IN THE UNITED STATES DISTRICT COURT FILED

FOR THE NORTHERN DISTRICT OF ALABAMA 04 MAY -6 AM 11:30

SOUTHERN DIVISION

U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA, Plaintiff	:	
v.	:	No. CR-03-BE-0530-S
RICHARD M. SCRUSHY, Defendant	:	

OPPOSITION OF THE UNITED STATES TO THE MOTION OF DEFENDANT RICHARD M. SCRUSHY TO DISMISS COUNTS 48-50 OF THE INDICTMENT

Pursuant to Fed. R. Crim. P. 12(b)(3)(B), the United States, by undersigned counsel, hereby opposes the Motion of Defendant Richard M. Scrushy ("Scrushy") to Dismiss Counts 48-50 of the Indictment.

INTRODUCTION

Scrushy has moved to dismiss Counts 48-50 on the grounds that (1) the Sarbanes-Oxley Act ("the Act") is unconstitutional because it imposes criminal liability arising from an act that is not necessarily criminal (see Mot. 5-9); (2) the Act is unconstitutional because it seeks to hold corporate officers criminally liable for inaction, even in the absence of defects in the periodic reports the officers are required to certify (see id. at 9-11); (3) Section 906 of the Act (codified at 18 U.S.C. 1350) is unconstitutionally void for vagueness (see Mot. 11-13) because it does not adequately define phrases like "willful certification" (see id. at 14-17), "fairly presents" (see id. at 17-19), and "in

169

all material respects" (see id. at 19-20). These contentions are either irrelevant, premature, or without support in the facts of this case or the applicable law. They should therefore be rejected.

In Counts 48-50, Scrushy is charged with three specific intent crimes, in violation of 18 U.S.C. 1350(c)(2) (and of 18 U.S.C. 1349 in Count 50 as well): willfully certifying (Count 48), and causing another person to willfully certify (Count 49), and attempting to cause another to willfully certify (Count 50) to the accuracy of three HealthSouth periodic SEC reports while knowing that those reports were materially false because they substantially overstated HealthSouth's income and materially overstated its assets during relevant time periods. To have committed a "willful" violation of Section 1350(c)(2), Scrushy must not only have certified (or caused to be certified, or attempted to cause to be certified) financial reports that he knew to be false, but he must have done so with an evil intent to disobey or disregard the law, that is, to have voluntarily and intentionally engaged in conduct that he knew was prohibited. As a result, there is no danger that he can be held criminally liable for non-criminal conduct. Cf. Mot. 5-9. Because he is not charged with inaction under the statute, any argument concerning such inaction (cf. id. at 9-11) is irrelevant. Because Scrushy's conduct does not implicate the First Amendment, he cannot make a facial challenge to Section 1350(c)(2), and because the conduct alleged in the indictment falls squarely within conduct that that section clearly prohibits, he cannot claim that the statute is void for vagueness as applied to him. Finally, insofar as Scrushy's claim of vagueness implicates issues of fact to be proved at trial, it is premature.

BACKGROUND

1. The Statute And Its Legislative History. Title IX of the Sarbanes-Oxley Act of 2002 was derived from S. 2717, the "White-Collar Crime Enhancement Act of 2002," which Senators Biden and Hatch introduced on July 10, 2002. On the same day, those senators offered the text of S. 2717 as a floor amendment to the "Public Company Accounting Reform and Investment Protection Act of 2002," S. 2673. See 148 Cong. Rec. S6542. The Senate unanimously adopted the amendment by a vote of 96-0. See id. at S6551. The Senate unanimously approved S. 2673, as amended by the inclusion of S. 2717, on July 15, 2002, by a vote of 97-0. See 148 Cong. Rec. S6779. S. 2673 then went to a Senate-House conference. The Biden-Hatch amendment was retained in the final conference report as Title IX and in substantially identical form to the amendment to S. 2673. Both Houses of Congress approved the conference report on the Act, H.R. 3763, on July 25, 2002. See 148 Cong. Rec. H5480, S7365. The President signed the Act into law on July 30, 2002. See 149 Cong. Rec. S5325-S5326 (April 11, 2003).

In pertinent part, Title IX of H.R. 3763 is codified at 18 U.S.C. § 1350. That section, which is entitled "Failure of corporate officers to certify financial reports," provides as follows:

> (a) Certification of periodic financial reports.--Each periodic report containing financial statements filed by an issuer with the Securities and Exchange Commission pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a) or 78o(d)) shall be accompanied by a written statement by the chief executive officer (or equivalent thereof) of the issuer.
>
> (b) Content.--The statement required under subsection (a) shall certify that the periodic report containing the financial statements fully complies with the requirements of section 13(a) or 15(d) of the Securities Act [of] 1934 (15 U.S.C. 78m or 78o(d)) and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer.
>
> (c) Criminal penalties.--Whoever--
>
> (1) certifies any statement as set forth in subsections (a) and (b) of this section <u>knowing</u> that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $1,000,000, or imprisoned not more than 10 years, or both; or
>
> (2) <u>willfully</u> certifies any statement as set forth in subsections (a) and (b) of this section <u>knowing</u> that the periodic report accompanying the statement does not comport with all the requirements set forth in this section shall be fined not more than $5,000,000, or imprisoned not more than 20 years, or both.

18 U.S.C. § 1350 (enacted in Pub. L. No. 107-204, Title IX, § 906, July 30, 2002, 116 Stat. 806) (emphasis added).

Senator Biden later inserted in the <u>Congressional Record</u> the legislative history of Title IX. See 149 Cong. Rec. S5325-S5331 (April 11, 2003); see also 2003 WL 1867217.[1] In pertinent part, the history provided a detailed explanation of the certification

[1] For the convenience of the Court, a copy of the legislative history is attached to this opposition as an Addendum ("Add.").

requirement of Section 906 of the Act, the current 18 U.S.C. § 1350. See 149 Cong. Rec. S5328-S5331. The history noted that the backdrop to the requirements was the long-standing requirement of 15 U.S.C. §§ 78m(a) and 78o(d) of the Securities and Exchange Act that publicly traded companies file reports with the SEC regarding the financial well-being of the corporation. See 149 Cong. Rec. S5329. The history further noted that pursuant to these provisions, the SEC requires publicly-traded companies to file numerous reports (for example, Forms 10-K, 20-F, 40-F, 10-Q, 8-K, 6-K), all intended to provide both the SEC and the investing public with information regarding the financial condition of the corporation. See ibid. The history pointed out that the willful failure to file these periodic reports, or the making of materially false statements in them, is a felony, see ibid. (quoting 15 U.S.C. 78ff, which makes such conduct punishable by imprisonment for up to ten years), and that defendants have been prosecuted in the past for filing false financial reports with the SEC, see 149 Cong. Rec. S5329 (citing United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972)).[2]

The history, however, noted that in using the term "willful" in Section 906 of the Act, Congress intended to create a specific intent crime, not the general intent crime under the standard

---

[2] In Colasurdo, the court upheld the defendants' convictions for omitting pertinent information from SEC reports and for making materially false and misleading statements in such reports. See 453 F.2d at 593-594.

that courts have sometimes used in prosecutions under the 1934 Act. See 149 Cong. Rec. S5329. The history also observed that Section 906 did not impose new reporting requirements on companies, and that the law has always required that the previously mandated reports "be materially accurate." See 149 Cong. Rec. S5329. The history pointed out that the notion of requiring a company's senior executive to certify a statement submitted to the government, on threat of possible criminal liability, was not novel. See 149 Cong. Rec. S5329 (citing Section 911(a)(1) of National Defense Authorization Act for Fiscal Year 1986, 10 U.S.C. § 2324(h) and (1); 48 C.F.R. § 52.242-4, which requires senior executive of defense contractor to certify that all costs included in proposal for settlement of indirect costs are allowable under relevant regulations).

The legislative history included an extended discussion of the two-tiered state-of-mind requirements for criminal liability under Section 906. See 149 Cong. Rec. S5329-S5331. The history noted that "both penalties only apply to corporate executives who certify statements 'knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section.'" The history pointed out that when "knowing" and "willful" mens rea requirements are used to set forth graduated penalties for the same predicate conduct, "knowing" embodies a general intent standard and "willful" embodies a specific intent standard. Thus knowing conduct is distinct from, and less intentional than, willful conduct. See id. at S5329 (quoting Bryan v. United States, 524 U.S. 184, 193 (1998) (for finding of willful misconduct, jury "must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful")).

The legislative history first addressed the "knowing" standard applicable in Section 906(c)(1) (codified at Section 1350(c)(1)). See 149 Cong. Rec. S5329-S5330. According to the history, "knowing" is "meant to embody a general intent standard," and refers to "knowledge of the facts constituting the offense, as distinguished from knowledge of the law." Id. at S5330 (citing Bryan v. United States, 524 U.S. at 192). As the history described it, "to certify financial statements 'knowing' them to be false simply means to certify the financial statement intentionally, voluntarily and with an awareness of their duplicity, rather than by mistake or accident. Knowledge of the law is not required, nor is a willful and intentional desire to evade the law's requirements." 149 Cong. Rec. at S5330. As a result, to establish a violation of Section 906(c)(1), "the government must only prove that the corporate officer knew that the financial statements were materially misleading or inaccurate." 149 Cong. Rec. at S5330.

The legislative history next addressed the "willful" standard applicable in Section 906(c)(2) (codified in Section 1350(c)(2)). See 149 Cong. Rec. S5330. The history described that standard as one of "specific intent," in that "a 'willful' act is generally one undertaken with a bad purpose, or with knowledge that the prohibited conduct is unlawful." 149 Cong. Rec. S53330. Acknowledging the principles set forth in cases like Ratzlaf v. United States, 510 U.S. 135, 142 (1994), and Cheek v. United States, 498 U.S. 192, 201 (1991), the history said that "[a] corporate executive who certifies financial statements which he knows to be false is not guilty under this section unless, in addition to knowing what he was doing, he voluntarily and intentionally engaged in conduct that he knew was prohibited." 149 Cong. Rec. at S5330. The history went on to say that in light of the complexity of the securities laws, Congress "intended to require a more particularized showing of knowledge in order to access the tougher criminal penalties under § 1350(c)(2) -- i.e., knowledge of the specific law or rule that a defendant's conduct is alleged to violate." 149 Cong. Rec. at S5530.[3]

2. Counts 48, 49, and 50. On October 29, 2003, a federal grand jury in the Northern District of Alabama returned an 85-count indictment that charged Scrushy with conspiracy (Count 1), securities fraud (Counts 2-3), wire fraud (Counts 4-21), mail fraud (Counts 22-41), false statements (Counts 42-47), false certifications (Counts 48-50), money laundering (51-70), and criminal forfeiture (71-85). See Doc. No. 1, at 1-38. The

---

[3] The legislative history also explained that a failure to file a certification pursuant to Section 1350(a) triggers criminal liability. See 149 Cong. Rec. at S5331. Scrushy is not charged with a failure to file a certification, nor is he charged with "knowingly" filing a false certification in violation of 18 U.S.C. § 1350(c)(1). Cf. Doc. No. 1, at 28-31.

charges arose out of a scheme to fraudulently inflate the operating results and financial condition of HealthSouth, the health care services company Scrushy had founded and controlled. The first of the counts at issue in the present motion, Count 48, charged that on or about August 14, 2002, and in violation of 18 U.S.C. §§ 1350(c)(2) and 2, Scrushy

> did willfully certify and cause to be certified a statement required by [18 U.S.C. § 1350] to be filed with the SEC, that is,
>
> > a statement certifying that the periodic report accompanying the statement, namely, a HealthSouth Form 10-Q (1) fully complied with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and (2) that the information contained therein fairly presented, in all material respects, the financial condition and results of operations of the company,
>
> while knowing that the periodic report so filed did not comport with all of the requirements of [18 U.S.C. § 1350] in that as defendant Scrushy then and there well knew and believed, the information therein did not fairly present, in all material respects, the financial condition and results of operations of HealthSouth because said information materially overstated HealthSouth's net income for each of the periods set forth in the report, and materially overstated the value of HealthSouth's assets at the end of each of said periods."

Doc. No. 1, at 28-29.

Counts 49 and 50 contained allegations substantially similar to those set forth in Count 48, and likewise charged violations of 18 U.S.C. §§ 1350(c)(2) and 2. Count 49 charged that on or about November 14, 2002, Scrushy caused HealthSouth's chief executive officer and its chief financial officer to willfully certify that a HealthSouth Form 10-Q (1) fully complied with the requirements of Sections 13(a) or 15(d) of the Securities

Exchange Act of 1934 and (2) that the information contained therein fairly presented the financial condition and results of operations of the company, while knowing that the report materially overstated HealthSouth's net income and materially overstated the value of its assets during the relevant time periods. Count 50 alleged that on or about March 18, 2003, Scrushy attempted to cause HealthSouth's chief financial officer to willfully certify that a HealthSouth Form 10-Q (1) fully complied with the requirements of Sections 13(a) or 15(d) and (2) that the information contained therein fairly presented the financial condition and results of operations of the company, while knowing that the report materially overstated HealthSouth's net income during the relevant time periods, except for the third quarter of 2002, and materially overstated the value of its assets during the relevant time periods. Count 50 further alleged that this conduct also violated 18 U.S.C. § 1349, which governs attempts or conspiracies to commit mail, wire, bank, health care, or securities fraud. See Doc. No. 1, at 29-31.

ARGUMENT

Scrushy's attack on the Act in general and on Section 906 in particular is curiously divorced from the facts of his own case. The indictment alleges the deliberate material falsification of HealthSouth's periodic reports to the SEC. Speculative arguments about periodic reports that do not involve willful violations of the securities laws or that do not contain materially false statements (see Mot. 9) thus have no bearing on Scrushy's case.

Nowhere in the indictment is Scrushy charged with an offense on the basis of inaction, namely, his failure to make a required certification. As a result, his speculative arguments that rest on a corporate officer's failure to certify a periodic report (see id. at 9-11) likewise do not bear on his case. And Scrushy's principal argument, that Section 906 is void for vagueness (see id. at 11-20), ignores that section's stringent scienter requirement and the well-established meanings of the critical terms used in the section. That scienter requirement and those well-established meanings defeat any claim that the section does not give fair warning of the conduct it prohibits or that it encourages arbitrary enforcement.

1. Scrushy Is Not Exposed To Criminal Liability For An Act That Is Not Necessarily Criminal. An indictment may not be dismissed if its factual allegations, when viewed in the light most favorable to the government, are sufficient to charge an offense as a matter of law. See United States v. Torkington, 812 F.2d 1347, 1354 (11th Cir. 1987); United States v. Mann, 517 F.2d 259, 266 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976); see generally 1A Wright, Federal Practice and Procedure: Criminal 3d § 194, at 363 (1999). Accordingly, for purposes of Scrushy's motion, the pertinent factual allegations of the indictment, namely, that he willfully certified, or caused another to willfully certify, or attempted to cause another to willfully certify, materially false information in HealthSouth reports, see Doc. No. 1, at 28-31, must be taken as true. In addition, a

person who "engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine [that person's] conduct before analyzing other hypothetical applications of the law." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982). In light of these settled principles of law, it is clear that Scrushy cannot prevail on his contention (see Mot. 5-9) that the Act is unconstitutional because it imposes criminal liability arising from an act that is not necessarily criminal.

While it is true that preparation of a periodic SEC report containing materially false information is not necessarily criminal because the inaccuracies may have resulted from mistake or accident, a defendant who, like Scrushy, is charged under Section 1530(c)(2) is not exposed to criminal liability because of the potentially innocent conduct of someone else. Rather, the exposure to criminal liability rests on Scrushy's own conduct, which cannot be deemed criminal unless it meets the stringent scienter requirements of Section 1350(c)(2). He must not only know that the periodic report contains materially false information, he must falsely certify (or cause another to falsely certify, or attempt to cause another to falsely certify) that the report is materially accurate, he must do so knowing that such a false certification is forbidden by law, and he must do so with the specific intent to violate the law. As the legislative history of Section 906 makes clear, "[a] corporate executive who certifies financial statements which he knows to be false is not guilty under this section unless, in addition to knowing what he was doing, he voluntarily and intentionally engaged in conduct that he knew was prohibited." 149 Cong. Rec. S5330 (emphasis added). For purposes of Section 1350(c)(2), it is irrelevant that a materially false report may have been innocently prepared, or that the preparer may not be criminally liable. The certifier's knowledge that the report is materially false and his willfully false certification of its material accuracy are decisive. In the present case, of course, innocent preparation of the pertinent reports or their lack of material falsity is not an issue, and Scrushy's arguments about such situations have no application to his case. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 495.

The principal case on which Scrushy relies (see Mot. 8-9) in this connection is Shuttlesworth v. City of Birmingham, Ala., 373 U.S. 262 (1963), where the Supreme Court struck down the convictions of two ministers for aiding and abetting the violation of a municipal trespass ordinance because the convictions of the demonstrators charged with violating the ordinance had been previously set aside. The Court explained, inter alia, that "there can be no conviction for aiding and abetting someone to do an innocent act." 373 U.S. at 265. This unexceptional rule of law has no bearing on the present case. Other cases cited (see Mot. 5-8) by Scrushy and stating similarly unobjectionable legal principles, see, e.g., United States v.

Evans, 358 F.3d 1311, 1312 (11th Cir. 2004) (no liability for attempt without criminal intent to commit underlying crime); United States v. King, 351 F.3d 859, 863 (8th Cir. 2003) (no liability for conspiracy unless objective is unlawful), are similarly inapposite. Scrushy is not charged with conspiring, or assisting another, to do an innocent or lawful act. Instead, he is charged with committing an independent criminal act of his own, the willful certification of a materially false report to the SEC that he knew to be materially false because he had ordered the falsification.[4]

2. That The Act May Impose Criminal Liability For Inaction By Corporate Officers Is Irrelevant To This Case. Scrushy further contends (Motion 9-11) that the Act is unconstitutional because it seeks to hold corporate officers criminally liable for inaction, even in the absence of defects in the periodic reports the officers are required to certify. The contention is irrelevant. Scrushy is not charged with inaction in Counts 48-50 of the indictment. Instead, he is charged with three willful violations of Section 1350(c)(2), and to convict him of those willful violations, the government must show, not that Scrushy failed to act, but rather that while knowing that certain

---

[4] Scrushy relies (see Mot. 7-8) on cases like United States v. Bilzerian, 926 F.2d 1285, 1298-1299 (2d Cir.), cert. denied, 502 U.S. 813 (1991), and United States v. Lang, 766 F. Supp. 389, 392-393 (D. Md. 1991), but that reliance is puzzling. If anything, those securities law cases support the government's position that when a defendant, like Scrushy, willfully certifies as accurate a periodic report to the SEC that he knows to be materially false, he exposes himself to criminal liability under Section 1350(c)(2).

HealthSouth periodic reports were materially false, and with the intention to violate the law, he certified, or caused to be certified, or attempted to cause another to certify, that those reports fairly presented the financial condition and results of operations of the company. See Doc. No. 1, at 28-31. Accordingly, because Scrushy is not charged under any provision of the Act governing "inaction" by corporate officers, he lacks standing to attack such provisions. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 495 (litigant's conduct to be examined, not hypothetical application of statute to others); see also Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947, 959 (1984) (where litigant cannot prevail on facial challenge to statute and cannot demonstrate that statute is unconstitutional as applied to him, he has no standing to allege that statute is unconstitutional as applied to others); Haig v. Agee, 453 U.S. 280, 309 n.61 (1981) (where litigant's conduct falls within core of regulation, he lacks standing to contend that regulation is vague); Parker v. Levy, 417 U.S. 733, 755-756 (1974).[5]

3. Section 906 Of The Act Is Not Void For Vagueness In This Case. Scrushy further contends (Mot. 11-20) that Section 906 of

---

[5] Although Scrushy's "inaction" argument plainly does not apply to his own case, it would be of little value to him if it did. The failure to perform a statutorily-mandated act can be the basis for criminal liability in a variety of contexts. See United States v. Weaver, 275 F.3d 1320, 1331-1332 (11th Cir. 2001) (failure to refund unused student loan monies), cert. denied, 536 U.S. 961 (2002); United States v. Williams, 121 F.3d 615, 621 (11th Cir. 1997) (failure to pay taxes), cert. denied, 523 U.S. 1065 (1998).

the Act is void for vagueness because, more specifically, it does not adequately define phrases like "willful certification" (Mot. 14-17), or "fairly present" (id. at 17-19), or "in all material respects" (id. at 19-20). The contention lacks merit. When a statute is challenged on the ground that it is unconstitutionally vague, it is construed as a whole, not on the basis of isolated words or phrases it may contain. See Hill v. Colorado, 530 U.S. 703, 733 (2000); Grayned v. City of Rockford, 408 U.S. 104, 110 (1972); United States v. Musser, 856 F.2d 1484, 1486 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989). In the case of Section 1350(c)(2), this principle of statutory construction requires that the concepts of knowledge, willfulness, fair presentation, and materiality -- as reflected in the statutory language -- must be considered together. When they are, it is clear that Scrushy cannot prevail on his vagueness claim. Before criminal liability can be imposed under Section 1350(c)(2), (1) the periodic report to be certified by a corporate officer must be materially false in that it does not fairly present, "in all material respects, the financial condition and results of operations of the issuer" (Section 1350(b)); (2) the certifying officer must know of the material falsity of the report; and (3) the certifying officer must nevertheless falsely certify to the material accuracy of the report with the intent to violate the law prohibiting such materially false certifications. In the present case, where the material falsity of the pertinent HealthSouth reports lay in their substantial overstatements of

HealthSouth's income and assets, no reasonable person could understand such reports to "fairly present" HealthSouth's "financial condition and results of operations."

In general, the void-for-vagueness doctrine requires that a penal statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." United States v. Fisher, 289 F.3d 1329, 1333 (11th Cir. 2002) (citation and internal quotation omitted), cert. denied, 537 U.S. 1112 (2003). Where First Amendment rights are not involved, however, "vagueness challenges must be evaluated in light of the facts of the case at hand." Ibid.; see United States v. Hasner, 340 F.3d 1261, 1269 (11th Cir. 2003) (absent First Amendment issue, statute challenged as vague is reviewed only as applied). Because Scrushy's conduct does not implicate the First Amendment, his challenge to Section 1350 "must be evaluated in the light of the facts of the case at hand," Fisher, 289 F.3d at 1333, namely, those alleged in the indictment.

Indeed, outside the First Amendment context, the Eleventh Circuit applies the void-for-vagueness doctrine only rarely. See American Iron and Steel v. OSHA, 182 F.3d 1261, 1277 (11th Cir. 1999). A rule that does not reach constitutionally protected conduct is void for vagueness only when it is "impermissibly vague in all its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. at 499; American Iron and Steel, 182 F.3d at 1277. As the Eleventh Circuit's predecessor court observed, to be void for vagueness, a statute must be "substantially incomprehensible." Exxon Corp. v. Busbee, 644 F.2d 1030, 1033 (5th Cir.), cert. denied, 454 U.S. 932 (1981).

Moreover, a statutory requirement that an act must be willful or purposeful relieves the statute of the objection that it punishes without warning an offense of which the accused was unaware. See United States v. Waymer, 55 F.3d 564, 568 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996); see also Hasner, 340 F.3d at 1269. And as well as giving fair warning of prohibited conduct, such a scienter requirement discourages "unscrupulous enforcement." See United States v. Acheson, 195 F.3d 645, 652 (11th Cir. 1999); see also United States v. Panfil, 338 F.3d 1299, 1301 (11th Cir. 2003). Thus, when a statute requires the government to prove the defendant's specific criminal intent in order to convict, the statute is not unconstitutionally vague as applied to that defendant. See Hasner, 340 F.3d at 1269. To convict Scrushy under Section 1350(c)(2) in Counts 48-50, the government is required to prove his specific criminal intent to falsely certify the pertinent 10-Q reports. As a result, Section 1350(c)(2) cannot be unconstitutionally vague as applied to him.

As noted above, the critical terms in Section 1350, e.g., "fairly presents," "in all material respects," "knowing," and "willfully" -- must be construed as a whole in assessing Scrushy's vagueness challenge. See Hill v. Colorado, 530 U.S. at

733; Grayned v. City of Rockford, 408 U.S. at 110; United States v. Musser, 856 F.2d at 1486. But even if those terms were evaluated separately, Scrushy's vagueness claim would fail. For example, the term "willfully" has a well-defined meaning in the criminal law. "The word 'willfully' * * * means that the act was committed voluntarily or purposely, with the specific intent to do something the law forbids; that is[,] with bad purpose either to disobey or disregard the law." 11th Circuit Pattern Jury Instructions -- Criminal, No. 9.1, at 23 (2003); see Bryan v. United States, 524 U.S. at 191-192 (discussing "willfulness" in term adopted by Congress in legislative history of Section 1350); United States v. Starks, 157 F.3d 833, 838-839 (11th Cir. 1998) (relying on the Bryan Court's discussion of "willfully"). As a result, Scrushy cannot claim that the phrase "willful certification" is so opaque that it is "substantially incomprehensible." Exxon Corp. v. Busbee, 644 F.2d at 1033.[6]

The term "knowing" has a similar well-defined meaning. See 11th Circuit Pattern Jury Instructions -- Criminal, No. 9.1, at 23 ("The word 'knowingly' as that term is used in the indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident"); United States v. Diecidue, 603 F.2d 535, 548 (5th Cir. 1979)

---

[6] Congress's careful definition of "willful" in the context of Section 1350(c)(2), see 149 Cong. Rec. S5330, and the term's well-settled criminal law meaning as established by cases like Bryan, 524 U.S. at 191-192, and by the law of the Eleventh Circuit thoroughly rebut Scrushy's claim (see Mot. 14-17) that, as used in Section 1350(c)(2), the term is unconstitutionally vague.

(approving pattern definition for use in jury instruction), cert. denied, 445 U.S. 946 (1980); see also 149 Cong. Rec. S5329 (making it clear that "to certify financial statements 'knowing' them to be false simply means to certify the financial statements intentionally, voluntarily and with an awareness of their duplicity, rather than by mistake or accident. Knowledge of the law is not required, nor is a willful and intentional desire to evade the law's requirements").[7]

The phrase "fairly presents" is likewise one that ordinary people can understand. The Eleventh Circuit and its predecessor court have used the phrase "fairly presents" in numerous cases in a variety of contexts. See, e.g., United States v. Massell, 823 F.2d 1503, 1510 (11th Cir. 1987) (jury instruction); United States v. Duff, 707 F.2d 1315, 1321 (11th Cir. 1983) (same); Goldberg v. C.I.R., 223 F.2d 709, 710 (5th Cir. 1955) (summary of evidence). None of those cases has even faintly suggested that the meaning of the phrase is so opaque that it is "substantially incomprehensible." Exxon Corp. v. Busbee, 644 F.2d at 1033. Indeed, the indictment alleges -- and for purposes of this motion

---

[7] In light of Congress's careful differentiation of the offenses described in Section 1350(c)(1) ("knowing" describes general intent offense) and (c)(2) ("willful" describes specific intent offense), see 149 Cong. Rec. S5329-S5330, there is no basis for Scrushy's claim (see Mot. 15-16) that it is "impossible" to distinguish between the offenses. Scrushy's suggestionthat he was charged under Subsection (c)(2) because of the severity of its penalties (see id. at 17) is similarly meritless. The government has discretion to charge under any statute that applies to a defendant's conduct. See United States v. Smith, 231 F.3d 800, 807 (11th Cir. 2000) (judiciary cannot interfere with prosecutorial charging decisions unless Constitution requires), cert. denied, 532 U.S. 1019 (2001).

the allegation must be taken as true -- that on numerous occasions Scrushy himself used the phrase "fairly presents" or substantially similar phrases in letters to HealthSouth's outside auditors. See Doc. No. 1, at 13, ¶ 44 (identifying 13 such letters). Scrushy therefore cannot credibly contend that he does not understand what the phrase means. In any case, as noted above, it is clear that the reports at issue here, which substantially overstated HealthSouth's income and materially overstated its assets, did not "fairly present" the company's "financial condition and results of operations." As applied to Scrushy, Section 1350(b)'s use of the phrase "fairly presents" is not unconstitutionally vague.[8]

Finally, contrary to Scrushy's contention (see Mot. 19-20) that the phrase "in all material respects" is subjective and open-ended, the term "material" has a well-defined meaning in the criminal law. "A 'material fact' is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction. A fact is 'material'

---

[8] Scrushy's claim (see Mot. 17-19) that the phrase "fairly presents" is "inherently subjective" has no basis in the facts of his case. A reasonable person's determination that HealthSouth's substantial overstatement of its income and assets, as alleged in the indictment, does not fairly present the company's financial condition and operational results would scarcely be "inherently subjective."

That terms like "fairly presents" may have specialized meanings in other contexts, see, e.g., 17 C.F.R. § 210.3A-02 (consolidated financial statements usually necessary for "fair presentation" of financial information where one entity has controlling interest in another), is likewise irrelevant to this case. A material overstatement of income and assets never "fairly presents" a company's financial condition.

if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to whom or to which it is addressed." 11th Circuit Pattern Jury Instructions -- Criminal, No. 50.1, at 282 (2003); see United States v. Neder, 197 F.3d 1122, 1128-1129 (11th Cir. 1999) (on remand from Supreme Court), cert. denied, 530 U.S. 1261 (2000); see also Neder v. United States, 527 U.S. 1, 17 (1999) (remanding for consideration of harmless error issue after discussion of definition of materiality). In any case, it is clear that the reporting defects alleged here, a substantial overstatement of HealthSouth's income and a material overstatement of its assets, would significantly alter the information mix available to a reasonable investor and thus would not fairly present "in all material respects" HealthSouth's financial condition and operational results. Whatever merit a void-for-vagueness claim based on the phrase "in all material respects" might have in another case, it has none here. In the context of the conduct alleged in Counts 48-50, the phrase "in all material respects" does not render Section 1350(c)(2) void for vagueness.

4. Scrushy's Void-For-Vagueness Claim Is Premature. As noted above, in considering the instant motion prior to trial, the Court is required to take the allegations of the indictment as true. But even if the Court were not so required, it would not be entitled to dismiss Counts 48-50 on the basis of Scrushy's motion. The conduct alleged in Counts 48-50, involving willful certifications of materially false information, see Doc. No. 1,

at 28-31, plainly does not implicate First Amendment concerns. Scrushy must therefore contend with the general rule that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. at 756; see Bama Tomato Company v. United States Department of Agriculture, 112 F.3d 1542, 1547-1548 (11th Cir. 1997) (rejecting facial challenge to statute allegedly void for vagueness where petitioner's conduct fell squarely within conduct precluded by statute, and statute was not vague in all its applications). Ultimately, whether Section 1350(c)(2) "clearly applies" to Scrushy's conduct as alleged in the indictment is a matter for proof at trial, and to the extent that it is, his motion to dismiss Counts 48-50 is premature. If the government's evidence at trial shows that Scrushy's conduct in connection with Counts 48-50 was as alleged in the indictment, and therefore clearly falls within the scope of Section 1350(c)(2) with its stringent scienter and specific intent requirement, Scrushy's vagueness claim necessarily fails. See Parker v. Levy, 417 U.S. at 756. If, on the other hand, the government's evidence fails to make such a showing of clear applicability, Scrushy will be free to renew his vagueness claim, and the court may consider it, in light of the evidence actually presented at trial. For now, however, prior to the offering of evidence that would show such clear application, there is no basis for granting Scrushy's motion. See United States v. Adkinson, 135 F.3d 1363, 1369 n.11 (11th Cir. 1998) (deferral of ruling on pretrial motion proper where facts at trial relevant to court's decision); cf. Fed. R. Crim. P. 12(b)(2) (pretrial motion proper if it can be decided without trial of general issue).

WHEREFORE, for the reasons set forth above, the Motion of Defendant Richard M. Scrushy to Dismiss Counts 48-50 of the Indictment should be denied.

Respectfully submitted,

Alice H. Martin /SJS
ALICE H. MARTIN
United States Attorney
Northern District of Alabama

MICHAEL V. RASMUSSEN
Assistant United States Attorney
Northern District of Alabama

Richard C. Smith /SJS
RICHARD C. SMITH
Deputy Chief, Fraud Section
Criminal Division
United States Department of Justice

Thomas M. Gannon
THOMAS M. GANNON
Attorney, Appellate Section
Criminal Division
United States Department of Justice
Post Office Box 899
Ben Franklin Station
Washington, D.C. 20044-0899
(202) 514-3651

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Response of the United States to Motion to Dismiss Counts 48-50 of the Indictment were served this day by first-class mail, postage prepaid, on the following counsel for defendant Scrushy:

Abbe David Lowell, Esq.
Thoma V. Sjoblom, Esq.
Chadbourne & Parke, LLP
1200 New Hampshire Avenue, N.W.
Wshington, D.C. 20036
(202) 974-5600
(202) 974-6778 (fax)

Arthur W. Leach, Esq.
c/o Thomas, Means, Gillis & Seay, P.C.
1035 Financial Center
505 20th Street North
Birmingham, Alabama 35243
(205) 328-7915
(205) 214-6160 (fax)

Dated: May ~~5~~ 6, 2004

Richard C. Smith /sjs
RICHARD C. SMITH
Deputy Chief
Fraud Section
Criminal Division
U.S. Department of Justice
Room 4100
1400 New York Avenue, N.W.
Washington, D.C. 20530
(202) 514-7023

ADDENDUM

Congressional Record --- Senate
Proceedings and Debates of the 108th Congress, First Session
Friday, April 11, 2003

***S5325** LEGISLATIVE HISTORY OF TITLE IX OF THE SARBANES-OXLEY ACT OF 2002

Mr. BIDEN.

Madam President, I rise today to offer the following section-by-section analysis of Title IX of the "Sarbanes-Oxley Act of 2002," P.L. 107-204, of which I was the primary author along with my good friend from Utah, Senator

Hatch. Title IX was derived ***S5326** from S. 2717, the "White-Collar Crime Penalty Enhancement Act of 2002," which I introduced with Senator

Hatch on July 10, 2002. That same day, Senator

Hatch and I offered the text of S. 2717 as a floor amendment to the Public Company Accounting Reform and Investment Protection Act of 2002, S. 2673. Our amendment was unanimously adopted by the Senate on July 10, 2002, by a 96-0 vote. S. 2673 was overwhelmingly approved, as amended with the inclusion of S. 2717, on **July 15, 2002**, by a vote of 97-0. S. 2673 then went to a House-Senate conference. The Biden-Hatch amendment was retained in the final conference report as Title IX, and in substantially identical form to that in S. 2673. The conference report, the Sarbanes-Oxley Act, H.R. 3763, was passed by the Senate on July 25, 2002, by a 99-0 vote. The President signed the Sarbanes-Oxley Act into law on July 30, 2002.

As I mentioned, Title IX of the Sarbanes-Oxley Act, entitled the "White- Collar Crime Penalty Enhancement Act of 2002," closely mirrors the original S. 2717. In order to provide guidance in the legal interpretation of these provisions, I have compiled the following analysis and discussion, which are intended to augment, and not supplant, the legislative history and explanatory statements that accompanied passage of H.R. 3763. This legislative history is intended also to supplement my remarks at the time of the Sarbanes-Oxley Act's final passage. See S7426-S7425 (July 26, 2002). I ask unanimous consent that this section-by-section analysis be included in the

Congressional Record as part of the official legislative history of these provisions.

The content of Title IX was developed partly in response to a series of white-collar crime hearings I held in my capacity as Chairman of the Senate Judiciary Subcommittee on Crime and Drugs. Through those hearings, the subcommittee heard from a wide range of witnesses with expertise in both corporate law and white-collar crime-including current and former high-ranking officials from the United States Securities and Exchange Commission (SEC), the United States Departments of Justice and Treasury, and the Federal Reserve; business and law professors; corporate practitioners; as well as victims of corporate fraud.

The first hearing, held on June 19, 2002, focused on the disparity in sentences between white-collar offenses, including pension fraud, and federal " street crimes" like car theft. Specifically, the hearing explored four broad areas: it focused on the human consequences of white-collar crimes; defined and quantified the problem, including an evaluation of the use of the criminal sanction against white-collar criminals and the severity of penalties typically imposed; explored the reasons that might explain the lighter sentences that white-collar offenders often receive; and discussed recent amendments to the federal sentencing guidelines that purport to address the historic, disparate treatment of economic crimes. The first-panel witnesses included Charles Prestwood, a retiree who lost his retirement savings in the bankruptcy of the Enron Corporation; Janice Farmer, a retiree who similarly lost her retirement savings in the Enron bankruptcy; and Howard Deputy, a former employee of the Metachem Company in Delaware who was at risk of losing a portion of his pension in Metachem's bankruptcy. The second-panel witnesses included James B. Comey, United States Attorney for the Southern District of New York; Glen B. Gainer, Chairman of the Board of Directors of the National White Collar Crime Center and West Virginia State Auditor; Bradley Skolnik, Chief of the Enforcement Section of the North American Securities Administrators Association and Securities Commissioner for the State of Indiana; Frank O. Bowman, Associate Law Professor at the University of Indiana School of Law; and Paul Rosenzweig, Senior Legal Research Fellow at the Heritage Foundation.

The second hearing, held on July 10, 2002, also addressed the adequacy of criminal penalties for white-collar crimes and evaluated the use of the criminal sanction to deter wrongdoing and encourage corporate responsibility. We were particularly interested in learning whether the current federal criminal law, as opposed to civil enforcement mechanisms, was sufficient to address the range of corporate scandals that were then unfolding. Specifically, the hearing addressed the issue through the lense of the recent accounting scandals-exploring the pattern of corporate irresponsibility and the cultural and economic conditions that made the scandals possible; the impact of the scandals on investor confidence and economic health; and the need for investor protection and anti-fraud legislation which includes stiffened criminal penalties. The first-panel witnesses included Michael Chertoff, Assistant Attorney General for the Criminal Division at the United States Department of Justice; and William W. Mercer, United States Attorney for the District of Montana and head of the United States Attorneys' White-Collar Crime Working Group. The second-panel witnesses included John C. Coffee, Jr., Adolf A. Berle Professor of Law at Columbia University School of Law; Thomas Donaldson, Mark O. Winkelman Professor at the Wharton School of Business at the University of Pennsylvania; Charles M. Elson, Edgar S. Woolard, Jr. Chair at the Center for Corporate Governance at the University of Delaware; George Terwilliger, former Deputy Attorney General at the United States Department of Justice; and Tom Devine, Legal Director at the Government Accountability Project.

The third hearing, held on July 24, 2002, continued the discussion initiated in the earlier hearings and featured three former, high-ranking officials in the Executive Branch who commented on a host of suggested reforms-including S. 2717 which, by that time, had been amended to the Senate precursor to the Sarbanes-Oxley Act (the Public Company Accounting Reform and Investment Protection Act of 2002, S. 2673). The witnesses included G. William Miller, former Secretary of the Treasury under President Carter and former Chairman of the Federal Reserve Board; Roderick Hills, former Chairman of the Securities and Exchange Commission under President Ford; and James Doty, former General Counsel to the Securities and Exchange Commission and head of the corporate and securities practice at Baker Botts LLP.

On a final note, the legislation was introduced and subsequently enacted against the backdrop of the Sentencing Commission's ongoing efforts in the area of economic crime. We are aware of the "Economic Crime Package," which was approved by the Commission in April 2001 and went into effect in November 2001. These amendments to the federal sentencing guidelines consolidated the guidelines for theft, property destruction, and fraud offenses; revised the definition of "loss," which largely informs the range of sentencing available for an offense; increased penalties for offenses involving moderate and high- dollar losses and reduced penalties on some lower-level offenses; and revised the loss table for tax offenses to provide for higher penalty levels for offenses involving moderate and high tax losses. Title IX was developed and enacted with full awareness of these new amendments to the guidelines.

I ask unanimous consent that the section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SECTION-BY-SECTION ANALYSIS AND DISCUSSION OF THE "WHITE-COLLAR CRIME PENALTY ENHANCEMENTS ACT OF 2002" (TITLE IX OF H.R. 3763)

Section 901. Short Title

This section designates this title of the Act as the "White-Collar Crime Penalty Enhancement Act of 2002."

Section 902. Attempts and Conspiracies To Commit Criminal Fraud Offenses

This section adds a new provision to the United States Code (18 U.S.C. s1349), which indicates that any person who attempts or conspires to commit a fraud offense under Chapter 63 of Title 18 (in other words, 18 U.S.C. ss1341- 1348) shall face the same penalties as those provided for in the predicate, or underlying, offense that was the object of the attempt or the conspiracy. (While 18 U.S.C. s2 currently provides for the same penalties for aiding and abetting offenses as the predicate crimes, prosecution under that section requires the government to prove some affirmative act by the defendant. In contrast, prosecution under Section 902 requires no affirmative act, but only an agreement to commit a future crime, as is the case with 18 U.S.C. s371.)

During hearings by the Judiciary Subcommittee on Crime and Drugs on the " penalty gap" between white-collar offenses and *S5327 other federal crimes, we observed that defendants charged with conspiracy pursuant to 18 U.S.C. s371 were afforded a potential windfall in terms of their sentence, vis-a-vis their co-defendants who were convicted of the actual offenses. That windfall resulted because the charge of conspiracy under Section 371 only subjects a convicted individual to a maximum imprisonment term of 5 years. In contrast, certain fraud offenses in Chapter 63 carry maximum penalties of up to 30 years imprisonment, e.g., 18 U.S.C. s1344 (imposing up to 30 years imprisonment for bank fraud). In the case of a particularly egregious bank fraud case, then, one co-defendant could receive a 30-year sentence while an equally culpable co- conspirator would receive only a 5-year sentence.

Congress responded by creating a new Section 1349 for defendants who attempt or conspire to commit a financial fraud under Chapter 63 of Title 18. The Justice Department may now elect to charge a fraud conspirator under this new section, rather than pursuant to 18 U.S.C. s371, thereby preserving the same maximum penalties. In enacting this new section, we harmonize the penalties for financial fraud conspiracy with those of narcotics offenses. See 21 U.S.C. s846 ("<a>ny person who attempts or conspires to commit any <narcotics> offense defined in this subchapter 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.")

Section 903. Criminal Penalties for Mail and Wire Fraud

This section increases the potential maximum term of imprisonment available upon conviction for mail fraud (18 U.S.C. s1341) or wire fraud (18 U.S.C. s1343) from 5 years to 20 years. Fraud affecting financial institutions in both Sections 1341 and 1343 of Title 18 is unaffected by this section, so the potential maximum term of imprisonment for this offense remains 30 years.

By raising the criminal penalties for Sections 1341 and 1343, we intended to harmonize the penalties for mail and wire fraud with the penalties for other serious financial crimes. See, e.g., 18 U.S.C. s1348 (25-year maximum penalty for securities fraud); 18 U.S.C. s1956(a)(3)(A) (20-year maximum penalty for money laundering); 18 U.S.C. 1962 (20-year maximum penalty for racketeering). In addition, we intended to ensure that the penalty structure for these offenses was sufficiently stiff to provide a real deterrent effect. As support for that aim, the Subcommittee on Crime and Drugs heard testimony from several witnesses who insisted that (1) these federal penalties should be toughened; and (2) in order to deter misconduct, offenders should be subject to some amount of actual incarceration.

For example, the Honorable James B. Comey, Jr., the United States Attorney for the Southern District of New York, observed that "<w>hite collar criminals have broken serious laws, done grave harm to real people . . . <and> should be subject to the same serious treatment that we accord all serious crimes: substantial periods of incarceration. While we have made significant progress on some issues in recent years, especially in improving the applicable sentencing guidelines, we believe that current federal penalties for white collar offenses should be toughened." Testimony of Comey before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 2. He continued: "<E>nforcement can be undermined when criminals perceive the risk of incarceration as minimal and view fines and probation merely as a cost of doing their criminal business. We believe that if it is unmistakable that the automatic consequence for one who commits a significant white collar offense is prison, then many will be deterred. . . . <White collar criminals> commit their crimes not in a fit of passion, but with cold, careful calculation. Accordingly, they are the most rational offenders and are more likely than most to weigh the risks of possible courses of action against the anticipated rewards of criminal behavior." Testimony of Comey before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 4.

The Honorable Michael Chertoff, Assistant Attorney General for the Criminal Division at the United States Department of Justice, echoed this sentiment: "We believe that strong enforcement and tough penalties are especially important in the context of white collar crimes, because business criminals act with calculation rather than in a fit of anger or compulsion. Because white collar criminals act more rationally than most other criminals, they can more easily be deterred. In our experience, one thing is crystal clear: businessmen and women want to avoid jail at any cost. If their calculus includes a reasonable likelihood that they will be caught, and if caught, a reasonable likelihood that they will go to jail rather than get probation, home detention, or some other alternative to incarceration,' they will be much less willing to roll the dice and commit a fraud." Testimony of Chertoff before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 3; see also Testimony of G. William Miller, former Secretary of the Treasury and former Chairman of the Federal Reserve Board, before the Senate Judiciary Subcommittee on Crime and Drugs, July 24, 2002, p. 3-4 ("<T>he greed that drives the recent rash of alleged corporate wrongdoing is fostered by the criminal's belief that the rewards are great and the possibility of more than nominal punishment is low. For the corporate wrongdoer the deterrent is only likely to be effective if there is a high likelihood of detection and a high probability of serious punishment. The most powerful deterrent is the threat of jail time. The prospect of substantial monetary penalties also can affect behavior."); Testimony of Bradley Skolnik, Securities Commissioner of the State of Indiana and Chairman of the Enforcement Division of the North American Securities Administrators Association, before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 2, 3 ("Investor education is an effective crime prevention tool but the strongest deterrent to crime, I believe is criminal prosecution and prison time. . . . <F>rom my perspective as a state securities regulator, white-collar criminals who commit securities fraud deserve prison time just like thieves, muggers and murderers. . . . Someone steals your car, they go to prison; some con artist steals the money your parents needed for retirement, they get fined. That's just not right.") "Jail time performs two functions," Chertoff explained. "It holds white collar criminals accountable for their past misdeeds, and it prevents future misbehavior by those executives who might toy with the idea of beating the system." Testimony of Chertoff before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 5.

Section 904. Criminal Penalties for Violations of the Employee Retirement Income Security Act of 1974

This section increases the maximum criminal penalties for a willful violation of the reporting and disclosure provisions of the Employee Retirement Income Security Act (ERISA), Title I, subtitle B, part 1, or any regulation or order issued thereunder. Section 904 increases the maximum fine for an individual defendant convicted under 29 U.S.C. s1131 from $5,000 to $100,000, and the maximum term of imprisonment from 1 year to 10 years. The increased maximum term of imprisonment converts the offense from a misdemeanor to a felony. In addition, this section increases the maximum fine for a convicted organizational defendant from $100,000 to $500,000.

ERISA imposes on pension managers a number of reporting and disclosure requirements regarding the administration of their pension plans. Among other things, ERISA requires the administrator of a pension plan to notify the United States Department of Labor and the plan's participants and beneficiaries of any material modifications in the terms of the pension plan. It also creates a fiduciary relationship between the pension managers and the pension plan beneficiaries. Criminal penalties apply for violations of Part 1 of ERISA, 29 U.S.C. s1131, which is designed, among other things, to do the following: (1) require the disclosure of significant information about employee benefit plans and all transactions engaged in by those who control the plans; (2) provide specific data to plan participants and beneficiaries about the rights and benefits to which they are entitled and the circumstances that may result in a loss of those rights and benefits; and (3) set forth the responsibilities and proscriptions applicable to persons occupying a fiduciary relationship to employee benefit plans. 29 U.S.C. ss1021-1031.

Hearings by the Judiciary Subcommittee on Crime and Drugs included a discussion of the penalty scheme under ERISA. Section 1131 of ERISA only made it a criminal misdemeanor "willfully" to violate Part 1 of ERISA, 29 U.S.C. s1131, even though the potential harm flowing from an ERISA violation could be enormous. A criminal violation of Part 1 of ERISA could occur, for example, where a corporation's pension administrator learns of information relating to the company's financial health which, if not disclosed, could result in a loss of the employees' rights and benefits under the corporation's pension. (A recent study by the Congressional Research Service of the Enron Corporation collapse concluded that one criminal provision which might be implicated is Section 1131 of ERISA. See CRS Report for Congress, "Possible Criminal Provisions Which May Be Implicated in the Events Surrounding the Collapse of the Enron Corporation," RS21177 (March 25, 2002)). In enacting Section 904, Congress concluded that the disproportionately low ERISA penalty constituted one of the "penalty gaps" between white-collar offenses and other federal crimes. For example, a defendant convicted of interstate auto theft is subject to up to 10 years in prison, regardless of the value of the stolen automobile. 18 U.S.C. s2312. In contrast, a defendant who violates ERISA-but no other federal fraud statute-was only subject to a maximum penalty of 1 year in prison, regardless of the value of the loss to an employee's pension.

While a defendant who violates the criminal provisions of ERISA may also violate another federal felony statute with higher penalties, that will not always be the case. Accordingly, the intention of this provision is to provide federal prosecutors with an appropriate felony charge to combat willful criminal conduct which devastates employees' pension holdings. The United States Sentencing Commission recognized that there are instances when an ERISA criminal violation occurs in the absence of any other federal criminal offense. The United States Sentencing Guideline provision for the ERISA criminal violation is USSG s2E5.3, entitled "False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security ***S5328** Act." The background notes to s2E5.3 provide that "this section covers the falsification of documents or records relating to a benefit plan covered by ERISA." The background note to s2E5.3 recognizes that while ERISA violations "sometimes occur in connection" with other federal offenses, they do not always thus occur. The base offense level under s2E5.3 for a "stand-alone" ERISA violation, absent any other violation, is only 6.

If the ERISA criminal offense is accompanied by another criminal violation, however, the guidelines direct the application of USSG s2B1.1, which addresses fraud, theft and other white-collar offenses (which has a base offense level of 6, but may increase to a level of 32 depending on the monetary value of the loss). Thus, under prior law, if a defendant violated both ERISA and the mail fraud statute, s2B1.1 would apply-not s2E5.3-and the defendant's sentence would be calculated with the loss calculations of the guidelines, and apply the higher felony maximum penalties of the mail fraud statute.

In contrast, if the defendant were only convicted of an ERISA criminal violation, the sentencing court would be limited by the statutory cap in 29 U.S.C. s1131 and the base offense level cap of s2E5.3. Accordingly, given the relative potential for devastating economic loss to pensioners who are victims of an ERISA criminal violation, it is entirely appropriate for Congress to close the "penalty gap" between ERISA and other federal statutes used to combat securities fraud. Pursuant to Section 905 of the Sarbanes-Oxley Act, Congress expects the Sentencing Commission to examine s2E5.3 of the Sentencing Guidelines and make any appropriate modifications given the enactment of Section 904.

Section 905. Amendment to Sentencing Guidelines Relating to Certain White- Collar Offenses

This section directs the United States Sentencing Commission, within 180 days of enactment of the Sarbanes-Oxley Act, to review and, as appropriate, to amend the applicable sentencing guidelines and related policy statements. Section 905(b) directs the Commission, among other things, to ensure that the guidelines and policy statements reflect the seriousness of the offenses and the statutory increases in penalties set forth in the Act, the growing incidence of such fraud offenses, and the need to modify the guidelines and policy statements to deter, prevent, and punish such offenses.

In passing the Sarbanes-Oxley Act, and the criminal and sentencing provisions in particular, Congress was aware of ongoing efforts by the Sentencing Commission to consolidate certain economic crimes, as achieved through the "Economic Crime Package," and to study the effects of that consolidation. Recognizing, however, that the length of an offender's sentence is determined both by the operation of the sentencing guidelines and by the strength of the underlying statute, cf. Testimony of Paul Rosenzweig, Senior Legal Research Fellow at the Heritage Foundation, before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p.6 (noting that disparities in penalties are principally the product of actions of Congress, i.e., the criminal statutes passed by Congress), we amended the federal criminal code to increase penalties significantly for certain offenses (as discussed above). Our expectation is that, similarly, the federal sentencing guidelines will be reviewed and, where appropriate, modified accordingly.

Although the Commission has recently considered the severity of sentences for these economic crimes, we believe that further study is warranted-as did several of the witnesses who testified before the Subcommittee on Crime and Drugs. This is particularly so, given the new and increased penalties for white-collar offenses established by Title IX. For instance, the Honorable Glen B. Gainer, III, State Auditor of the State of West Virginia and Chairman of the National White Collar Crime Center, a non-profit organization that provides support services to state and local law enforcement agencies and other organizations involved in the prevention, investigation and prosecution of economic crimes, noted: "In terms of sentence length, research conducted in the early 90's clearly demonstrates the disparity between <white-collar and so- called 'street' crime offenders. Those incarcerated for losses in excess of $100,000 or more as a result of the savings and loan scandals received an average of 36.4 months in prison. During the same time period, those nonviolent federal offenders who committed burglary got 55.6 months, car theft received 38 months, and first-time drug dealing averaged 65 months. While some of this disparity may have been corrected by revisions to the federal sentencing policy for economic crimes, disparate sentencing can still be seen between 'white- collar' cases involving substantial monetary loss, and other crimes with similar financial impact." Testimony of Gainer before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 4.

Another witness, also using data that preceded adoption of the "Economic Crime Package," cited statistics that similarly demonstrated a disparity in sentencing between traditional white-collar and other crimes: "<D>efendants convicted of larceny, embezzlement, fraud, and counterfeiting who were sentenced to federal prison received average (mean) sentences of 15.6 months, 9.9 months, 18 months, and 17 months respectively. By contrast, robbery defendants received 110.6 months, drug defendants 75.3 months, and firearms offenders 64.1 months. Even the average immigration sentence was 27.8 months, ten months longer than the average fraud penalty. Moreover, federal economic crime defendants receive sentences of probation at dramatically higher rates than virtually any other class of defendant. More than one-half of all larceny defendants and one-third of all fraud defendants receive probation." Testimony of Frank O. Bowman, Associate Law Professor at the University of Indiana School of Law, before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 2. Similarly, Rosenzweig observed: "An overwhelming percentage of those who were sentenced for traditional crimes received sentences requiring terms of imprisonment. For example, 94.2 percent of those convicted of drug trafficking were sentenced to prison. 97 percent of those convicted for robbery were imprisoned, as were 93 percent of those convicted of arson, and 97.4 percent of those convicted of murder. By contrast only 53.5 percent of those convicted of fraud and 48.1 percent of those convicted of embezzlement were sentenced to prison." Testimony of Rosenzweig before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 4.

While there was not a consensus regarding the reasons for, or desirability of, such a penalty disparity between similarly egregious infractions, many of the witnesses suggested that its existence worked to undermine the integrity of the criminal justice system. For example, Chairman Gainer concluded: "The conclusion we can safely draw from this body of information is that white-collar criminals, particularly those involved in large, complex frauds that impact hundreds, if not thousands of victims, do not receive punishment that is proportionate to the harm that they cause." Testimony of Gainer before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 5.

Finally, in its efforts to comply with the terms of this title, we hope that the Sentencing Commission will take the opportunity to review and advise Congress on a disturbing development cited by the two witnesses from the Justice Department, Assistant Attorney General Chertoff and United States Attorney Comey-namely, an over-willingness in some jurisdictions to depart downward from the mandated sentencing guideline range for certain white-collar offenses. Justifying the need to increase penalties for certain white collar offenses, Chertoff explained: "Not only are the maximum statutory penalties for fraud and other white collar-type offenses substantially less than those for violent offenders or drug cases, but it appears that judges in some jurisdictions are overly willing to depart downward from the mandated federal sentencing guideline range to sentence such offenders to minimal (if any) jail time, home detention, or even probation." Testimony of Chertoff before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 5.

Comey's comments mirrored this concern: "<I>n some districts, non- substantial assistance downward departures are anything but infrequent (9,286 non-substantial assistance downward departures were made in 2000). . . . While available analyses do not detail the bases of these departures in white collar cases, a number of district judges appear to believe that white collar defendants should not be incarcerated in order to facilitate payment of restitution and fines. Of course, this is at odds with the view that incarceration can deter such crime in the first instance. . . . <F>or a variety of reasons, federal judges are hesitant to incarcerate white collar defendants. If past is prologue, even though the economic crime amendments of 2001 increased penalties for these crimes, departures will be used to undercut the purposes of the new provisions." Testimony of Comey before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 17.

By citing this and other testimony, we underscore Congress' belief that a " penalty gap" has existed between white-collar offenses and other offenses. Congress in particular is concerned about base offense levels which may be too low. The increased sentences, while meant to punish the most egregious offenders more severely, are also intended to raise sentences at the lower end of the sentencing guidelines. While Congress acknowledges that the Sentencing Commission's recent amendments are a step in the right direction, the Commission is again directed to consider closely the testimony adduced at the hearings by the Judiciary Subcommittee on Crime and Drugs respecting the ongoing "penalty gap" between white-collar and other offenses. To the extent that the "penalty gap" existed, in part, by virtue of higher sentences for narcotics offenses, for example, Congress responded by increasing sentences for certain white-collar offenses. Accordingly, we ask the Commission to consider the issues raised herein; determine if adjustments are warranted in light of the enhanced penalty provisions contained in this title; and make recommendations accordingly.

Section 906. Corporate Responsibility for Financial Reports

Summary. This section adds a new provision to the United States Code (18 U.S.C. ***S5329** s1350), which requires the chief executive officer and chief financial officer (or their equivalent) of an issuer, foreign or domestic, to certify the accuracy of periodic financial statements filed by the issuer with the Securities and Exchange Commission under 15 U.S.C. ss78m(a) or 78o(d). (An "issuer" is defined, under Section 2(a)(7) of the Act, to mean an entity whose securities are registered under Section 12 of the Securities and Exchange Act of 1934 or that is required to file reports under Section 15(d) of that Act.) The chief executive and financial officers must certify that the periodic financial statement complies with certain specified requirements of the Securities and Exchange Act and that it "fairly presents, in all material respects, the financial condition and results of operations of the issuer." Pursuant to Section 1350(c)(1), anyone who makes such a certification "knowing" that the report accompanying the certifying statement does not meet the statutory requirements would, upon conviction, face up to $1 million in fines, up to 10 years in prison, or both. Pursuant to Section 1350(c)(2), anyone who " willfully" certifies compliance "knowing" that the periodic report accompanying the statement does not comport with the requirements of 18 U.S.C. s1350 would face up to $5 million in fines, up to 20 years in prison, or both.

Financial Reports. The backdrop to Section 906 is the long-standing requirement under Section 13(a) and Section 15(d) of the Securities and Exchange Act (15 U.S.C. ss78m(a) or 78o(d)) that publicly-traded companies file reports with the SEC regarding the financial well-being of the corporation. See 15 U.S.C. s78m(a) ("Every issuer of a security . . . shall file with the Commission . . . such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement <and> such annual reports . . . as the Commission may prescribe.") Pursuant to this provision, the SEC requires publicly-traded companies to file numerous reports (e.g., Forms 10-K, 20-F, 40-F, 10-Q, 8-K, 6-K), all intended to provide both the Commission and the investing public with information regarding the financial condition of the corporation. Willful failure to file these periodic reports, or the making of materially false statements therein, constitutes a felony. See 15 U.S.C. s78ff ("Any person who willfully violates any provision of this chapter . . . or any person who willfully and knowingly makes . . . < any> false or misleading <statement> with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both<.>") (We note that, in contrast to the "willful" standard we apply in Section 906, courts have ascribed a different meaning to "willful" violations of the 1934 Act, e.g., United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976) (determining that an act is done "willfully" if it is done intentionally and deliberately and not the result of innocent mistake, negligence or inadvertence; a specific intent to disregard or disobey is not required). As explained more fully below, Congress uses "willful" in Section 906 to create a specific intent crime, not the general intent crime which courts have sometimes used in interpreting the penalty provisions of the 1934 Act.) While defendants have been prosecuted under 15 U.S.C. ss78m and 78ff for filing false financial reports with the SEC, see, e.g., United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied. 406 U.S. 917 (1972), the law has never required a company's top corporate official to certify to the accuracy of the company's financial reports. Section 906 closes this loophole by imposing this responsibility upon the CEO and CFO (or their equivalents) of all publicly-traded corporations. Significantly, it does not mandate any additional reporting requirements, but only applies to those companies who are independently required, by Sections 13(a) and 15(d) of the Securities and Exchange Act of 1934, to certify the accuracy of those reports. As noted above, the law has always required that those reports be materially accurate.

Executive Certification. The notion of requiring an organization's primary or senior executive to certify a statement submitted to the government, on threat of possible criminal liability, is hardly novel. For example, Section 911(a)(1) of the National Defense Authorization Act for Fiscal Year 1986 requires a senior executive of a defense contractor to certify, to the best of his or her "knowledge and belief," that all costs included in a proposal for settlement of indirect costs are allowable under the cost principles of the Federal Acquisition Regulation and its supplements. 10 U.S.C. s2324(h); 48 C.F.R. s52.242-4. Like Section 906 of the Sarbanes-Oxley Act, the regulation implementing the certification requirement contained in Section 911(a)(1) mandates that the certificate be executed by a company's senior executives, who face potential criminal liability if the representations contained in the certification are shown to be inaccurate. See 10 U.S.C. s2324(i).

Such a certification of accuracy is especially important in the securities context, since the robustness of financial markets and the success of national securities regulation are based on the full disclosure of a company's financial state. During the summer of 2002, as daily reports of alleged CEO criminal wrongdoing filled the news, congressional testimony from finance experts touted the critical need to impose responsibility upon top corporate officials in ensuring accuracy in financial reports. For example, Federal Reserve Chairman Alan Greenspan testified before the Senate Committee on Banking, Housing and Urban Affairs on July 16, 2002, the day after the Senate passed S. 2673. Much of his testimony focused on (1) the need for top corporate officials to report accurately the financial health of their companies; and (2) the need for criminal penalties for those who knowingly fail to do so. Chairman Greenspan said the following: "A CEO must . . . bear the responsibility to accurately report the resulting condition of the corporation to shareholders and potential investors. Unless such responsibilities are enforced with very stiff penalties for noncompliance, as many now recommend, our accounting systems and other elements of corporate governance will function in a less than optimum manner. . . . Already existing statutes, of course, prohibit corporate fraud and misrepresentation. But even a small increase in the likelihood of large, possibly criminal penalties for egregious behavior of CEOs can have profoundly important effects on all aspects of corporate governance because the fulcrum of governance is the chief executive officer . . . . And I don't wish to make a generalized statement, but I suspect that if the CEO issue <i.e., accurate reporting of the financial health of a company> were fully and completely resolved-which it never will be, because we're dealing with human beings-I think all the rest of the problems will just disappear . . . . <I>f you do not get the CEO changing in the way that particular position functions, a goodly part of the work of the Senate is not going to be very effective . . . . <W>hat you can do is to try to create an environment and a legal structure which very significantly penalizes malfeasance."

Likewise, several witnesses before the Judiciary Subcommittee on Crime and Drugs echoed the testimony of Chairman Greenspan, suggesting that the best way to protect investors from fraud is to require corporate executives at publicly-traded companies to disclose detailed information about their companies' financial health. For example, Professor Thomas Donaldson, Mark O. Winkelman Professor at the Wharton School of Business at the University of Pennsylvania, commented: "The importance of accurate information in fueling efficient economic activity is well substantiated. Rational choice demands accurate information. When companies fail to provide investors with accurate information, investors make worse decisions and markets, in turn, become less efficient." Testimony of Donaldson before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 4. Relatedly, he noted: "Crony capitalism and the lack of transparency were rightly implicated in the Asian melt down of 1997-1998. Without transparency and reliable numbers about the economic health of Asian companies, investors were stymied from responding rationally to the crisis. They were unable to dump their investments in poorer companies and hold their investments in better companies because they simply couldn't trust the numbers. In the ensuing crisis, they dumped everything with pernicious consequences. Today, we appear to be experiencing a transparency discount in the American equity markets. Investors pay less because they believe that they know less." See id. at 2; see also Testimony of Devine before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 2 ("Two long-accepted truths are that secrecy is the breeding ground for corruption, and sunlight is the best disinfectant.")

Thus, Section 906 simply seeks to facilitate full disclosure and ensure the accuracy of financial reports by requiring corporate executives' personal stamp of approval. As Secretary Miller stated plainly but poignantly, "<i>f the CEO is required to certify the reports he will be hard pressed later to say he thought the CFO had everything in apple pie shape. So the certificate becomes the hook that establishes accountability." Testimony of Miller before the Senate Judiciary Subcommittee on Crime and Drugs, July 24, 2002, p. 5.

State of Mind Requirement for Criminal Liability. Section 906 provides for a two-tiered penalty scheme for corporate officials who certify financial statements which they know to be false. It should be kept in mind that both penalties only apply to corporate executives who certify statements "knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section."

While it is common for drafters of legislation to use the mens rea terms " knowing" and "willful" interchangeably, there are some criminal statutes which distinguish between them. See, e.g., 18 U.S.C. s35 (knowingly conveying false information triggers civil liability, while willfully conveying false information is a felony). When these two mens rea requirements are used in setting forth graduated penalties for the same predicate conduct, courts construe "knowing" to embody a general intent standard and "willful" to embody a specific intent standard. As such, knowing conduct is distinct from, and less intentional than, willful conduct. See Bryan v. United States, 524 U.S. 184, 193 (1998) (noting that "more is required" for a finding of "willful" misconduct; "<t>he jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful").

"Knowing." Section 906 establishes 18 U.S.C. s1350(c)(1), making it a 10-year felony ***S5330** for a corporate official to certify financial statements "knowing" that they contain false or misleading information. As explained above, "knowing" as used here is meant to embody a general intent standard. It refers to knowledge of the facts constituting the offense, as distinguished from knowledge of the law. See Bryan, 524 U.S. at 192 (quoting Justice Jackson). In other words, to certify financial statements "knowing" them to be false simply means to certify the financial statements intentionally, voluntarily and with an awareness of their duplicity, rather than by mistake or accident. Knowledge of the law is not required, nor is a willful and intentional desire to evade the law's requirements. Stated differently, Section 1350(c)(1) imposes criminal liability for corporate officials who certify a financial statement "knowing" that it fails to "fairly present, in all material respect, the financial condition and the operations of the issuer." It is not required that the corporate official intended to violate the statute (or even knew of the statute's certification requirements). Rather, the government must only prove that the corporate officer knew that the financial statements were materially misleading or inaccurate.

That is not to say, however, that certifying executives can evade liability by avoiding acquiring knowledge. We agree with the sentiments of Secretary Miller, who noted that "<t>he certifying officer should be judged upon whether he has been diligent, exercised due care, established procedures for verification, made adequate investigations, and provided appropriate supervision." Testimony of Miller before the Senate Judiciary Subcommittee on Crime and Drugs, July 24, 2002, p. 5. It is our intent that courts impose a duty on these individuals to be reasonably informed of the material facts necessary to prepare financial information for submission to the SEC and for dissemination to the public. This position is consistent with well-established law that conscious avoidance, or a deliberate attempt to avoid knowledge of the crime, will not be a defense to the criminal penalties contained in a statute. See, e.g., United States v. de Francisco-Lopez, 939 F.2d 1405, 1409 (10th Cir. 1991) ("'<T>he act of avoidance of knowledge of particular facts may itself circumstantially show that the avoidance was motivated by sufficient guilty knowledge to satisfy the . . . 'knowing' element of the crime."'); United States v. Hanlon, 548 F.2d 1096, 1101 (2d Cir. 1977) ("It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him; 'see no evil' is not a maxim in which the criminal defendant should take any comfort."); United States v. Jewel, 532 F.2d 697 (9th Cir.) (en banc) ("To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question."), cert. denied, 426 U.S. 951 (1976); see also Leary v. United States, 395 U.S. 6, 46 n. 93 (1969).

On the other hand, the standard articulated here is not tantamount to negligence or recklessness. We simply note the well-established proposition that conscious avoidance of certain facts should not provide immunity from prosecution; in contrast, if lower-level corporate officials conspire to hide the true financial health of the company from the CEO for whatever reasons, the CEO will not be held liable if he or she did not know these facts. We expect that this would be a rare event, however, given the requirement that a CEO be aware of the contents of their company's financial reports filed with the SEC. See, e.g., Howard v. Everix Systems, Inc., 228 F.3d 1057, 1062 (9th Cir. 2000) ("Key corporate officials should not be allowed to make important false financial statements knowingly or recklessly, yet still shield themselves from liability in the preparation of those statements. Otherwise, the securities laws would be significantly weakened, because corporate officers could stay out of loop such that . . . only the SEC could bring suit against them in an individual capacity for their misrepresentations.") Nor does Congress intend Section 906 to be a so-called "public welfare law" which would create strict liability. See, e.g., United States v. Dee, 912 F.2d 741 (4th Cir. 1990) (holding that one who possesses hazardous wastes will be presumed to be aware of federal regulations governing such wastes, notwithstanding law's inclusion of a knowledge mens rea requirement).

"Willful." Section 906 also creates a new 20-year felony provision, 18 U.S.C. s1350(c)(2), which applies to corporate officials who "willfully" certify financial statements which they know to be false. "Willfully" here is meant to denote a specific intent standard. When used in the criminal context, a "willful" act is generally one undertaken with a bad purpose, or with knowledge that the prohibited conduct is unlawful. See Bryan, 524 U.S. at 191- 92. Under Section 906, certifying financial statements which the CEO knows are false is not enough to be "willful." Rather, the act also must be done with an evil intent to evade the law. That evil intent is an intent to disobey or disregard the law, rather than an intent to do wrong in some more general sense. A corporate executive who certifies financial statements which he knows to be false is not guilty under this section unless, in addition to knowing what he was doing, he voluntarily and intentionally engaged in conduct that he knew was prohibited. See Ratzlaf v. United States, 510 U.S. 135, 142 (1994) (describing a "'willful' actor as one who violates 'a known legal duty"'); Cheek v. United States, 498 U.S. 192, 201 (1991) (establishing that " the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty"').

Section 1350(c)(2)'s construction is consistent with prior judicial interpretations of the word "willful." As the Supreme Court has observed, "the word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." Bryan, 524 U.S. at 191. "Willfully" may mean either a requirement of general intent or specific intent. Recognizing that ignorance of the law typically is no defense to a criminal charge, Congress here intended to require a more particularized showing of knowledge in order to access the tougher criminal penalties under s1350(c)(2)-i.e., knowledge of the specific law or rule that a defendant's conduct is alleged to violate. In passing this section, Congress relied on the Court's determination in cases like Ratzlaf, 510 U.S. 135, and Cheek, 498 U.S. 192.

In these cases, the Court interpreted the term "willfully" in two different statutes, one dealing with structuring transactions and the other dealing with tax evasion, as requiring a finding of specific intent. Ratzlaf, 510 U.S. at 141; Cheek, 498 U.S. at 200. Part of the Court's reasoning was that the complex nature of these laws justified an inference that Congress intended "willfully" to be a specific intent requirement so that those who were ignorant of the law, but exercised reasonable care, would not be subjected to the same punishment as bad actors with an evil intent. Ratzlaf, 510 U.S. at 144-46; Cheek, 498 U.S. at 200, 205. Stated differently, Congress made violations of these statutes "specific intent crime<s> because, without knowledge of the . . . requirement, a would-be violator cannot be expected to recognize the illegality of his otherwise innocent act." United States v. Eisenstein, 731 F.2d 1540, 1543 (11th Cir. 1984). Like the anti-structuring and tax evasion provisions at issue in Ratzlaf and Cheek, securities laws are complex, which is why Section 906 incorporates different penalties for " knowing" violations committed with general intent and "willful" violations characterized by a specific intent to violate the law. In effect, for the heightened penalties triggered by "willful" violations, Section 906 carves out a limited and rebuttable exception to the traditional rule that "ignorance of the law is no excuse." See Bryan, 524 U.S. at 196.

Finally, for purposes of clarity, we should mention that we are aware that the term "willfully" is invoked and interpreted differently in the context of civil administrative disciplinary proceedings instituted by the SEC under federal securities laws. For example, under Sections 15(b)(4) and 15(b)(6) of the Securities Exchange Act of 1934, the SEC may discipline a registered broker-dealer in securities or anyone associated or participating with the broker-dealer if it finds in such proceedings that the respondent has " willfully" violated or "willfully" aided and abetted the violation by any person of any provision of certain securities laws or rules. While, as we have noted, the meaning of "willfully" depends on statutory context, in the SEC administrative disciplinary context, it has been held to mean "no more than the person charged with the duty knows what he is doing." Hughes v. Securities and Exchange Commission, 174 F.2d 969, 977 (D.C. Cir. 1949); see also Seaman v. Securities and Exchange Commission, 603 F.2d 1126, 1135 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); Arthur Lipper Corp. v. Securities and Exchange Commission, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 430 U.S. 1009; Stead v. Securities and Exchange Commission, 444 F.2d 713, 714-15 (10th Cir. 1971), cert. denied, 404 U.S. 1059. See also the discussion of willfulness in Wonsover v. Securities and Exchange Commission, 205 F.3d 408, 413 (D.C. Cir. 2000). The court reiterated its "traditional formulation of willfulness" for purposes of Section 15(b) of the Exchange Act. Citing its prior holding in Gerhard & Otis, Inc. v. Securities and Exchange Commission, 348 F.2d 798 (D.C. Cir. 1965), the Court noted that "willfully" in that provision "means intentionally committing the act which constitutes the violation," not that " the actor <must> also be aware that he is violating <the law>." Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (2d Cir. 1965); Edward J. Mawood & Co. v. Securities and Exchange Commission, 591 F.2d 588, 595-96 (10th Cir. 1979) (same). Needless to say, for purposes of Section 906, we do not adopt the "general intent" interpretation of "willful."

Expert Advice. Some defendants charged in white-collar cases have attempted to avert criminal liability by claiming reliance on expert advice. See, e.g., Ratzlaf, 510 U.S. at 142 n.10 ("'<S>pecific intent to commit the crimes' . . . might be negated by, e.g., proof that defendant relied in good faith on advice of counsel."); Eisenstein, 731 F.2d at 1543-44 (same). To the extent that it exists, the so-called "reliance on expert" defense is held to apply only when the defendant can demonstrate that he fully disclosed all relevant facts to his accountant or attorney and that he relied in good faith on the expert's advice. See United States v. Johnson, 730 F.2d 683, 686 (11th Cir.), cert. denied, 469 U.S. 867 (1984); United States v. McLennan, 563 F.2d 943, 946 (9th Cir. 1977), cert. denied, 435 U.S. 969 (1978) (noting that "<a> dvice of counsel is no defense unless the defendant gave his attorney all of the facts, and unless counsel specifically advised the course of conduct taken by the defendant"). It is not Congress' intent to ***S5331** disrupt this line of authority. We presume that, where it is a reliance on expert advice that is truly at issue, see Johnson, 730 F.2d at 686-87 (discounting defendants' defense where reliance on expert advice was irrelevant to the real claims at issue), the same standard articulated in the above-cited and other authority would apply to the criminal provisions contained in this title.

Finally, the duty imposed by the Section 906 certification requirement is not intended to end once a financial statement and accompanying certification are submitted. Upon discovery that a statement contains an error, immediate correction and disclosure of the correction should be required.

Interplay With Section 302 of S. 2673: Scope of Certification Requirement. At the time I offered the Biden-Hatch Amendment to S. 2673, that bill already had a provision (now codified at Section 302), which is similar to Section 906, with three significant exceptions. First, the provision does not apply to the chairperson of a company's board of directors (my original legislation and subsequent amendment to S. 2673 applied the certification requirement to chief executive officers, chief financial officers, and board chairpersons). Second, it contains no criminal enforcement provisions. Third, the scope of corporate filing activity subject to the requirements of Section 302 is far narrower, as I explain below.

Section 302 provides that the SEC must require, for each company filing periodic reports under Section 13(a) or 15(d) of the Exchange Act, that the principal executive officer and the principal financial officer, or persons performing equivalent functions, make certain certifications in each annual or quarterly report filed with or submitted to the SEC. Section 302, by its terms, only applies to annual and quarterly reports and, accordingly, its scope is so cabined. Section 906, on the other hand and quite intentionally, includes no such limitation of its scope. It is intended to apply to any financial statement filed by a publicly-traded company, upon which the investing public will rely to gauge the financial health of the company. So, Section 906 applies to annual and quarterly reports (e.g., Forms 10-K, 20-F, 40-F, 10-Q) but, unlike Section 302 certifications, is also intended to apply to so-called " current" reports like Forms 8-K and 6-K (foreign issuer submissions), as well as submissions of Form 11-K by employee benefit plans. The above list is merely illustrative, not exhaustive, and Congress intends the SEC to issue guidance on any additional reports which are subject to Section 906.

We are aware of the SEC's historic position that the term "periodic reports" describes Forms 10-Q, 10-K, 10-QSB, 10-KSB, 40-F and 20-F, which are required to be filed at specified intervals in time, and not Forms 8-K and 6-K, which are only required to be filed upon the occurrence of specified events. We in no way intend to import the more expansive scope of Section 906 into broader securities regulation; the wider view of "periodic report" is for purposes of implementing this specific certification requirement only.

Note that Section 906 does not require certification that the financial statements are in accordance with generally accepted accounting principles (GAAP). That omission is intentional in that the certification is designed to ensure an overall accuracy and completeness that is broader than financial reporting requirements under generally accepted accounting principles. In so doing, for purposes of this section, Congress effectively establishes possible liability where statements may be GAAP-compliant but materially misleading. See States v. Simon, 425 F.2d 796, 808 (2d Cir. 1969) (finding that accountants can be criminally liable for preparing financial statements that are GAAP-compliant but materially misleading).

Certification Form. We do not intend to prescribe the precise form or format of certification (e.g., whether the certification should appear on the signature page or among the exhibits or appendices to the report) or method of submission to the appropriate regulators. On these questions, Congress properly defers to the expert judgment of experienced officials at the SEC, who we trust will fully consider the liability implications of these administrative options. What is important is that the ultimate form reflect the substantive requirements of the Sarbanes-Oxley Act-including a recognition that, as the text of the statute and the foregoing explanation should make clear, certification under Section 302 applies to a subset of the certifications required by Section 906. Nevertheless, I have encouraged the SEC and the Justice Department to develop a single form which could be used for certifications under both Sections 302 and 906. Section 906 certification establishes a "floor" of minimum certification requirements, while Section 302 cites some additional factors. Accordingly, any company properly certifying under Section 302 will also satisfy the requirements of Section 906. Thus, it may be possible for the SEC to develop a unitary certification for the sake of administrative ease. However, for companies that need only certify under Section 906, a separate certification satisfying the somewhat lesser requirements of Section 906 may be appropriate.

Penalties for Failure to File Section 906 Certification. Some observers have asked whether failure to file a certification pursuant to 18 U.S.C. s1350(a)-as opposed to certifying a false financial report as accurate in violation of 18 U.S.C. s1350(c)-triggers criminal liability. It does. Pursuant to Section 3(b) of the Sarbanes-Oxley Act, "a violation by any person of this Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules and regulations." As noted above, the criminal provisions of the Securities Exchange Act of 1934 (15 U.S.C. s78ff) include a 10-year felony for "willful" violations. Accordingly, willful failure to file a certification pursuant to Section 1350(a) of Title 18 triggers the criminal provisions of 15 U.S.C. s78ff. (As noted above, courts have interpreted "willful" violations of the 1934 Act to require only general intent to commit the crime.) Significantly, the U.S. Department of Justice concurs with this analysis. See Letter from Assistant Attorney General Daniel J. Bryant to the Honorable Joseph R. Biden, Jr., December 26, 2002 ("<A>s you have suggested, the Department may utilize Section 78ff's criminal penalties to prosecute executives who violate the Sarbanes-Oxley Act by willfully failing to file Section 906's required certification."). Of course, in addition to this penalty scheme, failure to file the required Section 1350(a) certification may also result in an economic penalty, since Wall Street analysts and investors would surely take note of the failure and punish offending companies by shifting their investment dollars to compliant companies. This potential economic penalty should in no way mitigate application of the criminal penalty.

149 Cong. Rec. S5325-04, 2003 WL 1867217 (Cong.Rec.)

END OF DOCUMENT