) (abuse of trust enhancement improper when victims were federal agencies and defendant had no fiduciary relationship with federal government).

Courts have upheld the use of the Section 3B1.1 enhancement in a variety of settings. In ***United States v. Lowder***, 5 F.3d 467, 470 (10th Cir. 1993), the defendant, a certified public accountant, was convicted of mail fraud based on misrepresentations he made when soliciting his tax clients for investments, which he then misused for personal expenditures. The Tenth Circuit upheld an enhancement for abuse of trust, explaining that the defendant "was a CPA who provided tax and financial advice to elderly and unsophisticated clients. He advised them to place their money with him and promised them security. As president of the corporations he was free to spend that money, without oversight." ***Id***. at 473. The ***Lowder*** court further stated that factors relevant to whether a defendant abused a position of trust include the "defendant's level of knowledge and authority, the level of public trust in defendant, and whether the abuse could be easily or readily noticed." ***Id***.

In ***United States v. Baker***, 200 F.3d 558, 560 (8th Cir. 2000), the defendant, an insurance agent, was convicted of mail fraud, insurance theft, and making false statements to the government. Defendant represented to elderly clients that she would use their insurance premium payments to purchase insurance policies or annuities when she actually misused the money for personal expenses. ***Id***. In upholding the abuse of trust enhancement, the Eighth Circuit stated that "ordinary commercial relationships do not constitute a trust relationship sufficient to invoke the . . . enhancement . . . [but] the issue is fact intensive because it turns on the precise relationship between defendant and her victims." ***Id.*** at 564 (citation omitted). The ***Baker*** court stated that the defendant "was an insurance agent who persuaded her elderly clients to give her personal control over their premium payments and then misappropriated those monies." ***Id***. It concluded that "a licensed insurance agent with control over client funds *may* occupy a position of private trust." ***Id***.

Courts also have upheld application of the abuse of trust enhancement to bank officers who used their positions to facilitate the commission of crimes. ***United States v. McCord***, 33 F.3d 1434, 1435 (5th Cir. 1994) (bank president convicted of misapplication of bank funds used position to arrange for bank funds to pay for installation of air conditioning unit at his home, and to arrange for false entries in bank records); ***United States v. Morris***, 18 F.3d 562, 568 (8th Cir. 1994) (bank officer and director convicted of bank fraud and money laundering used position to approve payment of insufficient funds checks and conceal overdraft status of account). Likewise, law enforcement officers who use their positions to further or conceal their criminal activity may be subject to this enhancement. ***United States v. Terry***, 60 F.3d 1541, 1545 (11th Cir. 1995) (deputy sheriff used office and patrol car to prevent police interception of his drug sales to undercover agent); ***United States v. Duran***, 15 F.3d 131, 132-33 (9th Cir.1994) (*per curiam*) (sheriff used office to embezzle funds seized during drug investigations). The Eleventh Circuit has upheld an abuse of public trust enhancement applied to a grand juror who provided information to an individual under grand jury investigation for drug smuggling and money laundering. ***United States v. Brenson***, 104 F.3d 1267, 1287-88 (11th Cir. 1997).

Because Section 3B1.3 states that the abuse of trust enhancement cannot apply when an abuse of trust is included in the base offense level or specific offense characteristic, some opinions have stated that this enhancement cannot apply in the context of certain fraud crimes. *See* ***Garrison***, 133 F.3d at 842 (owner and chief executive officer of home health care provider, convicted of submitting fraudulentcost reports for Medicare reimbursements, could not receive abuse of trust enhancement based upon same conduct underlying conviction); ***United States v. Broderson***, 67 F.3d 452, 456 (2d Cir. 1995) (vice-president of company with government contract, convicted of misrepresenting to the government that his company had complied with applicable regulations, could not receive abuse of trust enhancement because the base offense level for his fraud conviction already included any abuse of trust); *but cf.* ***United States v. Chimal***, 976 F.2d 608, 613 (10th Cir. 1992) (affirming abuse of trust enhancement in embezzlement case, even after acknowledging that "embezzlement by definition involves an abuse of trust"). Similarly, the Second Circuit has observed that the abuse of trust enhancement does not apply simply because the defendant violated a statutory duty to provide accurate information to the government; for example, the abuse of trust enhancement does not apply to every taxpayer who files a false tax return. ***Broderson***, 67 F.3d at 456.

The Guidelines define a "special skill" as a "skill not possessed by members of the general public and usually requiring substantial education, training or licensing." Persons with special skills include pilots, lawyers, doctors, accountants, chemists, and demolition experts. USSG §3B1.3, comment. (n.4). A special skill enhancement may apply even if the defendant is self-taught or lacks either formal education or professional stature. ***Noah***, 130 F.3d at 500. "[A] skill can be special even though the activity to which the skill is applied is mundane. The key is whether the defendant's skill set elevates him to a level of knowledge and proficiency that eclipses that possessed by the general public." *Id.* The special skill enhancement "requires only proof that the defendant's use of that skill makes it significantly 'easier' for him to commit or conceal the crime." ***United States v. Atkin***, 107 F.3d 1213, 1219-20 (6th Cir. 1997) (upholding special skill enhancement when lawyer, convicted, in part, of obstruction of justice, used position in order to facilitate and conceal his attempt to bribe a judge). A special skill enhancement may not be based on a coconspirator's actions. ***United States v. Gormley***, 201 F.3d 290, 295 (4th Cir. 2000). A sentencing court may apply a special skill enhancement even though it is also applying an additional enhancement for use of sophisticated means, under Section 2T1.3(b)(2). ***United States v. Rice***, 52 F.3d 843, 850-51 (10th Cir. 1995).

The First Circuit upheld the application of a special skill enhancement to a professional tax return preparer convicted of making false claims for refund through the filing of false electronic returns. ***Noah***, 130 F.3d at 500. In ***Noah***, the defendant unsuccessfully argued that the enhancement was inapplicable because the preparation and electronic filing of tax returns are relatively simple tasks and because he lacked formal training. ***Id***. The First Circuit relied upon the holding of the Second Circuit in ***United States v. Fritzson***, 979 F.2d 21, 22 (2d Cir. 1993) (*per curiam*), in which the defendant, an accountant convicted of a tax fraud conspiracy, disputed the propriety of the enhancement by claiming that even people without his special skills could prepare the Forms W-2 and W-3 at issue. ***Fritzson***, 979 F.2d at 22. Rejecting this claim, the ***Fritzson*** court found that "[a]n accountant's knowledge of the withholding process, including the roles of the claim and transmittal documents, and how and when to file them, exceeds the knowledge of the average person." *Id.* at 22-23; *see also* ***Rice***, 52 F.3d at 850 (accountant convicted of making false claims for tax refunds and filing false tax returns qualified for special skill enhancement).

In ***United States v. Wright***, 211 F.3d 233 (5th Cir. 2000), the defendant, a Certified Public Accountant and tax attorney, received an enhancement for use of a special skill. In upholding the enhancement, the Fifth Circuit stated that while the defendant's contribution to the scheme was not particularly sophisticated, the defendant did use his special skills to prepare legal documents which furthered the conspiracy. ***Id.*** at 238.

Note, however, that the enhancement for use of a special skill cannot be used if the defendant regularly acts as a return preparer or advisor for profit and is convicted pursuant to 26 U.S.C. § 7206(2). USSG §2T1.4, comment. (n.3); ***United States v. Young***, 932 F.2d 1510, 1514 n.4 (D.C. Cir. 1991). This is because the specific offense characteristics of Section 2T1.4 include a two-level enhancement if the defendant was in the business of preparing or assisting in the preparation of tax returns. USSG §2T1.4(b)(3); ***Young***, 932 F.2d at 1514 n.4.

43.5 [4] USSG § 3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases

The Sentencing Guidelines provision applicable to offenses under 26 U.S.C. § 7202, which proscribes a willful failure to collect, account for, and pay over trust fund employment taxes, is USSG § 2T1.6. Section 2T1.6 directs that the base offense level for Section 7202 is determined by the Section 2T4.1 Tax Table; Section 2T1.6 does not contain any enhancements for specific offense characteristics. USSG §2T1.6(b) does contain a cross reference indicating that the base offense level is to be determined by USSG §2B1.1 (Theft, Property Destruction, and Fraud) "[w]here the offense involved embezzlement by withholding tax from an employee's earnings and willfully failing to account to the employee for it," if the resulting offense level is greater. Section 3B1.2 of the Sentencing Guidelines, entitled "Abuse of Position of Trust of Use of Special Skill," provides, in pertinent part, that: "If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by two levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics."

In at least two cases, the Courts of Appeals have reversed the imposition of the Section 3B1.2 abuse-of-trust enhancement in a Section 7202 trust fund case. In ***United States v. May***, 568 F.3d 597 (6th Cir. 2009), the court held that the enhancement can be applied only where the defendant abused a position of trust vis-à-vis the victim, that the IRS is the victim of a Section 7202 offense, and that the defendant did not hold a position of trust in relation to the IRS. In ***United States v. DeMuro***, 677 F.3d 550 (3d Cir. 2012), the court similarly held that the defendants were not in positions of trust vis-à-vis the IRS where the defendants had been required by 26 U.S.C. § 7512 to establish a segregated bank account for withheld taxes.

There is an inter-circuit conflict as to whether a defendant must occupy a position of trust in relation to the victim of the count of conviction, or whether the Section 3B1.2 enhancement may be applied where the abuse of trust occurred with respect to uncharged conduct that significantly facilitated the count of conviction. ***See United States v. Friedberg***, 558 F.3d 131, 133-35 (2d Cir. 2009) (identifying conflict). In those circuits limiting the enhancement to situations where the defendant held a position of trust vis-à-vis the victim, prosecutors should be cautious about asserting that the defendant held a position of trust vis-à-vis the IRS. In those circuits that allow uncharged conduct to be the basis for the Section 3B1.2 enhancement, the employees in a Section 7202 prosecution might be considered the "victims" of the defendant's embezzlement, as contemplated by USSG § 2T1.6(b), but the force of that position is somewhat undermined by the fact that employees automatically receive credit for taxes that are "actually withheld" even if the monies are not paid over to the government. 26 C.F.R. § 1.31-1(a). And although the definition of a "responsible person" for Section 7202 purposes is broader than the position-of-trust definition used in Section 3B1.2 – meaning that the enhancement can only apply to a subset of Section 7202 cases – defendants are sure to argue that an abuse of trust is already included in the base offense level for a Section 7202 "trust fund" offense. *See* USSG §3B1.2 ("This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristics.")

In sum, there is litigation risk in seeking the USSG §3B1.2 abuse-of-position-of-trust enhancement in Section 7202 cases. As the ***May*** and ***DeMuro*** cases illustrate, a sentence that is otherwise valid may be vacated on appeal due to the imposition of that enhancement. In a Section 7202 prosecution where a defendant's egregious abuse of a position of trust is clearly not adequately reflected in the offense level, prosecutors should consider seeking a variance under Section 3553(a) as opposed to the Section 3B1.2 enhancement.

43.6 OBSTRUCTION OF JUSTICE

The Guidelines require a two-level increase in the offense level when the court finds that a defendant "willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense, and [] the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense." The application notes specifically provide that "[o]bstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction" may warrant a two-level increase under Section 3C1.1 "if the conduct was purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." USSG §3C1.1, comment. (n.1).

The commentary to Section 3C1.1 provides a non-exhaustive list of conduct that constitutes obstruction of justice. Case law provides a variety of scenarios that justify an obstruction of justice enhancement.

Section 3C1.1 requires specific intent to obstruct justice. ***United States v. Henderson***, 58 F.3d 1145, 1153 (7th Cir. 1995). The government bears the burden of proving that the enhancement is warranted, by a preponderance of the evidence. ***United States v. Parrott***, 148 F.3d 629, 634 (6th Cir. 1998); ***United States v. Ewing***, 129 F.3d 430, 434 (7th Cir. 1997). Section 3C1.1 does not require proof that the defendant's conduct actually prejudiced or impacted the case. ***Id.*** Section 3C1.1 provides for a denial of guilt exception. §3C1.1, comment. (n.2); *see also* ***United States v. Gormley***, 201 F.3d 290, 294 (4th Cir. 2000) (holding that defendant was not entitled to exception because his statements went beyond merely denying guilt and implicated his taxpayer clients in scheme to defraud).

The first behavior defined as obstruction of justice is "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so." USSG §3C1.1, comment. (n.4(a)); *see also* ***United States v. West***, 58 F.3d 133, 137-38 (5th Cir. 1995) (holding that the court's finding may properly be based on uncorroborated hearsay evidence). It is obstruction of justice for a defendant to tell a witness to lie or confirm a common story. ***United States v. Emerson***, 128 F.3d 557, 563 (7th Cir. 1997); ***United States v. Friend***, 104 F.3d 127, 130 (7th Cir. 1997); ***United States v. Hollis***, 971 F.2d 1441, 1460 (10th Cir. 1992).

"[C]ommitting, suborning, or attempting to suborn perjury" is likewise considered conduct warranting an obstruction of justice enhancement. USSG §3C1.1, comment (n. 4(b)). The Supreme Court has held that when a defendant perjures himself or herself on the stand, enhancing the defendant's offense level for obstruction of justice is warranted. ***United States v. Dunnigan***, 507 U.S. 87, 96 (1993); *accord* ***United States v. Fitzgerald***, 232 F.3d 315, 321 (2d Cir. 2000) (concluding that obstruction enhancement was required by defendant's perjury at both trial and sentencing); ***United States v. Tandon***, 111 F.3d 482, 491 (6th Cir. 1997). Noting that "not every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury," the Supreme Court has held that the sentencing court must be satisfied that the inaccurate testimony was not due to confusion, mistake, or faulty memory. ***Dunnigan***, 507 U.S. at 95. Therefore, in applying the obstruction enhancement for a defendant's perjury, the trial court must make findings on the record that encompass all of the factual predicates for a finding of perjury. ***Dunnigan***, 507 U.S. at 95; s*ee also* ***United States v. Logan***, 250 F.3d 350, 374-75 (6th Cir. 2001); ***United States v. Mounkes***, 204 F.3d 1024, 1028-30 (10th Cir. 2000). The ***Dunnigan*** Court indicated that perjury requires (1) the giving of false testimony (2) concerning a material matter (3) with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory. ***Dunnigan***,507 U.S. at 94; *cf.* ***United States v. Rubio-Topete***, 999 F.2d 1334, 1341 (9th Cir. 1993) (rejecting two-level enhancement for obstruction of justice in absence of factual findings by the sentencing court encompassing all of the factual predicates necessary for a finding of perjury). The obstruction guideline was amended in 1997 to clarify that there is no heightened standard of proof when making an adjustment for perjury, merely that "the court should be mindful that not all inaccurate testimony or statements reflect a willful attempt to obstruct justice." USSG App. C, amend. 566 (1997).

Another scenario that is specifically described by the commentary is "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." USSG §3C1.1 comment. (n.4(c)). However, in ***Parrott***, 148 F.3d at 635, the court found that the enhancement was not warranted because there was no evidence from which the sentencing court could have concluded that the defendant submitted the false documents for the purpose of impeding the government's investigation.

The commentary to Section 3C1.1 also identifies as an example of obstruction "destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding . . . or attempting to do so." USSG §3C1.1, comment. (n.4(d)). Relying on the commentary, the Ninth Circuit held that a transfer of $280,000 to Switzerland three weeks after the defendant had learned of the criminal investigation warranted the obstruction enhancement. ***United States v. Shetty***, 130 F.3d 1324, 1333-35 (9th Cir. 1997) ("[I]n a tax case, money is material evidence."). Similarly, the Eleventh Circuit held that a Section 3C1.1 enhancement was appropriate when the defendant attempted arson, to destroy records at his accountant's office. ***United States v. Patti***, 337 F.3d 1317, 1325-26 (11th Cir. 2003). And the Sixth Circuit has held that a defendant's withholding of documents responsive to grand jury subpoenas justifies the enhancement. ***United States v. Gray***, 521 F.3d 514, 543 (6th Cir. 2008).

A defendant also obstructs justice by "providing materially false information to a probation officer in respect to a presentence . . . investigation for the court." USSG §3C1.1, comment. (n.4(h)).[10] The Guidelines define material evidence as information which, "if believed, would tend to influence or affect the issue under determination." USSG §3C1.1, comment. (n.6); *see* ***United States v. Martinez-Rios***, 143 F.3d 662, 678 (2d Cir. 1998) (false information in affidavit for sentencing). "The threshold for materiality . . . is 'conspicuously low.'" ***Gormley***, 201 F.3d at 294 (internal citations omitted). A defendant's failure to provide a probation officer with information concerning the defendant's financial status, where it is necessary to determining the

[10] Note that "lying to a probation officer or pretrial services officer about drug use while released on bail does not warrant obstruction of justice under §3C1.1." USSG §3C1.1, comment. (n.5(E)).

defendant's ability to pay a fine or restitution, constitutes obstruction of justice. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990); *accord* ***United States v. Romer***, 148 F.3d 359, 372-73 (4th Cir. 1998). The sentencing court does not need to make an express finding of materiality if it can be fairly implied from the court's statements during sentencing. ***Id.*** at 372.

The commentary to Section 3C1.1 also advises that it is obstruction of justice to provide a law enforcement officer with a materially false statement that significantly obstructs or impedes the official investigation or prosecution of the instant offense. USSG §3C1.1, comment. (n.4(g)); *see* ***United States v. Uscinski***, 369 F.3d 1243, 1247 (11th Cir. 2004); ***Emerson,*** 128 F.3d at 563; *see also* ***United States v. Baker***, 200 F.3d 558, 561-62 (8th Cir. 2000). Interpreting the plain language of the section, the First Circuit held "that an enhancement may be made for unsworn, false statements to law enforcement officers only if the government shows that the statements significantly obstructed or impeded the official investigation or prosecution of the offense." ***United States v. Isabel***, 980 F.2d 60, 61 (1st Cir. 1992); *accord* ***United States v. Fiala***, 929 F.2d 285, 290 (7th Cir. 1991).

An obstruction of justice enhancement is appropriate when a defendant provides "materially false information to a judge or magistrate." USSG §3C1.1, comment. (n.4(f)). Thus, a defendant who makes false statements at sentencing is eligible for such an enhancement. ***United States v. McLeod***, 251 F.3d 78, 82 (2d Cir. 2001). The Ninth Circuit has held that submission of a false financial affidavit to a magistrate judge for the purpose of obtaining counsel is sufficiently related to the offense of conviction (violation of the Internal Revenue Code) to support a Section 3C1.1 enhancement. ***United States v. Hernandez-Ramirez***, 254 F.3d 841, 843-44 (9th Cir. 2001).

The Second Circuit has held that backdating a promissory note warrants an obstruction of justice enhancement. ***United States v. Coyne***, 4 F.3d 100, 114 (2d Cir. 1993). In ***Coyne***, the defendant was convicted of numerous charges including mail fraud and bribery, but was acquitted of a tax evasion charge based on failure to report $30,000. A backdated note was used to make the money appear to be a loan to the defendant. ***Id***. at 104-05. The defendant argued that the jury must have concluded that the transaction was a loan and that he, therefore, did not obstruct the IRS investigation. ***Id***. at 114. The court ruled, however, that the proof of the crime had to be supported beyond a reasonable doubt, but that the burden of proving obstruction of justice was by a preponderance ofthe evidence. Thus, the sentencing court "was free to find that the backdating was an intentional attempt to thwart the investigation of a bribe." ***Id***. at 115; *see also* ***United States v. Powell***, 124 F.3d 655, 666-67 (5th Cir. 1997) (submitting false documents in IRS audit, submitting false documents, and attempting to suborn perjury justified obstruction of justice enhancement); ***United States v. August***, 984 F.2d 705, 714 (6th Cir. 1992).

Note that application note 4 to Section 3E1.1 states that "[c]onduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply." USSG §3E1.1, comment. (n.4).

The Sixth Circuit has held that a district court must review the evidence and set forth findings independent of those contained in the presentence investigation report when applying an obstruction of justice enhancement. ***United States v. Middleton***, 246 F.3d 825, 847 (6th Cir. 2001). When a district court fails to do so, the reviewing court must vacate the sentence and remand the case for resentencing. ***Id.***

In a case in which the base offense level for a defendant convicted of violating 26 U.S.C. § 7212(a) (corruptly endeavoring to obstruct or impede the enforcement of the internal revenue laws) is determined pursuant to USSG §2J1.2, an enhancement for obstruction of justice is only appropriate if "a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself. USSG §3C1.1, comment. (n.7); *see also* ***U.S. v. Kelly***, 147 F.3d 172, 179 (2d Cir. 1998) (obstruction of justice enhancement proper in 26 U.S.C. § 7212(a) case when defendant committed perjury at trial); ***United States v. Friend***, 104 F.3d 127, 131 (7th Cir 1997) (enhancement appropriate when defendant's attempt to influence the testimony of a witness was distinct from the conduct underlying his conviction).[11]

Some courts have held that the obstruction of justice enhancement does not apply when the conduct at issue is coterminous with the offense of conviction because such

[11] Note that in employing the grouping rules under Section 3D1.2, several courts have held that a Section 3C1.1 enhancement may be appropriate if the defendant has been convicted of a separate count involving obstructive conduct. *See, e.g.* ***United States v. Davist***, 481 F.3d 425, 427 (6th Cir. 2007); ***United States v. Frank***, 354 F.3d 910, 924 (8th Cir. 2004); ***United States v. Edwards***, 303 F. 3d 606, 646 (5th Cir. 2002); ***United States v. Crisci***, 273 F.3d 235, 240 (2d Cir. 2001).

application would constitute impermissible double counting. *See, e.g.*, ***United States v. Clark***, 316 F.3d 210, 211-13 (3d Cir. 2003) (holding that enhancement was inappropriate when obstructive conduct was the same as offense of conviction); ***United States v. Lamere***, 980 F.2d 506, 516-17 (8th Cir. 1992) (same). However, other courts have permitted the enhancement even when the obstructive conduct was part of the offense of conviction. *See* ***United States v. Sabino***, 307 F.3d 446, 448 (6th Cir. 2002) (requiring application of enhancement when defendant testified falsely before grand jury, even when false testimony was part of *Klein* conspiracy). For a more detailed discussion of double counting under the Guidelines, *see* ***United States v. Vizcarra***, 668 F.3d 516, 519-27 (7th Cir. 2012).

43.7 GROUPING

Section 3D1.2 of the Guidelines provides that "[a]ll counts involving substantially the same harm shall be grouped together." The purpose is to impose "'incremental punishment for significant additional criminal conduct,' but at the same time prevent double punishment for essentially the same conduct." ***United States v. Seligsohn***, 981 F.2d 1418, 1425 (3d Cir. 1992) (quoting ***United States v. Toler***, 901 F.2d 399, 402 (4th Cir. 1990)), *superseded on other grounds*, USSG App. C, amend. 474. Grouping is a difficult area, and the section outlining the rules for grouping "is not a model of clarity." ***United States v. Gist***, 101 F.3d 32, 34 (5th Cir. 1996).

Section 3D1.2 identifies four alternative methods to determine what constitutes "substantially the same harm": (a) the counts involve the same victim and the same act or transaction; (b) the counts involve the same victim and two or more acts connected by a common criminal objective or a common scheme; (c) one of the counts embodies conduct that is treated as a specific offense characteristic in the guideline applicable to another of the counts; or (d) the offense level is determined largely on the basis of the total amount of harm or loss. §3D1.2. The methods are alternative and any one or more may be applied. ***United States v. Bove***, 155 F.3d 44, 49 (2d Cir. 1998).

Subsections (a) and (b) are closely related. In essence, they provide for grouping when two counts are sufficiently interrelated and involve the same victim within the meaning of Section 3D1.2. The term "victim" is defined by application note 2:

> The term "victim" is not intended to include indirect or secondary victims. Generally, there will be one person who is directly and

> most seriously affected by the offense and is therefore identifiable as the victim. For offenses in which there are no identifiable victims . . ., the "victim" for purposes of subsections (a) and (b) is the societal interest that is harmed. In such cases, the counts are grouped together when the societal interests that are harmed are closely related.

USSG §3D1.2, comment. (n.2). Thus, in victimless crimes, "'the grouping decision must be based *primarily* upon the nature of the interest invaded by each offense.'" ***United States v. Gallo,*** 927 F.2d 815, 824 (5th Cir. 1991) (money laundering and drug trafficking are not closely related) (internal quotation omitted); *see* ***United States v. Harper***, 972 F.2d 321, 322 (11th Cir. 1992); *see also* ***United States v. Braxtonbrown-Smith***, 278 F.3d 1348, 1356 (D.C. Cir. 2002) ("[T]he district court did not clearly err in grouping, for purposes of § 3D1.2(b) of the Guidelines, the fraud counts (bank, mail, and wire) separately from the money laundering and tax evasion counts given the district court's finding that there were different victims . . . ."); *but see* ***United States v. Lopez***, 104 F.3d 1149, 1150 (9th Cir. 1997) (so-called victimless crimes are treated as involving the same victim when the societal interests that are harmed are closely related, and societal interests harmed by money laundering and drug trafficking are closely related).

Subsection 3D1.2(c) provides that when conduct that represents one count is also a specific offense characteristic or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision is designed to prevent "double counting." USSG §3D1.2, comment. (n.5). Grouping under this section is only proper, however, when the offenses are closely related. *Id.* Nevertheless, this provision will apply even where the offenses involve different harms or societal interests. *Id.* For example, in ***United States v. Martin***, 363 F.3d 25, 41-43 (1st Cir. 2004), the defendant pleaded guilty to both fraud and tax evasion. The defendant participated in a scheme to defraud several victims of $1.8 million and then failed to report this income on his tax returns. ***Id***. at 30-31. Although the defendant's failure to report income from his illegal fraud scheme resulted in a two-level enhancement under Section 2T1.1(b)(1), the First Circuit held that the district court erred in grouping the fraud counts with the tax counts. ***Id***. at 41-43. The court concluded that the fraud and tax counts were not sufficiently "closely related" to apply Section 3D1.2(c). ***Id***.; *see also* ***United States v. Peterson***, 312 F.3d 1300, 1302-04 (10th Cir. 2002).

Subsection 3D1.2(d) applies to crimes where "the guidelines are based primarily on quantity or contemplate continuing behavior." USSG §3D1.2, comment. (n.6). Section 3D1.2(d) lists a number of offenses, including tax offenses, which are to be included in the category of offenses that have the offense level determined by loss, and the guideline provides a list of offenses specifically excluded from the operation of that subsection. In other words, Section 3D1.2(d) "divides offenses into three categories: those to which the section specifically applies; those to which it specifically does not apply; and those for which grouping may be appropriate on a case-by-case basis." ***United States v. Gallo***, 927 F.2d 815, 823 (5th Cir. 1991); *accord* ***United States v. Williams***, 154 F.3d 655, 656 (6th Cir. 1998) ("Subsection (d) further divides Guidelines sections covering classes of harms more or less susceptible to aggregation into three broad categories – those which 'are to be grouped,' those 'specifically excluded' from aggregated treatment, and those subject to grouping on a 'case by case' basis.") (citation omitted). The Eleventh Circuit reversed a defendant's sentence because the trial court erred in not grouping all of the defendant's counts where the defendant pleaded guilty to thirteen counts of failure to pay over federal employment taxes that had been withheld and four counts of filing false individual returns because the counts involved substantially the same harm. ***United States v. Register***, WL 1570775 (11th Cir. 2012) ([C]ounts should have been grouped because their offense level is determined largely on the basis of the amount of loss). There is no automatic grouping merely because the counts are on the "to be grouped" list. ***Id.***; ***Seligsohn,*** 981 F.2d at 1425; *see* ***Williams***, 154 F.3d at 56-57; ***United States v. Taylor***, 984 F.2d 298, 303 (9th Cir. 1993); ***United States v. Johnson***, 971 F.2d 562, 576 (10th Cir. 1992).

Grouping is not appropriate under Section 3D1.2 when the Guidelines measure harm differently. ***Weinberger v. United States***, 268 F.3d 346, 354-55 (6th Cir. 2001) (holding that tax and fraud counts should not be grouped); ***United States v. Taylor***, 984 F.2d 298, 303 (9th Cir. 1993) (holding that wire fraud and money laundering do not group); ***United States v. Johnson***, 971 F.2d 562, 576 (10th Cir. 1992) (holding that because wire fraud measures the harm based on the loss resulting from the fraud, and money laundering measures harm on the basis of the value of the funds, the two crimes do not group); *but see* USSG §3D1.2, comment. (n.5). Several courts have held that grouping is inappropriate in a case involving both fraud and tax evasion, when the fraud and tax crimes were not closely connected. *See, e.g.*, **United *States v. Vucko***, 473 F.3d 773, 779-781 (7th Cir. 2007) (wire fraud and tax offenses should not have been grouped because they were not "closely related"); ***United States v. Smith***, 424 F.3d 992, 1015 (9th

Cir. 2005) (concluding that district court's decision not to group tax, fraud, and money laundering offenses was not an abuse of discretion); ***United States v. Martin***, 363 F.3d 25, 41-43 (1st Cir. 2004) (holding that fraud and tax evasion should not be grouped because they involve "different victims," cause "different harms," and require "different conduct."); ***United States v. Shevi***, 345 F.3d 675, 680-81 (8th Cir. 2003) (finding that fraud and tax offenses should not be grouped because the different Guidelines provisions governing the two offenses "punish the same amount of loss differently"); ***United States v. Peterson***, 312 F.3d 1300, 1303-04 (10th Cir. 2002) ("[T]he specific offense characteristic for failure to report criminally-derived income is not sufficiently based here on conduct embodied in the mail fraud count as to warrant grouping.") (internal quotation omitted); ***Weinberger v. United States***, 268 F.3d 346, 354-55 (6th Cir. 2001) (holding that tax and fraud counts should not be grouped); ***United States v. Vitale***, 159 F.3d 810 (3rd Cir. 1998) (wire fraud and tax evasion do not group). Other courts, however, have reached a contrary conclusion and have grouped tax offenses with other offenses under §3D1.2(d). *See* ***United States v. Haltom***, 113 F.3d 43, 45-47 (5th Cir. 1997) (holding that mail fraud and tax evasion counts had to be grouped when the base offense level for tax evasion was increased because income was derived from criminal activity); *see also* ***United States v. Fitzgerald***, 232 F.3d 315, 319-20 (2d Cir. 2000) (upholding grouping of tax evasion, fraud, and conversion offenses under Section 3D1.2(d) because they "measure the harm by reference to the amount of monetary loss" and they are offenses of the same general type due to the "unity of the offense tables for tax evasion, fraud, and conversion.").

The Ninth Circuit held that conspiracy to distribute drugs and money laundering counts should be grouped because they harmed the same societal interests. ***Lopez***, 104 F.3d at 1150. The ***Lopez*** court based its holding on the legislative history of the Anti-Drug Abuse Act of 1986, which demonstrated that Congress's primary purpose in prohibiting money laundering was "to add a weapon to the arsenal against drug trafficking and to combat organized crime." ***Id.*** The court further noted that *Most Frequently Asked Questions About the Sentencing Guidelines* 20 (7th ed. 1994) stated: "because money laundering is a type of statutory offense that facilitates the completion of some other underlying offense, it is conceptually appropriate to treat a money laundering offense as 'closely intertwined' and groupable with the underlyingoffense."

Question 89 in the *Questions Most Frequently Asked About the Guidelines* (1993 Edition) addressed the question whether tax evasion and another count embodying criminal conduct that generated the income on which the tax was evaded could be grouped. The Commission responded:

> Yes. The counts can be grouped under §3D1.2(c). Grouping rule (c) instructs that counts are to be grouped when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts. Specific offense characteristic (b)(1) of 2T1.1 (Tax Evasion) provides an enhancement if the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity. Tax evasion is always grouped with the underlying offense according to rule (c), regardless of whether (b)(1) was actually applied.

However, several courts have reached the opposite conclusion and have held that crimes that generate income on which tax was evaded need not be grouped with the tax crimes at issue. *See, e.g.*, ***Vucko***, 473 F.3d at 779-781; ***Martin***, 363 F.3d at 41-43.

The Second Circuit held that violations of 26 U.S.C. § 7206(1), filing a false return, did not merge with conspiracy to structure financial transactions to evade reporting requirements in violation of 18 U.S.C. § 371. ***Bove***, 155 F.3d at 50. The Second Circuit also determined that "the laws prohibiting perjury and tax evasion protect wholly disparate interests and involve distinct harms to society." ***United States v. Barone***, 913 F.2d 46, 49 (2d Cir. 1990). Thus, the two crimes cannot be grouped for sentencing purposes. ***Id***., at 50; *accord* ***Williams***, 154 F.3d at 657 (when bankruptcy count charged a false oath or account filed under Title 11 of the United States Code, harm is measured in a different fashion than tax fraud); ***United States v. Madoch***, 108 F.3d 761, 764 (7th Cir. 1997) (bankruptcy and fraud counts are grouped separately because they represent separate victims with separate harms).

At least one circuit has concluded that verdicts entered at different times in the same case can be grouped for sentencing purposes. *See* ***United States v. Kaufman***, 951 F.2d 793 (7th Cir. 1992). In ***Kaufman***, the defendant was indicted on four counts of money laundering and one count of attempted money laundering. At trial, the jury acquitted the defendant of counts one and two, convicted on count five, and was unable to reach a verdict on counts three and four. The court declared a mistrial as to counts three and four, leaving them unresolved. The court sentenced on count five, and the defendant appealed. The appellate court found that count five could be grouped for sentencing with counts three and four, if necessary, when counts three and four were resolved by vacating the sentence on count five and sentencing on all counts at once. ***Kaufman***, 951 F.2d at 796.

The Sixth Circuit has held that Section 3D1.4, regarding multiple count adjustments, permits a court to apply the multiple count adjustment to counts arising from separate indictments. ***United States v. Griggs***, 47 F.3d 827, 830-31 (6th Cir. 1995). The defendant in ***Griggs*** pleaded guilty to one count of each of two indictments. Relying on Section 5G1.2, "Sentencing on Multiple Counts of Conviction," the ***Griggs*** court noted that a combined offense level must first be determined which incorporates the counts from the separate indictments. Only then is the court free to apply a sentence to multiple counts in a separate indictment. ***Id***. Note that the First Circuit has affirmed a district court finding that counts from different indictments did not group because they were not "closely related" as defined in Section 3D1.2. ***United States v. Hernandez Coplin***, 24 F.3d 312, 319-20 (1st Cir. 1994).

43.8 ACCEPTANCE OF RESPONSIBILITY

43.8 [1] Generally

Section 3E1.1(a) of the Guidelines authorizes the district court to reduce a defendant's offense level by two levels "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense . . ." A defendant demonstrates acceptance of responsibility by:

1) truthfully admitting conduct comprising the offense, and truthfully admitting or not falsely denying any additional relevant conduct;

2) voluntarily terminating criminal conduct or withdrawing from criminal associations;

3) voluntarily paying restitution prior to adjudication of guilt;

4) voluntarily surrendering to authorities promptly after committing the offense;

5) voluntarily assisting authorities in recovering fruits and instrumentalities of the offense;

6) voluntarily resigning from an office or position held while committing the offense;

7) making significant post-offense rehabilitation efforts; or

8) timely accepting responsibility.

USSG §3E1.1(a), comment. (n.1). The provision for a reduction of a defendant's sentence "for acceptance of responsibility 'merely formalizes and clarifies a tradition of leniency extended to defendants who express genuine remorse and accept responsibility for their wrongs.'" ***United States v. Lancaster***, 112 F.3d 156, 159 (4th Cir. 1997) (quoting ***United States v. Crawford***, 906 F.2d 1531, 1534 (11th Cir. 1990)).

The most common means by which a defendant qualifies for a reduction in his or her offense level for acceptance of responsibility is by entering a guilty plea and admitting to the elements of the crime to which he or she is pleading. An adjustment under Section 3E1.1 "is *not* intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." USSG §3E1.1(a), comment. (n.2) (emphasis added).

In rare circumstances, a defendant may clearly accept responsibility yet proceed to trial. Such a circumstance occurs when a defendant goes to trial to assert and preserve issues of constitutionality or statutory application unrelated to factual guilt. ***United States v. Mack***, 159 F.3d 208, 220 (6th Cir. 1998); ***United States v. Wilson***, 159 F.3d 280, 292 (7th Cir. 1998); ***United States v. McKittrick***, 142 F.3d 1170, 1178 (9th Cir. 1998). In such a case, determination of whether the defendant accepted responsibility will be based primarily on pre-trial statements and conduct. ***United States v. Mikutowicz***, 365 F.3d 65, 75-77 (1st Cir. 2004) (reduction for acceptance of responsibility was clearly erroneous when defendant admitted pretrial that he committed the acts in question but went to trial to contest the issue of willfulness); ***Mack***, 159 F.3d at 220. However, if a defendant proceeds to trial in order to contest issues of constitutionality and also contests his factual guilt, a reduction is not warranted. ***United States v. Baucom***, 486 F.3d 822, 830 (4th Cir. 2007), *vacated and remanded on other grounds,* ***Davis v. United States***, 552 U.S. 1092 (2008).

Even if a defendant pleads guilty, the district court may properly find that the defendant has not accepted responsibility for his or her conduct and is therefore not entitled to a reduction in offense level. USSG §3E1.1, comment. (n.3) ("A defendant who enters a guilty plea is *not* entitled to an adjustment under [§3E1.1] as a matter of right.") (emphasis added); ***United States v. Muhammad***, 146 F.3d 161, 168 (3d Cir. 1998). An attempt to plead guilty also does not guarantee this reduction. ***United States v. Middleton***, 246 F.3d 825, 845 (6th Cir. 2001); ***United States v. Ervasti***, 201 F.3d 1029, 1043 (8th Cir. 2000). In order to qualify for the reduction, the defendant must affirmatively accept personal responsibility. ***United States v. Lublin***, 981 F.2d 367, 370 (8th Cir. 1992). The defendant must show sincere contrition to warrant such a reduction. ***United States v. Beard***, 913 F.2d 193, 199 (5th Cir. 1990); ***United States v. Royer***, 895 F.2d 28, 30 (1st Cir. 1990). The burden is on the defendant to demonstrate his acceptance of personal responsibility, ***Lublin***, 981 F.2d at 370, by a preponderance of the evidence, ***Middleton***, 246 F.3d at 845 (citing ***United States v. Tucker***, 925 F.2d 990, 991 (6th Cir. 1991)). "[T]he question is not whether [the defendant] actively asserted his innocence, but whether he clearly demonstrate[d] acceptance of his guilt." ***United States v. Portillo-Valenzuela***, 20 F.3d 393, 394 (10th Cir. 1994) (internal citation omitted). Being merely regretful is not sufficient to warrant the reduction. ***United States v. Gallant***, 136 F.3d 1246, 1248 (9th Cir. 1998). The reduction is not appropriate when a defendant has pleaded guilty in order to obtain tactical advantage. ***Muhammed***, 146 F.3d at 168. The range of conduct upon which a court maybase its decision varies in different circuits.

Generally, the assertion of an entrapment defense is inconsistent with acceptance of responsibility when the defendant claims that his or her actions are not his or her own fault, but rather are due to the inducements of the government. ***United States v. Hansen***, 964 F.2d 1017, 1021-22 (10th Cir. 1992). Other courts also have reasoned that the reduction may not rest solely on the basis that a defendant admitted performing the acts leading to conviction when the defendant claims entrapment. *See* ***United States v. Chevre***, 146 F.3d 622, 623 (8th Cir. 1998); ***United States v. Brace***, 145 F.3d 247, 264-65 (5th Cir. 1998) (entrapment defense is a challenge to criminal intent and thus to culpability); ***United States v. Kirkland***, 104 F.3d 1403, 1405-06 (D.C. Cir. 1997); ***United States v. Simpson***, 995 F.2d 109, 112 (7th Cir. 1993); *but see* ***United States v. Davis***, 36 F.3d 1424, 1435-36 (9th Cir. 1994) (district court may not deny defendant acceptance of responsibility solely because he has presented an entrapment defense). Similarly, the Tenth Circuit affirmed the denial of acceptance of responsibility to a defendant who acknowledged the factual basis for the charges and went to trial only to assert the insanity defense. ***United States v. Moudy***, 132 F.3d 618, 621 (10th Cir. 1998).

The district court may deny a reduction for acceptance of responsibility even when the actions of a defendant facially appear to be in accordance with the language contained in USSG §3E1.1, comment. (n.1). In ***United States v. Hollis***, 971 F.2d 1441, 1459 (10th Cir. 1992), the Tenth Circuit found that the sentencing court properly denied a downward adjustment where the defendants had signed after conviction a consent judgment as to $35,000 that had previously been seized from them, had placed $55,000 in escrow prior to trial, and had offered prior to trial to pay $90,000 in restitution. ***Id***. The appellate court noted that the consent judgment was signed only after the defendants were found guilty, that the amount placed in escrow was to be turned over only if they were found guilty, and that the defendants only offered to pay restitution prior to trial in order to avoid indictment. ***Id***.

A defendant, in order to qualify for acceptance of responsibility, need not admit to conduct beyond the count of conviction. USSG §3E1.1, comment. (n.1(a)) ("[A] defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a).") The government "may not impose substantial penalties because [an individual] elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." ***Lefkowitz v. Cunningham***, 431 U.S. 801, 805 (1977). To require a defendant to admit to behavior beyond the crime of conviction would require a defendant to incriminate himself or herself in violation of the Fifth Amendment privilege. Therefore, a sentencing court cannot condition the acceptance of responsibility reduction on the defendant's admitting conduct for which he or she has not been convicted. *See, e.g.*, ***United States v. Frierson***, 945 F.2d 650, 659-60 (3d Cir. 1991); ***United States v. Piper***, 918 F.2d 839, 841 (9th Cir. 1990); ***United States v. Oliveras***, 905 F.2d 623, 632 (2d Cir. 1990); ***United States v. Perez-Franco***, 873 F.2d 455, 463 (1st Cir. 1989). However, "a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility." USSG §3E1.1, comment. (n.1(a)); *see* ***United States v. Bindley***, 157 F.3d 1235 (10th Cir. 1998); *see also* ***United States v. McLeod***, 251 F.3d 78, 82-83 (2d Cir. 2001); ***United States v. Hicks***, 978 F.2d 722, 726 (D.C. Cir. 1992).

Courts have consistently rejected the argument that Section 3E1.1 unconstitutionally punishes a defendant who invokes the Fifth Amendment right not to incriminate himself or herself by admitting guilt. Denial of the two-level reduction does not constitute a penalty and does not implicate the Fifth Amendment. ***United States v. Clemons***, 999 F.2d 154, 159 (6th Cir. 1993); ***United States v. Saunders***, 973 F.2d 1354, 1362 (7th Cir. 1992); ***United States v. Frazier***, 971 F.2d 1076, 1084 (4th Cir. 1992); ***United States v. Piper***, 918 F.2d 839, 841 (9th Cir. 1990); ***United States v. Henry***, 883 F.2d 1010, 1011 (11th Cir. 1989); ***United States v. White***, 869 F.2d 822, 826 (5th Cir. 1989).

Once a court has determined that a defendant has accepted responsibility for his or her conduct, a court has no discretion to award less than the two-level reduction for acceptance of responsibility under Section 3E1.1(a). ***United States v. Carroll***, 6 F.3d 735, 741 (11th Cir. 1993) (holding that Section 3E1.1(a) does not contemplate a partial acceptance of responsibility or a court's being halfway convinced that a defendant accepted responsibility).

Appellate courts review a sentencing court's factual determination of whether an individual accepted responsibility deferentially, applying the clearly erroneous standard. ***United States v. Mack***, 159 F.3d 208, 220 (6th Cir. 1998); ***United States v. Fellows***, 157 F.3d 1198, 1202 (9th Cir. 1998); ***United States v. Bove***, 155 F.3d 44, 46 (2d Cir. 1998); ***United States v. Bonanno***, 146 F.3d 502, 512 (7th Cir. 1998); ***United States v. Marmolejo***, 139 F.3d 528, 531 (5th Cir. 1998); ***United States v. Cruz Camacho***, 137 F.3d 1220, 1226 (10th Cir. 1998); ***United States v. McQuay***, 7 F.3d 800, 801 (8th Cir. 1993). The sentencing court's factual finding is clearly erroneous only if egregiously, obviously, and substantially erroneous. ***United States v. Ivy***, 83 F.3d 1266, 1294-95 (10th Cir. 1996).

Note that application note 4 to Section 3E1.1 states that "[c]onduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply." USSG §3E1.1, comment. (n.4).

43.08[2] Filing of Delinquent Returns and Payment of Taxes

Generally, the payment of restitution, either prior to adjudication of guilt or prior to sentencing, can constitute some evidence that a defendant has accepted responsibility for his or her criminal conduct. *See* ***United States v. Asher***, 59 F.3d 622, 624-25 (7th Cir. 1995) (voluntary payment of restitution after scheme was discovered taken into account by reducing offense level for acceptance of responsibility); ***United States v. White***, 875 F.2d at 431 (performance of one or more acts listed in application note 1 does not necessarily equate to acceptance of responsibility). On the other hand, the district court may consider a defendant's failure to pay restitution, when the defendant has the financial wherewithal to do so, as evidence of a lack of acceptance of responsibility. *See* ***United States v. Zichettello***, 208 F.3d 72, 107 (2d Cir. 2000) (defendant, who pled guilty, failed to demonstrate acceptance of responsibility where he had $80,000 available and failed to give adequate explanation for not making promised $19,100 restitution payment); ***United States v. Hollis***, 971 F.2d 1441, 1459 (10th Cir. 1993) (the defendants signed consent judgment only after they had been found guilty, and the defendants' offer to settle in part prior to trial showed willingness to concede responsibility only to extent they could avoid consequences of their criminal conduct).

Based on the above, it appears unlikely that a court of appeals would adopt a bright-line test whereby a defendant in a criminal tax case could be denied a reduction for acceptance of responsibility simply on the ground that he or she did not pay restitution. Certainly one can envision a case in which a defendant clearly manifests acceptance of responsibility, for example, by pleading guilty, filing amended returns, changing business practices to ensure timely payment of taxes, and agreeing to cooperate with the IRS or enter into a payment plan, but does not have the financial ability to pay restitution immediately. It would not seem that a current inability to pay would necessarily negate the other evidence of acceptance. The courts of appeals have emphasized that district courts should not unfairly discriminate in favor of defendants possessing greater financial resources than others. *See, e.g.*, ***United States v. Flowers***, 55 F.3d 218, 221-22 (6th Cir. 1995) (payment of restitution by check kiter to bank after the fact merely indicates some acceptance of responsibility, not grounds for downward departure – "we do not operate under a system that unfairly rewards financially able defendants who voluntarily make restitution after they are caught"); ***United States v. Shaffer***, 35 F.3d 110, 115 (3d Cir. 1994) (court of appeals noted that it agreed with the sentiment expressed by the district court at sentencing that a reduction of sentence because of a last minute payment of restitution would unfairly discriminate in favor of those with greater financial resources).[12] Consequently, it is likely that a district court's refusal, without the consideration of any other factors, to grant an acceptance of responsibility reduction in a tax case simply because the defendant did not agree to pay restitution would be subject to challenge on appeal.

On the other hand, it is just as unlikely that a district court's ruling would be overturned for refusing a reduction for acceptance of responsibility when all the defendant did was pay restitution and there was nothing else to suggest that the defendant accepted responsibility. *See* ***United States v. Tandon***, 111 F.3d 482, 490 (6th Cir. 1997) (fact that the defendant filed amended returns and paid some additional money to IRS simply a factor to consider and did not require reduction for acceptance); ***White***, 875 F.2d at 431. After all, a defendant's motivation to pay restitution could be based on something other than acceptance of responsibility. *See* ***Harris***, 882 F.2d at 906-07.

Ultimately, the decision as to whether a defendant has demonstrated by a preponderance of the evidence that he or she has clearly accepted personal responsibility for criminal conduct is one for the district court to decide based on all of the facts and circumstances of the case. No bright-line tests appear to apply. Accordingly, it seems reasonable to conclude that a district court, without fear of reversal on appeal, could refuse to grant a reduction for acceptance of responsibility in a criminal tax case where the defendant, despite having the financial means to do so, refused to pay restitution for the criminal losses caused by his or her offense. In such a case, the refusal to grant the reduction would not simply be for failure to pay restitution, but for a failure to pay restitution in circumstances that reasonably could be characterized as reflective of a refusal to accept responsibility.

43.8 [3] Timely Government Assistance

In certain circumstances, a defendant may be entitled to a three-level reduction for acceptance of responsibility. Section 3E1.1(b) provides:

> If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has

[12]The question in ***Shaffer*** was whether the loss in a check kiting scheme should be determined as of the date of detection of the scheme or as of the date of sentencing, at which time the loss might be reduced because of the payment of restitution.

> assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense by **1** additional level.

USSG §3E1.1(b).[13] Thus, Section 3E1.1(b) provides an additional one-level decrease in offense level for a defendant (1) whose offense level is 16 or greater before any reduction

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[13] From 1992 until April 30, 2003, Section 3E1.1(b) provided for an additional one-level reduction if:

the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the followingsteps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. USSG §3E1.1(b) (Nov. 2002).

Note that this earlier version of Section 3E1.1(b) was written in the disjunctive and, therefore, a defendant did not need to satisfy both timeliness requirements of subsections (b)(1) and (b)(2) to qualify for the third point reduction. ***United States v. Eyler***, 67 F.3d 1386, 1391 (9th Cir. 1995); ***United States v. Lancaster***, 112 F.3d 156, 158 (4th Cir. 1997).

The version of Section 3E1.1(b) in effect until 2003 required a defendant to meet the requirements of Section 3E1.1(a), to have an offense level of at least 16, and to assist the authorities in a timely fashion in order to be eligible for the additional one-level reduction. Timeliness was the key to determining whether a defendant merited the additional one-level reduction. ***Lancaster***, 112 F.3d at 158; ***United States v. Thompson***, 60 F.3d 514, 517 (8th Cir. 1995). The focus of an inquiry into the timeliness of a defendant's conduct is "whether the defendant provides information in sufficient time to aid the Government in the investigation or prosecution of the case." ***Thompson***, 60 F.3d at 517; *see* ***Lancaster***, 112 F.3d at 158. As the Guidelines formerly noted, the conduct qualifying for a decrease in offense level under §§3E1.1(b)(1) and (2) generally will occur "particularly early in the case." §3E1.1, comment. (n.6) (Nov. 2002). This is so even if the information the defendant discloses is otherwise easily discoverable. ***Lancaster***, 112 F.3d at 158; ***United States v. Stoops***, 25 F.3d 820, 822-23 (9th Cir. 1994).

Timeliness of a defendant's acceptance of responsibility is a context-specific, factual question, to be determined on a case-by-case basis. USSG §3E1.1(b), comment. (n.6) (Nov. 2002); ***United States v. Ayers***, 138 F.3d 360, 364 (8th Cir. 1998); ***United States v. Marroquin***, 136 F.3d 220, 224 (1st Cir. 1998); ***Lancaster***, 112 F.3d at 158; ***United States v. McPhee***, 108 F.3d 287, 289 (11th Cir. 1997); ***United States v. Hawkins***, 78 F.3d 348, 352 (8th Cir. 1996); ***United States v. Eyler***, 67 F.3d 1386, 1391 (9th Cir. 1995); ***United States v. McConaghy***, 23 F.3d 351, 353 (11th Cir. 1993). Because it is fact-specific, timeliness "cannot always be measured by counting calendar pages." ***United States v. Dethlefs***, 123 F.3d 39, 43 (1st Cir. 1997). Pleas on the eve of trial are generally untimely. ***United States v. Brown***, 148 F.3d 1003, 1007(8th Cir. 1998); ***Wilson***, 134 F.3d at 871-72; ***United States v. Kimple***, 27 F.3d 1409, 1413 (9th Cir. 1994); ***United States v. Tello***, 9 F.3d 1119, 1125 (5th Cir. 1993); ***United States v. Donavan***, 996 F.2d 1343, 1345 (1st Cir. 1993). "Thus, a defendant who delays the disclosure of information to the Governmentuntil shortly before a scheduled trial does not qualify for the reduction." ***Lancaster***, 112 F.3d at 158-59; *see also* ***Thompson***, 60 F.3d at 517; ***United States v. Hopper***, 27 F.3d 378, 384-85 (9th Cir. 1994). Likewise, under Section 3E1.1(a); (2) who admits responsibility under Section 3E1.1(a); and (3) who assists the government by timely notifying authorities of intent to plead guilty. However, the district court may not grant the additional one-level reduction absent a motion from the government. *See, e.g.*, ***United States v. Pacheco-Diaz***, 506 F.3d 545, 552 (7th Cir. 2007) ("[I]n calculating the correct guidelines range, the district court may not grant the third level reduction for acceptance of responsibility absent a motion by the government."); ***United States v. Chase***, 466 F.3d 310, 315 (4th Cir. 2006) (because the Guidelines authorize the third-level reduction only upon motion of the government, a district court is correct not to grant the reduction in the absence of a motion); ***United States v. Espinoza-Cano***, 456 F.3d 1126, 1134 & n.10 (9th Cir. 2006) (the prerequisite government motion in subsection (b) of Section 3E1.1 is a statutory requirement that the district court must apply in its calculations under the Guidelines); ***United States v. Moreno-Trevino***, 432 F.3d 1181, 1185-87 (10th Cir. 2005) (prosecutors retain discretion to move or not move for a third point acceptance of responsibility reduction); ***United States v. Smith***, 429 F.3d 620, 628 (6th Cir. 2005) (even after ***Booker***, a district court consulting the Guidelines remains constrained in awarding a Section 3E1.1(b) reduction absent a motion by the government); ***United States v. Smith***, 422 F.3d 715, 726-27 n.3 (8th Cir.2005) (under the PROTECT Act, there is no basis for a district court to grant the third level reduction *sua sponte*).

"[p]leas [on the eve of trial] do not help either the Government to avoid trial preparation or the court to manage its schedule efficiently, the two purposes served by the . . . additional one-point reduction." ***United States v. Gilbert***, 138 F.3d 1371, 1373 (3d Cir. 1998). However, a court may consider prosecutorial foot dragging when ascertaining a plea's timeliness. ***Wilson***, 134 F.3d at 872.

Moreover, under the old Section 3E1.1(b), once a court determined that a defendant had accepted responsibility for his criminal acts and met the three-prong test of Section 3E1.1, that court could not withhold the additional one-level reduction for issues other than timeliness. ***United States v. McPhee***, 108 F.3d 287, 289 (11th Cir. 1997) ("[W]hether or not to grant the additional one-level reduction is a matter of determining only whether the defendant timely provided information and notified authorities of his intention to enter a plea of guilty."); ***United States v. Townsend***, 73 F.3d 747, 755 (7th Cir. 1996); ***United States v. Huckins***, 53 F.3d 276, 279 (9th Cir. 1955). The First, Seventh, Eighth, and Ninth Circuits held that the additional one-point reduction was "mandatory," not permissive, once the defendant satisfied the relevant guideline criteria. *See* ***United States v. Mickle***, 464 F.3d 804, 809 (8th Cir. 2006); ***Marroquin***, 136 F.3d at 223; ***United States v. Villasenor-Cesar***, 114 F.3d 970, 973 (9th Cir. 1997); ***United States v. Cunningham***, 103 F.3d 596, 598 (7th Cir. 1996); ***United States v. Garrett***, 90 F.3d 210, 213 (7th Cir. 1996); ***Townsend***, 73 F.3d at 755; ***Eyler***, 67 F.3d at 1390; ***United States v. Talladino***, 38 F.3d 1255, 1262-63 (1st Cir. 1994).

Accordingly, in those cases in which the district court is using a version of the Guidelines that predates the 2003 amendments, the defendant may qualify for an additional one-level reduction absent a government motion. In contrast, the post-2003 versions of Section 3E1.1(b) permit a three-level reduction only upon motion of thegovernment.

Accordingly, the government possesses significant discretion to determine whether a three-level reduction for acceptance of responsibility is warranted. The commentary to the Guidelines provides that this amendment to Section 3E1.1(b) was appropriate "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial." USSG §3E1.1, comment. (n.6). "Congress' aim in amending the provision makes plain that under the new version both the court and the government must be satisfied that the acceptance of responsibility is genuine." ***United States v. Sloley***, 464 F.3d 355, 360 (2d Cir. 2006).

43.9 DEPARTURES[14]

43.09[1] Generally

Section 5K of the Guidelines provides for departures from the prescribed Guidelines range in certain limited circumstances. Departures under Section 5K should not be confused with non-Guidelines sentences imposed pursuant to ***United States v. Booker***, 543 U.S. 220 (2005), which are often called "variances." *See* § 43.10, *infra* (discussing ***Booker*** variances). The Guidelines generally discourage departures, except in certain rare circumstances. Although Guidelines departures are reviewed for abuse of discretion, *see* ***United States v. Husein***, 478 F.3d 318, 325-26 (6th Cir. 2007),[15] the Guidelines significantly limit the sentencing court's ability to depart. Because a sentencing court has broader discretion to impose a non-Guidelines sentence by relying

[14] Since the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), there has been some confusion regarding the term "departure." Some judges have used the term to describe all sentences that are outside of the initially calculated Guidelines range, while others have distinguished between departures under Section 5K of the Guidelines and non-Guidelines sentences imposed pursuant to ***Booker***. *Compare* ***United States v. Irizarry***, 553 U.S. 708, 128 S. Ct. 2198, 2202 (2008) (treating "departure" as a term of art under the Guidelines that is distinct from an 18 U.S.C. § 3553(a) "variance") *with* ***Irizarry*** 128 S. Ct. at 2204 (Breyer, J., dissenting) (arguing that the term "departure" should encompass both variances and Guidelines departures). To avoid confusion, this Manual will use the term "departure" to refer only to departures under the Guidelines.

[15] In 2003, Congress passed a law mandating that appellate courts review departures under the Guidelines de novo. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650; 18 U.S.C. § 3742(e)(4). In ***United States v. Booker***, 543 U.S. 220 (2005), however, the Supreme Court excised 18 U.S.C. § 3742(e) from federal sentencing law. Since ***Booker***, the courts of appeals that have addressed the question have held that Guidelines departures should be reviewed for abuse of discretion. ***Husein***, 478 F.3d at 325-26; ***United States v. Menyweather***, 431 F.3d 692, 697 (9th Cir. 2005), amended on other grounds on denial of rehearing, 447 F.2d 625 (9th Cir. 2006); ***United States v. Smith***, 417 F.3d 483, 489-90 (5th Cir. 2005); ***United States v. Selioutsky***, 409 F.3d 114, 119 (2d Cir. 2005).

on the 18 U.S.C. § 3553(a) factors, it seems likely that Guidelines departures will become less common. However, departures remain part of the Guidelines calculation, and most of the pre-***Booker*** precedents governing departures remain good law.

43.9 [2] Departures for Aggravating or Mitigating Circumstances

Section 5K provides a non-exhaustive outline of factors that the court may consider in enhancing or reducing a defendant's sentence. These factors include, but are not limited to:

-the victim's death (§5K2.1);

-the victim's physical injury (§5K2.2);

-the victim's extreme psychological injury (§5K2.3);

-abduction or unlawful restraint of the victim (§5K2.4);

-property damage or loss not otherwise accounted for within the Guidelines (§5K2.5);

-weapons and dangerous instrumentalities (§5K2.6);

-disruption of government function unless inherent in the offense (§5K2.7);[16]

-extreme conduct to victim (§5K2.8);

-criminal purpose (§5K2.9)

-victim's contributory conduct (§5K2.10);

-lesser harm avoided(§5K2.11);

-coercion and duress(§5K2.12);

-involuntarily diminished capacity (§5K2.13);[17]

[16] *See generally* ***United States v. Gunby***, 112 F.3d 1493 (11th Cir. 1997); ***United States v. Horton***, 98 F.3d 313 (1996); ***United States v. Heckman***, 30 F.3d 738 (6th Cir. 1994) (upward departure justified on this basis where defendant filed at least 79 false IRS Forms 1099); ***United States v. Flinn***, 18 F.3d 826 (10th Cir. 1994) (one-point enhancement under this provision does not preclude another one-point increase for financial loss to government); ***United States v. Kikumura***, 918 F.2d 1084 (3d Cir. 1990).

-public welfare (§5K2.14);

-voluntary disclosure prior to discovery (§5K2.16);[18]

-possession of high-capacity, semiautomatic firearms during offense (§5K2.17);

-violent gang membership (§5K2.18);

-post-sentencing rehabilitative efforts (§5K2.19);

-aberrant behavior (§5K2.20);

-dismissed and uncharged conduct (§5K2.21);

-discharged terms of imprisonment (§5K2.23); and

-commission of offense while wearing unauthorized insignia or uniform (§5K2.24).

When contemplating departure, the sentencing court must first determine the appropriate Guidelines sentence. Then the court must consider whether there are aggravating or mitigating circumstances present that warrant departure.[19] ***United States v. Davern***, 970 F.2d 1490, 1493 (6th Cir. 1992). The defendant must prove by a preponderance of the evidence that he or she is entitled to a downward departure. ***United States v. Wilson***, 134 F.3d 855, 871 (7th Cir. 1998); ***United States v. Urrego-Linares***, 879 F.2d 1234, 1238 (4th Cir. 1989). The government bears the burden of proof by a preponderance of the evidence when seeking an upward departure. ***United States v. Walls***, 80 F.3d 238, 241 (7th Cir. 1996); ***United States v. Okane***, 52 F.3d 828, 835 (9th Cir. 1995). A district court's discretionary decision not to depart downward is not appealable when the Guidelines range was properly computed. ***United States v. Burdi***, 414 F.3d 216, 220 (1st Cir. 2005); ***United States v. Stinson***, 465 F.3d 113, 114 (2d Cir.

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[17] "'Significantly reduced mental capacity' means the defendant, although convicted, has a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful." USSG §5K2.13, comment. (n.1).

[18] *See* ***United States v. Aerts***, 121 F.3d 277, 279 (7th Cir. 1997); ***United States v. Besler***, 86 F.3d 745 (7th Cir. 1997).

[19] In making this determination, a court may include relevant conduct. A sentencing court may upwardly depart on the basis of conduct in dismissed counts. ***United States v. Baird***, 109 F.3d 856, 862 (3d Cir. 1997).

2006); ***United States v. Cooper***, 437 F.3d 324, 333 (3d Cir. 2006); ***United States v. Allen***, 491 F.3d 178, 193 (4th Cir. 2007); ***United States v. Puckett***, 422 F.3d 340, 345 (6th Cir. 2005); ***United States v. Frokjer***, 415 F.3d 865, 874-75 (8th Cir. 2005); ***United States v. Sierra-Castillo***, 405 F.3d 932, 936 (10th Cir. 2005); ***United States v. Winingear***, 422 F.3d 1241, 1245-46 (11th Cir. 2005).

In addition to the reasons for departure specifically delineated by Section 5K, the court may depart when the court finds that there exists an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b); USSG §5K2.0; ***Burns v. United States***, 501 U.S. 129, 133 (1991). Thus, a sentencing court may only depart from the "mechanical dictates" of the Guidelines when the court finds that the case falls outside the "heartland" of cases covered by the Guidelines. *Id.*; *see generally*, USSG §5K2.0, comment. The Seventh Circuit characterizes the "outside the heartland cases" in the following manner:

> The Sentencing Guidelines were intended to carve out a "heartland," or a set of typical cases, against which each successive case would be measured. Departures from the guidelines are allowed only in cases that involve factors for which the guidelines do not adequately account, either because the factors are nowhere incorporated into the guidelines or because the factors are present in an exceptional way. Therefore, a factor supporting departure from the guidelines must be sufficiently unusual either in type or degree to take the case out of the Guidelines' heartland.

United States v. Carter, 122 F.3d 469, 473 (7th Cir. 1997) (citations and punctuation omitted), (*quoting* ***United States v. Otis***, 107 F.3d 487, 490 (7th Cir. 1997), and ***Koon v. United States***, 518 U.S. 81, 96 (1996)).

Essentially, for purposes of departure, a court may take into consideration any factor that the Guidelines do not proscribe:

> . . . [A] federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the Commission has proscribed, as a categorical matter, consideration of the factor. If the answer to the question is no -- as it will be most of the time -- the sentencing court must determine whether the factor, as

> occurring in the particular circumstances, takes the case outside the heartland of the applicable Guideline.

Koon, 518 U.S. at 109; *see also* ***United States v. Whitaker***, 152 F.3d 1238, 1239-40 (10th Cir. 1998); ***United States v. Rhodes***, 145 F.3d 1375 (D.C. Cir. 1998); ***United States v. O'Hagan***, 139 F.3d 641, 657 (8th Cir. 1998); ***United States v. Arce***, 118 F.3d 335, 339 (5th Cir. 1997); ***United States v. Brown***, 98 F.3d 690, 693 (2d Cir. 1996).

In ***Koon***, the Supreme Court agreed with then-Chief Circuit Judge Breyer's explanation in ***United States v. Rivera***, 994 F.2d 942, 949 (1st Cir. 1993), that a sentencing court considering a departure should ask itself the following questions:

> 1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
>
> 2) Has the Commission forbidden departures based on those features?
>
> 3) If not, has the Commission encouraged departures based on those features?
>
> 4) If not, has the Commission discouraged departures based on those features? ***Koon***, 518 U.S. at 95 (internal quotation marks omitted). The Supreme Court further explained:
>
> If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court must, after considering the "structure and theory of both relevant individual guidelines and the Guidelines taken as a whole," decide whether it is sufficient to take the case out of the Guideline's heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highlyinfrequent."

Id. at 95-96 (internal citations omitted).

The Guidelines list certain factors that can never be bases for departure: 1) race, sex, national origin, creed, religion, socioeconomic status, USSG §5H1.10; 2) lack of guidance as a youth, USSG §5H1.12; 3) drug or alcohol dependance, USSG §5H1.4; and 4) economic hardship, USSG §5K2.12. Further, it has been held that Section 5K2.0 does not authorize a sentencing court to grant a substantial assistance departure without a motion from the government since the Guidelines adequately consider substantial assistance departures in USSG §5K1.1. ***United States v. Maldonado-Acosta***, 210 F.3d 1182, 1184 (10th Cir. 2000).

Courts have departed from the guidelines in a myriad of circumstances after finding that the circumstances surrounding the case placed it "outside the heartland." A few examples of departures that courts found to be supported by circumstances taking a case outside the heartland follow: (1) upward departure where the defendant was a tax defier who had contempt for government, "cult-like belief that the laws of the United States do not apply" to him, and high risk of recidivism, ***United States v. Simkanin***, 420 F.3d 397, 414-15, 417-19 (5th Cir. 2005); (2) upward departure where defendants' use of false sight drafts and filing of false IRS Forms 8300 was not adequately reflected in the Guidelines range, ***United States v. Anderson***, 353 F.3d 490, 508-10 (6th Cir. 2003); (3) upward departure where defendant egregiously obstructed justice by conspiring to hide millions in assets from the IRS, ***United States v. Furkin***, 119 F.3d 1276, 1284 (7th Cir. 1997); (4) downward departure where government agent in conspiracy and money laundering sting manipulated defendant through sexual misconduct, ***United States v. Nolan-Cooper***, 155 F.3d 221, 244 (3d Cir. 1998); (5) downward departure for extraordinary rehabilitation effort, ***Whitaker***, 152 F.3d at 1239-40; (6) upward departure where defendant misrepresented himself as acting on behalf of charitable organization, ***United States v. Smith***, 133 F.3d 737, 750 (10th Cir. 1997); (7) downward departure for extraordinary pre-conviction record of civic contributions, ***United States v. Crouse***, 145 F.3d 786, 791 (6th Cir. 1998); (8) upward departure for use of minor to perpetrate mail fraud, ***United States v. Porter***, 145 F.3d 897 (7th Cir. 1998); and (9) downward departure for combination of factors, not one of which, if individually considered, would take a situation out of the "heartland." ***United States v. Rioux***, 97 F.3d 648, 663 (2d Cir. 1996).

The defendant's intent to pay eventually has been sustained as the basis for a downward departure in a tax evasion case. ***United States v. Brennick***, 134 F.3d 10, 13-15 (1st Cir. 1998). Job loss to innocent employees has also been upheld as a basis for a downward departure in a tax evasion case. ***United States v. Olbres***, 99 F.3d 28, 34 (1st

Cir. 1996) (under ***Koon v. United States***, 518 U.S. 81, 109-10 (1996), a factor the Guidelines neither forbids nor discourages may be considered).

Appellate courts have declined to find cases "outside the heartland" where (1) a defendant falsely testified that his violations of the tax laws were not willful and thereby disqualified himself for an aberrant behavior departure, ***United States v. Mikutowicz***, 365 F.3d 65, 79-80 (1st Cir. 2004); (2) a defendant made restitution within the Guidelines' contemplation, ***United States v. O'Kane***, 155 F.3d 969, 975 (8th Cir. 1998); *see also* ***United States v. Martin***, 363 F.3d 25, 47-49 (1st Cir. 2004) (holding that downward departure based on defendant's pretrial restitution did not justify downward departure when defendant had already received downward adjustment for acceptance of responsibility); (3) a defendant was willing to be deported, ***United States v. Marin-Castenada***, 134 F.3d 551, 555 (3d Cir. 1998); ***United States v. Clase-Espinal***, 115 F.3d 1054, 1059 (1st Cir. 1997); (4) district courts reconciled state and federal sentencing disparities and differences between codefendants, ***United States v. Jones***, 145 F.3d 959, 962 (8th Cir. 1998); ***United States v. Schulte***, 144 F.3d 1107, 1109 (7th Cir. 1998); ***United States v. Willis***, 139 F.3d 811, 812 (11th Cir. 1998); ***United States v. Snyder***, 136 F.3d 65, 67 (1st Cir. 1998); ***United States v. Searcy***, 132 F.3d 1421, 1422 (11th Cir. 1998); (5) a defendant asserted "cultural differences," ***United States v. Tomono***, 143 F.3d 1401, 1404 (11th Cir. 1998); ***United States v. Weise***, 128 F.3d 672 (8th Cir. 1997);[20] (6) the sentencing court considered the costs of imprisoning the defendant, ***United States v. Wong***, 127 F.3d 725, 728 (8th Cir. 1997); (7) a relatively minor white-collar offender who used credit cards without authorization was harshly punished under the Guidelines, ***United States v. Weaver***, 126 F.3d 789, 793 (6th Cir. 1997); and (8) a defendant committed a fraud of long duration and great extent against eight financial institutions, depriving them of $500,000, ***United States v. Alpert***, 28 F.3d 1104, 1108-09 (11th Cir. 1994).

Courts consistently hold that only "extraordinary" family responsibilities warrant downward departure. *See, e.g.*, ***United States v. Jones***, 158 F.3d 492, 499 (10th Cir. 1998); ***United States v. Archuleta***, 128 F.3d 1446, 1550 (10th Cir. 1997); ***United States v. Carter***, 122 F.3d 469, 474 (7th Cir. 1997); ***United States v. Romero***, 32 F.3d 641, 653 (1st Cir. 1994); ***United States v. Johnson***, 964 F.2d 124, 128 (2d Cir. 1992); ***United States v. Thomas***, 930 F.2d 526, 530 (7th Cir. 1991). "Disruption of the defendant's life,

[20] *But see* ***United States v. Lipman***, 133 F.3d 726, 730 (9th Cir. 1998) (holding "cultural assimilation" a basis for downwarddeparture).

and the concomitant difficulties for those who depend on the defendant, are inherent in the punishment of incarceration." ***United States v. Tejeda***, 146 F.3d 84, 87 (2d Cir. 1998) (internal quotation marks and citations omitted). Moreover, the Guidelines specifically provide that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted. USSG §5H1.6.

To similar effect, defendants' mental and physical health problems rarely rise to the level of "extraordinary physical impairment" necessary for downward departure. USSG §§5H1.3, 5H1.4. Sentencing courts, however, have found extraordinary impairments in the following cases: (1) liver cancer where death is imminent, ***United States v. Maltese***, No. 90-CR–87-19, 1993 WL 222350, at *10 (N.D. Ill. 1993); and (2) cancer spread, combined with removal of testicles and ongoing chemotherapy, ***United States v. Velasquez***, 762 F. Supp. 39, 40 (E.D.N.Y. 1991). Appellate courts, on the other hand, have affirmed denial of downward departures to defendants with AIDS, ***United States v. Rabins***, 63 F.3d 721, 727-29 (8th Cir. 1995); and past brain tumor operations, ***United States v. Carey***, 895 F.2d 318, 324 (7th Cir. 1990). Where a defendant's condition merely requires monitoring, a sentencing court's refusal to depart downwardly will be affirmed. ***United States v. Altman***, 48 F.3d 96, 104 (2d Cir. 1995).

When a sentencing court finds that departure from the prescribed guideline range is merited, 18 U.S.C. § 3553(c)(1) requires that the court state on the record its specific reasons for its imposition of the particular sentence. The sentencing court must state the specific reasons for the departure and the sentence imposed must be reasonable in light of the articulated reasons. ***United States v. Porter***, 23, F.3d 1274, 1280 (7th Cir. 1994). A court may satisfy the requirement to state specific reasons for the departure by adopting legally sufficient facts as set forth in a presentence investigation report. ***United States v. Dale***, 991 F.2d 819, 856-57 (D.C. Cir. 1993); *cf.* ***United States v. Charroux***, 3 F.3d 827, 836 (5th Cir. 1993). A sentencing court must justify the "particular" sentence imposed. ***United States v. Zanghi***, 209 F.3d 1201, 1205 (10th Cir. 2000) (appellate court remanded sentencing determination to district court for explanation as to supervised release and home confinement when district court only justified prison term). Additionally, Rule 32 of the Federal Rules of Criminal Procedure requires a district court to furnish reasonable notice to the parties of its intent to depart from the guidelines and to identify with specificity the ground on which it is contemplating a departure. ***Burns***, 501 U.S. at 138-39.[21]

Within the parameters of 18 U.S.C. § 3553, departure is within the sentencing court's sound discretion. ***Koon***, 518 U.S. at 109; ***United States v. Kaye***, 140 F.3d 86, 87-88 (3d Cir. 1998); ***United States v. Morris***, 139 F.3d 582, 584 (8th Cir. 1998). Likewise, a sentencing court may properly refuse to exercise its discretion to depart from the Guidelines. ***United States v. Brye***, 146 F.3d 1207, 1213 (10th Cir. 1998); ***United States v. Strickland***, 144 F.3d 412, 417 (6th Cir. 1998); ***United States v. Rizzo***, 121 F.3d 794,798-99 (1st Cir. 1997); ***United States v. Hernandez-Reyez***, 114 F.3d 800, 801 (8th Cir. 1997); ***United States v. Washington***, 106 F.3d 983, 1016 (D.C. Cir. 1997); ***United States v. Moore***, 54 F.3d 92, 102 (2d Cir. 1995); ***United States v. Byrd***, 53 F.3d 144, 145 (6th Cir. 1995).

In order to sustain a decision to depart upward or downward from the applicable sentencing guideline range, the sentencing court must (1) correctly interpret the Guidelines' policy statements, (2) accurately perform mathematical calculations, and (3) articulate the reason for its decision on the record. ***United States v. Kingdom (U.S.A.), Inc.***, 157 F.3d 133, 135 (2d Cir. 1998); ***United States v. Isaza-Zapata***, 148 F.3d 236, 238 (3d Cir. 1998); ***United States v. Szabo***, 147 F.3d 559, 561 (7th Cir. 1998). It must articulate the specific aggravating or mitigating circumstance and how it differs from "heartland" conduct in the commission of the crime. ***United States v. Onofre-Segarra***, 126 F.3d 1308, 1310 (11th Cir. 1997); ***United States v. Miller***, 78 F.3d 507, 511 (11th Cir. 1996). An appellate court will use an abuse of discretion standard when reviewing a trial court's evaluation of whether the facts and circumstances place the case outside the "heartland." ***Santoyo***, 146 F.3d at 525. Finally, a court must furnish reasonable notice to the parties of its intent to depart and to identify with specificity the grounds for departure. ***Burns***, 501 U.S. at 138-39.

43.9 [3] Departure Based on Substantial Assistance to Authorities

Title 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) grant a court, upon government motion, limited authority to impose a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence,

[21] Note that the Supreme Court has held that advance notice is *not* required if the court is varying from the Guidelines pursuant to ***Booker*** and 18 U.S.C. § 3553(a). ***Irizarry***, 128 S. Ct. at 2202-03.

when the defendant has provided substantial assistance to the government. The Sentencing Guidelines permit the government to request a downward departure from the Guidelines pursuant to Section 5K1.1 when the defendant has rendered substantial assistance in the investigation or prosecution of another person.[22]

Analyzing the interplay between 18 U.S.C. § 3553(e) and 28 U.S.C. § 944(n) and USSG §5K1.1, the Supreme Court addressed the issue of whether a government motion under Section 5K1.1 for departure from the Guidelines range for substantial assistance permits a sentencing court to depart below the statutory minimum. ***Melendez v. United States***, 518 U.S. 120 (1996). The Supreme Court held that in order for the court to sentence a defendant to a range below the statutory minimum, the government must have so moved the court pursuant to 18 U.S.C. § 3553(e). A motion pursuant to Section 5K1.1 for a departure below the guideline range has the effect of "withholding from the district court the power to depart below the statutory minimum." *See generally*, ***Melendez***, 518 U.S. at 129-131; ***In re Sealed Case (Sentencing Guidelines' "Substantial Assistance")***, 149 F.3d 1198, 1201 (D.C. Cir. 1998) (government motion under §5K1.1 for departure below sentencing guideline range does not also permit departure below the statutory minimum under 18 U.S.C. § 3553(e)) (citation omitted); ***United States v. Coleman***, 132 F.3d 440, 442 (8th Cir. 1998). The District of Columbia Circuit, however, determined that a sentencing court may depart downward for substantial assistance in the absence of a motion by the government where the circumstances of the case place it beyond the Guidelines' "heartland." ***In re Sealed Case ("Sentencing Guidelines")***, 149 F.3d at 1202.

Thus, within the parameters of Section 5K1.1, upon motion by the government, the sentencing court may make a downward departure from the Guidelines range because the defendant substantially assisted the government. The government motion must state that the defendant provided substantial assistance in the investigation or prosecution of another person who committed an offense. Section 5K1.1(a) sets forth a non-exhaustive list of considerations for the court to take into account in determining the degree of departure:

[22] But a defendant's refusal to assist authorities may not be considered an aggravating sentencing factor. USSG §5K1.2.

> The appropriate reduction shall be determined by the court for reasons stated[23] that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;[24]
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance. USSG §5K1.1. Substantial assistance is directed to the investigation and prosecution of persons other than the defendant, while acceptance of responsibility is directed to the defendant's own affirmative recognition of responsibility for his own conduct.

USSG §5K1.1, comment. (n.2).

In the event that the government elects not to file a motion for downward departure and there is a plea agreement that contains language regarding the availability of a Section 5K1.1 motion, the sentencing court applies settled principles of contract law in resolving the defendant's assertion that the government agreed to file a Section 5K1.1 motion. ***United States v. Isaac***, 141 F.3d 477, 482-83 (3d Cir. 1998). In plea agreements, the government regularly refers to the possibility of a Section 5K1.1 motion, but reserves discretion to determine whether such a motion is appropriate. ***United States v. Benjamin***, 138 F.3d 1069, 1063 (6th Cir. 1998); ***United States v. Watson***, 988 F.2d 544, 552 n.3 (5th Cir. 1993). The government is the appropriate party to assess whether thedefendant

[23] *See* 18 U.S.C. § 3553(c).

[24] When the defendant's assistance in an investigation became almost useless because the target of the investigation died, the court was within its discretion to consider that fact in determining the extent of any departure. ***United States v. Spiropoulos***, 976 F.2d 155, 162 (3d Cir. 1992).

has performed the conditions of his plea agreement, even if the plea agreement is silent as to the appropriate party. ***United States v. Snow***, 234 F.3d 187, 190 (4th Cir. 2000). In the event that the government elects not to file the motion, the sentencing court may review the government's refusal to make a motion for downward departure "if that refusal was based on an unconstitutional motive," such as bias against the defendant's race or religion. ***Wade v. United States***, 504 U.S. 181, 185-86 (1992); ***United States v. Santoyo***, 146 F.3d 519, 523 (7th Cir. 1998); ***United States v. Carter,*** 122 F.3d 469, 476 (7th Cir. 1997). The defendant bears the burden of making a substantial threshold showing of an unconstitutional motive before he or she is entitled to discovery or an evidentiary hearing on the issue. ***Wade***, 504 U.S. at 186; ***United States v. Kelly,*** 14 F.3d 1169, 1177 (7th Cir. 1994); *accord* ***United States v. Isaac***, 141 F.3d at 484; ***United States v. Leonard***, 50 F.3d 1152, 1157-58 (2d Cir. 1995). The court may also review whether the government's refusal was in bad faith and, accordingly, in violation of the plea agreement. ***Isaac***, 141 F.3d at 483-84; ***United States v. Rexach***, 896 F.2d 710, 713 (2d Cir. 1990). "The sole requirement is that the government's position be based on an honest evaluation of the assistance provided and not on considerations extraneous to that assistance." ***Isaac*** at 484. There is a split of opinion as to whether the government forfeits its discretion to move for a Section 5K1.1 departure by failing to reserve it in a plea agreement. *See* ***Snow***, 234 F.3d at 190; *but see* ***United States v. Courtois***, 131 F.3d 937, 938-39 (10th Cir. 1997) (contractual silence waives the government's discretion); ***United States v. Price***, 95 F.3d 364, 368 (5th Cir. 1996) (same).

If the plea agreement contains an unambiguous and unconditional promise to file a downward departure motion and the promise was consideration for the guilty plea, the defendant is entitled to either specific performance or withdrawal of the guilty plea, unless the government proves that the defendant breached the plea agreement. *See, e.g.,* ***Benjamin***, 138 F.3d at 1073-74; ***United States v. Mitchell***, 136 F.3d 1192, 1194 (8th Cir. 1998). Where the government alleges that the defendant breached the plea agreement, it must prove the breach by a preponderance of the evidence, before the government can be relieved of its obligations under the plea agreement. ***Benjamin***, 138 F.3d at 1073; ***United States v. Crowell***, 997 F.2d 146, 148 (6th Cir. 1993); ***United States v. Tilley***, 964 F.2d 66, 71 (1st Cir. 1992).

Appellate review of a district court decision whether to depart downward pursuant to a Section 5K1.1 motion is available only in limited situations. Review of a sentence is governed by 18 U.S.C. § 2742 and provides for review in four situations: the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) was not within the applicable Guidelines range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. 18 U.S.C. § 2742. An appellate court "may not review the merits of a court's decision not to downwardly depart, or probe the sufficiency of its consideration, so long as the sentence imposed is not otherwise a violation of law or a misapplication of the Guidelines." ***United States v. Campo***, 140 F.3d 415, 419 (2d Cir. 1998).

A sentencing court's refusal to consider a Section 5K1.1 motion is appealable. ***Campo***, 140 F.3d at 418. In ***Campo***, the district court refused to grant a downward departure despite the filing of a Section 5K1.1 motion because the government did not recommend a specific below-guidelines range. The Second Circuit noted that, although the district court had discretion whether to grant the motion, the district court's refusal to exercise that discretion resulted in a sentence imposed "in violation of law." ***Campo***, 140 F.3d at 418. Likewise, a court's failure to recognize its authority to depart from the guidelines is legal error, and thus appealable. *See* ***In re Sealed Case ("Sentencing Guidelines")***, 149 F.3d at 1199 (finding that, although district court decisions not to depart are generally not subject to appellate review, appellate court has jurisdiction where appellant argues that district court misconstrued legal authority under the Guidelines); ***United States v. Adeniyi***, 912 F.2d 615, 619 (2d Cir. 1990); *accord* **United States v. *Poff***, 926 F.2d 588, 590-91 (7th Cir. 1991) *(en banc*) (court's failure to appreciate its authority to depart is reviewable, while court's decision not to depart is unreviewable).

Although a district court's decision not to depart is generally unreviewable, an appellate court will review a trial court's discretionary refusal to grant a downward departure when the defendant argues that the district court misconstrued the legal standards governing its authority to depart. ***Carter***, 122 F.3d at 471 n.1. In such a case, the court reviews for abuse of discretion. ***Id.*** at 472. A district court abuses its discretion when it makes an error of law. ***Koon***, 518 U.S. at 100. When the issue is whether a given factor could ever be a permissible basis for departure, the question is one of law subject to *de novo* review. ***In re Sealed Case ("Sentencing Guidelines")***, 149 F.3d at1198.

43.10 VARIANCES

Under the Supreme Court's decision in ***United States v. Booker***, 543 U.S. 220 (2005), district courts have the option of varying from the advisory Guidelines range.

After the district court performs its Guidelines calculations, it must consider the advisory range along with the factors listed in 18 U.S.C. § 3553(a). The court has discretion to impose a sentence outside of the advisory Guidelines range -- a variance, or deviation -- if it finds that a variance will better serve the statutory goals than a Guidelines sentence. Variances are distinct from departures under the Guidelines, as courts possess broader discretion to impose a variance sentence. *See* ***United States v. Irizarry***, 553 U.S. 708,128 S. Ct. 2198, 2202 (2008) (treating "departure" as a term of art under the Guidelines that is distinct from a "variance" under 18 U.S.C. § 3553(a)). In ***Gall v. United States***, 552 U.S. 38, 50 (2007), the Supreme Court emphasized that sentencing courts "may not presume that the Guidelines range is reasonable." Rather, a district court "must make an individualized assessment based on the facts presented," and, if the court decides that a non-Guidelines sentence is appropriate, it "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." ***Id.*** at 50. In *Gall*, the Supreme Court rejected appellate review that would require "extraordinary" circumstances to justify a variance, or that would employ a "rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." ***Id.*** at 47.

Although the Supreme Court made clear in ***Gall*** that a district court's decision to vary from the Guidelines is entitled to deference, the Court also indicated that appellate courts should carefully review sentences for procedural and substantive errors. ***Gall***, 552 U.S. at 51. Procedural errors may include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range." ***Id.*** Substantive review involves evaluating the reasonableness of the sentence while considering "the totality of the circumstances, including the extent of any variance from the Guidelines range." ***Id.***

In ***Gall***, the Supreme Court held that the district court did not abuse its discretion in imposing a probationary sentence when the Guidelines provided for a range of 30 to 37 months' imprisonment. ***Gall***, 552 U.S. at 41, 43. Although the defendant had participated in an extensive drug conspiracy, the district court found that several factors justified a below-Guidelines sentence, including "the Defendant's explicit withdrawal from the conspiracy almost four years before the filing of the Indictment, the Defendant's post-offense conduct, especially obtaining a college degree and the start of his own successful business, the support of family and friends, lack of criminal history, and his age at the time of the offense conduct." ***Id***. at 593.

In a case decided on the same day as *Gall*, the Supreme Court held that a sentencing court can consider the disparity between Guidelines sentences for crack and powder cocaine offenses, and that the disparity can justify more lenient sentences for crack offenders than the Guidelines recommend. ***Kimbrough v. United States,*** 552 U.S. 85, 91 (2007). Although the Court's holding in ***Kimbrough*** suggests that a district court's disagreement with the policies embodied in the Guidelines can justify a variance, the Court took pains to point out that courts are not free to simply ignore the Guidelines. ***Id***. at 108-10. The Court emphasized that the Guidelines remain the "starting point and initial benchmark" for sentencing, and it indicated that the Sentencing Commission has an institutional advantage over district courts with regard to using empirical data to establish national sentencing standards. ***Id***. at 108 (citations omitted). In addition, the Court stated that "closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." ***Id***. at 109 (internal quotation marks omitted); *see also* ***United States v. Higdon***, 531 F.3d 561, 562 (7th Cir. 2008) ("As a matter of prudence, however, in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.").

Since the Supreme Court decided ***Gall*** and ***Kimbrough***, the courts of appeals have generally reviewed district courts' sentencing decisions deferentially. *See, e.g.*, ***United States v. Martin***, 520 F.3d 87, 96 (1st Cir. 2008) (noting "the degree of respectful deference that is owed to the sentencing court's exercise of its informed discretion"); ***United States v. Wise***, 515 F.3d 207, 217-18 (3d Cir. 2008) (substantive reasonableness review and review of district court's factual findings require substantial deference to district court); ***United States v. Pauley***, 511 F.3d 468, 474-75 (4th Cir. 2007) (affirming downward variance); ***United States v. Bolds***, 511 F.3d 568 (6th Cir. 2007) (affirming upward variance); ***United States v. Braggs***, 511 F.3d 808, 812 (8th Cir. 2008) (same).

Appellate courts have been willing to vacate sentences when the sentencing court has committed a procedural error. *See, e.g.*, ***United States v. Higdon***, 531 F.3d 561, 562-63 (7th Cir. 2008) (vacating sentence because of district court's numerous factual and procedural errors, and recommending that sentencing courts explain reasons for imposing a non-Guidelines sentence in a written order); ***United States v. Gonzalez***, 529 F.3d 94, 97-99 (2d Cir. 2008) (vacating sentence because district court's failure to provide defendant with opportunity for allocution was impermissible procedural error); ***United States v. Bartee***, 529 F.3d 357, 358 (6th Cir. 2008) (reversing on the basis of Guidelines calculation error); ***In re Sealed Case***, 527 F.3d 188, 192-93 (D.C. Cir. 2008) (district court's failure to explain reasons resulted in unreasonable sentence); ***United States v. Desantiago-Esquivel***, 526 F.3d 398, 401 (8th Cir. 2008) (holding that district court's imposition of alternative sentences was reversible procedural error); ***United States v. Grissom***, 525 F.3d 691, 697-99 (9th Cir. 2008) (finding district court's failure to consider relevant conduct reversible procedural error); ***United States v. Langford***, 516 F.3d 205, 212 (3d Cir. 2008) (concluding that error in Guidelines calculation was "significant procedural error" requiring resentencing). A procedural error may not result in reversal, however, if the court of appeals determines that the error was harmless. *See* ***United States v. Williams***, 517 F.3d 801, 808 (5th Cir. 2008) (district court's Guidelines calculation error was harmless and did not warrant resentencing, because sentence would not have been different but for error).

Although courts have been less willing to find sentences to be substantively unreasonable, in ***United States v. Cutler***, 520 F.3d 136, 164 (2d Cir. 2008), the Second Circuit held that a significant downward variance in a tax case *was* substantively unreasonable. The two defendants in this case -- Cutler and Freedman -- were involved in a $100 million bank fraud scheme. Cutler was also involved in a tax fraud scheme that caused a $5 million tax loss. The advisory Guidelines range for Cutler was 78 to 97 months, and Freedman's advisory guidelines range was 108 to 135 months. ***Id***. at 146, 149. Through a combination of Guidelines departures and downward variances, the court ultimately sentenced Cutler to 12 months' imprisonment and Freedman to three years' probation. ***Id***. at 139. With respect to Cutler, the Second Circuit rejected the district court's findings that the amount of loss in this case overstated the seriousness of the offense, ***id***. at 161; that the length of a term of imprisonment does not affect deterrence in criminal tax cases, ***id***. at 163-64; and that Cutler had extraordinary family responsibilities, ***id***. at 166. The court of appeals faulted the district court for completely disregarding the Guidelines provision that a larger amount of loss justifies a longer sentence. ***Id***. at 158-62. Similarly, the court of appeals found that the district court "gave no explanation for its disagreement with the Commission's policy judgments, reflected in the Guidelines as explained by the background commentary, that tax offenses, in and of themselves, are serious offenses; that the greater the tax loss, the more serious the offense; and that the greater the potential gain from the tax offense, the greater the sanction that is necessary for deterrence." ***Id.*** at 163. The Second Circuit ultimately concluded that both Cutler and Freedman's sentences were substantively unreasonable. ***Id.*** at 176.

In ***United States v. Hunt***, 521 F.3d 636, 639 (6th Cir. 2008), a jury convicted the defendant of various health care fraud offenses. The advisory Guidelines range was 27 to 33 months, but the district court found that the defendant lacked fraudulent intent and imposed a downward variance of five years' probation. ***Id.*** at 641. The Sixth Circuit ruled that this sentence was substantively unreasonable, because "it would be improper for the judge in sentencing to rely on facts directly inconsistent with those found by the jury beyond a reasonable doubt." ***Id.*** at 649.

43.11 TAX DIVISION POLICY

It has long been a priority of the Tax Division to pursue vigorous prosecution of a wide range of tax crimes to deter taxpayer fraud and to foster voluntary compliance. Consistent with this long-standing priority, the Tax Division has issued a number of statements concerning policy and procedures as to pleas and sentencing.

43.12 SENTENCING POLICIES

43.12[1] Departures and Variances from the Guidelines

As noted above, the sentencing court must calculate and consider the applicable Guidelines range. Tax Division attorneys may recommend, without further approval, a departure, either upward or downward, based on any of the factors listed in Section 5K2 of the guidelines. However, within the Tax Division, approval of the appropriate Section Chief is required for an attorney to seek either: (a) a downward departure under Section 5K1.1 for substantial assistance to authorities or (2) an upward or downward departure for any factor other than one of those set out in Section 5K2. Prior to making such a recommendation, the Tax Division attorney must consult with the local U.S. Attorney's office to insure that the proposed departure is consistent with the policyof that office.

Normally, the government attorney in a tax case should not recommend that there be no period of incarceration. *But see* USAM 6-4.340.

As for variances, it is general Tax Division policy that sentences within the advisory Guidelines range adequately reflect the seriousness of the offense, promote deterrence, and reduce unwarranted sentencing disparities. Accordingly, Tax Division attorneys should seek supervisory approval before recommending either an upward or downward variance at sentencing.

43.12[2] Costs of Prosecution

The principal substantive criminal tax offenses (*i.e.*, 26 U.S.C. §§ 7201, 7203, 7206(1) & (2)) provide for the mandatory imposition of costs of prosecution upon conviction. Courts increasingly recognize that imposition of costs in criminal tax cases is mandatory and constitutional. *See, e.g.*, ***United States v. Jungels***, 910 F.2d 1501, 1504 (7th Cir. 1990); ***United States v. Palmer***, 809 F.2d 1504, 1506-07 (11th Cir. 1987); ***United States v. Saussy***, 802 F.2d 849, 855 (6th Cir. 1986); ***United States v. Fowler***, 794 F.2d 1446, 1449 (9th Cir. 1986); ***United States v. Wyman***, 724 F.2d 684, 688 (8th Cir. 1984); ***United States v. Chavez***, 627 F.2d 953, 954-57 (9th Cir. 1980).

The policy statement on costs of prosecution in Section 5E1.5 states that "[c]osts of prosecution shall be imposed on a defendant as required by statute." The commentary to Section 5E1.5 states that "[v]arious statutes *require* the court to impose the costs of prosecution" and identifies 26 U.S.C. §§ 7201, 7202, 7203, 7206, 7210, 7213, 7215, 7216, and 7232 as among the statutes requiring the imposition of costs. USSG §5E1.5, comment. (backg'd) (emphasis added).

For offenses committed by individuals, Section 5E1.3 mandates the imposition of a special assessment in the amount prescribed by 18 U.S.C. § 3013. Section 8E1.3 authorizes the court to impose the costs of prosecution and statutory assessments upon organizations that commit felonies and Class A misdemeanors. The Tax Division strongly recommends that government attorneys seek costs of prosecution in criminal tax cases. USAM 6-4.350.

43.12[3] Government Appeal of Sentences

18 U.S.C. § 3742 permits sentences imposed under the Guidelines to be appealed by both the defendant and the government under certain circumstances. The government may appeal a sentence in the following four situations:

a. When the sentence is imposed in violation of law;[25]

b. When the sentence is imposed as a result of an incorrect application of the Guidelines;[26]

c. When the sentence imposed is less than the sentence specified in the applicable Guidelines range; or

d. When the sentence is imposed for an offense for which there is no sentencing guideline and the sentence is plainly unreasonable.[27]

18 U.S.C. §§ 3742(b)(1)-(4); ***United States v. Giddings***, 37 F.3d 1091, 1093 (5th Cir. 1994).

The government may file a notice of appeal in district court for review of an otherwise final sentence. ***United States v. Hernandez***, 37 F.3d 998, 1000 (n.3) (11th Cir. 1994). However, any further action requires the approval of the Solicitor General. USAM 2-2.121.

Recommendations to the Solicitor General for government appeals of sentences on tax counts must be processed through the Tax Division, which should be notified immediately of any adverse sentencing decision. To assure consistent implementation of the Guidelines, a government attorney in a tax case should notify the Tax Division of any *significant* sentencing issue raised on appeal by a defendant that could pose a problem for the Department. The designated person to contact is the Chief of the Criminal Appeals and Tax Enforcement Policy Section (CATEPS). The current telephone number is (202) 514-5396.

A notice of appeal must be filed within 30 days of the imposition of the sentence or within 30 days of the defendant's notice of appeal. Fed. R. App. P. 4(b)(1)(B). Therefore, the government attorney who wishes to appeal an adverse sentencing decision should forward a recommendation to the Tax Division, along with accompanying

[25] *See* ***United States v. Hardy***, 101 F.3d 1201 (7th Cir. 1996); ***United States v. Underwood***, 61 F.3d 306, 308 (5th Cir. 1995); ***United States v. Nnanna***, 7 F.3d 420 (5th Cir. 1993); ***United States v. Piche***, 981 F.2d 706 (4th Cir. 1992); ***United States v. Lopez***, 974 F.2d 50 (7th Cir. 1992).

[26] ***Williams v. United States***, 503 U.S. 1193 (1992); ***United States v. Burnett***, 66 F.3d 137 (7th Cir. 1995); ***United States v. Soltero-Lopez***, 11 F.3d 18 (1st Cir. 1993).

[27] ***United States v. Giddings***, 37 F.3d 1091, 1093 (5th Cir. 1994).

documentation, promptly, preferably within two days of imposition of sentence. USAM 2-2.111.

43.13 RESTITUTION

Prosecutors should consider seeking restitution in all tax cases. See § 44.00 et seq., *infra*.

43.14 FINES

Prosecutors may consider requesting a fine. See § 45.00 et seq., *infra*.

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44.00 RESTITUTION IN CRIMINAL TAX CASES

When seeking restitution in criminal tax cases, prosecutors should keep the following principles in mind:

- Restitution is statutory; district courts have no inherent power to order restitution absent statutory authorization.
- Restitution is limited to the actual loss caused by the count(s) of conviction, unless the defendant agrees to pay more.
- For Title 18 tax offenses, restitution as an independent part of the sentence is mandatory pursuant to 18 U.S.C. § 3663A.
- For Title 26 tax offenses, restitution may be ordered as an independent part of the sentence if the defendant agrees to pay restitution in a plea agreement (18 U.S.C. § 3663(a)(3)).
- For Title 26 cases in which the defendant has not agreed to pay restitution, restitution may be ordered as a condition of supervised release or probation (18 U.S.C. §§ 3563(b), 3583(d)).
- Prosecutors should seek prejudgment Title 26 interest in restitution in order to fully compensate the IRS.
- Use the Tax Division's form plea language whenever possible (available at § 44.10, *infra*)

Each of these principles is explained in detail in this chapter.

44.01 BACKGROUND

After the 1925 Federal Probation Act, courts rarely ordered restitution in criminal cases. *See* S. Rep. No. 97-532, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2536 ("As simple as the principle of restitution is, it lost its priority status in the sentencing procedures of our federal courts long ago"); Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 90-91 (1993). But more recent statutes encourage, and sometimes require, district courts to order restitution. *See* ***Hughey v. United States***, 495 U.S. 411, 415-416 (1991) (listing examples).

In 1982, Congress, to encourage broader use of restitution, enacted the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248 (restitution provisions codified at 18 U.S.C. § 3663). The VWPA permits restitution in, among other cases, Title 18 criminal cases and any criminal case (including Title 26 cases) where a defendant agrees to restitution in a plea agreement.

Fourteen years later, Congress enacted the Mandatory Victim Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A), which generally requires a court to order full restitution for all Title 18 criminal cases, including cases involving tax-related charges under 18 U.S.C. §§ 286, 287, 371, and 1001.

Section 5E1.1 of the United States Sentencing Guidelines permits restitution in all criminal cases, either as a part of the sentence or as a condition of probation or supervised release, depending on the type of offense. Although the Guidelines are now advisory, *see* ***United States v. Booker***, 543 U.S. 220, 246, 259-60 (2005); ***United States v. Frith***, 461 F.3d 914, 919 n.2 (7th Cir. 2006), the change from mandatory to advisory sentencing guidelines generally did not affect the rules relating to restitution. *See, e.g.*, ***United States v. Bonner***, 522 F.3d 804, 806-08 (7th Cir. 2008); ***United States v. Farrington***, 499 F.3d 854, 861 (5th Cir. 2007); ***United States v. Gordon***, 393 F.3d 1044, 1051 n.2 (9th Cir. 2004).

Accordingly, in tax cases, the applicable statutes provide the following: (1) for tax offenses prosecuted under Title 18, restitution is mandatory and is ordered as an independent part of the sentence; and (2) for tax offenses prosecuted under Title 26, restitution is discretionary and is ordered as a condition of supervised release, but the defendant can agree to (and plea agreements should provide for) restitution ordered as an independent part of the sentence.

Section 209 of the Mandatory Victims Restitution Act requires prosecutors negotiating plea agreements to consider "requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the counts to which the defendant actually plead[s]." Pub. L. No. 104-132 § 209; 18 U.S.C. § 3551 note; *see also* Attorney General Guidelines for Victim and Witness Assistance, Art. V(D) (May 2012); Justice Manual § 9-16.320, Plea Agreements and Restitution. To help prosecutors comply with this statutory and Department requirement, standard language for the restitution portion of plea agreements in tax cases is included in § 44.10, *infra*.

44.02 AUTHORITY TO ORDER RESTITUTION

44.02[1] The Victim and Witness Protection Act (Title 18 Offenses (including criminal tax cases) and Plea Agreements)

The Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248, empowers courts, in certain instances, to impose restitution as a separate and independent part of a sentence rather than as a special condition of probation or supervised release. *See* 18 U.S.C. §§ 3663, 3664; ***United States v. Minneman***, 143 F.3d 274, 284 (7th Cir. 1998); ***United States v. Martin***, 128 F.3d 1188, 1190 (7th Cir. 1997); ***United States v. Helmsley***, 941 F.2d 71, 101 (2d Cir. 1991). "The purpose of restitution under the VWPA is 'to ensure that wrongdoers, to the degree possible, make their victims whole.'"[1] ***United States v. Patty***, 992 F.2d 1045, 1050 (10th Cir. 1993) (quoting ***United States v. Rochester***, 898 F.2d 971, 983 (5th Cir. 1990)); *see* ***United States v. Louper-Morris***, 672 F.3d 539, 566 (8th Cir. 2012); ***Hughey v. United States***, 495 U.S. 411, 416 (1990); ***United States v. Innarelli***, 524 F.3d 286, 293-94 (1st Cir. 2008); ***United States v. Serawop***, 505 F.3d 1112, 1123-24 (10th Cir. 2007); ***United States v. Brock-Davis***, 504 F.3d 991, 998 (9th Cir. 2007); ***United States v. Milstein***, 481 F.3d 132, 136 (2d Cir. 2007); ***United States v. Gordon***, 393 F.3d 1044, 1052-53 (9th Cir. 2004); ***United States v. Simmonds***, 235 F.3d 826, 830-33 (3d Cir. 2000) (purpose of restitution is to make victims whole, to restore victims to their original state of well-being).

In enacting the VWPA, Congress "strove to encourage greater use of a restitutionary remedy." ***United States v. Vaknin***, 112 F.3d 579, 582-83, 587 (1st Cir. 1997) (discussing history of restitution back to the Code of Hammurabi and the Old Testament); *see* ***Minneman***, 143 F.3d at 284-85; ***Martin***, 128 F.3d at 1190 (VWPA designed to ensure that courts do not relegate victim restitution to "an occasional afterthought") (citations omitted). The VWPA authorizes a district court to order that a defendant convicted of, among other offenses, offenses under Title 18 — including 18

[1] There is a split in the circuits concerning whether restitution inflicts a criminal punishment and is therefore punitive. *Compare* ***United States v. Perez***, 514 F.3d 296, 298 (3d Cir. 2007) (restitution is a criminal penalty), and ***United States v. Cohen***, 459 F.3d 490, 496 (4th Cir. 2006) (although restitution allows victims to recover losses that might be available in civil litigation, restitution is part of a criminal defendant's sentence), *with* ***United States v. Serawop***, 505 F.3d 1112, 1122-23 & n.4 (10th Cir. 2007) (MVRA does not inflict criminal punishment and is not punitive; collecting cases discussing circuit split).

U.S.C. §§ 286, 287, 371, and 1001 — make restitution to victims of the offense. 18 U.S.C. § 3663; *see* ***Helmsley***, 941 F.2d at 101.

The United States and its agencies, including the IRS, may qualify as victims under the VWPA and the MVRA. *See, e.g,* ***United States v. Schmidt***, 675 F.3d 1164, 1167 (8th Cir. 2012); ***United States v. Leahy***, 464 F.3d 773, 793 (7th Cir. 2006); ***United States v. Senty-Haugen***, 449 F.3d 862, 865 (8th Cir. 2006) (MVRA definition of victim same as VWPA, IRS is eligible victim under MVRA); ***United States v. Ekanem***, 383 F.3d 40, 42-44 (2d Cir. 2004); ***United States v. Butler***, 297 F.3d 505, 518 (6th Cir. 2002) (approving order to pay restitution to the IRS); ***United States v. Lincoln***, 277 F.3d 1112, 1114 (9th Cir. 2002); ***United States v. Tucker***, 217 F.3d 960, 962 (8th Cir. 2000); ***Minneman***, 143 F.3d at 284; ***Vaknin***, 112 F.3d at 591; ***Martin***, 128 F.3d at 1190-92; *see also* ***United States v. Kirkland***, 853 F.2d 1243, 1246 (5th Cir. 1988) (upholding restitution order to the Farmers Home Administration); ***United States v. Sunrhodes***, 831 F.2d 1537, 1545-46 (10th Cir. 1987) (quoting ***United States v. Ruffen***, 780 F.2d 1493, 1496 (9th Cir. 1986)) (upholding restitution order to Indian Health Service); *but see* ***United States v. Ubakanma***, 215 F.3d 421, 427-28 & n.6 (4th Cir. 2000) (reversing restitution ordered payable to the United States government where real victim was located in the United Arab Emirates; discussing necessity to identify victim).

Before ordering restitution under the VWPA, the district court must consider several factors, including the amount of loss, the defendant's financial resources, the financial needs and earning ability of the defendant and his or her dependents, and any such other factors the court deems appropriate.[2] 18 U.S.C. § 3663(a)(1)(B)(i); *see* ***United States v. Caldwell***, 302 F.3d 399, 420 (5th Cir. 2002); ***Weinberger v. United States***, 268 F.3d 346, 356 (6th Cir. 2001) (vacating restitution order because district court did not consider all factors necessary under VWPA); ***United States v. Ben Zvi***, 242 F.3d 89, 100 (2d Cir. 2001) (defendant's limited financial resources at time of imposition of sentence not dispositive, particularly where defendant has reasonable potential for future earnings; in absence of showing by defendant of restricted future earnings potential, district court may reasonably presume future earnings); ***United States v. Lawrence***, 189 F.3d 838, 848 (9th Cir. 1999) (while district court is not required to make express finding concerning

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[2] There is no constitutional requirement that a jury find beyond a reasonable doubt the facts needed by the district court in order to impose restitution. ***United States v. Dupes***, 513 F.3d 338, 345-46 (2d Cir. 2008) (quoting ***United States v. Reifler***, 446 F.3d 65, 116 (2d Cir. 2006)).

ability to pay, the court must consider the information and "cannot completely defer to the monitoring capabilities of the probation officer"); ***United States v. Wells***, 177 F.3d 603, 611 (7th Cir. 1999) (court can consider likelihood that defendant will acquire resources in future and defendant's entrepreneurial talents).

If the district court does not make detailed findings regarding these factors, the court of appeals may remand the restitution order because of "inadequate explanation and insufficient reasoning." ***United States v. Menza***, 137 F.3d 533, 538 (7th Cir. 1998); *see* ***United States v. Butler***, 297 F.3d 505, 519 (6th Cir. 2002) (district court did not explain restitution order; court must consider factors set forth in 18 U.S.C. § 3664 and explain why they are or are not relevant).

44.02[2] The VWPA and Plea Agreements

The VWPA also provides that district courts may order restitution "in any criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a) (3). Thus, as part of a plea agreement in *any* criminal case (including pure Title 26 criminal tax cases), a defendant may agree to pay restitution. 18 U.S.C. § 3663(a)(3); *see* ***United States v. Anderson***, 545 F.3d 1072, 1077-78 (D.C. Cir. 2008); ***United States v. Firth***, 461 F.3d 914, 920 (7th Cir. 2006). But the plea agreement must clearly contemplate restitution for the court to order it on this basis. As one court of appeals put it, "[n]ot to put too fine a point on it (as Snagsby was wont to say in *Bleak House*), it would seem self-evident that for a court to order restitution under § 3663(a)(3), the plea agreement might be expected to mention the word 'restitution.'" ***United States v. Gottesman***, 122 F.3d 150, 151-52 (2d Cir. 1997).

To enhance the prospects of collection, prosecutors should ensure that restitution ordered as part of a plea agreement is made an independent part of the sentence, not just a condition of supervised release or probation. Restitution ordered as condition of supervised release or probation ceases to be collectible when the period of supervision or probation ends, but restitution ordered as an independent part of the sentence gives the government and the IRS 20 years to collect. *See* § 44.02[4], *infra*, for information about the longevity of a restitution order.

44.02[3] The Mandatory Victim Restitution Act (Title 18 Offenses, including certain criminal tax cases)

The Mandatory Victim Restitution Act of 1996 ("MVRA"), Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A), discards the discretionary balancing system of the VWPA and makes restitution mandatory for certain crimes, including some Title 18 tax crimes. *See* ***United States v. Turner***, 718 F.3d 226, 235-36 (3d Cir. 2013); ***United States v. Lessner***, 498 F.3d 185, 201 (3d Cir. 2007); ***United States v. Newman***, 144 F.3d 531, 537-38 (7th Cir. 1998); ***United States v. Williams***, 128 F.3d 1239, 1241 (8th Cir. 1997). As 18 U.S.C. 3663A(a)(1) states, "the court *shall order*, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . ." (emphasis added). *See* ***United States v. Serawop***, 505 F.3d 1112, 1118 (10th Cir. 2007); ***United States v. Gordon***, 393 F.3d 1044, 1048 (9th Cir. 2004). the district court may not consider the defendant's economic circumstances or ability to pay when ordering mandatory restitution under the MVRA. *See* ***Serawop***, 505 F.3d at 1118; ***United States v. Corley***, 500 F.3d 210, 224-25 (3d Cir. 2007), *reversed on other grounds* at 553 U.S. 303 (2009).

The MVRA applies to (1) crimes of violence, as defined in 18 U.S.C. § 16; (2) offenses against property, including any offense committed by fraud or deceit; and (3) offenses described in 18 U.S.C. §§ 670 and 1365 (which relate to consumer and medical products). 18 U.S.C. § 3663A(c)(1)(A). The offense must also be one in which an identifiable victim (or victims) has suffered a physical injury or pecuniary loss. 18 U.S.C. § 3663A(c)(1)(B). Aside from the differences noted above, the MVRA and the VWPA are similar in all important respects, and, when interpreting the MVRA, one may look to and rely on cases interpreting the VWPA as precedent. *See* ***Serawop***, 505 F.3d at 1118; ***United States v. Brock-Davis***, 504 F.3d 991, 996 (9th Cir. 2007); ***Gordon***, 393 F.3d at 1048; ***United States v. Dickerson***, 370 F.3d 1330, 1338 (11th Cir. 2004); ***United States v. Randle***, 324 F.3d 550, 555-56 & nn.2-3 (7th Cir. 2003).[3]

Although the MVRA does not apply to Title 26 offenses, it does apply to Title 18 criminal tax offenses that are offenses against property and committed by fraud or deceit. The statutory phrase "'offense against property' applies to those offenses in which

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[3] There are exceptions to the MVRA's mandate that sentencing courts order restitution that may apply when there are many victims or determining restitution would unduly complicate or prolong sentencing. *See* § 43.03]9], *infra*, discussing these exceptions.

physical or tangible property, including money, is taken (or attempted to be taken) by theft, deceit or fraud." ***United States v. Cummings***, 189 F. Supp. 2d. 67, 73 (S.D.N.Y. 2002); *see* ***Dickerson***, 370 F.3d at 1336 n.12 (wire fraud is an offense against property). Conspiracies to defraud the IRS in violation of 18 U.S.C. 371 are "offenses against property" that are covered by the MVRA. ***United States v. Turner***, 718 F.3d 226, 236 (3d Cir. 2013); ***United States v. Meredith***, 685 F.3d 814, 827 (9th Cir. 2012) (applying MVRA to conspiracy to defraud the IRS in violation of 18 U.S.C. § 371); ***United States v. Senty-Haugen***, 449 F.3d 862, 865 (8th Cir. 2006) (district court properly ordered defendant convicted of conspiracy to defraud the government to pay restitution to the IRS); ***United States v. Kubick***, 205 F.3d 1117, 1128-29 (9th Cir. 1999) (mandatory restitution ordered on convictions for conspiracy to commit bankruptcy fraud and conspiracy to impede and impair the Internal Revenue Service, each in violation of 18 U.S.C. § 371). Courts have also held that mail and wire fraud (in violation of 18 U.S.C. §§ 1341 and 1343, respectively), bankruptcy fraud, false claims against the United States (in violation of 18 U.S.C. § 287), and offenses involving stolen property are all offenses against property to which the MVRA applies . *See* ***United States v. Jones***, 289 F.3d 1260, 1263-64 (11th Cir. 2002) (MVRA applied to § 287 offense involving false tax returns); ***United States v. Bonner***, 522 F.3d 804, 808 (7th Cir. 2008) (mail fraud against Social Security Administration); ***United States v. Cheal***, 389 F.3d 35, 46-47 (1st Cir. 2004) (mail and wire fraud); ***United States v. Boyd***, 239 F.3d 471, 471-72 (2d Cir. 2001) (same); ***United States v. Myers***, 198 F.3d 160, 168-69 (5th Cir. 1999); ***United States v. Stanelle***, 184 F. Supp. 2d 854, 857 (E.D. Wis. 2002). The MVRA applies to an offense against property even when the victim's loss is purely financial. *See* ***United States v. Overholt***, 307 F.3d 1231, 1253-54 (10th Cir. 2002) (collecting cases); ***United States v. Sapoznik***, 161 F.3d 1117, 1121-22 (7th Cir. 1998).

Under the MVRA, the district court must establish a payment schedule and cannot delegate this judicial function to the probation office or the Bureau of Prisons. *See* ***Ward v. Chavez***, 678 F.3d 1042, 1049 (9th Cir. 2012); ***United States v. Kyles***, 601 F.3d 82, 87-88 (2d Cir. 2010); ***Corley***, 500 F.3d at 224-25 (district court cannot delegate determining payment schedule to Bureau of Prisons Inmate Financial Responsibility Program, even if it makes practical sense); ***Lessner***, 498 F.3d at 202; ***United States v. Day***, 418 F.3d 746, 761 (7th Cir. 2005) (where evidence indicated that defendant could not make immediate payments toward restitution, order that restitution was payable immediately constituted an impermissible delegation of judicial authority to probation officer).

When establishing the payment schedule, the district court must consider a defendant's financial resources and ability to pay. 18 U.S.C. § 3664(f)(1)(A); *see* ***Lessner***, 498 F.3d at 202 (where record indicates court's consideration of the defendant's financial situation — even without express findings — requirements of Section 3664(f)(2) are met); ***United States v. Ahidley***, 486 F.3d 1184, 1191-93 (10th Cir. 2007) (statute expressly instructs court to consider defendant's financial resources; although extensive remarks are not necessary, it is plain error not to consider financial resources); ***Day***, 418 F.3d 746.

44.02[4] Conditions of Supervised Release or Probation (Criminal Tax Cases)

Although neither § 3663 (VWPA) nor § 3663A (MVRA) provides for restitution as an independent part of the sentence for offenses under Title 26, *see* ***United States v. Hoover***, 175 F.3d 564, 569 (7th Cir. 1999); ***United States v. Joseph***, 914 F.2d 780, 783-84 (6th Cir. 1990), a combination of statutes, when read together, allows district courts to order restitution for Title 26 offenses as a condition of supervised release or probation.[4]

The probation statute, 18 U.S.C. § 3563(b), authorizes district courts to order a defendant to pay restitution as a discretionary condition of probation. The supervised release statute, 18 U.S.C. § 3583(d), authorizes district courts to impose as a condition of supervised release, "any condition set forth as a discretionary condition of probation in section 3563(b)." The text of § 3563(b) provides that a district court may order the defendant to "make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A)." This language makes clear that restitution ordered as a condition of probation or supervised release is available for offenses not covered by §§ 3663(a) and 3663A(c)(1)(A). Section 3556 authorizes a district court to "order restitution in accordance with section 3663," which in turn provides that a court "may order . . . that the defendant make restitution to any victim of such offense." And although § 3663 by its own terms limits restitution to certain (non-Title 26) offenses, § 3563(b) expressly provides that § 3663's limitation in scope does not apply to restitution as a condition of probation (or, accordingly, as a condition of supervised release). *See* ***United States v. Perry***, 714 F.3d 570, 577 (8th Cir. 2013); ***United States v. Batson,*** 608 F.3d 630, 633-37 (9th Cir. 2010); ***United States v. Frith***,

[4] If provided for in a plea agreement, a district court can order restitution for Title 26 offenses as an independent part of the sentence. *See* § 44.02[2], *supra*.

461 F.3d 914, 919-20 (7th Cir. 2006) (discussing Title 15 offenses); ***United States v. Butler***, 297 F.3d 505, 518 (6th Cir. 2002); ***United States v. Bok***, 156 F.3d 157, 167 (2d Cir. 1998); ***United States v. Daniel***, 956 F.2d 540, 543-44 (6th Cir. 1992); ***United States v. Helmsley***, 941 F.2d 71, 101 (2d Cir. 1991); ***United States v. Comer***, 93 F.3d 1271, 1278 (6th Cir. 1996).

A court's authority to order restitution for Title 26 offenses as a condition of probation or supervised release is explicitly recognized in the Sentencing Guidelines, which prescribe the use of that authority. *See* USSG § 5E1.1(a)(2); ***Gall v. United States***, 21 F.3d 107, 109-10 (6th Cir. 1994).

Generally, under § 5E1.1(a)(2), when a defendant has been found guilty after a trial of a tax crime under Title 26 and a court finds that the government has suffered a loss, the defendant should be ordered to make restitution as a condition of supervised release. *See* USSG § 5E1.1(a)(2). Of course, after ***United States v. Booker***, 543 U.S. 220, 246, 259-60 (2005), section 5E1.1 is advisory. *See* ***Frith***, 461 F.3d at 919 n.2.

If the sentencing court does not order restitution, it should state on the record its reasons for not imposing restitution. *See* 18 U.S.C. §§ 3663 and 3664. Section 5E1.1(b)(2) — echoing § 3663A(c)(3) — provides, with exceptions likely not applicable in tax cases,[5] that restitution need not be ordered if the district court finds that (1) "the number of identifiable victims is so large as to make restitution impracticable," or (2) "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."

While restitution ordered as an independent part of the sentence is enforceable for 20 years pursuant to 18 U.S.C. § 3613(b), restitution ordered solely as a condition of supervised release or probation is only enforceable during the period of supervision or probation. *See* ***United States v. Westbrooks***, 858 F.3d 317, 328 (5th Cir. 2017), *vacated on other grounds by* 138 S. Ct. 1323 (2018) (holding that restitution ordered solely as a

[5] Section 5E1.1(b)(2) applies "in the case of a restitution order under 18 U.S.C. § 3663; a restitution order under 18 U.S.C. § 3663A that pertains to an offense against property described in 18 U.S.C. § 3663A(c)(1)(A)(ii); or a condition of restitution imposed" as a condition of supervised release or probation. It thus does not apply when restitution is mandatory under the MVRA because it is a crime of violence under § 3663A(c)(1)(A)(i), or is mandatory by virtue of some other subsection of § 3663A(c)(1)(A) besides subsection (ii).

condition of supervised release is not enforceable before the period of supervision begins); ***United States v. Hassebrock***, 663 F.3d 906, 924 (7th Cir. 2011) (where restitution is imposed as a condition of supervised release, a defendant cannot be required to pay restitution until his period of supervised release begins); *see also* ***United States v. Gifford***, 90 F.3d 160, 162 (6th Cir. 1996) (holding that conditions of supervised release become unenforceable after supervised release is revoked); ***United States v. Soderling***, 970 F.2d 529, 532 (9th Cir. 1992) (same); ***United States v. Irvin***, 820 F.2d 110, 111 (5th Cir. 1987) (restitution ordered as condition of probation no longer enforceable once probation was revoked).

44.02[5] Civil Assessments Based on Criminal Restitution Orders

As of August 16, 2010, the IRS can use a restitution order in a criminal tax case as the basis for a civil tax assessment. *See* 26 U.S.C. § 6201(a)(4). The IRS can make the assessment as soon as any criminal appeals have concluded. See 26 U.S.C. § 6201(a)(4)(B). The defendant may not challenge the amount of an assessment based on a criminal restitution order. See 26 U.S.C. § 6201(a)(4)(C).

The IRS had previously taken the position that interest under 26 U.S.C. § 6601 accrued on restitution-based assessments from the last date prescribed for payment of the tax liability that is the subject of the restitution-based assessment to the date that the IRS receives full payment. In ***Klein v. Commissioner***, 149 T.C. No. 15 (Oct. 3, 2017), the Tax Court held that interest under 26 U.S.C. § 6601 does *not* accrue on restitution-based assessments made pursuant to 26 U.S.C. § 6201(a)(4). The IRS revised its position after ***Klein*** and has made clear that interest does not accrue on restitution-based assessments. *See* IRS Chief Counsel Notice 2019-004. Therefore, in order to allow the IRS to collect interest, prosecutors should seek to include Title 26 interest as part of the restitution order. *See* § 44.10, *infra*, for form plea language.

The IRS's ability to use restitution orders as the basis for civil assessments increases the enforcement and collection options available. In order to ensure that the IRS is able to properly assess the restitution amount, prosecutors should make sure that the court's restitution order includes a detailed breakdown of the loss amount, including the loss attributable to each tax year at issue and the names of any third-party taxpayers. See § 44.10, *infra*, for a form plea agreement.

44.03 CALCULATION OF AMOUNT OF RESTITUTION

44.03[1] Actual Loss

In any criminal tax case, prosecutors should exercise care in determining the amount of the loss suffered by the IRS. The VWPA provides guidance regarding the calculation of the amount of restitution to be ordered. *See* ***Hughey v. United States***, 495 U.S. 411, 418 (1990); ***United States v. Minneman***, 143 F.3d 274, 284-85 (7th Cir. 1998); ***United States v. Mullins***, 971 F.2d 1138, 1146-47 (4th Cir. 1992).[6] The VWPA provides that "in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," the restitution order may require return of the property or, if that is impossible, impractical, or inadequate, payment of an amount equal to "the value of the property on the date of sentencing." 18 U.S.C. § 3663(b)(1). In a criminal tax case, the offense generally results in the loss of government property, to wit, the money to which the government was entitled under the tax laws but which was not paid by the defendant.[7] *See* ***Pasquantino v. United States***, 544 U.S. 349, 355-56 (2005) (unpaid tax constituted property under the wire fraud statute); ***United States v. Porcelli***, 865 F.2d 1352, 1359-62 (2d Cir. 1989) (unpaid New York State gasoline sales tax was property under the mail

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[6] The determination of the amount of restitution imposed as a condition of supervised release for Title 18 offenses is governed by the rules set forth in the VWPA. *See* U.S.S.G. §5E1.1; ***Gall v. United States***, 21 F.3d 107, 110-11 (6th Cir. 1996) (restitution imposed as a condition of supervised release must still be imposed in conformity with VWPA; vacating restitution ordered pursuant to guilty plea that did not mention restitution for losses arising from mere allegations of crimes for which defendant was not convicted); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992); ***United States v. Husky***, 924 F.2d 223, 226 n.4 (11th Cir. 1991) (section 5E1.1 provides that restitution shall be ordered in accordance with the VWPA).

[7] In ***United States v. Touchet***, 658 F.2d 1074, 1076 (5th Cir. 1981), the Fifth Circuit, relying on ***United States v. Taylor***, 305 F.2d 183 (4th Cir. 1962), a Fourth Circuit case interpreting language in the now-repealed Probation Act, 18 U.S.C. 3651, stated that "[u]ntil there has been a definitive determination or adjudication of the amount of taxes Touchet owes, he may not be required to pay charged deficiency sums as a prerequisite of probation or as a condition for release from custody." *See* ***United States v. Stuver***, 845 F.2d 73, 76 (4th Cir. 1988) (noting that the result in ***Taylor*** was predicated on language in the Probation Act). The law under which restitution is currently imposed contains different language. The Fourth Circuit now allows restitution to be imposed as a condition of supervised release in a tax case without satisfaction of the conditions identified in ***Taylor***. *See* ***United States v. Lewis***, 235 F.3d 215, 219 (4th Cir. 2000) (although it vacated the restitution order because the district court "did not make any factual findings as to the proper amount of restitution or as to Lewis' ability to pay," court of appeals recognized that a district court has the authority to impose restitution as a condition of supervised release in a tax case); ***United States v. Long***, No. 94-5029, 1995 WL 703548, at *1 (4th Cir. 1995) (district courts can now impose restitution as a condition of supervised release in tax cases "without having to satisfy ***Taylor***"); *see also* ***United States v. Butler***, 297 F.3d 505, 518 (6th Cir. 2002). And in ***United States v. Nolen***, 523 F.3d 331, 333 (5th Cir. 2008), the Fifth Circuit made clear that "under the current statutory scheme, restitution may be imposed if done so as a condition of supervised release in a criminal tax case, even in the absence of a prior definitive determination or adjudication of the amount of taxes owed . . . ."

fraud statute); ***United States v. Pierce***, 224 F.2d 158, 165-66 (2d Cir. 2000); ***United States v. Helmsley***, 941 F.2d 71, 94 (2d Cir. 1991) (necessary property interest existed in unpaid New York State income and corporate franchise taxes); *see also* ***United States v. Yusuf***, 536 F.3d 178, 189 (3d Cir. 2008) (unpaid United States Virgin Islands' gross receipts tax constituted proceeds of mail fraud).

For purposes of determining the amount of restitution, Section 3663(a)(1)(A) requires a showing of actual loss to the victim. *See* ***United States v. Chalupnik***, 514 F.3d 748, 754 (8th Cir. 2008); ***United States v. Galloway***, 509 F.3d 1246, 1253 (10th Cir. 2007) (restitution must be based on actual loss, not on the amount of gain to the defendant); ***United States v. Germosen***, 139 F.3d 120, 130 (2d Cir. 1998). Restitution in a criminal case may only compensate a victim for actual losses caused by the defendant's criminal conduct. *See* ***United States v. Serawop***, 505 F.3d 1112, 1124 (10th Cir. 2007) (district court that orders restitution in an amount greater than the total loss caused by the offense exceeds its statutory jurisdiction and imposes illegal sentence); ***United States v. Brock-Davis***, 504 F.3d 991, 998 (9th Cir. 2007); ***United States v. Gaytan***, 342 F.3d 1010, 1011 (9th Cir. 2003); ***United States v. Bussell***, 414 F.3d 1048, 1061 (9th Cir. 2005) (reversing restitution order based on intended loss because amount of restitution is limited by the victim's actual loss; directing district court on remand to compare what actually happened with what would have happened if defendant had acted lawfully).

In cases involving both embezzlement and tax fraud, defendants sometimes argue that they should not have to pay restitution to the IRS because payment of restitution to the embezzlement victim eliminates any actual tax loss. In fact, funds obtained by embezzlement or theft are taxable income to the defendant in the year that he receives the funds. The Supreme Court made this clear in ***James v. United States***, 366 U.S. 213 (1961), in which the court held that criminally derived income is taxable even if the defendant has to repay the fraud victims: "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.'" *Id.* at 219 (quoting ***North American Oil Consolidated v. Burnet***, 286 U.S. 417, 424 (1932)). A defendant may be entitled to claim a deduction based on a restitution payment in the tax year in which the restitution payment was made, but that is a civil tax matter that is outside the scope of the criminal case, and prosecutors should avoid making representations about deductibility of restitution payments.

44.03[2] Loss underlying the offense of conviction

44.03[2][a] General Rule

Generally, the amount of restitution is limited to losses caused by the specific conduct underlying the offense of conviction, and does not include relevant conduct.[8] *See* ***Hughey***, 495 U.S. at 420; ***United States v. Batson,*** 608 F.3d 630, 637 (9th Cir. 2010); ***United States v. Nolen***, 523 F.3d 331, 332-33 (5th Cir. 2008); ***United States v. Wright***, 496 F.3d 371, 381-82 (5th Cir. 2007); ***United States v. Firth***, 461 F.3d 914, 920 (7th Cir. 2006); ***United States v. Inman***, 411 F.3d 591, 595 (5th Cir. 2005) (remanding restitution order on plain error review where the amount of restitution was not limited to the conduct underlying the offense for which defendant was convicted); ***Germosen***, 139 F.3d at 131; ***United States v. Campbell***, 106 F.3d 64, 69-70 (5th Cir. 1997) ("relevant conduct" provisions of guidelines are inapplicable to determination of amount of restitution); ***United States v. Daniel***, 956 F.2d 540, 543 (6th Cir. 1992).

44.03[2][b] Scheme, Conspiracy, or Pattern

However, when the count of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, as in a conspiracy to defraud, in violation of 18 U.S.C. § 371, or mail fraud, in violation of 18 U.S.C. § l341, the restitution order may include losses caused by acts that were part of the same scheme, even if the defendant was not convicted of offenses based on those particular acts. 18 U.S.C. § 3663(a)(2); *see* ***United States v. Foley***, 508 F.3d 627, 635-36 (11th Cir. 2007) (restitution amount properly included acquitted conduct; district court could award restitution to any victim of the scheme furthered by the defendant's mail fraud offense); ***Brock-Davis***, 504 F.3d at 998-99 (restitution may be ordered for losses to persons harmed in the course of the defendant's scheme even beyond the counts of conviction); ***United States v. Farrington***, 499 F.3d 854, 860-61 (8th Cir. 2007) (restitution may be ordered in wire fraud case for criminal conduct part of a broad scheme to defraud

[8] There are exceptions to this general rule, which will be discussed further below. Also, a plea agreement can (and should) provide for restitution for all the government's losses, including losses caused by relevant conduct.

regardless of whether the defendant is convicted of each fraudulent act in the scheme); (quoting ***Inman***, 411 F.3d at 595); ***United States v. Gordon***, 480 F.3d 1205, 1211 (10th Cir. 2007); ***United States v. Lawrence***, 189 F.3d 838, 847-48 (9th Cir. 1999) (district court found that acts underlying bankruptcy fraud charges were part of overall scheme alleged in mail fraud count).

A defendant in a conspiracy may be held liable for all reasonably foreseeable losses caused to the victims by the conspiracy. *See* ***United States v. Cohen***, 459 F.3d 490, 500 (4th Cir. 2006) (court properly ordered defendant to pay restitution to all victims of the offense even if the defendant did not expressly admit to each and every overt act alleged in support of the conspiracy); ***United States v. Solares***, 236 F.3d 24, 26 (1st Cir. 2000); ***United States v. Boyd***, 222 F.3d 47, 50-51 (2d Cir. 2000) (jury acquitted defendant on conspiracy charge but convicted defendant on substantive counts on theory of coconspirator liability under ***Pinkerton v. United States***, 328 U.S. 640 (1946); not plain error for district court to require defendant to pay restitution for losses that were reasonably foreseeable; VWPA allows courts to order conspirator to pay restitution even on uncharged or acquitted counts; collecting cases); ***United States v. Collins***, 209 F.3d 1, 2-3 (1st Cir. 1999) (defendant convicted of conspiracy responsible for all reasonably foreseeable losses caused in the course of defendant's criminal conduct, whether defendant is convicted of each offense); ***United States v. Nichols***, 169 F.3d 1255, 1278 (10th Cir. 1999); ***United States v. Hensley***, 91 F.3d 274, 276-77 (1st Cir. 1996); *see also* ***United States v. Mann***, 493 F.3d 484, 498 (5th Cir. 2007) (court can include in restitution amount all losses caused by scheme when defendant is convicted of scheme to defraud); *but see* ***United States v. Wright***, 496 F.3d at 382 (error to award restitution for losses unconnected to scheme of conviction); ***United States v. Davenport***, 445 F.3d 366, 373-74 (4th Cir. 2006) (district court cannot order restitution under MVRA to persons not victims of the offense for which the defendant was convicted); ***United States v. Pollak***, 844 F.2d 145, 149-52 (3d Cir. 1988) (a defendant named in counts charging an overall scheme to defraud may not be required to pay restitution with respect to counts on which he was acquitted).

When a scheme, conspiracy, or pattern is an element of the offense, the MVRA requires restitution for all losses attributable to the scheme, "even for losses that occurred outside the limitations period for the underlying crime." ***United States v. Parnell***, 959 F.3d 537, 538-39 (2d Cir. 2020). In ***Parnell***, the defendant was indicted in August 2017 on four counts of wire fraud; the indictment alleged a scheme that started in 2010 and continued into 2016. ***Ibid.*** The court of appeals upheld the district court order of restitution for all the losses during this period, notwithstanding that some of the losses occurred outside the applicable five-year statute of limitations. ***Id.*** at 539-41. As ***Parnell*** explained, the "plain meaning of the statute"—which without qualification, mandates restitution for "any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern," 18 U.S.C. § 3663A(a)(2)—by its terms "include[es] acts outside the statute-of-limitations period, as long as those losses are attributable to the same underlying scheme, and as long as some part of that scheme for which the defendant was convicted occurred within the statute of limitations." ***Parnell***, 959 F.3d at 540; *accord* ***United States v. Ellis***, 938 F.3d 757, 763–65 (6th Cir. 2019); ***United States v. Anieze-Smith***, 923 F.3d 565, 573–75 (9th Cir. 2019); ***Dickerson***, 370 F.3d at 1339, 1342-43.

Because the MVRA mandates restitution for all resulting losses when a scheme is an element of the offense, prosecutors should define the scheme as broadly as the evidence permits when charging such offenses to allow for collection of full restitution. When "a defendant is convicted by a jury . . . the scope of the scheme is defined by the indictment for purposes of restitution." ***United States v. Jones***, 641 F.3d 706, 714 (6th Cir. 2011); *accord* ***Wright***, 496 F.3d at 381-82 (where fraudulent scheme is element of offense, restitution is limited to specific temporal scope of indictment). The government, which controls the drafting of the indictment, thus "bears the burden of including language sufficient to cover all acts for which it will seek restitution." ***United States v. Akande***, 200 F.3d 136, 142 (3d Cir. 1999) (cleaned up); *accord* ***United States v. DeSalvo***, 41 F.3d 505, 514 (9th Cir. 1994). Prosecutors, moreover, should be aware that, for purposes of determining restitution, open-ended temporal language, such as "on or about" or "no later than," may not suffice to expand the temporal scope of a scheme beyond the specific dates alleged in the indictment. *See* ***Akande***, 200 F.3d at 141-42 (rejecting argument that use of "on or about" in a conspiracy charge permitted restitution outside the express dates alleged; this language did not suffice on its own to "evince[] an intent" to reach conduct outside the dates charged); ***Ellis***, 938 F.3d at 765-66 (Stranch, J., concurring) (criticizing restitution award that encompassed losses beginning in 2008 where indictment merely alleged that the scheme began "no later than in or about" 2012, but not reaching issue because defendant did not raise it; collecting cases).

In ***United States v. Adams,*** 955 F.3d 238 (2d Cir. 2020), the court of appeals affirmed a restitution order imposed as a condition of supervised release that encompassed all the losses attributable to a "decade-long scheme to deceive the IRS" that was charged as a corrupt endeavor to obstruct the due administration of the internal revenue laws under 26 U.S.C. § 7212(a). ***Id.*** at 251 (cleaned up). Adams challenged the restitution order on grounds that it exceeded the loss charged in the counts of conviction because it included losses from four tax years that were not charged in separate tax evasion or false return counts. ***Ibid.*** The ***Adams*** court, however, was unpersuaded. It reasoned that 18 U.S.C. § 3563(b) permits restitution to the victim "of the offense," and Adams's offense under § 7212(a) here "caused the IRS losses" in the tax years not charged in other counts. ***Ibid.***

44.03[3] Interest

In imposing restitution, a district court may include both prejudgment and postjudgment interest. *See* ***United States v. Perry,*** 714 F.3d 570, 577 (8th Cir. 2013) (affirming inclusion of interest in restitution to IRS because the full loss to the victim included the time value of money); ***United States v. Jimenez***, 513 F.3d 62, 87 (3d Cir. 2008); ***United States v. Gordon***, 393 F.3d 1044, 1058-59 (9th Cir. 2004) (prejudgment interest is necessary to make the victim whole, interpreting MVRA); ***Virgin Islands v. Davis***, 43 F.3d 41, 47 (3d Cir. 1994) (prejudgment interest is an aspect of victim's actual loss); ***United States v. Patty***, 992 F.2d 1045, 1049 (10th Cir. 1993) (prejudgment interest reflects the victim's loss due to his inability to use the money for a productive purpose and is necessary to make the victim whole); ***United States v. Kress***, 944 F.2d 155, 160 (3d Cir. 1991) (postjudgment interest may be included in restitution order); *see also* ***Helmsley***, 941 F.2d at 101 (defendant ordered to pay restitution to government of taxes owed and all penalties and interest thereon; court found that defendant had acquiesced to the amount of restitution in the presentence report). Accordingly, prosecutors should request prejudgment interest in all cases for which restitution is imposed (i.e., in cases involving either Title 18 violations or Title 26 violations). This is especially so because interest does not accrue on the IRS's restitution-based assessment. *See* § 44.02[5], *supra*.

In cases involving the MVRA (i.e., cases involving Title 18 violations), prosecutors may be able to argue that prejudgment interest is mandatory. While the Tax Division is not aware of any cases holding that the MVRA requires the inclusion of prejudgment interest in the restitution amount, there is some authority to support such an argument. The MVRA requires the court to order the defendant to pay the greater of the value of the property on the date of the offense or the value of the property on the date of sentencing. *See* 18 U.S.C. § 3663A(b). The value of the tax loss on the date of sentencing should include interest. *See* 26 U.S.C. §§ 6601, 6621. Moreover, 18 U.S.C. § 3664(f)(1)(A) instructs the sentencing court to order "restitution to each victim in the full amount of each victim's losses" (emphasis added). Prosecutors can argue that prejudgment interest accounts for the lost time-value of money and is necessary to make the IRS whole. And the MVRA's emphasis on full compensation for victims suggests that prejudgment interest is appropriate. *See* ***Rodgers v. United States***, 332 U.S. 371, 373-74 (1947) (holding that the test for determining whether interest should be included requires weighing the "relative equities" between the beneficiaries of the obligation and those upon whom it has been imposed); ***Adams***, 955 F.3d at 251-52 (prejudgment interest properly included in restitution order because it "is part of the government's loss when delinquent taxes are not timely paid"); ***Davis***, 43 F.3d at 47 ("the inclusion of prejudgment interest . . . is an aspect of the victim's actual loss which must be accounted for in the calculation of restitution in order to effect full compensation"); *see also* ***Gordon***, 393 F.3d at 1058-59 (9th Cir. 2004) (affirming order requiring defendant to pay prejudgment interest on assets embezzled from his corporate employer); ***United States v. Shepard***, 269 F.3d 884, 886 (7th Cir. 2001) (stating that prejudgment interest should be included in restitution due from defendant who embezzled funds from an elderly victim's interest-bearing account).

44.03[4] Penalties

As a general rule, the amount of the loss does not include penalties. *See* ***Chalupnik***, 514 F.3d at 754 (amount of restitution is limited to victim's provable actual loss, even if more punitive remedies would be available in a civil action); ***United States v. Bussell, II***, 504 F.3d 956, 964-65 (9th Cir. 2007) (actual loss for restitution purposes is determined by comparing what actually happened with what would have happened if the defendant had acted lawfully (citations omitted)); ***Gordon***, 393 F.3d at 1053 (primary and overarching goal of restitution statutes is "to make victims of crime *whole*, to *fully* compensate these victims for their losses and to restore these victims to their original state of well-being" (internal quotation omitted) (emphasis in original)).

An exception applies, however, if the defendant agrees to pay penalties as part of a plea agreement. *See* 18 U.S.C. § 3663(a)(3). In addition, restitution may include penalties in evasion of payment cases and failure to pay cases in which the offense of conviction involved the willful failure to pay penalties. This is because the evasion of the penalties is the goal of the offense, and the victim IRS has accordingly been deprived of those penalties because of the defendant's criminal conduct.

The Sentencing Guidelines' treatment of penalties in evasion of payment and failure to pay cases is instructive. The commentary to Guidelines § 2T1.1 provides that "[t]he tax loss does not include interest or penalties, except in willful evasion of payment cases under 26 U.S.C. § 7201 and willful failure to pay cases under 26 U.S.C. § 7203." U.S.S.G. § 2T1.1, comment. (n.1). A number of courts have thus included penalties in the Guidelines tax loss figure in cases involving evasion of payment and willful failure to pay. *See* ***United States v. Black***, 815 F.3d 1048, 1055 (7th Cir. 2016); ***United States v. Thomas***, 635 F.3d 13, 16-17 (1st Cir. 2011); ***United States v. Josephberg***, 562 F.3d 478, 502-03 (2d Cir. 2009); ***United States v. Barker***, 556 F.3d 682 (8th Cir. 2009).

44.03[5] Tax Loss Versus Actual Loss

The calculation of the amount of loss for purposes of restitution when the IRS is the victim may be closely related to the calculation of the tax loss under the Sentencing Guidelines. But the Guidelines tax loss is usually the intended loss, *see* § 43.03[1], *infra*, while the amount of restitution is always limited to actual loss unless the defendant agrees to pay more. Guidelines tax loss also includes all losses attributable to relevant conduct, but restitution, as explained above in § 44.03[2][b], is limited to losses attributable to the offenses of conviction unless one of those offenses has a scheme as an element. Thus, the Guidelines tax loss may be greater than the amount of restitution, and prosecutors should take care not to conflate the two. Generally, however, the district court may rely upon the same "quantity and quality of evidence" to determine the amount of loss in both contexts. *See* ***Germosen***, 139 F.3d at 130; ***United States v. Copus***, 110 F.3d 1529, 1537 (10th Cir. 1997).

Although the district court has broad discretion to determine the type and amount of evidence to support an award of restitution, the court cannot simply "'accept uncritically an amount recommended by the probation office.'" ***United States v. Najjor***, 255 F.3d 979, 984 (9th Cir. 2001) (quoting ***United States v. Barany***, 884 F.2d 1255, 1261 (9th Cir. 1989)); *see* ***United States v. Tran***, 234 F.3d 798, 814 (2d Cir. 2000) (it is not enough that district court had before it a PSR including information relevant to factors mandated by 18 U.S.C. § 3364; district court's statement that it reviewed the PSR in detail is not enough to indicate that it considered specific statutory factors in setting restitution payment schedule under MVRA). The court must make an independent determination as to the amount of the loss suffered by the victim as a result of the defendant's conduct. *See* ***Najjor***, 255 F.3d at 984.

44.03[6] Proof of Restitution Amount

The prosecutor must establish the amount of loss for restitution by a preponderance of the evidence. *See* 18 U.S.C. § 3664(e); ***McMillan v. Pennsylvania***, 477 U.S. 79, 97-92 (1986); ***Chalupnik***, 514 F.3d at 754; ***Brock-Davis***, 504 F.3d at 998; ***United States v. DeRosier***, 501 F.3d 888, 896 (8th Cir. 2007); ***United States v. Vaghela***, 169 F.3d 729, 736 (11th Cir. 1999); ***Minneman***, 143 F.3d at 284-85; ***United States v. Vaknin***, 112 F.3d 579, 587 (1st Cir. 1997) (a restitution award "cannot be woven solely from the gossamer strands of speculation and surmise").

In some circumstances, the government can satisfy this burden by presenting evidence establishing a reasonable estimate of the loss. *See, e.g.,* ***United States v. Osman***, 853 F.3d 1184, 1189 (11th Cir. 2017); ***United States v. Gushlak***, 728 F.3d 184, 198 (2d Cir. 2013); ***United States v. Masek***, 588 F.3d 1283, 1287 (10th Cir. 2009) ("In the case of fraud or theft . . . [t]he court need only make a reasonable estimate of the loss, given the information available." (cleaned up)). But this principle may not apply when the "appropriate restitution amount is definite and easy to calculate." ***United States v. Sheffield***, 939 F.3d 1274, 1276 (11th Cir. 2019). In ***Sheffield***, the defendant carried out a tax credit fraud scheme where the "refunds issued by the IRS . . . were all for the same exact amount—$1,000—and the evidence the government submitted in support of its restitution request was admittedly and demonstrably inaccurate" because the spreadsheet used to calculate restitution contained duplicate entries. ***Id.*** at 1276-77. As ***Sheffield*** explained, "[t]he use of estimation is permitted because it is sometimes impossible to determine an exact restitution amount," but that principle was inapplicable on the facts before it because "figuring out the loss only required a simple mathematical exercise, i.e., multiplying each false tax credit by $1,000." ***Id.*** at 1277-78 (cleaned up).

44.03[7] District Court Must Determine Amount of Restitution and any Payment Schedule

The district court must determine the amount of restitution and must state that the defendant is required to pay a sum certain. As a general rule, the district court may not delegate the judicial functions inherent in ordering restitution to another body such as the probation office or the IRS. *See* ***Butler***, 297 F.3d at 518 (district court could not order restitution in an amount "[t]o be determined thru tax court or IRS"); ***United States v. Pandiello***, 184 F.3d 682, 688 (7th Cir. 1999) (leaving to Inmate Financial Responsibility Program decision as to how much restitution defendant must pay while incarcerated is an improper delegation of judicial authority and constitutes plain error); ***United States v. Mikaelian***, 168 F.3d 380, 390-91 (9th Cir. 1999) (provision that "if the probation officer were to determine that Mr. Mikaelian does not have the ability to make such restitution, the probation officer may make such adjustments in the restitution amount as is [sic] appropriate under the circumstances" invalid); ***United States v. Braxtonbrown-Smith***, 278 F.3d 1348, 1356 (D.C. Cir. 2002) (court may not allow Probation Office to modify amount of restitution defendant must pay upon release from custody).

Before the MVRA was enacted, the courts of appeal split over whether the district court could delegate setting a restitution payment schedule to the Bureau of Prisons or the Probation Office. *See* ***Weinberger v. United States***, 268 F.3d 346, 360 & n.3 (6th Cir. 2001) (under the VWPA, court may delegate setting of payment schedule so long as court first determines the amount of the restitution; collecting cases and discussing circuit split). But the MVRA amended Section 3664 to provide that all restitution orders, even those that are not mandatory under the MVRA, "shall . . . specify in the restitution order . . . the schedule according to which[] the restitution is to be paid." 18 U.S.C. § 3664(f)(2); *see* ***United States v. Coates***, 178 F.3d 681, 683-85 (3d Cir. 1999) (explaining this statutory change); 18 U.S.C. § 3556 ("The procedures under section 3664 shall apply to all orders of restitution under this section," including non-mandatory restitution ordered under Section 3663). Following this statutory amendment, most courts of appeal have held that district courts lack discretion to delegate establishment of a payment schedule, but some still allow the Bureau of Prisons to determine the defendant's payment schedule during incarceration. *Compare, e.g.,* ***United States v. Kinlock***, 174 F.3d 297, 300 (2d Cir. 1999) ("When restitution cannot be paid immediately, the sentencing court must set a schedule of payments for the terms of incarceration, supervised release, or probation," but "a payment schedule expressed as a percentage of the defendant's monthly income while incarcerated . . . is satisfactory"); ***Coates***, 178 F.3d at 685 ("the fixing of restitution payments is a judicial act that may not be delegated to a probation officer"; the MVRA "overrides[] the regulations" allowing "the Bureau of Prisons to make payment schedules for all monetary penalties"); *with* ***United States v. Sawyer***, 521 F.3d 792, 794-96 (7th Cir. 2008) (Easterbrook, J.) (Section 3664(f) "does not say when the [payment] schedule must begin," so no error when district court sets schedule that begins after incarceration and "leav[es] payment during imprisonment to the Inmate Financial Responsibility Program"; collecting cases and discussing circuit split). Some circuits that prohibit the Bureau of Prisons from determining any aspects of the payment schedule have likewise proscribed the "implicit" delegation that results when the district court orders an indigent defendant to pay restitution immediately. *See* ***United States v. Corley***, 500 F.3d 210, 224-27 (3d Cir. 2007) (such an order is indistinguishable from improper outright delegation of authority to Bureau of Prisons), *vacated and remanded on other grounds*, 533 U.S. 303 (2009); ***United States v. Overholt***, 307 F.3d 1231, 1255-56 (10th Cir. 2002) (same); ***United States v. Prouty***, 303 F.3d 1249, 1255 (11th Cir. 2002) (same).

When a district court imposes a payment schedule, prosecutors should seek to make clear that such a schedule is a minimum obligation that does not prevent the government from additional collection action. Some courts have held that the existence of a payment schedule prevents additional collection action by the government. *See, e.g.*, ***United States v. Martinez***, 812 F.3d 1200, 1204 (10th Cir. 2015). The Tax Division's form plea language, available at § 44.10, *infra*, requires the defendant to agree that the restitution amount is due and payable immediately and is subject to immediate enforcement by the government. When a defendant so agrees in a plea agreement, the district court is permitted to "set a *minimum* installment as a condition of supervised release," notwithstanding that § 3664(f)(2) requires the court to establish a payment schedule. *See* ***United States v. Fariduddin***, 469 F.3d 1111, 1112-13 (7th Cir. 2006) (Easterbook, J.) (explaining that the defendant "waived th[e] entitlement" to a payment schedule when he entered into a plea agreement with such a provision); *see also* ***Carpenter v. Commissioner***, 152 T.C. 202, 214-16 (2019) (court-ordered restitution payment schedule did not limit IRS's ability to collect on restitution-based assessment because the district court, in accordance with defendant's plea agreement, made the restitution order payable immediately); ***United States v. Williams***, 898 F.3d 1052, 1054-56 (10th Cir. 2018) (government could seek garnishment in excess of payment schedule because restitution was made due in full immediately).

44.03[8] Amount of Loss Agreed to in Plea Agreement

The major exception to the general rule that restitution is limited to losses caused by the offense of conviction is in cases involving plea agreements. The VWPA provides that district courts may order restitution "in *any* criminal case *to the extent agreed to* by the parties in a plea agreement . . . ." 18 U.S.C. § 3663(a)(3) (emphasis added). Thus, the parties to a plea agreement in any criminal tax case may authorize restitution in an amount greater than the loss attributable to the offense of conviction.[9] *See e.g.*, ***United States v. Sloan***, 505 F.3d 685, 695 (7th Cir. 2007); ***United States v. Cooper***, 498 F.3d 1156, 1158 (10th Cir. 2007) (party to plea agreement can agree in plea agreement to pay restitution to persons other than the victim of the offense of conviction, 18 U.S.C. § 3663A(a)(2)); ***United States v. Blake***, 81 F.3d 498, 506 (4th Cir. 1996); ***United States v. Schrimsher***, 58 F.3d 608, 609 (11th Cir. 1995); ***United States v. Silkowski***, 32 F.3d 682, 688-89 (2d Cir. 1994); ***United States v. Baker***, 25 F.3d 1452, 1457 (9th Cir. 1994). This is sometimes referred to as "heightened restitution." The best practice is to identify in the plea agreement the specific amount of restitution the defendant agrees to pay. Keep in mind that any ambiguity in the plea agreement will be construed against the government. *See, e.g.*, ***United States v. Phillips***, 174 F.3d 1074, 1076-77 (9th Cir. 1999).

The parties to a plea agreement may also agree that the court may order restitution to persons other than the victim of the offense. 18 U.S.C. § 3663(a)(1)(A); *see* ***Gordon***, 480 F.3d at 1211; ***Cooper***, 498 F.3d at 1158; ***United States v. Firment***, 296 F.3d 118, 122 (2d Cir. 2002); ***United States v. Ubakanma***, 215 F.3d 421, 427-28 & n.7 (4th Cir. 2000) (reversing restitution ordered payable to United States, where victim of offense was a specifically named person in the United Arab Emirates and plea agreement did not provide for payment of restitution to persons other than the victim of the offense). When a defendant agrees to pay heightened restitution, the government must still prove that the loss to be repaid resulted from the defendant's criminal conduct. *See* ***Patty***, 992 F.2d at 1050 (heightened restitution agreed to by defendant included amounts and victims not charged in the indictment, but defendant's fraudulent conduct caused losses).

A court may order a defendant to pay restitution to the victim of an offense in excess of the loss that resulted from the offense only up to the amount agreed upon by the parties. *See* ***United States v. Bartsh***, 985 F.2d 930, 933 (8th Cir. 1993); ***United States v. Arnold***, 947 F.2d 1236, 1238 (5th Cir. 1991). To permit any restitution beyond that generally allowable by statute, a plea agreement must specifically state both that the defendant will pay restitution and the amount of restitution that the defendant will pay.

[9] In Title 26 cases, plea agreements can (and should) additionally provide that restitution is ordered as an independent part of the sentence and not merely as a condition of supervised release. This ensures that the restitution order will remain collectible after the supervised release term ends. *See* § 44.02[4], *supra*.

See ***Phillips***, 174 F.3d at 1077; ***Weinberger***, 268 F.3d at 356-57; ***United States v. Gottesman***, 122 F.3d 150, 152-53 (2d Cir. 1997). If, however, the plea agreement does not provide for heightened restitution in excess of the loss caused by the offense of conviction, the court may still order restitution to any victim, including the IRS, to the extent of the loss caused by the offense of conviction. *See* ***Wienberger***, 268 F.3d at 357; ***United States v. Broughton-Jones***, 71 F.3d 1143, 1148 (4th Cir. 1995).

44.03[9] Mandatory Restitution

The restitution amount under the MVRA is generally the amount of the property taken from the victim. 18 U.S.C. § 3663A(b)(1)(A), (B). The MVRA directs that restitution be ordered to any victims who are "directly and proximately harmed" as a result of the offense of conviction. 18 U.S.C. § 3663A(a)(2). Thus, the district court lacks discretion to consider a defendant's financial circumstances in calculating the restitution amount under the MVRA. *See* ***United States v. Chay***, 281 F.3d 682, 686 (7th Cir. 2002); ***United States v. Jones***, 289 F.3d 1260, 1265-66 (11th Cir. 2002).

Even though the MVRA explicitly states that courts "shall order restitution" for certain crimes, exceptions to this rule exist. The MVRA provides that a court is not obligated to order restitution if the MVRA applies because the offense is one "against property" under § 3663A(c)(1)(A)(ii),[10] and the court finds that (1) "the number of identifiable victims is so large as to make restitution impractical" or (2) "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. 3663A(c)(3). *See See* ***Serawop***, 505 F.3d at 1124-25 (district court could have left complex matters to civil determination); ***United States v. Galloway***, 509 F.3d 1246, 1254 (10th Cir. 2007) (court "may opt out of imposing restitution" if these provisions are satisfied).

Some courts have also recognized that the MVRA does not require payment of restitution to those who are either involved in the offense of conviction or those who have suffered losses of property otherwise obtained by unlawful means. For instance, in

[10] As explained above in § 44.02[3], Section 3663(c)(1)(A)(ii) is the provision that makes restitution mandatory in some statutes commonly charged in criminal tax cases, such as 18 U.S.C. 371 (conspiracy to defraud), and 18 U.S.C. §§ 1341 and 1343 (mail and wire fraud).

United States v. Ojeikere, 545 F.3d 220 (2d Cir. 2008) (Calabresi, J.), the court recognized that the MVRA does not require restitution of a victim's "ill-gotten gains," or when the victims "were *in pari materia* with the scheme of which [the defendant] was convicted," but "h[e]ld that that restitution under the MVRA may not be denied simply because the victim had greedy or dishonest motives." ***Id.*** at 222-23 (applying this rule to reject the defendant's argument that his victims were not entitled to restitution because they believed they were paying defendant as part of a different "fraudulent scheme"); *see also* ***United States v. Litos***, 847 F.3d 906, 907-09 (7th Cir. 2017) (Posner, J.) (vacating restitution order to bank that acted "reckless[ly]" in approving applications submitted to it in the course of the defendants' mortgage fraud scheme); ***United States v. Martinez***, 978 F. Supp. 1442, 1453 (D.N.M. 1997) (rejecting argument that an illegally operated casino was entitled to restitution where the defendant was convicted of a crime of violence against it). Likewise, some courts have held that co-conspirators are not "victims" entitled to restitution under the MVRA. ***United States v. Reifler***, 446 F.3d 65, 127 (2d Cir. 2006) ("any order entered under the MVRA that has the effect of treating coconspirators as 'victims,' and thereby requires 'restitutionary' payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*"); ***United States v. Lazarenko***, 624 F.3d 1247, 1249, 1251-52 (9th Cir. 2020) ("in the absence of exceptional circumstances, a co-conspirator cannot recover restitution"); ***In re Wellcare Health Plans, Inc.***, 754 F.3d 1234, 1239-40 (11th Cir. 2014) (rejecting mandamus petition of corporation seeking restitution under the MVRA for crimes committed by the corporation's officers); *but see* ***United States v. Kendre***, 486 Fed. App'x 271, 275 & n.2 (3d Cir. 2012) (questioning these cases, but not reaching the issue). It is the Tax Division's position, consistent with this authority, that absent extraordinary circumstances investors are not victims in the prosecution of a tax shelter promotor, and taxpayer-clients are not victims in the prosecution of a return preparer.

44.04 LIMITED CIRCUMSTANCES IN WHICH A RESTITUTION ORDER MAY BE MODIFIED

A restitution order is a final judgment that can be modified only in a limited set of circumstances. *See* ***United States v. Puentes***, 803 F.3d 597, 605-06 (11th Cir. 2015) ("The law is clear that the district court has no inherent authority to modify a sentence; it may do so only when authorized by a statute or rule."). The circumstances under which a restitution order can be modified are listed in 18 U.S.C. § 3664(o). Within 14 days of sentencing, "the court may correct a sentence that resulted from arithmetical, technical, or other clear error" pursuant to Fed. R. Crim. P. 35(a). *See* 18 U.S.C. § 3664(o)(1)(A). A restitution order may be modified if it is appealed and remanded under 18 U.S.C. § 3742. *See* 18 U.S.C. § 3664(o)(1)(B). If a victim discovers additional losses after sentencing and petitions the district court, the court may amend the restitution order to include the additional losses "upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief." 18 U.S.C. § 3664(o)(1)(C) (citing § 3664(d)(5)). And the court may modify a defendant's payment schedule upon finding a change in defendant's financial circumstances. *See* 18 U.S.C. § 3664(o)(1)(D); *see also* § 44.05, *infra*. But unless one of the provisions identified in 18 U.S.C. § 3664(o) applies, the district court lacks jurisdiction to modify a restitution order after the fact. Of special note, there is no statutory basis to reduce the amount of restitution ordered payable to the IRS based on a claim that the actual tax loss is less than the restitution ordered. *See* ***United States v. Sloan***, 505 F.3d 685, 697 (7th Cir. 2007); ***United States v. Obie***, No. 2:10-cr-20142 (E.D. Mich.).

44.05 CHANGE IN FINANCIAL CIRCUMSTANCES

A defendant may experience significant changes in his economic circumstances after a court has entered a restitution order. ***United States v. Overholt***, 307 F.3d 1231, 1256 (10th Cir. 2002). The court is to be notified of the change in circumstances—either by the defendant, or by the government or the victim—and then may adjust the schedule accordingly. Section 3664(k) states:

> A restitution order shall provide that the defendant shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

Note that while a change in financial circumstances can justify modification of the payment *schedule*, it does not justify modification of the restitution *order*. Restitution orders can only be modified pursuant to the limited circumstances identified in 18 U.S.C. § 3664(o). *See* § 44.04, *supra*.

44.06 DISCHARGE OF RESTITUTION ORDERS IN BANKRUPTCY

Restitution orders are not subject to discharge in bankruptcy proceedings. 11 U.S.C. §§ 523(a)(7), 1538(a)(3). *See* ***Kelly v. Robinson***, 479 U.S. 36, 52 (1986); ***United States v. Ridgeway***, 489 F.3d 732, 737-38 (5th Cir. 2007); ***In re Verola***, 446 F.3d 1206, 1207-08 (11th Cir. 2006) (state restitution order not dischargeable); ***United States v. Leahy***, 438 F.3d 328, 342 (3d Cir. 2006).

44.07 NO COMPROMISE OF CIVIL TAX LIABILITY

Prosecutors should remember that, as discussed in Section 44.03 above, restitution in criminal tax cases is limited only to losses caused by the criminal conduct of the defendant and generally does not include penalties or amounts of tax related to purely civil items. Therefore, in all criminal tax cases in which a restitution order is contemplated, care should be taken not to compromise the ability of the IRS to attempt to collect the civil tax liability, interest, and penalties. The form plea language located in § 44.10, *infra*, contains language designed to protect the civil liability.

For an example of what can happen when care is not taken to protect the IRS's ability to collect civil tax liability, *see* ***Creel v. Commissioner***, 419 F.3d 1135 (11th Cir. 2005). In ***Creel***, the defendant agreed to pay "$83,830 plus any applicable penalties and interest" for the years 1986 to 1991. 419 F.3d at 1138. Creel paid the full $83,830, but no penalties or interest. ***Id***. The United States Attorney's Office (USAO) issued a satisfaction and release of lien that stated that "restitution imposed by the Court . . . having been paid or otherwise settled," the monetary judgment is satisfied. The satisfaction and release of lien also directed that the judgment lien previously recorded should be "fully released, satisfied, discharged, and cancelled" because it had been "paid in full." ***Id***. The IRS applied the restitution payments to tax, interest, and penalties for 1986 and part of 1987. After the USAO issued its satisfaction of judgment and release of lien, the IRS attempted to collect tax, interest, and penalties for 1987 through 1991. 419 F.3d at 1138. Creel petitioned the Tax Court, which held that Creel's debt for those years had been settled by the satisfaction and release of lien issued by the USAO. ***Id***. at 1139.

The court of appeals affirmed, holding that "because the government elected to include his civil tax liabilities as part of the restitution order, when the U.S. Attorney discharged the restitution obligation, Creel's civil tax liabilities were also extinguished." ***Creel***, 419 F.3d at 1140-42.

Use of the standard language for the restitution portion of plea agreements should prevent this type of problem from recurring. *See* § 44.10, *infra*.

44.08 THE DAY OF SENTENCING

Prosecutors should recognize that any number of unusual things can happen on the day of sentencing. A defendant may come to sentencing with completed tax returns. If this happens, the prosecutor should ensure that the special agent takes the returns. The special agent should deliver the returns to IRS Technical Services, Fraud Coordinator (Exam). An important consideration in such an instance is preserving the ability of the IRS to assert the fraud penalty.

A defendant may also show up at sentencing with a large check, wanting to make a payment. The prosecutor and the special agent need to try to determine what exactly it is that the defendant is trying to pay. The defendant may be trying to pay restitution that he or she agreed to pay in a plea agreement. If that is the case, the prosecutor or the special agent should take the check but wait until after the sentencing to find out whether the court actually orders the defendant to pay restitution. For additional guidance on payment, see the form plea language at § 44.10, *infra*.

It is also possible that the defendant may simply want to make a payment on his or her past due tax liabilities in order to demonstrate to the sentencing judge that the defendant is remorseful or has accepted responsibility. In that case, the prosecutor should refer the defendant to the special agent who should take the check and find out from the defendant to what years or periods the defendant wants the money applied. After the sentencing hearing, the special agent should check to see whether a revenue officer or revenue agent has been assigned to the defendant's case. If not, the special agent should deliver the check to Technical Services, Fraud Coordinator (Exam) and ensure that the defendant's account is properly credited.

44.09 DEFERRING THE DETERMINATION OF RESTUTION

Under the MVRA, the district court is not always required to determine the defendant's restitution on the day of sentencing. Instead, when "the victim's losses are not ascertainable . . . 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5).

In ***Dolan v. United States***, 560 U.S. 605 (2010), the Supreme Court held that § 3664(d)(5)'s 90-day limit for scheduling a post-sentencing restitution hearing does not limit the district court's power to impose restitution once the deadline has lapsed. ***Dolan*** concluded that the 90-day limit was "a deadline [that] seeks speed by creating a time-related directive that is legally enforceable but does not deprive a judge or other public official of the power to take the action to which the deadline applies if the deadline is missed." ***Id.*** at 611. The 90-day limit for scheduling a hearing thus is neither a jurisdictional limitation on the district court's power to impose restitution, nor a "claims-processing rule" that the district court is obligated to enforce if a party raises it. ***Id.*** at 610-11. In so holding, the Court relied upon the fact that the MVRA's "text places primary weight upon, and emphasizes the importance of, imposing restitution upon those convicted of certain federal crimes," and reasoned that the MVRA "seeks speed primarily to help the victims of crime and only secondarily to help the defendant." ***Id.*** at 612-13.

The ***Dolan*** Court discussed, but did not decide, whether a defendant whose restitution hearing has been deferred may immediately appeal the balance of his sentence or must await a restitution order. The court stated in *dicta* that "strong arguments favor the appealability of the initial judgment irrespective of the delay in determining the restitution amount," including the argument that such a sentence is appealable as a "final judgment" under 18 U.S.C. § 3582(b) if it contains a "sentence to imprisonment." ***Id.*** at 617-18.

In ***Manrique v. United States***, 137 S. Ct. 1266 (2017), the Supreme Court took up this issue, and concluded that "deferred restitution cases involve two appealable judgments, not one." **Id**. at 1273. Manrique filed a timely notice of appeal from the district court's initial sentence, but failed to file a second notice of appeal from the district court's later restitution order. **Id**. at 1270-71. The court of appeals refused to consider his challenge to the restitution order on account of this failure. **Id**. at 1271. The Court, relying on its dicta in ***Dolan***, rejected Manrique's argument that his earlier notice of appeal "springs forward" to encompass the deferred restitution order once it is entered. **Id**. at 1272-73. The Court, however, declined to decide whether the requirement to file a second notice of appeal from a deferred restitution judgment is a jurisdictional rule or a mandatory claim-processing rule, reasoning that it is "at least" the latter, and that the difference was immaterial on the facts presented because the government objected to Manrique's failure to file a second notice of appeal in the court of appeals. **Id**. at 1271-72.

44.10 FORM PLEA LANGUAGE AND ADDITIONAL RESOURCES

44.10[1] FORM PLEA LANGUAGE

1. Defendant agrees to pay restitution to the Internal Revenue Service in the total amount of **____________________**, pursuant to 18 U.S.C. § 3663(a)(3). **[FN 1/]**
2. Defendant agrees that the total amount of restitution reflected in this agreement results from Defendant's fraudulent conduct.
3. The total amount of restitution consists of the following: **[FN 2/]**

Tax Year(s) or Period(s) and Item(s)	Amount to Be Credited to Tax [see footnote 2 about inclusion of interest and penalties]
Total:	

Defendant agrees to pay Title 26 interest on the restitution amount; interest runs from the last date prescribed for payment of the relevant tax through the date of sentencing. The government will provide an updated interest figure at sentencing.

4. Defendant agrees that restitution is due and payable immediately after the judgment is entered and is subject to immediate enforcement, in full, by the United States. If the Court imposes a schedule of payments, Defendant agrees that the schedule of payments is a schedule of the minimum payment due, and that the payment schedule does not prohibit or limit the methods by which the United States may immediately enforce the judgment in full. The IRS will use the amount of restitution ordered as the basis for a civil assessment under 26 U.S.C. § 6201(a)(4). Defendant does not have

the right to challenge the amount of this restitution-based assessment. *See* 26 U.S.C. § 6201(a)(4)(C). Neither the existence of a restitution payment schedule nor Defendant's timely payment of restitution according to that schedule will preclude the IRS from immediately collecting the full amount of the restitution-based assessment.

5. Defendant is entitled to receive credit for restitution paid pursuant to this plea agreement against those assessed civil tax liabilities due and owing for the same periods for which restitution was ordered. Defendant understands and agrees that the plea agreement does not resolve the Defendant's civil tax liabilities, that the IRS may seek additional taxes, interest and penalties from Defendant relating to the conduct covered by this plea agreement and for conduct relating to another time period, and that satisfaction of the restitution debt does not settle, satisfy, or compromise Defendant's obligation to pay any remaining civil tax liability. Defendant authorizes release of information to the IRS for purposes of making the civil tax and restitution-based assessments.
6. Defendant understands that **[** he/she **]** is not entitled to credit with the IRS for any payment until the payment is received by the IRS.
7. If full payment cannot be made immediately, Defendant agrees to make a complete and accurate financial disclosure to the IRS on forms prescribed by the IRS (including, but not limited to, IRS Form 433-A and Form 433-B, as appropriate), and to disclose to the IRS any and all additional financial information and financial statements provided to the probation office. Defendant also agrees to provide the above-described information to the probation office.
8. If Defendant makes a payment of the restitution agreed to in paragraph [3] prior to sentencing, the payment will be applied as a credit against the restitution ordered pursuant to paragraph [3]. **[FN 3/]**

PROVISIONS REGARDING PAYMENT

9. Defendant agrees to send all payments made pursuant to the court's restitution order to the Clerk of the Court at the following address:

[insert appropriate address here**]**

10. With each payment to the Clerk of the Court made pursuant to the District Court's restitution order, defendant will provide the following information:

A. Defendant's name and Social Security number;
B. The District Court and the docket number assigned to this case;
C. Tax year(s) or period(s) for which restitution has been ordered; and
D. A statement that the payment is being submitted pursuant to the District Court's restitution order.

Defendant agrees to include a request that the Clerk of the Court send the information, along with Defendant's payments, to the IRS address below:

IRS - RACS
Attn: Mail Stop 6261, Restitution
333 W. Pershing Ave.
Kansas City, MO 64108

11. Defendant also agrees to send a notice of any payments made pursuant to this agreement, including the information listed in the previous paragraph, to the IRS at the following address:

IRS - RACS
Attn: Mail Stop 6261, Restitution
333 W. Pershing Ave.
Kansas City, MO 64108

NOTES

1/ If the defendant is not agreeing to pay a sum certain in restitution, *i.e.* the amount of restitution will be determined at sentencing, clearly identify the conduct for which the defendant is agreeing to pay restitution, including the relevant tax years and the names of any taxpayers. A defendant can agree to (and under Department policy should be required to) pay restitution for loss caused by conduct beyond the count(s) of conviction, but the plea agreement must specify the conduct. Ensure that the fact that the court may order the defendant to pay restitution is included in paragraph setting out defendant's awareness of possible punishment.

2/ Explain here (or refer to attached and incorporated documents), in as much detail as possible, the years, periods, and items for which the defendant has agreed to pay restitution. This sample chart is for use in a typical criminal tax case, where the defendant agrees to make restitution for his own personal past due income taxes. If taxes other than income taxes are involved, if other taxpayers or entities are involved, or if the restitution order is joint and several, additional information will be required. In cases involving additional taxpayers or entities, provide the court with a detailed chart that includes the names and Social Security Numbers of the relevant taxpayers, along with the loss for each tax period. The Tax Division recommends filing this information with a motion to seal that also informs the court that the information will be provided to civil IRS to permit the proper cross-referencing and crediting of the various accounts.

Title 26 interest should be included in the final amount of restitution, but this figure must be calculated as of the date of sentencing. The final restitution amount should clearly identify the amount attributable to each tax year, the principal, and the interest due and owing.

Penalties may be included in restitution if the defendant agrees to pay them. Even if the defendant does not agree to pay penalties, they should be included where the object of the offense was the evasion of assessed tax, penalties, and interest. In such cases, the restitution order should include, and separately state, the tax, penalties, and interest evaded.

If the defendant seeks to pay restitution in full before sentencing, the defendant must include Title 26 interest and any applicable penalties with the payment. Calculation of the interest must take into account that interest will continue to accrue until full payment is actually received by the IRS.

3/ [Alternative paragraph 9 where the amount of restitution ordered is to reflect pre-sentencing payments] If Defendant makes a payment of the restitution agreed to in paragraph [3] prior to sentencing, Defendant agrees that [he/she] will sign IRS Form 870, Form 2504, or other appropriate form enabling the IRS to make an immediate assessment of the liability underlying the restitution agreed to in paragraph [3]. Defendant agrees that [he/she] will not claim a refund of the payment or otherwise challenge the existence or amount of the tax liability underlying the restitution agreed to in paragraph [3]. If the amount of restitution identified in paragraph [3] has not already been reduced to account for any such payments, the government agrees that the amount of the restitution to be ordered by the court shall be reduced by a payment made in conformity with this provision.

44.10 [2] ADDITIONAL RESOURCES

IRS has issued three Chief Counsel Notices about 26 U.S.C. § 6201(a)(4), the restitution-based assessment statute: one issued on August 26, 2011, one issued on July 31, 2013, and one issued on June 27, 2019.

In May 2013, the United States Attorneys' Bulletin published an article entitled "Restitution-Based Assessments Pursuant to 26 U.S.C. § 6201(a)(4)."

Prosecutors with questions on restitution can contact attorney Elissa Hart-Mahan, who may be reached at the general number for the Criminal Appeals & Tax Enforcement Policy Section, (202) 514-5396, or by email at elissa.r.hart@usdoj.gov

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Last updated: May 2024

45.00 FINES

A defendant who has been found guilty of a criminal tax offense may be sentenced to pay a fine.

45.01 STATUTORY PROVISIONS

45.01[1] General Criminal Fine Statute (18 U.S.C. § 3571)

The general criminal fine statute, 18 U.S.C. § 3571, provides for higher maximum fines than those specified in the statute of conviction, unless the statute of conviction specifically exempts the offense from Section 3571's provisions. *See* 18 U.S.C. § 3571(e). Since Title 26 tax offenses are not exempted, the higher limits of Section 3571 control. *See*, *e.g.*, *United States v. Looney*, No. 04-16064, 2005 WL 2522519, at *8 (11th Cir. 2005) ("The statute under which Looney was convicted, 26 U.S.C. § 7203, does not contain any language exempting it from 18 U.S.C. § 3571, the general fine statute.").

18 U.S.C. § 3571(b) provides that, with certain exceptions, "an individual who has been found guilty of an offense may be fined not more than the greatest of –

> (1) the amount specified in the law setting forth the offense;
>
> (2) the applicable amount under subsection (d) of this section;
>
> (3) for a felony, not more than $250,000;
>
> (4) for a misdemeanor resulting in death, not more than $250,000;
>
> (5) for a Class A misdemeanor that does not result in death, not more than $100,000;
>
> (6) for a Class B or C misdemeanor that does not result in death, not more than $5,000; or
>
> (7) for an infraction, not more than $5,000.

Subsection (c) contains the maximum fines that may be imposed on organizations:

> (1) the amount specified in the law setting forth the offense;
>
> (2) the applicable amount under subsection (d) of this section;
>
> (3) for a felony, not more than $500,000;

(4) for a misdemeanor resulting in death, not more than $500,000;

(5) for a Class A misdemeanor that does not result in death, not more than $200,000;

(6) for a Class B or C misdemeanor that does not result in death, not more than $10,000; or

(7) for an infraction, not more than $10,000.

Finally, subsection (d) provides for an alternative fine based on gain or loss from the offense:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of the fine under this subsection would unduly complicate or prolong the sentencing process.

In general, unless subsection (d) applies, the criminal fine limits under § 3571 for the most common tax offenses are as follows:[1]

26 U.S.C. § 7201 26 U.S.C. § 7202 26 U.S.C. § 7206 26 U.S.C. § 7212(a) - (omnibus clause)	**$250,000 ($500,000 in the case of a corporation)**
26 U.S.C. § 7203	**$100,000 ($200,000 in the case of a corporation)**

[1] As noted above, these Title 26 offense statutes specify maximum fine amounts that are superseded by the higher amounts provided for in § 3571. For reference, the statutory fines for these common tax offenses are:

26 U.S.C. § 7201	$100,000 ($500,000 in the case of a corporation)
26 U.S.C. § 7202	$10,000
26 U.S.C. § 7203	$25,000 ($100,000 in the case of a corporation)
26 U.S.C. § 7206	$100,000 ($500,000 in the case of a corporation)
26 U.S.C. § 7212(a)	$5,000/$3,000 (if offense is committed only by threats of force)

45.01[2] Applicability of **Apprendi** *to Criminal Fines*

Prosecutors invoking the alternative fine provision of Section 3571(d) should be aware that the holding of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to criminal fines. The Supreme Court held in *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2350-2351 (2012), that the Sixth Amendment requires that where the maximum fine is calculated based on reference to particular facts, including the defendant's gain or the victim's loss, such facts must be found by the jury beyond a reasonable doubt. *See also United States v. Bane*, 720 F.3d 818, 830-31 (11th Cir. 2013); *United States v. Coplan*, 703 F.3d 46, 94-95 (2d Cir. 2012); *United States v. Pfaff*, 619 F.3d 172, 175 (2d Cir. 2010); *United States v. LaGrou Distrib Sys., Inc.*, 466 F.3d 585, 594 (7th Cir. 2006). Absent such a finding, the district court may not impose a fine exceeding the default statutory maximum. Therefore, in cases where the prosecutor anticipates invoking 18 U.S.C. § 3571(d), the prosecutor should ensure that the indictment alleges the necessary facts, request appropriate jury instructions and a special verdict form at trial, or obtain an admission by the defendant. *See United States v. Day*, 700 F.3d 713, 731-32 (4th Cir. 2012).

45.02 SENTENCING GUIDELINES PROVISIONS

The Sentencing Guidelines require the district court to impose a fine unless the defendant establishes that he is unable to pay and is not likely to become able to pay any fine. U.S.S.G. § 5E1.2(a). The fine guideline range is based on the offense level. U.S.S.G. § 5E1.2(c)(3). The sentencing court should calculate the fine guideline range even where the alternative fine statute applies. *United States v. Chusid*, 372 F.3d 113, 117-118 (2d Cir. 2004) (holding that the applicability of the alternative fine statute does not authorize a sentencing court to disregard the guidelines for fines); *United States v. Sharma*, 85 F.3d 363, 365 n.1 (8th Cir. 1996); *but see United States v. Ellis*, 548 F.3d 539, 546 (7th Cir. 2008) ("However, 18 U.S.C. § 3571 allows a sentencing judge to disregard the suggested fines under the Sentencing Guidelines . . . .) *and United States v. Levinson*, 543 F.3d 190, 193 n1. (3d Cir. 2008) (calculating upper end of the fine range as twice the gross gain or loss from the crimes). However, where the Section 3571(d) alternative fine exceeds the maximum of the guideline fine range, the Guidelines specifically contemplate that the district court may be warranted in departing from that range. U.S.S.G. § 5E1.2 cmt. 4. Additionally, an upward departure may be appropriate where a fine within the guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that would not otherwise be disgorged (for example, by restitution or forfeiture) and an adequate punitive fine. *Id*.

When imposing a fine, the district court must consider not only the 18 U.S.C. § 3553(a) sentencing factors, but also specific factors enumerated at U.S.S.G. § 5E1.2(d) and at 18 U.S.C. § 3572(a). These factors include the costs of incarceration; the defendant's income, earning capacity, and financial resources; any pecuniary loss inflicted on others as a result of the offense; the amount of restitution ordered; and the need to deprive the defendant of illegally obtained gains. Importantly, the court must not impair the ability of the defendant to make restitution to victims of the offense other than the United States. 18 U.S.C. § 3572(b).

CRIMINAL TAX MANUAL

Note: The indictment forms are being updated.
Page numbers and form numbers have changed.
Please verify that you are using the appropriate form.

INDICTMENT AND INFORMATION FORMS

Contents

Form 1

26 U.S.C. § 6531
Complaint to Toll Statute of Limitations

IN THE UNITED STATES DISTRICT COURT
FOR THE __________ DISTRICT OF ______________

UNITED STATES OF AMERICA	)	
	)	
v.	)	COMPLAINT
	)	
______________________	)	

COMPLAINT FOR VIOLATION OF SECTION 7201[1]
INTERNAL REVENUE CODE OF 1986 (26 U.S.C.)

Before [***Magistrate Judge's Name***], United States Magistrate Judge,
[***Judicial District***].

The undersigned complainant, being duly sworn, states:

That he [she] is a Special Agent [***or Revenue Agent***] of the Internal Revenue Service and, in the performance of the duties imposed on him [her] by __________, he [she] has conducted an investigation of the Federal income tax liability of [***Defendant's Name***] of [***City***], [***State***], for the calendar year[2] 20____, by examining the taxpayer's tax return for the calendar year 20____, and other years; [***e.g., by examination and audit of the taxpayer's business and financial books and records; by identifying and interviewing third parties with whom the taxpayer did business; by consulting public and private records reflecting the taxpayer's income; and/or by interviewing third persons having knowledge of the taxpayer's financial condition.***][3]

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[1] When drafting complaints for violation of other Sections of the Internal Revenue Code, refer to the appropriate indictment form as a guide.

[2] If a fiscal year is involved, substitute "fiscal year ended, [***Date***], 20____". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

[3] The bracketed descriptions of the kinds of investigation conducted by the subscribing agent may all be used if they correctly reflect the facts. Otherwise, the inapposite description(s) should, of course, be deleted. When appropriate, the description of a different investigative course should be added or substituted based on the facts. *See* ***Jaben v. United States***, 381 U.S. 214 (1965).

That based on this investigation, the complainant has personal knowledge that on or about the day of , 20______, at [***City***], [***State***] in the ________ District of ________, [***Defendant's Name***] did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him [her] to the United States of America for the calendar year 20___, by preparing and causing to be prepared, and by signing and causing to be signed in the ________ District of _________, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, which was filed with the Internal Revenue Service. In that return, [***Defendant's Name***] stated that his [her] taxable[4] [***or adjusted gross***] income for the calendar year 20___ was $________, and that the amount of tax due and owing thereon was the sum of $________, when in fact, as he [she] knew, his [her] taxable [***or adjusted gross***] income for the calendar year[5] was the sum of $_________, upon which taxable[4] [***or adjusted gross***] income he [she] owed to the United States of America an income tax of $__________.

__________________[6]
Title of Subscribing Internal
Revenue Service Officer

Sworn to before me and subscribed in my presence, this _______day of 20____.

____
United States Magistrate Judge

l[4] Forms 1040 for some years do not use the phrase "taxable income" or "tax table income." However, what constitutes taxable income as defined in 26 U.S.C. § 63, is actually computed on the appropriate line of the return. That line may vary, and the line on the return showing the amount on which the actual tax was computed should be used.

[5] If a fiscal year is involved, substitute "fiscal year ended [***Date***], 20____".

[6] To be sworn to by an Internal Revenue Service Officer having knowledge of the facts.

Form 2

26 U.S.C. § 7201
Individual Taxes – Evasion (Assessment) — False Return as Only Affirmative Act
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT, a resident of **[City]**, **[State]**, willfully attempted to evade and defeat income tax due and owing by **[him/her]** to the United States of America, for the calendar year **[Year]**[7], by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent **[Form Title]**, Form **[Form Number]**, which was submitted to the Internal Revenue Service. On that tax return, DEFENDANT reported and caused to be reported that **[his/her]** taxable income for the calendar year **[Year]** was $**[_____]** and that the amount of tax due and owing was $**[_____]**. In fact, as DEFENDANT knew, **[his/her]** taxable income for the calendar year **[Year]**[8] was greater than the amount reported on the tax return, and as a result of such additional taxable income, there was additional tax[9] due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

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[7] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on **[Date]**."

[8] If the defendant is married and resides in a community property state, his/her and his/her spouse's income may be computed based on that state's rules for community property. If so, it may be appropriate to insert the phrase ", computed on a community property basis,".

[9] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

Form 3

26 U.S.C. § 7201
Joint Taxes – Evasion (Assessment) — False Return as Only Affirmative Act
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT, a resident of **[City]**, **[State]**, willfully attempted to evade and defeat income tax due and owing by **[him/her]** and **[his/her]** spouse to the United States of America, for the calendar year **[Year]**[10], by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent **[Form Title]**, Form **[Form Number]**, which was submitted to the Internal Revenue Service. On that tax return, DEFENDANT reported and caused to be reported that **[his/her]** and **[his/her]** spouse's joint taxable income for the calendar year **[Year]** was $**[_____]**, and that the amount of tax due and owing was $**[_____]**. In fact, as DEFENDANT knew, DEFENDANT and **[his/her]** spouse had joint taxable income for the calendar year **[Year]** that was greater than the amount reported on the tax return, and as a result of such additional taxable income, there was additional tax[11] due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

[10] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[11] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

Form 4

26 U.S.C. § 7201
Individual Taxes – Evasion (Assessment) — False Return and Other Affirmative Acts
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT, a resident of **[City]**, **[State]**, willfully attempted to evade and defeat income tax[12] due and owing by **[him/her]** to the United States of America, for the calendar year **[Year]**[13], by committing the following affirmative acts, among others:

(a) preparing and causing to be prepared, and signing and causing to be signed, a false and fraudulent **[Form Title]**, Form **[Form Number]**, which was submitted to the Internal Revenue Service; and

(b) – (…) **[insert other affirmative acts[14]]**.

In violation of Title 26, United States Code, Section 7201.

[12] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[13] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[14] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 5

26 U.S.C. § 7201
Joint Taxes – Evasion (Assessment) — False Return and Other Affirmative Acts
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT, a resident of **[City]**, **[State]**, willfully attempted to evade and defeat income tax[15] due and owing by **[him/her]** and **[his/her]** spouse to the United States of America, for the calendar year **[Year][16]**, by committing the following affirmative acts, among others:

(a) preparing and causing to be prepared, and signing and causing to be signed, a false and fraudulent **[Form Title]**, Form **[Form Number]**, which was submitted to the Internal Revenue Service; and

(b)– (…) **[insert other affirmative acts[17]]**.

In violation of Title 26, United States Code, Section 7201.

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[15] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[16] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[17] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 6

26 U.S.C. § 7201
Individual Taxes – Evasion (Assessment) — **Spies** ***Evasion***
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year **[Year]**[18], DEFENDANT, a resident of **[City]**, **[State]**, received taxable income[19], upon which there was income tax[20] due and owing to the United States of America. Knowing the foregoing facts and failing to make an income tax return[21] on or before April 15[22], **[Year]**, as required by law, to any proper officer of the Internal Revenue Service, and to pay the income tax to the Internal Revenue Service, DEFENDANT, from on or about **[Month Year]** through on or about **[Month Year],** in the **[_____]** District of **[_____]** and elsewhere, willfully attempted to evade and defeat income tax due and owing by **[him/her]** to the United States of America, for the calendar year **[Year]**, by committing the following affirmative acts, among others:

(a) – (…) [**insert affirmative acts**[23]**]**.

In violation of Title 26, United States Code, Section 7201.

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[18] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[19] If the defendant is married and resides in a community property state, his/her and his/her spouse's income may be computed based on that state's rules for community property. If so, it may be appropriate to insert the phrase ", computed on a community property basis."

[20] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[21] It is important to note that *failing* to file a tax return is not an affirmative act and should not be alleged as such in a tax evasion indictment where a return was not submitted to the Internal Revenue Service.

[22] If April 15 of the applicable year fell on a weekend or holiday, then the filing deadline would be the next day that was not a weekend day or holiday. Also, if the defendant requested and received a filing extension, then the due date may need to be changed to October 15 (or later, if October 15 was a weekend or holiday).

[23] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 7

26 U.S.C. § 7201
Individual Taxes — Evasion (Payment)
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT, a resident of **[City]**, **[State]**, willfully attempted to evade and defeat the payment of income tax[24] due and owing by **[him/her]**[25] to the United States of America, for the calendar year**[s]**[26] **[Year(s)][27]**, by committing the following affirmative acts, among others:

(a) – (…) **[insert affirmative acts[28]]**.

In violation of Title 26, United States Code, Section 7201.

[24] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[25] If the defendant is charged with evading the income taxes of him/her and his/her spouse, then insert "and **[his/her]** spouse." Likewise, if the defendant is charged with evading the income taxes of another, then replace "him" or "her" with the name or initials of that person.

[26] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[27] If the evasion relates to multiple calendar (or fiscal) years, then the prosecutor should make the statement plural. *Criminal Tax Manual* § 8.07[2].

[28] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 8

26 U.S.C. § 7201
Corporation Taxes – Evasion (Assessment) — False Return as Only Affirmative Act
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT willfully attempted to evade and defeat income tax due and owing by **[Name of Corporation]**,[29] a corporation that had its principal place of business in **[City]**, **[State]**, to the United States of America, for the calendar year **[Year]**[30], by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent **[Form Title]**, Form **[Form Number]**, which was submitted to the Internal Revenue Service. On that tax return, the corporation reported that its taxable income for the calendar year **[Year]** was $**[_____]** and that the amount of tax due and owing was $**[_____]**. In fact, as DEFENDANT knew, the corporation's taxable income for the calendar year **[Year]** was greater than the amount reported on the tax return, and as a result of such additional taxable income, there was additional tax[31] due and owing to the United States of America.

In violation of Title 26, United States Code, Section 7201.

[29] This form should only be used if the corporation in question is a Subchapter C corporation since a Subchapter S corporation does not pay taxes at the corporate level.

[30] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[31] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

Form 9

26 U.S.C. § 7201
Corporation Taxes – Evasion (Assessment) — False Return and Other Affirmative Acts
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT willfully attempted to evade and defeat income tax[32] due and owing by **[Name of Corporation]**,[33] a corporation that had its principal place of business in **[City]**, **[State]**, to the United States of America, for the calendar year **[Year][34]**, by committing the following affirmative acts, among others:

(a) preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent **[Form Title]**, Form **[Form Number]**, which was submitted to the Internal Revenue Service; and

(b)– (…) [insert other affirmative acts.[35]]

In violation of Title 26, United States Code, Section 7201.

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[32] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[33] This form should only be used if the corporation in question is a Subchapter C corporation since a Subchapter S corporation does not pay taxes at the corporate level.

[34] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[35] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 10

26 U.S.C. § 7201
Corporation Taxes — Evasion (Assessment) —* Spies *Evasion
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year **[Year]**[36], **[Name of Corporation]**,[37] a corporation that had its principal place of business in **[City]**, **[State]**, received taxable income, upon which there was income tax[38] due and owing to the United States of America. Knowing the foregoing facts, and that **[Name of Corporation]** neither made an income tax return[39] on or before March 15, **[Year]**,[40] as required by law, to any proper officer of the Internal Revenue Service, nor paid the income tax to the Internal Revenue Service, DEFENDANT, from in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, willfully attempted to evade and defeat income tax due and owing by **[Name of Corporation]** for the calendar year **[Year]**, by committing the following affirmative acts, among others:

(a) – (…) **[insert affirmative acts.[41]]**

In violation of Title 26, United States Code, Section 7201.

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[36] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[37] This form should only be used if the corporation in question is a Subchapter C corporation since a Subchapter S corporation does not pay taxes at the corporate level.

[38] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[39] This form should be used when the corporation has not filed a return. It is important to note that *failing* to file a tax return is not an affirmative act and should not be alleged as such in a tax evasion indictment where a return was not submitted to the Internal Revenue Service.

[40] Generally, a corporation must file its income tax return by the 15th day of the third month after the end of its tax year. For a corporation that operates on a calendar year, the due date is March 15 of the following year. However, if the due date falls on a Saturday, Sunday, or legal holiday, the return is due on the next business day. Also, if the corporation requested and received a filing extension, then the due date may need to be changed to the date upon which the tax return was due once the extension was granted.

[41] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 11

26 U.S.C. § 7201
Corporation Taxes — Evasion (Payment)
[Revised October 2015]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____]** District of **[_____]** and elsewhere, DEFENDANT willfully attempted to evade and defeat the payment of income tax[42] due and owing by **[Name of Corporation]**,[43] a corporation that had its principal place of business in **[City]**, **[State]**, to the United States of America, for the calendar year**[s]**[44] **[Year(s)]**[45], by committing the following affirmative acts, among others:

(a)– (…) **[insert affirmative acts.[46]]**

In violation of Title 26, United States Code, Section 7201.

[42] Although the statutory language of 26 U.S.C. § 7201 does not contain the word "substantial," some circuits require the United States to prove that the tax due and owing was substantial. Other circuits have explicitly held that the United States need not prove substantiality. *Criminal Tax Manual* § 8.07[3].

[43] This form should only be used if the corporation in question is a Subchapter C corporation since a Subchapter S corporation does not pay taxes at the corporate level.

[44] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year that ended on [Date]."

[45] If the evasion relates to multiple calendar (or fiscal) years, then the prosecutor should make the statement plural. *Criminal Tax Manual* § 8.07[2].

[46] For examples of affirmative acts, see *Criminal Tax Manual* § 8.06[1].

Form 12

26 U.S.C. § 7202
Failure to Collect, Account For, and Pay over Trust Fund Taxes — Tabular Form
[Revised August 2021]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

Introductory Allegations

At all times relevant to this [indictment/information]:

DEFENDANT resided in **[City]**, **[State]**.

[Business name] was a **[corporation/sole proprietorship/partnership/limited liability company]**[47] doing business in **[City]**, **[State]. [Business Name]** was engaged in the business of **[describe type of business]**.

DEFENDANT was the **[title/role]**[48] of **[Business Name]**.

The Internal Revenue Service ("IRS") was an agency of the United States Department of the Treasury responsible for administering the tax laws of the United States and collecting taxes owed to the United States.

Employment Tax Withholding

Pursuant to the Internal Revenue Code and associated statutes and regulations, employers are required to withhold amounts from their employees' gross pay including Federal Insurance Contribution Act ("FICA") taxes, which represent Social Security and Medicare taxes, and federal income taxes. These taxes will be referred to in this Indictment collectively as "trust fund taxes" because employers hold the withheld amounts in trust until paid over to the United States. Employers are required to remit these withheld, trust fund amounts to the IRS on a quarterly basis, no later than the last day of month following the end of the quarter.

In addition to the trust fund taxes that must be withheld from pay, employers are separately required to make contributions under FICA for Social Security and Medicare in amounts matching the amounts withheld from their employees' pay for those purposes. Such

[47] This form is not applicable where the business is operated as a sole proprietorship or a partnership and there are no employees other than the owner or the general partners. In such cases, the owners are directly liable for all income and self-employment taxes and should be charged with failure to file or pay, or tax evasion, as appropriate. This form may be used to charge the owner of a sole proprietorship or a general partner where there are other employees whose trust fund taxes are not properly withheld, accounted for, or paid over to the IRS.
[48] Include all the defendant's titles and roles at the business, including founder, partner, CEO, CFO, president, member of the Board of Directors, etc.

employer contributions are likewise required to be remitted to the IRS no later than the last day of the month following the end of the quarter. Collectively, these five components required to be remitted quarterly are commonly referred to as "employment taxes," made up of the trust fund taxes withheld (individual income, Social Security and Medicare taxes) and the matching amounts contributed by the employer.

Employers are required to file, one month after the conclusion of the calendar quarter, an Employer's Quarterly Federal Tax Return, Form 941 ("Form 941"), setting forth the total amount of income taxes withheld, the total amount of Social Security and Medicare taxes due, and the total tax deposits.

A person is responsible for collecting, accounting for, and paying over the employment taxes if he or she has the authority required to exercise significant control over the employer's financial affairs, regardless of whether the individual exercised such control in fact.[49]

DEFENDANT exercised control over **[Business Name's]** financial affairs by, among other acts, **[describe factors: i.e. approving payments, signing checks, controlling bank accounts, signature authority on bank accounts, etc.]**; thus, [he/she] was a responsible person for collecting trust fund taxes, accounting for the employment taxes by filing Forms 941 with the IRS, and paying over to the IRS the employment taxes for **[Business Name]'s** employees.

Statutory Allegations

Paragraphs [number] through [number] of this indictment are re-alleged as if fully set forth herein.

DEFENDANT was a person required to collect, account for on quarterly Forms 941, and pay over to the IRS on behalf of **[Business Name]** the trust fund taxes imposed on its employees by the Internal Revenue Code.

On or about the dates listed in the table below, for each of the calendar quarters listed below, in the **[_____]** District of **[_____]** [and elsewhere], DEFENDANT did willfully **[fail to collect, truthfully account for, and pay over]**[50] the trust fund taxes due and owing to the IRS on behalf of the employees of **[Business Name]**.

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[49] Where applicable, prosecutors may add the following: "More than one person may be considered a "responsible person" for the purpose of collecting, accounting for, and paying over employment taxes, including trust fund amounts and employers' matching amounts."

[50] Only include those duties the defendant failed to perform. For example, if the defendant withheld but did not account for (i.e., did not file the Form 941) or pay over, then the indictment would only allege a failure to "truthfully account for and pay over." If the defendant withheld and filed the Form 941 but did not pay over, then the indictment would only allege a failure to "pay over."

Count	Calendar Quarter Ending	Due Date of Form 941	Trust Fund Taxes Due and Owing[51]
1			
2-(…)			

In violation of Title 26, United States Code, Section 7202.

[51] It is not necessary to allege the amounts due and owing. If the defendant did not file quarterly Forms 941, or filed false Forms 941, or you are otherwise unable to determine the exact amount of taxes due and owing for each quarter, you should not include this column.

Form 13

26 U.S.C. § 7203
Failure to File an Individual Income Tax Return
[Updated September 2021]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year **[Year]**[52], DEFENDANT, a resident of **[City]**, **[State]**,[53] had and received gross income[54] in excess of $**[Minimum filing requirement]**.[55] By reason of such gross income, [he/she] was required by law, following the close of calendar year **[Year]**, and on or before April 15, **[Year]**,[56] to make an income tax return to the Internal Revenue Service,

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[52] Natural persons are generally required to report income based on calendar-year accounting. 26 U.S.C. § 441(g); 26 C.F.R. § 1.442-1. If a fiscal year is involved, however, substitute "fiscal year **[Year]**". Fiscal-year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

[53] If venue is based on the defendant's principal place of business, substitute for residence, "whose principal place of business was in **[City]**, **[State]**."

[54] For a discussion of what constitutes gross income, see Criminal Tax Manual 10.05[2].

[55] The minimum amount of income necessary to trigger the duty to file varies by year and depends on the taxpayer's age, marital status, filing status, and filing status of a spouse. For a discussion of gross income and the annual minimum filing requirement, see Criminal Tax Manual 10.05[2]. If the decision is made to allege the specific amount of gross income, replace this language with "had and received approximately $[defendant's income] in gross income."

If the defendant is married and files jointly, replace this language with "DEFENDANT and [his/her] spouse had and received gross income in excess of $[minimum filing requirement for married filing jointly]." For spouses residing in a community property state, each spouse's gross income is computed on the community property basis. In such a case, replace this language with "DEFENDANT and [his/her] spouse, [Spouse's Name], were residents of [State], which is a community property state, had and received gross income computed on the community property basis of $[Amount] and $[Amount], respectively."

[56] When April 15 falls on a Saturday, Sunday, or legal holiday, including Emancipation Day (celebrated in the District of Columbia on the weekday closest to April 16), 26 U.S.C. § 7503 provides that filing shall be deemed timely if performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday, so "April 15" should be replaced with the "timely" filing deadline. Note, however, that Section 7503 does not change the statutory due date for purpose of calculating the statute of limitations under 26 U.S.C. § 6513(a), so the limitations period for charging should be calculated with reference to April 15, not the succeeding day. See Criminal Tax Manual 7.02[1][a]. Taxpayers who file at the Andover Service Center receive an extra day to file in those years when the filing date coincides with Patriots' Day in Massachusetts, which falls on the third Monday of April. It is important to verify the filing deadline for each year charged. The filing deadline also changes if the taxpayer obtained an extension of time for filing. *See* Criminal Tax Manual 10.05[3].

stating specifically the items of [his/her] gross income and any deductions and credits to which [he/she] was entitled. Knowing and believing all of the foregoing, [he/she] did willfully fail, on or about April 15, **[Year]**, in the **[_____]** District of **[_____]**, [and elsewhere,] to make an income tax return.

In violation of Title 26, United States Code, Section 7203.

Form 14

26 U.S.C. § 7203
Failure to File a Partnership Income Tax Return
[Updated September 2021]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year **[Year]**[57], DEFENDANT conducted business as a partnership under the name **[Name of business]**, with its principal place of business at **[City]**, **[State]**. [He/She] was [a/the] partner responsible for filing tax returns on behalf of the partnership.[58] [He/She] was therefore required by law, following the close of the calendar year **[Year]** and on or before April 15, **[Year]**,[59] to make, for and on behalf of the partnership, a partnership return of income to the Internal Revenue Service, stating specifically the items of the partnership's gross income and the deductions and credits allowed by law. Knowing and believing all the foregoing, [he/she] did willfully fail, on or about April 15, **[Year]**, in the **[_____]** District of **[_____]**, [and elsewhere,] to make a partnership return.

In violation of Title 26, United States Code, Section 7203.

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[57] If a fiscal year is involved, substitute "fiscal year **[Year]**".

[58] Prosecutors should not assume that all partners are responsible persons simply by virtue of being a partner. Instead, prosecutors should look to the partnership agreement, as well as the partnership's operational history, to determine whether a particular partner has the responsibility or duty to file the partnership's returns.

[59] Fiscal year partnership returns must be filed on or before the 15th day of the fourth month following the close of the fiscal year. 26 U.S.C. §§ 6031, 6072(a). When the 15th falls on a Saturday, Sunday, or legal holiday, 26 U.S.C. § 7503 provides that filing shall be deemed timely if performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday, so the 15th should be replaced with the "timely" filing deadline. Note, however, that Section 7503 does not change the statutory due date for purpose of calculating the statute of limitations under 26 U.S.C. § 6513(a), so the limitations period for charging must be calculated with reference to the statutory filing date, not the succeeding day. See Criminal Tax Manual 7.02[1][a]. It is important to verify the filing deadline for each year charged. The filing deadline also changes if the taxpayer obtained an extension of time for filing. See Criminal Tax Manual 10.05[3].

Form 15

26 U.S.C. § 7203
Failure to File a Corporate Income Tax Return

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year **[Year]**[60], DEFENDANT was the **[position held in corporation]** of **[Name of Corporation]**, a corporation not expressly exempt from tax, with its principal place of business at **[City]**, **[State]**. [He/she] therefore was required by law,[61] after the close of calendar year **[Year]** and on or before March 15, **[Year]**,[62] to make an income tax return, for and on behalf of the corporation, to the Internal Revenue Service, stating specifically the items of the corporation's gross income and the deductions and credits allowed by law. Knowing and believing all of the foregoing, [he/she] did willfully fail, on or about March 15, **[Year]**, in the **[_____]** District of **[_____],** [and elsewhere,] to make an income tax return at the time required by law.

In violation of Title 26, United States Code, Section 7203.

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60 If a fiscal year is involved, substitute "fiscal year **[Year]**".

61 The term "person" as used in § 7203 encompasses corporate officers responsible for filing the returns of the corporate "person." See 26 U.S.C. §§ 7203, 7343. More than one corporate officer or employee may be a responsible person with respect to filing the corporation's income taxes. Whether an individual is responsible for filing a corporation's tax returns depends on all the circumstances, including their position, the corporation's governing documents, and the corporation's operational history.

62 Fiscal year corporation income tax returns must be filed on or before the 15th day of the third month following the close of the fiscal year. 26 U.S.C. § 6072(b). When the 15th falls on a Saturday, Sunday, or legal holiday, 26 U.S.C. § 7503 provides that filing shall be deemed timely if performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday, so the 15th should be replaced with the "timely" filing deadline. Note, however, that Section 7503 does not change the statutory due date for purpose of calculating the statute of limitations under 26 U.S.C. § 6513(a), so the limitations period for charging must be calculated with reference to the statutory filing date, not the succeeding day. See Criminal Tax Manual 7.02[1][a]. It is important to verify the filing deadline for each year charged. The filing deadline also changes if the taxpayer obtained an extension of time for filing. See Criminal Tax Manual 10.05[3].

Form 16

26 U.S.C. § 7203
Failure to Pay Individual Income Tax

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year[63] 20___, [***Defendant's Name***], who was a resident of [***City***], [***State***], had and received taxable income of $__________, on which taxable income there was owing to the United States of America an income tax of $__________. He [she] was required by law to pay, on or before April 15, 20___,[64] that income tax to the Internal Revenue Service Center, at [***City***], [***State***], to a person assigned to receive returns at the local office of the Internal Revenue Service at [***City***], [***State***], or to another Internal Revenue Service office permitted by the Commissioner of Internal Revenue. Well knowing all of the foregoing, he [she] did willfully fail, on April 15, 20___[2], in the __________ District of __________ and elsewhere, to pay the income tax due.

In violation of Title 26, United States Code, Section 7203.

[63] If a fiscal year is involved, substitute "fiscal year ended __________, 20_." Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

[64] If April 15th fell on a Saturday, Sunday, or legal holiday, the appropriate date in the information would be the next succeeding day that was not a Saturday, Sunday, or legal holiday. 26 U.S.C. § 7503. Note that taxpayers who file at the Andover Service Center receive an extra day to file in those years when the filing date coincides with Patriots' Day in Massachusetts, which falls on the third Monday of April. Also note that fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

Form 17

26 U.S.C. § 7204
Failure to Furnish Employee's Withholding Statement, Form W-2

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year 20___, [***Defendant's Name***],[65] a resident of [***City***], [***State***], employed [***Name of Employee***], a resident of [***City***], [***State***]. **[*Defendant's Name*]** was required under the Internal Revenue laws to deduct and withhold federal income taxes and Federal Insurance Contributions Act taxes with respect to the wages of [***Name of Employee***] and to furnish him [her] on or before January 31, 20___, with a written statement showing the amount of wages paid and taxes deducted and withheld during the calendar year 20___. On or about the day of , 20___, in the ________ District of ________, **[*Defendant's Name*]** did willfully fail to furnish the required statement to the employee, [***Name of Employee***], in the manner and at the time required by law.

In violation of Title 26, United States Code, Section 7204.

[65] If the employer is a corporation, refer to language in Form 13 as a guide in charging appropriate corporate officials with an offense involving violation of a corporation's obligations under the law.

Form 18

26 U.S.C. § 7204
Furnishing False and Fraudulent Employee's Withholding Statement, Form W-2

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year 20___, [***Defendant's Name***],[66] a resident of [***City***], [***State***], employed [***Name of Employee***], a resident of [***City***], [***State***]. [***Defendant's Name***] was required under the Internal Revenue laws to deduct and withhold federal income taxes and Federal Insurance Contributions Act taxes with respect to the wages of [***Name of Employee***] and to furnish him [her] on or before January 31, 20___, with a written statement showing the amount of wages paid and taxes deducted and withheld during the calendar year 20___. On or about [***Month***] [***Day***], [***Year***], in the ________ District of ________, [***Defendant's Name***] did willfully furnish to [***Name of Employee***] a false and fraudulent statement, showing that the total wages paid were $___________, that the income taxes deducted and withheld were $___________, and that the Federal Insurance Contributions Act taxes deducted and withheld were $________, whereas, as [***Defendant's Name***] then and there knew, the total wages paid were $___________, the income taxes deducted and withheld were $_________, and the Federal Insurance Contributions Act taxes deducted and withheld were $_________.

In violation of Title 26, United States Code, Section 7204.

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[66] If the employer is a corporation, refer to language in Form 13 as a guide in charging appropriate corporate officers with an offense involving violation of a corporation's obligations under the law.

Form 19

26 U.S.C. § 7205
False Withholding Allowance Certificate, Form W-4

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

During the calendar year 20___, [***Defendant's Name***], a resident of [***City***], [***State***], was employed by [***Name of Employer***], a resident of [***City***], [***State***]. [***Defendant's Name***] was required under the Internal Revenue laws to furnish [***Name of Employer***], on or about the date of the commencement of employment by [***Name of Employer***], with a signed Employee's Withholding Allowance Certificate, Form W-4, setting forth the number of withholding allowances claimed. On or about [***Month***] [***Day***], [***Year***], in the _________ District of ________, [***Defendant's Name***] did willfully supply a false and fraudulent Employee's Withholding Allowance Certificate, Form W-4, to [***Name of Employer***], on which [***Defendant's Name***] claimed withholding allowances,[67] whereas, as [***Defendant's Name***] then and there knew, he [she] was entitled to claim only withholding allowances.[68]

In violation of Title 26, United States Code, Section 7205.

[67] Where appropriate, the following language should be substituted: "he [she] claimed exemption from withholding." The Government does *not* have to prove the number of allowances that the defendant could claim. *See* ***United States v. McDonough***, 603 F.2d 19, 23-24 (7th Cir. 1979).

[68] Where appropriate, the following language should be substituted: "he [she] was not exempt from withholding." The Fifth Circuit has ruled that "withholding exemptions" and "withholding allowances" are the same in the context of the sufficiency of a Section 7205 indictment. ***United States v. Anderson***, 577 F.2d 258, 261 (5th Cir. 1978).

Form 20

26 U.S.C. § 7206(1)
Making and Subscribing a False Tax Return[69]
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about [**Date**], in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT willfully made and subscribed[70] [and filed and caused to be filed with the Internal Revenue Service,][71] a false [**Form Title**], Form [**Form Number**], for calendar year [**Year**][72], which was verified by a written declaration that it was made under the penalties of perjury and which DEFENDANT did not believe to be true and correct as to every material matter. That tax return reported [*describe the line item(s)*[73] *and amount(s) reported OR describe the nature of the falsity*], whereas, as DEFENDANT knew [he/she/the corporation] [*describe correct facts*][74].

In violation of Title 26, United States Code, Section 7206(1).

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[69] Prosecutors should select this form when charging a false tax return. Tax returns that can be charged as violations of Section 7206(1) include, but are not limited to: U.S. Individual Income Tax Returns, Forms 1040 (as well as Forms 1040A and 1040EZ); U.S. Corporation Income Tax Returns, Forms 1120; U.S. Income Tax Returns for an S Corporation, Form 1120S; U.S. Returns of Partnership Income, Forms 1065; and Quarterly Federal Excise Tax Returns, Forms 720. Employer's Quarterly Federal Income Tax Returns, Forms 941, can be charged as violations of Sections 7201, 7202, or 7206(1).

[70] For electronically filed tax returns, no additional allegations are required to satisfy the subscription element. *See* Criminal Tax Manual § 12.08[2].

[71] The plain language of Section 7206(1) does not require that the return be filed with the IRS. However, some courts have held that a taxpayer does not "make" a return until it is filed with the IRS. *See* Criminal Tax Manual § 12.07[1]. In Circuits that have interpreted Section 7206(1) in this manner, the indictment should include the bracketed language alleging that the return was filed or caused to be filed with the IRS.

[72] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year."

[73] It is proper to allege multiple falsities on one tax return in a single count. When doing so, prosecutors should determine whether their Circuit requires a specific unanimity instruction or whether a general unanimity instruction is sufficient. *See* Criminal Tax Manual § 12.10[3].

[74] For example: "That tax return reported that DEFENDANT received $X in gross income, whereas, as DEFENDANT knew, [he/she] received gross income in excess of $X."

Form 21

26 U.S.C. § 7206(1)
Making and Subscribing a False Statement or Other Document[75]

[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about [**Date**], in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT willfully made and subscribed[76] [and filed and caused to be filed with the Internal Revenue Service,][77] a false [**Form Title**], Form [**Form Number**], which was verified by a written declaration that it was made under the penalties of perjury and which DEFENDANT did not believe to be true and correct as to every material matter. That Form **[Form Number]** reported [*describe the line item(s), if applicable, and nature of the falsity*], whereas, as DEFENDANT knew [*describe correct facts*[78]].

In violation of Title 26, United States Code, Section 7206(1).

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75 Prosecutors should select this form when charging a false statement or other document. Statements and documents that can be charged as violations of Section 7206(1) include, but are not limited to: Collection Information Statements for Wage Earners and Self-Employed Individuals, Forms 433-A; Collection Information Statements for Businesses, Forms 433-B; Offers in Compromise, Forms 656; and Reports of Cash Payments Over $10,000 Received in a Trade or Business, Forms 8300.

76 For electronically filed forms, no additional allegations are required to satisfy the subscription element. *See* Criminal Tax Manual § 12.08[2].

77 The plain language of Section 7206(1) does not require that the statement or document be filed with the IRS. However, some courts have held that a taxpayer does not "make" a return until it is filed with the IRS. *See* Criminal Tax Manual § 12.07[1]. In Circuits that have interpreted Section 7206(1) in this manner, the indictment should include the bracketed language alleging that the statement or document was filed or caused to be filed with the IRS. Note that some documents are not "filed" with the IRS in the manner of tax returns; Forms 433, for example, are submitted directly to revenue officers.

78 For example: "The Form 433-A reported that DEFENDANT had $X in monthly income, whereas, as DEFENDANT knew, he had monthly income in excess of that amount."

Form 22

26 U.S.C. § 7206(1)
Making and Subscribing a False Tax Return — Tabular Form
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about the dates set forth below, in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT willfully made and subscribed[79] [and filed and caused to be filed with the Internal Revenue Service,][80] the following false [**Form Titles**], Forms [**Form Numbers**][81], for the calendar years[82] set forth below, which were verified by a written declaration that they were made under the penalties of perjury and which DEFENDANT did not believe to be true and correct as to every material matter. The tax returns reported [*describe the falsities generally*], whereas, as DEFENDANT knew [*describe correct facts*].[83]

Count	Approximate Filing Date	Year	False Item(s)[84]
1			**a. [Line, Line Title, and Reported Amount]** **b. ….**
2			**a. [Line, Line Title, and Reported Amount]** **b. ….**

[79] For electronically filed tax returns, no additional allegations are required to satisfy the subscription element. *See* Criminal Tax Manual § 12.08[2].

[80] The plain language of Section 7206(1) does not require that the return be filed with the IRS. However, some courts have held that a taxpayer does not "make" a return until it is filed with the IRS. *See* Criminal Tax Manual § 12.07[1]. In Circuits that have interpreted Section 7206(1) in this manner, the indictment should include the bracketed language alleging that the return was filed or caused to be filed with the IRS.

[81] If the chart will include different types of tax returns, such as Forms 1040, 1040A and 1040EZ, replace this language with "the false forms set forth below" and add a "Tax Return" column to the chart between the filing-date and year columns.

[82] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year."

[83] For example: "The tax returns reported that DEFENDANT received gross income in the amounts set forth below, whereas, as DEFENDANT knew, [he/she] received gross income in excess of those amounts."

[84] It is proper to allege multiple falsities on a document in a single count of Section 7206(1). When doing so, prosecutors should determine whether their Circuit requires a specific unanimity instruction or whether a general unanimity instruction is sufficient. *See* Criminal Tax Manual § 12.10[3].

Form 23

26 U.S.C. § 7206(1)
Making and Subscribing a False Statement or Other Document — Tabular Form
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about the dates set forth below, in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT willfully made and subscribed [and filed and caused to be filed with the Internal Revenue Service,][85] the following false **[Form Titles]**, Forms **[Form Numbers]**[86], which were verified by a written declaration that they were made under the penalties of perjury and which DEFENDANT did not believe to be true and correct as to every material matter. The **[Form Numbers]** reported [*describe the falsities generally*], whereas, as DEFENDANT knew, [*describe correct facts*][87].

Count	**Approximate Filing Date**	**Year**	**False Item(s)[88]**
1			**a. [Line, Line Title, and Reported Amount]** **b. ….**
2			**a. [Line, Line Title, and Reported Amount]** **b. ….**

In violation of Title 26, United States Code, Section 7206(1).

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[85] The plain language of Section 7206(1) does not require that statements or documents be filed with the IRS. However, some courts have held that a taxpayer does not "make" a return until it is filed with the IRS. *See* Criminal Tax Manual § 12.07[1]. In Circuits that have interpreted Section 7206(1) in this manner, the indictment should include the bracketed language alleging that the statement or document was filed and caused to be filed with the IRS. Note that some documents are not "filed" with the IRS in the manner of tax returns; Forms 433, for example, are submitted directly to revenue officers.

[86] If the chart will include different types of false statements or documents, such as Forms 433-A and 433-B, replace this language with "the false forms set forth below" and add a "Forms" column to the chart between the filing-date and false-items columns.

[87] For example: "The Forms 433-A reported that DEFENDANT had monthly income in the amounts set forth below, whereas, as DEFENDANT knew, he had monthly income in excess of that amount."

[88] It is proper to allege multiple falsities on a document in a single count of Section 7206(1). When doing so, prosecutors should determine whether their Circuit requires a specific unanimity instruction or whether a general unanimity instruction is sufficient. *See* Criminal Tax Manual § 12.10[3].

Form 24

26 U.S.C. § 7206(2)
Aiding and Assisting in the Preparation and Presentation of a False and Fraudulent Tax Return, Statement, or Other Document
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about **[Date]**, in the **[_____]** District of **[_____]** [and elsewhere], DEFENDANT willfully aided and assisted in, and procured, counseled, and advised the preparation and presentation to the Internal Revenue Service of a **[Form Title]**, Form **[Form Number]** for **[Taxpayer]**[89] for calendar year **[Year]**[90], which was false and fraudulent as to a material matter. That [tax return/form] reported [*describe the line item(s)*[91] *and amount(s) reported OR describe the nature of the falsity*], whereas, as DEFENDANT knew, [*describe correct facts*[92]].

In violation of Title 26, United States Code, Section 7206(2).

[89] When the taxpayer is not also charged, prosecutors should not identify the taxpayer by name, but should instead use alternate generic identifiers, such as "Client 1," "Individual A," or the taxpayer's initials. Section 7206(2) is not limited to cases involving professional return preparers, and the taxpayer may be any other person or entity. A defendant may also be charged with aiding and assisting in the preparation of his or her own tax return.

[90] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year."

[91] It is proper to allege multiple falsities on one tax return or other form in a single count. When doing so, prosecutors should determine whether their Circuit requires a specific unanimity instruction or whether a general unanimity instruction is sufficient. *See* Criminal Tax Manual § 12.10[3].

[92] For example, "That tax return claimed a $X deduction for gifts to charity, whereas, as DEFENDANT knew, [Taxpayer] was not entitled to claim that deduction."

Form 25

26 U.S.C. § 7206(2)
Aiding and Assisting in the Preparation and Presentation of False and Fraudulent Tax Returns, Statements, or Other Documents — Tabular Form
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about the dates set forth below, in the **[_____]** District of **[_____]** [and elsewhere], DEFENDANT willfully aided and assisted in, and procured, counseled, and advised the preparation and presentation to the Internal Revenue Service of **[Form Titles],** Forms **[Form Numbers]**[93], for the taxpayers[94] and calendar years[95] set forth below, which were false and fraudulent as to a material matter. The [tax returns/documents] reported [*describe the falsities generally*], whereas, as DEFENDANT knew, the taxpayers [*describe correct facts*].

Count	**Approximate Filing Date**	**Taxpayer**[96]	**Year**	**False Item(s)**[97]
1				**a. [Line, Line Title, Reported Amount]** **b. (…)**
2				**a. [Line, Line Title, Reported Amount]** **b. (…)**

In violation of Title 26, United States Code, Section 7206(2).

[93] If the chart will include different types of tax returns, statements, or documents, replace this language with "the false forms set forth below" and add a "Form" column to the chart between the filing-date and taxpayer columns.

[94] If the defendant filed multiple false forms for the same taxpayer, replace this language with "for [Taxpayer] for the calendar years set forth below," and omit the "Taxpayer" column from the table.

[95] If the relevant tax period is a fiscal year rather than a calendar year, substitute "fiscal year." If all the forms were for the same year, replace this language with "for calendar year **[Year]**," and omit the "Year" column from the table.

[96] When the taxpayer is not also charged, prosecutors should not identify the taxpayer by name, but should instead use alternate generic identifiers, such as "Client 1," "Individual A," or the taxpayer's initials. Section 7206(2) is not limited to cases involving professional return preparers, and the taxpayer may be any other person or entity. A defendant may also be charged with aiding and assisting in the preparation of his or her own tax return.

[97] It is proper to allege multiple falsities on a form in a single count of Section 7206(1). When doing so, prosecutors should determine whether their Circuit requires a specific unanimity instruction or whether a general unanimity instruction is sufficient. *See* Criminal Tax Manual § 12.10[3].

Form 26

26 U.S.C. § 7206(4)
Removal or Concealment of Goods or Commodities with Intent to Evade or Defeat the Assessment or Collection of a Tax

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], in the ________ District of _______, [***Defendant's Name***], a resident of [***City***], [***State***], with intent to evade and defeat the collection of income taxes assessed against him [her] on or about, 20___, by the Internal Revenue Service,[98] did knowingly and unlawfully remove and conceal [***Describe Property***], upon which levy was authorized by Section 6331 of the Internal Revenue Code.

In violation of Title 26, United States Code, Section 7206(4).

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[98] Where appropriate, substitute "evade and defeat the assessment of income taxes against him [her] by the Internal Revenue Service."

Form 27

26 U.S.C. § 7206(5)(A)
Concealment of Assets in Connection with a Compromise or Closing Agreement

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], in the ________ District of ________, [***Defendant's Name***], a resident of [***City***], [***State***], in connection with an offer in compromise[99] relating to his [her] liability for [***Type of Tax***] taxes due and owing by him [her] to the United States of America for the calendar year(s),[100] did willfully conceal from [***Specify Particular Officer, with Job Title***] and all other proper officers and employees of the United States, [***Describe Property Belonging to Taxpayer or Other Person Liable for the Tax***].

In violation of Title 26, United States Code, Section 7206(5)(A).

[99] Where appropriate, substitute "a compromise"; or "a closing agreement"; or "an offer to enter into a closing agreement".

[100] If fiscal year is involved, substitute "fiscal year(s) ended, 20__". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

Form 28

26 U.S.C. § 7206(5)(B)
Withholding, Falsifying, or Destroying Records or Making a False Statement in Connection with a Compromise or Closing Agreement

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], in the ________ District of **_______**, [***Defendant's Name***], a resident of [***City***], [***State***], in connection with an offer in compromise[101] relating to his [her] liability for [***Type of Tax***] taxes due and owing by him [her] to the United States of America for the calendar year(s),[102] did willfully [***(receive) (withhold) (destroy) (mutilate) or (falsify), Describe Book, Document, or Record Involved***].[103]

In violation of Title 26, United States Code, Section 7206(5)(B).

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[101] Where appropriate, substitute "a compromise"; or "a closing agreement"; or "an offer to enter into a closing agreement".

[102] If fiscal year is involved, substitute "fiscal year(s) ended [***Date***], 20__". Fiscal year individual returns must be filed on or before the 15th day of the fourth month after the end of the fiscal year. 26 U.S.C. § 6072(a).

[103] Where false statement is the crime, substitute "make a false statement to [***Name Appropriate Official, with Job Title***], at [***Place***], [***Location***], wherein [***Defendant's Name***] stated that [***Describe False Statement Relating to the Estate or Financial Condition of Taxpayer***], whereas, as he [she] then and there knew, [***Describe Correct Fact(s) Relating to False Statement***]".

Form 29

26 U.S.C. § 7207
False Document Submitted to I.R.S[104] – Venue in District Where Document Submitted

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], in the ________ District of ________, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by submitting to an Officer(s) of the Internal Revenue Service, United States Treasury Department, at [***Place***], [***Location***], a [***Describe Document, e.g., List, Account, Statement, or Other Document***].[105] [***Defendant's Name***] knew that the [***Description of Document***] was fraudulent and false as to a material matter in that [***Describe the False Fact(s)***], whereas, as he [she] then and there knew, [***Describe the Correct Fact(s)***].

In violation of Title 26, United States Code, Section 7207.

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[104] Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns.

[105] A separate count should be charged for each false document.

Form 30

26 U.S.C. § 7207
False Document Submitted to I.R.S.[106] *– Venue in District of Mailing*

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], in the ________ District of ________, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by mailing and causing to be mailed, to an Officer(s) of the Internal Revenue Service, United States Treasury Department, a [***Describe Document, e.g., List, Account, Statement, or Other Document***].[107] [***Defendant's Name***] knew that the [***Description of Document***] was fraudulent and false as to a material matter in that [***Describe the False Fact(s)***], whereas, as he [she] then and there knew, [***Describe the Correct Fact(s)***].

In violation of Title 26, United States Code, Section 7207.

[106] Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns.

[107] A separate count should be charged for each false document.

Form 31

26 U.S.C. § 7207
False Documents Submitted to I.R.S. – Venue in District Where Documents Submitted – Tabular Form Information

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

1. That on or about the dates hereinafter specified, in the ________ District of _________, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by submitting to an Officer(s) of the Internal Revenue Service, United States Treasury Department, at [***Place***], [***Location***], documents[108] described below.[109] The defendant then and there knew that the documents were fraudulent and false as to a material matter, as set forth below.

2. The allegations of paragraph "1." are repeated and realleged in Counts I through ___________, inclusive, of this Information, as though fully set forth therein.

COUNT	DATE OF OFFENSE	DESCRIPTION OF DOCUMENT	FALSITY
I.	________________	_____________________________	__________
II.	________________	_____________________________	__________
III.	________________	_____________________________	__________

In violation of Title 26, United States Code, Section 7207.

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[108] Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns.

[109] A separate count should be charged for each false document.

Form 32

26 U.S.C. § 7207
False Documents Submitted to I.R.S. – Venue in District of Mailing – Tabular Form Information

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

1. That on or about the dates hereinafter specified, in the ________ District of __________, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully deliver and disclose by mailing and causing to be mailed, to an Officer(s) of the Internal Revenue Service, United States Treasury Department, documents[110] described below.[111] The defendant then and there knew that the documents were fraudulent and false as to a material matter, as set forth below.

2. The allegations of paragraph "1." are repeated and realleged in Counts I through ____, inclusive, of this Information, as though fully set forth therein.

COUNT	DATE OF OFFENSE	DESCRIPTION OF DOCUMENT	FALSITY
I.	__________________	____________________________	________
II.	__________________	____________________________	________
III.	__________________	____________________________	________

In violation of Title 26, United States Code, Section 7207.

[110] Department policy generally limits Section 7207 prosecutions to cases involving the falsification of documents other than U.S. tax returns.

[111] A separate count should be charged for each false document.

Form 33

26 U.S.C. § 7210
Failure to Appear in Response to Summons

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about [***Month***] [***Day***], [***Year***], in the ________ District of ________, [***Defendant's Name***], a resident of [***City***], [***State***], was required under the Internal Revenue laws, by reason of being duly summoned, to appear to testify[112] at on that date at the office of ________ . Well knowing and believing all of the foregoing, he [she] willfully failed to appear to testify[1] at the time and place required by the summons.

In violation of Title 26, United States Code, Section 7210.

[112] Where appropriate, add or substitute "and produce [***Describe Documents Summoned***]".

Form 34

26 U.S.C. § 7212(a)
Corrupt Endeavor to Obstruct and Impede the Administration of the Internal Revenue Laws
[Revised June 2020]

BACKGROUND

[An indictment charging a violation of 26 U.S.C. § 7212(a) should include a background section alleging the basic facts regarding the pending or reasonably foreseeable tax-related proceeding or targeted administrative action, such as an IRS audit, collection activity, or criminal investigation.[113] The section should include when the IRS commenced the proceeding, the type of proceeding,[114] the purpose of the proceeding in general terms,[115] and the major steps that the IRS took as part of the proceeding. Include any notices or other communications between the IRS and the defendant, as well as any other events, acts, or omissions[116] by the IRS, the defendant, or another person or entity (such as an accountant or return preparer) that would demonstrate the defendant's knowledge of or ability to reasonably foresee that action or proceeding.]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

Paragraph(s) **[number(s)]** above **[is/are]** incorporated as though fully set out herein.

From in or about **[Month Year]** through in or about **[Month Year]**, in the **[_____________]** District of **[_____________]** and elsewhere, DEFENDANT, knowing of and reasonably foreseeing[117] the **[type of proceeding]**[118] described in Paragraph(s) **[number(s)]**, did

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[113] For a discussion of what types of proceedings or targeted administrative actions satisfy *Marinello*, see *Criminal Tax Manual*, Chapter 17.04[4].

[114] Types of proceedings include audits/examinations, collections, criminal investigations, etc.

[115] The purpose of the proceeding could be to assess or collect the defendant's (or another taxpayer's) taxes, to investigate potential violations of criminal law by the defendant (or another taxpayer), etc.

[116] Omissions, such as a defendant's failure to file a tax return, should not be alleged in the charging paragraph as an endeavor, but may and should be included in the background.

[117] Although this form indictment advises charging, in the conjunctive, that the defendant both knew of and reasonably foresaw the proceeding or targeted administrative action, prosecutors are cautioned to ensure that the requirements for reliance on the "reasonably foreseeable" language of *Marinello* are satisfied before relying on that

corruptly obstruct and impede, and corruptly endeavor to obstruct and impede, the due administration of the internal revenue laws, that is, the **[type of proceeding]**, by committing and causing to be committed various acts, each such act having a nexus to the **[type of proceeding]**, including but not limited to the following:

(a) — (…) [insert acts constituting corrupt endeavors][119]

In violation of Title 26, United States Code, Section 7212(a).

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prong. See *Criminal Tax Manual*, Chapter 17.04[5].

[118] Name the type of proceeding or targeted administrative action described in the background section.

[119] List the acts the defendant committed with the corrupt intent to obstruct or impede the pending or foreseeable proceeding or targeted administrative action. Do not include omissions. See *Criminal Tax Manual*, Chapters 17.03, 17.04[3]. Do not include acts that preceded the commencement of the IRS proceeding unless the requirements for reliance on the "reasonably foreseeable" language of *Marinello* are satisfied.

Form 35

26 U.S.C. § 7215
Failure to Make Trust Fund Deposit After Notice

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

1. During the period [***Date***], 20___, to [***Date***], 20___, in the ________ District of __________, [***Defendant's Name***] was an employer of labor[120] required under the provisions of the Internal Revenue Code to collect, account for, and pay over to the United States federal income taxes and Federal Insurance Contributions Act (F.I.C.A.) taxes withheld from wages.

2. [***Defendant's Name***] did fail at the time and in the manner prescribed by the Internal Revenue Code, and Regulations promulgated pursuant thereto, to collect, truthfully account for, and pay over and to make deposits and payments of the said withheld taxes to the United States, which were due and owing for the quarters ending [***Date***] 20___, [***Date***] 20___, [***Date***, 20___, and [***Date***] , 20___.[121]

3. On [***Date***], 20___, [***Defendant's Name***] was notified of such failure by notice delivered in hand to him [her] as provided by Title 26, United States Code, Section 7512. The notice advised him [her] that he [she] was required to collect the aforesaid taxes that became collectible after delivery of the notice and, not later than the end of the second banking day after the collection, to deposit the taxes into a separate bank account established by him [her] in trust for the United States. The notice further advised [***Defendant's Name***] that the taxes were required to be kept in that bank account until paid over to the United States.

4. Within the ________ District of __________, [***Defendant's Name***] unlawfully failed to comply with the provisions of Title 26, United States Code, Section 7512, in that, after receiving delivery of the notice referred to in paragraph "3.", he [she] paid wages and was

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[120] If the employer is other than a sole proprietorship (*e.g.*, a corporation, partnership, or joint venture), the relationship of the defendant to the employer-entity, which makes him the responsible person, should be alleged in paragraphs 1, 2, and 3, by substituting "[***Defendant's Name***], who was the [***Position Held in Company***] of [***Name of Company***], a [***Type of Company, e.g., Corporation, Partnership, etc.***], and an employer of labor".

[121] Quarters prior to notice for which there was a failure to collect, account for, and pay over federal income and F.I.C.A. taxes withheld from wages.

required to collect and deposit the said taxes, but failed to deposit said taxes into a separate bank account in trust for the United States, by the dates and in the amounts specified below:

COUNT	DATE WAGES PAID	DATE DEPOSIT REQUIRED	AMOUNT OF DEPOSIT REQUIRED
I.	________________	______________	$__________________
II.	________________	______________	$__________________
III.	________________	______________	$__________________
IV.	________________	______________	$__________________

In violation of Title 26, United States Code, Section 7215.

Form 36

18 U.S.C. § 286
Conspiracy to File False Claims[122]
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

Beginning in or about **[Month, Year]**, and continuing until in or about **[Month, Year]**, in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT(S) **[Names]** and others known and unknown to the grand jury, knowingly, intentionally, and voluntarily agreed, combined, and conspired to defraud the United States by obtaining and aiding to obtain the payment and allowance of [a] false, fictitious and fraudulent claim[s] for refund[s] of taxes against the Internal Revenue Service, an agency of the United States Department of the Treasury.

The conspiracy was accomplished, in part, by the following acts:[123]

[*Describe how the conspiracy was accomplished or intended to be accomplished. The following examples are based on a scheme in which defendants prepare false and fictitious forms, such as Forms 1099-OID or Forms W-2, falsely reporting that taxpayers received income from which federal income taxes were withheld, and then file tax returns claiming refunds of the purportedly withheld taxes.[124] Include different or additional acts as warranted*.]

1. Defendants **[Names][125]** recruited customers into the scheme through [seminars/one-on-one consultations/other].

2. Defendants **[Names]** charged each customer up to $**[Amount]** for **[***describe what customer received or was supposed to receive; avoid referring to membership***]**.

3. Defendants **[Names]** paid a fee to others for referring a paying customer.

4. Defendants **[Names]** prepared [and caused to be prepared] false, fraudulent, and fictitious [Forms 1099-OID, Original Issue Discount, or Forms W-2, Wage and Tax Statements]. The

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[122] This form may be used in conjunction with Form 49 to charge, in tabular form, specific false claims filed as part of the conspiracy.

[123] An overt act in furtherance of the conspiracy is not an element of a false-claims conspiracy under Section 286. *See* Criminal Tax Manual 22.05.

[124] For a description of this scheme, and examples of other common false-claim schemes, see Criminal Tax Manual 22.08.

[125] Specify which defendant(s) committed or caused to be committed the various acts.

forms falsely reported that the customer had received income which [he/she] had not actually received and that federal income taxes had been withheld from that income.

4. Defendants **[Names]** prepared [and caused to be prepared] false and fraudulent federal income tax returns in the names of customers. The returns falsely reported that the customer had received income that [he/she] had not actually received, and that federal income taxes had been withheld from this income. The tax returns claimed tax refunds to which the customers were not entitled.

4. Defendants **[Names]** required that scheme customers pay them a portion of the fraudulently obtained refunds.

5. Defendants **[Names]** [electronically] transmitted [or caused to be [electronically] transmitted] the false and fraudulent [Form 1099-OID/Form W-2] information and tax returns to the IRS.

In violation of Title 18, United States Code, Section 286.

Form 37

18 U.S.C. § 287
Filing False Claim for Refund
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On about **[Date]**, in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT made and presented, and caused to be made and presented, to the Internal Revenue Service, an agency of the United States Department of the Treasury, a claim against the United States for payment of a refund of taxes in the amount of $**[Amount]**, knowing that claim to be false, fictitious, and fraudulent. DEFENDANT made the claim by preparing and causing to be prepared, and presenting and causing to be presented to the Internal Revenue Service, a **[Form Title]**, Form **[Form Number]**, for calendar year **[Year]**, requesting a refund to which DEFENDANT knew [he/she] was not entitled.

In violation of Title 18, United States Code, Section 287.

Form 38

18 U.S.C. § 287
Filing False Claim for Refund – Tabular Form
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On about the dates listed below, in the **[_____]** District of **[_____]**, [and elsewhere,] DEFENDANT made and presented, and caused to be made and presented, to the Internal Revenue Service, an agency of the United States Department of the Treasury, claims against the United States for payment of a refund of taxes, knowing those claims to be false, fictitious, and fraudulent. DEFENDANT made the claims by preparing and causing to be prepared, and presenting and causing to be presented to the Internal Revenue Service, **[Form Title],** Forms **[Form Number]**[126], for the individuals[127] and calendar years[128] set forth below, requesting refunds to which DEFENDANT knew the individuals were not entitled in the amounts listed below.

Count	**Date**	**Name**[129]	**Year**	**Refund Claimed**
1				**$[Amount]**
2-(…)				**$[Amount]**

In violation of Title 18, United States Code, Section 287.

[126] If the chart will include different types of tax returns, replace this language with "the forms set forth below" and add a "Form" column to the chart between the date and name columns.

[127] If the defendant filed multiple false claims for the same individual, replace this language with "for **[Individual]**, for the calendar years set forth below" and omit the "Name" column from the table.

[128] If all the forms were for the same year, replace this language with "for calendar year **[Year]**," and omit the "Year" column from the table.

[129] When the taxpayer is not also charged, prosecutors should not identify the taxpayer by name, but should instead use alternate generic identifiers, such as "Client 1," "Individual A," or the taxpayer's initials.

Form 39

18 U.S.C. § 371
Conspiracy to Defraud the United States
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month, Year]**, [the exact date being unknown to the Grand Jury], and continuing until in or about **[Month, Year]**, in the **[_____]** District of **[_____]**, [and elsewhere,] defendants **[Names]** did unlawfully, voluntarily, intentionally, and knowingly conspire, combine, confederate, and agree together and with each other [and with other individuals both known and unknown to the Grand Jury] to defraud the United States by impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: namely, **[type of tax]** taxes.[130]

<u>Parties, Persons, and Entities</u>

At all relevant times:

[*Identify and briefly describe the individuals and entities necessary to understand the conspiracy*.[131]]

<u>Manner and Means</u>[132]

The defendants sought to accomplish the objects of the conspiracy through the following manner and means, among others:

[*In general terms, describe how the conspiracy was carried out.*[133]]

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[130] Describe the taxes at issue, such as individual income taxes, corporate income taxes, and/or employment taxes. Include *all* types of taxes and taxpayers involved in the tax fraud. For example, "their individual income taxes and the income taxes of clients" or "the corporate income and employment taxes of [entity]."

[131] When including entities involved in scheme, include type of entity and state of incorporation, and the relationship of defendants to entities. For example:

"[Entity], was a [state] [corporation/limited liability company] formed in [year] by defendant [name] to [purpose of entity/type of business]."

"Defendants [names] were president and vice president, respectively, of [entity]. Each owned 50 percent of the stock of [entity]."

"Defendant [name] was a certified public accountant who prepared the income tax returns of [entity], and its officers."

[132] Unlike a conspiracy to commit a substantive offense, a *Klein* conspiracy should charge that the conspiracy was carried out by means that included deceit, craft, or trickery, or at least means that were dishonest. *See* Criminal Tax Manual 23.07; *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

Overt Acts

In furtherance of the conspiracy, and to effect the objects thereof, the defendants committed or caused to be committed the following overt acts in the **[_____]** District of **[_____]**, [and elsewhere]:

[*List overt acts in furtherance of the conspiracy.*][134]

In violation of Title 18, United States Code, Section 371.

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[133] For example:
"By providing false books and records to the corporate accountant for use in preparing [entity]'s, corporate income tax returns,"
"By backdating documents to conceal defendant [name]'s ownership of and interest in real property from the Internal Revenue Service,"
"By making false statements and representations to Internal Revenue Service agents to conceal defendant [name]'s income."
"By preparing tax returns for clients that reported false expenses and fraudulently claimed deductions and credits."

[134] For example:

"On or about [date], defendants [names] met and discussed how to backdate real estate contracts."

"On or about [date], defendant [name] removed cash from defendant [name]'s safe deposit box at the [name of bank] in [city, state]."

"On or about [date], defendant [name] prepared and caused to be prepared a false individual income tax return for defendant [name] for calendar year [year], which failed to report all of defendant [name]'s income."

Form 40

18 U.S.C. § 371

Dual-Object Conspiracy to Defraud the United States and to Commit Other Offenses
[Updated July 2020]

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From in or about **[Month, Year]**, [the exact date being unknown to the Grand Jury], and continuing until in or about **[Month, Year]**, in the **[_____]** District of **[_____]**, [and elsewhere,] defendants **[Names]** did unlawfully, voluntarily, intentionally, and knowingly conspire, combine, confederate, and agree together and with each other [and with other individuals both known and unknown to the Grand Jury] to defraud the United States and to commit offenses against the United States, namely, violations of Title [18/26], United States Code, Section(s) **[Section(s)]**.

Objects of the Conspiracy

It was a part and an object of the conspiracy that **[Names]** [and others known and unknown to the Grand Jury] would and did defraud the United States by impeding, impairing, obstructing, and defeating the lawful Government functions of the Internal Revenue Service of the Department of the Treasury in the ascertainment, computation, assessment, and collection of the revenue: namely, **[type of tax]** taxes.[135]

It was further a part and object of the conspiracy that **[Names]** [and others known and unknown to the Grand Jury] would and did **[describe the statutory violation that was the other object of the conspiracy]**[136], in violation of Title [26/18], United States Code, Section

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[135] Describe the taxes at issue, such as individual income taxes, corporate income taxes, and/or employment taxes. Include *all* types of taxes and taxpayers involved in the tax fraud. For example, "their individual income taxes and the income taxes of clients" or "the corporate income and employment taxes of [entity]."

[136] Describe the statutory violation. Be sure to include the correct *mens rea* for that violation. For example:

"would and did willfully subscribe to false U.S. Individual Income Tax Returns, Forms 1040, which returns contained and were verified by written declarations that they were made under the penalties of perjury, and which [taxpayers] did not believe to be true and correct as to every material matter, in violation of Title 26, United States Code, Section 7206(1)."

"would and did willfully aid, assist in, and procure, counsel, and advise the preparation and presentation to the IRS of U.S. Individual Income Tax Returns, Forms 1040, for clients, in violation of Title 26, United States Code, Section 7206(2)."

"would and did willfully attempt to evade or defeat the payment of income taxes due and owing by [taxpayer] to the United States, in violation of Title 26, United States Code, Section 7201."

[Section].[137]

Parties, Persons, and Entities

At all relevant times:

[*Identify and briefly describe the individuals and entities necessary to understand the conspiracy*.[138]]

Manner and Means[139]

The defendants sought to accomplish the objects of the conspiracy through the following manner and means, among others:

[*In general terms, describe how the conspiracy was carried out.*[140]]

Overt Acts

In furtherance of the conspiracy, and to effect the objects thereof, the defendants committed or caused to be committed the following overt acts in the **[_____]** District of **[_____]**, [and elsewhere]:

[*List overt acts in furtherance of the conspiracy.*][141]

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[137] If more than one statutory violation was the object of the conspiracy, include a separate paragraph for each one.

[138] When including entities involved in scheme, include type of entity and state of incorporation, and the relationship of defendants to entities. For example:

"[Entity], was a [state] [corporation/limited liability company] formed in [year] by defendant [name] to [purpose of entity/type of business]."

"Defendants [names] were president and vice president, respectively, of [entity]. Each owned 50 percent of the stock of [entity]."

"Defendant [name] was a certified public accountant who prepared the income tax returns of [entity], and its officers."

[139] Unlike a conspiracy to commit a substantive offense, a *Klein* conspiracy should charge that the conspiracy was carried out by means that included deceit, craft, or trickery, or at least means that were dishonest. *See* Criminal Tax Manual 23.07; *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

[140] For example:

"By providing false books and records to the corporate accountant for use in preparing [entity]'s, corporate income tax returns,"

"By backdating documents to conceal defendant [name]'s ownership of and interest in real property from the Internal Revenue Service,"

"By making false statements and representations to Internal Revenue Service agents to conceal defendant [name]'s income."

"By preparing tax returns for clients that reported false expenses and fraudulently claimed deductions and credits."

[141] For example:

"On or about [date], defendants [names] met and discussed how to backdate real estate contracts."

"On or about [date], defendant [name] removed cash from defendant [name]'s safe deposit box at the [name of bank] in [city, state]."

In violation of Title 18, United States Code, Section 371.

"On or about [date], defendant [name] prepared and caused to be prepared a false individual income tax return for defendant [name] for calendar year [year], which failed to report all of defendant [name]'s income."

Form 41

18 U.S.C. § 1001
False Statement or Representation Made to Department/Agency of U.S.

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], [***Defendant's Name***], a resident of [***City***], [***State***], did willfully and knowingly make and cause to be made a materially false, fictitious, and fraudulent statement(s) and representation(s) in a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States by [***Describe False Statement or Representation and Describe Official to Whom False Statement Was Made***], at [***Place***], [***Location***], in the ________ District of __________. The statement[s] and representation[s] were false because, as [***Defendant's Name***] then and there knew, [***Describe Correct Fact(s) Regarding the False Statement or Representation***].

In violation of Title 18, United States Code, Section 1001.

Form 42

18 U.S.C. § 1001
False Document Submitted to Department/Agency of U.S.

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

That on or about [***Month***] [***Day***], [***Year***], [***Defendant's Name***], a resident of [***City***], [***State***], did willfully and knowingly make and cause to be made, and use and cause to be used, in a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, a false writing or document, knowing the same to contain a materially false, fictitious, and fraudulent statement. [***Defendant's Name***] submitted [***Describe False Document and False Statement(s) Within Document and Describe Official to Whom the False Document Was Submitted***], at [***Place***], [***Location***], in the ________ District of __________, well knowing [***Describe Correct Fact(s) Regarding False Document***].

In violation of Title 18, United States Code, Section 1001.

Form 43

18 U.S.C. § 1001
Falsify, Conceal, or Cover Up by Trick, Scheme, or Device a Material Fact

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

From on or about [***Month***] [***Day***], [***Year***], to on or about [***Month***] [***Day***], [***Year***], in the _______ District of __________, [***Defendant's Name***], a resident of [***City***], [***State***], did willfully and knowingly falsify, conceal, and cover up, by trick, scheme, and device a material fact, in a matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States. [***Defendant's Name***][***Describe Nature of Scheme or Device to Conceal, Including Name and Title of any IRS Employee to Whom False Statement(s) or Representation(s) Were Made; Nature of False Statement(s) or Representation(s); Place and Location Where False Statement(s) or Representation(s) Were Made; and/or Specific False Document(s) Submitted***],[142] well knowing [***Describe Correct Facts Relating to False Statement(s), Representation(s), and/or Document(s)***].[143]

In violation of Title 18, United States Code, Section 1001.

[142] *E.g.*, "by representing to John Smith, Revenue Officer, Internal Revenue Service, at 33 Main Street, Boston, Massachusetts, that the deductions claimed for contributions were in the amount of $ _____ and that eight checks drawn on account number _________ at __________ Bank were issued to make the contributions in the amounts represented on said checks".

[143] *E.g.*, "the said eight checks had been altered and were false as to (amounts, payees, dates, etc.)".

Form 44

18 U.S.C. § 1956(a)(1)(A)(ii)
Laundering of Monetary Instruments

THE [GRAND JURY/UNITED STATES ATTORNEY] CHARGES:

On or about [***Date***], in the ________ District of __________, [***Defendant(s) Name(s)***] did knowingly and willfully conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, to wit, [***Description of Financial Transaction***], which involved the proceeds of a specified unlawful activity, that is [***Describe Specified Unlawful Activity***]. Defendant acted with the intent to engage in conduct constituting a violation of [26 U.S.C. § 7201] [26 U.S.C. § 7206][144] to wit, [***Describe Conduct***]. While conducting and attempting to conduct that financial transaction, [***Defendant's Name***] then and there knew that the property involved in the financial transaction, that is [***Funds***][145] [***Monetary Instruments***][146] in the amount of $_________, represented the proceeds of some form of unlawful activity.

All in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(ii) and 2.

Count	Approximate Dollar Amounts
I.	$______________
II.	$______________
III.	$______________

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[144] Choose one or both. If both are used, set forth in the conjunctive.

[145] Select one. Remember monetary instrument is a defined term in § 1956(c)(5), whereas "funds" is undefined.

[146] If the activity described in this paragraph is intended to cover more than one count, this last phrase can be redrafted in tabular form as follows: "That is, [***Funds***], [***Monetary Instruments***] in the amounts set forth below:

APPENDIX

Links to Circuit Pattern Criminal Jury Instructions

First Circuit

Third Circuit

Fifth Circuit

Sixth Circuit

Seventh Circuit

Eighth Circuit

Ninth Circuit

Tenth Circuit

Eleventh Circuit