

UNDERSTANDING WHITE COLLAR CRIME

Third Edition

J. Kelly Strader

Professor of Law

Southwestern Law School



CAROLINA ACADEMIC PRESS

Durham, North Carolina

ISBN: 978-1-4224-9604-6

Library of Congress Cataloging-in-Publication Data

Strader, J. Kelly.

Understanding white collar crime / J. Kelly Strader. -- 3rd ed.

p. cm.

Includes index.

ISBN 978-1-4224-9604-6

1. White collar crimes--United States. I. Title.

KF9350.S77 2011

345.73'0268--dc23

2011036921

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2011 Carolina Academic Press, LLC

All Rights Reserved

No copyright is claimed in the text of statutes, regulations, and excerpts from court opinions quoted within this work.

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.caplaw.com

Printed in the United States of America

Dedication

For Hal

Preface

Overview of the Text

This book is primarily intended for students in White Collar Crime, Federal Criminal Law, and Corporate Crime classes. The text should also prove useful to practitioners, judges, law clerks, and scholars seeking an introduction to and an overview of the law in this area.

The bulk of this text provides a substantive overview of the principal federal white collar crimes. The book also covers the basic principles of criminal law and criminal procedure necessary to an understanding of white collar crime, and includes chapters on the process of white collar criminal investigations and prosecutions. Finally, the book covers remedies and penalties, including sentencing and forfeitures.

White collar crime is primarily based upon a complex set of statutes. This book provides the texts of the relevant statutes, along with analyses of the statutes' elements and requirements. Because many of these statutes are open to varying interpretations, the book also extensively discusses the main cases interpreting the statutes, including a large number of United States Supreme Court cases. Finally, the book discusses the significant policy issues that arise in white collar investigations and prosecutions, such as enforcement barriers and prosecutorial discretion.

Because of the complexity of the subject, a text such as this necessarily condenses a great deal of information. In addition, readers should note that this area of the law is changing rapidly. For a more extensive discussion of any particular subject, the reader may wish to refer to such sources as *White Collar Crime: Business and Regulatory Offenses* (Otto Obermaier & Robert Morvillo, eds.) (updated annually), and the *Annual Survey of White Collar Crime*, published by the American Criminal Law Review. These sources are also referred to throughout this text.

A Special Request

Any book of this length is bound to contain errors. Those errors are entirely my responsibility, and I would like to know about all of them. I welcome any comments you may have. Please do not hesitate to call ((213) 738-6753), e-mail (kstrader@swlaw.edu), or write (Southwestern Law School, 3050 Wilshire Boulevard, Los Angeles, CA 90010).

Acknowledgments

This book would not have been possible without the generous support of the Southwestern Law School Faculty Development Program. In addition, a number of my colleagues — Catherine Carpenter, Mark Cammack, Eileen Gauna, Warren Grimes, and Karen Smith — gave generously of their time and read various of the book's chapters. I am forever in their debt. I have also received enormous help from my many research assistants. Too many pitched in to name them all, but thanks to Steven Bercovitch, Elizabeth Hall, Matthew Newman, Whitney Nonnette, and, especially, research assistant extraordinaire Christopher DeClue. And thanks to Southwestern Faculty Support Supervisor Angelique Porter and the members of the Faculty Support staff for all their help. Thanks to my mentors at Morvillo, Abramowitz, Grand, Iason, Anello, and Bohrer for inspiring me to undertake this career. Finally, thanks to all of you who have used this book and have given me such helpful feedback over the years. I am very grateful.

On a personal note, I would like to thank my partner, Hal, our children, Eleanor and Sam, and their moms, Helen and Marian, for all their love and support.

TABLE OF CONTENTS

Chapter 1	INTRODUCTION TO WHITE COLLAR CRIME	1
§ 1.01	THE DEFINITION OF “WHITE COLLAR CRIME”	1
§ 1.02	RECURRING ISSUES IN WHITE COLLAR INVESTIGATIONS AND PROSECUTIONS	3
[A]	The Harm Caused by White Collar Crime	3
[B]	Difficulties in Enforcing White Collar Statutes	4
§ 1.03	ISSUES OF FEDERALISM IN WHITE COLLAR PROSECUTIONS	5
[A]	Federal and State Overlap	5
[B]	Federal Jurisdiction	6
[C]	The Debate Concerning the Federalization of Crimes	6
§ 1.04	PARALLEL CIVIL AND ADMINISTRATIVE PROCEEDINGS	7
§ 1.05	ISSUES OF PROSECUTORIAL DISCRETION IN WHITE COLLAR CRIME	8
§ 1.06	WHITE COLLAR CRIME AND THE GENERAL CRIMINAL LAW	9
[A]	Mens Rea	9
[1]	Purpose, Knowledge, and Willful Blindness	11
[2]	Willfulness	12
[3]	Recklessness and Negligence	12
[4]	Strict Liability	12
[B]	Vicarious Liability	13
[C]	Inchoate Crimes	13
§ 1.07	APPLICATION OF CRIMINAL PROCEDURE PRINCIPLES TO WHITE COLLAR CRIME	14
Chapter 2	CORPORATE AND INDIVIDUAL LIABILITY	15
§ 2.01	INTRODUCTION	15
§ 2.02	THE DEVELOPMENT OF CORPORATE CRIMINAL LIABILITY	15
§ 2.03	STANDARDS FOR IMPUTING LIABILITY TO CORPORATIONS	17
[A]	Respondeat Superior	17
[1]	Application in the Federal System	17
[2]	Elements of Respondeat Superior	17
[3]	Agents Whose Liability May Be Imputed to the Corporation	17
[4]	Liability of Successor and Non-Existent Corporations	18
[B]	Model Penal Code	18
[C]	Comparing Respondeat Superior and § 2.07	19
[D]	The Debate Over Corporate Criminal Liability	19
§ 2.04	ISSUES ARISING UNDER THE MODEL PENAL CODE	20
[A]	Legislative Intent to Impose Liability	20

TABLE OF CONTENTS

[B]	Approval by High Managerial Agent	20
§ 2.05	ACTING ON BEHALF OF THE CORPORATION	21
[A]	Model Penal Code vs. Respondeat Superior	22
[B]	Corporate Compliance Programs and Actions Contrary to Corporate Policy	22
[C]	Actions Not Taken “For the Benefit” of the Corporation	24
§ 2.06	CORPORATE MENS REA	25
[A]	Managerial Approval of Criminal Conduct	25
[B]	Collective Knowledge	25
§ 2.07	LIABILITY OF CORPORATE OFFICERS AND AGENTS	27
[A]	Scope of Individual Wrongoers’ Liability	27
[B]	Strict Liability of Management for Subordinates’ Acts	28
Chapter 3	CONSPIRACY	33
§ 3.01	INTRODUCTION	33
[A]	Nature of Conspiracy Charges	33
[B]	Policy Bases	34
§ 3.02	THE FEDERAL CONSPIRACY STATUTES	34
[A]	Types of Federal Conspiracy Statutes	34
[B]	The Elements of the General Conspiracy Statute — § 371	35
[C]	The Overt Act	36
[D]	The Unlawful Object	37
§ 3.03	THE ADVANTAGE OF A CONSPIRACY CHARGE	38
[A]	Joinder	38
[B]	Venue	38
[C]	Evidence	38
[D]	Vicarious Liability — The <i>Pinkerton</i> Rule	39
[E]	Multiple Punishments	39
[F]	Statute of Limitations	39
§ 3.04	THE AGREEMENT	40
[A]	Government Agents as Co-Conspirators	41
[B]	Plurality in the Corporate Context	41
[C]	Wharton’s Rule	42
§ 3.05	THE “OFFENSE” CLAUSE AND THE “DEFRAUD” CLAUSE	42
[A]	The “Offense” Clause	43
[B]	The “Defraud” Clause	44
[1]	Breadth of the Defraud Clause	44
[2]	The Federal Government as Victim	44
[C]	Relationship Between the Offense Clause and the Defraud Clause	45
§ 3.06	REQUIRED MENTAL STATE	46
[A]	Specific Intent	47

TABLE OF CONTENTS

[B]	“Knowledge” vs. “Specific Intent”	48
[C]	Conscious Avoidance	49
[D]	Mens Rea and Federal Jurisdiction	50
§ 3.07	PROOF OF GUILT IN A CONSPIRACY CASE	50
[A]	Level of Required Proof	50
[B]	Co-Conspirators’ Exception to the Hearsay Rule	51
§ 3.08	THE BREADTH OF THE AGREEMENT	52
[A]	Overview	52
[B]	Advantages of a Single Trial	53
[C]	Single Conspiracy vs. Multiple Conspiracies	53
[1]	Joinder Issues	53
[2]	The Showing of Prejudice	56
[3]	Double Jeopardy Issues	57
§ 3.09	VICARIOUS LIABILITY — THE <i>PINKERTON</i> DOCTRINE	57
[A]	The <i>Pinkerton</i> Decision	57
[B]	The Policy Debate	58
[C]	Application to White Collar Crimes	59
§ 3.10	INCONSISTENT VERDICTS	59
§ 3.11	DURATION	60
§ 3.12	WITHDRAWAL	61
Chapter 4	MAIL FRAUD, WIRE FRAUD, AND RELATED OFFENSES	63
§ 4.01	BREADTH OF THE MAIL AND WIRE FRAUD STATUTES	63
[A]	The Statutes’ Appeal to Prosecutors	63
[B]	Courts’ Interpretations of the Statutes	64
§ 4.02	STATUTORY OVERVIEW	65
[A]	Sections 1341 and 1343	65
[B]	The Elements	66
[C]	The Inchoate Nature of Mail and Wire Fraud	66
[D]	Federal Jurisdiction	66
[1]	Jurisdictional Bases	66
[2]	Federalism Issues	68
§ 4.03	THE SCHEME TO DEFRAUD	68
[A]	Intent to Defraud	68
[1]	The <i>Durland</i> Decision	68
[2]	Deception Relating to the Economic Bargain	69
[3]	Literally True and Misleading Statements	69
[4]	Omissions and Concealment	70
[5]	Good Faith and Reliance on Counsel Defenses	71
[B]	Materiality	71

TABLE OF CONTENTS

[1]	The <i>Neder</i> Decision	71
[2]	The “Reasonable Reliance” Issue	72
§ 4.04	THE USE OF THE MAILS AND WIRES	73
[A]	The “In Furtherance” Requirement	73
[1]	The <i>Schmuck</i> Rule	73
[2]	The “Lulling” Rule	75
[B]	The “Causation” Requirement	77
§ 4.05	DEPRIVATION OF MONEY, PROPERTY, OR HONEST SERVICES . .	78
[A]	The “Money or Property” Requirement	78
[1]	The <i>McNally</i> Decision	78
[2]	Intangible Property Rights	79
[a]	Secret Business Information	79
[b]	Licenses and Permits	81
[c]	The Right to Control Property Interests	81
[3]	Property Interests of Foreign Governments	82
[4]	The “Convergence” Requirement	83
[B]	Section 1346 and the Deprivation of “Honest Services”	85
[1]	The Adoption and Interpretation of § 1346	85
[2]	The <i>Skilling</i> Decision	86
[3]	Questions Post- <i>Skilling</i>	87
§ 4.06	RELATED STATUTES AND CRIMES	89
[A]	Bank Fraud	89
[B]	Bankruptcy Fraud	90
[C]	Health Care Fraud	90
[D]	False Government Claims and Procurement Fraud	91
[1]	False Claims	91
[2]	Procurement Fraud	92

Chapter 5 SECURITIES FRAUD 95

§ 5.01	INTRODUCTION	95
§ 5.02	STATUTORY OVERVIEW AND DEFINITIONS	96
[A]	Introduction	96
[B]	The 1933 and 1934 Acts	97
[1]	The Statutory Scheme	97
[2]	The Definition of “Security”	97
[3]	Secondary Liability	97
§ 5.03	CIVIL ENFORCEMENT OF THE SECURITIES LAWS	98
[A]	The Statutory Provisions	98
[B]	The Elements	98
§ 5.04	CRIMINAL ENFORCEMENT OF THE SECURITIES LAWS	99
[A]	The Statutory Scheme	99

TABLE OF CONTENTS

[B]	The Elements	100
[C]	The “Willfulness” Requirement	100
[1]	Definition	100
[2]	The Level of Proof	101
[3]	The “Good Faith” Defense and Reliance on Counsel	104
[D]	The “No Knowledge” Proviso	104
§ 5.05	THE SARBANES-OXLEY ACT OF 2002	105
§ 5.06	THE CIVIL/CRIMINAL OVERLAP	106
§ 5.07	INSIDER TRADING	106
[A]	Introduction	106
[B]	Policy Bases	107
[C]	Insider Trading Defined	108
[1]	Insider Trading Theories	108
[2]	Elements of Insider Trading	109
[D]	The Evolution of the Misappropriation Theory	109
[1]	The Supreme Court Cases	110
[2]	The Boundaries of Fiduciary Duties	112
[a]	Pre- <i>O’Haganagan</i> Case Law	112
[b]	The SEC’s Attempt to Extend the Boundaries of Fiduciary Duties — Rule 10b5-2	113
[3]	The “On the Basis of” Requirement	114
[a]	The Circuit Split	114
[b]	SEC Adoption of the “Knowing Possession” Standard — Rule 10b5-1	115
[E]	Tippee Liability	116
[1]	The <i>Dirks</i> Decision	116
[2]	The Elements of Tippee Liability	117
[a]	Proof of Willfulness	117
[b]	Eavesdropper Liability	118
[c]	Intent to Benefit — Misappropriation Theory	118
[F]	Trading in Connection with a Tender Offer	119
§ 5.08	THE “IN CONNECTION WITH” REQUIREMENT	121
§ 5.09	MATERIALITY	122
§ 5.10	OTHER OFFENSES	125
[A]	Stock Parking	125
[B]	Proxy Statements	126
§ 5.11	PROFESSIONALS’ LIABILITY	126

Chapter 6 COMPUTER CRIME 129

§ 6.01	INTRODUCTION	129
§ 6.02	CHALLENGES TO LAW ENFORCEMENT	129

TABLE OF CONTENTS

§ 6.03	THE COMPUTER FRAUD AND ABUSE ACT	130
[A]	The Statutory Provisions	130
[1]	Section (a)(1) — Knowing and Willful Theft Involving National Security	130
[2]	Section (a)(2) — Intentional Theft of Protected Information	131
[3]	Section (a)(3) — Intentional Gaining of Access to Government Information	131
[4]	Section (a)(4) — Fraud Through a Protected Computer	132
[5]	Section (a)(5)(A)(i) — Intentionally Causing Damage Through a Computer Transmission	132
[6]	Section (a)(5)(A)(ii) — Recklessly Causing Damage Through Unauthorized Access	133
[7]	Section (a)(5)(A)(iii) — Causing Damage Through Unauthorized Access	133
[8]	Subsection (a)(6) — Fraudulent Trafficking in Passwords	133
[9]	Subsection (a)(7) — Extortion	134
[B]	The Sentencing Scheme	134
§ 6.04	PROSECUTING COMPUTER CRIME	135
[A]	Issues in Cases Brought Under the CFAA	135
[1]	Determining the Required Mens Rea	135
[2]	Determining the “Thing of Value”	136
[3]	Determining Covered Losses	138
[B]	Issues in Wire Fraud Prosecutions of Computer Crime	138
[C]	Other Applicable Statutes	139
§ 6.05	INTERNATIONAL COMPUTER CRIME	140
§ 6.06	CONSTITUTIONAL AND STATUTORY CONSTRAINTS	140
[A]	Search and Seizure Issues	141
[B]	First Amendment Issues	142
§ 6.07	CIVIL ACTIONS	143
[A]	Suits by Internet Service Providers	143
[B]	Suits by Private Individuals	144
Chapter 7	ENVIRONMENTAL CRIMES	147
§ 7.01	INTRODUCTION	147
§ 7.02	COMMON ISSUES IN ENVIRONMENTAL PROSECUTIONS	149
[A]	Corporate Liability	149
[B]	Individual Liability and the Responsible Corporate Officer Doctrine	149
[C]	Mental State	150
[D]	Overlap of Civil and Criminal Liability	151
§ 7.03	HAZARDOUS WASTE — THE RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) AND COMPREHENSIVE ENVIRONMENTAL	

TABLE OF CONTENTS

	RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) . . .	151
[A]	The Statutory Provisions	151
[B]	Knowing Violations	152
[1]	Applicability of the Responsible Corporate Officer Doctrine	152
[2]	Knowledge of Permit Status	153
[3]	Knowledge of the Nature of the Waste	154
[C]	Knowing Endangerment	155
[D]	Individual Liability	156
[E]	Corporate Parent Liability	157
§ 7.04	WATER POLLUTION — THE CLEAN WATER ACT (CWA) AND THE THE REFUSE ACT	157
[A]	Statutory Scheme	157
[B]	Discharge from a Point Source Under the CWA	158
[C]	Discharge Under the Refuse Act	159
[D]	Required Mental State Under the CWA and the Refuse Act	160
[1]	Negligent Acts Under the CWA	160
[2]	Mistake of Law Under the CWA	161
[3]	Mistake of Fact Under the CWA	162
[4]	Strict Liability Under the Refuse Act	162
[5]	Applicability of the Responsible Corporate Officer Doctrine	163
[E]	The CWA Permit Requirement	164
[F]	Knowing Endangerment	164
§ 7.05	AIR POLLUTION — THE CLEAN AIR ACT (CAA)	165
[A]	Overview of the CAA	165
[B]	Definition of “Knowledge”	165
[C]	Judicial Review	166
[D]	Double Jeopardy Issues	167
§ 7.06	ENFORCEMENT ISSUES	168
[A]	Enforcement Bodies	168
[B]	Parallel Proceedings	168
[C]	Fourth Amendment Issues	169
Chapter 8	BRIBERY AND GRATUITIES	171
§ 8.01	INTRODUCTION	171
§ 8.02	SECTION 201 — STATUTORY OVERVIEW	172
[A]	Bribery	172
[B]	Gratuity	173
[C]	Statutory Definitions	173
§ 8.03	ELEMENTS OF BRIBERY AND GRATUITY UNDER § 201	174
[A]	Bribery	174
[B]	Gratuity	174

TABLE OF CONTENTS

[C]	Sentencing	175
[D]	Comparison of Bribery and Gratuity	175
[1]	Intent and Quid Pro Quo	175
[2]	Intent and Timing	176
§ 8.04	DEFINITION OF “SOMETHING OF VALUE” UNDER § 201	177
§ 8.05	DEFINITION OF FEDERAL “PUBLIC OFFICIALS” UNDER § 201	177
[A]	Employees of Entities Other than the Federal Government	177
[B]	Participants in the Legislative Process	179
§ 8.06	DEFINITION OF “OFFICIAL ACT” UNDER § 201	179
[A]	The Parties’ Intent	180
[B]	The Scope of the Public Official’s Duties	180
§ 8.07	DEFINITION OF CRIMINAL INTENT UNDER § 201	182
[A]	Bribery	182
[B]	Gratuity	183
§ 8.08	FEDERAL PROGRAM BRIBERY	185
[A]	Statutory Overview	185
[B]	Elements of § 666	185
[C]	Scope of § 666	186
[1]	The Connection Between the Bribe and Federal Funds	186
[2]	Bribes and Gratuities	187
[3]	The Meaning of Federal “Benefits”	188
[4]	The Meaning of “Agent”	188
[5]	The Meaning of “Misapplies”	189
§ 8.09	THE FOREIGN CORRUPT PRACTICES ACT	189
Chapter 9 EXTORTION		191
§ 9.01	INTRODUCTION	191
§ 9.02	STATUTORY OVERVIEW	192
[A]	Statutory Background and Definitions	192
[B]	Elements of Extortion	192
[C]	Extortion as an Inchoate Crime	193
§ 9.03	EFFECT ON INTERSTATE COMMERCE	193
§ 9.04	OBTAINING PROPERTY FROM ANOTHER	194
§ 9.05	THE REQUIRED MENS REA	195
§ 9.06	EXTORTION BY THE USE OF FEAR	195
§ 9.07	EXTORTION UNDER COLOR OF OFFICIAL RIGHT	198
[A]	“Inducement” in Extortion Under Color of Official Right	198
[B]	The Distinction Between Bribery and Extortion Under Color of Official Right	199
[C]	Distinguishing “Extortion” from Legitimate Campaign Fundraising	200
[D]	The Quid Pro Quo Requirement	201

TABLE OF CONTENTS

[1]	Does the Quid Pro Quo Requirement Apply Outside the Campaign Contribution Context?	201
[2]	Is an Explicit Quid Pro Quo Required, or Is an Implicit Quid Pro Quo Sufficient?	202
§ 9.08	THE TRAVEL ACT	203
Chapter 10	FALSE STATEMENTS	205
§ 10.01	INTRODUCTION	205
§ 10.02	STATUTORY OVERVIEW	206
§ 10.03	THE MEANING OF “STATEMENT”	207
[A]	The Scope of § 1001	207
[1]	Silence	207
[2]	Implied Statements	208
[B]	The “Exculpatory ‘No’ ” Doctrine	208
[C]	The Judicial Proceeding Exception	209
§ 10.04	FALSITY AND CONCEALMENT	210
[A]	Implied Falsity and Concealment	210
[B]	Literally True or Ambiguous Statements	210
[C]	Statements Concerning Future Actions	211
[D]	Documents	211
§ 10.05	MATERIALITY	212
§ 10.06	THE REQUIRED MENS REA	213
[A]	Knowledge of Falsity	213
[B]	Knowledge of Facts Giving Rise to Federal Jurisdiction	213
[C]	Intent to Deceive	214
§ 10.07	JURISDICTION	214
[A]	Statements Made to the Federal Government	214
[B]	The Definition of “Jurisdiction”	215
[C]	Statements Made to State and Local Agencies and to Private Parties	216
§ 10.08	SECTION 1001 AND OTHER OFFENSES	218
Chapter 11	PERJURY AND FALSE DECLARATIONS	221
§ 11.01	INTRODUCTION	221
§ 11.02	THE STATUTORY PROVISIONS	222
[A]	Introduction	222
[B]	Elements of § 1621	222
[C]	Elements of § 1623	223
[D]	Key Differences Between § 1621 and § 1623	223
§ 11.03	THE ELEMENTS OF A PERJURY CASE	224
[A]	Oath	224
[B]	Tribunals and Proceedings	225

TABLE OF CONTENTS

[C]	Falsity	225
[1]	Literally True or Non-Responsive Answers	225
[2]	Ambiguous Questions and Answers	226
[3]	Inconsistent Statements	227
[D]	Mens Rea	228
[1]	Knowledge of Falsity	228
[2]	Willfulness	228
[E]	Materiality	228
[F]	The “Two-Witness” Rule	229
§ 11.04	THE RECANTATION DEFENSE	231
[A]	A Comparison of § 1623 and § 1621	231
[B]	Elements of the Recantation Defense	232
[C]	Must a Defendant Prove All the Elements to Prevail?	233
§ 11.05	IMMUNITY	234
§ 11.06	VICARIOUS LIABILITY	235
[A]	Aiding and Abetting	235
[B]	Subornation of Perjury	236
Chapter 12	OBSTRUCTION OF JUSTICE	237
§ 12.01	INTRODUCTION	237
§ 12.02	A COMPARISON OF §§ 1503, 1505, 1510, AND 1512	238
§ 12.03	THE ELEMENTS OF OBSTRUCTION OF JUSTICE — THE OMNIBUS CLAUSES	240
[A]	Actus Reus — The “Endeavor”	240
[1]	The Breadth of the “Endeavor” to Obstruct	241
[a]	Interfering with the Production of Documents	241
[b]	Giving or Encouraging False Testimony	242
[c]	Making False Statements to Government Agents	243
[d]	Encouraging a Witness to Assert the Fifth Amendment or Attorney- Client Privilege	243
[e]	Threatening Jurors or Court Officers	244
[2]	The “Nexus” Requirement	245
[3]	A Deceptive Promise to Commit an Endeavor	246
[B]	The Pending Proceeding	247
[1]	Court Proceedings	248
[2]	Grand Jury Proceedings	249
[3]	Agency and Legislative Proceedings	249
[C]	Mens Rea	250
[1]	The Knowledge Requirement	250
[2]	“Corrupt” Intent	250
§ 12.04	THE RELATIONSHIP BETWEEN OBSTRUCTION AND PERJURY	253

TABLE OF CONTENTS

§ 12.05	THE SARBANES-OXLEY ACT — 18 U.S.C. §§ 1519–1520	254
[A]	Section 1519 — Destruction of Records in Federal Investigations and Bankruptcy	254
[B]	Section 1520 — Destruction of Audit Records	254
§ 12.06	SECTION 1512 — THE WITNESS TAMPERING STATUTE	255
[A]	The Statutory Provision and Elements	255
[B]	Corrupt Persuasion	257
[C]	The Misleading Conduct Provision	259
[D]	The Nexus Requirement	260
[E]	The Relationship Between the Obstruction Statutes and the Witness Tampering Statute	260
Chapter 13	TAX CRIMES	261
§ 13.01	INTRODUCTION	261
§ 13.02	TAX EVASION	262
[A]	Statutory Overview and Elements	262
[B]	Underpayment	262
[C]	Affirmative Act of Evasion	263
§ 13.03	FALSE RETURNS	264
[A]	Statutory Overview and Elements	264
[B]	Tax Filer and Preparer Liability	265
[C]	Falsity	266
[D]	Materiality	267
§ 13.04	FAILURE TO FILE A RETURN OR PAY TAXES — STATUTORY OVERVIEW AND ELEMENTS	268
§ 13.05	MENS REA — WILLFULNESS	269
[A]	Definition of Willfulness	269
[B]	Proof of Willfulness	270
[C]	Defenses	271
[1]	Good Faith	271
[2]	Legal Uncertainty	272
[3]	Reliance on Professional Advice	275
§ 13.06	METHODS OF PROOF	276
[A]	Direct or Specific Items Method	276
[B]	Indirect Methods	277
§ 13.07	THE PROCESS OF TAX INVESTIGATIONS AND PROSECUTIONS	279
§ 13.08	CHARGES BROUGHT IN CRIMINAL TAX CASES	279
Chapter 14	CURRENCY TRANSACTION REPORTING CRIMES	281
§ 14.01	INTRODUCTION	281
§ 14.02	STATUTORY OVERVIEW	281

TABLE OF CONTENTS

[A]	Introduction	281
[B]	Section 5313(a) — Filing of CTRs by Domestic Financial Institutions	282
[1]	The Statute	282
[2]	The Elements	283
[C]	Section 5324(a) — Structuring and Related Crimes in Connection with Financial Institution Transactions	283
[1]	The Statute	283
[2]	The Elements of § 5324(a)	284
[D]	Section 6050I — Cash Transactions Reporting by Businesses	285
[1]	The Statute	285
[2]	The Elements	286
[E]	Section 5316 — Transporting Monetary Instruments	287
[1]	The Statute	287
[2]	The Elements	287
§ 14.03	MENS REA ISSUES IN CURRENCY REPORTING CASES	288
[A]	Knowledge of and Intent to Violate the Law	288
[B]	Collective Knowledge	289
[C]	Proving Mens Rea	289
§ 14.04	ATTORNEY/CLIENT ISSUES	289
[A]	Introduction	289
[B]	Constitutional Challenges	290
[C]	Attorney-Client Privilege	290
Chapter 15	MONEY LAUNDERING	293
§ 15.01	INTRODUCTION	293
§ 15.02	STATUTORY OVERVIEW	294
[A]	Domestic Money Laundering — § 1956(a)(1) — Statutory Elements and Definitions	295
[B]	International Money Laundering — § 1956(a)(2)	297
[1]	Statutory Elements and Definitions	297
[2]	Comparison of § 1956(a)(1) and § 1956(a)(2)	298
[C]	Prohibited Monetary Transactions — § 1957	298
[D]	Comparison of § 1956(a)(1) and § 1957	300
§ 15.03	PROOF OF THE DEFENDANT’S MENTAL STATE	300
[A]	Section 1956	300
[1]	First Level of Mens Rea — Knowledge that the Transaction Represented Proceeds of Unlawful Activity	300
[2]	Second Level of Mens Rea — Four Possible Theories	302
[a]	Evidence of a Design to Conceal or Disguise Dirty Money Under § 1956(a)(1)(B)(i) and 1956(a)(2)(B)(i)	302
[b]	Evidence of Intent to Promote Unlawful Activity Under	

TABLE OF CONTENTS

	§ 1956(a)(1)(A)(i)	305
[B]	Section 1957	307
[1]	The Government’s Theory	307
[2]	Proof of Knowledge	307
§ 15.04	PROOF THAT THE PROPERTY WAS THE PRODUCT OF CRIMINAL ACTIVITY	308
[A]	Issues Relating to Timing	308
[1]	Section 1957	308
[2]	Section 1956	309
[B]	Commingling	310
[1]	Cases Under § 1956	310
[2]	Cases Under § 1957	311
[C]	“Proceeds:” Net Receipts or Net Profits?	312
§ 15.05	THE USA PATRIOT ACT	312
 Chapter 16 RICO		315
§ 16.01	INTRODUCTION	315
[A]	The RICO Debate	315
[B]	Department of Justice Guidelines	316
[C]	Civil RICO	317
§ 16.02	THE STRUCTURE OF THE RICO STATUTE	317
[A]	Introduction	317
[B]	Elements and Penalties	318
§ 16.03	DEFINING THE RICO “THEORY”	318
[A]	Subsection 1962(a)	319
[B]	Subsection 1962(b)	319
[C]	Subsection 1962(c)	320
[D]	Subsection 1962(d)	320
§ 16.04	THE ENTERPRISE	321
[A]	Statutory Definition	321
[B]	Legitimate vs. Illegitimate Enterprises	321
[C]	Economic Motive	322
[D]	Formal Entities as Enterprises	323
[E]	The “Association-in-Fact” Enterprise	323
[1]	Interpretations of the Statutory Definition	323
[2]	The Proof Required for an Association-in-Fact Enterprise	324
[F]	Naming the Enterprise as a Defendant	325
[1]	The Enterprise as a Defendant in Cases Brought Under Subsections 1962(a) and (b)	326
[2]	The Enterprise as a Defendant in Cases Brought Under Subsection 1962(c)	326

TABLE OF CONTENTS

[a]	Distinguishing the Enterprise and the Defendant	326
[b]	Sole Proprietorships as Defendants	327
[c]	Corporations as Defendants	328
[3]	Pleading Issues Arising from the Defendant/Enterprise Distinction . .	328
§ 16.05	THE “OPERATION OR MANAGEMENT” TEST UNDER § 1962(C) .	329
§ 16.06	THE “RACKETEERING ACTIVITY”	331
[A]	Introduction	331
[B]	State Crimes	332
[1]	Defining the State Law Predicates	332
[2]	Determining Whether the Facts Support the State Predicate Charge .	333
[C]	Federal Crimes	334
[D]	The “Pattern” Requirement	335
[1]	The Supreme Court’s Test	336
[2]	Application of the Continuity Requirement	337
[3]	Application of the Relatedness Requirement	340
[4]	Summary of the Pattern Requirement	341
§ 16.07	ISSUES UNIQUE TO CIVIL RICO	341
[A]	RICO Actions Brought by Private Plaintiffs	342
[1]	Attempts to Limit Civil RICO: The <i>Sedima</i> Decision	342
[2]	Standing	343
[B]	Civil RICO Actions Brought by the Government	345
§ 16.08	INTERSTATE COMMERCE	346
§ 16.09	STATUTE OF LIMITATIONS	346

Chapter 17 INTERNAL INVESTIGATIONS AND COMPLIANCE PROGRAMS 349

§ 17.01	INTRODUCTION	349
§ 17.02	INTERNAL INVESTIGATIONS	349
[A]	Tactical Considerations	349
[B]	Attorney-Client Privilege and Related Issues	350
[C]	The Work Product Doctrine	351
[D]	Voluntary Disclosures of Documents	352
§ 17.03	COMPLIANCE PROGRAMS	355
[A]	Sarbanes-Oxley Act of 2002	355
[B]	Department of Justice Policies	355
[C]	Compliance Programs and Corporate Liability	355
[D]	Compliance Programs and Individual Liability	356

Chapter 18 GRAND JURY ISSUES 357

§ 18.01	INTRODUCTION	357
§ 18.02	COMPOSITION AND DURATION OF THE GRAND JURY	358

TABLE OF CONTENTS

§ 18.03	PURPOSE OF THE GRAND JURY	358
§ 18.04	THE GRAND JURY'S INVESTIGATORY POWERS	359
[A]	The Scope of the Investigation	359
[B]	Post-Indictment Investigations	361
§ 18.05	PRESENTATION OF EXCULPATORY EVIDENCE	361
§ 18.06	GRAND JURY SECRECY	363
[A]	Disclosure of Grand Jury Information to Government Officials	363
[B]	Disclosure of Grand Jury Materials to Defendants	364
[C]	Disclosure to Third Parties	365
[D]	Disclosure to the Press and Public	365
[E]	Disclosure to Grand Jury Witnesses	366

Chapter 19	THE RIGHT AGAINST COMPELLED SELF-INCRIMINATION	367
-------------------	---	------------

§ 19.01	INTRODUCTION	367
§ 19.02	THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF- INCRIMINATION — COMPELLED TESTIMONY	367
§ 19.03	THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF- INCRIMINATION — THE COMPELLED PRODUCTION OF DOCUMENTS	368
[A]	The Required Records Rule	368
[B]	The Collective Entity Rule	368
[C]	The Act of Production Doctrine	369
§ 19.04	IMMUNITY	371

Chapter 20	CIVIL ACTIONS, CIVIL PENALTIES, AND PARALLEL PROCEEDINGS	373
-------------------	---	------------

§ 20.01	INTRODUCTION	373
§ 20.02	PARALLEL STATE AND FEDERAL PROCEEDINGS	373
§ 20.03	PARALLEL AGENCY PROCEEDINGS	374
§ 20.04	PARALLEL PROCEEDINGS AND THE FIFTH AMENDMENT	375
§ 20.05	PARALLEL PROCEEDINGS AND GRAND JURIES	377
[A]	Immunized Testimony	377
[B]	Secrecy	378
[C]	Civil Protective Orders	379
[D]	Stays	380
[E]	Deferred Prosecution	381
§ 20.06	CIVIL FINES	381
§ 20.07	QUI TAM ACTIONS	383
[A]	The False Claims Act	383
[B]	Qualifying as a Relator	383

TABLE OF CONTENTS

[1]	Direct and Independent Knowledge	383
[2]	The “Original Source” Exception to the “Public Disclosure” Rule . . .	384
[3]	Standing	385
[C]	Claims Made to Private Entities	386
§ 20.08	OTHER SANCTIONS	387
Chapter 21	SENTENCING	389
§ 21.01	INTRODUCTION	389
§ 21.02	OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION AND SENTENCING GUIDELINES	391
[A]	The Sentencing Commission	391
[B]	The Guidelines	391
§ 21.03	INDIVIDUAL SENTENCING UNDER THE GUIDELINES	392
[A]	Base Level Offense	393
[B]	Specific Offense Characteristics	393
[C]	Adjustments	394
[D]	Multiple Counts	394
[E]	Acceptance of Responsibility	394
[F]	Defendant’s Criminal History	395
[G]	Relevant Conduct	395
[H]	Sentencing Range	396
[I]	Fines	396
[J]	Departures	397
[K]	Section 3553(a) Factors	397
§ 21.04	CONSTITUTIONALITY OF THE GUIDELINES	399
[A]	Delegation of Authority and Separation of Powers	399
[B]	The Sixth Amendment Right to a Jury Trial	399
[1]	The <i>Booker</i> Decision	400
[2]	Issues Created by <i>Booker</i>	401
[a]	Plain Error	401
[b]	Harmless Error	402
[c]	Reasonableness	402
[d]	The Standard of Review on Appeal	404
[e]	Post- <i>Booker</i> Deference to the Guidelines	405
[f]	Substantial Assistance	405
§ 21.05	ORGANIZATIONAL SENTENCING UNDER THE GUIDELINES . . .	407
[A]	Overview	407
[B]	Effect on Organizational Conduct	408
[C]	Sanctions	408
[1]	Restitution	408
[2]	Community Service	408

TABLE OF CONTENTS

[3]	Fines	409
Chapter 22	FORFEITURES	413
§ 22.01	INTRODUCTION	413
§ 22.02	CIVIL FORFEITURE PROCEEDINGS	414
[A]	Federal Civil Forfeiture Statutes	414
[B]	Property Seizure Procedures	415
[1]	Statutory Provisions	415
[2]	The Burden of Proof and Standing	416
[C]	The Scope of Property Subject to Seizure and Forfeiture	417
[1]	Introduction	417
[2]	The Substantial Connection Test	418
[D]	Third-Party Interests — The “Innocent Owner” Defense	419
[E]	Assistance of Counsel	420
[F]	Post-Judgment Awards of Attorneys’ Fees and Fines	420
[G]	The Effect of the Vesting Provision	420
§ 22.03	FEDERAL CRIMINAL STATUTES PROVIDING FOR THE RESTRAINT AND FORFEITURE OF PRIVATE PROPERTY	421
[A]	Statutory Forfeiture Provisions	422
[B]	Statutory Procedures for Restraining Property	423
[C]	The Scope of Forfeitable Property	423
[1]	Rule 32.2(b) and the Nexus Requirement	423
[2]	The Forfeiture Theory	424
[3]	Proceeds	424
[4]	Substitute Assets	425
[5]	Money Judgments	426
[6]	<i>Apprendi/Booker</i> Issues	426
[D]	Rights of Innocent Third Parties	427
[E]	The Effect of the Vesting Provision	428
§ 22.04	CONSTITUTIONAL DEFENSES	428
[A]	Procedural Due Process	429
[1]	Civil Forfeitures	429
[2]	Criminal Forfeitures	430
[B]	Substantive Due Process — Innocent Owners	431
[C]	The Eighth Amendment’s Excessive Fines Clause	431
[1]	Criminal Forfeitures	431
[2]	Civil Forfeiture	433
[D]	Double Jeopardy	434
[E]	Attorney’s Fees	435

