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A Guide to Commonly Used Federal Statutes in Public Corruption Cases

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A Guide to Commonly Used Federal Statutes in Public Corruption Cases

A Practitioner Toolkit

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This toolkit was prepared by the Center for the Advancement of Public Integrity at Columbia Law School with assistance from practitioners experienced in public corruption cases. We can be reached at CAPI@law.columbia.edu.

What is CAPI?

CAPI is a nonprofit resource center dedicated to improving the capacity of public offices, practitioners, policymakers, and engaged citizens to deter and combat corruption. Established as a partnership between the New York City Department of Investigation and Columbia Law School in 2013, CAPI is unique in its city-level focus and emphasis on *practical* lessons and tools.

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Practitioner Toolkit Series



This publication is part of an ongoing series of contributions from practitioners, policymakers, and civil society leaders in the public integrity community. If you have expertise you would like to share, please contact us at CAPI@law.columbia.edu.

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When corruption prosecutors pick up their federal codebooks to determine which statutes should be used, their task is not as simple as turning to a chapter entitled “Public Corruption Offenses.” Not only is there no such chapter, there are not even any individual statutes that purport to charge something called “corruption.” Instead, relevant charges for public corruption crimes can be found in many different federal statutes, including some that might not be intuitive. In this Practitioner Toolkit, we set forth the federal statutes most commonly used to charge the conduct that we think of as “corruption,” including but not limited to bribery. We then provide analysis and some practice pointers for using these statutes to investigate, charge, and litigate these kinds of offenses.

The Federal Bribery Statute, 18 U.S.C. § 201(b)

A. Relevant statutory language:

18 U.S.C. § 201(b):

Whoever—

(a) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

. . . shall be fined under this title . . . or imprisoned for not more than fifteen years, or both.

B) Analysis and Practice Pointers

18 U.S.C. § 201(b) is the statute most commonly used to prosecute bribery of federal public officials. In addition, many of the substantive concepts regarding the application of Section 201 apply to the other criminal statutes discussed below.

The federal bribery statute requires the government to prove that the defendants acted with corrupt intent to engage in a *quid pro quo*, that is, “a specific intent to give or receive something of value in exchange for an official act.” *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999).

The statute applies to all federal public officials, including any “officer or employee or person acting for or on behalf of the United States” or any department, agency, or branch of the federal government in “any official function.” The statutory definition of federal public officials includes employees and agents of the District of Columbia and jurors. The federal bribery statute also applies to any person who has been nominated or appointed to be a public official.

The Supreme Court has construed the definition of public official in Section 201 broadly, to reach any person who “occupies a position of public trust with official federal responsibilities,” whatever the “form of delegation of authority.” *Dixson v. United States*, 465 U.S. 482, 496 (1984). Section 201 covers both federal public officials and those who bribe them.

The statute criminalizes “offer[ing]” or “promis[ing]” a bribe as well as “demand[ing]” or “seek[ing]” a bribe, so the government can often charge a violation of 18 U.S.C. § 201 even when the bribe is never actually paid.

Considerations regarding “anything of value”

- The federal courts have held that the term “anything of value” in the federal bribery statute applies broadly to intangible as well as tangible payments. The thing of value need not go to the public official himself or herself.
- When the thing of value provided in exchange for the official act is a campaign contribution, the government must prove that the payment was made “in return for an explicit promise or undertaking by the official to perform or not to perform an official act.” *McCormick v. United States*, 500 U.S. 257, 273 (1991).
- **Logrolling:** Logrolling, or the exchange of political favors, is not bribery. *United States v. Blagojevich*, 794 F.3d 729 (7th Cir. 2015).

Considerations regarding official act

- The federal bribery statute defines the term “official act” to mean “any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.” In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the Supreme Court addressed the scope of this definition. The Court concluded that the term “official act” has two elements. First, there must be a question or matter that may be brought before a public official. This question or matter must be specific and focused and involve the formal exercise of governmental power, something akin to a lawsuit, an administrative decision, or a hearing. Second, there must be some decision or action on the question or matter. The Court concluded that setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an official act. A

public official can take an official act if that official uses his position to pressure or advise another official to perform an official act, knowing or intending that the official will rely on the pressure or advice to take an action on the question or matter. However, merely expressing support for a position is not an official act unless the public official intends to pressure or advise another official. For a recent application of *McDonnell*, see *United States v. Silver*, 2017 WL 2978386 (2d Cir. July 13, 2017).

- The public official need not have the actual power to perform the promised official act, as long as the public official tells the bribe payor that he has the power to perform the requested official act. Similarly, if the bribe payor believes the public official has the necessary power, that is enough.

Note that the Supreme Court’s interpretation of the term “official act” in Section 201(b) likely will apply to a bribery charge under some other statutes as well, including extortion (18 U.S.C. § 1951) and honest services fraud (18 U.S.C. § 1346). Thus, for these kinds of cases, prosecutors should ensure that their jury instructions are consistent with McDonnell. McDonnell’s application to federal program bribery (§ 666) is not entirely settled. See U.S. v. Boyland, 2017 WL 2918840 (2d. Cir. July 10, 2017) (holding that McDonnell does not apply to § 666 charge); U.S. v. Porter, 2017 WL 1095040 (E.D. Ky. Mar. 22, 2017) (same).

Considerations regarding intent:

- The evidence of a *quid pro quo* need not be explicit. A corrupt agreement may be implied from the public official’s words and actions, as “otherwise the law’s effect could be frustrated by knowing winks and nods.” *Evans v. United States*, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).
- The fact that a payment to a public official may be motivated in part by friendship is not a defense, so long as one of the motive for the payment is to influence the public official to perform an official act. Similarly, it is not a legal defense to the crime of bribery that the public official would have performed the official act in question even without the bribe, for example because the official act was good for the community or beneficial to the public official’s career.
- A bribery scheme can be charged as a course of conduct—that is, an exchange of a series of things of value (or a “stream of benefits”) for a series of official actions. When a course of conduct bribery scheme is charged, the government is not required to prove a connection between each individual payment and a particular official action.

Charging Considerations: Section 201 is a relatively straightforward charge that is used in just about every case involving bribery of a federal public official.

Recent Examples: *United States v. Fattah* 83 F.Supp.3d 632 (2015) (E.D. Pa. Jan. 6, 2015); *United States v. Menendez* 109 F.Supp.3d 720 (2015); *United States v. Young*, No. 14-CR-4 (W.D. Va. 2015); *United States v. Whitman et al.* (M.D. Ga. 2014).

Gratuities, 18 U.S.C. § 201(c)

A) Relevant statutory language:

18 U.S.C. § 201(c):

Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;

shall be fined under this title or imprisoned for not more than two years, or both.

B) Analysis and Practice Pointers

18 U.S.C. § 201(c) makes it a crime to offer or accept a gratuity. A gratuity is a thing of value given “for or because of any official act performed or to be performed by” a public official. Like the federal bribery statute, Section 201(c) applies only to federal public officials. Offering or accepting a gratuity is a lesser included offense of bribery.

Difference between Bribe and Gratuity: A gratuity, unlike a bribe, does not require proof of a quid pro quo or a corrupt intent to influence an official act. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999). As a practical matter, the difference between a bribe and a gratuity often comes down to timing. When the payment comes *after* the official act, the proper charge is probably gratuity, unless there is evidence of an agreement to make the payment before the official act. When the payment comes *before* the official act, the proper charge is probably bribery, because the connection between the payment and the official act will be circumstantial evidence that the payment was intended to influence the official act.

Payment to Public Official: Unlike a bribe, a gratuity must be paid to the public official personally.

Status Gratuities: A status gratuity is a payment made to a public official because of the official’s position rather than because of a specific official act. In *Sun-Diamond*, the Supreme Court rejected the concept of a status gratuity, holding that “the Government must prove a link between a thing of value conferred upon a federal official and a specific ‘official act’ for or because of which it was given.” 526 U.S. at 414.

Charging Considerations: As discussed above, when the thing of value is paid *after* the official act is performed, and there is no evidence of an agreement to provide the thing of value prior to the performance of the official act, gratuity may be the proper charge.

Recent Examples: *United States v. Verrusio*, No. 09-CR-64 (D.D.C. 2017); *United States v. Greenbut*, 2016 U.S. Dist. LEXIS 156440 (C.D. Cal. Nov. 8, 2016); *United States v. Kline* (W.D.N.C. 2015).

Hobbs Act Extortion, 18 U.S.C. § 1951

A) Relevant Statutory Language

18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

B) Analysis and Practice Pointers

The Hobbs Act makes it a crime to obtain property from another with that person’s consent under the color of official right in a manner that affects interstate commerce. (Under the Hobbs Act, extortion can also be committed through the use or threat of force, violence, or fear. However, these provisions are rarely used in the context of public corruption cases.)

The standard for proving extortion under the Hobbs Act is very similar to the standard for proving bribery: “The Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.” *Evans v. United States*, 504 U.S. 255, 268 (1992). Indeed, many of the concepts discussed above regarding the scope of the federal bribery statute also apply to the Hobbs Act (e.g., the public official need not actually have the power to take the official action, extortion can be charged as a course of conduct, the standard is heightened where the payment is made in the form of campaign contributions, etc.). For a recent, concise statement of how the Hobbs Act applies to extortion, see *United States v. Buffis*, 2017 App. LEXIS 15051 (1st Cir. Aug. 14 2017).

“Property”: The Hobbs Act uses the term “property” (rather than “anything of value”) to describe the thing exchanged for the official act. The courts have recognized that the term “property” as it is used in the Hobbs Act is “expansive,” and includes, “in a broad sense, any valuable right considered as a source or element of wealth, including a right to solicit business.” *United States v. Arena*, 180 F.3d 380, 392 (2d Cir. 1999). However, the Supreme Court has held that investment advice is not “property,” and therefore an attempt to compel a person to recommend that his employer approve an investment does not constitute extortion for purposes of the Hobbs Act. *Sekhar v. United States*, 133 S. Ct. 2720 (2013). This is because obtaining property requires “not only the deprivation but also the acquisition of property.” *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 404 (2003). “The property extorted must therefore be *transferable*—that is, capable of passing from one person to another.” *Sekhar*, 133 S. Ct. at 2725.

In addition, several federal courts have concluded that the term “property” as it is used in the Hobbs Act does not include sexual activity in most circumstances. See *Sharpe v. Kelley*, 835 F. Supp. 33, 34 (D. Mass. 1993); *United States v. Warme*, No. 09-CR-19A, 2010 WL 125846, at *4 (W.D.N.Y. Jan. 7, 2010). This means that a public official who

demands sexual favors in exchange for an official act likely does not commit extortion under the Hobbs Act (though he or she may be violating some of the other statutes discussed herein).

Effect on Interstate Commerce: The Hobbs Act requires that the government prove an effect on interstate commerce. Because the Hobbs Act is imbued with the full reach of Congress's Commerce Clause Power, the government can meet this element by establishing a de minimis effect on interstate commerce, or even the reasonable probability of an effect on interstate commerce. This low threshold can be met, for example, with evidence that the extortion payment would have been made using funds that a company would otherwise use to purchase items in interstate commerce, or that the payment was wired using an interstate transfer of funds. *United States v. Mitov*, 460 F.3d 901, 908-09 (7th Cir. 2006). This element can be tricky where the victim of the extortion is an individual, not a business, and therefore the funds that might be used to pay the public official would not necessarily otherwise flow through interstate commerce. *E.g.*, *United States v. Perrotta*, 313 F.3d 33 (2d Cir. 2002).

Charging Considerations: Extortion casts the bribe payor as a victim, and therefore may be an appropriate charge in a case where the public official aggressively solicited the bribe payment.

Note that the Supreme Court's interpretation of the term "official act" in McDonnell v. United States likely will apply to a bribery charge under 18 U.S.C. § 1951 as well. (See above in discussion of § 201 bribery offenses.) Thus, for these kinds of cases, prosecutors should ensure that their jury instructions are consistent with McDonnell.

Recent Examples: *United States v. Boyland*, 862 F.3d. 279 (2d Cir. 2017); *United States v. Pomrenke*, No. 15-CR-33 (W.D. Va. 2016); *United States v. Infante* (S.D. Tex. 2015); *United States v. Raphael*, 2015 U.S. Dist. LEXIS 155246 (S.D. Ohio 2015); *United States v. Willis*, 2015 U.S. Dist. LEXIS 77474 (D.V.I. 2015).

Federal Program Bribery, 18 U.S.C. § 666

A. Relevant statutory language:

18 U.S.C. § 666:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at \$5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of \$5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of \$10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

B) Analysis and Practice Pointers:

The federal program bribery statute applies to agents and employees of state and local government entities that receive over \$10,000 in federal funds in a given year. For those individuals, Section 666 prohibits both embezzlement and bribery. When the violation of Section 666 is based on bribery, the substantive concepts discussed above for Section 201 apply. The key issue in deciding whether to charge a state or local official under Section 666 is nearly always whether the government can meet the statute's jurisdictional elements.

Value of Transaction: The value of the transaction at issue must be at least \$5,000. When the defendant is charged with theft, fraud, or embezzlement, this requirement is simple—the defendant must have stolen or embezzled at least \$5,000. When the defendant is charged with bribery, this requirement means the government must prove that the bribery related to business or transactions of the government entity that are valued at \$5,000 or more.

When the official action involves a tangible item, like a government contract, the analysis is usually fairly straightforward—the question is whether the value of that item exceeds \$5,000. But in some cases, the official action that is connected to the bribe payment may be intangible, such as payments to a state prison guard in exchange for extra conjugal visits or lenient treatment. In such cases, courts will typically look to the amount of the bribe payment as evidence of the value of the intangibles connected to the official act. *E.g., United States v. Fernandez*, 722 F.3d 1, 13 (1st Cir. 2013) (“Hence, when the subject matter of the bribe is a ‘thing of value’ without a fixed price, courts may look to the value of the bribe as evidence of the value of the ‘business, transaction, or series of transactions.’”); *United States v. Marmolejo*, 89 F.3d 1185, 1193-94 (5th Cir. 1996). **But do not be confused by this principle!** While courts may look to the value of the bribe in order to determine the value of the business or transaction at issue, Section 666 does not contain any **requirement** that the bribe payment be any particular amount. Rather, like Section 201, Section 666 requires only that the bribe payment be “anything of value.”

To meet the \$5,000 requirement, the value of a series of transactions can be aggregated, so long as the transactions are part of a single plan and fall within a one-year period. *United States v. Hines*, 541 F.3d 833 (8th Cir. 2008).

Federal Funding Requirement: In addition to the \$5,000 valuation requirement, Section 666 also requires that the defendant be an agent of a state or local government entity that receives over \$10,000 in federal funds in a given year. **The government need not prove that the federal funds are implicated in the bribery scheme.** *Sabri v. United States*, 541 U.S. 600 (2004). This funding requirement can be met through evidence of federal funds provided under grants, contracts, subsidies, loans, guarantees, or insurance. *Fischer v. United States*, 529 U.S. 667 (2000). For a recent discussion of the challenges associated with proving the federal funding requirement, see *United States v. Doran*, 2017 WL 1487222 (11th Cir. Apr. 26, 2017).

Agent: The public official accepting the bribe must be an agent of the government entity that receives the federal funds. The statute defines an “agent” as “a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner director, officer, manager, and representative.” As the federal courts have recognized, this definition is “an expansive one,” *United States v. Lupton*, 620 F.3d 790, 801 (7th Cir. 2010), and may include employment relationships not enumerated in the statute, like an independent contractor, so long as the evidence shows that the defendant had the authority to act on behalf of the government entity. **Remember that the defendant must be an agent of the particular state or local government entity that receives at least \$10,000 annually in federal funds.**

Attempted Bribery: Section 666(a)(1)(B) makes it a crime to “accept[] or agree[] to accept, anything of value,” meaning that the statute is violated even if no payment is actually received.

Bona Fide Salary Exception: Section 666(c) provides that the statute “does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.” One might think that this provision simply means that a person cannot be prosecuted for federal program theft or bribery based on accepting bona fide compensation. But courts have applied subsection (c) to the entire statute. Thus, for example, courts have held that, in light of subsection (c), the federal funding requirement means that the government entity must receive \$10,000 in federal funds annually after excepting bona fide salary paid to the entity by the federal government. *United States v. Chafin*, 808 F.3d 1263, 1273 (11th Cir. 2015). Similarly, the \$5,000 transaction value requirement also does not include bona fide salary payments. *United States v. Mills*, 140 F.3d 630 (6th Cir. 1998).

Charging Considerations: As discussed above, Section 666 contains jurisdictional elements that can be difficult to meet in some cases. However, Section 666 also criminalizes a broader range of conduct than some of the other common corruption statutes, like embezzlement.

Recent Examples: *United States v. Porter*, No. 7:15-cr-022-DCR (E.D. Ky.); *United States v. Arnold*, 2016 U.S. Dist. LEXIS 136003 (M.D. Tenn. 2016); *United States v. Pomrenke*, No. 15-CR-33 (W.D. Va. 2016); *United States v. Maggio* Docket No. 4:15-cr-00001 (E.D. Ark. 2015); *United States v. Infante* (S.D. Tex. 2015); *United States v. Acevedo-Hernandez* Civil No. 12-1763 (DRD) (D.P.R. 2014); *United States v. Willis*, 2015 U.S. Dist. LEXIS 77474 (D.V.I. 2014).

Honest Services Mail and Wire Fraud: 18 U.S.C. §§ 1341, 1343, 1346

A) Relevant Statutory Language

18 U.S.C. §§ 1341 - Frauds and swindles:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both

18 U.S.C. §§ 1343 - Fraud by wire, radio, or television:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both

18 U.S.C. §§ 1346 - Definition of “scheme or artifice to defraud”:

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

B) Analysis and Practice Pointers

The mail and wire fraud statutes make it a federal crime to knowingly devise or participate in a scheme to defraud that involves the use of the mails or interstate wires. Prior to *McNally v. United States*, 483 U.S. 350 (1987), the federal courts had interpreted the fraud statutes to criminalize both schemes to defraud individuals of tangible property (like money) and schemes to defraud individuals of intangible rights (like the public’s right to the honest services of public officials). After the Supreme Court’s decision in *McNally* limiting the reach of the fraud statutes to tangible fraud schemes, Congress responded by enacting 18 U.S.C. § 1346, which states that the mail and wire fraud statutes apply to “a scheme or artifice to deprive another of the intangible right of honest services.” In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court interpreted Section 1346 to apply only to bribery and kickback schemes, and not to schemes to defraud individuals of other honest services (for example undisclosed conflicts of interest).

The honest services fraud statute is a powerful tool for the prosecution of corrupt state and local public officials. In most cases, the requirement of an interstate wire or mailing in furtherance of the fraud scheme is much easier to establish than the various jurisdictional limitations set forth in Section 666. In addition, a pattern of corrupt activity can be easily charged as a single honest services fraud scheme. And the pattern jury instructions for an honest services fraud charge contain language explaining to the jury the dangers of corrupt public officials.

Materiality: An honest services fraud charge requires the government to show that the scheme to defraud was accomplished “by means of false or fraudulent pretenses, representations, or promises.” Note that when multiple defendants are charged with participating in a single fraud scheme, the government is not required to prove that each defendant made a false representation. *Reistroffer v. United States*, 258 F.2d 379, 387 (8th Cir. 1958). The false or fraudulent pretenses, representations, or promises must be material. *Neder v. United States*, 527 U.S. 1, 25 (1999). A concealed bribe or kickback constitutes a material false pretense. *United States v. Langford*, 647 F.3d 1309, 1321 (11th Cir. 2011).

Interstate Wire or Mailing in Furtherance of the Scheme: A mailing or wire is in furtherance of a fraud scheme if it is a step in the execution of the scheme, as the scheme is conceived by the perpetrators. Note that mailings and wires that occur after the fraud scheme has been completed—for example wires related to the perpetrators’ expenditure of their ill-gotten gains—are not in furtherance of the scheme. *E.g., United States v. Phillips*, 704 F.3d 754 (9th Cir. 2012). E-mail communications and text messages will constitute interstate wires provided that they are routed through servers located outside the state where the e-mail or text was sent. *Colony at Holbrook, Inc. v. Strata G.C., Inc.*, 928 F.Supp. 1224 (E.D.N.Y. 1996); *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 808 F.Supp. 213 (S.D.N.Y. 1992), *aff’d* 99 F.3d 401 (2d Cir.1995 (summary order)). Internet services providers will provide information about the location of their servers during a particular time period in response to a grand jury or trial subpoena. Similarly, most bank transactions constitute interstate wires because banks typically route payments

through out-of-state locations. *United States v. Mills*, 199 F.3d 184,189 (5th Cir. 1999). Banks will provide information about the interstate nature of their transaction processing in response to a grand jury or trial subpoena.

The Duty of Honest Services: A defendant's conduct violates the honest services fraud statute only if the defendant owes a duty of honest services. It is well established that state and local public officials owe a duty to the public at large not to engage in bribery or kickback schemes. However, the federal courts have upheld the application of the honest services fraud statute outside the public-sector context, where the evidence shows that the defendant owed a fiduciary duty to a particular entity and that the defendant breached that fiduciary duty by engaging in bribery or kickbacks. Thus, the courts have recognized that an employee owes a fiduciary duty to his or her employer, and therefore an employee can be prosecuted under the honest services fraud statute for accepting bribes in exchange for acts within the scope of employment. *See, e.g., United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003). In these so-called "private sector" honest services fraud cases, the government must establish the existence of a fiduciary duty in addition to all the other elements of a typical honest services fraud prosecution.

Tangible Fraud: If a defendant engages in a fraud scheme that involves both the deprivation of honest services through bribery or kickbacks and the deprivation of money or property using false or fraudulent representations, the defendant can be charged with a multi-object fraud scheme.

Charging Considerations: When the target of the investigation is a state or local official and the jurisdictional elements of Section 666 are difficult to establish, honest services fraud may be a good alternative or complementary charge. As the cases discussed above make clear, in most circumstances it will not be difficult to establish a wire or mailing in furtherance of the scheme.

Note that the Supreme Court's interpretation of the term "official act" in McDonnell v. United States likely will apply to a bribery charge under 18 U.S.C. § 1346 as well. (See above in discussion of § 201 bribery offenses.) Thus, for these kinds of cases, prosecutors should ensure that their jury instructions are consistent with McDonnell.

Recent Examples: *United States v. Fattah*, *supra*; *United States v. Woods* (W.D. Ark. 2017); *United States v. Bills*, No. 14-CR-135 (N.D. Ill. 2016); *United States v. Pomrenke*, *supra*; *United States v. Arnold*, 2016 U.S. Dist. LEXIS 136003 (M.D. Tenn. 2016); *United States v. Whitman et al.* (M.D. Ga. 2014); *United States v. Lustyik*, 2012 U.S. Dist. LEXIS 178251 (D. Ut. 2012).

False Statements: 18 U.S.C. § 1001

A) Relevant statutory language:

18 U.S.C. § 1001:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, [and/or] imprisoned not more than 5 years

B) Analysis and Practice Pointers

Section 1001 makes it a crime to make a false statement “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” In corruption cases, it is common for defendants to attempt to conceal their crimes by making false statements to federal law enforcement officers, to regulators, and/or on paperwork like campaign finance reports and ethics disclosure forms.

Materiality: The plain language of Section 1001 includes materiality as an element. Materiality is a question of fact for the jury to decide. *United States v. Valdez*, 594 F.2d 725 (9th Cir. 1979); *United States v. Kim*, 808 F. Supp. 2d 44 (D.D.C. 2011).

Judicial and Legislative Exceptions: The statute contains narrow exceptions for statements made in certain judicial and legislative proceedings.

Other Obstruction Statutes To Consider Charging: Witness Tampering (18 U.S.C. § 1512), Falsification of Records (18 U.S.C. § 1519).

RICO, 18 U.S.C. § 1961 *et seq.*

A) Synopsis of Relevant Statutory Language

The federal racketeering statute, 18 U.S.C. § 1961 *et seq.*, makes it a crime “to conduct or participate” in the affairs of an enterprise “through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). The statute also criminalizes a conspiracy to engage in such conduct. *Id.* § 1962(d). The RICO conspiracy provision does not require proof of an overt act in furtherance of the conspiracy.

The statute defines the term “racketeering activity” to include extortion, bribery, and mail and wire fraud. 18 U.S.C. § 1961(1). Note that federal program bribery, 18 U.S.C. § 666, is not a RICO predicate.

An “enterprise” is defined as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). As the statutory language makes clear, a RICO enterprise can be an existing organization or an “association in fact,” which the Supreme Court has defined as a “group of persons associated together for a common purpose of engaging in a course of conduct.” *United States v. Turkette*, 452 U.S. 576, 583 (1981). The essential features of an association-in-fact enterprise are: “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle v. United States*, 556 U.S. 938, 946 (2009). An association-in-fact enterprise “need not have a hierarchical structure or ‘chain of command’; decisions may be made on an ad hoc basis and by any number of methods.” *Id.* at 948.

A pattern of racketeering activity “requires at least two acts of racketeering activity...the last of which occurred within ten years...after the commission of a prior act of racketeering activity.” 18 U.S.C. § 1961(5). To establish a pattern of racketeering activity, the government must show that “the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.” *H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

B) Analysis and Practice Pointers

The federal courts have upheld application of the RICO statute to public corruption schemes, including cases in which the government charged the defendants under an “association-in-fact” enterprise theory. *See, e.g., United States v. Ferriero*, No. 13-CR-592 (D.N.J. 2016); *United States v. Warner*, 498 F.3d 666 (7th Cir. 2007); *United States v. Cianci*, 378 F.3d 71, 78 (1st Cir. 2004); *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1984); *United States v. Fattah*, 2016 WL 1043554 (E.D. Pa. 2016); *United States v. McDade*, 827 F. Supp. 1153 (E.D. Pa. 1993).

The RICO statute can be used to bring together in a single charge a wide range of corrupt behavior. The federal courts have recognized that multiple conspiracies that would otherwise be tried separately can be charged as a single overarching racketeering conspiracies. *See United States v. Riccobene* (3d Cir.). In addition, RICO has a ten-year statute of limitations, and state crimes can be charged as RICO predicates. However, the jury instructions on the elements of RICO offenses are very dense, and therefore charging a RICO offense can introduce significant legal complications.

Theft Statutes, 18 U.S.C. § 641 and 18 U.S.C. § 654

A) Relevant Statutory Language

18 U.S.C. § 641 - Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 654 - Officer or employee of United States converting property of another

Whoever, being an officer or employee of the United States or of any department or agency thereof, embezzles or wrongfully converts to his own use the money or property of another which comes into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or employee, shall be fined under this title or not more than the value of the money and property thus embezzled or converted, whichever is greater, or imprisoned not more than ten years, or both; but if the sum embezzled is \$1,000 or less, he shall be fined under this title or imprisoned not more than one year, or both.

B) Analysis and Practice Pointers

18 U.S.C. § 641 prohibits the theft of government property. That statute makes it a crime to “embezzle, steal, purloin, or knowingly convert,” or “without authority, sell, convey, or dispose of any record, voucher, money, or things of value” of the United States. The statute also criminalizes knowingly receiving stolen property of the United States.

A similar statute, 18 U.S.C. § 654, prohibits theft by a federal public official. That statute makes it a crime for an officer or employee of the United States to “embezzle or wrongfully convert” the money or property of another “which comes into his possession or under his control” in the execution of his office or “under color or claim of authority” as a public official.

The scope of conduct prohibited by Section 641 is broad, and includes abuse or misuse of property as well as stealing or embezzlement. *Morissette v. United States*, 342 U.S. 246 (1952). The majority view is that Section 641 protects intangible property. *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). The statute does not require the government to prove that the defendant knew that the property belonged to the United States. *United States v. Matzkin*, 14 F.3d 1014, 1020 (4th Cir. 1994).

Section 654 does not require that the stolen property belong to the United States. But it does require that the defendant gain possession of the property “either while properly performing his employment or while pretending to carry out the duties of his employment.” *United States v. Rippon*, 537 F. Supp. 789, 790 (C.D. Ill. 1982).

Recent Examples: *United States v. Corrine Brown* Case No. 3:16-cr-93-J-32JRK (M.D. Fl. 2016); *United States v. Bowman* (C.D. Cal. 2016); *United States v. Lustyik*, No. 13-CR-616 (S.D.N.Y. 2014).

The Travel Act, 18 U.S.C. § 1952

A) Relevant Statutory Language

18 U.S.C. § 1952:

(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

- (1) distribute the proceeds of any unlawful activity; or
- (2) commit any crime of violence to further any unlawful activity; or
- (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(B) an act described in paragraph (2) shall be fined under this title, imprisoned for not more than 20 years, or both, and if death results shall be imprisoned for any term of years or for life.

(b) As used in this section (i) “unlawful activity” means . . . (1) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States . . .

B) Analysis and Practice Pointers

The Travel Act, 18 U.S.C. § 1952, makes it a crime to use a “facility in interstate or foreign commerce” with the intent to promote “any unlawful activity” and thereafter to perform “any unlawful activity.” 18 U.S.C. § 1952(a). The statute defines “unlawful activity” to include “extortion [or] bribery...in violation of the laws of the State in which they are committed or of the United States.” *Id.* § 1952(b). This means that the Travel Act can be used to prosecute a defendant who commits bribery in violation of *state* law, so long as the defendant used an interstate facility.

Interstate Facility: The Travel Act’s jurisdictional nexus (use of a “facility in interstate...commerce”) is broader than those of the mail and wire fraud statutes. Any phone call, email, text message, mailing, or wire transmission will constitute the use of a facility in interstate commerce, even if the mail or wire did not actually cross state lines. *United States v. Herrera*, 584 F.2d 1137 (2d Cir. 1978).

Charging Considerations: A Travel Act charge may be appropriate where the state corruption statute covers broader conduct than the federal statutes discussed above and the conduct at issue is closer to the line. In addition, the Travel Act can be a useful charge when the evidence on jurisdictional elements for Section 666 or honest services fraud is weaker (for example, where the evidence shows phone calls or emails in furtherance of the scheme, but it is not clear whether those communications actually crossed state lines, making it easier to prove the use of an interstate facility than an interstate wire in furtherance of the scheme).

Recent Examples: *United States v. Williams*, No. 17-cr-137 (E.D. Pa. 2017).