

# Organized Crime

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# Responding to the Threat of International Organized Crime: A Primer on Programs, Profiles, and Practice Points

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*The fight against organized crime is a top priority of the Department of Justice (“Department”). International organized criminals, in particular, pose serious threats to the nation’s security, from penetrations of our strategic markets to collaborating with terrorists and nations hostile to the United States. Every day, international organized criminals threaten the lives and properties of U.S. citizens by committing every imaginable type of serious crime, from sophisticated cyber crimes to trafficking in human beings, the theft of intellectual property to money laundering, traditional rackets, and labor racketeering, all protected by a vicious cycle of corruption and violence. At the same time, despite great successes achieved by the Organized Crime Program, La Cosa Nostra continues to wield powerful criminal networks in certain U.S. cities and threaten citizens’ peace and prosperity. Dismantling these organizations and rendering them incapable of harming U.S. citizens remain among the most important tasks of the Department and of federal law enforcement.*

Memorandum from Attorney General Eric H. Holder, Jr.

Regarding Att’y Gen. Order No. 3206-2010 (Sept. 20, 2010)

## **I. Introduction**

In recent years, the Department of Justice (DOJ), and the United States government as a whole, has increased its focus on combating the phenomenon that is commonly referenced as “international organized crime,” “transnational organized crime,” or as a slightly broader construct of “transnational criminal activity.” For purposes of this article, “international organized crime” (IOC) will be used. Experts from various fields, including law enforcement, intelligence, finance, foreign affairs, and academia, agree that the IOC poses a significant threat to the country. They also share a common understanding that this threat must be aggressively addressed using a multi-discipline approach to effectively thwart IOC. The resulting strategies aim to cut off organizations from the illicit profits, protect financial institutions and other strategic sectors from corrupt penetration, enhance intelligence and information sharing, promote international cooperation and rule of law through diplomatic channels, and strengthen the interdiction, investigation, and prosecution of crimes that cross United States borders.

While federal prosecutors may applaud the news of these high-level efforts, they may as a practical matter be left asking, “What does it all mean for me in the field?” Helpful information regarding the nature of the IOC threats, the characteristics of the organizations, and the strategies and programs that are relevant to prosecutors are detailed throughout several lengthy documents. Some of those documents

are summarized in this article. Moreover, it is generally recognized that IOC is fairly amorphous—it emanates from places around the globe, manifests hierarchical structures to loose networks, and involves a wide-range of crimes, including public corruption, sophisticated frauds, counterfeiting, cybercrime, narcotics trafficking, money laundering, alien smuggling, violence, and even the facilitation of terrorism. The inherent challenges of investigating and prosecuting IOC cases are compounded by the fact that United States Attorneys’ offices (USAOs), Main Justice, and law enforcement agencies are generally divided into specialized components that are focused on particular types of crime, while IOC groups are diversified in their activities and mobile—district and national boundaries are ignored. Accordingly, to successfully disrupt and dismantle IOC groups, federal prosecutors must work collaboratively and be prepared to follow two approaches: (1) pursue all reasonable tactics in cases that target a known IOC group, and (2) recognize that a seemingly discrete or benign offense may actually be part of a larger pattern of activity by an organization that merits further investigation and coordination.

This article intends to assist prosecutors in this challenge by providing a perspective on the organized crime threats as they exist today, giving an overview of certain IOC programs and strategies that prosecutors may encounter and seek to utilize, and offering a general description of the common characteristics of IOC groups. It also clarifies and promotes the extraterritorial application of RICO and briefly reminds prosecutors of other key statutes and resources that can be helpful in the successful litigation of all international cases.

## **II. The evolution of organized crime: new threats prompt new strategies**

Traditionally, the greatest organized crime threat to the United States has been the Italian-American Mafia, also known as La Cosa Nostra (LCN). For decades, the corrupt influence of the LCN plagued various sectors of American society and the economy. Unfortunately, for many years the federal government failed to even recognize the existence of the LCN and was therefore slow to respond to the LCN’s extensive criminal activities in a comprehensive manner. *See* HOWARD ABADINSKY, ORGANIZED CRIME 191-92 (3d ed., 1990 Burnham, Inc.). However, that reticence began to change following the 1951 televised hearings by Senator Estes Kefauver, Chairman of the Senate Select Committee to Investigate Organized Crime in Interstate Commerce. These hearings brought widespread public attention to the threat of organized crime in the United States. Likewise, the New York State Troopers’ historic 1957 raid of the meeting of mob leaders in Apalachin, New York, crystallized the scope of the Mafia’s threat and prompted new strategies for federal law enforcement. One of these responses was the creation of the Department’s Organized Crime Strike Forces in 1961 by Attorney General Robert F. Kennedy. In 1969, the United States Congress found that organized crime, especially the LCN, posed “a new threat to the American economic system” because of its “extensive infiltration of legitimate business.” S. REP. NO. 91-617, at 967 (1969). Likewise, in 1984, the President’s Commission on Organized Crime (PCOC) expressed concern that the money laundering schemes of the LCN and other organized criminal groups allowed their activities to flourish. *See* PRESIDENT’S COMM’N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (Jan. 2001) (citing the transmittal letter to President Reagan of the PCOC’s first interim report, originally published in 1984).

Such findings greatly enhanced law enforcement’s efforts to combat organized crime through the adoption of several new tools and strategies, including legislation that permits electronic surveillance, *see* 18 U.S.C. §§ 2510–2522 (2012); witness protection provisions, *see* 18 U.S.C. §§ 3521–3528 (2012); the Racketeer Influenced and Corrupt Organizations statutes (RICO), *see* 18 U.S.C. §§ 1961–1968 (2012); and the money laundering statutes, *see* 18 U.S.C. §§ 1956–1957 (2012). In addition, agents and prosecutors shifted their mission to the long-term objective of dismantling the criminal enterprises of the

LCN and purging its membership of illicit profits. After years of persistent multi-agency investigations and prosecutions, the organized crime program proved to be extremely successful—mobsters were indicted, convicted, and imprisoned; their assets were forfeited; and, ultimately, the LCN was severely weakened. *See* PRESIDENT’S COMM’N ON ORGANIZED CRIME, *THE IMPACT: ORGANIZED CRIME TODAY* 33-35, 47 (Thelma S. Mrazek ed., Apr. 1986) (noting that during the 4-year period of 1982-1986, the leadership in 17 of 24 LCN families in the United States had been prosecuted).

While the LCN still remains a threat today in certain cities in the United States, IOC groups have steadily emerged over the past two decades to pose greater challenges to law enforcement. The International Crime Threat Assessment, published by the White House in December 2000, observed that:

[t]he dynamics of globalization ... particularly the reduction of barriers to movement of people, goods, and financial transactions across borders, have enabled international organized crime groups to expand both their global reach and criminal business interests. International organized crime groups are able to operate increasingly outside traditional parameters, take quick advantage of new opportunities, and move more readily into new geographic areas.

Since the end of the Cold War, organized crime groups from Russia, China, Italy, Nigeria, and Japan have increased their international presence and worldwide networks or have become involved in more transnational criminal activities. Most of the world’s major international organized crime groups are present in the United States.

EXECUTIVE OFFICE OF THE PRESIDENT, *INTERNATIONAL CRIME THREAT ASSESSMENT*, at 8-9 (Dec. 2000).

More recently, the United States has become increasingly aware of the serious national security threats posed by IOC groups. In January 2010, after a 12-month review, the Office of the Director of National Intelligence published a report of government experts that concluded the following:

Transnational organized criminal networks continue to expand dramatically in size, scope, and influence, posing significant new and increasing threats to U.S. national security. Transnational organized crime (TOC) groups are threatening U.S. interests by forging alliances with corrupt government officials, destabilizing political institutions in fragile states, undermining competition in key world markets, perpetrating extensive cybercrimes and sophisticated frauds, and expanding their narco-trafficking and illicit smuggling networks. The increasing nexus between TOC and terrorist and insurgent groups also presents continuing dangers because terrorists and insurgents use criminal networks for logistical support and funding.

OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *NAT’L INTELLIGENCE COUNCIL, THE THREAT TO U.S. NAT’L SEC. POSED BY TRANSNATIONAL ORGANIZED CRIME* (Jan. 2010).

These groups often have billions of dollars at their disposal, are highly educated, and employ some of the world’s best accountants, lawyers, bankers, and lobbyists to facilitate their criminal activities. Moreover, as their criminal operations have become more innovative, IOC groups have also evolved from traditional hierarchical structures toward looser networks that are more fluid and elusive.

### **III. Key government responses to international organized crime**

As with the LCN’s threat over 60 years ago, the federal government has responded aggressively to the threat of IOC groups. In recent years, the government has implemented a myriad of strategies and programs designed to prevent IOC groups from gaining a foothold equivalent to that once enjoyed by the LCN. This article does not attempt to provide an exhaustive review of every agency’s initiatives. The following strategies are highlighted to increase the awareness of certain programs that demonstrate the

priority placed on the investigation and prosecution of IOC.

### **A. The Law Enforcement Strategy to Combat International Organized Crime**

Since 2008, the DOJ has led a multi-agency effort to develop and implement The Law Enforcement Strategy to Combat International Organized Crime (IOC Strategy). The IOC Strategy established a comprehensive framework for law enforcement to address the threats posed by IOC. Among the many measures implemented are the following:

**Attorney General's Organized Crime Council:** The IOC Strategy reinvigorated the Attorney General's Organized Crime Council (AGOCC) that had been dormant for several years. A 1968 Executive Order by President Lyndon Johnson granted the Attorney General the authority to coordinate all federal law enforcement activity against organized crime. *See* Exec. Order No. 11,396, 33 Fed. Reg. 2689 (1968). The Attorney General's Organized Crime Council has always been charged with establishing priorities and formulating a national, unified strategy to combat organized crime. It is chaired by the Deputy Attorney General and is comprised of the Assistant Attorney General of the Criminal Division, a representative of the Attorney General's Advisory Committee of United States Attorneys, and senior executives from each concerned federal law enforcement agency, including the Federal Bureau of Investigation, Immigration and Customs Enforcement, Secret Service, Drug Enforcement Administration, Internal Revenue Service/Criminal Investigation Division, Department of State/Bureau of Diplomatic Security, Postal Inspection Service, Department of Labor/Office of Inspector General, and Bureau of Alcohol, Tobacco, Firearms and Explosives.

The Chief of the Organized Crime and Gang Section (OCGS) of the DOJ is responsible for providing reports to the AGOCC concerning patterns and trends throughout the country, recommending policies and strategies for the AGOCC's consideration in consultation with other Department components, and supervising the operation and coordination of federal organized crime cases. The IOC Strategy was ultimately promulgated and implemented under the auspices of the AGOCC.

**IOC Targeting Committee and Top International Criminal Organizations Targets (TICOT List):** In order to most effectively utilize resources, it is essential to formally identify the IOC figures and organizations that pose the greatest threat to national interests. Prioritizing selected IOC targets is crucial to disrupting their activities and dismantling their organizations. Accordingly, the first step in implementing the IOC Strategy was the creation of a targeting committee. The IOC Targeting Committee (the Committee) functions to identify and designate priority IOC organizations and individuals that pose the greatest threat to the United States for concerted, high impact law enforcement action. The Committee strives to evolve with the threats and continually seeks to identify the emergence of new international criminal schemes, trends, and organizations. The Committee is chaired by OCGS and is comprised of high-level supervisors from each of the agencies participating in the AGOCC.

The Committee designates prioritized targets to the TICOT List, which provides a strategic directive for the participating agencies. It is the objective of the Committee to promote wide and cooperative participation in pursuing IOC targets. Each of the participating agencies is invited to periodically nominate, evaluate, and vote on targets through their respective representatives on the Committee. The TICOT List is classified as "Law Enforcement Sensitive," but may be obtained by prosecutors from OCGS.

**International Organized Crime Intelligence and Operations Center (IOC-2):** The ability of United States law enforcement to successfully investigate and prosecute targeted IOC figures and organizations depends heavily on the quality of information that is available on the targets and the

capability of law enforcement personnel to systematically collect, synthesize, and disseminate that information from multiple sources. Law enforcement must closely coordinate and communicate across jurisdictions to identify and exchange the best information available on IOC targets so that quick and decisive action can be taken against the targeted individuals or organizations. To assist in achieving these objectives, IOC-2 was launched in May 2009 as a high-tech mechanism capable of marshaling the resources and information of federal law enforcement agencies and to collectively combat the threats to domestic safety and national security that are posed by international criminal organizations. IOC-2 is discussed in greater detail elsewhere in this issue.

**IOC Financial Investigation Seminar:** A critical objective of the IOC Strategy is to disrupt IOC groups by targeting their financial assets. The Attorney General's Organized Crime Council/Asset Forfeiture and Money Laundering Section Financial Investigation Seminar constitutes a significant development in that regard. The seminar is an intensive four day, hands-on, interactive training program where participants conduct a complex financial investigation of an IOC group. The course is designed to assist participants in recognizing the signs of IOC infiltration and "following the money" to build strong cases that are targeted at apprehending and prosecuting these dangerous groups and depriving them of their money and assets. Federal prosecutors and agents involved in the investigation and prosecution of IOC targets are invited to attend the seminar. All expenses for the seminar are paid by the Asset Forfeiture Fund. Individuals who are interested in attending an upcoming seminar should contact the Asset Forfeiture and Money Laundering Section (AFMLS) or OCGS.

## **B. Attorney General's Order Modernizing the Department of Justice Organized Crime Program**

On September 20, 2010, Attorney General Eric Holder issued an Order Modernizing the Department of Justice Organized Crime Program. Att'y Gen. Order No. 3206-2010. The Order sets forth a series of mandates for USAOs, the Department's Criminal Division, and the FBI, to ensure that the Organized Crime Program is effectively positioned to combat international organized crime.

**Defined priorities:** The USAOs, the Criminal Division litigating components, the FBI, and all other DOJ components are directed by the Attorney General to prioritize and commit adequate resources to the investigation and prosecution of "High Priority Organized Crime Groups." These groups include:

- Groups that are designated to the TICOT List;
- Families of La Cosa Nostra;
- Organized crime groups in regard to cases coordinated by IOC-2; and
- Any other organized crime group that OCGS, in consultation with any affected USAO, has designated a High Priority Organized Crime Group.

As with the TICOT List, the current list of High Priority Organized Crime Groups is classified as "Law Enforcement Sensitive," but may be obtained by prosecutors from OCGS. The list includes a wide variety of groups, ranging from global syndicates that are engaged in sophisticated frauds to national and international violent gangs.

**Affirmation of the Organized Crime Strike Forces:** In recognition of the Strike Forces' tradition of expertise and critical contributions in dismantling criminal enterprises, the Attorney General directed that every USAO with an existing Strike Force must continue to maintain their Strike Forces at current staffing levels to focus primarily on cases involving High Priority Organized Crime Groups. Further, the Strike Forces are to continue to be staffed with experienced Assistant United States

Attorneys who possess a mix of skills to allow them to handle sophisticated organized crime cases involving many different kinds of criminal activity. However, a United States Attorney also has the flexibility to assign an organized crime case to any Assistant United States Attorney when deemed necessary.

**Organized Crime (OC) Coordinators:** The purpose of the OC Coordinators Program is to develop a network of federal prosecutors, similar to that of the Strike Force Units, to share information that is needed to facilitate the identification and coordination of organized crime cases on a national level. The Attorney General's Order required each USAO and Criminal Division litigating component to designate a supervisory attorney who will be responsible for the Organized Crime Program in his or her district or component, including the supervision of gathering and processing crucial information concerning organized crime cases. The OC Coordinator will also be responsible for:

- Identifying cases in his or her office that involve a High Priority Organized Crime Group;
- Reporting those cases to OCGS upon a case's initiation and providing updated information concerning these cases on a monthly basis and upon request;
- Consulting with OCGS on all matters involving High Priority Organized Crime Groups; and
- Collecting and assembling annual organized crime threat assessments from law enforcement agencies in his or her district and preparing a strategy for responding to those threats.

The first OC Coordinators conference and training was hosted by OCGS at the National Advocacy Center in February 2012. At that time, the participants were provided a brief overview of the High Priority Organized Crime Groups and were introduced to the completion and online filing of the OC reporting forms.

**OCNet:** Pursuant to the Attorney General's Order, OCGS is tasked with coordinating multi-district investigations and prosecutions against High Priority Organized Crime Groups and providing federal prosecutors with the latest information concerning organized crime trends and programs. To further those efforts, OCGS has established "OCNet," an online source for interconnectedness with colleagues who are actively involved in the prosecution of organized crime cases. The OCNet listserv facilitates the exchange of information between members and provides a mechanism for members to quickly and securely draw on the knowledge base of all prosecutors in the OCNet virtual community by sending a specific question to the group. All federal prosecutors may join OCNet by completing a brief form available on the OCGS Intranet site.

### **C. White House Strategy to Combat Transnational Organized Crime (TOC)**

The White House Strategy to Combat Transnational Organized Crime (White House TOC Strategy) was announced in July 2011 and is intended to complement the DOJ's Law Enforcement Strategy to Combat International Organized Crime and other federal security initiatives. It recognizes transnational organized crime as a significant threat to national and international security. The White House TOC Strategy "is organized around a single unifying principle: to build, balance, and integrate the tools of American power to combat transnational organized crime and related threats to national security—and to urge our foreign partners to do the same." EXECUTIVE OFFICE OF THE PRESIDENT, WHITE HOUSE STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME 1 (2011). In that regard, it set

forth new tools that maximize the impact of all United States resources:

**Economic sanctions:** As part of the White House TOC Strategy, the President signed Executive Order 1358, effective July 25, 2011, declaring a national emergency to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States posed by the activities of significant transnational criminal organizations. In issuing this Executive Order, the President invoked, among other authorities, the International Emergency Economic Powers Act (IEEPA), 50 U.S.A. §§ 1701–1706, the National Emergencies Act (NEA), 50 U.S.A. §§ 1601–1651, and 3 U.S.C. § 301.

The Executive Order blocks the property and property interests of specific entities that are listed in its Annex. It also blocks individuals and entities that are determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be significant transnational criminal organizations or are determined to have provided material support for, or to be owned or controlled by, or to have acted on behalf of, such organizations. These individuals and entities are designated to the Treasury’s Specially Designated Nationals (SDN) List. With certain exceptions, United States persons and persons acting through the United States are prohibited from transferring, paying, exporting, withdrawing, or otherwise dealing in the property and interests in property of an entity or individual listed on the SDN List. Upon conviction, criminal penalties of up to \$1,000,000, imprisonment for up to 20 years, or both, may be imposed on any person who “willfully commits, willfully attempts to commit, willfully conspires to commit, or aids or abets in the commission of “ a violation of the Executive Order. *See* § 1705(c).

To date, the Department of Treasury, in consultation with the DOJ, has designated four transnational criminal groups for financial sanctions:

- **Brothers’ Circle (Eurasia):** The Brother’s Circle is comprised of leaders and senior members of several Eurasian criminal groups largely based in countries of the former Soviet Union. Brothers’ Circle members share a common ideology based on the “thief-in-law” tradition that seeks to spread their brand of criminal influence globally. The Brothers’ Circle serves as a coordinating body for several national level criminal networks, mediates disputes between individual criminal networks, and directs a wide range of criminal activity.
- **Camorra (Italy):** Considered the largest Italian organized crime group, the Camorra is a competing organization of local clans in Naples and the province of Campania. The Camorra, whether taken as a whole or considered in terms of its most powerful clans, constitutes a major organized crime network. The Camorra operates internationally and is involved in serious criminal activity such as counterfeiting and narcotics trafficking. The Camorra’s involvement in smuggling counterfeit and pirated goods, such as luxury clothing, power tools, CDs, DVDs, and software, extends into European and United States markets.
- **Los Zetas (Mexico):** Los Zetas were estimated to number in the thousands with the group present in Mexico, Central America, and the United States. Los Zetas facilitate drug trafficking into the United States and have relationships with gangs based in this country. In addition to drug trafficking, Los Zetas are involved in kidnaping, murder, assault, extortion, money laundering, intellectual property theft, and human smuggling. Los Zetas have demonstrated their capacity and willingness to intimidate and brazenly kill law enforcement and other government personnel. In February 2011, Los Zetas ambushed and killed United States Immigration and Customs Enforcement (ICE) Special

Agent Jaime Zapata and wounded ICE Agent Victor Avila.

- **Yakuza (Japan):** The Yakuza comprises all of the major Japanese organized crime syndicates, sometimes referred to as “families.” As of 2008, the Yakuza had over 80,000 members. The Yakuza profits from involvement in serious criminal activities, including narcotics and weapons trafficking, prostitution, and human trafficking. The Yakuza is also heavily involved in white collar crime, often using front companies to hide profits that are generated from its corruption of lucrative legitimate industries, such as construction, real estate, and finance. In the United States, the Yakuza has been involved primarily in drug trafficking (particularly methamphetamine) and money laundering.

For more information about sanctions that the federal government employs, *see* <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tco.pdf>.

In addition, the White House TOC Strategy introduced other initiatives to enhance the government’s ability to effectively interdict, investigate, and prosecute the activities of transnational criminal networks, including:

**Presidential Proclamation:** A new Presidential Proclamation under the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. § 1182(f), will deny entry to transnational criminal aliens and others who have been targeted for financial sanctions.

**Rewards Program:** A new rewards program administered by the Department of State will replicate the success of narcotics rewards programs in obtaining information used to arrest and convict leaders of transnational criminal organizations that pose the greatest threats to national security. Nominations for targets and rewards are subject to the careful review of an interagency committee.

**Legislative Proposals:** A series of legislative proposals have been drafted and promoted to ensure that federal law keeps pace with the evolution of transnational organized crime. The legislative proposals, pending before Congress, emphasize the need for the following: (1) changes to existing money laundering, asset forfeiture, narcotics, and racketeering statutes; (2) authorities to provide witness security and protection for foreign witnesses; and (3) stronger penalties for certain crimes, such as intellectual property offenses. *See Combating International Organized Crime: Evaluating Current Authorities, Tools, and Resources: Hearing Before the S. Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary, 112th Cong. 1 (2011) (statement of Lanny Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice).*

The Interagency Policy Committee (IPC) on Illicit Drugs and Transnational Criminal Threats will oversee a whole-of-government approach to implementing this Strategy. Co-chaired by the White House’s National Security Staff and the Office of National Drug Control Policy, this IPC will issue implementation guidance, establish performance measures, and receive regular progress updates from the interagency community.

#### IV. How is “international organized crime” defined?

A definition of “international organized crime” is necessary to provide a common understanding of the issues addressed by the aforementioned programs and to set parameters for the development of policies and strategies on a national level. However, as previously discussed, “international organized crime” is a somewhat amorphous concept that does not easily lend itself to a concise definition. The problem stems not from the words “international” or “crime,” but from the word “organized.” Whether certain criminal activities are indeed organized—thereby warranting prioritized law enforcement

action—has historically been a subject of great debate. The fact that IOC groups may exist in several forms further complicates the matter. While in practice, the definition may not fully illuminate the presence of organized crime in a particular case for prosecutors, it does serve as a helpful first step in making that determination.

### **A. Legislative history**

Legislators, academics, and law enforcement officials have long struggled to craft a concise definition of “organized crime” that is generally accepted as an appropriate delineation of the concept. *See generally* JAMES O. FINCKENAUER, PROBLEMS OF DEFINITION: WHAT IS ORGANIZED CRIME? TRENDS IN ORGANIZED CRIME 63 (Springer New York 2005). Various definitions have been offered in different contexts, but have not been sustainable. The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), defined organized crime as “the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.” This definition described organized crime in terms of the illegal activities rather than in terms of what constitutes a criminal organization. Also, at the time, organized crime was primarily a domestic concern, comprised of groups that rarely operated outside their local domain. The definition was repealed in the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (1979), leaving the United States with no statutory definition of organized crime. Congress expressly declined to include any definition of organized crime in the RICO statute that has served as the centerpiece of federal law proscribing organized criminal activity.

### **B. United Nations Convention Against Transnational Organized Crime (UNTOC or Palermo Convention)**

The UNTOC was signed in Palermo, Italy, in December 2000 and demonstrated a global response to the shared challenges of combating transnational organized crime. It was entered into force for the United States in November 2005. For purposes of the Convention, “organized criminal group” was defined as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences (i.e., a felony) established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” *See generally* United Nations Convention Against Transnational Organized Crime 1-5, art. 2, 2004. Further, a “structured group” was defined as “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.” *Id.*

### **C. Definition adopted by the United States**

In 2008, as part of The Law Enforcement Strategy to Combat International Organized Crime, senior Department of Justice officials and experienced organized crime agents and prosecutors drafted a definition of “international organized crime” that blended new and traditional concepts. The definition received the endorsement of the Attorney General’s Organized Crime Council and was ultimately adopted by all United States government departments and agencies in connection with the White House’s Strategy to Combat Transnational Organized Crime. The definition reflects the common traits, motivations, objectives, and activities of IOC groups:

“[I]nternational organized crime” [used interchangeably with “transnational organized crime”] refers to those self-perpetuating associations of individuals who operate internationally for the

purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence or through an international organizational structure and the exploitation of international commerce or communication mechanisms. There is no single structure under which international organized criminals operate; they vary from hierarchies to clans, networks and cells, and may evolve to other structures. The crimes they commit also vary. International organized criminals act conspiratorially in their criminal activities and possess certain characteristics which may include, but are not limited to:

- In at least part of their activities, they commit violence or other acts that are likely to intimidate, or make actual or implicit threats to do so;
- They exploit differences between countries to further their objectives, enriching their organization, expanding its power, and/or avoiding detection and apprehension;
- They attempt to gain influence in government, politics, and commerce through corrupt as well as legitimate means;
- They have economic gain as their primary goal, not only from patently illegal activities but also from investment in legitimate business; and
- They attempt to insulate both their leadership and membership from detection, sanction, and/or prosecution through their organizational structure.

DEP'T OF JUSTICE, THE LAW ENFORCEMENT STRATEGY TO COMBAT INTERNATIONAL ORGANIZED CRIME (Apr. 2008).

The breadth and flexibility of this definition is intended to fully encompass the evolving threats and inherent challenges posed by such groups. However, in and of itself, it fails to fully provide the practical guidance needed by OC Coordinators, Strike Force attorneys, and other federal prosecutors who seek to identify the presence of IOC groups within their respective districts.

## **V. Identifying IOC: an overview of characteristics, patterns, and trends**

Prosecutors should work with the relevant law enforcement agencies in their districts to evaluate cases as they develop for connections to organized crime and to other matters pending within their office or in another district. In the event organized crime ties are suspected, prosecutors are encouraged to have the case agent submit a request to IOC-2 to determine the connectivity, if any, of the case to other federal investigations throughout the United States. Even if IOC-2 initially provides a negative response, the inquiry will remain in its database and may later trigger a connection based on new investigative reports that are subsequently uploaded to the database.

As a threshold matter, the indications of conspiratorial association(s) must be carefully considered. Members of all organized crime groups and gangs act collaboratively to achieve a common goal or objective. However, there is no single structure under which organized criminals operate. Rather, such structures vary from hierarchies to clans, networks, and cells and may evolve to other structures.

If indicia of a conspiracy exists, several characteristics should be considered that may signal the presence and operation of organized crime in an investigation. The following examples are only some of the various "red flags" that, when encountered, may warrant additional scrutiny.

### **A. Clannish or cultural connections**

The common characteristics and ties that are shared between members of the group and/or between known groups may be the most recognizable indicator of an organized crime group. Such groups generally restrict membership based on a number of factors, including national origin, ethnicity, language, kinship, induction rituals, and/or criminal background.

### **B. Leadership**

Leadership can be spotted with the identification of a recognized leader, a leadership structure of some form, or other decision-making process for purposes of directing activities, resolving disputes, enforcing loyalty, and assuring that the objectives of the organization are met.

### **C. Scope of membership**

The scope of an organized crime group's membership may be based on the number of participants who are identified in a particular criminal scheme or conspiracy, the historical intelligence gathered from earlier investigations of the group, and/or a reasonable inference that the nature of the offense necessitated the involvement of others who have yet to be identified.

### **D. Primary motivation**

The primary goal of organized crime groups is to make money. These groups are economically-driven rather than ideology-driven (a key distinction between organized crime and terrorist groups). However, terrorist organizations have forged alliances with certain IOC groups as a means to obtain logistical support and funding.

### **E. Continuity**

The activities of the group may involve a long-term pattern of criminal conduct, namely, activities over an extended period of time and/or the implicit or explicit threat of long-term activity. These criminal organizations continue even if leadership or membership changes over time.

### **F. Foreign nexus**

This element may be based on characteristics of the offender, such as extensive international travel, employment by a foreign business, or known affiliation with a hostile foreign government. Likewise, a foreign nexus may be established by the characteristics of the offense, such as foreign financial transactions, imports and exports, international communications, or foreign victims.

### **G. Known safe havens (domestic and abroad)**

With the advent of globalization, the Internet, international banking, and modern technologies, IOC groups can target the United States while remaining in countries that provide them with safe haven from arrest due to corruption, absence of rule of law, or bank secrecy laws. Domestically, IOC groups also attempt to engage in public corruption and exploit laws protecting the beneficial owners of shell companies from disclosure.

## **H. Impact and expanse of activities**

Prosecutors should also evaluate the impact and threat that the conspirators pose to United States citizens as well as the sophistication and expanse of an operation or scheme. Some IOC activities involve widespread international conspiracies while others are perpetrated by groups based in this country with ties abroad. Special attention should be paid to the amount of dollar loss, number of known and/or potential victims, the use of high-tech methods, and involvement in the financial, energy, or other strategic sectors of the economy. Some IOC groups have been known to employ the professional services of unwitting, negligent, or corrupt attorneys, accountants, financial analysts, and even public relations advisors to facilitate their illegal activities and provide a veil of legitimacy.

## **I. Nature of offenses**

As discussed, IOC groups engage in a wide range of criminal activities that impact the United States. They target consumers through various techniques that are designed to obtain bank account information and steal personal identities. In addition to traditional “phishing,” advanced fee fraud schemes, mass-marketing schemes, and Internet auction fraud, IOC groups use other high-tech mechanisms such as “skimming” devices that are surreptitiously installed in ATMs and point-of-sale machines. IOC groups have also become increasingly adept at government fraud, targeting food stamp and welfare programs, Medicare and Medicaid, and government grant and loan programs. Money is the “life blood” of all organized crime groups. These groups launder their illicit proceeds by exploiting the financial system in this country through the use of prepaid access cards, digital currencies, shell companies, cash checkers, and informal money transmitters. IOC groups also engage in the theft of intellectual property, ranging from movies and CDs to proprietary designs of technology and manufacturing processes. International networks allow IOC groups to engage in the smuggling of narcotics, contraband cigarettes, weapons, counterfeit goods and currency, as well as the smuggling and trafficking of humans into the United States. Moreover, to protect their illegal operations and increase their sphere of influence, IOC groups routinely seek to corrupt public officials in the United States and abroad and engage in acts of intimidation and violence.

These factors, of course, are not dispositive in identifying an organized crime case, but are offered as guidance. The identification of IOC in a particular case will ultimately rely on the collective experience, awareness, and effort of the assigned agents and prosecutors.

Additional information on the characteristics, patterns and trends of specific IOC groups can be obtained by conferring with OCGS and IOC-2 or by referring to the TICOT List and the list of High Priority Organized Crime Groups. In the event an OC Coordinator has a reasonable basis to believe that a case involves organized crime, the case should be reported to OCGS pursuant to the Attorney General Order No. 3206-2010. *See supra* Part III.B.

## **VI. RICO’s extraterritorial application: a powerful tool for the prosecution of IOC groups**

### **A. An overview of the RICO statute**

For decades, the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968, has been among the most powerful tools that federal prosecutors have had to combat organized criminal groups. RICO allows the government to prosecute the leaders, members, and associates of a criminal “enterprise” that affects interstate or foreign commerce in a single case. More specifically, the act allows the government to prosecute these individuals for their respective roles in

conducting the affairs of the enterprise through a “pattern of racketeering activity.” *Id.* at § 1962(c) (2012). “Racketeering activity” is defined as any of the many serious state and federal crimes listed in § 1961(1). A “pattern of racketeering activity” requires at least two acts of racketeering activity committed within a statutorily prescribed time period, “one of which occurred after the effective date of this chapter and the last of which occurred within ten years ... after the commission of a prior act of racketeering activity.” *See id.* at § 1961(5). Moreover, the crimes must be related and amount to, or pose a threat of, continued criminal activity. *See id.* at § 1961. An “enterprise” includes any individual, partnership, corporation, association, or other legal entity and any group of individuals associated in fact although not a legal entity. *See id.* at §§ 1961(4), (5). RICO is also a “continuing offense” and may therefore be brought “in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a) (2012).

The RICO statute also allows the government to reach back to offenses committed beyond the substantive statute of limitations for any single offense, provided each defendant is charged with committing at least one offense (comprising the pattern of racketeering) within five years of the date of indictment. *See, e.g., United States v. Frega*, 179 F.3d 793, 808 (9th Cir. 1999). Similarly, in a RICO conspiracy prosecution, the defendant’s agreement must have continued to a date within five years of the date of indictment. *See, e.g., United States v. LeQuire*, 943 F.2d 1554, 1563 (11th Cir. 1991). Finally, RICO provides a broad forfeiture provision and a potential sentence of 20-years imprisonment—or life if the underlying racketeering activity carries a life term. 18 U.S.C. § 1963 (2012). All RICO prosecutions must be reviewed and receive prior approval by OCGS. *See* DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-110.101–9-110.900.

## **B. Recent civil cases have “muddied the waters” as to RICO’s extraterritorial application**

RICO has frequently been used in transnational cases where some of the criminal activities and/or defendants were located outside the United States. It is critical that RICO continues to be available as a tool for prosecutors to effectively address these threats. However, recent decisions by the Second Circuit and several district courts have held that the RICO statute does not apply extraterritorially in private civil RICO suits for damages. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 622 F.3d 148 (2d Cir. 2010), *amended by* 631 F.3d 29, 31–33 (2d Cir. 2010); *European Cmty. v. RJR Nabisco, Inc.*, 2011 WL 843957, at \*3-7 (E.D.N.Y. Mar. 8, 2011); *Cedeño v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 472 (S.D.N.Y. 2010). Each of these cases rely on the Supreme Court’s decision in *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2878 (2010). The *Morrison* case held that where a federal statute is silent or unclear on extraterritoriality, a presumption against the extraterritorial application of the statute arises.

In *Norex*, the Second Circuit affirmed the dismissal of the Canadian plaintiff’s civil RICO claim alleging a massive scheme by Russian oil companies to take over a substantial portion of the Russian oil industry. *Norex*, 631 F.3d at 31. First, the *Norex* court found that the scheme was extraterritorial because the complaint had only alleged slim contacts with the United States. It then held that “RICO is silent” about extraterritoriality and thus did not reach the scheme. *Id.* at 32–33. Citing *Morrison*, the Second Circuit also rejected the plaintiff’s argument “that because a number of RICO’s predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.” *Id.* at 33. However, the case was a private action under § 1964(c), so the court clarified in the amended opinion (in response to an amicus brief filed by the government) that it had “no occasion to address—and express[ed] no opinion on—the extraterritorial application of RICO when enforced by the government pursuant to Sections 1962, 1963 or 1964(a) and (b).” *Id.* at 33. Nevertheless, while the *Norex* opinion would not currently control in the

context of a criminal RICO prosecution, its language remains a concern as to the issue of RICO's extraterritoriality. The Second Circuit has left the door open for future consideration of the issue.

*European Community* was also a civil RICO case involving Colombian and Russian criminal organizations that smuggled cocaine and heroin into Europe, where they generated and laundered large cash proceeds in Euros. In dismissing the complaint, the court first stated that, based on *Morrison* and *Norex*, RICO did not have extraterritorial effect. The court then examined whether the activities alleged in the complaint had sufficient "territoriality" to the United States. In doing so, the court concluded that the "focus" of the RICO statute is the "enterprise" and that the enterprise had to be a domestic enterprise. *European Community*, 2011 WL 843957, at \*5. The court acknowledged that no cases exist that suggest how a court may determine the geographic location of a RICO enterprise. *Id.* So, it then considered cases it viewed as analogous and adopted the "nerve center test," a test that the Supreme Court applied in determining a corporation's principal place of business. See *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010). The court in *European Community* reasoned that the location of the enterprise is where its "nerve center, the "brains not the brawn," is located. *European Community*, 2011 WL 843957, at \*6. The court also explained that because the drug smuggling and money laundering arose from South American and European criminal organizations, the enterprise was outside the reach of the RICO statute. *Id.* at \*7.

Finally, *Cedeño* was a civil RICO case seeking damages arising out of a wide-ranging money laundering scheme that used United States banks in New York to conceal the proceeds of fraud, extortion, and abuse by Venezuelan officials. *Cedeño*, 733 F. Supp. 2d at 472. Citing *Morrison* and *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("The RICO statute is silent as to any extraterritorial application."), the *Cedeño* court held that RICO did not apply extraterritorially. *Cedeño*, 733 F. Supp. 2d at 473. The plaintiffs attempted the same argument that was rejected in *Norex*—"that since the federal statutes prohibiting money laundering are ... extraterritorial in nature, a RICO action predicated on violations of those statutes should be given extraterritorial application." *Id.* The court however, discredited this argument as "superficial" and a misinterpretation of "*Morrison* and the nature of RICO." *Id.* The court concluded that "the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity" and reasoned that because "RICO evidences no concern for foreign enterprises," it does not apply, and dismissed the complaint. *Id.* at 473-74

The broad language of *Norex*, *European Community*, and *Cedeño* has the potential to generate uncertainty and jeopardize the extraterritorial application of RICO in criminal prosecutions. Therefore, "courts should be cautious before construing the [RICO] statute in civil cases in ways that would be most undesirable, not to mention inconsistent with Congressional intent, if applied in criminal cases." *Chevron Corp. v. Donziger*, 2012 WL 1711521, at \*6 (S.D.N.Y. May 14, 2012) (referencing the RICO prosecution of the Sicilian Mafia in the "Pizza Connection" case). A court's misconstruction of the RICO statute is of particular concern in the prosecution of IOC groups, terrorists organizations, international gangs, and other criminal syndicates that victimize Americans and threaten the national security and economic stability of the United States while their leadership remain insulated in safe havens abroad. Prosecutors should anticipate the defense bar's attacks on the extraterritorial application of RICO in the criminal context and be prepared to defend the intended scope of the statute.

### **C. RICO's extraterritorial application is strongly supported in criminal cases**

RICO's extraterritorial application in criminal prosecutions is strongly supported by case law, statutory construction, and the principles of international law. In *United States v. Bowman*, 260 U.S. 94, 97-99 (1922), the Supreme Court explained that absent Congress' explicit intent to apply a criminal statute extraterritorially, Congress' intent to do so may be inferred from the nature of the offense and the

government's interests to be protected consistent with international law. *Id.* at 97-99 (“The necessary *locus*, when not specially defined, depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations.”); accord *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (When determining if Congress intended a statute to apply extraterritorially, the court should examine “the statute’s text for any indication” and its “compliance with principles of international law.”). The *Bowman* court added that the presumption against extraterritoriality “should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government’s jurisdiction” but instead derive from “the right of the government to defend itself against obstruction, or fraud wherever perpetrated ....” *Bowman*, 260 U.S. at 98. The Court observed that limiting the locus of such statutes to the domestic sphere would “curtail the[ir] scope and usefulness” and “leave open a large immunity” for international criminal cases. *Id.*

In *United States v. Yousef*, 327 F.3d 56, 91 (2d Cir. 2003), the Second Circuit applied *Bowman* and held that 18 U.S.C. § 32(a), prohibiting aircraft destruction, applies extraterritorially. *Id.* at 86-88. That statute and others similar to it are premised on fundamental principles of international law that recognize that a nation may exercise extraterritorial criminal jurisdiction when necessary to protect its citizens and national interests from harm. *Id.* at 91 n.24. The court explained that the presumption against extraterritorial applicability can be overcome “when Congress clearly expresses its intent to do so.” *Id.* at 86. The court went on to state that “Congress is presumed to intend extraterritorial application of criminal statutes where the nature of the crime does not depend on the locality of the defendants’ acts and where restricting the statute to United States territory would severely diminish the statute’s effectiveness.” *Id.* at 87. The *Yousef* opinion made clear that “Congress is presumed to intend extraterritorial application” of statutes that meet the *Bowman* test. *Id.* In other words, such statutes enjoy a presumption *in favor* of extraterritoriality.

The RICO statute satisfies the *Bowman* test for extraterritorial application because the text of RICO clearly indicates Congress’ intent to apply the statute to conduct outside the United States. The substantive RICO provisions prohibit certain types of conduct, all of which share a common component, the commission of a “pattern of racketeering.” In turn, RICO’s definition of “racketeering activity,” found in 18 U.S.C. § 1961(1)(B) and (F), includes “any acts indictable” under an array of statutes. Some of those statutes contain an explicit provision that they apply extraterritorially, such as 18 U.S.C. § 1512(h) (witness tampering), §§ 1956(f) and 1957(d)(2) (money laundering), § 1960 (illicit money transmitting), 21 §§ U.S.C. 952, 959, and 963 (importation and conspiracy to import narcotics), and 8 U.S.C. §§ 1324, 1327, and 1328 (alien smuggling). Other statutes can be logically inferred to apply to conduct that occurs extraterritorially in whole or in part, such as 18 U.S.C. § 1546 (fraud and misuse of a United States visa) and § 1952 (interstate and *foreign* travel or transportation in aid of racketeering activity). Finally, several racketeering acts can only be violated by extraterritorial conduct, such as 18 U.S.C. § 2332 (killing a United States national “while such national is outside the United States”), § 2332a(b) (use of weapons of mass destruction by a United States national outside the United States), and § 2332b (acts of terrorism transcending national boundaries).

The fact that RICO’s definition of “racketeering activity” includes many offenses that are typically committed outside the United States compels the conclusion that Congress likewise intended a pattern of those predicate offenses under RICO to apply extraterritorially. *See Bowman*, 260 U.S. at 99 (that the “probable place” for the commission of an offense lies outside the United States indicates that Congress intended to apply that offense extraterritorially); accord *United States v. Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004); *United States v. Plummer*, 221 F.3d 1298, 1305 (11th Cir. 2000). Courts have consistently held that where one statute piggybacks on a different, extraterritorial statute in

this fashion, the former also applies extraterritorially even if it is silent on the matter. *See, e.g., Yousef*, 327 F.3d at 87-88; *United States v. Bin Laden*, 92 F. Supp. 2d 189, 197 (S.D.N.Y. 2000) (observing that “a statute that is ancillary to a substantive offense statute will be presumed to have extraterritorial effect if the underlying substantive statute is first determined to have extraterritorial effect”). Indeed, it would be anomalous to hold that RICO can never apply extraterritorially where some of its predicate statutes can only be violated by extraterritorial conduct.

It is equally clear that principles of international law also support the extraterritorial application of RICO. Following *Bowman*, various criminal statutes, including RICO, have been applied extraterritorially where inherent powers of the United States as a sovereign are compromised or threatened or where the conduct gravely impacts a substantial number of American citizens. *See, e.g., United States v. Vasquez-Velasco*, 15 F.3d 833 (9th Cir. 1994) (applying 18 U.S.C. § 1959 extraterritorially where defendants participated in the murder in Mexico of a United States citizen mistaken for a DEA agent); *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1203-06 (9th Cir. 1991) (applying 18 U.S.C. § 3 extraterritorially to an accessory after the fact charge for assisting the murder of a DEA agent in Mexico). Applying these principles, courts have similarly held that RICO’s criminal provisions apply extraterritorially in circumstances having an impact within the nation’s borders. For example, in *United States v. Noriega*, 746 F. Supp. 1506, 1512-19 (S.D. Fla. 1990), the court held that RICO applied extraterritorially to defendant Noriega’s drug trafficking offense that occurred almost entirely in Panama, stating that RICO’s Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), evinced Congress’ intent to apply RICO expansively to reach unlawful conduct occurring outside the United States. *Id.* at 1516-17. The court concluded:

Given the [RICO] Act’s broad construction and equally broad goal of eliminating the harmful consequences of organized crime, it is apparent that Congress was concerned with *the effects and not the locus* of racketeering activities. The Act thus permits no inference that it was intended to apply only to conduct within the United States. Such a narrow construction would frustrate RICO’s purpose by allowing persons engaged in racketeering activities directed at the United States to escape RICO’s bite simply by moving their operations abroad.... Keeping in mind Congress’ specific instruction that RICO be applied liberally to effect its remedial purpose, the Court cannot suppose that RICO does not reach such harmful conduct simply because it is extraterritorial in nature. As long as the racketeering activities produce effects or are intended to produce effects in this country, RICO applies.

*Id.* at 1517 (emphasis added).

The recent opinion in *Chevron Corp.*, 2012 WL 1711521, at \*5, is particularly illuminating because it closely examines the decisions of *Norex*, *European Community*, and *Cedeño*. The *Chevron* court distinguished *Norex* factually, noting that *Norex* involved only “slim contacts” with the United States. *Id.* The court observed that the Second Circuit “found it unnecessary to articulate an approach to deciding” the extraterritorial application of RICO “beyond drawing a conclusion with respect to the particular complaint before it.” Therefore, the court concluded that “[*Norex*] sheds no light on the pivotal question before [it].” *Id.* Accordingly, it can be argued that the *Norex* case is fact-specific. Similarly, the court in *Chevron* did not find *Cedeño*’s conclusion that “RICO evidences no concern with foreign enterprises” to be “persuasive or helpful.” *Id.* at \*5, 6. The court explained that “it is very unlikely that Congress had ‘no concern’ with the conduct of the affairs of foreign enterprises through patterns of racketeering activity, at least if the prohibited activities injured Americans in this country and occurred here, either entirely or in significant part.” *Id.* at \*6. In fact, the *Chevron* court concluded—contrary to the *Cedeño* and *European Community* courts—that based on its legislative history, RICO’s focus “unmistakably is on the racketeering activity or, at least, on the racketeering

activity in relation to the enterprise.” *Id.* n.50. Finally, the *Chevron* court stated that while the “nerve center” test adopted in *European Community* may make sense for determining a company’s principal place of business for jurisdictional purposes, its relevance to the extraterritoriality issue of RICO is “questionable.” *Id.* at \*7. The court correctly noted that a RICO enterprise “may not be a defendant and need not be charged with wrongdoing.” *Id.* (footnote omitted). Therefore, the court explained that the “nerve center” test is of no use in the RICO context because there is “no necessary or, in many cases, even probable connection between where the RICO enterprise makes its decisions and whether the application of RICO to the racketeering activity at issue in a given case was the sort of activity with which Congress would have been concerned.” *Id.*

#### **D. Summary**

The private civil RICO cases of *Norex*, *European Community*, and *Cedeño* cannot be reconciled with the Supreme Court’s long-standing decision in *Bowman* and the related decisions of other federal courts. Further, the reasoning in *Norex*, *European Community*, and *Cedeño* misconstrue *Morrison*, which did not even mention *Bowman*, let alone overrule it. Courts are therefore bound to follow the *Bowman* test when construing RICO’s extraterritorial reach in a criminal case. *See, e.g., United States v. Belfast*, 611 F.3d 783, 813-15 (11th Cir. 2010) (applying *Bowman*, post-*Morrison*, to hold that 18 U.S.C. § 924(c) applied extraterritorially).

The *Norex*, *European Community*, and *Cedeño* trio of cases also fail to properly consider Congressional intent underlying RICO and the general principles of international law allowing a nation to exercise extraterritorial jurisdiction over criminal conduct that is committed outside its borders and that has a substantial effect within its territory or otherwise harms the government’s interests. “Many modern criminal organizations have an international infrastructure, and the crimes (as well as their effects) transcend national border.” *United States v. Leija-Sanchez*, 602 F.3d 797, 799-800 (7th Cir. 2010). As the *Chevron* opinion cautioned, courts addressing civil cases must be careful about construing the RICO statute “in ways that would be most undesirable, not to mention inconsistent with Congressional intent, if applied in criminal cases.” *Chevron*, 2012 WL 1711521, at \*6. The reasoning applied in *Norex*, *European Community*, and *Cedeño*—particularly the “nerve center test” adopted by *European Community*—is untenable because it would preclude the government’s use of RICO to target the leadership of organized crime groups, violent gangs, terrorist organizations, and cyber networks and fraud syndicates that emanate from around the globe, but carry out their criminal activities in the United States and victimize American citizens. It is irrational to conclude that Congress would not have intended for RICO to apply to these cases. Such an interpretation would misread RICO’s text, structure, purpose, and legislative history. Congress intended RICO to reach “any enterprise” in “interstate or foreign commerce,” 18 U.S.C. § 1962 (a), (b), (c) (2012), and to “be liberally construed to effectuate its remedial purposes,” Pub. L. No. 91-542, 84 Stat. 947 (1970).

Accordingly, the DOJ maintains that RICO applies extraterritorially in the context of a criminal prosecution, at least to the same extent that RICO’s predicate offenses apply extraterritorially. Further, prosecutors are reminded that the issue of RICO’s extraterritorial application should not be relevant where the alleged racketeering activity occurred within the United States—even though evidence of conduct occurring abroad is also introduced. *See, e.g., Pasquantino v. United States*, 544 U.S. 349, 371 (2005); *United States v. Black*, 469 F. Supp. 2d 513, 545 (N.D. Ill. 2006).

## **E. Proposed legislative amendment**

To fully ensure that RICO remains a powerful tool for prosecutors in international cases, the DOJ has proposed legislative amendments that “would clarify that RICO has extraterritorial application in cases where criminal enterprises operate at least in part in the United States, or where they commit any predicate acts in the United States, or where the charged pattern includes offenses that apply extraterritorially.” In addition, the proposed legislation:

expands the list of racketeering predicate crimes to include offenses that are prevalent in an increasingly interconnected world and engaged in by transnational organized crime groups, including economic espionage, computer fraud, aggravated identity theft, violations of the Foreign Corrupt Practices Act, health care fraud, illegal firearms trafficking, as well as a limited number of violations of foreign law.

*See Combating International Organized Crime: Evaluating Current Authorities, Tools, and Resources: Hearing Before the S. Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary, 112th Cong. 1 (2011) (statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, United States Department of Justice).*

## **VII. International cooperation and mechanisms to obtain admissible foreign evidence in a timely manner**

Law enforcement authorities in the United States and world-wide are engaged in parallel campaigns against IOC. Boundaries have faded as IOC groups continue to devise new schemes to exploit the world’s connectivity in technology, communications, and commerce. IOC groups increase the scope and depth of their activities exponentially while authorities attempt to navigate international laws and protocols to conduct long-distance investigations. To effectively carry out operations to disrupt and dismantle IOC groups, law enforcement must capitalize on established relationships with vetted foreign officials and build international partnerships to collaborate in the domestic and foreign prosecution of IOC cases.

Federal prosecutors today are increasingly dependent on obtaining admissible foreign evidence for the successful indictment and conviction of targets who are engaged in an array of transnational crimes. As a general matter, obtaining this evidence adds another layer of complexity to an investigation and creates inevitable delays that can benefit the criminal organization under investigation. Moreover, the applicable procedures and protocols for obtaining evidence and seeking extradition may vary widely for any particular country around the globe. And, in countries that serve as safe havens to criminals due to corruption, the absence of rule-of-law, or strict bank secrecy laws, United States investigative and prosecution efforts could be compromised or deliberately obstructed if assistance is sought from the foreign authorities. To overcome some of these hurdles—and avoid potential land mines that could not only jeopardize a case, but expose prosecutors and agents to personal repercussions for violations of a country’s sovereignty—it is critical to proceed prudently and first consult colleagues who are knowledgeable of the legal and political landscape of a foreign country. *See DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-13.500–9-13.900.*

The mechanism that is utilized for a foreign request for assistance ordinarily depends on the facts of the case, the nature of the request, and the unique legal environment of the relevant foreign country. This section briefly discusses some of the formal and informal mechanisms that are available to prosecutors for obtaining foreign evidence and certain statutes to accommodate the additional time needed.

## **A. Formal mechanisms**

Formal mechanisms for seeking foreign assistance tend to be more labor intensive and time-consuming for a prosecutor. These mechanisms, however, generally afford prosecutors a greater likelihood of compliance by foreign authorities and of obtaining documentary evidence that has been authenticated in a manner more likely to satisfy the admissibility requirements of the Federal Rules of Evidence and relevant case law. *See, e.g.*, FED. R. EVID. 802, 803(6) & (8), 903(3) & (12); *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004).

All official requests to foreign authorities—whether seeking to obtain evidence or to request the extradition or other legal rendition of an international fugitive—must be reviewed and approved by the DOJ’s Office of International Affairs (OIA). DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-13.500. Prosecutors should consult OIA early and often on all foreign requests. The OIA attorneys who are responsible for a particular country can advise prosecutors on the most favorable mechanisms available and provide appropriate exemplars for the drafting of the request.

If the prosecutor is fortunate, the foreign evidence is located in a country that has a Mutual Legal Assistance Treaty (MLAT) with the United States. An MLAT is a bilateral agreement between the United States and another country that creates a contractual obligation between the parties to render legal assistance in criminal matters in accordance with the terms of the treaty. MLATs are a formal mechanism that can typically be used to exchange information, gather authenticated bank records and public documents, obtain witness statements and testimony, arrange service of process, restrain and forfeit assets, perform a search, and receive other investigative support, such as undercover investigations, controlled deliveries, and intercepted communications. However, not all types of assistance may be available from all countries. Investigative operations requested in an MLAT will also need to be coordinated with the relevant law enforcement attachés who are detailed to the country.

In the event an MLAT does not exist with the foreign country where the evidence is located or the contemplated charges are not covered under the treaty, prosecutors may be able to make a request pursuant to a multilateral treaty such as UNTOC or the United Nations Convention Against Corruption. If the country is not a party with the United States in either an MLAT or a multilateral treaty, the prosecutor can still seek assistance through a letter rogatory. A letter rogatory is a formal request from a United States district court to a judicial authority of a foreign nation requesting assistance in obtaining evidence. *See* 28 U.S.C. § 1781 (2012). Assistance pursuant to letters rogatory is a matter of comity between courts, and execution is discretionary. Because no obligation arises to provide the requested assistance, the process can be lengthy and generate uncertain results.

OIA is also responsible for initiating all requests for the provisional arrest of fugitives pursuant to extradition treaties. When extradition is not available or appropriate, OIA assists with requests for deportation or expulsion of fugitives. OIA also reviews and makes recommendations with respect to the necessary Criminal Division approvals for international fugitive lures. A lure is a ruse or scheme employed by law enforcement to facilitate the arrest of a defendant in a foreign safe haven by prompting the defendant to willingly travel to the United States through international waters or air space, or to a country amenable to extraditing, deporting, or expelling the defendant to the United States

## **B. Informal mechanisms**

The most successful international law enforcement operations are often facilitated by informal relationships that have been cultivated to build trust with foreign counterparts and familiarity with their practices and procedures. Cultivating these relationships is one of the principal functions of OIA and

agency attachés who are stationed around the globe. Other collaborative efforts have also emerged such as the FBI/Hungarian National Bureau of Investigation Organized Crime Task Force in Budapest and the Border Enforcement Security Task Forces that partners Homeland Security Investigations and other agencies with foreign law enforcement counterparts to target criminal organizations that pose significant threats to border security. Similarly, the Department of Treasury's Financial Crimes Enforcement Network has joined its counterparts from approximately 14 other nations to form the "Egmont Group," an informal alliance that provides an operational exchange of information to assist law enforcement agencies investigating international financial crimes and money laundering. These are just a few examples of the many ongoing initiatives that can serve as informal sources of foreign information and evidence.

To the extent possible, before preparing a formal request for foreign assistance, prosecutors should first attempt to obtain evidence informally by reaching out to vetted foreign partners through OIA, attachés, agents detailed abroad, and others. The type of foreign assistance available informally will generally depend on the laws of the foreign country, the nature of the case, and the existence of a parallel foreign investigation. However, the assistance could include a broad array of potential evidence, including public documents, witness interviews, or even electronic surveillance. While informal sources may not produce evidence in an admissible form, such sources can still provide a strategic benefit in the investigation. Informal sources may generate relevant information in a timely manner so as to maintain the momentum of an investigation. Moreover, it can help a prosecutor to later draft a more efficient MLAT or letter rogatory request by narrowing the scope of the evidence requested, by providing a more detailed description of the evidence, and by identifying a foreign authority as a point of contact for execution of the request. Even if an informal inquiry results in a negative response, the request allows the agent and prosecutor to stop chasing dead leads and avoid the wasted time and effort of drafting a formal request and waiting for months on an official response.

Prosecutors should be aware, however, that if United States agents have a "substantial involvement" in foreign law enforcement actions based on the existence of several factors—including active participation or engaging in control or direction of the operation—a United States court could determine that a "joint venture" exists. That determination may impact the admissibility of certain foreign evidence under the Fourth, Fifth, and Sixth Amendments. *See, e.g., United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (determining that joint venture existed as a result of the presence of many factors); *United States v. Angulo-Hurtado*, 165 F. Supp. 2d 1363, 1371 (N.D. Ga. 2001) (citing *United States v. Behety*, 32 F.3d 503, 511 (11th Cir. 1994) and *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986)). *See also United States v. Abu Ali*, 528 F.3d 210, 228 (4th Cir. 2008) ("[S]tatements elicited during overseas interrogation by foreign police in the absence of Miranda warnings must be suppressed whenever United States law enforcement agents actively participate in questioning conducted by foreign authorities.") (quoting *United States v. Yousef*, 327 F.3d 56, 145 (2d. Cir. 2003)). Similarly, foreign evidence obtained by methods that a United States court finds to "shock[] the conscience" could be suppressed. *Rochin v. California*, 342 U.S. 165, 172-73 (1952). However, an MLAT request alone that seeks specific foreign law enforcement action will rarely be sufficient to find a joint venture. *See, e.g., United States v. Gomez-Castrillon*, 2007 WL 2398810, at \*4 (S.D.N.Y. Aug. 15, 2007).

**C. Statute of limitations: suspension while an official request for foreign evidence is pending**

Pursuant to 18 U.S.C. § 3292 (2012):

(a)(1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

\* \* \* \*

(b) [Generally] a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

However, the period of suspension may never exceed three years. 18 U.S.C. § 3292(c)(1) (2012). Furthermore, if the foreign entity takes final action before the expiration of the original statute of limitations, the tolling may not exceed six months. *Id.* § 3292(c)(2). Moreover, the application must be filed before the original statute of limitations expires. *See United States v. Kozeny*, 541 F.3d 166, 174 (2d. Cir. 2008). Likewise, a minimal showing must be made to the court that the evidence “is in” a foreign country at the time the government files its application. *United States v. Atiyeh*, 402 F.3d 354, 363-64 (3d. Cir. 2005). *See also United States v. Trainor*, 376 F.3d 1325, 1332-33, 1336 (11th Cir. 2004) (holding the unsworn proffer of facts in government’s application under § 3292 was insufficient where it was not accompanied by affidavits, declarations, exhibits, or other materials of evidentiary value). The Second Circuit recently held that the government’s application for a § 3292 suspension may be considered *ex parte* by the court because the statute does not provide the defendant with any entitlement to notice or hearing on the applicability of the statute. *United States v. Lyttle*, 667 F.3d 220, 225 (2d. Cir. 2012).

Section 3292(d) defines “official request” as “a letter rogatory,” “a request under a treaty or convention,” or “any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.”

**D. Speedy trial: motion to exclude time while an official request for foreign evidence is pending**

Similarly, when an official request is pending for foreign evidence, a prosecutor should apply to the court pursuant to 18 U.S.C. § 3161(h)(8), to exclude time for purposes of assuring a speedy trial. The statute states, in pertinent part, that:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

\* \* \* \*

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in

section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

### **E. Subpoena compelling appearance of a national or resident in a foreign country**

Pursuant to 28 U.S.C. § 1783, incorporated by reference in FED. R. CRIM. P. 17(e)(2), a United States district court has the authority to order the issuance of a subpoena to a national or resident of the United States who is in a foreign country directing his appearance as a witness—at trial or before a grand jury so long as the court finds that the testimony is necessary in the interest of justice. Specifically, the statute provides:

A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice ....

18 U.S.C. § 1783(a) (2012).

The statute further requires that the subpoena “designate the time and place for the appearance or for the production of the document” and dictates that service of the subpoena must comply with “the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country.” *Id.* § 1783(b). The issuing court should determine the “estimated necessary travel and attendance expenses” and that amount should be given to the target of the subpoena when it is served. *Id.* The constitutionality of an earlier version of the statute was upheld in *Blackmer v. United States*, 284 U.S. 421, 424-43 (1932). Prior to seeking the issuance of a subpoena pursuant to this statute, prosecutors must consult with OIA. *See* DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-13.525.

### **F. Deposition of witnesses in a foreign country are warranted by exceptional circumstances and the interest of justice**

If an important government witness is outside the United States, not subject to a subpoena, and is unwilling to come to the United States to testify, a prosecutor may attempt to proceed by means of a deposition. Federal Rule of Criminal Procedure 15(a)(1) provides that “[a] party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.”

Prosecutors should be aware, however, that Rule 15 depositions conducted abroad can present significant legal challenges. Prosecutors must exercise caution because the law in this area currently appears to be in a state of flux. For example, an amendment to the text of Rule 15(c) (regarding the defendant’s presence at a deposition) is to be “effective December 1, 2012, absent contrary Congressional action.” FED. R. CRIM. P. 15(c). Upon the amendment’s effect, a deposition of “a witness who is outside the United States may be taken without the defendant’s presence if the court makes case-specific findings” of several factors. FED. R. CRIM. P. 15(c)(3). However, the deposition will require substantial planning and coordination with OIA, attachés, and foreign authorities. Prosecutors should also anticipate that such depositions will still prompt a motion to suppress the testimony pursuant to the Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (holding that the Confrontation Clause of the Sixth Amendment requires actual confrontation for the admission of

testimonial evidence). Therefore, prosecutors are again encouraged to contact OIA as soon as it appears that a Rule 15 foreign deposition may be necessary in their case.

### **G. Admissibility of foreign business records**

Foreign business records do not constitute hearsay evidence and are authentic if the records meet the requirements of 18 U.S.C. § 3505. These requirements parallel the requirements of Federal Rule of Evidence 803(6), stating that the record was made at or near the time of the matters set forth therein by a person with knowledge of those matters, that the record was kept in the regular course of business activity, that such business activity was a regular practice of the business, and that if the record was not the original it is a copy of the original. *Id.* § 3505(a)(1).

Additionally, § 3505 declares that a “foreign certification under this section shall authenticate such record or duplicate.” *Id.* § 3505(a)(2); *accord* FED. R. EVID. 902(3). The party seeking to admit the foreign records must “provide written notice of that intention” to the opposing party. 18 U.S.C. § 3505(b) (2012). The opposing party must then file a motion opposing admittance of such evidence and the motion must be “determined by the court before trial.” *Id.* Failure of the opposing party to file such motion constitutes “waiver of objection to such record or duplicate.” *Id.* The legislative history conveys the purpose of § 3505 to “make foreign-kept ... records more readily admissible into evidence in criminal trials in the United States.” H.R. REP. NO. 98-907, at 2 (1984).

The *Crawford* case should not affect the admissibility of public records and business records that are not prepared in anticipation of litigation. *See United States v. Hagege*, 437 F.3d 943, 957-58 (9th Cir. 2006) (holding that “foreign business records admitted under § 3505 are not subject to the *Crawford* requirement of confrontation”); *United States v. Qualls*, 553 F. Supp. 2d 241, 245 (E.D.N.Y. 2008) (noting that § 3505 only contemplates foreign records of “regularly conducted business activity,” categorically non-testimonial under *Crawford*).

The DOJ’s post-*Crawford* guidance for continued use of foreign records certifications involves obtaining the pre-trial determination of admissibility of the foreign records of regularly conducted activity pursuant to § 3505 and, thereafter, removing the foreign certificate or attestation of authenticity from the record. Only the foreign records, themselves, should be introduced as evidence at trial. *See* Memorandum from Patty Merkamp Stemler, Chief, Appellate Section, Criminal Division, United States Dep’t of Justice, Supplemental Guidance Regarding the Application of *Crawford* [cite omitted] to Certifications and Declarations Submitted to Establish the Admissibility of Bus. Records (Apr. 14, 2004). *But see United States v. Thompson*, 686 F.3d 575, 581-82 (8th Cir. 2012) (holding that the introduction of business records was permissible using a Rule 902(11) affidavit).

### **VIII. Conclusion**

Over the past two decades, IOC has steadily expanded its presence, sophistication, and influence and today poses a substantial threat to the United States. The successful implementation and utilization of the programs, profiles, and practice points outlined in this article will enhance the ability of federal prosecutors and agents to tackle the evolving challenges of IOC and protect the United States from the corrupt infiltration of IOC groups. Prosecution and law enforcement agencies must continue to work collaboratively with one another and their foreign counterparts to utilize all available resources and tools, share intelligence, identify priority targets, and fully commit to an operational focus that will be effective and sustainable against IOC groups far into the future. ❖

## ABOUT THE AUTHOR

□ **Thomas P. Ott** was appointed Deputy Chief for International Organized Crime in the OCGS in 2011. He previously served as Deputy Chief in the Organized Crime and Racketeering Section (OCRS) from 2006 through 2010, and as a Trial Attorney in OCRS since 2001. He came to the DOJ in 1988 through the Attorney General's Honor Program and served 13 years as a Trial Attorney in the Tax Division's Criminal Enforcement Sections. He has litigated cases involving RICO, financial fraud, money laundering, narcotics, extortion, and related offenses. He has also taught trial advocacy classes and lectured on international organized crime.✉

# *Glecier* Format Conspiracy and the RICO Act

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## **I. Introduction**

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations (RICO) Act as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941 (1970). Congress stated that its purpose in passing RICO was to combat the corrupt influence of “organized crime ... by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.” *Id.* at 923. RICO was a response to concerns with traditional organized crime, particularly crime families like La Cosa Nostra and their illegal conduct, including gambling, loan sharking, and drug dealing. It was also a response to concerns with the infiltration of labor unions and legitimate businesses by these criminal enterprises. S. REP. NO. 91-617, at 76-78 (1969). Although “[t]he occasion for Congress’ action was the perceived need to combat organized crime,” Congress “chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime.” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248 (1989). Accordingly, RICO applies not only to traditional organized crime, but also to street gangs and other criminal enterprises that are associated with both legitimate and illegitimate organizations. *See, e.g., United States v. Nascimento*, 491 F.3d 25, 42 (1st Cir. 2007) (holding that RICO was not defeated by the lack of “economic motive” in the violent street gang’s criminal activities).

Congress chose a simple formation for the RICO conspiracy provision: “It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” 18 U.S.C. § 1962(d) (2012). Unlike the general conspiracy statute, RICO conspiracy does not require any overt acts, making it even more comprehensive. *Salinas v. United States*, 522 U.S. 52, 63 (1997). The most frequently alleged RICO offense is a conspiracy to violate subsection (c). Subsection (c) prohibits “any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” 18 U.S.C. § 1962(c) (2012).

This article focuses on RICO conspiracy and describes two alternative methods for pleading a conspiracy under § 1962(d): (1) alleging a specific pattern of racketeering activity; and (2) alleging the types of crimes that constitute the pattern of racketeering activity. The second is known as a *Glecier* format conspiracy, *see United States v. Glecier*, 923 F.2d 496, 500 (7th Cir. 1991), where it is not necessary to allege any specific racketeering acts. Part II of this article gives a brief overview of the role of the Organized Crime and Gang Section and the resources that it provides to prosecutors who are contemplating RICO charges. Part III discusses the elements of RICO conspiracy and the issues that are often litigated in connection with such charges. Part IV describes how prosecutors can ensure that they provide adequate notice when drafting a *Glecier* format conspiracy count. Finally, Parts V and VI provide a discussion of several recent cases in this area and other resources for prosecutors.

## **II. Organized Crime and Gang Section's supervisory responsibility for RICO indictments**

Any federal prosecutor who is considering charging a defendant with RICO violations should contact the Organized Crime and Gang Section (OCGS) at Main Justice at an early stage in the investigation. As a matter of policy, all requests to bring RICO charges must be submitted to OCGS and must be approved by the OCGS RICO Review Unit before filing. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-110.010 to 9-110.400 (2012). Experienced OCGS attorneys are prepared to provide prosecutors with legal advice and guidance regarding the appropriateness of RICO prosecutions in particular cases, the type of evidence and investigative work required to support RICO charges, and the proper structure of RICO charging documents and prosecution memoranda. The Criminal Resource Manual provides the following non-exclusive examples of the types of cases where RICO charges may be appropriate:

- When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;
- When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;
- When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as prior similar acts, continuing crime, or conspiracy), a RICO count may be appropriate; and
- When a substantial prosecution interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which the individual has acquired, maintained, operated or conducted in violation of 18 U.S.C. § 1962, RICO may be appropriate.

DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 2070 (2012); *see also* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.310 (2012) (listing considerations before seeking a RICO indictment).

Organized crime and gang cases are often complex and frequently involve multiple targets with criminal activity in more than one district. Experienced OCGS Trial Attorneys, either individually or in cooperation with Assistant United States Attorneys in the field, often staff investigations and prosecutions that involve significant organized crime enterprises and gangs. OCGS can also provide training for prosecutors and agents to familiarize them with the RICO statute and methods of utilizing it to combat organized crime. For further information, including sample charging documents and model prosecution memoranda, please contact OCGS at 202-514-3594.

## **III. Elements of RICO conspiracy**

The RICO conspiracy provision under § 1962(d) makes it a crime to violate any of the substantive provisions of RICO. 18 U.S.C. § 1962(d) (2012). To fully understand RICO conspiracy then, prosecutors should first look to the most often used substantive RICO charge, subsection (c). 18 U.S.C. § 1962(c) (2012).

## A. Substantive RICO under subsection (c)

In order to establish a substantive RICO charge in violation of subsection (c), the government must prove the following elements:

- the existence of an enterprise;
- the enterprise engaged in, or its activities affected, interstate or foreign commerce;
- the defendant was employed by or was associated with the enterprise;
- the defendant conducted or participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and
- the defendant participated in the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt.

*See, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 (1985); *United States v. Posada-Rios*, 158 F.3d 832, 855 (5th Cir. 1998); *see generally* DEP'T OF JUSTICE, ORGANIZED CRIME AND RACKETEERING SECTION, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS (Criminal RICO Manual) (5th ed. Oct. 2009).

**The enterprise:** RICO provides that an “ ‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]” 18 U.S.C. § 1961(4) (2012). The Supreme Court has held that an association-in-fact enterprise “is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.” *United States v. Turkette*, 452 U.S. 576, 583 (1981). An association-in-fact enterprise “must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle v. United States*, 556 U.S. 938, 946 (2009).

**Interstate or foreign commerce nexus:** Circuit courts have frequently upheld jury instructions that say the government need only prove that the activities of the charged RICO enterprise had a de minimis effect on interstate or foreign commerce to satisfy RICO’s jurisdictional nexus. *See, e.g., United States v. Fernandez*, 388 F.3d 1199, 1249 (9th Cir. 2004). In *Nascimento*, 491 F.3d at 43–45, for example, the First Circuit ruled that the following evidence established the requisite de minimis effect: (1) a violent street gang—that the district court had concluded was a “massive purchaser of guns”—kept at least nine different firearms to be used by members in carrying out the enterprise’s affairs, and all but one of the firearms had been manufactured outside of the state; (2) a member traveled interstate to obtain one of the firearms for use in carrying out the enterprise’s affairs; and (3) members communicated with each other by cell phone to carry out enterprise activities. *Id.*

**Employed by or associated with:** To prove that a defendant was employed by or associated with an enterprise, it is not necessary to prove that the defendant had a formal position in the enterprise, participated in all the activities of the enterprise, had full knowledge of all the details of its activities, or even knew about the participation of all the other members in the enterprise. Rather, the defendant need only “know the general nature of the enterprise and know that the enterprise extends beyond his individual role.” *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir. 1989) (collecting cases).

**Conducted or participated:** Section 1962(c) requires proof that each defendant did “conduct or participate, directly or indirectly, in the conduct of [the] enterprise’s affairs.” 18 U.S.C. § 1962(c) (2012). In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), the Supreme Court addressed this element and held that a defendant is not liable for a substantive RICO violation under subsection (c) unless the defendant

“participate[s] in the operation or management of the enterprise itself.” *Id.* at 185. This element does not require proof that the defendant had “significant control” over or within the enterprise. *Id.* at 179. As the Supreme Court stated:

An enterprise is “operated” not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management. An enterprise also might be “operated” or “managed” by others “associated with” the enterprise who exert control over it ....

*Id.* at 184 (footnote omitted).

**Pattern of racketeering activity:** A “racketeering activity” is any of the enumerated crimes listed under § 1961(1), including various federal and state crimes such as murder, gambling, arson, robbery, mail and wire fraud, and drug trafficking. *See* 18 U.S.C. § 1961(1)(A) (2012). Section 1961(5) provides that a “ ‘pattern of racketeering activity’ requires at least two acts of racketeering activity ....” The Supreme Court concluded that there must be “something to a RICO pattern *beyond* simply the number of predicate acts involved.” *See H.J. Inc.*, 492 U.S. at 238 (emphasis in original). “[T]o prove a pattern of racketeering activity a ... prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.” *Id.* at 239 (emphasis in original); *see generally* Criminal RICO Manual at 89-102 (describing the relatedness and continuity required to establish a pattern of racketeering activity).

## **B. RICO conspiracy under § 1962(d)**

Against this backdrop, the elements of RICO conspiracy are relatively simple. To establish a RICO conspiracy to violate subsection (c), in violation of § 1962(d), the government must prove the following:

- the existence of an enterprise, or that an enterprise would exist;
- that the enterprise was, or would be, engaged in interstate or foreign commerce; or its activities affected, or would affect, interstate or foreign commerce; and
- that each defendant knowingly agreed that a member of the conspiracy, which may include the defendant himself, would commit a violation of subsection (c).

*See, e.g., Salinas*, 522 U.S. at 62-65; *Posada-Rios*, 158 F.3d at 857; *see generally* Criminal RICO Manual.

Two alternative methods are available to plead RICO conspiracy. Under either method, the government must prove that the defendant knowingly agreed that a member of the conspiracy would commit at least two racketeering acts. *Salinas*, 522 U.S. at 65-66. The first method, similar to pleading a substantive RICO count, is to allege specific racketeering acts that constitute the pattern of racketeering activity. If the RICO conspiracy count alleges a pattern consisting solely of specific racketeering acts, then the government might well be required to prove that at least two of the agreed-upon acts are among the racketeering acts specified in the indictment. *See United States v. Phillips*, 874 F.2d 123, 130 (3d Cir. 1989) (noting a case where “the government set out specific predicate acts to make up the pattern of racketeering activity and would have been properly confined to them in its proof”). The second method, known as *Gleazier* format after the Seventh Circuit’s holding in *Gleazier*, 923 F.2d at 500, is to allege the types of crimes that constitute the pattern of racketeering activity.

In *Gleazier*, the Seventh Circuit held that a RICO conspiracy indictment does not have to allege either specific racketeering acts or overt acts that the defendant agreed would be committed. *Id.* The court stated that:

to list adequately the elements of section 1962(d), an indictment need only charge—after identifying a proper enterprise and the defendant’s association with that enterprise—that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity (here, the “pattern” being multiple acts of bribery prohibited by specified provisions of the Illinois criminal code).

*Id.*

Similarly, in *Phillips*, 874 F.2d at 127, the Third Circuit held that a RICO conspiracy count need not allege with particularity the racketeering acts that the defendant agreed would be committed. In that case, the count was sufficient in alleging the type of racketeering acts, bribery under state law and extortion under federal law. *Id.* at 127-28; *see also United States v. Sutherland*, 656 F.2d 1181, 1197 (5th Cir. 1981) (rejecting a “lack of specificity” challenge to RICO conspiracy where it identified the pattern of racketeering activity as “a number of bribes” and tracked the language of the bribery statute). Other recent circuit court decisions have noted the acceptance of the *Gleazier* format. *United States v. Randall*, 661 F.3d 1291, 1297 (10th Cir. 2011) (“[A] RICO conspiracy charge need not specify the predicate racketeering acts that the defendant agreed would be committed.”); *United States v. Applins*, 637 F.3d 59, 81 (2d Cir. 2011) (“[I]t is sufficient to allege and prove that the defendants agreed to the commission of multiple violations of a specific statutory provision that qualifies as RICO racketeering activity.”).

Regardless of the pleading format, the government is required to prove that the defendant knowingly agreed that a conspirator would commit at least two racketeering acts. In *Salinas*, the Supreme Court found that although substantive RICO under subsection (c) requires proof that each defendant committed at least two racketeering acts, a RICO conspiracy charge does not require proof that the defendant himself committed or agreed to commit any racketeering act or overt act. 522 U.S. at 65. (“The interplay between [sections 1962(c) and (d)] does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit two or more predicate acts requisite to the underlying offense.”). The court stated:

A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.... One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.

*Id.*

Accordingly, RICO conspiracy requires proof “only that a particular defendant agreed that a member of the conspiracy would commit two predicate racketeering acts, not that the particular defendant committed or agreed to commit two predicate acts himself. A RICO conspiracy case does not require proof that any racketeering acts were actually carried out.” *United States v. Benabe*, 654 F.3d 753, 776 (7th Cir. 2011) (internal citations omitted). Of course, RICO conspiracy could also be proved by evidence that establishes that the defendant did, in fact, commit two racketeering acts. *See United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978) (“Where ... the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise’s affairs, the inference of an agreement to do so is unmistakable.”).

The elements of RICO conspiracy may be proved solely by circumstantial evidence, and it is common to do so, given that “conspirators normally attempt to conceal their conduct.” *Posada-Rios*, 158 F.3d at 857. Moreover, a conspiracy can still exist even if its membership changes over time or some defendants cease to participate in it. *See United States v. Garcia*, 785 F.2d 214, 225 (8th Cir. 1986) (“An agreement may include the performance of many transactions, and new parties may join or old parties terminate their relationship with the conspiracy at any time.”).

A defendant may be liable for RICO conspiracy under § 1962(d), even if the defendant himself did not participate in the operation or management of the enterprise, or conspire personally to do so. As described above, the Supreme Court in *Reves* held that liability under subsection (c) requires an individual to have participated in the operation or management of the enterprise. 507 U.S. at 185. However, *Reves* did not involve conspiracy and its holding cannot be extended to § 1962(d) because it is well-settled that a defendant may be liable for a conspiracy even if he is not among the class of persons who could commit the substantive offense. All eight circuits that have decided this issue have held that *Reves* does not apply to RICO conspiracy in that liability under § 1962(d) does not require that the defendant himself participate in the operation or management of the enterprise. *United States v. Mouzone*, 687 F.3d 207, 217-18 (4th Cir. 2012); *United States v. Wilson*, 605 F.3d 985, 1019-20 (D.C. Cir. 2010); *United States v. Fernandez*, 388 F.3d 1199, 1230 (9th Cir. 2004); *Smith v. Berg*, 247 F.3d 532, 537-38 (3d Cir. 2001); *United States v. Zichettello*, 208 F.3d 72, 98-99 (2d Cir. 2000); *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 966-67 (7th Cir. 2000); *United States v. Posada-Rios*, 158 F.3d 832, 856-58; (5th Cir. 1998); *United States v. Castro*, 89 F.3d 1443, 1452 (11th Cir. 1996). RICO conspiracy “is an agreement, not to operate or manage the enterprise, but personally to facilitate the activities of those who do.” *Brouwer*, 199 F.3d at 967.

#### **IV. Sufficiency of drafting language in *Gleazier* format conspiracy charge**

The *Gleazier* format raises some concerns about adequate notice in the indictment. As specific racketeering acts or overt acts are not required, the government may be susceptible to sufficiency challenges if it is unclear exactly what conduct was the subject of the charges. Federal Rule of Criminal Procedure 7(c)(1) directs that an indictment “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged ....” Generally, a RICO conspiracy charge is sufficient when it “[1] states all of the elements of the offense charged, [2] informs [the defendant] of the nature of the charge so that a defense can be prepared, and [3] enables the defendant to evaluate any possible double jeopardy problems presented by the charge.” *Gleazier*, 923 F.2d at 499. It is not necessary to allege evidentiary details. *See United States v. Nabors*, 45 F.3d 238, 240-41 (8th Cir. 1995) (noting that the government is not required to reveal all its proof in the indictment). In the *Gleazier* case, the RICO conspiracy count did not allege that the defendant personally committed or agreed to personally commit any specific racketeering act. Instead, it alleged that during the specified time period, the defendants agreed “to conduct and participate in the conduct of the affairs of [the enterprise], directly and indirectly, through a pattern of racketeering activity, as that term is defined in [18 U.S.C. § 1961], said racketeering activity consisting of multiple acts involving bribery” under the applicable state statute. *Gleazier*, 923 F.2d at 498. The court found that:

By specifying the time period during which the alleged conspiracy operated, the locations and courts, the principal actors, and, with some detail, the specific types of predicate crimes to be committed and the modus operandi of the conspiracy, the indictment adequately enabled [the defendant] to prepare a defense.

*Id.* at 500.

OCGS policy requires that *Gleazier* format pleadings identify the types of racketeering acts that the conspirators agreed would be committed, cite the appropriate statutes, and include other allegations to ensure adequate notice to the defendant of the scope of the racketeering activity. Prosecutors may include overt acts in the indictment, although RICO conspiracy does not require them, in order to provide a more complete picture of the charged conduct. It is important to note the difference between overt acts and racketeering acts. A racketeering act must be a violation of one or more of the crimes listed in § 1961(1). As described above, those racketeering acts can be alleged specifically by describing the underlying conduct that constitutes the crimes, or generally in *Gleazier* format by listing the types of crimes and statutory provisions. An overt act is a discrete act or event that does not use statutory language. For example, if a defendant is accused of money laundering as part of his pattern of racketeering activity, an overt act might allege (with a view toward proving that a particular financial transaction involved the use of illicit proceeds) that on a particular date and at a particular location “the defendant used cash to rent a hotel room.” Moreover, an overt act, standing alone, might not constitute a crime at all. Sample charging documents are available from OCGS.

## **V. Several recent cases involving RICO conspiracy**

### **A. RICO conspiracy does not require that defendant participated in operation or management**

In *United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012), the defendants appealed their conviction claiming, among other issues, that the court should have instructed the jury, based on *Reves*, that “[s]ome part in directing the enterprise’s affairs is required” for conviction under RICO conspiracy. *Id.* at 217. Fleming and Mouzone were members of the Tree Top Piru gang, a subset of the Bloods gang that developed in the Maryland prison system. At trial, Fleming and Mouzone were found guilty of RICO conspiracy with distribution of crack cocaine, distribution of cocaine, and robbery as conspiracy objectives, and also drug charges. The Fourth Circuit affirmed the convictions and joined its sister circuits in holding that liability under RICO conspiracy does not require that a defendant have a role in directing an enterprise. The court cited the *Salinas* opinion for the proposition that a defendant can violate RICO conspiracy without personally committing or agreeing to personally commit two or more racketeering acts. *Id.* at 217-18. The court found support in traditional conspiracy principles: (1) conspiracies exist even though each conspirator may not agree to commit or facilitate each and every part of the substantive offense, and (2) an individual may be liable for conspiracy even if incapable of committing the substantive offense. *Id.* at 218-19.

### **B. Pleading to specific racketeering acts under RICO conspiracy is not constructive amendment of *Gleazier* format indictment**

In *United States v. Tello*, 687 F.3d 785 (7th Cir. 2012), one of the issues addressed by the Seventh Circuit was the defendant’s contention that the racketeering acts referenced in his plea agreement improperly varied from those that were alleged in the indictment’s RICO conspiracy. Tello was among 49 Milwaukee-area Latin Kings who were indicted on charges of substantive RICO, RICO conspiracy, drug trafficking and conspiracy, and unlawful possession and distribution of firearms. Count One of the indictment alleged the substantive RICO charge and listed more than 60 specific racketeering acts, including 3 acts attributed to Tello. Count Two alleged RICO conspiracy in *Gleazier* format, listing the types of crimes constituting the pattern of racketeering activity and also incorporating the allegations in Count One by reference. Tello pled guilty to the RICO conspiracy in Count Two and, in the plea agreement, Tello specifically admitted “that he conspired with other Latin King gang members to commit

at least two qualifying criminal act[s] in furtherance of the criminal enterprise.” *Id.* at 788. The plea agreement identified two acts that Tello personally committed, one that corresponded to a specific racketeering act in Count One and one—a sexual assault—that did not.

Tello argued that his guilty plea was invalid because Count One delineated the parameters of the conspiracy in Count Two and the disparity between his plea and the indictment caused an impermissible amendment. The Seventh Circuit found no merit in Tello’s argument. Citing the *Salinas* and *Glecier* opinions, the court noted that for an indictment to adequately set forth the elements of RICO conspiracy, it need only charge—after identifying a proper enterprise and the defendant’s association with that enterprise—that the defendant knowingly joined a conspiracy, the objective of which was to operate that enterprise through a pattern of racketeering activity. The indictment need not allege that the defendant agreed to commit specific racketeering acts, as long as it alleges that the defendant agreed that some member of the conspiracy would commit at least two racketeering acts. The court said that incorporating by reference the allegations in Count One did not alter Count Two’s conspiracy to require proof that Tello personally committed any of the racketeering acts in Count One. The racketeering acts from Count One were mere surplusage, and Tello’s later admission in his guilty plea to personally committing certain acts did not impermissibly amend the indictment. While it was unnecessary for Tello to admit that he himself participated in at least two racketeering acts, the court found that the language in Tello’s plea agreement tracked the essential allegations of Count Two and established Tello’s guilt in the RICO conspiracy.

### **C. Jury instruction requiring unanimity on types of racketeering acts, not specific racketeering acts, is sufficient**

In *United States v. Randall*, 661 F.3d 1291 (10th Cir. 2011), the defendant attacked his RICO conspiracy conviction by arguing, among other things, that the jury had to agree unanimously on the specific racketeering acts that Randall, a member of the Wichita-area Insane Crips, agreed would be committed. Randall allegedly purchased and sold drugs for the group, and he was charged with substantive RICO, RICO conspiracy, and drug trafficking conspiracy. Randall went to trial and was found guilty of the RICO conspiracy, which had been alleged in *Glecier* format and did not list specific racketeering acts. At trial, the court instructed the jury that for RICO conspiracy it had to be “unanimous as to which type or types of predicate racketeering activity [Randall] agreed would be committed; for example, at least two acts of drug trafficking.” *Id.* at 1296. The Tenth Circuit held that for a RICO conspiracy charge, a jury need only be unanimous as to the types of racketeering acts, not as to specific acts themselves. The court noted that under *Salinas*, a RICO conspiracy covers a defendant who does not himself commit or agree to personally commit two or more racketeering acts and that under *Glecier*, an indictment need not identify specific racketeering acts, although neither case addressed the “specific racketeering act” issue in the context of jury instructions. The court found the decision of its sister circuit in *United States v. Applins*, 637 F.3d 59 (2d Cir. 2011), particularly persuasive because *Applins* involved jury instructions on RICO conspiracy with largely the same language.

In *Applins*, the Second Circuit also addressed whether a jury instruction requiring unanimity on the type of racketeering acts in a RICO conspiracy charge was proper. The defendants were members of the Elk Block gang in Syracuse, New York, that allegedly engaged in murder, attempted murder, drug trafficking, and other crimes. The defendants were charged with and convicted of RICO conspiracy. At trial, the district court instructed the jury that the “verdict must be unanimous as to which type or types of predicate racketeering activity the defendant agreed would be committed; for example, at least two acts of murder, attempted murder, or drug trafficking, or one of each, or any combination thereof.” *Id.* at 80. Citing *Salinas* and *Glecier*, among other cases, the Second Circuit found that “the district court’s

instruction was sufficient in requiring unanimity as to the types of predicate racketeering acts that the defendants agreed to commit without requiring a finding of specific predicate acts.” *Id.* at 82.

With *Randall* and *Applins* in mind, prosecutors should note that as long as the jury receives an instruction requiring unanimity as to the types of racketeering acts, the jury need not return a special verdict reflecting its unanimity.

## VI. Other resources for federal prosecutors

- JOEL ANDROPHY, *WHITE COLLAR CRIME* 2D § 13:1 (2d ed. 2012);
- Sean M. Douglass & Tyler Layne, *Racketeer Influenced and Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075 (Spring 2011);
- JIMMY GURULE, *COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME* § 2 (Lexis Law Publishing 2d ed. 2000);
- PAUL MARCUS, *THE PROSECUTION & DEFENSE OF CRIMINAL CONSPIRACY CASES* § 4.03 (Matthew Bender & Co. rev. ed. 2012);
- DEP’T OF JUSTICE, ORGANIZED CRIME AND RACKETEERING SECTION, *CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS* (5th ed. Oct. 2009);
- DEP’T OF JUSTICE, *UNITED STATES ATTORNEYS’ MANUAL* §§ 9-110.010 to 9-110.400 (2012);
- DEP’T OF JUSTICE, *CRIMINAL RESOURCE MANUAL 2070-2084, 2090* (2012).

## VII. Conclusion

RICO has significantly strengthened the federal government’s ability to bring charges against individuals who are members of a criminal enterprise. It allows prosecutors to target criminal enterprises whose structure and strength transcend their membership by bringing “the highly diversified acts of a single organized crime enterprise under RICO’s umbrella.” *United States v. Irizarry*, 341 F.3d 273, 293 n.7 (3d Cir. 2003). The RICO conspiracy provision allows prosecutors to charge those individuals who had previously been “untouchable” because of their insulation within the enterprise. *See, e.g., Russello v. United States*, 464 U.S. 16, 19 (1983) (discussing defendant whose criminal activities were significantly insulated by sophisticated enterprise that was formed to commit arson and defraud insurance companies). Prosecutors should remember the policy considerations expressed in the United States Attorneys’ Manual and carefully select those cases that are appropriate for RICO charges. OCGS attorneys are readily available to assist in the decision-making process and provide advice on legal and investigative issues surrounding RICO prosecutions in order to ensure consistent, uniform interpretations of the RICO statute. ❖

## ABOUT THE AUTHOR

□ **Jerome M. Maiatico** is a Trial Attorney with the OCGS and has been prosecuting gang-related cases, including those under the RICO statute, for the last two years. Prior to joining the Department of Justice, Mr. Maiatico was a law clerk with United States District Court Judge J. William Ditter, Jr., in Philadelphia, Pennsylvania.✉

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# The National Anti-Gang Task Force and the Special Operations Division

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On February 15, 2006, the Attorney General of the United States announced that, as part of the unified Department of Justice anti-gang strategy, the Department would form a National Anti-Gang Task Force to create law enforcement strategies and facilitate anti-gang operations across agency and jurisdictional lines. Gang Targeting, Enforcement & Coordination Center (GangTECC) was officially established by Memorandum of the Deputy Attorney General on July 25, 2006.

GangTECC was created as a multi-agency center designed to leverage the strengths of several federal law enforcement entities in the fight against gang violence. To ensure open sharing of intelligence and operational information and to support coordination of multi-district prosecutions, the Deputy Attorney directed participation from the ATF, BOP, DEA, FBI, and USMS. Through the Assistant Secretary of DHS, ICE was also invited to participate.

At the time of its inception, GangTECC's stated mission was to serve as a critical catalyst in a unified federal effort to disrupt and dismantle the most violent gangs in the United States as they relate to national security, border protection, and public safety. GangTECC was to accomplish this mission by assisting in the initiation of gang-related investigations, aiding in coordination and de-confliction of existing investigations and prosecutions, developing an enhanced understanding of the national gang problem, and proposing strategies to neutralize the most violent and significant threats. By the end of 2009, it was apparent that GangTECC's mission would be best served by establishing a formal partnership with the DEA-led, multi-agency Special Operations Division (SOD). In January 2010, SOD and GangTECC partnered, and SOD set up its gang section (OSG).

Established in 1994, SOD brings together numerous participating law enforcement agencies to pool investigative capabilities and intelligence. Its goal is to coordinate seamless law enforcement strategies and operations aimed at dismantling national and international drug trafficking and narco-terrorism organizations by attacking their command and control communications. This critical information is shared with a wide range of law enforcement entities in foreign and domestic offices and is instrumental in expanding the scope, breadth, and depth of current multi-agency, multi-jurisdiction, and/or multi-nation investigations of major criminal organizations. Special emphasis and priority is placed on those organizations that operate across jurisdictional boundaries on a regional, national, and international level.

Capable of operating at a classified level, SOD provides foreign and domestic-based law enforcement personnel with timely investigative information. This information enables them to fully exploit federal law enforcement's investigative authority under United States law, including electronic surveillance conducted under Title III of the Omnibus Crime Control and Safe Streets Act, as amended, or analogous state law. Through the many information sources utilized, SOD personnel are able to provide "big picture" analysis and added value to field investigative elements.

For nearly 20 years, SOD has earned a reputation as the preeminent multi-agency center for enhancing investigations of drug-trafficking and narcoterrorism organizations through communication exploitation, de-confliction and dissemination of sensitive and vital intelligence data to law enforcement agencies, provision of guidance on wiretap investigations, and coordination of multi-jurisdictional, multi-national operations. Federal prosecutors and agents throughout the country have learned from experience that utilizing the tools available through SOD and submitting/de-conflicting target communication data and other information to SOD gets results and helps produce more successful, higher-impact investigations. The unique investigative support provided by SOD allows the program to act as a “force multiplier” for drug law enforcement because it provides an effective and efficient medium for communication, intelligence sharing, and coordination among America’s law enforcement agencies. Additionally, through its partnership with the DOJ attorneys, SOD is able to pursue maximum disruption of drug trafficking organizations through prosecution efforts.

To date, the GangTECC—SOD merger has been a great success. Indeed, after supporting only approximately 100 cases in 3 years prior to the merger, under the operational direction of SOD, the GangTECC/OSG Section has supported over 800 cases in its first full year at SOD alone and is on pace to exceed that this year. ❖

#### **ABOUT THE AUTHOR**

❑ **John J. Sieder** has been a Special Agent with the Drug Enforcement Administration since 1991. In 2009, he was assigned to DEA’s Special Operations Division. In December 2009, he was designated as Director of Gang TECC. ❖

# Combating the Organized Crime Threat to the Healthcare System: Lessons Learned from Eurasian Organized Crime Prosecutions

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## I. Introduction

Recent prosecutions reveal that Eurasian Organized Crime is engaging in highly sophisticated, widespread health care fraud schemes that inflict massive losses on Medicare and private insurers. The prosecutions demonstrate a growing threat to the United States' health care system posed by these international organized crime groups. Acting Deputy Attorney General Gary Grindler recognized that "[t]he emergence of international organized crime in domestic health care fraud schemes signals a dangerous expansion that poses a serious threat to consumers as these syndicates are willing to exploit almost any program, business or individual to earn a profit." Press Release, Acting Deputy Attorney General Gary Grindler (Oct. 13, 2010). While a number of domestic and international organized crime groups are engaging in health care fraud, including La Cosa Nostra and gangs, Eurasian Organized Crime groups are committing some of the most extensive health care fraud schemes.

"Eurasian Organized Crime" is defined by the FBI as "organized crime associated with persons originating from Russia, eastern and central European countries, as well as the other independent states created following the collapse of the Soviet Union." *The Senate Subcommittee on European Affairs*, 108th Cong. 2 (Oct. 30, 2003) (testimony of Grant D. Ashley, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation). In response to the threat of Eurasian Organized Crime operating within the United States, the FBI established Eastern European crime as a subprogram of its organized crime program in June 1991. *Russian Organized Crime in the United States, Hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, United States Senate, 104th Cong. 15 (May 15, 1996) (testimony of James E. Moody, Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation).

For decades, law enforcement has recognized the involvement of Eurasian Organized Crime in sophisticated health care fraud schemes within the United States. *Id.* In 2000, the FBI acknowledged that

[h]ealth care fraud represents the most costly crime in America, and ROC [Russian Organized Crime] is taking its cut. ROC groups continue to innovate and perpetuate complex health care fraud schemes that defraud Medicare, Medicaid, and private insurance companies through false and inflated medical claims. ROC schemes, such as staged auto accidents and "rolling medical labs" (mobile labs that conduct unnecessary tests), often include in the conspiracies doctors, pharmacists, medical supply companies, and attorneys.

Scott O’Neal, *Russian Organized Crime: A Criminal Hydra*, 69 FED. BUREAU OF INVESTIGATION L. ENFORCEMENT BULL. 1, 3–4 (2000) (discussing Russian organized crime schemes and investigations in the United States), *available at* <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2000-pdfs/may00leb.pdf>. Health care fraud schemes “have, over time, become more sophisticated and complex and are now being perpetrated by more organized crime groups” and “certain ethnic or national groups tend to also employ the same fraud schemes.” FED. BUREAU OF INVESTIGATION, FINANCIAL CRIMES REPORT TO THE PUBLIC FISCAL YEARS 2010-2011 (2011), *available at* <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011>.

Organized crime’s interest in health care fraud is not surprising given the vast sums of money paid out through the health care system. The Centers for Medicare and Medicaid Services (CMS) projects that health care spending in the United States will grow from an estimated \$2.6 trillion in 2010 to \$3.6 trillion in 2016 and comprise 18.6 percent of the GDP. CENTERS FOR MEDICARE AND MEDICAID SERVICES, NATIONAL HEALTH CARE EXPENDITURES PROJECTIONS 2010-2020 4 (2010), *available at* <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/proj2010.pdf>. At the same time, it is estimated that as much as 10 percent of every dollar spent on health care is lost to fraud. The astounding profit potential for organized crime in the business of health care fraud presents a lucrative target for racketeering activity. Health care fraud targets public health programs as well as private insurers and employment based health plans. “Every person who pays for health care benefits, every business that pays higher insurance costs to cover their employees, and every taxpayer who funds Medicare, is a victim” of health care fraud. *Health Care Fraud, Statement Before the Senate Judiciary Committee*, 112th Cong. (May 16, 2012) (statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation).

For law enforcement, complex health care fraud schemes that are perpetrated by domestic or international organized crime groups present unique challenges. These groups have the established networks in place to develop expertise in the execution of health care fraud schemes, operate multiple schemes simultaneously, establish fraud schemes quickly and efficiently, operate in many different states, work cooperatively with other organized crime groups, and recruit immigrants or other foot soldiers to do the low-level footwork and shield their leaders from direct involvement in the execution of the schemes. Given the established networks of sophisticated organized crime groups, such networks will continue to function despite the takedown of a single scheme. However, when enforcement efforts focus on disrupting or dismantling the organized crime network, future racketeering activity can be prevented or impaired. The Attorney General has emphasized that the fight against organized crime “is a top priority of the Department of Justice” and “[d]ismantling these organizations and rendering them incapable of harming U.S. citizens remain among the most important tasks of the Department and of federal law enforcement.” Memorandum from Attorney General Eric H. Holder, Jr. Regarding Att’y Gen. Order No. 3206-2010 (Sept. 20, 2010).

This article will focus on the significant threat to the United States’ health care system posed by Eurasian Organized Crime. This threat is clear from a review of recent health care fraud prosecutions that have established connections to Russian and Armenian organized crime groups, including high level organized crime leaders. These prosecutions have brought charges designed to dismantle the organized crime networks behind the schemes. The unique challenges associated with investigation and prosecution of organized crime groups committing health care fraud will be discussed, as well as enforcement strategies to employ in combating this threat.

## II. Eurasian organized crime and health care fraud: recent prosecutions

“The Department has made great strides in attacking transnational organized crime groups, particularly those with some physical presence or foothold in the United States. We have prosecuted groups involved in narcotics and narco-terrorism, kidnapping and extortion, and health care and other identify fraud crimes alike.” *The Senate Judiciary Subcommittee on Crime and Terrorism*, 112th Cong. 2 (Nov. 1, 2011) (statement of Assistant Attorney General Lanny A. Breuer), available at <http://www.justice.gov/criminal/pr/testimony/2011/crm-testimony-111101.html>. In the last two years, several prosecutions linking Russian and Armenian Organized Crime to highly sophisticated health care fraud schemes reveal expansive health care fraud racketeering by Eurasian Organized Crime groups that operate domestically and internationally.

### A. Armenian Organized Crime operated 118 phantom health care clinics

In October 2010, the Department of Justice (DOJ) announced an indictment under the Racketeering Influenced Corrupt Organizations Statute (RICO), 18 U.S.C. §§ 1961–1968, linking Armenian Organized Crime to “the largest Medicare fraud scheme ever perpetrated by a single criminal enterprise and charged by the Department of Justice.” Press Release, Office of Pub. Affairs, Dep’t of Justice, Seventy-Three Members and Associates of Organized Crime Enterprise, Others Indicted for Health Care Fraud Crimes Involving More Than \$163 Million (Oct. 13, 2010). The RICO prosecution was announced in conjunction with indictments in 5 different districts of 73 defendants for their various roles in a number of related multistate schemes. Those schemes included the submission of \$163 million in fraudulent claims to Medicare. Dozens of those charged were reputed members and associates of a transnational Armenian Organized Crime enterprise, the Mirzoyan-Terdjanian Organization. Press Release, U.S. Attorney’s Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Charges 44 Members and Associates of an Armenian-American Organized Crime Enterprise with \$100 Million Medicare Fraud (Oct. 13, 2010), available at <http://www.fbi.gov/newyork/press-releases/2010/nyfo101310.htm>.

In announcing the RICO indictment, United States Attorney Preet Bharara emphasized that “[i]n terms of profitability, geographic scope, and sheer ambition, the elaborate health care scam we charge today highlights the emerging and serious threat of international organized crime. With 118 phantom clinics and over \$100 million in bogus billings, this group of international gangsters allegedly ran a veritable fraud franchise.” *Id.* Kevin Perkins, FBI Assistant Director of the Criminal Investigative Division, explained as follows:

The international organized crime enterprise known as the Mirzoyan-Terdjanian, fleeced the health care system through a wide-range of money making criminal fraud schemes .... The members and associates located throughout the United States and in Armenia, perpetrated a large-scale, nationwide Medicare scam that fraudulently billed Medicare for more than \$100 million of unnecessary medical treatments using a series of phantom clinics.

*Id.*

The RICO indictment identified the Mirzoyan-Terdjanian Organization (the M-T Organization) as an international organized crime group operating throughout the United States. *United States v. Kazarian*, No. 10 Cr 895, 2 (S.D.N.Y., indictment unsealed Oct. 13, 2010). The organization was identified by the names of its two leaders, Davit Mirzoyan, based in Los Angeles, and Robert Terdjianian, based in New York. The racketeering activity included a massive nationwide scheme to defraud Medicare through fraudulent health care claims. In addition to the Medicare fraud, the indictment alleged

a conspiracy to defraud automobile insurance companies through fraudulent billings for unnecessary medical services to treat injuries claimed to be incurred in automobile accidents. Members and associates of the M-T organization were also alleged to be involved in a wide array of other criminal activity including credit card fraud, bank fraud, narcotics distribution, immigration fraud, money laundering, identity fraud, and extortion.

The Medicare fraud involved phantom medical clinics established under the names of doctors whose identities had been stolen. Those fake clinics then billed Medicare for more than \$100 million in false claims in the names of patients whose identities had also been stolen. The bills were entirely fictitious. No services were received by Medicare beneficiaries and no doctors performed services. Medicare wired money to accounts associated with the phantom clinics in payment of these false claims. The indictment outlined how conspirators then laundered the Medicare proceeds through one or more additional bank accounts where the money was ultimately withdrawn as cash, paid out through checks to individuals who cashed them at check cashing stores, or transferred to other untraceable locations. Tens of thousands of dollars in cash was allegedly transferred to Armenia by courier.

The indictment emphasized that the success of the criminal venture did not depend on the success of any particular phantom clinic. Recognizing that each fraudulent clinic had a “shelf life” of only several months before it would inevitably be detected, the defendants took steps to insure that bank accounts associated with the clinics were opened in the names of individuals whose identities had been stolen or who had left the United States. New phantom clinics were regularly opened to “insure a ready pipeline of bogus Medicare providers with which to commit fraud when a particular clinic was shut down.” *Id.* at 22.

Characteristics of international organized crime were apparent in the indictment. Members and associates of the M-T Organization were identified as Armenian nationals or immigrants with substantial ties to Armenia, such as regular travel to Armenia and criminal connections to individuals residing in Armenia. Criminal proceeds were allegedly transferred to Armenia. Real estate and other assets were purchased in Armenia with criminal proceeds. Businesses were operated in Armenia and funded by criminal proceeds obtained in the United States. The prosecution also tied the M-T Organization to a Russian “vor v zakone” or “vor.” “Vor” is a Russian term translated as “thief-in-law” and refers to a member of a select group of high-level criminals from Russia and the countries that had been part of the former Soviet Union, including Armenia.

The M-T Organization operated with assistance and under the protection of Vor Armen Kazarian. Kazarian, also indicted in the case, is an Armenian-American alleged to have “substantial influence in the criminal underworld.” *Id.* at 4. Kazarian admitted that he was a vor when he was arrested on the racketeering charges. Press Release, U.S. Attorney’s Office for the S. Dist. of N.Y., Leader of Armenian Organized Crime Ring Pleads Guilty in Manhattan Federal Court to Racketeering (July 8, 2011). Kazarian used his position as a vor to resolve disputes in the United States, Armenia, and elsewhere with implicit and sometimes explicit threats of violence. Kazarian pleaded guilty on July 8, 2011, marking the first time a vor had ever been convicted for federal racketeering crimes. *Id.* All but two defendants have entered guilty pleas. Mirzoyan is awaiting trial. Kazarian and Terdjianian await sentencing. The *Kazarian* indictment marked a significant achievement in law enforcement efforts to combat health care frauds perpetrated by Eurasian Organized Crime. It was the first health care fraud prosecution to identify ties to the highest levels of Armenian organized crime. In addition, the comprehensive RICO indictment was designed to dismantle the organized crime enterprise responsible for the operation of fraudulent health care clinics across the country.

The Kazarian indictment was announced in conjunction with related indictments brought in five judicial districts. The additional indictments in the Southern District of New York, Cleveland, Los Angeles, Albuquerque, and Georgia revealed the breadth of the activity that was believed to be related to the Armenian organized criminal enterprise. The related New York indictment described the fraudulent auto insurance medical claims as part of a multimillion dollar scheme that was designed to generate income for the Mirzoyan-Terdjanian Organization. *United States v. Aron Chervin*, 10 CR 918 (S.D.N.Y., indictment unsealed Oct. 13, 2010). The indictment alleged that at least two members of the M-T Organization carried out, for at least a decade, a widespread and sophisticated fraud that involved the bribing of a hospital employee to steal the names of patients for the schemers and organizers, who then recruited those patients, sometimes by posing as a hospital referral service employee charged with helping accident victims. In some cases, the defendants allegedly staged auto accidents to generate fake patients who would then undergo unnecessary and expensive treatments that would be billed and reimbursed. Doctors, lawyers, and patients were solicited to participate in a scheme where patients were provided medical treatment without reference to their actual medical need. Once insurance companies paid for these unnecessary medical costs, the fraud proceeds were laundered through multiple accounts, including the escrow account belonging to an attorney. *Id.*

The Cleveland prosecution, brought as part of this multi-jurisdictional investigation, obtained convictions of leaders of the international ring that stole identities of doctors and patients in an effort to bill Medicare for more than \$40 million worth of fraudulent charge. *United States v. Chilyan*, 10-CR-426 (N.D. Ohio, indictment unsealed Sept. 29, 2010). On May 31, 2012, stiff sentences were handed out to the leaders, who were California residents. Karen Chilyan was sentenced to 8 years in prison and Eduard Oganessian was sentenced to 11 years in prison. The leaders, believed to be part of the Armenian organized criminal enterprise, had previously pleaded guilty to conspiracy to commit mail fraud, wire fraud, and health care fraud. Press Release, U.S. Attorney's Office for the N. Dist. of Ohio, Leaders of Health Care Fraud Ring Given Lengthy Prison Sentences (May 31, 2012). According to court records, the group stole the identities of 12 doctors and hundreds of Medicare recipients, leased commercial office space to establish false front practice locations for doctors or businesses that were purportedly employing the doctors whose identities were stolen. *Id.* They applied for Medicare Provider Applications in the names of the doctors whose identities were stolen, opened bank accounts in the names of those doctors, submitted false and fraudulent bills for \$48 million to Medicare for services that were never provided, and obtained nearly \$13 million in Medicare payments. *Id.* The indictment alleged that the defendants relied heavily on computers and the Internet to generate electronic billing, obtain and exchange stolen identifications among conspirators, search for false storefronts, incorporate businesses, check the status of Medicare applications and claims, and access and maintain bank accounts. In announcing the sentencing results, Steven M. Dettelbach, United States Attorney for the Northern District of Ohio, remarked that "[t]his is the new face of organized crime .... It used to be what you saw in 'The Godfather' but now it's someone with Internet access stealing hundreds of millions of dollars. This money is being sucked right out of our health care system." *Id.*

Three related indictments were also announced in Los Angeles against 10 individuals who were involved in the operation of California clinics. *See* Press Release, U.S. Attorney's Office for the Cent. Dist. of Cal., Ten Indicted in Operation "Diagnosis Dollars" Where Defendants Allegedly Defrauded the U.S. Medicare System in \$17 Million Scheme, Several Defendants Charged Nationwide in Related Cases Also Arrested in Los Angeles Today (Oct. 13, 2010), available at <http://www.fbi.gov/losangeles/press-releases/2010/la101310.htm>. "This multi-agency investigation is proof positive that health care fraud is not local, not regional, not even nationwide. Rather, this crime is now global in nature and results in the loss of hundreds of millions of taxpayer dollars." *Id.* (quoting Glenn R. Ferry, Special Agent in Charge for the Los Angeles Region of the Office of Inspector General, Department of Health and Human

Services). The main eight-defendant indictment charged conspiracy to commit bank fraud, conspiracy to launder monetary instruments, money laundering, bank fraud, and aggravated identity theft. *United States v. Pogos Satamyan et al.*, CR10-1123 (C.D.Ca., indictment unsealed Oct. 13, 2010). The California defendants used stolen Medicare provider information to submit Medicare Enrollment Applications and to open bank accounts that were used to launder money derived from eight fraudulent clinics. Three of the defendants were foreign nationals who assisted in setting up fraudulent clinics, fraudulent bank accounts, and fraudulent post office boxes. The defendants are alleged to have billed Medicare for over \$17 million in fraudulent claims and received approximately \$8 million. Pogos Satamyan has pleaded guilty to conspiracy to commit money laundering and is awaiting sentence. Satamayan has also pleaded guilty to the RICO count in *U.S. v. Kazarian* and is awaiting sentencing in the Southern District of New York.

The related indictment in New Mexico charged Russian, Armenian, Kazakh, and Ukrainian nationals with submitting fraudulent claims in connection with a phony durable medical equipment (DME) supplier. See Press Release, U.S. Attorney's Office for the Cent. Dist. of N.M., Members of Organized Crime Enterprise Charged with Federal Health Care Fraud Offenses (Oct. 13, 2010). Armenian nationals were also indicted in the Southern District of Georgia for conspiracy to commit health care fraud, health care fraud, aggravated identity theft, and money laundering in connection with their operation of sham clinics and a DME provider. Press Release, U.S. Attorney's Office for the S.D. of Ga., Six Defendants Indicted on \$4 Million Medicare Fraud Scheme (Oct. 13, 2010). The phony health care businesses used misappropriated Medicare provider numbers and misappropriated names and personal information of Medicare participants to bill Medicare for \$4 million for medical services that were never rendered. In March 2012, the lead defendant, Mansarian, was sentenced to 12 years imprisonment and \$1.8 million in restitution for his role in the scheme. Press Release, U.S. Attorney's Office for the S. Dist. of Ga., Armenian National Sentenced to 12 Years in Prison for Stealing Millions from Medicare (Mar. 3, 2012).

### **B. Russian organized crime group engaged in \$279 million health care fraud scheme involving staged auto accidents**

There is a significant history of prosecutions of Russian and Armenian organized crime cells defrauding private insurers through false claims for medical care allegedly rendered to treat injuries sustained in staged car accidents. The organizational structure of these schemes was addressed in a report issued by the National Insurance Crime Bureau in 2005. NATIONAL INSURANCE CRIME BUREAU (NICB), AUTOMOBILE ACCIDENT FRAUD, 4–8 (Aug. 2005), available at [http://www.nicbtraining.org/Auto\\_Accident\\_Fraud.pdf](http://www.nicbtraining.org/Auto_Accident_Fraud.pdf). While such schemes mimic Medicare fraud schemes by establishing phony health care clinics to submit false medical claims, they target private auto or health insurance policies rather than government programs. Fraudulent medical claims are generated based on preplanned, orchestrated automobile accidents. These accidents may be staged accidents where all parties cooperate, “caused accidents” where an unwitting driver is targeted and set up to be at fault, or purely fictitious accidents that occur only on paper. *Id.* Organized rings employ street bosses or cappers, recruit individuals to participate in the accident and to fake injuries, provide a target car or insurance policy to be used, direct the staging for the accident, and maintain detailed records of insurance policies, claims filed, names, addresses, and diagrams. *Id.* Cappers “sell” the accident to a medical clinic that generates the bogus health care claims. Clinics may then, in turn, sell the accident and related false claims to an attorney to pursue. *Id.*

In the 2005 report, the NICB recognized that organized crime ring participants are often from the same ethnic group and noted that its research indicated that the largest organized crime groups involved

in such schemes were of Russian origin. They are involved at all levels of the operation from the “street level” to the “medical providers, attorneys, and financial backers in the highest tiers of the ring.” *Id.* at 8. Participants are often recruited from the same ethnic group by employing a sense of cultural trust and familiarity to individuals with limited English skills and a lack of experience with United States laws. *Id.* These characteristics continue to be present in sophisticated health care fraud schemes that are committed by Eurasian Organized Crime.

Earlier this year a RICO indictment was returned in the southern District of New York. The indictment alleged a massive staged auto scheme orchestrated by a “criminal organization consisting primarily of individuals of Russian descent in the United States participating in organized criminal activity.” *United States v. Zemlyansky*, No. 12 Cr. 171 (S.D.N.Y.) (indictment filed Feb. 29, 2012). Members of the organization were charged with conspiring to steal \$279 million through the submission of fraudulent bills. The total loss to the private insurance companies was alleged to be \$113 million.

The indictment was announced as “the largest single no-fault insurance fraud ever charged, and the first case of its kind to allege violations of the Racketeer Influenced and Corrupt Organizations.” Press Release, U.S. Attorney’s Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Announces Charges Against 36 Individuals for Participating in \$279 Million Health Care Fraud Scheme (Feb. 29, 2012). The charges “expose[d] a colossal criminal trifecta, as the fraud’s tentacles simultaneously reached into the medical system, the legal system, and the insurance system, pulling out cash to fund the defendants’ lavish lifestyles.” *Id.* (quoting Preet Bharara, United States Attorney, Southern District of New York). A total of 36 people were indicted on charges, including racketeering, conspiracy to commit health care fraud, mail fraud, and money laundering. According to the detention memos filed in the case, leaders of the no-fault scam have ties to the former Soviet Union. *United States v. Zemlyansky*, 10 CR-426 S.D.N.Y (indicted Feb. 29, 2012). They are naturalized citizens who were born in the former Soviet Union, speak fluent Russian, and had recently traveled to Ukraine. *Id.*

The indictment alleged that from at least 2007 through 2012, the members and associates of an enterprise, identified as the “No-Fault Organization,” engaged in a massive and sophisticated scheme to defraud automobile insurance companies of hundreds of millions of dollars. *Zemlyansky*, No. 12 Cr. 171. The scheme took advantage of the patient-friendly New York no-fault insurance law that enables individuals to receive up to \$50,000 in personal injury claims sustained in an automobile accident regardless of fault. The no-fault law requires prompt payment for medical treatment, eliminating the need for claimants to file personal injury lawsuits to obtain reimbursement. Vehicle occupants can assign their right to reimbursement from an insurance company to a medical clinic treating their injuries so long as the clinic is owned, operated, and controlled by a licensed medical practitioner. In order to mislead New York authorities and private insurers, the true owners of these medical clinics (clinic controllers), paid licensed medical practitioners, including doctors, to use their licenses to incorporate the professional corporations through which the medical clinics billed the private insurers for the bogus medical treatments. *Id.* The indictment alleged that the clinics were “fraud mills” that generated medical claims for treatments that were never performed or not medically needed. The ring allegedly created and ran nine clinics in Bronx, Brooklyn, and Queens. These clinics provided unnecessary and excessive medical treatments, including physical therapy, acupuncture, pain management, psychological services, X-rays, MRIs, and other services. *Id.*

### **C. Fraudulent South Florida health clinics operated by Armenian organized crime group**

On February 16, 2011, six indictments of more than 100 members and associates of transnational organized crime groups were announced in Miami, Los Angeles, and Denver for criminal activity ranging from extortion and kidnapping to firearms trafficking and health care fraud. Press Release, Office of Pub. Affairs, Dep't of Justice, More Than 100 Members and Associates of Transnational Organized Crime Groups Charged with Offenses Including Bank Fraud, Kidnapping, Racketeering and Health Care Fraud (Feb. 16, 2011). Two indictments in the Southern District of Florida charged members of the "Khranyan Organization," an organized crime group operating domestically and internationally, with health care fraud schemes in connection with medical billings for injuries claimed to be sustained in staged auto accidents. Press Release, U.S. Attorney's Office for the S. Dist. Fla., Thirteen Members and Associates of Transnational Organized Crime Group Charged in South Florida (Feb. 16, 2011), *available at* <http://www.fbi.gov/miami/press-releases/2011/mm021611.htm>. The indictments alleged a four-year conspiracy to commit health care fraud and substantive counts of health care fraud in connection with their ownership and operation of two medical clinics. *United States v. Itchmelyan*, Case No. 11-CR-60027 WPD (S.D. Fla., indictment filed Feb. 15, 2011); *United States v. Okun*, 11-CR-20126-JAL (S.D. Fla., indictment filed Feb. 15, 2011). Both of these clinics paid individuals to refer "patients" of staged automobile accidents. The clinics billed private automobile insurance carriers for medical treatments that were either not medically necessary or were not provided. The lead defendants in both cases were convicted and sentenced for conspiracy to commit health care fraud.

According to court documents, the Florida clinic owners were alleged members or associates of an organized criminal group that was directed and supervised by Aram Khranyan, who operated in the Southern District of Florida and had significant ties to Russia and Armenia. Court documents in a related extortion case alleged that Khranyan operated as an "overseer" of the criminal activity in the Organization and that the Khranyan Organization was connected to Armenian Power, an international organized crime group based in Los Angeles. *United States v. Aram Khranyan*, Case No. 11-20125-CR-Jordan/McAliley, Memorandum of Law in Support of the Government's Motion for Pretrial Order of Detention (S.D. Fla., filed Feb. 16, 2011). Khranyan is alleged to have had meetings with a "thief-in-law" in Miami and Las Vegas and to have met with a leader of Armenian Power in Miami, Las Vegas, and Los Angeles. *Id.* When the indictments were announced, John V. Gillies, special agent in charge of the FBI's Miami office, emphasized that:

[t]he impact on Eurasian Organized Crime is not just from the sheer number of arrests today but from disrupting their criminal influence in our community. Although the investigations in Miami and Los Angeles are in different parts of the country, today's takedown is an example of the FBI's ability to conduct cross-program, multi-divisional, and multi-agency investigations targeting a national level threat.

Press Release, U.S. Attorney's Office for the S. Dist. Fla. (Feb. 16, 2011).

### **III. Enforcement challenges in combating organized crime involved in health care fraud**

Given the high volume of fraudulent medical claims generated by some organized crime health care fraud schemes, the federal government is under considerable pressure to stop the flow of fraudulently induced payments from Medicare, Medicaid, or private insurers as soon as possible. Prosecutors and investigators are understandably motivated to move quickly to shut off payment on

fraudulent claims and stop fraud losses to the victim payer whether it is Medicare, Medicaid, or a private insurer. The greater the volume of fraudulent billing exposed, the greater the pressure to bring a prompt indictment. However, swift prosecution of readily identifiable conspirators may close off the potential to explore connections, links, and associations, and identify affiliated schemes, networks, and leaders. When the larger criminal enterprise remains intact, new schemes will be generated preying on new victims.

Of course, targeting the leadership of an enterprise rarely leads to a quick-hit prosecution. Developing the evidence that links the operation of a domestic or international organized crime cell to associated cells or a larger network is labor intensive and time-consuming. Where the health care fraud schemes are ongoing, overt investigative techniques, such as search warrants, will alert the criminal enterprise to the investigation and provide the opportunity for the enterprise to protect itself by shutting down operations, moving proceeds, or destroying evidence. When an investigation is overt, those with foreign ties may flee the country. Because conspirators and associates of an international organized crime group, like those involved in Russian and Armenian organized crime, tend to limit their operations within their ethnic group and exclude outsiders, undercover operations are difficult to employ. When opportunities arise to employ undercover techniques, surveillance, or informants, it will prolong an investigation and consume additional investigative resources. Employing the use of wire taps can provide a wealth of evidence that identifies conspirators and details of the scheme and affiliated schemes. *See United States v. Kazarian*, 2012 WL 1810214, at \*1 (S.D.N.Y. May 18, 2012) (denying motion to suppress evidence obtained by court authorized wire taps). Yet conducting a wiretap investigation requires a commitment of extensive time and resources that are difficult to obtain given the limited resources that are available to dedicate to such comprehensive investigations.

While there are many obstacles to developing evidence to prosecute an international organized crime enterprise, including its leadership, prosecutions that focus only on lower level members of the international organized crime cell or enterprise will not stop the network behind the scheme. Despite such obstacles, “dismantling these organizations and rendering them incapable of harming U.S. citizens remain among the most important tasks of the Department and of federal law enforcement.” Memorandum from Attorney General Eric H. Holder, Jr. Regarding Att’y Gen. Order No. 3206-2010 (Sept. 20, 2010). The cases discussed in this article are examples of the Department’s accomplishments in attacking transnational organized crime enterprises engaged in health care fraud with prosecutions designed to disrupt and dismantle such organized crime groups. The DOJ’s international organized crime strategy and modernized approach to organized crime has established mechanisms to increase the identification of international organized crime involvement in health care fraud, expand the sharing of intelligence, and facilitate the coordination of such multi-jurisdictional and multi-agency investigations and prosecutions. In addition, the DOJ is seeking to enhance available prosecution tools to dismantle such organized crime enterprises with proposed amendments to RICO and the money laundering statutes.

## **IV. Strategies to address organized crime involved in health care fraud**

### **A. Identification of organized crime ties to health care fraud schemes**

Increasing the identification of international organized crime groups’ connection to criminal activity, including health care fraud, is one of the objectives of the DOJ’s IOC strategy. *See* DEP’T OF JUSTICE, THE LAW ENFORCEMENT STRATEGY TO COMBAT INTERNATIONAL ORGANIZED CRIME (Apr. 2008). A detailed discussion of the characteristics, patterns, and trends that are used to identify international organized crime and related “red flags” are included elsewhere in this issue of the United States Attorneys’ Bulletin. The prosecutions discussed above reflect a number of specific characteristics

of Eurasian Organized Crime. Where health care fraud investigations include characteristics of Eurasian Organized Crime, further scrutiny of international organized crime connections may be warranted.

The Organized Crime Coordinators Program initiated by the Attorney General is designed to increase identification and coordination of high priority organized crime groups. Memorandum from Attorney General Eric H. Holder, Jr. Regarding Att’y Gen. Order No. 3206-2010 (Sept. 20, 2010). Designated OC Coordinators are now in place in each USAO and in each section of the Criminal Division. They are responsible for identifying domestic and international organized crime cases, gathering and processing information on those cases, reporting case initiations to the Organized Crime and Gang Section (OCGS) at the DOJ, and coordinating with OCGS on high priority matters, such as Eurasian Organized Crime. *Id.* Pursuant to the Order, OC Coordinators also assemble organized crime threat assessments from law enforcement agencies in their district and a strategy for responding to them. Where a prosecutor believes a health care fraud investigation may be linked to an organized crime group, the OC coordinator in their office should be advised.

## **B. Information sharing and coordination**

The ability to bring down international organized crime groups that are engaged in sophisticated health care fraud or other racketeering activity requires considerable commitment and cooperation between multiple federal and state investigative agencies and United States Attorneys’ offices (USAOs). The recent successes in prosecuting large Eurasian Organized Crime networks involved in health care fraud demonstrate the inter-agency information sharing and cooperation needed to continue to address such threats. Health care fraud prosecutions frequently bring together multiple investigative agencies, including the FBI, the Department of Health and Human Services, the Office of Inspector General, the Internal Revenue Service, Immigration and Customs Enforcement (ICE), the Department of Labor, and other state and federal investigative agencies and health care fraud task forces. Where organized crime groups engage in health care fraud, such racketeering activity intersects both the DOJ’s organized crime and health care fraud programs.

The IOC Strategy emphasized the need to collect and synthesize the best available information and intelligence from multiple sources to optimize law enforcement’s ability to identify, assess, and draw connections among nationally significant international organized crime threats. In furtherance of this goal, the International Organized Crime Intelligence and Operations Center (IOC-2) was established in 2009, Organized Crime (OC) Coordinators have been designated in each United States Attorney’s office and within each section of the Criminal Division, and an online DOJ Intranet site has been established to actively connect colleagues who are involved in the prosecution of organized crime cases.

Because Eurasian Organized Crime groups have various organizational structures, maintain cultural and foreign language connections among coconspirators, and insulate their leadership from detection, they are difficult to penetrate. Gaps in our intelligence jeopardize our ability to target the leaders of these schemes and stop them from setting up another fraud shop. The continued sharing and ongoing analysis of investigative intelligence from agencies involved in combating health care fraud will help to fill in informational gaps and provide increased awareness of connections and associations between individual Eurasian Organized Crime figures and Eurasian Organized Crime networks.

IOC-2 is designed to (1) gather, store, and analyze all-source information and intelligence related to international organized crime; (2) disseminate such information and intelligence to support law enforcement operations, investigations, prosecutions, and forfeiture proceedings; and (3) coordinate multi-jurisdictional and multi-agency law enforcement operations, investigations, prosecutions, and forfeiture proceedings. DEP’T OF JUSTICE, PRIVACY IMPACT ASSESSMENT FOR THE ORGANIZED CRIME

DRUG ENFORCEMENT TASK FORCE FUSION CENTER AND INTERNATIONAL ORGANIZED CRIME INTELLIGENCE AND OPERATIONS CENTER SYSTEM (June 1, 2009). IOC-2 became fully operational in early 2009 and began to analyze telephone and other information generated by ongoing investigations into the Top International Criminal Organization Targets (TICOT) and bring the capabilities of the Special Operations Division and the Compass database to bear on the problem of expanding and enhancing those cases. CRIMINAL DIV., DEP'T OF JUSTICE, FY 2012 PRESIDENT'S BUDGET 3 (2012). Since its opening, IOC-2 has conducted a series of case coordination conferences that brought together prosecutors and agents from around the country along with foreign and industry partners to share information on pending cases and targets and to devise strategies to effectively penetrate and dismantle several of the TICOT list targets. *Id.* These conferences succeeded in making contacts, enhancing current cases, generating new cases, and greatly increasing the level of knowledge on some of the worst organized crime groups threatening the nation. *Id.*

IOC-2 has already made significant contributions in the investigation and prosecution of health care fraud committed by Eurasian Organized Crime groups. Assistant Attorney General Lanny A. Breuer emphasized the contributions that IOC-2 is making in announcing the indictment of the Armenian Power prosecution in February 2011:

We're also using new tools in this fight, including the International Organized Crime Intelligence and Operations Center, or IOC-2, which allows prosecutors and agents to coordinate across jurisdictions to target the illegal activities of a group operating in more than one city. Federal, state, and local agents and prosecutors are synchronizing their efforts, and we are using every available technique to investigate these cases, including Title III wiretaps and consensual recordings.

Press Release, Assistant Attorney Gen. Lanny A. Breuer of the Criminal Div., Armenian Power Takedown (Feb. 16, 2011), *available at* <http://www.fbi.gov/miami/press-releases/2011/mm021611.htm>.

Where prosecutors believe a health care fraud investigation may be tied to a Eurasian Organized Crime group, an inquiry placed to IOC-2 can provide invaluable intelligence. Investigative agencies who are members of IOC-2 can forward inquiries to IOC-2 through their designated representatives. Currently, nine agencies are members of IOC-2, including the FBI, IRS, ICE, and the Department of Labor, Office of Inspector General, which carry significant responsibility in the investigation of private and public sector health care fraud. As the depth and breadth of the IOC-2 data base of intelligence on Eurasian Organized Crime continues to expand, so too will the quality of the analysis and assistance provided to IOC-2 member agencies in identifying and prosecuting health care frauds engaged in by Eurasian Organized Crime.

Federal prosecutors also have access to an online DOJ Intranet site, OCNet, to facilitate communication with colleagues who are actively involved in the prosecution of organized crime cases. OCNet provides quick and secure access to the knowledge of all prosecutors in the OCNet community. Any federal prosecutor may join the OCNet community from the OCNet Intranet site.

### **C. Enterprise approach under RICO and legislative proposals**

RICO is a useful tool in disrupting racketeering enterprises. The RICO cases above identified the enterprise behind the health care fraud activity and brought racketeering charges against its leadership, members, and associates. The DOJ has had longstanding success in prosecuting racketeering activity engaged in by the La Cosa Nostra, under an enterprise theory that targets the structure of the LCN family and its leadership. However, unlike La Cosa Nostra families that operate with delineated chains of

command leading up a pyramid structure to a single leader, or boss, many international organized crime groups, including Eurasian Organized Crime groups, are not well structured. Consequently, it is particularly challenging to identify chains of command, top leadership, and links between coconspirators. *See* Scott O’Neal, *Russian Organized Crime: A Criminal Hydra*, 69 L. ENFORCEMENT BULL. 1, 5 (2000) (discussing Russian Organized Crime schemes and investigations in the United States), *available at* <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2000-pdfs/may00leb.pdf>. Nevertheless, the RICO statute was designed to assist prosecutors in pursuing an enterprise theory of prosecution even when the enterprise is informal.

RICO is a valuable enforcement tool that permits prosecution of various individuals who have operated together in a coordinated manner in furtherance of a common purpose under one count. An individual’s association with an enterprise can be formal or informal and:

may be proven by a wide variety of direct and circumstantial evidence including, but not limited to, inferences from the members’ commission of similar racketeering acts in furtherance of a shared objective, financial ties, coordination of activities, community of interests and objectives, interlocking nature of the schemes, and overlapping nature of the wrongful conduct.

*See* ORGANIZED CRIME AND RACKETEERING SECTION, DEP’T OF JUSTICE, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS (CRIMINAL RICO MANUAL) 62 (5th ed. 2009), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/rico.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/rico.pdf).

Individual defendants associated with an enterprise will violate the RICO statute, specifically 18 U.S.C. § 1962(c), when they conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity that includes at least two acts of racketeering activity listed in 18 U.S.C. § 1961(1)(A)-(G). The RICO statute also contains a conspiracy provision, § 1962(d), under which defendants who conspire to violate § 1962(c) may be charged. A key element of such a RICO conspiracy is proof that a defendant agreed that he or a coconspirator would commit at least two acts of racketeering activity in the conduct of the affairs of the enterprise. Thus, an advantage of a RICO conspiracy charge is the elimination of the requirement that a defendant himself personally commit the acts of racketeering. *See id.* at 133-55.

Under RICO, a broad spectrum of participants, including both leaders and lower level associates, may be charged together under one count for their conduct related to the enterprise. *See id.* at 123-30. In addition, racketeering activity that occurred in different districts may be charged in one indictment, thereby joining all participants in the racketeering activity in one prosecution. RICO charges also enable the prosecution to present evidence of the target organization’s full range of criminal activity and to provide a complete picture of each defendant’s conduct in furtherance of it. Finally, RICO includes broad forfeiture provisions that allow not only for the forfeiture of the ill-gotten gains but also the forfeiture of the defendant’s interest in the enterprise itself. In health care fraud cases, these interests might include clinics, doctor’s offices, and/or law firms.

In an effort to increase the application of RICO as an enforcement tool to attack international organized crime, the DOJ has proposed legislation to amend the statute. The use of RICO in health care fraud cases is limited by the fact that federal health care crimes enacted under the Health Insurance Portability and Accountability Act (HIPAA), Pub. L. No. 104-191 (2012), are not included in the list of racketeering activity in 18 U.S.C. § 1961(1). Specifically, the following were not included as RICO predicate offenses when they were enacted in 1996: (1) health care fraud, 18 U.S.C. § 1347; (2) theft or embezzlement in connection with health care, 18 U.S.C. § 669; (3) false statements relating to health care matters, 18 U.S.C. § 1035; and (4) obstruction of investigations of health care offenses, 18 U.S.C. § 1518. The DOJ has recognized these limitations to RICO’s application in health care fraud

prosecutions and has proposed legislation to “expand[] the list of racketeering predicate crimes to include offenses that are prevalent in an increasingly interconnected world and engaged in by transnational organized crime groups, including ... health care fraud ....” *Transnational Organized Crime, Before the S. Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong. 1 (Nov. 1, 2011) (statement of Lanny Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice), available at <http://www.justice.gov/criminal/pr/testimony/2011/crm-testimony-111101.html>. In addition, the proposed RICO amendments “would clarify that RICO has extraterritorial application in cases where criminal enterprises operate at least in part in the United States, or where they commit any predicate acts in the United States, or where the charged pattern includes offenses that apply extraterritorially.” *Id.*

#### **D. Money laundering and asset forfeiture**

The use of the money laundering and asset forfeiture statutes continues to be a key component to the success of disrupting international organized crime groups. Eurasian Organized Crime is motivated to commit health care fraud because it is a highly profitable racketeering activity. In Congressional testimony on Transnational Organized Crime, Jennifer Shasky Calvery, Chief of the Asset Forfeiture and Money Laundering Section, explained that:

[w]hile money motivates and ... empowers [these groups] ... it can also be their Achilles heel. Transnational organized crime is like any business, and like any business, profit is their primary motivation.... Because money is the foundation on which these criminal organizations operate, our money laundering laws are our primary means to stop them.

*Combating Transnational Organized Crime: International Money Laundering as a Threat to Our Financial Systems, Before the Subcomm. of Crime, Terrorism, and Homeland Security of the S. Comm. on the Judiciary*, 112th Cong. 3 (Feb. 8, 2012) (testimony of Jennifer Shasky Calvery, Chief, Asset Forfeiture and Money Laundering Section, Criminal Division, Department of Justice).

Curtailing or limiting the use of proceeds of criminal activity can substantially limit ongoing or future crimes. In addition, examination of the flow of proceeds results in more thorough investigations and contributes to more successful prosecutions. In general, the money laundering statutes prohibit financial transactions involving more than \$10,000 in criminal proceeds, 18 U.S.C. § 1957, and financial transactions involving domestic and international money laundering, 18 U.S.C. § 1956. Conducting an unlicensed money transmission business is also prohibited. 18 U.S.C. § 1960 (2012).

Sophisticated health care fraud schemes involve the movement of large volumes of proceeds. Where Medicare, Medicaid, or private insurance companies or employee health benefit plans are making payments on false claims, those payments, whether made electronically or by check, must be processed through the banking system at some point. Reviewing Currency Transaction Reports (CTRs) and Suspicious Activity Reports (SARs) associated with bank accounts that receive deposits of criminal proceeds can identify the source of funds in those accounts and subsequent transactions involving the proceeds. Following the flow of proceeds will identify the money laundering operations and potential criminal violations. Financial institutions are required to submit CTRs on all deposits, withdrawals, exchanges of currency, or other payment in currency of more than \$10,000 by, through, or to such financial institution. 31 U.S.C. § 5313 (2012). SARs are required when a financial institution suspects that a transaction involves proceeds of an illegal activity, was structured or designed to evade a reporting requirement, had no business or other lawful purpose, or was not the sort of transaction that the particular customer would be expected to engage in. *Id.* § 5318(g).

Last year, FinCEN published guidance on potential indicators of health care fraud and a list of red flags that identify activities directly related to fraud occurring in the health care system. Financial Crimes Enforcement Network (FinCEN), *The SAR Activity Review: Trends, Tips and Issues 57–60, 65, 67, 71* (BSA Advisory Group issue 20) (Oct. 2011), *available at* [http://www.fincen.gov/news\\_room/rp/files/sar\\_tti\\_20.pdf](http://www.fincen.gov/news_room/rp/files/sar_tti_20.pdf). The FinCEN red flags serve to educate law enforcement and alert financial institutions to activity that may indicate health care fraud and warrant the filing of a SAR. The red flags that FinCEN identified include:

- An account opened with a minimum deposit that had no activity or minimal activity over an extended period of time suddenly begins to receive large or frequent deposits from a Medicare contractor;
- EFT deposits from Medicare immediately followed by a withdrawal for exactly the same amount by either check, wire transfer, cash withdrawal, or ATM withdrawal within a day of the deposit;
- Checks from Medicare and/or HMO plans are endorsed over to a third party and either deposited into an account with no affiliation to the health care industry or cashed at a check cashing business.

*Id.* at 67.

FinCEN has recommended that financial institutions specifically reference “health care fraud” in the narrative portion of all relevant SAR filings for transactions that they suspect may involve health care fraud. The FinCEN Review instructs financial institutions to also include in the narrative “an explanation of why the institution knows, suspects, or has reason to suspect that the activity is suspicious.” *Id.* at 68. FinCEN further explained that:

[i]t is ... beneficial to law enforcement if, when filing a SAR related to health care fraud, a filer 1) identifies the company or insurance program that is providing incoming EFT’s or checks associated with the suspicious activity and, 2) documents the names of companies, entities or individuals that are receiving frequent or large checks or EFT’s from the subject account.

*Id.*

As financial institutions become more familiar with the indicia of health care fraud and as they file SARs with specific narrative information regarding suspected health care fraud activity, SARs may become an even more informative tool in health care fraud investigations.

To learn more about targeting organized crime in health care cases, prosecutors and investigators may also take advantage of the Attorney General’s Organized Crime Council/Asset Forfeiture and Money Laundering Section Financial Investigations Seminar. The seminar provides intensive practical training in the conduct of complex financial investigations. The course also provides hands-on interactive training in recognizing signs of international organized crime infiltration and an opportunity for participants to apply techniques and strategies to identify and track assets and analyze financial records.

## **V. Conclusion**

The recent successes in prosecuting Eurasian Organized Crime health care fraud networks offer valuable guidance for prosecutions of organized crime groups engaged in health care fraud. By establishing the evidence to link organized crime leaders and networks to these schemes, prosecutions can continue to make progress in dismantling the organized crime networks behind the schemes.

Prosecutors and investigators can build on these recent successes by increasing the identification of organized crime group involvement in health care schemes and, when involvement of organized crime is suspected, following the model of these successes by working cooperatively, using the expertise of multiple agencies, and maintaining a commitment to investigations that follow the money trail and target the enterprise behind the fraud scheme. With the emergence of an organized crime presence behind massive health care fraud networks, the DOJ's IOC strategy and tools are in place to assist enforcement efforts to disrupt and dismantle this threat to the United States health care system.❖

#### **ABOUT THE AUTHOR**

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# Use of Experts in Gang Prosecutions

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## **I. What can an expert do for your case?**

One of the dangers in handling a cooperator-driven gang case is that while the prosecutor gets fully immersed in the gang's culture, rules, and terminology, the jurors simply cannot comprehend those vital aspects of the case. The prosecutor has been proffering, debriefing, and preparing gangsters for weeks, months, or even years. The juror is sitting in the jury box wondering if he or she is going to have a ticket stuck on the windshield of his or her car. When the two worlds collide, it is critical that the prosecutor explain the gang world early and often. The opening statement in a historical RICO case presents the challenge of explaining the enterprise and the nature of the prosecution (such as conspiracy vs. substantive crimes, use of cooperators, etc.), as well as the applicable law.

The beauty of using an expert is that he or she can amplify concepts, terms, rules, structure, and history associated with a given gang in a concentrated fashion. The expert may well use demonstrative exhibits or conditionally admitted substantive exhibits to illustrate his or her points with panache. The expert may go far in establishing that the gang is properly classified as an enterprise, and, at least in essence, he or she may prove that the defendants are members of that criminal enterprise. To demystify a national or international gang like MS-13, Latin Kings, Hells Angels, Bloods, and others, having an expert testify as the first witness can lay a fantastic foundation before cooperators, victims, rivals, agents, and cops delve deeper into specific acts. In fact, reassuring a jury during opening statement with “and the very first witness you will hear from is Agent [expert], who will provide you with expert testimony about this gang's history, structure, rules, and terminology ... “ can arouse the jury's interest and reassure them that they will have plenty of opportunity to understand this utterly foreign culture.

Gang prosecutors get very comfortable with interviewing and presenting gang members as witnesses. It comes with the territory. However, it is the first time the jury has entered this criminal society (hopefully, or you might want to re-think your voir dire questions). The more the jurors can learn from a well-spoken law enforcement expert, the more comfortable they will be in hearing the same information from your cooperator. The expert will likely be more articulate, more comfortable, and maybe even more knowledgeable about the enterprise's history and operation, and it is rarely ideal to start your presentation of witnesses with a witness who might be saddled with more *Giglio* baggage than Al Capone.

To the extent that your expert can single-handedly establish that the gang being prosecuted is a criminal enterprise, that testimony can significantly lessen the intimidation felt by jurors wondering what this “RICO” thing is all about. Eliciting enterprise evidence from cooperators is one of the great joys of doing a gang RICO case—there are a million sociopathic stories lurking in the memories of your cooperator pool. When they recount for the jury vignettes about the gang's values, structure, leadership, and activities, they provide you with plenty of closing argument fodder about how this group constitutes an enterprise. That said, it is still helpful to add to the mix an argument about how Officer Expert gave the jury members all they need to understand that this is an enterprise, long before having that fact confirmed by the insider witnesses. In fact, a recent published opinion from the Fourth Circuit specifically found that the gang expert witness, Sergeant George Norris, single-handedly established that

MS-13 was a criminal enterprise (in the context of a sufficiency-based appellate claim). In *United States v. Palacios*, 677 F.3d 234 (4th Cir. 2012), the prosecutors presented Norris’ testimony regarding the history, structure, rules, and communications of MS-13. The Fourth Circuit found that “the testimony of Sergeant Norris provided the jury with adequate support for its finding that MS-13 members had a ‘common purpose of engaging in a course of conduct,’ that the organization was ‘ongoing,’ and that ‘the various associates function[ed] as a continuing unit.’” *Id.* at 249 (citing *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)). In short, the expert alone was enough to establish the enterprise and ward off claims of insufficiency on appeal. For tactical and legal reasons, then, utilizing a gang expert can be an important piece of the mosaic.

## II. Now that I have decided to use an expert, how do I find one?

In seeking an expert, you should probably start by talking to your agents and officers. If they are members of the burgeoning number of gang investigator associations, they may already have someone in mind that would do well. You should also feel free to contact the Organized Crime and Gang Section (OCGS) for assistance. We keep a database of experts, organized by gang. It is not perfectly comprehensive, and for a variety of practical and legal reasons we do not keep transcripts of testimony, but for the most established gangs, there is a decent chance that we can make some connections for you. In addition, we utilize GangLink, a list-serve that instantly connects over 400 gang prosecutors and allows for helpful answers to questions like, “Where can I find a good expert for a Mexican Mafia prosecution?”

The most obvious criteria for selecting an expert are that he or she is knowledgeable about the subject matter and capable of making a clear and interesting presentation. It is also important to consider an expert who can provide you with an appearance of impartiality toward your case. More specifically, consider having an expert from a completely different agency than the case agent, cops, and agents who are testifying as fact witnesses. It is not that an FBI agent testifying in an FBI-led trial is *actually* slanting testimony to favor his colleagues, but why give the defense attorney even a passing argument of bias? The other related aspect to selecting an expert is to find one who has no factual testimony to provide in this case, if possible. It is not that it is impossible to have the witness wear two hats (fact and expert), but you are inviting judicial, defense attorney, and, as you will see below, appellate court mischief.

## III. Then along came *Mejia*

In the fall of 2008, the Second Circuit Court of Appeals issued an opinion that continues to have repercussions in the realm of gang prosecution. *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008), has had a ripple effect of negative consequences that will likely continue for some time to come. In *Mejia*, the defendants were two MS-13 members who participated in several drive-by shootings. They were charged with violent crime in aid of racketeering (VICAR) and firearm offenses, and the prosecution relied upon State Police Investigator Hector Alicea to provide expert testimony that proved the “enterprise” element of the VICAR charges. The Second Circuit overturned the convictions, finding the expert’s testimony violated the Federal Rules of Evidence (FRE) and the Confrontation Clause.

The scope of the expert’s testimony on the gang was wide-ranging, but it was, in most parts, typical of organized crime enterprise prosecutions:

- History;
- Structure;
- Rules (at least some “policies” of the gang regarding rivals);
- Modes of communication and slang;

- Identifying the defendants as members and, more problematically;
- MS-13's criminal activities on Long Island.

The defense challenged the admissibility of Officer Alicea's testimony, claiming his conclusions relied upon hearsay. The trial court allowed for a defense voir dire of Alicea before his direct examination, and Alicea indicated that he had conducted "somewhere between fifteen and fifty custodial interviews of MS-13 members" but that he also had information from other sources. *Id.* at 187. The court properly recognized that expert witnesses frequently rely upon inadmissible evidence like hearsay to support their conclusions and allowed him to testify.

Much of Alicea's testimony focused upon history, structure, colors, hand signs, and rules. He also stated that MS-13 members from other states and El Salvador had attended organizational meetings in New York; that "MS-13 needed guns 'to do what MS-13 does, which is ... shoot at rival gang members, and sometimes in the process, obviously, some people get hit,' " *id.*; and that an anti-gang task force on Long Island had seized between 15 and 25 firearms from MS-13 members. He described narcotics arrests on Long Island of MS-13 members, and, most critically, he stated "that MS-13 had committed 'between 18 and 22, 23' murders on Long Island" over the last few years. *Id.*

The court's analysis included a lengthy and largely unassailable analysis of "the emergence of the officer expert" within the Second Circuit, a jurisdiction obviously familiar with traditional organized crime prosecutions as well as emerging gang ones. *Id.* at 188-93. It noted the starting point of FRE 702 and tracked various cases supporting the notion of officer expert testimony in the organized crime setting. For example, the court noted prior decisions approving of the expert's proffered knowledge:

- Defining La Cosa Nostra (LCN) terms like "captain," "capo," "regime," and "crew," *United States v. Ardito*, 782 F.2d 358, 360 (2d Cir. 1986);
- Decoding written messages, *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987);
- Identifying the five LCN families in New York City and describing their membership requirements, rules, *omerta*, and jargon, *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988);
- Interpreting recorded conversations between Gambino family members, *United States v. Locascio*, 6 F.3d 924, 937 (2d Cir. 1993);
- Describing the structure, leadership, operations, and jargon of Los Solidos, *United States v. Feliciano*, 223 F.3d 102, 109 (2d Cir. 2000).

However, and this became a huge "however," the court in *Mejia* noted that "[i]f the officer expert strays beyond the bounds of appropriate 'expert' matters, that officer becomes, rather than a sociologist describing the inner workings of a closed community, a chronicler of the recent past whose pronouncements on elements of the charged offense serve as shortcuts to proving guilt." *Mejia*, 545 F.3d at 190. This point was aggravated, in the court's mind, by the fact that "the expert happens to be one of the Government's own investigators." *Id.* at 191. The pre-*Mejia* constricting trend of appellate review had culminated in a near miss to the government in *United States v. Lombardozi*, 491 F.3d 61 (2d Cir. 2007), where the expert opined that the defendant was "a soldier in the Gambino family," and acknowledged that the basis of his information was conversations with cooperating witnesses and confidential informants and his personal observation of Lombardozi's activities dozens of times for many years. *Id.* at 72. The prosecution dodged a bullet because the defense failed to object at trial, so the belated Confrontation Clause claim brought with it a plain error standard. No such luck in *Mejia*.

The factual lynchpin of the reversal in *Mejia* was the officer's testimony about gun seizures, narcotics arrests, and murders attributable to MS-13. 545 F.3d at 194-95. This information was essentially summary hearsay testimony and not the stuff of traditional expert opinion. The distinction is basically between an agent presenting summary information in the Grand Jury and the permissible parameters of expert trial testimony. An accompanying problem under FRE 703 was the expert's inability to satisfy the court regarding the basis of his expert testimony. Specifically, the court found that "some of his testimony involved merely repeating information he had read or heard." *Id.* at 197. In many ways, this criticism is largely unavoidable—gang experts are not taking college courses on gangs and publishing peer-reviewed research materials akin to biochemists, and they are necessarily gleaning much of their knowledge from interviews of gang members and ex-members. Nonetheless, the Second Circuit found that the expert's reliance on testimonial statements, particularly when drifting into summary testimony (for example, drug "taxes" on Long Island that stemmed from a co-defendant's proffer), violated *Crawford* and that Alicea's testimony on MS-13 murders on Long Island was not harmless error beyond a reasonable doubt, warranting reversal. *Id.* at 201-02.

#### IV. Spawn of *Mejia*

Since *Mejia*, federal prosecutors from around the country have continued to take an enterprise approach to gangs, continued to use expert witnesses on these gangs, and continued to have tremendous results. There are, however, an increasing number of instances where trial courts have set substantial limits on the scope of the expert's testimony, typically citing *Mejia* as support.

In the highly successful prosecution of MS-13 in San Francisco, District Court Judge Alsup cited *Mejia*'s reasoning as the central basis for his limitation on officer expert testimony. Claiming much of the proposed testimony could be established in more direct ways, the judge opined, "No one should be convicted and sent to prison based on an opinion of a police officer that an element of an offense [the existence of the enterprise] was committed when that element is amenable to ordinary fact proof." *United States v. Cerna*, 2010 WL 2347406, at \*5 (N.D. Cal. June 8, 2010). Consequently, Judge Alsup described proposed officer testimony on MS-13 operations and structure as being put forth as "mere opinions by highly partisan players." *Id.* The court held that expert opinions on structure, organizations, and operations would not be allowed in the government's case-in-chief, but the experts could describe "code words and customs used by drug dealers in the Bay Area," if properly noticed. *Id.* at \*7. Even with that cramped form of expert testimony, the judge was willing to entertain a testimonial hearing regarding experts under *Daubert*. Of course, often one of the maddening features of trial court evidentiary limits is the complete inability of the government to seek relief. Thus, unreviewed opinions like the one in *Cerna* add to the next challenge in San Francisco and beyond.

Similarly, the District Court judge in *United States v. Kamahele*, 2011 WL 4368542 (D. Utah Sept. 19, 2011), was willing to permit the expert to testify about the Tongan Crip Gang and whether the defendants were indeed members, but she barred opinion testimony where the basis of Officer Merino's conclusions had not been provided to the defendants. *Id.* at \*2. The practical difficulty in having an experienced gang investigator classify and disclose each source of information that contributed to his or her opinions is mind boggling. Gang members, ex-gang members, associates, rivals, friends, families, victims, and other law enforcement colleagues undoubtedly contribute to the expert's knowledge, so that the disclosure process is particularly daunting in the gang prosecution complex, regardless of the additional concerns regarding source safety (that the court addressed via protective measures with defense counsel). Compliance required a significant documentary retrieval, review, and disclosure, so be forewarned about the possibility of such an approach.

Another MS-13 prosecution relying upon expert testimony met with better fortune. In Charlotte, the defense challenged the prosecution's use of LAPD Detective Frank Flores as an expert. *United States v. Umana*, 2010 WL 1439111 (W.D.N.C. Apr. 9, 2010). The defense cited FRE 703 and *Crawford* as reasons for excluding his testimony, but the court dismissed these claims in short order. Interestingly, the trial court mentioned *Mejia* in finding that Flores was *qualified* to testify (as was Alicea), but this court felt the officer's "independent assessment" of his basis of knowledge (i.e., that he was not simply channeling information from a source or two) would render his opinions reliable and admissible. *Id.* at \*2-3 (quoting *United States v. Johnson*, 587 F.3d 625, 636 (4th Cir. 2009)). Similarly, Flores testified in several MS-13 prosecutions in Maryland, with the Fourth Circuit finding it appropriate to elicit his expertise on the history, structure, and practices of MS-13. *United States v. Ayala*, 601 F.3d 256, 274 (4th Cir. 2010).

Still, the thorny issues of basis of expert conclusions and specific connection to the defendants at-hand are besieging post-*Mejia* prosecutions. For instance, an Eastern District of Michigan trial judge waded deeply into the AUSA's expert notice and basis for interpreting drug code, and found that the proposed expert testimony in fairly interpreting conspiracy-specific code phrases would improperly usurp the jury's fact-finding province. *United States v. Watson*, 2011 WL 1565812, at \*5 (E.D. Mich. Apr. 25, 2011). The ironic take-away lesson in some of these cases seems to be that if the expert's information is universally accepted, then it does not sufficiently aid the jury and is therefore inadmissible, but if the opinion touches on the specifics of the particular case, then it is *too* helpful and must also be restricted. Heads I win, tails you lose. Even in the better-established setting of drug code interpretation, rather than relatively newer jurisprudence on gang expert testimony, trial courts are giving close scrutiny to the expert notice, the basis of the expert's conclusions, and the direct applicability to the case at bar.

## V. The path forward

There may be a couple of "best practices" to utilize, notwithstanding the different permutations of case law within different districts and circuits. Most of these suggestions pertain to the scope of the expert's testimony, and the fundamental, practical, and legal utility of presenting an officer/agent expert in enterprise cases remains sound.

It will always be a dicey proposition to utilize a gang expert who also has factual information to present at trial. While cases like *Mejia* acknowledge the conceptual possibility of "wearing two hats" (i.e., fact and opinion testimony in the same trial), presenting such witnesses brings with it a greater risk that the trial judge will have heartburn about the expert's basis of knowledge and whether the witness is providing defendant-specific factual proof in the guise of helpful expert opinion testimony. Coupled with the above-mentioned tactical consideration of presenting experts from outside the case, it appears that the best practice will be to do everything possible to have independent experts wearing one hat only at trial, regardless of any grand jury or sentencing usage one might have for such experts.

Consistent with that approach, prosecutors should think long and hard before attempting to have the expert witness offer an opinion as to whether the defendant is indeed a member of the criminal enterprise that the expert is providing information for. Most multi-defendant gang prosecutions already involve cooperators, seized photographs, documents (like dues sheets), and admissions (or tacit admissions like a big MS-13 tattoo on the forehead) that can all provide direct evidence of membership without possibly running afoul of FRE 702 and *Crawford*. In short, why create the appellate issue if it is already obviously established through other sources?

While there is increasing scrutiny by the bench on the basis of the expert's knowledge, it is still likely that the law enforcement witness can go a long way toward establishing the gang's classification as an enterprise and simultaneously demystify the culture for jurors who will welcome the guidance. Even if prudence or a judge prevents the witness from opining that *this* defendant is a member of the enterprise, a properly-focused direct examination can pull within a whisker's length of such a link in most cases. Settling for the enterprise opinion, then, can still move your case closer to the finish line. However, if you want the bonus testimony, make sure you have reviewed your circuit's post-*Mejia* cases pertaining to organized crime, gang, and drug experts.❖

#### **ABOUT THE AUTHOR**

❑ **James M. Trusty** is the Chief of Department of Justice's OCGS. Prior to that appointment, he spent two years as the Deputy Chief and Acting Chief of the Gang Unit, ten years as an AUSA in the District of Maryland, and ten years as an Assistant State's Attorney in Montgomery County, Maryland. Since 2004, much of his practice has involved violent gang prosecutions. He is also a frequent contributor at the National Advocacy Center in Columbia, South Carolina.⌘

# Proffer Agreements

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## I. Introduction

Cooperating witnesses are invaluable, especially in complex federal prosecutions. These witnesses provide first-hand, insider knowledge about the inner-workings of criminal organizations and the criminal intent of significant defendants, among other things. Thus, evaluating the credibility of potential cooperating witnesses is of utmost importance when identifying and developing the best witnesses to create the most powerful and convincing courtroom presentation.

The most basic tool for a federal prosecutor in facilitating that evaluation process is the proffer agreement, otherwise known as the “queen for a day” or “limited immunity” agreement. One court explained that:

[a] “proffer agreement” is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview, commonly referred to as a “proffer session.” The proffer agreement defines the obligations of the parties and is intended to protect the defendant against the use of his or her statements, particularly in those situations in which the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement or other form of cooperation agreement.

*United States v. Lopez*, 219 F.3d 343, 345 (4th Cir. 2000).

An effective proffer agreement is thus of paramount importance, for it must accomplish several things. The agreement must provide sufficient immunity protection for the defendant such that the defendant will feel free to fully disclose his complete criminal conduct, whether or not that conduct is related to the charges that he is facing, as well as the conduct of others. However, the agreement must not so blanket the defendant with immunity that he can later lie at trial if he fails to enter into a cooperation agreement. Moreover, the agreement should not grant the defendant such far-reaching immunity that the principles of the *Kastigar* line of cases become relevant, allowing whole avenues of investigation to become “tainted” by immunized information. *See Kastigar v. United States*, 406 U.S. 441, 441 (1972) (“[I]n any subsequent criminal prosecution of a person who has been granted immunity to testify, the prosecution has the burden of proving affirmatively that evidence proposed to be used is derived from a legitimate source wholly independent of compelled testimony.”). Lastly, an effective proffer agreement may address the consequences of breach, the rules of disclosure of information generated at the proffer, and a host of other issues.

This article will discuss the drafting of proffer agreements and the litigation that arises from their use. Sections II and III of this article will set forth the prevailing case authority on the interpretation of proffer agreements. These sections will also address provisions for immunizing direct use of a defendant’s statement while reserving the government’s right to make derivative use of defendant’s proffer. Section IV of this article will explore some of the more significant issues that arise when a defendant contends that the government breached its proffer agreement at trial or sentencing. Finally, the article will offer suggestions for drafting portions of a proffer agreement.

## II. The basics of proffer agreements: proffer agreements are contracts

Because proffer agreements are legal agreements between two parties, courts have almost uniformly turned to the law of contracts when addressing legal issues that arise from them. “Proffer agreements are contracts, and their ‘terms must be read to give effect to the parties intent.’” *United States v. Raisley*, 466 F. App’x 125, 130 (3d Cir. 2012) (quoting *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008)); *United States v. Yellow*, 627 F.3d 706, 708 (8th Cir. 2010) (finding that plea agreements are contractual and therefore should be interpreted by “general contractual principles”) (quoting *United States v. Thompson*, 403 F.3d 1037, 1039 (8th Cir. 2005)); *United States v. Chiu*, 109 F.3d 624, 625 (9th Cir. 1997) (applying contract principles to the interpretation of a proffer agreement and stating that the court should review alleged violations of a proffer agreement de novo); *United States v. Thompson*, 25 F.3d 1558, 1562 (11th Cir. 1994) (“In determining the extent of immunity afforded a defendant under an [informal] immunity agreement, a court should apply basic principles of contract law.”). However, the Seventh Circuit has cautioned that proffer agreements are held to a higher standard than normal contracts because they are part of an ongoing criminal proceeding. *See United States v. Farmer*, 543 F.3d 363, 374 (7th Cir. 2008) (“[U]nique contracts and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant’s rights to fundamental fairness under the Due Process Clause.”) (quoting *United States v. \$87,118.00 in United States Currency*, 95 F.3d 511, 516-17 (7th Cir. 1996) (internal quotations omitted)).

When interpreting proffer agreements as contracts, the court must “try to discern the intent of the parties ‘as expressed in the plain language of the agreement when viewed as a whole.’” *United States v. Taylor*, 258 F.3d 815, 819 (8th Cir. 2001) (emphasis omitted) (quoting *United States v. Kelly*, 18 F.3d 612, 616 (8th Cir. 1994) (discussing plea agreements)). Courts have also applied the common contractual inference: “that which is not included, is excluded.” *United States v. Hill*, 643 F.3d 807, 876 (11th Cir. 2011); *see also In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007) (“The doctrine of *expressio unius est exclusio alterius* instructs that when certain matters are mentioned in a contract, other similar matters not mentioned were intended to be excluded.”) (internal quotations and citation omitted).

Most significantly, ambiguities in a proffer agreement are construed against the government, as it is the original drafter of the agreement. *United States v. Pielago*, 135 F.3d 703, 709-10 (11th Cir. 1998); *see also United States v. Harvey*, 869 F.2d 1439, 1452 (11th Cir. 1989) (reiterating that “ambiguity ‘should be resolved in favor of the criminal defendant’”) (quoting *Rowe v. Griffin*, 676 F.2d 524, 526 (1982)).

Lastly, because a defendant’s immunity originates from the proffer agreement and not from a formal statutory grant of immunity, courts look to the text of the agreement to determine the scope of immunity. *Hill*, 643 F.3d at 875; *see also Taylor v. Singletary*, 148 F.3d 1276, 1284 (11th Cir. 1998) (concluding that a formal grant of immunity under 18 U.S.C. §§ 6001–6003 gives a defendant more protection than an informal immunity agreement).

## III. Federal Rule of Evidence 410 and derivative use of defendant’s proffer statements

With these basic principles in mind, the drafter of a cooperation agreement must ensure that, while a defendant is protected and sufficiently immunized by the agreement, immunity is not so broad as to prevent appropriate use of a defendant’s statements should the defendant opt for a trial or the cooperation process otherwise break down. When properly drafted, these waivers, and the case law examining them, make proffer agreements particularly effective.

To ensure that the government retains some ability to use a defendant's proffer statements against him in case of a breach of the agreement or other break down, a defendant must waive his rights under Federal Rule of Evidence 410. Rule 410(a)(4), provides in relevant part:

[E]vidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

\* \* \* \*

- (4) a statement made during plea discussion with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

*See, e.g., United States v. Roberts*, 660 F.3d 149, 157 (2d Cir. 2011); *see also* FED. R. CRIM. P. 11(f) ("The admissibility or inadmissibility of ... a plea discussion, and any related statement is governed by Federal Rules of Evidence 410."); *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977) ("Statements are inadmissible if made at any point during a discussion in which the defendant seeks to obtain concessions from the government in return for a plea.").

The Second Circuit has explicitly held that "[s]tatements made by defendants in proffer sessions are covered by Rule 410." *United States v. Barrow*, 400 F.3d 109, 116 (2d Cir. 2005) (citing *United States v. Velez*, 354 F.3d 190, 194 (2d Cir. 2004)). The Supreme Court has concluded that because Rule 410 serves as an exception to "the general principle that all relevant evidence is admissible at trial," it is narrowly interpreted by courts and can be waived by the defendant. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 205 (1995) (finding that while the rule holds that statements made in plea discussions are inadmissible, this right can be waived or even offered by the defendant himself if it would be advantageous); *Roberts*, 660 F.3d at 157 (recognizing that the protections of the rule can be waived by a defendant); *United States v. Mitchell*, 633 F.3d 997, 1000-06 (10th Cir. 2011) (reiterating that a defendant can waive Rule 410 as long as it is voluntary and knowingly); *United States v. Sylvester*, 583 F.3d 285, 289 (5th Cir. 2009) (finding "no indication of congressional disfavor towards waiver" of Rule 410 rights).

Courts have not appeared to require the actual citing of Rule 410 in a waiver provision that has the effect of waiving that rule. Thus, in the *Velez* case, the Second Circuit deemed the following paragraph in a proffer agreement from the Southern District of New York as being a full waiver of a defendant's rights under Rule 410:

[T]he Government may ... use statements made by [defendant] at the meeting to rebut any evidence or arguments offered by or on behalf of [defendant] (including arguments made or issues raised *sua sponte* by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against [defendant].

*United States v. Velez*, 354 F.3d at 192. Nevertheless, the safer practice would be to include a citation to Rule 410 in the agreement, as well as Federal Rule of Criminal Procedure 11(f), which incorporates Rule 410. Many agreements, including that utilized by the Southern District of New York, include a citation to Rule 410.

In addition, courts have required the government to explicitly reserve the specific right to use proffer statements against the defendant at trial in order for the court to permit that use in the event of a breach. *See United States v. Hill*, 643 F.3d 807, 875-76 (11th Cir. 2011) (upholding the district court's conclusion interpreting the proffer agreement as not allowing for use of defendant's proffer statements against him at trial when the agreement provided that "anything related to the proffer ... will not be

used ... in any Government case-in-chief” and did not expressly state that the government could use the statement); *United States v. Merz*, 396 F. App’x 838, 841 (3d Cir. 2010) (affirming the use of statements where the agreement stated that “the government may make derivative use of ... statements ... , [the] client waive[d] any right to challenge such derivative use ... [and] Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 do not govern such derivative use”); *United States v. Whitmore*, 35 F. App’x 307, 325 (9th Cir. 2002) (finding that the government’s right to derivatively use defendant’s proffer statements, pursuant to the proffer agreement, was not “extinguished” under the failed plea agreement, and therefore the court properly ruled that the defendant’s statements were not given retroactive immunity); *United States v. Pielago*, 135 F.3d 703, 710 (11th Cir. 1998) (derivative use allowed where proffer agreement stated, “[t]he government also expressly reserves the right to pursue any and all investigative leads derived from [the defendant’s] statements or information and use such derivative evidence in any criminal or civil proceeding against her and/or others.”).

Indeed, the case authority is replete with courts’ admonishments to the government to be as explicit as possible in delineating in a proffer agreement exactly how the government may use a defendant’s proffer statements under the agreement. For example, the Ninth Circuit went so far as to, in effect, endorse using the words “derivative use” in the proffer agreement itself:

The following proffer is made pursuant to Rule 11(e)(6) of the Federal Rules of Criminal Procedure and is agreed between the Government and Mr. Michael Wyner to be an “off-the-record” representation, by counsel, of what the evidence might show in connection with certain matters currently under investigation by the United States Attorney. It is further understood that, although the government may make derivative use of or pursue investigative leads suggested by the proffer, any information herein will not be used by the Government in its case-in-chief against Mr. Wyner in any criminal case or any civil action pertaining to the matters referenced herein.

*United States v. Wyner*, 230 F.3d 1368, 1369 (9th Cir. 2000) (“Here, the language in Wyner’s proffer explicitly provides for derivative use. Thus, even if the government made derivative use of Wyner’s proffer, it was allowed under the terms of the proffer.”).

By contrast, a proffer agreement that merely states, “the government is precluded from directly offering [defendant’s] statements against him only in its case-in-chief,” but neglects to include explicit language about how a government may use defendant’s statements at trial in the event of a breach, grants only direct use immunity. *In re: Grand Jury Subpoena to Mustafa Janan*, 325 F. App’x 551, 552 (9th Cir. 2009) (rejecting defendant’s attempt to “adopt an expansive definition of the term ‘case-in-chief’ “ in holding that the government can use proffer statements to prepare a witness for trial). If a proffer agreement does not explicitly provide for derivative use of the statement, the defendant has to prove a breach of the agreement by a preponderance of the evidence. *See United States v. Causwell*, 10 F. App’x 80, 85-86 (4th Cir. 2001) (concluding that defendant did not meet his burden since he could not show that any piece of evidence was derived from his proffer statement).

Where a meeting between a defendant and the government takes place without any proffer agreement, courts must examine the meeting to determine if plea negotiations were taking place such that a defendant had Rule 410 rights. Courts suggest—especially in situations where no explicit waiver of Rule 410 occurred—that an inquiry be made to distinguish between a discussion involving a defendant who simply made an admission and a discussion involving a defendant who possibly sought to negotiate a plea agreement. *See United States v. Robertson*, 582 F.2d 1356, 1367 (5th Cir. 1978). To properly evaluate the circumstances of the meetings in this case, a court “must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the

time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." *Id.* at 1366. The *Robertson* case addressed a post-arrest meeting in a parking lot between a defendant and DEA agents. That case involved the applicability of an older version of Federal Rule of Criminal Procedure 11(e)(6). Since that decision, Rule 11 has been amended simply to incorporate Federal Rule of Evidence 410, which only applies to plea discussions between a defendant and "an attorney for the prosecuting authority ...." FED. R. EVID. 410(a)(4). Nevertheless, especially where a prosecutor does not employ a proffer agreement, courts have continued to follow the analysis in *Robertson* and closely examine proffer meetings to determine—often with the aid of evidentiary hearings—whether plea negotiations were taking place. *See, e.g., United States v. Edelmann*, 458 F.3d 791 (8th Cir. 2006); *United States v. Williams*, 1996 WL 692521, at \*1 (4th Cir. Dec. 4, 1996); *United States v. Morgan*, 91 F.3d 1193 (8th Cir. 1996); *United States v. Penta*, 898 F.2d 815 (1st Cir. 1990); *United States v. O'Brien*, 618 F.2d 1234 (7th Cir. 1980); *United States v. Lindsey*, 2010 WL 4822939, at \*36-40 (D. Minn. July 20, 2010). In light of this authority, if practical and tactical considerations permit, a prosecutor may lessen the risk of a court considering a defense claim that he was involved in plea negotiations by informing "a defendant of the nature of a meeting; just as a Government attorney can make a proffer, he or she can make a 'non-proffer.'" *United States v. Washington*, 614 F. Supp. 144, 150 (E.D. Pa. 1985) (footnote omitted).

Thus, under this statutory and case authority, a proffer agreement is an important component of meetings between the government and a defendant, and the agreement should contain explicit waivers of a defendant's rights under Federal Rule of Evidence 410 (and Federal Rule of Criminal Procedure 11(f) that incorporates Rule 410), as well as an explicit and express reservation of the government's right to make derivative use of a defendant's proffer statements. These terms are critically important when litigating claims by the defendant that the government has breached the terms of the proffer agreement at trial or sentencing.

#### **IV. Breaches of the agreement**

Defendants often litigate claims of breach of a proffer agreement in situations where the government seeks to use the statements against the defendant during trial or sentencing. The key to the government's success in opposing these challenges often lies in the degree of precision that the government employed in drafting the proffer agreement in general, particularly the derivative use section.

##### **A. Use of proffer statements at trial**

United States Attorneys' offices around the country differ in how broadly they draft provisions concerning the derivative use of proffer statements at trial. The more narrow approach is for the government to reserve the right to use proffer statements solely in a situation where the defendant testifies at trial and contradicts his proffer statements. *See, e.g., United States v. Williams*, 295 F.3d 817 (8th Cir. 2002); *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992); *United States v. Singletary*, 1991 WL 243220, at \*1-3 (4th Cir. Nov. 21, 1992). Where the defendant decides to take the stand and then contradicts his proffer statements, courts have generally enforced the derivative use clauses of government proffer agreements, upholding the provisions as bargained-for provisions under contract law.

Other United States Attorneys' offices take a broader approach and include provisions that permit the government to use a defendant's proffer statements where a defendant offers evidence contrary to the proffer, *United States v. Al-Esawi*, 560 F.3d 888 (8th Cir. 2009), or "present[s] a position inconsistent with the proffer." *United States v. Krilich*, 159 F.3d 1020, 1024 (7th Cir. 1998). Most

expansively, the inclusion of such a provision in the agreement allows the government derivative use “to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [a defendant] at any stage of a criminal prosecution.” *United States v. Barrow*, 400 F.3d 109, 113 (2d Cir. 2005); accord *United States v. Hardwick*, 544 F.3d 565 (3d Cir. 2008); *United States v. Rebbe*, 314 F.3d 402, 407 (9th Cir. 2002); *United States v. Burch*, 156 F.3d 1315, 1321-22 (D.C. Cir. 1998).

Courts have scrutinized this most expansive language but have upheld its application. For example, in the *Hardwick* case, defense counsel cross-examined a government witness in a way to suggest that another drug gang may have had motive to kill the victims, even though, at a proffer session, the defendant had confessed to ordering the killings. 544 F.3d. at 569-71. The Third Circuit affirmed that the cross-examination triggered the derivative use provision of the District of New Jersey’s proffer agreement. *Id.* at 571. Similarly, in *Barrow*, counsel argued in opening statements that the defendant had not sold the undercover officer narcotics and that the case was one of mistaken identity, an issue that counsel further pursued during cross examination of the officer. 400 F.3d at 119-20. Because this opening statement and cross-examination flatly contradicted defendant’s admissions of the sales during a proffer, the Second Circuit concluded that defendant had triggered the Southern District of New York’s derivative use clause and admitted his proffer statements. *Id.* at 117-19; see also *United States v. Raisley*, 466 F. App’x 125, 130 (3d Cir. 2012) (finding that the district court correctly admitted defendant’s proffer statement when defense counsel’s opening statement clearly contradicted defendant’s previous proffer statement).

Because courts have deemed this particular provision as “expansive,” *Barrow*, 400 F.3d at 118, courts will likely scrutinize motions by the government that counsel’s arguments or cross-examination have implied a fact that is contrary to a defendant proffer. Thus, the Second Circuit cautioned that “district court[s] may well have to consider carefully what fact, if any, has actually been implied to the jury before deciding whether proffer statements fairly rebut it.” *Id.* at 119; see also *United States v. Roberts*, 660 F.3d 149, 158 (2d Cir. 2011) (“Particular caution is required when the purported fact is asserted by counsel rather than through witness testimony or exhibits.”).

The practical result at trial is that, when a defendant has fully proffered under the terms of an “expansive” proffer agreement, the defendant’s attorney is sharply limited in what he can argue without triggering its provisions. However, counsel need not be silent. Counsel can still argue and ask questions that challenge a

witness’s perception or recollection of an event, which do “not necessarily imply that the event did not occur, only that the witness may not have seen or reported it accurately,” and questions accusing the witness of fabricating an event, which in the context of that case “implicitly assert[ed] that no such [event] ever took place.”

*Roberts*, 660 F.3d at 158 (quoting *Barrow*, 400 F.3d at 119). Such an analysis is fact specific. Therefore, the circuits, while reviewing the district court’s interpretation of the terms of a proffer agreement de novo, will give deference to district court’s evidentiary rulings that apply the agreement and review under an abuse of discretion standard. See, e.g., *Roberts*, 660 F.3d at 157. Counsel will always be free to argue that the evidence is insufficient for the government to meet its burden on the charges in the indictment.

Whether a United States Attorney’s office chooses a more narrow or expansive clause in a proffer agreement, the drafter must write the clause as explicitly as possible so as to not accidentally confer full immunity to the defendant. Such was the problem in *United States v. Hill*, 643 F.3d 807 (11th Cir. 2011). In *Hill*, the government attempted to carve out derivative use of the defendant’s proffer statements and documents provided during the sessions. *Id.* at 875-77. To that end, it created an agreement with the following clause:

*Anything related to the proffer cannot and will not be used against [Rector] in any Government case-in-chief. Nor would any statements be used against [Rector] to increase his offense level pursuant to the Sentencing Guidelines (Section 1B1.8) should charges be filed or a conviction occur. However, any previous statements by [Rector] do not fall within this 1B1.8 protection. Also, the Government is completely free to pursue any and all investigative leads derived in any way from the proffer. Similarly, nothing, including Rule 11(e)(6), Federal Rules of Criminal Procedure, shall prevent the Government from using the substance of the proffer and/or leads derived therefrom for impeachment or in rebuttal testimony should [Rector] subsequently testify in any proceeding contrary to the substance of the proffer or in a prosecution for perjury, false statements, or obstruction of justice.*

*Id.* at 875 (emphasis in original). The Eleventh Circuit held that the two highlighted portions of the agreement were in direct conflict. Applying the rule that ambiguities are construed against the government as the drafter of proffer agreements, the court precluded the government from making derivative use of the proffers and applied *Kastigar* to the entire proffer process. *Id.* at 875-77. Thus, the drafter of a proffer agreement should be as explicit as possible. Indeed, the *Hill* court cited with approval other proffer agreements that expressly permitted the government to make derivative use of the defendant's proffer statements, including one used for a co-defendant. *Id.* at 876 (showing a proffer agreement that stated the government "reserves the right to pursue any and all investigative leads derived from statements and information and to use such derivative evidence in any criminal or civil proceeding against Mr. Alcindor and others"); see also *United States v. Schwartz*, 541 F.3d 1331, 1355 (11th Cir. 2008) ("The United States may make derivative use of the statements [the defendant] makes during the proffer and may pursue investigative leads therefrom, and would not be required to prove an independent source at any *Kastigar* or other hearing held thereon."); *United States v. Pielago*, 135 F.3d 703, 710 (11th Cir. 1998) ("The government also expressly reserves the right to pursue any and all investigative leads derived from [the defendant's] statements or information and use such derivative evidence in any criminal or civil proceeding against her and/or others.").

## **B. Proffer statements used during sentencing**

Defendants have also claimed that the government breached proffer agreements during sentencing proceedings. In these situations, a defendant will assert that the offense level calculation, departures, and/or ultimate sentence within the resultant range was based on or influenced by proffer-protected information. Especially in this area, courts have cautioned that it is imperative that a proffer agreement be drafted precisely to avoid unintentionally broad immunity at sentencing.

As a threshold matter, sentencing presents an additional challenge to the drafter of a proffer agreement, as the sentencing guidelines specifically address the relevance of immunity agreements at sentencing. United States Sentencing Guidelines (U.S.S.G.) Section 1B1.8 provides in relevant part:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.

U.S. SENTENCING GUIDELINES MANUAL § 1B1.8(a) (2012).

The Guidelines address several exceptions to its general applicability. These exceptions include the following: (1) allowing for the use of information "known to the government prior to entering into the

cooperation agreement,” *Id.* § 1B1.8(b)(1); (2) calculating the defendant’s criminal history category or career offender status, *id.* § 1B1.8(b)(2); (3) prosecuting “for perjury or giving a false statement,” *Id.* § 1B1.8(b)(3); (4) the event of a breach of the agreement, *Id.* § 1B1.8(b)(4); and (5) “determining whether, and to what extent,” to move for a § 5K1.1 departure, *Id.* § 1B1.8(b)(5).

At first blush, this section may appear superfluous. It says little more than an immunity agreement that applies to sentencing shall be applied to sentencing. However, this section is necessary in light of the otherwise applicable statutory provision, 18 U.S.C. § 3661, instructing that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.” 18 U.S.C. § 3661 (2012). Thus, U.S.S.G. § 1B1.8 serves to ensure that properly drafted agreements that intend to protect a defendant’s proffer statements at sentencing are given full force. *See United States v. Perry*, 640 F.3d 805, 811 (8th Cir. 2011) (finding that § 1B1.8 is triggered by a proffer agreement that promises not to use the statement against the defendant, resulting in the terms of the proffer agreement, as opposed to § 3661, controlling the court’s use of the statement at sentencing).

As a result of these provisions, many proffer agreements include a sentencing section similar to that examined by the Seventh Circuit in *United States v. Singleton*, 548 F.3d 589 (7th Cir. 2008):

[P]ursuant to Section 1B1.8 of the Sentencing Guidelines, no self-incriminating information given by your client will be used to enhance the Offense Level against your client except as provided in that Section. The government, may, however, use any statements made or other information provided by your client to rebut evidence or arguments at sentencing materially different from any statements made or other information provided by your client during the “off-the-record” proffer or discussion.

*Id.* at 594.

In addressing and applying such provisions to defendant claims of breach, courts have applied the same contract principles and same presumptions against the government as for claims of breach during trial. For example, in *United States v. Farmer*, 543 F.3d 363 (7th Cir. 2008), the court reversed a defendant’s sentence where it determined that the sentencing court had increased the cocaine weight attributable to the defendant, and thus his base offense level, based solely on his protected proffer statements. The court concluded that to do so was effectively “using” defendant’s proffer statement in breach of the proffer agreement. *Id.* at 374; *see also United States v. Botham*, 2000 WL 1523132, at \*1 (9th Cir. Oct. 12, 2000) (vacating defendant’s sentence because it was based on a pre-sentence report that gained its information solely from the proffer statement, as opposed to information “independently derived from the statement”).

By contrast, where defense counsel argues facts at sentencing that conflict with defendant’s proffer statement, courts will permit the use of those proffer statements to calculate the defendant’s applicable guideline range. In *Singleton*, the defendant claimed that the government violated the proffer agreement when it introduced his proffer statements that included his admission to selling more than six grams of crack cocaine in the past, but where his pre-sentence report only reflected that he had sold six grams. *Singleton*, 548 F.3d at 591. The Seventh Circuit upheld the sentence, partly because the defendant breached the agreement and partly because the government had introduced proffer statements from another defendant that also reflected that the defendant had sold more than six grams of crack cocaine. *Id.*; *see also United States v. Cantu*, 427 F. App’x 587, 588 (9th Cir. 2011) (“[U]nder the proffer agreement, the Government was free to use Defendant’s proffer statements to refute his lawyer’s

sentencing brief that Defendant ‘had no prior history of robberies or gun-related crimes.’ “); *United States v. Roman*, 184 F. App’x 66, 68 (2d Cir. 2006) (same).

In the sentencing context—perhaps even more so than in cases where the government invokes the proffer agreement and attempts to use defendant’s proffer statements at trial—the proffer agreement must be drafted as explicitly as possible to ensure that the agreement falls outside the scope of U.S.S.G. § 1B1.8 and that proffer statements can therefore be used at sentencing. Courts have interpreted § 1B1.8 quite broadly and the terms of proffer agreements narrowly. For example, the Eighth Circuit held that U.S.S.G. § 1B1.8 applied and the government could not use a defendant’s proffer statements against him at sentencing even though the proffer statement explicitly stated that “the government, pursuant to 18 U.S.C. § 3661, must provide to [Perry’s] sentencing judge the contents of the proffer.” *United States v. Perry*, 640 F.3d 805, 812 (8th Cir. 2011). The court concluded that this provision merely stated that the government would provide the court with the proffer statement, not that the court could consider it in fashioning the applicable guideline range. *Id.* at 812; *see also United States v. Robinson*, 898 F.2d 1111, 1117 (6th Cir. 1990) (stating that an agreement “not to file additional charges” based on defendant’s proffer statements triggered U.S.S.G. § 1B1.8 and thus the statements could not be used at sentencing); *United States v. Shorteeth*, 887 F.2d 253, 256 (10th Cir. 1989) (finding that statements could not be used under § 1B1.8 because agreement stated that “no separate federal prosecutions will be instituted against [defendant] ... for conduct and acts committed by her related to information she provides the Government during ... debriefings”); *United States v. Cocilova*, 584 F. Supp. 2d 885, 893 (W.D. Va. 2008) (concluding that statements could not be used under § 1B1.8 where agreement stated that government would “not introduce in a criminal prosecution of [the defendant], in its case-in-chief at trial, and of the statements [made] pursuant to this agreement”).

The *Perry* case involved a defendant who proffered but ultimately did not enter into a cooperation agreement. The Eight Circuit applied U.S.S.G. § 1B1.8 to its analysis. *Perry*, 640 F.3d at 810. However, at least one circuit has concluded that, for a defendant who entered into a proffer agreement but never a cooperation plea agreement, § 1B1.8 does not apply at all. The court in *United States v. Cruz*, 156 F.3d 366 (2d Cir. 1998 ), held that § 1B1.8 applies only where a defendant “agrees to cooperate with the government” and that, because the defendant had not subsequently entered into a cooperation agreement, the defendant had not “obtained the benefits nor the burdens of such a cooperation agreement in this case.” *Id.* at 370. Moreover, the Second Circuit also rejected the defendant’s argument that proof of a proffer’s applicability as a cooperation agreement lies in Application Note 5 of § 1B1.8 that refers to “information furnished by a defendant in the context of a defendant-government agreement.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.8, Application Note 5 (2012). The court concluded that the application note did not “alter the plain meaning of the word ‘cooperate’ in subsection (a) of § 1B1.8.” *Cruz*, at 156 F.3d at 370. While the circuit continues to follow *Cruz*, *see, e.g., Salazar v. United States*, 2005 WL 3312050, at \*3 (S.D.N.Y. Dec. 6, 2005); *United States v. Doe*, 1999 WL 243627, at \*10 (E.D.N.Y. Apr. 1, 1999), other circuits have not expressly commented on, or followed, *Cruz*’s holding.

Given that some uncertainty exists as to whether U.S.S.G. § 1B1.8 will apply to a proffer agreement not resulting in cooperation, the safer practice is to ensure that a proffer agreement effectively accomplishes the government’s goals of allowing for use of the statements when the defendant is in breach, or full direct use at sentencing, depending on the goals of the prosecutor. Thus, the drafter of the proffer agreement needs to include explicit language similar to that employed in *Singleton*. *See Singleton*, 548 F.3d at 594 (“The government, may, however, use any statements made or other information provided by your client to rebut ....”); *see also United States v. Cox*, 985 F.2d 427, 431 (8th Cir. 1993) (“However, such testimony or other information ... may be considered by the court or probation office at

any time, including at the time of your guilty plea and sentencing in this matter and *to determine the length of your sentence.*”) (emphasis in original); *Cruz*, 156 F.3d at 368 (“[T]he Government will not offer in evidence ... in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by [Cruz] at the meeting, except in a prosecution for false statements, obstruction of justice, or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting.”).

Another important drafting consideration that has arisen primarily in the sentencing context concerns the inclusion of integration clauses in any cooperation agreement that results from the proffer process. In other words, if a defendant subsequently enters into a plea agreement after having first entered into a proffer agreement with the government, the cooperation agreement should include a clause that makes clear that the cooperation agreement supersedes and replaces any and all prior agreements, including the original proffer agreement. *See generally United States v. Quesada*, 607 F.3d 1128, 1131 (6th Cir. 2010); *United States v. Santisteban*, 501 F.3d 873, 880 (8th Cir. 2007); *United States v. Davis*, 393 F.3d 540, 545-46 (5th Cir. 2004); *United States v. Hunt*, 205 F.3d 931, 935-36 (6th Cir. 2000); *United States v. Fagge*, 101 F.3d 232, 234 (2d Cir. 1996).

The *Quesada* decision is particularly illustrative regarding the importance of explicit integration clauses. In that case, the defendant entered into a proffer agreement that contained the following provision: “[e]xcept as otherwise specified in this letter, no statement made by [Quesada] during this proffer discussion will be offered ... in the government’s case in chief in any criminal prosecution ....” *Quesada*, 607 F.3d at 1129. The defendant later entered into a written plea agreement that contained this provision:

This agreement, which includes all documents that it explicitly incorporates, is the complete agreement between the parties. It supersedes all other promises, representations, understandings, and agreements between the parties concerning the subject matter of this plea agreement that are made at any time before the guilty plea is entered in court. Thus, no oral or written promises made by the government to defendant or to the attorney for defendant at any time before defendant pleads guilty are binding except to the extent they have been explicitly incorporated into this agreement.

*Id.* at 1131-32.

The *Quesada* court concluded that because this integration clause precluded consideration of the terms of the proffer agreement, and because the plea agreement itself offered no limitation on the government’s use of the proffer statements, the government was free to use them at sentencing. *Id.* Other courts have similarly held that a plea agreement’s integration clause applied to proffer agreements, and thus freed the parties from the terms of the proffer agreement. *See, e.g., United States v. Santisteban*, 501 F.3d 873, 880 (8th Cir. 2007) (“Once the plea agreement was signed, the terms of that agreement superseded the terms of the preliminary proffer letters concerning the use of [defendant’s] statements.”); *United States v. Davis*, 393 F.3d 540, 546 (5th Cir. 2004) (“Thus, where [the defendant’s] plea agreement plainly provided that it superseded any other agreements reached between the parties and where [the defendant] specifically represented to the trial court ... that there were no other promises made to him other than those contained in the plea agreement, it follows that [the defendant’s] plea agreement superseded the proffer letter.”); *United States v. Thornton*, 197 F.3d 241, 253 (7th Cir. 1999) (“[P]roffer letters, which memorialize the framework under which the codefendants agreed to talk in the first place, [were] of scant relevance at trial when a subsequent, superseding plea agreement has been reached.”); *United States v. Fagge*, 101 F.3d 232, 234 (2d Cir. 1996) (finding that “[t]he plea agreement superseded the proffer agreement”).

Accordingly, given this strong case authority, prosecutors should include an explicit, thorough integration clause in all plea and cooperation agreements to ensure that the terms of the prior proffer agreement do not have any chance of surviving post-plea.

## V. Conclusion

Proffer agreements are a crucial component of federal criminal prosecutions. Given the developing case authority in this area, the desire to avoid the pitfalls and pain of *Kastigar* litigation, and the unintended shielding of defendants from the full consequences of all of their criminal conduct, prosecutors must take great care and draft the key components of both proffer agreements and cooperation agreements with precision. Among the many things needed in proffer agreements, explicit waivers of a defendant's rights under Federal Rule of Evidence 410 (and Federal Rule of Criminal Procedure 11(f)) should be made. Agreements should also explicitly and expressly reserve for the government the right to make derivative use of a defendant's proffer statements and evidence that are presented at a proffer in any on-going investigation, without the need for a *Kastigar* hearing. The derivative clause should allow the government to use a defendant's statements both to cross-examine a defendant at trial and to rebut any argument or testimony made or offered on the defendant's behalf that contradicts the proffer. The agreement should clearly and explicitly define how and under what circumstances a defendant's proffer statements may be used at sentencing, either to affect a defendant's offense level, basis for departure, and/or sentence within the applicable guideline range. Finally, cooperation agreements should have full and robust integration clauses that eliminate the applicability, relevance, and force of any pre-existing proffer agreement. ❖

## ABOUT THE AUTHOR

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