

AN EXAMINATION OF THE CRIMINALIZATION OF COMMERCIAL ACTIVITY

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I. Introduction

In the days and weeks following the dramatic collapse of energy giant Enron, the calls for legislation designed to avert “the next Enron” began. In recent months, numerous legislative and regulatory proposals have been put forward, and government authorities have instituted high profile criminal investigations and prosecutions of well known U.S. companies. Sweeping accounting reform legislation, which will include dramatically increased criminal penalties for corporate executives, is expected to be enacted shortly. All of these developments have served to make corporate America and the general public far more aware of criminal enforcement in the commercial sphere.¹

Well before the collapse of Enron, however, Congress has steadily been passing new criminal statutes affecting the commercial sphere, and government prosecutors have increasingly been conducting criminal investigations and prosecutions of corporations, executives and employees under those statutes. As a result, the field of so-called “white collar” crime has significantly expanded in the past 30 years.² Increased criminal enforcement has been most evident in the past decade in such areas as health care, intellectual property, environmental law, antitrust, and securities and financial institutions, and it is in these areas that the government now expends significant prosecutorial resources.

This increase in the criminalizing of commercial activity is widely viewed as the result of a dramatic expansion in the regulation of commercial activity. With this expansion, there has been a growing concern in the private sector that many of statutes applicable to commercial activity either reduce or eliminate mens rea requirements, or fail to give adequate notice of the conduct prohibited or to limit prosecutorial discretion. Many observers are specifically concerned with statutes that carry criminal penalties and that are either overly broad or vague, or leave definition of the criminal conduct to regulatory discretion.

Historically the American criminal justice system has been founded on the premise that the investigation, prosecution, and conviction of misconduct should be fair, just and efficient. This is based on the understanding that the exercise of government power has limits, that the law must recognize the freedom and dignity of all citizens, and that the law must be rational and knowable if it is to steer human affairs in a positive direction. It is important that these principles continue to guide criminal enforcement in the commercial context.

This paper is intended to promote discussion regarding the use of criminal statutes in the commercial area. The paper has been prepared with the assistance of government prosecutors, private practitioners and academics, and was originally presented at a meeting of opinion leaders in July 2002. The paper begins with a list of proposed questions for discussion, followed by a summary of trends in criminal enforcement in the commercial sector and the post-Enron reform proposals. The paper then discusses the role of criminal sanctions, as well as (1) concerns with diminishing criminal mental state requirements; (2) the risks of vague or overly complicated statutes; and (3) alternatives to

criminal enforcement. In closing, the paper discusses the importance of clear, respected prosecutorial guidelines.

II. Proposed Questions

In evaluating the criminalizing of commercial activity, it is important to consider that the principles of freedom, dignity, and limited exercise of government power apply to our commercial life, and that the ability of entrepreneurs, shareholders, and employees to earn a livelihood and to utilize their talents in pursuit of a vocation is an essential feature of human dignity. The fact of a corporate presence should not diminish the importance of these principles. Corporations, after all, are simply webs of human relationships and interactions. Considerations regarding the appropriateness of criminal sanctions in the commercial area may include:

- What has been driving the increased tendency toward criminalization of commercial activity?
- Under what circumstances should criminal law be used to resolve disputes over commercial conduct?
- Does the type of criminal conduct matter (e.g. where the victim is the public at large, where the dispute is between companies, or where the victim is a consumer or set of consumers)?
- What weight should be given to prevention or deterrence? And what is the proper balancing point between prevention and over-deterrence in the commercial sphere?
- What are the benchmarks or measures for government success and appropriate effectiveness?
- How should criminal sanctions be evaluated for their impact upon competition and innovation in the economy?
- Are the current trends in criminal prosecutions of commercial activity consistent with our traditional concepts of due process and fair play?
- What are the standards of intent, and do they leave the door too wide open for prosecution?
- Are changes appropriate to ensure that prosecutions are balanced and not heavily weighed in favor of unrelated factors such the need to justify prosecutorial resources dedicated to enforcement of specific types of cases, or potential recoveries of funds for agency budgets?
- Are the principles of federal prosecution and the Guidelines issued by the Department of Justice (DOJ) for corporate criminal investigation adequate?
- When is it appropriate to hold a corporation criminally liable, including where such prosecution will have a severe impact on innocent employees or shareholders?

While this paper does not undertake to answer all of these questions, it seeks to promote discussion by addressing trends in enforcement (*see* Section III) and issues relating to the criminalizing of commercial activity (*see* Sections IV - VII).

III. Trends in the Criminalizing of Commercial Activity

In our American economy, areas in which criminal enforcement has dramatically increased include the following:

A. Health Care

Criminal enforcement has increased very significantly in recent years in the area of health care prosecutions. Investigating and prosecuting health care fraud became one of the DOJ's top priorities in 1993.³ After several years of pursuing this initiative, the DOJ demonstrated its aggressive enforcement efforts, having filed 322 criminal cases related to health care fraud in 1998, 371 criminal cases in 1999, and 457 such cases in 2000.⁴ In addition, the federal government funded Medicare fraud control units in many states, and Medicaid fraud came to be viewed as an area of state enforcement.⁵

The increase of prosecutions in the health care field has been attributable in large part to the enactment of new legislation carrying potential criminal penalties. In 1986, Congress amended the False Claims Act to include Medicare and Medicaid among the government programs against which individual whistleblowers could bring lawsuits alleging fraud against the government in "qui tam" lawsuits.⁶ Qui tam lawsuits play a prominent role in health care prosecutions. The DOJ reports that "over half of the \$480 million the Department was awarded in health care fraud cases in FY 1998, involved judgments or settlements related partially or completely to allegations in qui tam cases."⁷ Qui tam cases raise important questions regarding the relationship between private lawsuits and government prosecutions. There is a perception in the private sector, moreover, that too many private "qui tam plaintiffs" bring cases which are frivolous yet very costly for companies to defend against, and that measures may be warranted to curb abuses by private litigants in such litigation.

Congress further strengthened the government's ability to pursue criminal health care cases with the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HIPAA imposed significant new potential criminal liabilities upon health care providers. It created new criminal offenses for health care fraud, theft or embezzlement in connection with health care offense, false statements relating to health care offense, and obstruction of criminal investigations of health care offenses. In addition, HIPAA added a federal health care offense to the money laundering statute.⁸

The result of the complexity of new criminal health care statutes and widespread prosecutions, in conjunction with the growth of large health care providers, is that health care organizations now employ significant numbers of attorneys and other staff to respond to the growing number of criminal investigations and prosecutions. As is discussed further below, an analysis of the merits of criminal penalties in health care should attempt to compare the costs imposed by the pursuit of criminal investigations

with the expected benefits of such prosecutions. In addition, such an analysis should evaluate whether alternative enforcement mechanisms, such as vigorous civil enforcement, could achieve similar ends.

It may also be appropriate to consider in the health care field whether some prosecutions are driven by factors unrelated to the merits of a specific case. For example, government prosecutors may be subject to pressure to pursue False Claims Act cases in order to achieve a public image of fighting fraud. Further, persons on both the prosecution and defense side have suggested that during the past decade many of the most obvious cases of intentional fraud in the health care area have been rooted out, and that enforcement authorities may be currently pursuing more ambiguous cases. They have also suggested that there may be internal pressure to bring health care prosecutions in order to utilize the large prosecutorial resources that have been built up during the 1990s, or in certain cases to enhance the prospect for a civil settlement, or because of the possibility of recovering fees for the prosecuting agency. In view of these perceptions, it may be helpful in the health care area to discuss whether there are changes in enforcement priorities or in the regulatory scheme which would be appropriate.

B. Intellectual Property

With the rapid growth of the importance of intellectual property to our national economy in the past decade has also come an increased focus on intellectual property crimes. As with health care, Congress led the way with new statutes and increased criminal penalties. In particular, in the past few decades, Congress has been active in expanding penalties in copyright law. In 1976, Congress revolutionized copyright law by establishing federal preemption of state law.⁹ In 1982, Congress increased criminal penalties for infringement of certain works and expanded these penalties to all works in 1992.¹⁰ In 1997, Congress passed the No Electronic Theft (“NET”) Act criminalizing copying of works even without economic or commercial motive, and in 1998, at the behest of the copyright industries, Congress enacted the Digital Millennium Copyright Act providing criminal penalties for the sale or commercial use of devices or technology primarily designed to circumvent copyright protection technologies.¹¹ The DMCA in particular has caused significant discussion regarding the appropriate limits of government control of copyright technologies and the statute’s impact upon fair use and other First Amendment issues.¹²

Congress has not only expanded criminal penalties in copyright law, an area in which criminal penalties previously existed, but Congress also created criminal penalties for misappropriation of trade secrets. In 1996, Congress enacted the Economic Espionage Act which targeted two types of conduct: (1) economic espionage intended to benefit any foreign government and (2) any theft or misappropriation of a trade secret with the knowledge or intent that it would harm the owner of that trade secret.¹³ Criminalizing the latter conduct imposed criminal penalties for conduct that had previously been governed by an entire body of civil trade secret law.¹⁴ Since the passage of the EEA, the DOJ has pursued 30 cases under the statute.¹⁵ The vast majority of these cases involve allegations of a current or former employee misappropriating trade secrets.¹⁶

Criminal enforcement may play a particularly important role in the intellectual property area because the financial yield from wrongdoing may be very high. At the same time, it is noteworthy that Congress, out of concern that criminal penalties in the area of trade secret law presented the potential for abuse, expressed its desire that all prosecutions under the statute be approved at the highest levels of the Justice Department.¹⁷ As a result, the DOJ issued a regulation requiring that all prosecutions under the EEA be approved by the Attorney General, the Deputy Attorney General, or the Assistant Attorney General of the Criminal Division for the first five years of the statute's existence.¹⁸

C. Environmental Law

Since the introduction of modern environmental law in 1970,¹⁹ environmental criminal prosecutions have steadily increased and more frequently have involved negligent or accidental rather than intentional conduct.²⁰ Recently, it appears that there may be a change in this trend to the extent it appears that the Justice Department's Environmental Division may be focusing its criminal prosecutorial attention and resources on cases involving knowing and fraudulent conduct, as opposed to accidental or negligent violations. For example, Carnival Corp. recently agreed to pay \$18 million after pleading guilty to environmental charges for illegal discharges in international waterways.²¹ The cruise line company had reportedly falsified its dumping records and made false statements to Coast Guard officials about the unlawful practice.²² Carnival's executives reportedly cooperated fully and agreed to an extensive compliance program.²³

The increase in environmental prosecutions during the past decade is attributable to a variety of factors, including a greater number of statutes with criminal penalties.²⁴ Further, while many prosecutions involve well known hazardous waste laws, in addition, investigators and prosecutors increasingly look to traditional Title 18 crimes, including fraud, false statements, conspiracy, aiding and abetting, perjury and obstruction of justice. Further, in August 1994, Attorney General Janet Reno issued a Bluesheet authorizing U.S. Attorney's Offices to prosecute environmental crime cases of "national interest."²⁵ The DOJ credits its increased criminal enforcement to a number of factors, including various initiatives as well as a greater number of U.S. Environmental Protection Agency (EPA) investigators, and DOJ prosecutors assigned to environmental crimes.²⁶

EPA criminal referrals to the DOJ have steadily increased during the past decade, and more than quadrupled between 1990 and 1999.²⁷ In 1990, there were 65 criminal matters referred to the DOJ for criminal prosecution, while charges were brought against 100 defendants and 62 years of imprisonment were imposed.²⁸ In 1999, there were 241 criminal referrals, while 322 defendants were charged and 208 years of prison sentences were imposed.²⁹ In 1999, in addition to the massive civil fines, there were \$61.6 million in criminal fines, while in 2000 that figure increased to \$122 million.³⁰

One of the factors contributing to the increase in criminal penalties has been the emergence of a growing number of environmental crimes with negligence or strict

liability standards.³¹ In the environmental area, prosecutions are no longer limited to cases in which there was proof that the defendant knew and understood that his conduct violated the law and intended to violate the law.³² Rather, federal prosecutors may seek criminal penalties under “public welfare” laws that do not require specific knowledge or intent for criminal liability.³³ Furthermore, high-level employees of the corporation may be pursued under the “responsible corporate officer” doctrine which allows for criminal liability without actual knowledge or intent.³⁴

Companies or individuals in the private sector have in certain instances perceived the government’s criminal environmental investigations and proceedings to be hostile, unreasonable or overzealous.³⁵ Further, there is a perception that government prosecutions are too commonly based on mere negligence or unknowing conduct, rather than knowing or intentional conduct aimed at violating the law.³⁶

While vigorous enforcement of the nation’s environmental laws is important to the public welfare, serious concerns may be raised where criminal prosecutions are based on negligence standards or vague statutes. On the one hand, the government should pursue clear cases of fraud, particularly in such areas as intentional fraud in laboratory testing where companies are obligated to test or sample for purposes of permit compliance, or perhaps in situations such as the recent Carnival Corp. case. Such fraud prevents the goals of the environmental laws from being achieved. On the other hand, it may be appropriate for government prosecutors to reevaluate their prosecution of cases of “technical” or unknowing violations of the environmental laws, and to consider whether alternative enforcement mechanisms, such as vigorous civil enforcement, environmental audits, compliance programs or other measures could achieve similar goals.³⁷

D. Antitrust

In the antitrust area, there has been a vast expansion in criminal fines and penalties in recent years.³⁸ For example, for the ten years prior to 1997, the Antitrust Division obtained, on average, \$29 million in fines annually.³⁹ In 1997, the Antitrust Division collected \$205 million in criminal fines (500% higher than any previous year in its history), in 1998 the antitrust authorities collected \$265 million in criminal fines, and in 1999 collected in excess of \$1 billion.⁴⁰ Further, less than 10 years ago, \$2 million was the largest corporate fine ever imposed for a single Sherman Act violation.⁴¹ During the past five years, the Antitrust Division has imposed fines of \$10 million or more against at least 30 defendants, and \$100 million or more in at least 6 cases.⁴² In connection with investigations in the vitamin industry, in 1999 the Antitrust Division obtained a fine of \$500 million from Hoffmann-La Roche, Ltd., and \$225 million from BASF AG.⁴³ Similarly, in cases involving graphite electrodes, SGL Carbon, Mitsubishi Corp. and UCAR International, Inc. were each subject to fines well in excess of \$100 million.⁴⁴

This increase in criminal fines is attributable to a number of factors, including a change in 1990 in the Sherman Act maximum fine from \$1 million to \$10 million per count.⁴⁵ Further, in 1991, new antitrust sentencing guidelines were applied to corporate

offenders.⁴⁶ In addition, during the past decade criminal penalties have substantially increased because, while the Sherman Act has express provisions limiting corporate penalties to \$10 million for corporate defendants and \$350,000 for individuals,⁴⁷ prosecutors have been able to circumvent these limitations based on “double the gain/double the loss” standards.⁴⁸

Another trend in the antitrust arena has been a significant increase in criminal penalties for individual executives and employees. The DOJ has, furthermore, been far more aggressive in recent years with regard to enforcement of international cartels, including increasingly through the extraterritorial application of the U.S. antitrust laws to conduct overseas affecting the United States.⁴⁹ Following prosecutions, the DOJ has secured prison sentences for individuals in various countries, including Germany, Switzerland, the Netherlands, England, France, Italy, Sweden, Canada, Mexico, Korea, and Japan.⁵⁰ In the past decade, the Antitrust Division has obtained these sentences with increasing frequency and for longer periods.⁵¹

A significant recent change in antitrust enforcement has been the change in amnesty policy. Effective 1994, the DOJ Antitrust Division changed its amnesty policy such that the first person in the door receives full amnesty from criminal prosecution even where there is an active investigation. This creates a strong incentive for companies and individuals to come forward (although treble damage civil liability still applies), and has served to dramatically expand the number of cases.

The enormous increase in criminal enforcement in the antitrust area represents a significant shift in focus by antitrust authorities. During the 1970s, antitrust authorities had frequently focused their attention on vertical arrangements between sellers and buyers (*e.g.*, restrictions on the supply, distribution or resale of products) which arrangements are typically governed by a rule of reason analysis and do not give rise to criminal prosecution. In 1978, however, Judge Robert H. Bork published his highly influential book *The Antitrust Paradox*⁵² which emphasized that the goal of the antitrust laws should be protection of consumer welfare and not protection of other less efficient competitors, that the rubric for determining harm to consumer welfare should be economics, and that the mainstay of antitrust enforcement should be genuinely anticompetitive horizontal agreements between competitors which result in harm to the consumer. The publication of Judge Bork's book, together with the election of President Reagan, brought a major shift in focus by antitrust authorities away from vertical pricing arrangements to the more genuinely anticompetitive horizontal price fixing agreements between competitors (*e.g.* express price fixing or cartel arrangements) which are *per se* anticompetitive and may be prosecuted criminally. That focus on price fixing and cartel activity has continued with subsequent administrations.

While increased criminal prosecution of intentional price fixing and cartels is important to protect consumers, it is also important to bear in mind that whenever a company or individual is targeted by antitrust authorities, they must dedicate huge resources, legal fees, and time to comply with a possible criminal investigation, even where no formal investigation is initiated or case is prosecuted. While cases involving

antitrust violations that directly harm consumers should be pursued vigorously, particularly cases involving intentional price fixing which results in higher prices, government prosecutors should be cautious when instituting criminal investigations where violations are not knowing or willful.⁵³ As in other areas, prosecutors should consider the alternatives available, including civil enforcement.

E. Securities and Financial Institutions

In the areas of securities and financial institutions, there has also been an increasing number of criminal statutes and growing criminal enforcement. Even prior to the recent corporate controversies, the SEC has been seeking to increase prosecutions for securities fraud.⁵⁴ During the past few months, as has been widely publicized, both the New York Attorney General and the DOJ's Criminal Division have been conducting criminal investigations of securities analysts and investment firms in connection with concerns over potential conflicts of interest and other matters.⁵⁵ The SEC has also issued new proposed rules relating to auditing and disclosure matters, and a new Corporate Fraud Task Force has been established by executive order.⁵⁶

With respect to financial reporting, there is already broad potential criminal liability even absent the sweeping accounting reform legislation expected to be passed in the near future (*see* Section IV). For example, the providing of false material information to the SEC may violate criminal statutes.⁵⁷ The provision of such information to investors may also violate the mail or wire fraud statutes, which merely require the use of the interstate mail or wire fraud when making a false statement.⁵⁸ Findings of mail or wire fraud can in turn be used to support RICO or money laundering prosecutions.⁵⁹ Furthermore, under federal case law, it is possible to prosecute persons for "conscious avoidance" instead of proving actual intent.⁶⁰

There are also other federal criminal statutes which have been enacted to govern offenses by or against financial institutions, including statutes which provide for an array of criminal penalties.⁶¹ Recently, following 9/11, the USA PATRIOT Act was enacted which includes criminal penalties, and amends the Bank Secrecy Act to require financial institutions to assist in fighting terrorism by establishing anti-money laundering programs and to adopt minimum standards for financial institutions regarding the identity of customers opening accounts.⁶²

Criminal investigations and prosecutions in the areas of securities and financial institutions raise grave concerns for the companies and individuals targeted, particularly in view of the complexity or ambiguities in the relevant statutes and regulations. For this reason, it is important now, and will be increasingly important in the future, that enforcement authorities be cautious in their initiation of criminal investigations and prosecutions, and that they consider the specific nature of the alleged violations, the degree of knowledge, and the countervailing costs that criminal enforcement may have on the targets of the investigation. Prosecutors should consider whether less severe penalties or sanctions would be effective, including compliance programs, which may have a less dramatic impact on a company's core business and employees.

IV. Post-Enron Legislative Proposals

Following the Enron controversy, a host of new bills were introduced to further regulate financial reporting and auditing,⁶³ diversification of pension plan assets, account access or accountability under pension plans.⁶⁴ The sweeping new accounting reform legislation currently pending before Congress provides for dramatically increased criminal penalties, including the creating of a new securities fraud felony for any "scheme or artifice" to defraud shareholders, enhanced penalties for fraud and obstruction of justice, increased prison terms for mail or wire fraud, and criminal penalties relating to the certification of financial reports.⁶⁵ That proposed legislation also significantly extends the statute of limitations in securities fraud cases.

In this area, Congress and enforcement authorities should adhere to the basic principle that new rules relating to financial reporting, accounting or corporate governance should not cause harm to our commercial life. For example, one should consider whether real time and more frequent disclosures in fact lead to better information in the marketplace, or whether such disclosures provide dissembled information for investors. Similarly, in connection with corporate governance or audit committee reforms, one should assess whether the proposed changes could have the effect of deterring good persons from serving on corporate boards and audit committees. While many believe that action is necessary to address the current corporate controversies, others are properly concerned that Congress not overreact and adopt measures that will discourage entrepreneurial activity or harm our economic system.

V. Role of Criminal Sanctions

In connection with all of the above areas, it is important to consider the role of criminal sanctions. Citizens expect their criminal justice system to deter crime, provide punishment and retribution, and ensure due process for the accused. Those who emphasize repression of crime as the most important domestic goal of government, place a high premium on the efficiency of investigation and prosecution of criminals.⁶⁶ Others, who focus upon the maximization of human freedom, emphasize the protection of individuals from restrictions upon their liberty.⁶⁷

While the rapid expansion of a particular area of the criminal law may be warranted by egregious misconduct, the growth of criminal laws in any area of the economy should be cause for concern. Such criminalizing inevitably raises questions of whether it is efficient regulation of commercial conduct, whether prosecutorial discretion is being properly used, or whether the goals of fair play and substantial justice are being achieved.

As a general matter, many persons view criminal sanctions as essential because they may have a far greater deterrent effect than monetary sanctions. Monetary sanctions may be passed along as a cost of business or avoided through minimizing the assets that can be reached by the courts. Those who advocate increased criminal sanctions believe the personal sanction of detention has a far greater deterrent value.⁶⁸

At the same time, however, a variety of problems arise, when criminal sanctions are imposed in the commercial context. Two areas which raise particular concerns are (A) reduced mens rea requirements;⁶⁹ and (B) overly complex or ambiguous statutes.⁷⁰

A. Criminal Mental States / Mens Rea

Historically, the common law imposed criminal sanctions only where an individual committed a crime with purpose or knowledge. The requirements of mens rea (a guilty mind) and an actus reus (a guilty act) were thought to ensure that only those who were guilty of accomplishing an evil act with a guilty mind would be prosecuted. These two requirements, however, ultimately came to be viewed as constraining the ability of legislators and prosecutors to prohibit or punish undesirable conduct in some circumstances. The result is that the law now imposes criminal liability in certain circumstances for negligent conduct.⁷¹

The Supreme Court has stated that an exception to mens rea exists for “public welfare offenses,” although the Court has explicitly declined to define the scope of such offenses.⁷² As commentators have observed, this requires defining the limits of “public welfare offenses,” an exercise that is critical where statutes, such as certain environmental statutes, are likely to impose criminal liability upon a finding of negligence standard.⁷³

Similarly, Congress has enacted many statutes that are vague with respect to the requisite mental state. For example, the recently enacted Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, imposes criminal penalties on anyone who, with the specific intent to mislead National Highway Traffic Safety Administration (NHTSA), knowingly and willfully files a false, misleading or incomplete report to the NHTSA, or fails to file a required report concerning safety-related defects that have caused death or serious bodily injury.⁷⁴ The statute can easily be read to subject persons or corporations who file such reports to criminal liability for any defect that may occur in the future, even though the person filing the report had no knowledge of the defect at the time of submission of the report.

Not all of the new statutes applied to commercial conduct, however, include a reduced mental state. The diminishment of mens rea is less of a concern in the intellectual property area, for example. The intellectual property statutes all include a knowing standard, or in some instances the more rigorous, if not somewhat more ambiguous, willfulness standard.⁷⁵

When legislators consider new criminal statutes, they should give considerable thought to the mental state they require for conviction. Where the conduct prohibited is fraud, they should be particularly vigilant that criminal prosecutions, which should be reserved for egregious conduct, are based on real knowing and willful fraud, and not merely on a theory of negligence or unknowing failure to comply with complex or ambiguous statutes.

B. Complex Statutes

Criminalizing commercial conduct requires overcoming at least two significant “complexity” challenges. First, modern commercial activity is generally significantly more complicated than the type of conduct traditionally addressed by the criminal justice

system. Second, the statutes written by Congress to regulate the activity are far more complex than traditional criminal statutes. Such complexity can make it hard for individuals and companies to have fair and adequate notice of what might constitute a criminally punishable act.

1. Factual Complexity

As a general rule, criminal courts do not address issues that are as factually complex as civil or regulatory disputes. This can be anecdotally observed by comparing the shorter amount of time it takes for courts to resolve criminal matters, compared with the amount of time it takes to resolve most civil proceedings. As another example, the DOJ has recognized the inherent complexity of prosecuting health care fraud claims and advises its prosecutors to seek assistance from the Department of Health and Human Services because “[t]he reimbursement principles under Medicare have grown increasingly complicated over the years.”⁷⁶ Further, health care fraud schemes are “diverse and vary in complexity” and may include, for example, billing for services not rendered or not medically necessary, double billing, upcoding, unbundling or fraudulent cost reporting.⁷⁷ Similar levels of factual complexity can be found in prosecutions arising in the securities, intellectual property, antitrust and other areas.

2. Statutory / Regulatory Complexity

A direct result of the factual complexity of many commercial activities is the complexity of the statutes that seek to impose criminal liability for conduct that transgresses commercial norms. Examples of such statutory complexity exist in each of the legal areas discussed in this paper. Criminal environmental statutes are particularly notorious for detailed rules that include criminal penalties despite ambiguous terms.⁷⁸ Intellectual property is another area with complex statutes.⁷⁹ In the areas of health care or financial reporting, the statutes and regulations may be highly complex and beyond the ability of many persons to understand.

Courts in the United States require criminal statutes to specifically define the prohibited conduct, and courts construe criminal statutes using a “rule of lenity” that resolved any ambiguities in favor of the defendant.⁸⁰ Although these principles remain an essential element of the criminal law, some observers note that Congress and the courts have allowed exceptions to creep into the criminal law for regulatory violations. Such a diminishment of the specificity principle would fail to provide fair notice to citizens.

Two recent cases highlight the problem of complex or vague criminal statutes in the commercial context.

In *United States v. Whiteside*,⁸¹ a defendant was convicted for making false statements relating to a “capital related interest expense” in Medicare/Medicaid and Civilian Health and Medical Program of the Uniformed Services reimbursement costs reports.⁸² The Eleventh Circuit reversed the conviction, finding that the government had failed to prove that the defendant’s statements were an unreasonable interpretation of ambiguous reimbursement requirements, and accordingly had failed to prove that the statements were knowing or false.⁸³ The Eleventh Circuit pointed to evidence that

reasonable persons could differ as to the proper characterization of the debt interest at issue, and that experts had disagreed with the government's theory of capital reimbursement.⁸⁴

In *United States v. Handakas*,⁸⁵ the Second Circuit examined the "honest services" provision of the mail fraud statute.⁸⁶ That case involved the owner of a construction company which performed work for the New York City School Construction Authority (SCA).⁸⁷ The government contended that the defendant had failed to comply with a state mandated requirement that his company pay "prevailing rate of wages" to workers on work performed, and thereby had deprived the SCA of its intangible right to "honest services."⁸⁸ The Second Circuit found the provision to be unconstitutionally vague as applied to the defendant and overturned his criminal conviction. The Second Circuit noted that the meaning of 'honest services' in the text of the mail fraud statute "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute."⁸⁹ The Court further noted that it was impossible to know what is forbidden under the statute without undertaking the "lawyer-like task" of answering questions about the large body of conflicting case law regarding "honest services."⁹⁰

The *Handakas* Court also pointed out that "an indefinite criminal statute creates opportunity for the misuse of government power," and that there are dangers when an offense is "harnessed into service" by the state "when other prohibitions will not serve."⁹¹ The Court described the mail fraud statute as an "all purpose prosecutorial expedient," stating as follows:

The mail fraud statute has been aptly described as an all purpose prosecutorial expedient. By invoking § 1346, prosecutors are free to invite juries "to apply a legal standard which amounts to little more than the rhetoric of sixth grade civics classes." [Citation omitted.] If the "honest services" clause can be used to punish a failure to honor the SCA's insistence on the payment of prevailing rate of wages, it could make a criminal out of anyone who breaches any contractual representation: that tuna was netted dolphin free; that stationery is made of recycled paper; that sneakers or T-shirts are not made by child workers; that grapes are picked by union labor -- in sum so called consumer protection law and far more.

Those who would propose new criminal sanctions in the commercial sphere must ask themselves whether the conduct they seek to proscribe is properly articulated and comprehensible to the person of ordinary understanding. In those instances where the potential conduct will occur in a context of complex transactions or technology, particular care is required in the drafting of statutes to ensure that fair warning is provided to participants in the particular market, and to ensure that innovation is not stifled.

VI. Alternatives to Criminalization

In all areas of criminal enforcement, consideration should be given to the various alternatives to criminal penalties. This is particularly true in the commercial arena where

actors are presumably motivated by economic opportunity and may be influenced by economic incentives in lieu of criminal sanctions. Non-criminal alternatives may provide adequate prevention or deterrence, and criminal penalties may result in inefficient forms of over-deterrence. Alternatives to criminal penalties may include, *inter alia*, civil or administrative enforcement, self-reporting, or reform of vague statutes.

A. Civil or Administrative Enforcement

In each of the areas discussed above, there are extensive civil statutory and regulatory schemes which may be employed to encourage compliance. The use of civil or administrative enforcement mechanisms may avoid unduly burdening corporations or service providers with costs and penalties which ultimately are borne shareholders, employees or others who have no involvement in or awareness of the alleged wrongdoing. To this end, it may be appropriate for enforcement authorities to adopt procedures similar to those of the EEA discussed above, whereby criminal referrals are reviewed by senior officials and are closely scrutinized prior to initiation of a criminal prosecution. It may also be appropriate to consider in all of the above areas whether civil penalties, compliance programs or other means may be more effectively used to achieve the goals of the prosecuting agency.

B. Self-Reporting

Self-reporting is a tool utilized in the health care, environmental, government contracting and other areas of criminal law.⁹² This is also an alternative, although the consequences for self-reporting vary in different areas. For example, in the defense contracting realm reporting entities can avoid criminal sanction. In the health care fraud and other arenas, however, the government reserves the right to prosecute those who self-report, although important incentives for self-reporting, such as possible lesser penalties, do exist.⁹³

Self-reporting may be an important tool in complex markets such as health care where the cost of enforcing laws is high, as well as when it may be difficult to draft statutes broad enough to describe prohibited conduct and yet be sufficiently narrow to be enforceable. Nevertheless, many observers comment that under current enforcement standards and guidelines, companies may be unwilling to pursue self-reporting because of the potential risk of criminal prosecution. One proposal which has been made is that in those areas where companies which voluntarily report are currently still subject to criminal prosecution, that at least a presumption against prosecution be adopted in order to encourage more voluntarily reporting.

C. Reform of Vague Statutes

In order to avoid overcriminalizing commercial conduct, it may also be prudent for enforcement authorities and those in the private sector to consider and discuss modifications to existing statutes or regulations that would serve to more clearly define proscribed criminal conduct. While it is beyond the scope of this article to identify such statutes and regulations, regulators and private practitioners in specific industries may wish to jointly focus on specific statutes and regulations that carry potential criminal penalties and cause significant concern because they fail to describe the proscribed

conduct, leave significant discretion to a regulatory agency to decide the actual criminal conduct, or have been otherwise been viewed as ambiguous or difficult to interpret.

VII. Role of Prosecutorial Guidelines and DOJ Approval

In closing, it should be noted that prosecutors play a critical role in the manner and frequency with which statutes are enforced.⁹⁴ This role is particularly critical in the commercial sphere where determinations of intent can be difficult, as well as where the availability of non-criminal resolutions plays a larger role than in non-economic crimes. In the federal arena, the DOJ has issued prosecution guidelines to federal prosecutors to provide a framework for prosecutorial decisions.⁹⁵

The federal prosecution guidelines direct prosecutors to use the following factors when considering whether to prosecute a particular case:

1. Whether a substantial Federal interest would be served by prosecution;
2. Whether the person is subject to effective prosecution in another jurisdiction; or
3. Whether an adequate non-criminal alternative to prosecution exists.

With respect to the first criteria, it is worthwhile considering whether the guidelines are overly broad and indeterminate. What exactly is the “interest” to be served? Are they interests directly related to the criminal justice process, such as deterrence and prevention? Are those interests related to the policy goals at stake, such as a clean environment or a well-managed and economical health care market? Do interests here depend on the type and target of the criminal conduct—namely, is there a difference between acts that involve the public as a whole, that resemble disputes between companies, or that directly affect particular consumers of goods and services? And, finally, should the definition of the “interest” be at least somewhat historical or backward-looking, with due consideration to success and effectiveness based on the impact of prior prosecutorial activity?

The third criteria identified in the guidelines, whether a sufficient non-criminal alternative to prosecution exist, is particularly important to examine when proposing new criminal penalties in the commercial arena. Significant economic crimes frequently do have substantial non-criminal alternatives such as a civil suit by the aggrieved party. For example, the vast majority of trade secret cases will always have a civil alternative. Those who advocate increased criminal penalties must ask themselves how the penalties will interact with the civil alternatives and should consider whether precise criteria should be provided in the statute to ensure that only the most egregious violations are subject to criminal sanction. And, again, there should be due consideration of how criminal prosecution has fared in the past. This requires some careful thinking about what ought to be the benchmarks of success, as well as a careful consideration of whether there is an appropriate symmetry between who is being prosecuted and who really ultimately bears the costs of a particular criminal sanction (e.g., innocent shareholders, employees or consumers versus the culpable individuals).

VIII. Conclusion

Imposing criminal sanctions upon America's vibrant economy should not be done lightly. While vigorous enforcement is necessary to protect the public from genuine fraud and intentional misconduct, the exercise of proper prosecutorial discretion in the commercial sphere is very important. As Congress and enforcement authorities respond to the current corporate controversies and seek to protect investors, workers, and managers in America's economy, attention should be paid to the potential risks and costs of further criminalizing commercial conduct. To the extent additional potential criminal sanctions are imposed upon entrepreneurs, workers, and management, it should only be done after careful consideration of the potential risks and costs that may be imposed upon economic activity. Congress and regulators should specify clearly the proscribed criminal conduct and should be wary of departing from fundamental mens rea requirements or imposing criminal sanctions in lieu of alternatives that may sufficiently deter undesirable conduct with significantly lower societal costs.

¹ The author expresses gratitude to all of those persons who provided comments or guidance concerning this paper, and particularly acknowledges Scott F. Frewing, Esq., Assistant United States Attorney, Northern District of California.

² See, e.g., William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 787 (1988); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will The Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993); Ellen S. Podgor, *Corporate And White Collar Crime: Simplifying The Ambiguous*, 31 AM. CRIM. L. REV. 391, 392 (1994).

³ See Department of Justice, *Health Care Fraud Report, Fiscal Year 1997* (available at <http://www.usdoj.gov/dag/pubdoc.html>).

⁴ See Department of Justice, *Health Care Fraud and Abuse Control Program Annual Report For FY 2000, Health Care Fraud and Abuse Control Program Annual Report For FY 1999, Health Care Fraud Report, Fiscal Year 1998* (each available at <http://www.usdoj.gov/dag/pubdoc.html>). All numbers are for the respective fiscal year.

⁵ See Department of Justice, Criminal Resource Manual § 933 (available at http://www.usdoj.gov:80/usao/eousa/foia_reading_room/usam/title9/text/t9rm09.wpd).

⁶ False Claims Act, 31 U.S.C. § 3729 et seq., see generally False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), reprinted in, 10A USCCAN (December 1986).

⁷ DOJ Health Care Fraud Report, *supra* note 3.

⁸ 18 U.S.C. § 1956(c)(7)(F).

⁹ 17 U.S.C. § 301.

¹⁰ 17 U.S.C. § 506 and 18 U.S.C. § 2319.

¹¹ See 17 U.S.C. 1201 et seq.

¹² See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 741 (2000); Pamela Samuelson, *Towards More Sensible Anti-Circumvention Regulations*, 5 Cyberspace Law. 2 (2000).

¹³ 18 U.S.C. §§ 1831, 1832.

¹⁴ Prior to the enactment of the EEA, federal prosecutors did charge criminal cases involving trade secrets using mail fraud or wire fraud theories under 18 U.S.C. §§ 1341, 1343.

¹⁵ Department of Justice Computer Crime and Intellectual Property Section, Economic Espionage Act (EEA) Cases (available at www.cybercrime.gov/eeapub).

¹⁶ *See generally*, DOJ EEA Cases supra note 14.

¹⁷ Manager's Statement for H.R. 3723 (statement of Sen. Orin Hatch, Committee on the Judiciary) (portions available at www.cybercrime.gov/eealeghist.htm).

¹⁸ *See* 28 C.F.R. § 0.64-5.

¹⁹ In 1970, Congress initiated modern federal environmental law with the passage of the Clean Air Act and followed with a number of additional environmental statutes during the 1970s. Other statutes followed shortly thereafter. *See, e.g.*, Ocean Dumping Act (1972); Clean Water Act (1972); Federal Insecticide, Fungicide, and Rodenticide Act (1972); Endangered Species Act (1973); Safe Drinking Water Act (1974); and Resource Conservation and Recovery Act (1976). The decade culminated with the passage of the Comprehensive Environmental Response, Compensation and Liability Act (1980).

²⁰ *See, e.g.*, Richard Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 706-710 (1997); Richard Thornburgh, *Criminal Enforcement of Environmental Laws – A National Priority*, GEORGE WASH. L.R. 59, 776 n. 3 (1991); N. Kubasek, *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. Balt. J. Env'tl. L. 122 (2000).

²¹ *See* Reuters, "Carnival Admits Ocean Polluting," (April 19, 2002); *see also* Associated Press, "Carnival Pleads Guilty in Ocean Dumping Case, to Pay \$18 Million" (April 20, 2002).

²² *Id.*

²³ *Id.*

²⁴ For a list of major environmental laws, see <http://www.epa.gov/epahome/laws.htm>.

²⁵ *See* Office of Attorney General, Bluesheet Revision to the U.S. Attorney's Manual on Environmental Crimes (Aug. 23, 1994)(available at www.usdoj.gov/ag/readingroom/usam_env.htm).

²⁶ *See, e.g.*, David T. Buente and Kathryn B. Thomson, *The Changing Face of Federal Environmental Criminal Law: Trends and Developments-1999-2001*, 31 ELR News & Analysis 11340, 11342 (11-2001)("the late 1990s witnessed a blurring of the line between civil and criminal liability to the point of extinction under many federal criminal statutes").

²⁷ Annual Report on Enforcement and Compliance Assurance Accomplishments in 1999, Ex. B-5 (available at www.epa.gov/oeca/fy99accomp.pdf).

²⁸ *Id.*

²⁹ *Id.*

³⁰ January 19, 2001 EPA Releases FY 2000 Enforcement and Compliance Assurance Data (available at www.epa.gov).

³¹ *See, e.g.*, David T. Buente and Kathryn B. Thomson, *The Changing Face of Federal Environmental Criminal Law: Trends and Developments-1999-2001*, 31 ELR News & Analysis 11340 (11-2001)(stating

that “the late 1990s witnessed a blurring of the line between civil and criminal liability to the point of extinction under many federal criminal statutes”).

³² *Id.*

³³ *See, e.g., U.S. v. Unser* 165 F.3d 755 (10th Cir. 1999)(criminal conviction of person lost in blizzard and drove snowmobile into National Forest Wilderness Area for violating statute for protection of wilderness); *U.S. v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000)(criminal conviction of off duty supervisor for negligent discharge of oil into navigable waters where discharge caused accidentally by contractor on the site).

³⁴ This doctrine is derived from *United States v. Dotterwich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975).

³⁵ *See, e.g.* Ronald W. Zorojeski and David Greene, *Enviro-Cops Continue Aggressive Tactics*, The Connecticut Law Tribune (November 20, 2000).

³⁶ *Id.*

³⁷ *See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Part III*, 60 Fed. Reg. 66,706 (Dec. 22, 1995).

³⁸ Status Report: Criminal Fines (2/01/2002)(available at www.usdoj.gov/atr/public/criminal/9937.htm); Antitrust Division, Sherman Act Violations Yielding a Fine of \$10 Million or More (3/1/2002)(available at www.usdoj.gov/atr/public/criminal/10859.htm).

³⁹ Status Report: Criminal Fines (2/01/2002)(available at www.usdoj.gov/atr/public/criminal/9937.htm).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Antitrust Division, Sherman Act Violations Yielding a Fine of \$10 Million or More (3/1/2002)(available at www.usdoj.gov/atr/public/criminal/10859.htm).

⁴⁴ *Id.*

⁴⁵ *See, e.g.,* Gary R. Spratling, “*The Trend Towards Higher Corporate Fines: It’s a Whole New Ball Game,*” (March 7, 1997)(available at www.usdoj.gov/atr/public/speeches/4011.htm).

⁴⁶ *Id.*

⁴⁷ 18 U.S.C. § 3.

⁴⁸ 18 U.S.C. § 3571(d)(provides for fines of up to double the pecuniary gain to the defendant, or double the pecuniary loss to a person other than the defendant).

⁴⁹ Status Report: International Cartel Enforcement (2/01/2002) (available at www.usdoj.gov/atr/public/criminal/9939.htm).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Robert H. Bork, *The Antitrust Paradox: A Policy at War With Itself* (1978).

⁵³ *Id.*

⁵⁴ See Speech by SEC Staff; Remarks at the Glasser LegalWorks 20th Annual Federal Securities Institute by Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities & Exchange Commission, February 15, 2002 (“[SEC has] made a concerted effort to increase criminal prosecutions of securities fraud”)(available at <http://www.sec.gov/news/speech/spch538.htm>).

⁵⁵ See Bloomberg News, “U.S. Will Probe Analysts For Criminal Misconduct (Update3)” (4/23/02).

⁵⁶ See Executive Order dated July 9, 2002 (available at www.whitehouse.gov/news/releases/2002/07/20020709-2.html)

⁵⁷ 18 U.S.C. § 1001; Securities Exchange Act of 1934, Sec. 32.

⁵⁸ 18 U.S.C. §§ 1341, 1343.

⁵⁹ 18 U.S.C. § 981 *et seq.* (forfeiture provisions), § 1961 *et seq.* (RICO); §§ 1956-57 (money laundering offenses).

⁶⁰ See, e.g., *U.S. v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2002)(A conscious avoidance jury instruction “permits a finding of knowledge even when there is no evidence that the defendant possessed actual knowledge”).

⁶¹ See, e.g. 18 U.S.C. § 1344 (Bank Fraud Statute); 12 U.S.C. § 1818 (j)(Financial Institutions Reform, Recovery and Enforcement Act of 1989); 31 U.S.C. § 5322(A) (Bank Secrecy Act); see also, e.g. Matthew J. Shepherd, Scott N. Wagner and Natasha M. Williams, *Financial Institutions Fraud*, 38 Am. Crim. L. Rev. 843 (Summer 2001).

⁶² 107th Congress, Public Law 107-56 (available at www.access.gpo.gov/congress).

⁶³ See, e.g., S. 2004 (“Investor Confidence in Public Accounting Act of 2002”); H.R. 3970 (“Truth and Accountability in Accounting Act of 2002”); see also SEC Release 2002-53 (SEC proposes accelerated reporting dates and increased availability of disclosed data to the public); California Assembly Bill 2873 (Amended April 25, 2002).

⁶⁴ See, e.g., S 2460 (“Shareholder Bill of Rights Act”); S. 1992 (“Protecting America’s Pensions Act of 2002”); H.R. 3657 (“Employee Pension Freedom Act of 2002”); H.R. 2269 (“The Retirement Security Advice Act”); see also H.R. 3634 (“Enron Employee Pension Recovery Act of 2002”); S. 2010 (“Corporate and Criminal Fraud Accountability Act of 2002”)(emphasis added); H.R. 3818, Sec. 15 (“Comprehensive Investor Protection Act of 2002”).

⁶⁵ See H.R. 3763/S. 2673 (“Public Company Accounting Reform and Investor Protection Act of 2002); see also H.R. 5118 (“Corporate Fraud Accountability Act of 2002”).

⁶⁶ See generally Herbert L. Packer, Two Models of the Criminal Process, 113 U. PA. L. REV. 1 (1964) (describing two models of criminal procedure, the crime control model and the due process model).

⁶⁷ *Id.*

⁶⁸ See, Richard Lazarus, Fairness in Environmental Law, 27 ENVTL. L. 705, 733-734 (1997) (advocating the importance of felony criminal sanctions for environmental crimes).

⁶⁹ See John C. Coffee, *Does Unlawful Mean “Criminal?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 210-213 (1991); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453, 470 (1997)(expressing concern regarding trends of the “criminalization of civil law” and the “civilization of criminal law”).

⁷⁰ See, e.g., Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 Am. Crime. L. Rev. 391 (1994).

⁷¹ See, e.g., 33 U.S.C. § 1319(c) (1988) (Clean Water Act); 42 U.S.C. § 7413(c)(4) (Clean Air Act).

⁷² *Staples v. United States*, 511 U.S. 600, 607 (1994).

⁷³ See 33 U.S.C. § 1319 (1988) (Clean Water Act); 42 U.S.C. § 7413(c)(4) (Clean Air Act).

⁷⁴ 49 U.S.C. § 30170.

⁷⁵ 17 U.S.C. § 1204.

⁷⁶ Department of Justice, Criminal Resource Manual § 933 (available at http://www.usdoj.gov:80/usao/eousa/foia_reading_room/usam/title9/text/t9rm09.wpd) (as of January 9, 2002)

⁷⁷ Department of Justice, Health Care Fraud Report, Fiscal Year 1998 (available at <http://www.usdoj.gov/dag/pubdoc/health98.htm#scope>) (as of January 6, 2002) [hereinafter “DOJ Health Care Fraud Report”]

⁷⁸ See, e.g. *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C.Cir.1987) (stating that the process of determining whether a material is a “solid waste” under the Resource Conservation and Recovery Act is a “mind-numbing journey”); See also R. Christopher Locke, *Environmental Crimes: The Absence of Intent and the Complexities of Compliance*, 16 COLUMBIA ENV. L. JOURNAL 311 (1991).

⁷⁹ Intellectual property law is an area challenged with complex criminal statutes. For example, when Congress criminalized the manufacturing of technology designed to circumvent copyright protections by enacting the DMCA, Congress sought to balance protections for intellectual property with the need to permit research into encryption and digital rights management technology, as well as to preserve traditional notions of “fair use” of copyrighted works. As a result, the statute includes a number of exceptions and implicitly incorporates the entire body of fair use jurisprudence. These exceptions and the fair use issues have led some commentators to criticize the DMCS as potentially ambiguous, although those interested in distributing copyrighted works in digital form argue the statute is essential to protect property rights. The complex issues arising from statutes such as the DMCA may lead to complex litigation in the criminal context that was previously generally reserved for the civil sphere.

⁸⁰ See *The Schooner Enterprise*, 1 Paine 32 (1810); *Tozer v. United States*, 52 F. 917 (1892); see also *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (applying rule of lenity to National Firearms Act).

⁸¹ 285 F.3d 1345 (11th Cir. 2002).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 286 F.3d 92 (2d Cir. 2002).

⁸⁶ The elements of mail fraud include (1) a “scheme or artifice to defraud,” (2) furthered by the use of interstate mail, (3) to deprive another of money, property or “the intangible right of honest services.” 18 U.S.C. §§ 1341, 1346.

⁸⁷ 2002 U.S. App. LEXIS at *1.

⁸⁸ *Id.* at **5-6.

⁸⁹ *Id.* at *31.

⁹⁰ *Id.*

⁹¹ *Id.* at **39-41.

⁹² *See* 42 U.S.C. § 1320a-7b(a)(3) (making it a crime to “fail to disclose information with the fraudulent intent to secure an overpayment”). The Department of Health and Human Services “Provider Self Disclosure Program” is set forth in the October 30, 1998 Federal Register at 63 Fed. Reg. 58399.

⁹³ *See* United States Sentencing Guidelines, § 8C.

⁹⁴ Federal prosecutors are directed to “initiate or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction.” United States Attorney Manual § 9-27 (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm).

⁹⁵ United States Attorney Manual § 9-27 (available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm). *See also* *Federal Prosecution of Corporations* (available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>).