



SUFFICIENTLY ARMED:
THE FEDERAL TOOLBOX FOR PUNISHING CRIMINALITY IN THE SUBPRIME MARKET

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It should come as no surprise that the current market crisis has given rise to a fierce outcry for heads to roll and “greedy corporate executives” to be thrown behind bars. Like the “Enron scandal” (shorthand for the many, sudden corporate failures of that time period), and the savings and loan debacle before that, the press and public are looking to the federal government for action and a vindication for the wrongs arguably inflicted by Wall Street on Main Street.¹ In this heated environment, Congress is likely to see itself as compelled to enact new criminal statutes that supposedly would have prevented the crisis.² However, Congress has already enacted all of the tools prosecutors need (and far more) to prosecute any criminal activity associated with the subprime market. Congressional action in this arena would be redundant at best.

This paper briefly sets forth the federal criminal statutes that are currently in place and available for prosecutors to use to pursue whatever criminal activity allegedly occurred. The paper begins with a list of the relevant charging statutes that already exist in the United States Code for financial and related crimes.³ Then, in varying depth, we discuss each statute’s individual coverage, elements, and application. This analysis takes a neutral perspective and explains the current state of the law without advocating for a particular application. Nothing in this paper should be interpreted as advocating for the enforcement of the criminal law in the current circumstances in general, or in any case in particular.

¹ Eric Lichtblau, David Johnston, and Ron Nixon, *F.B.I. Struggles to Handle Financial Fraud Cases*, *The New York Times* (Oct. 19, 2008), available at <http://www.nytimes.com/2008/10/19/washington/19fbi.html> (last visited Oct. 20, 2008) (“The pressure on the F.B.I. has recently increased with the disclosure of criminal investigations into some of the largest players in the financial collapse . . .”).

² See Rachel Brand, *Making It a Federal Case: And Inside View of the Pressure to Federalize Crime*, Heritage Foundation Legal Memo No. 30, August 28, 2008.

³ However, “[d]ocumenting the precise contours of federal criminal law has proved difficult, because getting an accurate count of federal crimes is not as simple as counting the number of criminal statutes. According to the ABA Report, ‘[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.’” John S. Baker, *Jurisdictional And Separation Of Powers Strategies To Limit The Expansion Of Federal Crimes*, 54 AM. CRIM. L. REV. 545, 548-49 (2005) (internal citations omitted).

Nevertheless, it is the view of NACDL and numerous criminal-law experts that all too often the rush to use overbroad criminal statutes with loose *mens rea* requirements results in prosecutions that cannot stand – and should not stand – in light of the lack of evidence of what has always been considered *criminal* behavior: behavior that involves a fraud or a high level of deceit, and that can only be deterred through criminal sanction.⁴ When a person is prosecuted and convicted, even though he or she acted without the intent to do anything wrong or violate any law, the criminal law loses its moral force. The criminal law is the greatest power government uses against its own citizens and thus should be used only as society’s last line of defense for intentional wrongdoing. The civil law and administrative remedies are available to redress inadvertent violations of the law and good-faith mistakes of judgment.

As with previous crises, such as the S&L failures, it is not likely to be the case that criminal activity *caused* the collapse. Rather, any criminal activity will more reasonably be classified as incidental to or a collateral consequence of, the crisis.⁵ In making a preliminary assessment of the types of wrongdoing coming to the surface as part of the subprime investigations, Benton Campbell, U.S. Attorney for the Eastern District of New York stated, “The more things change, the more they stay the same.”⁶ As part of any investigation into the crisis, prosecutors will have to focus on separating bad business decisions from possible criminal conduct.⁷ Campbell explained that the current “types of criminal activity are fundamentally very familiar” to the criminal conduct his office has seen over the years and that most investigations so far have been finding evidence suggestive of “classic cases of securities fraud.”⁸

Classic cases of securities fraud include willful material misrepresentations in violation of Rule 10b-5, intentional overvaluation and misrepresentations to auditors, insider trading, and other forms of self-dealing. Some of the cases currently under investigation involve allegations that investors were deceived about the type of securities in which they were investing, or the risk involved in making investments.⁹ The federal criminal statutes used to prosecute these kinds of activities include securities fraud under Titles 15 and 18, mail fraud, wire fraud, bankruptcy fraud, and bank fraud.

⁴ See, e.g., Stephanie A. Martz and Ivan Dominguez, *A Very Brief History of the Criminalization of Everything*, THE CHAMPION, September 2008, at 30 (documenting recent examples of over-zealous prosecutions of financial crimes, based on overly broad criminal offenses such as mail fraud and wire fraud, resulting in acquittals or reversals on appeal).

⁵ Abbe David Lowell, *Don’t Overstate Crimes*, The National Law Journal (October 24, 2008).

⁶ Evan Perez, *Familiar Abuses Seen in Latest Finance Crisis*, The Wall Street Journal (Oct. 4, 2008), available at <http://online.wsj.com/article/SB122307667720003963.html> (last visited Oct. 20, 2008) (internal quotation marks omitted); see also Linda Sandler and Christopher Scinta, *Lehman Collapse Probed by Three Federal Grand Juries*, Bloomberg.com (Oct. 17, 2008), available at <http://www.bloomberg.com/apps/news?pid=20601087&refer=home&sid=a5oUoIV5pBTk#> (last visited Oct. 20, 2008).

⁷ See Carrie Johnson, *Prosecutors Expected To Spare Wall St. Firms*, Washington Post (Oct. 3, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/02/AR2008100203631.html> (last visited Oct. 20, 2008).

⁸ Noeleen G. Walder, *Criminal Prosecutions Predicted to Surge Over Financial Crisis*, New York Law Journal (Oct. 9, 2008), available at <http://www.law.com/jsp/article.jsp?id=1202425138326> (last visited Oct. 20, 2008) (internal quotation marks omitted).

⁹ See Walder, *supra* note 5; Perez, *supra* note 3; Johnson, *supra* note 4.

General federal fraud statutes, such as mail and wire fraud, are also available to address any criminality. In fact, these laws reach conduct such as violating technical state regulations and private company policies that the lay person would not think of as “fraud.” Courts’ expansive reading of the mail fraud statute “has made it possible for the federal government to attack a remarkable range of criminal activity even though some of the underlying wrongdoing does not rest comfortably within traditional notions of fraud.”¹⁰ Leading commentators have widely agreed that “[s]cheme to defraud,” the key phrase of the mail fraud and wire fraud statutes, “has long served . . . as a charter of authority for courts to decide, retroactively, what forms of unfair or questionable conduct in commercial, public and even private life should be deemed criminal. In so doing, this phrase has provided more expansive interpretations from prosecutors and judges than probably any other phrase in the federal criminal law.”¹¹

In addition, federal investigators and prosecutors will be looking out for the non-substantive crimes of false statements and obstruction that can be prosecuted under Chapters 47 and 73 of the Federal code. As in the Martha Stewart prosecution, these collateral counts, some of which carry long potential sentences, are often brought even when the substantive counts are not indicted at all, are weak, or are dismissed.

On both the state and local level, prosecutors will likely continue to focus their efforts on the retail-level fraud perpetrated by individual brokers, real-estate agents, lenders, buyers, and borrowers.¹² Like the federal government, states have ample legal authority to prosecute fraud. In addition, states – and not the federal government – regulate mortgage brokers and the insurance industry. They are likely to be the locus of the most urgent *civil and administrative* reforms in the wake of the crisis.

The draconian sentences that are available for punishing white collar offenders put the government in an even more powerful position. In fraud cases, the calculation of “loss” under the federal sentencing guidelines is far from nuanced. Because sentencing judges often use a naked, rough figure based on decline in stock value or the “amount” of the fraudulent transactions, sentences can range as high as Bernie Ebbers’ (25 years), Jeffrey Skilling (more than 24 years), Jamie Olis (24 years, later reduced to 6 years), and Timothy Rigas (17 years). These sentences are comparable to those used for punishing the most violent of crimes in state systems. Only recently, after a series of United States Supreme Court decisions that restored much-needed discretion in sentencing to federal judges, have courts begun to consider more nuanced questions such as whether the drop in stock price was also due to global market factors and whether the amount of loss should be reduced based on the victim/investors’ level of sophistication. These are questions that will prove determinative in enforcement decisions that grow out of this particular financial crisis.¹³

In sum, our analysis demonstrates that the government is sufficiently armed to pursue any criminal conduct that may be related to the market crisis. To the extent that criminal law is capable of

¹⁰ Julie R. O’Sullivan, “Federal White Collar Crime: Cases and Materials,” 483 (2d ed. 2003).

¹¹ John C. Coffee, Jr. & Charles K. Whitehead, *the Federalization of Fraud: Mail and Wire Fraud Statutes*, in 1 Otto G. Obermaier & Robert G. Morvillo, *White Collar Crime: Business and regulatory offenses* § 9.01 (2002).

¹² *See id.*

¹³ Evan Jenness, “Gaining the Upper Hand in Arguing Loss in Securities Fraud Cases,” *The Champion*, September 2008.

detering financial crimes, such laws have already been in place, often resulting in enormous fines and terms of imprisonment that are effectively life sentences. While we acknowledge that the cry for government action may be both loud and forceful, we also note that some are likely to find political advantage in raising or promoting that cry and that any response that is based in criminal enforcement should not lie in an impassioned rush to prosecute executives, nor in the passage of even more federal criminal laws.

I. List of Relevant Charging Statutes:

- **Title 18, Chapter 47 – Fraud and False Statement Offenses**
 - 18 U.S.C. § 1001 – False Statements or Entries
 - 18 U.S.C. § 1005 – Bank Entries, Reports and Transactions
 - 18 U.S.C. § 1014 – Loan/Credit applications generally
 - 18 U.S.C. § 1016 – Acknowledgment/Oath

- **Title 18, Chapter 63 – Mail Fraud Offenses**
 - 18 U.S.C. § 1341 – Mail Fraud
 - 18 U.S.C. § 1343 – Wire Fraud
 - 18 U.S.C. § 1344 – Bank Fraud
 - 18 U.S.C. § 1346 – Honest Services Clause
 - 18 U.S.C. § 1348 – Securities Fraud
 - 18 U.S.C. § 1349 – Attempt/Conspiracy to commit Chapter 63 offense
 - 18 U.S.C. § 1350 – Certification of Financial Reports

- **Title 18, Chapter 73 – Obstruction Offenses**
 - 18 U.S.C. § 1505 – Obstruction of Proceedings
 - 18 U.S.C. § 1510 – Obstruction of Criminal Investigations
 - 18 U.S.C. § 1512 – Witness Tampering
 - 18 U.S.C. § 1516 – Obstruction of Federal Audit
 - 18 U.S.C. § 1517 – Obstructing the Examination of a Financial Institution
 - 18 U.S.C. § 1519 – Destruction, Alteration, or Falsification of Records
 - 18 U.S.C. § 1520 – Destruction of Corporate Audit Records

- **Title 15, Chapter 2b – Securities Exchange Offenses**
 - 15 U.S.C. § 78j – Manipulative and deceptive devices
 - 15 U.S.C. § 78ff – Willful violations; false and misleading statements

- **Other Relevant Criminal Statutes**
 - 18 U.S.C. § 371 - Conspiracy

- **Related SEC Regulations**
 - 17 C.F.R. § 240.10b-5 – Use of Manipulative and Deceptive Devices
 - 17 C.F.R. § 240.10b-5-1 – Insider Trading
 - 17 C.F.R. § 240.10b-5-2 – Duty in misappropriation insider trading cases
 - 17 C.F.R. § 240.12b – Registration and Reporting
 - 17 C.F.R. § 240.12b-2 – Maintenance of records; preparation of reports
 - 17 C.F.R. § 240.13a – Issuers’ reports securities registered pursuant to §12

II. Explanations of Charging Statutes

Statutes such as mail, wire, and securities fraud and many of the obstruction of justice-related statutes are already exceedingly broad in their reach. What follows is a description of the often broad interpretation currently given to these statutes. Some key conclusions emerge:

1. Federal “fraud” offenses often do not, in fact, criminalize what we often think of as “fraudulent” behavior. Rather, under the law of some circuits, a defendant can face a possible 20-year sentence for having merely breached a fiduciary duty – thereby criminalizing bad business judgment.
2. The new criminal sanctions ushered in by Sarbanes-Oxley make it exceptionally easy to attach similarly long sentences to the execution of anything other than entirely routine, long-standing policies for destroying or retaining documents. In addition, the Department of Justice has increasingly used lying-to-the-government theories to indict corporate employees for misstatements made to *private* counsel, which are *then* turned over to the government. This is a significant (but yet unlitigated) tool in DOJ’s toolbox.
3. The “willfully” requirement in criminal federal securities law has been interpreted by some courts as requiring mere proof that the defendant was acting knowingly, rather than by accident or mistake, and that the defendant’s conduct violated civil securities provisions. This could easily lead to the indictments of “low-hanging employees” – managers whose public statements, *in retrospect*, were inaccurate depictions of the health of securities that few understood.
4. These statutes, in conjunction with the federal conspiracy statute (which requires only circumstantial evidence of an agreement and one overt act by one individual in the conspiracy), have been used to indict individuals who were only peripherally involved in the activity. In addition, the willful blindness jury instruction – which allows a jury to convict an executive for failing to detect wrongdoing – can be used to prosecute higher-ups who knew nothing of any criminality. In the hands of a prosecutor who is exercising less than measured discretion, this leverage can be used against the culpable and the non-culpable alike.

In sum, current law already vests a tremendous amount of discretion with the executive branch to prosecute those who truly committed bad acts with criminal intent – and even those who did not.

➤ Title 18, Chapter 47 – Fraud and False Statement Offenses

- False Statements or Entries (18 U.S.C. 1001)

- Elements:
 - (1) knowingly and willfully making false statements, representations, writings, or entries; and
 - (2) those statements are made in a matter within the jurisdiction of a federal agency; but
 - (3) the scienter requirement only applies to the first element, not the second jurisdictional element. *See United States v. Yermian*, 468 U.S. 63, 69 (1984).
- Materiality: “[C]onviction under this provision requires that the statements be ‘material’ to the Government inquiry . . . [and] ‘materiality’ is an element of the offense that the

Government must prove.”¹⁴ However, courts have held that materiality is deemed satisfied even if the government was not actually influenced by or did not rely upon or believe the false statements.¹⁵

- **Bank Entries, reports and transactions (18 U.S.C. 1005)**

This statute prohibits individuals from making “false entr[ies] in any book, report, or statement of [a] bank, company, branch, agency, or organization with intent to injure or defraud such [institution].” Further, it punishes those who participate or share, either directly or indirectly, in any money or benefits of a transaction with the financial institution, when one does so with the intent to defraud the United States government or that institution. Similar to the previous statutes, this could be used to indict any behavior involving the false reporting by corporate officials. The statute’s language explicitly delineates what types of institutions are within its reach.

- **Loan/Credit applications generally (18 U.S.C. § 1014)**

This excessive broadness of this statute to cover even innocent mistakes is due to the fact that it criminalizes *any* false statements or overvaluations made in conjunction with any loan or credit application. The Supreme Court has held that materiality is not an element of this offense and thus the government need not prove such. *United States v. Wells*, 519 U.S. 482, 484 (1997). The statute’s language explicitly delineates what types of institutions are within its reach.

As part of a 2007 Press Release, the FBI listed 18 U.S.C. § 1014 as one of nine “applicable Federal criminal statutes which may be charged in connection with mortgage fraud.”¹⁶ The government has used this statute to prosecute retail-level mortgage fraud committed by individuals such as buyers, borrowers, lenders, and agents.

- **Acknowledgment/Oath (18 U.S.C. § 1016)**

This statute punishes an individual who “knowingly makes any false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person” This statute could be used, in conjunction with 18 U.S.C. § 1014, to prosecute individuals who falsely certified loans and mortgages.

¹⁴ *United States v. Gaudin*, 515 U.S. 506, 509 (1995); see *United States v. Johnson*, 520 U.S. 461, 465 (1997) (restating the holding of *Gaudin* that materiality is an element of 18 U.S.C. 1001 that must be submitted to the jury for consideration).

¹⁵ See *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) (“Actual influence or reliance by a government agency is not required. The statement may still be material ‘even if it is ignored or never read by the agency receiving the statement.’”) (internal citations omitted); *United States v. Steele*, 933 F.2d 1313, 1319 (6th Cir. 1991) (“It is not necessary to show that the statement actually influenced an agency, but only that it had the capacity to do so”) (internal citations omitted); see also *United States v. Herring*, 916 F.2d 1543, 1547 (11th Cir. 1990); *United States v. Land*, 877 F.2d 17, 20 (8th Cir. 1989); *United States v. Notarantonio*, 758 F.2d 777, 785 (1st Cir. 1985); *United States v. Norris*, 749 F.2d 1116, 1121 (4th Cir. 1984).

¹⁶ Federal Bureau of Investigation, *Press Release: FBI Issues Mortgage Fraud Notice In Conjunction With Mortgage Bankers Association* (Mar. 8, 2007), available at <http://www.fbi.gov/pressrel/pressrel07/mortgagefraud030807.htm> and <http://www.fbi.gov/pressrel/pressrel07/mortgagefraudwarning.pdf> (last viewed Oct. 20, 2008).

➤ **Title 18, Chapter 63 – Mail Fraud Offenses**

- **Mail Fraud (18 U.S.C. § 1341)**

Federal mail fraud and wire fraud are two of the broadest criminal statutes in American law. While the elements of the federal mail fraud statute have been subject to a wide range of interpretations and are subject to great debate, we attempt to distill them here.

○ Elements:

- (1) a scheme devised or intending to defraud or for obtaining money or property by fraudulent means;
- (2) use or causing the use of the mails (or private courier) in furtherance of the fraudulent scheme; and
- (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.”

There is also a trend to use the breach of fiduciary duty as the underlying act in both public and private sector acts under 18 U.S.C. § 1346, although some courts have rejected this approach.¹⁷

○ Related Statutes:

- 18 U.S.C. § 1346 provides that a “scheme or artifice to defraud” includes schemes or artifices to deprive another of the intangible right of honest services. This statute is often referred to as the “honest services clause” because it has been interpreted in some, although not all, circuits as criminalizing such behavior as failing to abide by a private company’s internal policy, or acting against the company’s interests, even if action may be not criminal if it is in accordance with a company’s policies and interests.
- 18 U.S.C. § 1349 punishes the inchoate offenses of attempt and conspiracy and be coupled with all of the Chapter 63 offenses.¹⁸

- **Wire Fraud (18 U.S.C. § 1343)**

Along with mail fraud, federal wire fraud is one of the broadest criminal offenses in American criminal law.

○ Elements:

- (1) a scheme devised or intending to defraud or for obtaining money or property by fraudulent means;

¹⁷ See Joshua A. Kobrin, *Betraying Honest Services: Theories Of Trust And Betrayal Applied To The Mail Fraud Statute And § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 816-17, n. 1190 (2006) (“[T]he Fifth Circuit has defined the deprivation of honest services as a failure to perform a duty owed under state law [and] . . . the Third Circuit has not decided whether an underlying state violation is always necessary . . .”).

¹⁸ The following offenses, as discussed in this piece, are codified under Chapter 63: 18 U.S.C. §§ 1341, 1343-44, 1346, 1348-50.

- (2) transmission by means of wire, radio, or television communication in furtherance of the fraudulent scheme; and
- (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.”

- Related Statutes: Same as Mail Fraud 18 U.S.C. § 1341

- **Bank Fraud (18 U.S.C. 1344)**

Bank Fraud is very similar to mail and wire fraud, but the focus is on a defendant’s execution of a fraud upon a financial institution.

- Statute Prohibits: The knowing execution, or attempt to execute, “a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.”

- Elements:

- (1) a scheme devised for intending to defraud or for obtaining money or property by fraudulent means;
- (2) perpetrated against a financial institution as defined by 18 U.S.C. § 20; and
- (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.”

- Related Statutes:

- 18 U.S.C. § 20 defines the term “financial institution.” Under this statute, “financial institution” includes, among other entities, insured depository institutions, insured credit unions, Federal home loan banks, small business investment companies, deposit institution holding companies, Federal Reserve banks and member banks.
- 18 U.S.C. §§ 1346 and 1349, as discussed under Mail Fraud 18 U.S.C. § 1341
- Any of the certification or reporting statutes outlines below, such as 18 U.S.C. §§ 1005, 1350, or 15 U.S.C. § 78m, because a failure to accurately report transactions, funds, etc., could be considered a fraud on the financial institution.

- **Securities Fraud (18 U.S.C. 1348)**

- Elements:

- (1) a scheme devised to or intending to defraud or for obtaining money or property by fraudulent means;
- (2) in connection with any security or the purchase or sale of any security as defined by the statute; and
- (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.” This holding logically extends to the additional crime of securities fraud.

- Related Statutes: Same as those discussed under Mail Fraud – 18 U.S.C. § 1341 and Bank Fraud – 18 U.S.C. 1344.

- **Attempt/Conspiracy (18 U.S.C. 1349)**

This statute establishes the inchoate offenses of attempt and conspiracy with regard to any offense listed under Chapter 63 (Mail Fraud Offenses). It provides that “[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

- **Certification of Financial Reports (18 U.S.C. 1350)**

This statute, enacted by the Sarbanes-Oxley Act of 2002 (SarbOx), (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), sets forth the requirements for periodic financial reporting and makes the failure of corporate officers – specifically the CEO and CFO – to certify financial reports, or to do so in the manner proscribed by the statute, a criminal offense.

- Elements:
 - (1) certification of periodic financial statement or report that does not comport with all the requirements set forth in §§ 13(a) or 15(d) of the Securities Exchange Act of 1934 – 15 U.S.C. §§ 78m(a) and 78o(d); and
 - (2) the person signing the certification “had reason to know, or should have suspected, due to the presence of glaring accounting irregularities or other ‘red flags’ that the financial statements contained material misstatements of omissions” (*Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266).

➤ **Title 18, Chapter 73 – Obstruction Offenses**

- **Definitional Provision (18 U.S.C. § 1515)**

This statute sets forth the definitions of various terms and provisions utilized in the Chapter 73 Obstruction of Justice statutes.

- **Obstruction of Proceedings (18 U.S.C. § 1505)**

This statute covers any pending proceeding before any agency or department of the United States government, as well as any inquiry or investigation by either House of Congress or committee thereof. It specifically provides a criminal penalty for “[w]hoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had”

- **Obstruction of Criminal Investigations (18 U.S.C. § 1510)**

This statute applies to both criminal investigations and judicial proceedings. First, it punishes the willful use “of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute” to a criminal investigator. Second, it

punishes the disclosure of contents of a subpoena either directly or indirectly, by officers of financial institutions.

- **Witness Tampering (18 U.S.C. § 1512)**

This statute punishes against various acts – ranging from physical violence to intentional harassment to corrupt persuasion – done with the intent to prevent, hinder, delay, or influence the production of, testimony of, or appearance of persons and things at judicial proceedings or with respect to criminal investigations. It provides, however, that “an official proceeding need not be pending or about to be instituted at the time of the offense” 18 U.S.C. § 1512 (f)(1).

The statute also punishes “[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with intent to” obstruct, hinder, or delay investigations, proceedings, and/or production of evidence or “the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense” 18 U.S.C. § 1512 (b).

This statute also covers acts by individuals alone or in connection with physical evidence, by punishing “[w]hoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity of availability for use in an official proceeding; or otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.” 18 U.S.C. § 1512 (c).

Both 18 U.S.C. § 1512 (b) and (c) have been used to indict corporate employees who allegedly make untrue statements to private lawyers conducting internal investigations. The theory is that these employees expected (to varying degrees) that these statements would then be turned over to the government.¹⁹

- **Obstruction of Federal Audit (18 U.S.C. § 1516)**

Punishes “[w]hoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties”

- **Obstructing the Examination of a Financial Institution (18 U.S.C. § 1517)**

Punishes “[w]hoever corruptly obstructs or attempts to obstruct any examination of a financial institution by an agency of the United States”

The term financial institution is defined by 18 U.S.C. § 20. Under this statute, “financial institution” includes, among other entities, insured depository institutions, insured credit unions, Federal home loan banks, small business investment companies, deposit institution holding companies, Federal Reserve banks and members banks.

¹⁹ Stephanie Martz, *The Ring Case*, White Collar Crime Prof Blog (Oct. 13, 2008), available at http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/10/heres-an-evergr.html (last visited Oct. 20, 2008).

- **Destruction, Alteration, or Falsification of Records (18 U.S.C. § 1519)**

This statute, also enacted by the Sarbanes-Oxley Act of 2002 (SarbOx), (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), punishes “[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States”

This “statute is drafted in broader terms than prior existing law” and is sometimes referred to as the “anti-shredding provision” of SarbOx.²⁰ “Furthermore, the provision does not limit liability to those actors who are facing a ‘pending proceeding’ nor does it link the ‘intent to obstruct’ element to an official proceeding. Although the actor must form an ‘intent to impede, obstruct or influence’ a federal investigation or administrative action, the statute includes the ‘in relation to or contemplation of’ language – which is unique to the federal obstruction statutes – to modify the mental state sufficient for conviction.”²¹

- **Destruction of Corporate Audit Records (18 U.S.C. § 1520)**

Promulgates requirements for retention of audit records and establishes criminal penalties for violation of any rules or regulations enacted by the SEC, related to record retention, under this statute.

➤ **Title 15, Chapter 2b – Securities Exchanges**

- **Manipulative and deceptive devices (15 U.S.C. § 78j)**

This statute, under Chapter 2b dealing with the Securities Exchange, is the primary statute used to punish securities fraud and violations. Generally there are four types of fraud that can be a basis for a violation under this section: (1) SEC Regulation Rule 10b-5 material omissions and misrepresentations, (2) insider trading, (3) parking, and (4) broker-dealer fraud. Because this statute is essentially read hand-in-hand with Rule 10b-5, 17 C.F.R. § 240.10b-5, it can be used to punish any manipulative behavior or misrepresentations made in connection with securities. Also, this statute can be used broadly to punish both general conduct and specific regulations violations.

- **Willful violations; false and misleading statements (15 U.S.C. § 78ff)**

This is the primary statute under Chapter 2b used to elevate civil regulations to criminal violations when there is evidence of willfulness. As such, it penalizes willful regulatory violations, a willful or knowing failure to file appropriate documents or reports, and willfully or knowingly making misleading statements. When relied upon for an indictment, this statute is often used in conjunction with one or more SEC Regulations.

²⁰ Dana E. Hill, *Anticipatory Obstruction Of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 89 CORNELL L. REV. 1519, 1521 (2004).

²¹ *Id.* at 1522 (internal citations omitted).

➤ **Other Relevant Criminal Statutes**

- **Conspiracy (18 U.S.C. § 371)**

This is the basic criminal offense of conspiracy in the United States criminal code that penalizes any conspiracy to commit any offense or to defraud the United States. It requires proof of an agreement, which can be proven through circumstantial evidence; willing participation by the defendant; and an overt act committed by any one member of the conspiracy.

➤ **Related SEC Regulations and those Commonly Used in Charging Documents**

As discussed above, Title 15, Chapter 2b, makes it a criminal offense to violate any of the Securities Exchange Commission Regulations. These regulations are incredibly voluminous, but there are a handful that commonly appear in criminal indictments. Individuals are often simultaneously charged with violating one of these regulations under 15 U.S.C. § 78j and ff.

- **17 C.F.R. § 240.10b-5** – Employment of Manipulative and Deceptive Devices
- **17 C.F.R. § 240.10b-5-1** – Insider Trading
- **17 C.F.R. § 240.10b5-2** – Duties of trust/confidence in misappropriation insider trading cases
- **17 C.F.R. § 240.12b** – Registration and Reporting
- **17 C.F.R. § 240.12b-2** – Maintenance of records and preparation of required reports
- **17 C.F.R. § 240.13a** – Reports of issuers of securities registered pursuant to section 12