



WHITE-COLLAR CRIME

Expert Analysis

Targeting Law Enforcement To Improve the Economy

Experience teaches that crises in public confidence often beget the same political reaction: more criminal legislation and increasingly aggressive enforcement policies, sometimes regardless of necessity. To be sure, not every citizen accepts the notion that the more than 4,450 federal criminal statutes currently in force are inadequate weapons for the Executive to ensure domestic tranquility. Recent events may cause some to wonder whether “the more things change, the more they stay the same.”

President Barack Obama’s stimulus package, passed by Congress on Feb. 13, 2009, in response to our nation’s current economic crisis, included almost \$4 billion for criminal justice programs. At first blush, it may not be clear how increased criminal enforcement will help the economy recover. The hope is that a renewed focus on white-collar crime, in the United States and abroad, will serve to replenish the government’s coffers and increase investor confidence in response to recent alleged wrongdoing in the financial sector. This renewed focus on crime enforcement is not limited to the new stimulus package, but also is at the heart of other legislation currently pending, some of which has met with mixed reviews in the legal community.

Proposed Legislation

• **The Fraud Enforcement and Recovery Act (S. 386).** On Feb. 11, 2009, the Senate Judiciary Committee held hearings on “The Need for Increased Fraud Enforcement in the Wake of Economic Downturn.” Committee Chairman, Senator Patrick Leahy, D-Vt., called upon law enforcement to “track down and punish” those responsible for the financial and mortgage frauds, noting that the purpose of the hearings was to “learn more about the scope of the fraud problem, about how enforcement efforts are progressing, and whether the Justice Department needs new tools and greater resources to root out those responsible for these financial crimes.”¹

The impetus for these hearings was the introduction by Senator Leahy and Senator



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Charles Grassley, R-Iowa, of a bill entitled the Fraud Enforcement and Recovery Act (FERA). The bill proposes to provide money to strengthen fraud enforcement at the Justice Department, the FBI, and other federal agencies. The press release announcing the proposed legislation notes that the Leahy-Grassley bill is aimed primarily at white-collar crimes and is designed to expand the reach of the statutes currently used by the government to prosecute those crimes. Specifically, the bill seeks to accomplish the following:

Some of the legislation currently pending has met with mixed reviews in the legal community.

- (1) amend the definition of “financial institution” to extend federal fraud laws to mortgage lending business not directly regulated or insured by the federal government;
- (2) amend the major fraud statute to protect funds expended under the Troubled Asset Relief Program (TARP) and the economic stimulus package;
- (3) authorize funding to hire fraud prosecutors and investigators at the Department of Justice, the FBI, and other law enforcement agencies, and authorize funding for U.S. Attorneys’ Offices to help staff FBI mortgage fraud task forces;
- (4) amend the federal securities statute to cover fraud schemes involving commodities futures and options;
- (5) amend the criminal money laundering statute to make clear that the proceeds of specified unlawful activity include the gross receipts of the illegal activity, and not just the profits of the activity; and
- (6) improve the False Claims Act to clarify that the act was intended to extend to any false or fraudulent claim for government money or property, whether or not the claim is presented to a government official

or employee, whether or not the government has physical custody of the money, and whether or not the defendant specifically intended to defraud the government.²

In announcing the legislation, Senator Leahy stated that although “[t]he federal government has spent hundreds of billions of dollars to stabilize our banking system, and Congress will soon spend even more to restart our economic recovery...to date, we have paid far too little attention to investigating and prosecuting the mortgage and corporate frauds that have so dramatically contributed to this economic collapse.”³

Rita Glavin, acting assistant attorney general for the Criminal Division at the Justice Department, testified before the Judiciary Committee urging congressional approval of the bill. “The financial crisis demands an aggressive and comprehensive law enforcement response, including vigorous fraud investigations and prosecutions of securities and commodities firms, banks, and individuals that have defrauded their customers and the American taxpayer and otherwise placed billions of dollars of private and public money at risk.”⁴

Many believe the legislation engages in “overcriminalization,” however. On Feb. 11, 2009, two unlikely allies, the National Association of Criminal Defense Lawyers and the Heritage Foundation, a conservative policy think tank, submitted a joint letter to the Senate Judiciary Committee objecting to certain language in the act. Specifically, the letter argues that Section 2 of the bill, which significantly expands existing federal criminal statutes, is unnecessary, redundant and runs the risk of overreaching: “Among the over 4,450 criminal offenses already in federal law, Congress has already enacted all of the tools prosecutors need (and far more) to prosecute any criminal activity associated with the subprime market or the current financial crisis.”⁵

Addressing the proposed changes listed in Senator Leahy’s bill in the context of the extensive federal criminal code, the letter argues that federal prosecutors already are “sufficiently armed to prosecute any criminal conduct that has a federal nexus and may be related to the market crisis.” Concluding that the expansion proposed in the legislation does not provide any methods not already in the federal government’s arsenal, the organizations encourage amending the bill to appropriately reflect their concerns. “[A]nalysis of Section 2 of FERA reveals that it is both redundant and an inappropriate expansion of federal authority,

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at the expense of state and local law-enforcement operations, based on the thinnest of Commerce Clause jurisdictional hooks."⁶

• **The Derivatives Markets Transparency and Accountability Act of 2009 (H.R. 977).** In the same vein, on Feb. 2, 2009, Representative Collin Peterson, D-Minn., the chairman of the House Agriculture Committee, introduced a bill that would expand the powers of the Commodity Futures Trading Commission. While the proposed legislation, entitled the "Derivatives Markets Transparency and Accountability Act of 2009," significantly broadens the CFTC's regulation of over-the-counter commodity transactions and expands the agency's reach to international exchanges, perhaps the most noteworthy change is that section which would grant the CFTC the authority to initiate and conduct criminal litigation relating to violations of the act where the Attorney General has declined such litigation.⁷

In a Feb. 10 speech at the Brookings Institution in Washington, D.C., CFTC Commissioner Bart Chilton praised the legislation, calling specifically for the CFTC to be granted this criminal prosecutorial power. The agency currently is authorized to pursue only administrative and civil cases, while criminal actions fall to the Justice Department. Mr. Chilton called this a "mistake" given the highly technical nature of the derivatives-related cases dealt with by the CFTC which "require[] the expertise of CFTC lawyers to succeed." "To prosecute these violations effectively, attorneys and investigators must be experts in the functioning of markets. CFTC enforcement personnel are specially trained to handle these matters, unlike DOJ prosecutors who are more likely to be generalists, unfamiliar with the mechanics of derivatives trading and the interstices of the Act and regulations."⁸

• **Public Corruption Act (S. 49).** Also of note is the Public Corruption Prosecutions Improvements Act of 2009, which was scheduled for markup by the Senate Judiciary Committee on Feb. 26, 2009. This bill, also introduced by Senator Leahy, with Senator John Cornyn, R-Tex., considerably broadens the current criminal prohibitions against public corruption and bribery of a public official. Specifically, S.49 proposes to: (i) expand the statute of limitations for corruption offenses; (ii) add "anything of value" to the "money and property" definition of mail and wire fraud; (iii) decrease from \$5,000 to \$1,000 the amount of money necessary to constitute a violation of the statute prohibiting theft or bribery concerning programs receiving federal funds; (iv) increase the maximum terms of imprisonment for related statutes; and (v) add bribery, deprivation of honest services, and Hobbs Act violations as predicate offenses to the racketeering laws.⁹

International Considerations

Both Senator Leahy's Fraud Enforcement and Recovery Act and Representative Peterson's Derivatives Markets Transparency and Accountability Act of 2009 contain an international component. The Senate bill targets the use of offshore funds for the purpose of evading income taxes by criminalizing the transfer of funds into or out of the United States with the intent to engage in conduct constituting a violation of U.S. income tax laws. The House bill requires international exchanges that host U.S.-based

commodities to share data with the CFTC and adopt position limits similar to those imposed on American exchanges.

As noted by Acting Assistant Attorney General Glavin during her testimony before the Senate Judiciary Committee, "[d]ue to the rapid globalization of the financial system in the last two decades and the development of offshore banking centers, we have seen the development of a troubling growth of income tax evasion that exploits the international funds transfer mechanisms and those offshore centers."

International Focus

The government's international focus is not altogether new. Trends in the enforcement of the Foreign Corrupt Practices Act (FCPA), which criminalizes the bribery of foreign officials, show an escalation over the past couple of years, which commentators predict will last into 2009. Although the FCPA statute is over 30 years old, it has been enforced with great vigor in recent years. Last year had the highest level of enforcement of 13 cases for the SEC, up from eight cases in 2006, and 20 cases for the Justice Department, up from seven cases in 2006.¹⁰

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In addition to an increase in the number of cases, other key developments in the enforcement of the FCPA include an increase in the amount of penalties assessed, an increasing focus on individual prosecutions, and the pairing of FCPA violations with other crimes. With respect to this last trend, experts note that those accused of FCPA violations now face "three silos of exposure: DOJ and SEC investigations; collateral civil litigation; and lawsuits filed by competitors or by other people who were disgruntled by the FCPA-related issues." Finally, commentators note that the U.S. prosecutors have worked increasingly closer with their counterparts in other countries to increase "foreign coordination" in FCPA enforcement.¹¹

All of these trends can be observed in the recent case of Kellogg Brown & Root, a global engineering, construction, and services company, accused of bribing Nigerian government officials to obtain contracts. On Feb. 11, 2009, the Department of Justice released a press release announcing that the company had pled guilty to the FCPA charges and settled a parallel civil case brought by the SEC, paying a total of \$579 million in penalties to the government.

The criminal fine itself was \$402 million, the second largest fine ever in an FCPA prosecution. Further, the company's CEO, Albert Stanley, also was indicted in the case, ultimately pleading guilty to conspiring to violate the FCPA. Government attorneys stated that "[w]e will continue to

investigate these matters by working in partnership with other law enforcement agencies, both foreign and domestic, to ensure that corporate executives who have been found guilty of bribing foreign officials in return for lucrative business contracts, are punished to the full extent of the law."¹²

Conclusion

The criminal justice system is not immune from the effects of the recent economic crisis. Notably, many believe that a lapse in the investigation and prosecution of white-collar crimes played a part in the country's economic problems, particularly as related to the collapse of the mortgage market. As a result, the legislative branch is actively focused on increasing resources to the Justice Department, FBI, and other relevant federal agencies to increase the enforcement of white collar crimes. In addition, there are proposals to expand the reach of federal criminal statutes, both here and abroad, in order to empower other agencies to engage in criminal prosecutions. If these proposals are effectuated, the result will be increased criminal penalties, additional coordination with foreign governments, and more individual prosecutions, as has been the case with the government's increased enforcement of the FCPA.

1. Statement of Senator Patrick Leahy, Senate Judiciary Committee Hearings on "The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn," (Feb. 11, 2009).

2. Press Release, U.S. Senator Patrick Leahy, "Leahy, Grassley Introduce Anti-Fraud Legislation: Bill Would Give Federal Government More Resources to Combat Mortgage Fraud" (Feb. 5, 2009).

3. *Id.*

4. Statement of Rita Glavin, Senate Judiciary Committee Hearings on "The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn," (Feb. 11, 2009).

5. Letter from Kyle O'Dowd, Associate Executive Director for Policy, NACDL, and Brian W. Walsh, Senior Legal Research Fellow for the Heritage Foundation, to Senators Leahy and Arlen Specter, R-Pa., Re: Fraud Enforcement and Recovery Act of 2009 (S.386) at p. 1 (Feb. 11, 2009) (available at: http://lawprofessors.typepad.com/whitecollarcrime_blog/files/nacdlheritage_ltr_to_senate_judiciary_fraud_enforcement_recovery_act_s_386.pdf).

6. *Id.* at p. 4.

7. Platts "U.S. House Ag Committee Chief to Offer New Commodity Trading Bill," (Jan. 29, 2009).

8. Bart Chilton, "The Commodity Coaster," Speech Before the Washington Agricultural Roundtable, Brookings Institute (Feb. 10, 2009).

9. Public Corruption Prosecutions Improvements Act of 2009, S. 49, 111th Cong. (2009) (available at: https://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s49is.txt.pdf).

10. Press Release, Bureau of National Affairs, "Foreign Corrupt Practices Act: Key Trends in FCPA Enforcement in 2008" (Feb. 9, 2009).

11. *Id.*

12. Press Release, Department of Justice, "Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay \$402 Million Criminal Fine" (Feb. 11, 2009); SEC Litigation Release No. 20897 (Feb. 11, 2009).