

# Tax Enforcement I

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# An Introduction to the Tax Division

*Kathryn Keneally*  
*Assistant Attorney General*  
*Tax Division*

## I. Background

The United States engages with all Americans through our tax system. We ask our citizens, residents, and those who earn income in this country, to report their confidential financial information annually and to self-assess and pay their tax liabilities. We also levy taxes on a range of specific activities. We then fund government services, from national defense to national parks, through tax collections.

The United States in turn has an obligation to ensure fair and consistent enforcement of our tax laws. We owe each person and business that complies with the tax laws a commitment to enforce the laws against those who do not comply. We also owe every taxpayer the assurance that our tax laws will be enforced on a consistent basis throughout the nation.

Meeting these obligations is central to the mission of the Tax Division. The Tax Division has one purpose: to enforce the nation's tax laws fully, fairly, and consistently, through both criminal and civil litigation.

In many cases, Tax Division attorneys have full responsibility for litigating or prosecuting a matter. In other cases, the Tax Division works as part of a team with the United States Attorneys' offices, and in many criminal prosecutions, the Tax Division authorizes grand jury investigations and indictments that will be handled by the United States Attorneys' offices. The Tax Division values all opportunities to work with attorneys from the United States Attorneys' offices in any capacity in which Division attorneys can be of service and provide support. The Tax Division also has a close and highly valued relationship with the Internal Revenue Service, including its agents, officers, and counsel.

It is a true privilege to serve as the Assistant Attorney General for the Tax Division, to work with the dedicated and talented attorneys within the Division, and to work in collaboration with the United States Attorneys' offices in the enforcement of our tax laws. We are pleased to have the opportunity to present the articles in this issue and the May issue of the Bulletin to you. In these articles, we address a number of our current priorities and offer many practice tips that we hope you will find helpful. We are joined in these presentations by two prosecutors who have extensive experience in working on tax cases, and who share insights and tips for handling criminal tax cases, as well as by the Chief of the IRS Criminal Investigation Division, whose article highlights in particular the current efforts at addressing the specific and growing challenges of combating stolen identity refund fraud.

## II. Civil tax enforcement

The Assistant Attorney General of the Tax Division is charged with its functions and responsibilities by regulation in 28 C.F.R. § 0.70. Pursuant to this regulation, the Tax Division has broad responsibilities in civil litigation that arise under the internal revenue laws or result from the taxing

provisions of other federal statutes. For any matter in which the taxpayer seeks judicial resolution without first paying the tax liability, the United States Tax Court has jurisdiction, and the Internal Revenue Service litigates the case directly. The Tax Division is charged with the prosecution and defense of tax cases in all other courts (with a narrow exception for civil forfeiture and civil penalty matters relating to liquor, narcotics, gambling, and firearms). The Tax Division is also responsible for all appeals to the United States Circuit Courts in tax matters, including appeals from decisions of the United States Tax Court.

In most federal districts, civil tax litigation is handled entirely by the Tax Division. Lawyers from the Tax Division, working independently or in close coordination with United States Attorneys' offices, also represent the interests of the IRS in bankruptcy courts. A small number of United States Attorneys' offices take direct responsibility for civil tax litigation, and in those districts the Tax Division welcomes the opportunity to provide support or to work together in pending cases.

The regulation also charges the Tax Division with the “[e]nforcement of tax liens, and mandamus, injunctions, and other special actions or general matters arising in connection with internal revenue matters,” and with the defense of actions brought against the United States as a result of a tax lien. 28 C.F.R. § 0.70(c) (2012). Working independently or with the United States Attorneys' offices, the Tax Division enforces summonses issued by the IRS in agency examinations and investigations, enforces and defends liens, and supports tax collection. The May issue of the Bulletin will include an article that addresses the issues that arise when the Fifth Amendment is raised in summons enforcement.

Injunction actions are a particular priority of the Tax Division. Through a strong injunction program, the Tax Division is able to stop fraudulent return preparers, abusive tax shelter promoters, and others who devise fraudulent schemes in violation of the tax laws. These enforcement efforts stop the wrongdoer who is enjoined and also prevent taxpayers from being lured into fraudulent and abusive schemes.

With a cadre of around 250 lawyers, the civil sections of the Tax Division have, on average, around 6,000 cases in process annually, plus a full roster of appeals, and enjoy a success rate of around 95 percent.

### **III. Criminal tax enforcement**

#### **A. Authorizations of grand juries and prosecutions**

Section 0.70(b) authorizes the Assistant Attorney General of the Tax Division to conduct or supervise “criminal proceedings arising under the internal revenue laws . . . .” The regulation contains very limited exceptions, most notably excluding certain excise taxes and criminal proceedings involving either corrupt or forcible interference with IRS officers and employees, and misconduct by the Internal Revenue Service. Criminal enforcement that is within the responsibility of the Tax Division includes any attempt to evade a responsibility imposed by the Internal Revenue Code, an obstruction or impairment of the Internal Revenue Service, or an attempt to defraud the Government or others through the use of mechanisms established by the Internal Revenue Service for the filing of internal revenue documents or the payment, collection, or refund of taxes. This authority is broad and encompasses federal crimes under Title 26 of the Internal Revenue Code, as well as crimes under Titles 18 and 31.

Another key factor comes into play in the administration of our tax laws. Because taxpayers are asked to provide detailed and often sensitive financial and personal information, the tax law promises them confidentiality under 26 U.S.C. § 6103. Before confidential return information, which is broadly defined under the statute, can be used in a grand jury investigation or prosecution, the Internal Revenue Service must refer the matter to the Tax Division. The Tax Division in turn is charged with the responsibility of authorizing grand jury investigations into tax matters and authorizing prosecutions in tax cases. This responsibility applies equally to matters that begin as investigations by the Internal Revenue Service Criminal Investigation Division or by the United States Attorneys' offices, including matters that are expansions of grand jury investigations of other criminal activity.

Centralization of the responsibility to authorize tax-related grand juries and prosecutions serves a vital function in tax administration: it enables us to meet our obligation to all taxpayers to enforce the tax laws consistently throughout the nation. The Tax Division authorizes between 1300 and 1800 criminal tax investigations annually. Many of those cases are handled directly by the three regional criminal sections of the Tax Division, some are investigated and prosecuted by Tax Division attorneys working in teams with United States Attorneys' offices, and the majority are prosecuted directly by the United States Attorneys' offices. A team of lawyers in the Division's Criminal Appeals and Tax Enforcement Policy section has responsibility for, among other areas, appeals in the Tax Division's criminal cases, summons and subpoena enforcement, and general criminal tax policy issues. The Tax Division has over 100 attorneys committed to its criminal enforcement efforts. In its criminal cases, as in its civil matters, the Tax Division enjoys an overall 95 percent or better success rate.

## **B. Stolen identity refund fraud**

The nationwide reach of the Tax Division's centralized criminal tax enforcement serves another important goal: it facilitates the Government's ability to respond efficiently and forcefully to often-changing patterns of wrongdoing. The recent explosion in the use of stolen social security numbers and other personal identification information to file false tax returns seeking fraudulent refunds is an example of this type of challenge.

Dubbed stolen identity refund fraud, or SIRF, the crime may be simple to describe, but has proven complex both in its reach and in the extent of the criminal enterprises involved. The most vulnerable members of our communities—the elderly, the infirm, grieving families—have been the victims when social security numbers have been stolen or bought from institutions such as hospitals, nursing homes, and public death lists. In a very real sense, every taxpayer is a victim when the IRS issues a fraudulent refund to these thieves.

The Tax Division has had considerable success in SIRF prosecutions, and continues to be involved with United States Attorneys' offices in large investigations throughout the country. This [Bulletin](#) includes an article from three of our prosecutors, providing helpful information for handling investigations and prosecutions in this area, in addition to a discussion of the IRS perspective from the vantage point of the Chief of its Criminal Investigation Division.

SIRF crimes are different from the crimes typically reviewed by the Tax Division. Charges brought in SIRF cases rarely concern the types of issues that must be addressed in virtually all other criminal tax matters, such as whether the return is in fact incorrect under the tax laws or whether the taxpayer acted willfully. Also of significance, SIRF prosecutions are often reactive. In many cases, the crime is discovered by local law enforcement officers who come upon a large cache of Treasury checks or

debit cards loaded with fraudulent tax refunds. More like street crime, such cases may move quickly through the system.

Recognizing these differences, the Tax Division recently issued Directive 144, which delegates to the United States Attorneys' offices the authority to open tax-related grand jury investigations in SIRC matters, to charge those involved in SIRC crimes by complaint, and to obtain seizure warrants for the forfeiture of criminally derived proceeds arising from SIRC crimes, without prior authorization from the Tax Division. The Tax Division retains authority in connection with forfeitures if any genuine taxpayer refunds are involved. While the Tax Division also retains authorization over the filing of charges by indictment and information, on the same day that Directive 144 became effective, the Tax Division also implemented expedited procedures for such authorizations in reactive cases.

The delegation of authority in Directive 144 is conditioned on the designation, in each district, of a SIRC point-of-contact. The Directive and the expedited procedures also require that the Tax Division be kept informed at all significant steps in the investigation and prosecution.

Directive 144 and the expedited procedures are also covered by a thoughtful article in this [Bulletin](#). The Directive's central goals bear noting. The challenge posed by SIRC crimes requires strong coordination among, and fast responses by, all law enforcement, including local sheriffs and police, many federal law enforcement agencies, and prosecutors with United States Attorneys' offices and the Tax Division. Further, underlying the Directive is the centralization of knowledge about this insidious activity. To stop the crime at the door, it is vital that the IRS receive information to improve its filters. With this centralized knowledge, prosecutors can also work together to identify schemes and to pursue the highest level of schemers.

### **C. International enforcement**

In recent years, the Tax Division, working closely with United States Attorneys' offices, has seen ground-breaking success in addressing the use of foreign financial accounts to evade United States taxes and reporting requirements. Building on these efforts, we expect to expand these investigations throughout the country to include activities in more countries. The Tax Division is committed to using every tool available in this effort. For example, as will be discussed in the May issue of the [Bulletin](#), we are benefiting from a growing number of district and circuit courts that are upholding subpoenas to account holders for foreign financial records over Fifth Amendment objections, based on the requirements under Title 31 that such records be maintained. The May issue will also include an article from prosecutors who have made effective use of subpoenas on U.S.-based correspondent accounts of foreign banks to obtain vital evidence in tax prosecutions.

An essential part of the Tax Division's mission is to encourage voluntary compliance with the tax laws. In addition to the specific deterrence that results from the enforcement efforts in connection with unreported foreign financial accounts, these prosecutions triggered truly remarkable general deterrence. Tens of thousands of taxpayers have come forward, and are continuing to come forward, making voluntary disclosures of previously unreported accounts and paying billions of dollars in taxes, interest, and penalties. As a result, these enforcement efforts not only remedy past wrongdoing, but also bring into the system tax revenue from taxpayers who become compliant going forward.

## **D. Tax defiers**

A certain segment of our citizenry flatly refuses to accept its tax obligations. These individuals manufacture frivolous arguments against the clear language of the law. They also frequently devise complicated schemes to mask their activities. Often, they are affiliated with sovereign citizen movements, who challenge the United States Government in numerous ways. Too often, they are prepared and willing to resort to violence.

Tax defiers have long been and will remain a priority of the Tax Division. This Bulletin includes a valuable contribution from our National Director, answering the most common questions that arise in these cases. In many cases, these wrongdoers turn directly against the prosecutors and other government officials. In another article, one of the Tax Division's prosecutors describes how to combat these acts.

## **E. Tax evaders**

While the Tax Division is and will remain responsive to shifts in criminal tax schemes, enforcement of the criminal tax statutes against individuals and businesses that engage in attempts to evade taxes, willful failure to file returns, and the submission of false returns, are at the core of the Division's mission. In addition, the Tax Division has always prioritized and remains committed to prosecutions of fraudulent return preparers and those who promote fraudulent tax schemes.

Tax crimes under Title 26, with few exceptions, require that the Government charge and prove willfulness—a voluntary and intentional violation of a known legal duty. The Tax Division brings considerable experience to that evidentiary burden and to other unique aspects of the criminal tax laws. The Tax Division also brings expertise to developments in the law. For example, the May issue of the Bulletin will include an article on the recent expansion of the law regarding restitution following criminal tax convictions.

Enforcement of these laws serves the goals of both specific and general deterrence. Enforcement of our criminal tax laws also helps us meet our responsibility to all taxpayers who meet their obligations, to pursue those who do not. The Tax Division stands ready to work with or support United States Attorneys' offices in these enforcement efforts.

## **IV. Using all our tools**

Tax charges can be a significant part of a vast range of cases. For example, the May issue of the Bulletin will include an article that discusses how tax charges can be brought in support of counter-terrorism enforcement. Tax charges may also be a significant part of investigations into other financial crimes, ranging from securities fraud to mortgage scams to public corruption.

The Tax Division is committed to the coordination of its civil and criminal enforcement efforts. The benefits and challenges faced in these efforts will be set out in an article in the May issue of the Bulletin, contributed by the Division's civil and criminal tax enforcement coordinator. As a fundamental point, it is important not only to punish wrongdoers, but also to stop their activities at the earliest possible opportunity through our injunction program.

A strong tax system is vital to our national strength. It is essential that taxpayers believe, with good reason, in the integrity of the tax system. It is fundamental that we meet our obligations to our citizens to ensure the full, fair, and consistent enforcement of our tax laws. The Tax Division stands ready to work with United States Attorneys' offices, the Internal Revenue Service, and all law enforcement agencies, to meet these goals. It is a personal privilege to work together with dedicated and talented people to serve this mission. ❖

#### **ABOUT THE AUTHOR**

❑ **Kathryn Keneally** was sworn in as the Assistant Attorney General for the Tax Division on April 6, 2012. Before joining the Department of Justice, Ms. Keneally was a partner in the New York office of the law firm Fulbright & Jaworski LLP. For over 25 years, she has represented individuals and businesses before the Internal Revenue Service and the Department of Justice in criminal and civil tax cases, and she has appeared and tried cases in the federal district and appellate courts and in the United States Tax Court. She has served as the chair of the ABA Section of Taxation's Committees on Civil and Criminal Tax Penalties and Standards of Tax Practice, and until recently was a vice chair of the Section of Taxation. Ms. Keneally is a prolific author who formerly co-authored a column on IRS Practice in the Journal of Tax Practice and Procedure. She has also served on the Practitioners' Advisory Group to the U.S. Sentencing Commission. ❖



# Key Things to Know in Prosecuting Criminal Tax Cases: A View From the U.S. Attorneys' Offices

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## I. Introduction

“Tax cases are hard to prosecute.”

“Seriously? The Government has to *disprove* the defendant’s claim that he had a ‘good faith, subjective belief’ that the law did not require him to pay taxes?!”

“No one, including the jury, likes the IRS.”

“What do you mean ‘I need DOJ’s permission to investigate, prosecute, *and* take a plea on a tax charge’?!”

“How did this tax case get on my desk. . . ?”

Sounds familiar, right? It is the rare AUSA whose prosecutorial career does not include a Title 26 tax charge, whether in a stand-alone tax case or as a part of a broader non-tax prosecution. Invariably, the initial response to such a charge is one or more of the above.

We are the AUSAs who oversee the work of the only two divisions within United States Attorneys’ offices throughout the country that are dedicated solely to tax work. Being in this position, we work regularly with the IRS, DOJ Tax Division, the AUSAs in our own divisions, and other criminal AUSAs in our offices. We have heard AUSAs talk about the difficulties of working tax cases and the extra layers of bureaucracy involved in obtaining required Tax Division approvals. We have heard Tax Division attorneys emphasize the need for AUSAs to understand their role in maintaining consistency across the country in charging and resolving criminal tax cases and ensuring that this is done in a way that sends the required message of deterrence. We bridge these worlds. We see the benefits tax charges bring to criminal investigations and trials. And we hope to overcome what is frequently an initial resistance to

pursuing these charges by offering our perspective on the obligations and benefits of working with the Tax Division.

## II. Purpose of DOJ Tax Division?

To achieve uniform, broad, and balanced criminal tax enforcement, the Attorney General has authorized the Tax Division to oversee all federal criminal tax enforcement and to authorize or decline investigations and prosecutions in tax matters. *See* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-4.200 (2012). Subject to narrowly delegated exceptions, only the Tax Division may authorize a grand jury investigation of potential criminal tax violations and the designation of any individual or entity as a target of the investigation. Only after the Tax Division has authorized a grand jury investigation may a United States Attorney issue subpoenas and undertake other investigative actions. Only after the Tax Division has authorized the prosecution of individuals and entities for criminal tax violations may a United States Attorney seek an indictment or file any tax charges. In short, the Tax Division must approve any and all criminal charges that a United States Attorney intends to bring against a defendant in connection with conduct arising under the internal revenue laws, regardless of which criminal statutes the United States Attorney proposes to use in charging the defendant.

Why this level of centralized control? It is because tax cases are not like other criminal cases. The prosecution of each criminal tax case must be viewed as part of the overall effort to convince more than 200 million taxpayers every year to make substantial tax payments voluntarily and honestly in compliance with the tax code. In short, each criminal tax prosecution is an essential part of the effort to ensure that the "tax gap," which is the difference between what should be reported as owing and paid to the Government each year versus what is actually reported and paid, remains under control.

The reasons we prosecute tax cases are very simply summarized in the United States Sentencing Guidelines:

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

U.S. SENTENCING GUIDELINES MANUAL ch. 2, pt. T, introductory cmt. (2012).

As the Guidelines recognize, we have the ability to criminally prosecute only a fraction of those who violate the tax laws. Because we prosecute so few, each criminal tax case must fully serve its deterrent purpose by demonstrating to the public both that the tax laws are being consistently and fairly enforced and that failure to comply with the tax laws can result in significant penalties. A criminal tax case that is lost, or perhaps even worse, results in little more than a slap on the wrist to the defendant, perhaps accompanied by criticism from the court for pursuing the case in the first place, undermines public perception that the tax laws will be fairly enforced against those who do not comply with those laws. Avoiding that result explains the need for national consistency, both in selecting cases for prosecution and in the way in which the selected cases are prosecuted.

The DOJ Tax Division provides the required national consistency by utilizing a centralized review process. This review is conducted by a group of prosecutors who, in light of their technical and practical expertise in criminal tax cases, not only evaluate the strengths and weaknesses of a particular case, but also do so with a view toward overall consistency to achieve the necessary goals of national tax compliance and deterrence. Their job is not only to help us select the right tax cases to prosecute, but also to help us successfully prosecute those cases and obtain sentences that will send a strong deterrent message.

### **III. Working with DOJ Tax Division**

We have all thought it and probably even said it: “No one knows the facts of an AUSA’s case the way that he or she does.” Plus, the AUSA has an awareness and understanding of the local judiciary and jury pool that cannot be overlooked when evaluating the likelihood of conviction and ability to obtain an appropriate sentence. So, aside from accepting the necessity imposed by law, what is the real benefit to an AUSA in working with the Tax Division on a criminal tax case?

For starters, one of the best things about being an AUSA is the availability and willingness of colleagues, including supervisors, to assist at every stage of the investigation and prosecution, and even in post-conviction proceedings. Thus, while review and approval by a USAO supervisor is required when charging or disposing of a charged case, that review is also often appreciated as it provides another experienced AUSA’s view that can be of assistance in making often difficult decisions. Review and approval by the Tax Division’s Criminal Enforcement Section (CES) should be viewed in the same way: while it is required, it can also be of great assistance.

Indeed, in what other area of federal prosecution does an AUSA have a minimum of not one, not two, but three experienced federal prosecutors, all with subject matter specialization, who will: (1) review the IRS Special Agent’s report and related exhibits to determine if additional evidence is needed to satisfy the burden of proof; (2) provide a written memorandum addressing the merits of the prosecution, including an explanation of the charges, a discussion of the evidence available to prove each element, and a discussion of the foreseeable problems and defenses; and (3) provide an analysis of the applicable law and policy, including case and statutory citations, as well as do legal research on venue, statute of limitations, and applicable sentencing guidelines? CES review provides these services to assist in ensuring a successful prosecution.

That is not to suggest that there are never difficulties in the relationship between USAOs and the Tax Division. Such difficulties do arise, particularly when the Tax Division disagrees with an AUSA and determines that it will not approve prosecution of a particular target, a preferred tax count, or even an entire case. But we have all been in the same situation on non-tax cases, right? So, while we may complain—in the privacy of our offices—we move on and live to investigate and prosecute another case another day.

### **IV. The role of the Tax Division**

#### **A. Authorization for grand jury investigations**

AUSAs are accustomed to receiving allegations of criminal conduct and immediately beginning a grand jury investigation. But, such speed is not always possible if it is a matter arising under the internal revenue laws.

Section 6103 of the Internal Revenue Code, with few exceptions, precludes the IRS from disclosing tax return information to an AUSA unless a federal tax case has been referred to the DOJ Tax Division. That means to effectively investigate a criminal tax case and to legally access tax return information in connection with such a case, an AUSA needs the IRS to refer the tax case to the Tax Division. Once the Tax Division has authorized a tax investigation, the AUSA has responsibility for handling the case. In other words, once the grand jury investigation is authorized, it is the AUSA's case to work as he or she would any other criminal investigation, which means you can work *your case your way* with the comfort of knowing that you have a staff of tax prosecutors in the Tax Division to assist, should you need or want such assistance.

## **B. Pre-indictment review**

The Tax Division also must review and authorize all criminal tax cases charged across the nation. 28 C.F.R. § 0.70 (2012). While the Tax Division also considers factors such as uniformity, broad enforcement goals, and Department and IRS priorities and policies in criminal enforcement matters, *see generally* DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-4.010 (2012), the Principles of Federal Prosecution set forth the general standards that govern the Tax Division's review of a criminal tax matter to determine whether to authorize prosecution. Because we are all starting from the same set of rules, it should be the rare instance when the Tax Division does not give significant deference to the judgments of the AUSA.

Based upon experience, even when broader tax enforcement policy goals come into play, Tax Division reviewers are always open to discussions with the prosecutor about charging decisions, particularly if there is any possibility that a prosecution request will be declined.

Actually, the pre-indictment review process is probably our favorite aspect of the Tax Division's involvement in tax cases. At this stage of the game, the Tax Division's review can really bring helpful suggestions for presenting and framing tax issues, as well as flag hazards particular to tax litigation, before the indictment is drafted. Think of this process as "which line item on the tax return should I charge?"

Tax Division attorneys who review prosecution recommendations have, in the realm of tax cases, seen it all nationwide. They get weekly updates of pending tax cases and hot-off-the-presses court decisions involving tax issues. *Wouldn't you rather have them read all that stuff and just cite to what you need rather than comb through it all yourself?* Tax Division attorneys also have at their disposal a brief bank filled with all kinds of tax related motions, jury instructions, and indictment forms, all for the asking by any AUSA requesting assistance. Tax Division attorneys have also put together the Criminal Tax Manual, which provides a comprehensive procedural and substantive guide to the handling of criminal tax cases, with sample jury instructions and other forms. If you have not used the Criminal Tax Manual, which is located on the DOJ Web site, it is worth taking a look. *See* CRIMINAL TAX MANUAL, [www.justice.gov/tax/readingroom/2008ctm/TaxManual2008.htm](http://www.justice.gov/tax/readingroom/2008ctm/TaxManual2008.htm).

## **C. Post-indictment and post-conviction assistance**

While the Government disposes of an overwhelming percentage of all criminal tax cases by guilty pleas, should you find yourself heading to trial on a Title 26 offense or thereafter handling an appeal from a conviction in a tax case, you should know that the Tax Division still has resources available to assist AUSAs with tax issues. In particular, the Tax Division has the Criminal Appeals and Tax Enforcement

Policy Section (CATEPS), which not only plays an important role in directly handling appeals in criminal tax cases tried by Tax Division attorneys, but is also available to assist with appeals in cases prosecuted by USAOs. In fact, CATEPS attorneys will assist with the review of adverse decisions of United States District Courts and United States Courts of Appeals in all criminal tax cases and prepare recommendations to the Solicitor General about whether to appeal or seek other review. For most AUSAs, assistance from the experts in the appellate world is always a welcome bonus for any case.

## V. Conclusion

While tax cases are not like other criminal cases, they are as important as other criminal cases. Those who willingly break the tax laws not only do it for their own personal gain, but to the detriment of the integrity of our voluntary compliance-based tax system. When you prosecute a tax case, you not only hold the tax cheat accountable, but you also honor the honest taxpayers who sacrifice to pay their fair share and meet the arduous demands of the tax code. So when you find that a tax case has landed on your desk, we encourage you to view both the case assignment and DOJ Tax Division's involvement as a good thing. ❖

## ABOUT THE AUTHORS

❑ **Sandra R. Brown** has been the Chief of the Tax Division, United States Attorney's Office for the Central District of California, since 2004. In January 2003, Ms. Brown was appointed as Deputy Chief, Criminal Tax in the Tax Division, a position which she held until her appointment as Division Chief. As an AUSA in the Tax Division, where she has worked since 1991, Ms. Brown has represented the United States in civil, criminal, and bankruptcy tax matters, as well as defending *Bivens* actions involving IRS officials. Ms. Brown has litigated a number of nationally important civil tax cases, including two Supreme Court decisions, as well as a broad range of equally noteworthy criminal tax cases. Her articles, *FBAR Violations: The IRS's New Tool for Improved Tax Compliance*, was published in the Dec. 2008-Jan. 2009 issue of *Journal of Tax & Procedure*, and *Appearing for the United States of America* was featured in the 2009 edition of the ABA's publication of *Careers in Tax Law*. In addition to regularly providing training in civil and criminal tax matters to AUSAs and IRS agents within the Central District, Ms. Brown is also a regular speaker at ABA Criminal Tax Conferences, USC School of Law Tax Institute, UCLA Extension Annual Tax Controversy Institute, and the National Advocacy Center in South Carolina. ❖

❑ **Thomas Moore** has been an Assistant United States Attorney in the Tax Division of the United States Attorney's Office for the Northern District of California for over 20 years. During that time, he tried numerous civil and criminal tax cases in federal, state, and bankruptcy courts. He has served as the Chief of the Tax Division for the United States Attorney's Office for the Northern District of California since 2007. Mr. Moore served as a trial attorney with the Civil Trial Section, Western Region, Tax Division for the Department of Justice from 1988 to 1992. During that time, he tried civil tax cases in federal, state, and bankruptcy courts in Idaho, Washington, California, and Hawaii. ❖

# Stolen Identity Refund Fraud (SIRF: Riding the Identity Theft Wave)

*Richard Weber*  
*Chief, IRS Criminal Investigation*

There are waves about which surfers dream, and then there are epic, menacing ones that even the most seasoned surfer knows are perilous. When the stolen identity refund fraud tsunami first hit, we bravely grabbed our trusted boards and attempted to ride it as best we could. Beyond the amounts drained from the government coffers, our primary purpose for jumping into the turbulent waters was that honest taxpayers should not have to suffer the miserable consequences of someone stealing their identity. There were many noble attempts, but we soon realized our boards were not adequately designed to effectively ride out such a concentrated force of a criminal nature. The epidemic of these crimes demands immediacy.

So a new board was designed and built. Meet Department of Justice (DOJ) Tax Division's Directive 144, Stolen Identity Refund Fraud (SIRF). The overarching design concept is to streamline the approval process. Directive 144 delegates to the United States Attorney the authority to take the following actions without approval from the Criminal Enforcement Sections of DOJ-Tax:

- Open tax-related grand jury investigations of individuals suspected of committing SIRF crimes,
- Arrest and federally charge by criminal complaint individuals engaged in SIRF crimes, and
- Seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from SIRF.

Though DOJ-Tax must continue to authorize all indictments or criminal informations in advance, this process has also been dramatically streamlined through expedited and parallel review processes in certain cases to meet the United States Attorneys' offices' (USAOs) arraignment and grand jury schedules. In SIRF cases in which an arrest has been made and/or a criminal complaint has been issued and an indictment deadline is fast-approaching, DOJ-Tax will have three calendar days from receipt of an indictment package to approve or deny it. *Any indictment package not approved or denied by DOJ-Tax within this time period will be deemed approved for the USAO to proceed.*

With SIRF, the Special Agent in Charge makes a direct referral to the United States Attorney's office. Under SIRF investigations, a proposed indictment drafted by an Assistant United States Attorney or an "investigation summary" may be used in lieu of a Special Agent's Report. We created an investigation summary template to ensure that all pertinent information and evidence is included for evaluation and use in the judicial process.

In addition to IRS Criminal Investigation's (IRS-CI) increased investigations related to SIRF, we recognized that our law enforcement counterparts have been tirelessly fighting the battle with us and have felt hamstrung by legacy processes. It is no secret that many hardened, chronic criminals have gravitated to stolen identity refund fraud, so Directive 144 allows tax return information to be disclosed to local,

state, and federal officers who are part of the grand jury investigation, as long as IRS-CI is also participating.

Even while the Directive was still in its framework stage, IRS-CI immediately began drafting guidelines to our field office Special Agents to use in SIRF investigations. We developed a toolkit and standardized templates for referrals to the United States Attorneys. We worked diligently with Criminal Tax Counsel and the Tax Division to ensure agents were ready to go with consistent procedures once the Directive was implemented.

As for our in-house administrative process, we recognized that traditional violations within IRS-CI's jurisdiction were often insufficient to target all potential participants and address all conduct related to identity theft schemes. We therefore authorized a number of additional violations that could be pursued as charges in identity theft investigations. In addition to Title 26 charges and Title 18 U.S.C. §§ 286 and 287, we added the following violations to the identity theft arena:

- Title 18 U.S.C. § 510, Forging Endorsements on Treasury Checks
- Title 18 U.S.C. § 641, Theft of Public Money
- Title 18 U.S.C. § 1028, Fraud in Connection with Identification Information
- Title 18 U.S.C. § 1028A, Aggravated Identify Theft
- Title 18 U.S.C. § 1029, Fraud and Related Activity in Connection with Access Devices

Each Criminal Investigation (CI) field office established a SIRF point of contact for the USAOs to reach out to when seeking CI participation in SIRF investigations. This point of contact will ensure the quickest response possible to inquiries on SIRF investigations and avoid any hindrance to moving investigations forward in the judicial process. In investigations not joined by CI, this point of contact will receive defendant and victim/taxpayer information from the USAOs to begin the de-confliction process. The information will be given to the Refund Crimes' Identity Theft Clearing House and/or the Scheme Development Center for further evaluation of whether the information pertains to an existing investigation, or if it can be developed into a new investigation. In addition, transmitting victim information to the Clearing House helps protect victims from future misuse of their personal identification information. CI stands ready to assist all prosecutors in making sure victim information gets to where it has to go in order to prevent future SIRF crimes.

Although we have only been under the guidance of this directive since October 1, we have already seen an increase in the initiation of identity theft investigations. Within just the first month of the implementation of Directive 144, we opened 152 new investigations. Overall, for fiscal year 2012, we initiated 898 investigations and recommended 544 for prosecution. We have also allowed field offices to use these streamlined procedures in previously opened identity theft investigations that meet the SIRF criteria. We are confident that Directive 144 is making a difference in swiftly stopping the flow of false claims for tax refunds submitted by identity thieves.

In addition to the streamlined procedures of Directive 144, the IRS has taken other positive steps to halt the identity theft activities investigated by state and local law enforcement agencies. In April 2012, the IRS launched a law enforcement assistance pilot program in the state of Florida. This program was

designed to help law enforcement officials obtain tax return data vital to their local efforts in investigating and prosecuting specific cases of identity theft. In October 2012, this program was expanded to include eight additional states: Alabama, California, Georgia, New Jersey, New York, Oklahoma, Pennsylvania, and Texas.

Under the program, state and local law enforcement officials with evidence of identity theft involving fraudulently filed federal tax returns are able to have identity theft victims complete a special IRS disclosure form. Taxpayers must give their permission for the IRS to provide law enforcement with the returns submitted using their social security number. Law enforcement officials contacted the identity theft victims in order to request and secure the victims' consent for disclosure of the records. In certain instances, the IRS assisted law enforcement in locating taxpayers and soliciting their consent. We are still assessing the success of this program, but preliminary information showed that during the initial pilot program, from April 2012 through October 2012, over 750 waiver requests had been received from roughly 50 state and local law enforcement agencies in Florida.

IRS-CI also appointed Special Agent Michael DePalma, an experienced supervisor from the Miami Field Office, as our ID Theft Coordinator. The Coordinator will assist CI's point person on all issues relating to ID Theft/Tax Refund fraud.

We've heard countless, painful stories from victims. Stolen identity refund fraud is a menacing tidal wave that financially brutalizes many honest taxpayers. This reason alone impels us to make it a top enforcement priority. We truly appreciate all the hard work your offices have extended us in this fight. IRS-CI is dedicated to continuing our longstanding partnership with all United States Attorneys in combating tax refund schemes committed by identity thieves. We look forward to relying on the new authorities outlined in this directive to timely address the crimes of tax-related identity theft. IRS-CI applauds the Tax Division and the United States Attorneys on working together to come up with this directive, which will assist law enforcement in combating the proliferation of tax-related identity theft across the country and protecting victims of SIRF crimes from future misuse of their personal identification information. ❖

## ABOUT THE AUTHOR

❑ **Richard Weber** is the Chief of IRS, Criminal Investigation, and oversees a worldwide staff of 4,000 CI employees, including approximately 2,700 Special Agents who are responsible for investigating criminal violations of the tax code, money laundering, terrorist finance, and narcotics-related financial crime cases. Mr. Weber previously served as Chief of the Asset Forfeiture and Money Laundering Section at the Department of Justice, and as an Assistant United States Attorney in the Eastern District of New York. Before joining CI, Mr. Weber was the Deputy Chief of the Investigation Division and Chief of the Major Economic Crimes Bureau in the Manhattan District Attorney's Office. Mr. Weber is a two-time recipient of the Attorney General's John Marshall Award, the highest honor for Justice Department lawyers. ☒



# Investigating and Prosecuting Stolen Identity Tax Refund Fraud

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You're a fraudster. In the old days, you knew you could never just walk into the United States Department of the Treasury in the hopes of walking out with a bag of cash. But now the game has changed. You've obtained a victim's name and Social Security number, walked to the nearest Starbucks with free Wi-Fi, ordered a Pumpkin Spice Latte, and you've perfected the art of the steal. In your eyes, the IRS has graciously created a form for you to fill out when you want money—a federal income tax return. You simply file a tax return making a claim for a tax refund using the name and Social Security number of your identity theft victim, and you direct the IRS to send you thousands of dollars. Shortly, if all goes as planned, the IRS will have wired thousands of dollars into your bank account or onto your debit card. Or, if you are a bit old-fashioned, the IRS will have mailed you a check to an address you have provided.

In a nutshell, this is Stolen Identity Refund Fraud (SIRF), a crime that is as technologically advanced as it is classic theft—a crime estimated to cost the United States *billions* of dollars each year. But when properly investigated and prosecuted, this crime is also one that can land perpetrators in federal prison for decades.

## **I. What is a SIRF case?**

### **A. Common types of schemes**

The basics of a SIRF case are simple. A suspect unlawfully obtains an identity theft victim's name, Social Security number (SSN), and date of birth (each of which constitutes a "means of identification" under federal law, 18 U.S.C. § 1028(c)(7)(A)). That same person or a co-conspirator files a false tax return in the victim's name, making a fraudulent claim for a tax refund. The preparer simply fabricates the information on the tax return to generate a tax refund. The only accurate information on the tax return is the taxpayer's name, SSN, date of birth, and directions as to where to send the refund. SIRF schemes generally exploit two aspects of the tax system: (1) the IRS does not receive information on tax

withholdings until later in the year, allowing fraudsters to create fictitious W-2 forms with fake tax withholdings, making it appear as if a refund is due, and (2) “refundable” credits, such as the earned income tax credit, do not require a person to have had taxes withheld to receive a tax refund.

Generally, the filing of false returns fall into one of two broad categories: (1) tax returns filed through a tax preparation business, and (2) tax returns that appear to be self-prepared. As to the first category, the fraudster sets up a tax preparation business and obtains an Electronic Filing Identification Number (EFIN) from the IRS (or in some cases steals another company’s EFIN). When a tax return is filed using an EFIN, the tax return lists the tax preparation business, and the IRS can connect the return to the EFIN. In some cases, the fraudster has an actual business location and prepares tax returns for real clients through the EFIN, while at the same time, filing false tax returns using stolen identities. In other cases, fraudsters create phony businesses with fictitious owners. They have no physical locations and are just shell companies used to file false tax returns using stolen identities.

As to the second category, the perpetrator does not set up a tax business or use an EFIN to file the returns. Rather, the perpetrator electronically files tax returns from anywhere with an Internet connection, using tax software programs designed for individuals who prepare their own tax returns (for example, Turbo Tax or Tax Slayer). This approach gives the appearance that independent taxpayers are simply filing their legitimate tax returns when, in fact, the named taxpayer’s identity has been stolen.

The IRS also provides the suspect with several ways to obtain the bag of cash. The old-fashioned methods are to have the IRS mail the check to the address on the return or to direct deposit the money into a bank account. The recent trend in SIFR cases is to have the tax refund sent to a prepaid debit card. A prepaid debit card is a card linked to an account at a financial institution that can receive deposits electronically, like a traditional bank account, and can be used to make purchases and cash withdrawals with funds in the account, like a traditional debit card. Prepaid debit cards are typically obtained from various vendors such as Wal-Mart and TurboTax. However, the cards are administered through financial institutions such as GE Capital Retail Bank, which for example, services Wal-Mart Money Cards.

Sometimes, the suspect simultaneously obtains a fraudulent refund anticipation loan (RAL), a loan secured by the anticipated tax refund. The fraudster obtains the RAL, while the refund, when it is paid, goes to the issuing bank to pay off the loan. Just as with a tax refund from the Treasury, a RAL can be deposited into a bank account, onto a prepaid debit card, or issued as a check from the bank. For an investigator, the use of RALs adds another layer to penetrate.

## **B. Common players**

For prosecutors and investigating agents, understanding and defining the scope of a SIFR investigation is critical. In some cases, the person who unlawfully obtained identity information is the same person who files a fraudulent tax return. But, in more sophisticated schemes, networks of fraudsters are working together. The person filing fraudulent tax returns is an important catch, but the bigger fish is the source that provided stolen identity information. Thus, meaningfully fighting this crime requires catching and successfully prosecuting sources.

A SIFR crime involves four basic players: (1) the source, (2) the preparer, (3) the runners, and (4) the ringleader. In smaller schemes, the same person may fulfill multiple roles. The source is the person who unlawfully procured the stolen identity information and transferred it to the preparer. For instance, a health care administrator who steals lists of names from his or her employer is a source. The preparer is

the person who actually files the fraudulent tax returns. The runners gather the proceeds, permit fraudulent tax refunds to be deposited into their bank accounts, cash fraudulent Treasury checks, use debit cards loaded with refunds to make cash withdrawals, and the like. In larger schemes, the ringleader is the person organizing the entire operation, and the ringleader's name may not appear on any document.

### **C. Tax Division Directive 144**

A SIRF case is not your typical tax case. Unlike a routine tax case in which the dispute centers on a known defendant's state of mind regarding a false item on a tax return, the dispute in a SIRF case almost always revolves around who committed the crime in the first place. SIRF cases frequently resemble federal narcotics cases more than tax cases. These are classic "who done it" mysteries in which you must determine, among other things, who filed a particular tax return, who provided stolen identity information to a preparer, who cashed a particular check, and who used a particular debit card. Traditional tax cases are historical investigations, while SIRF schemes are real-time criminal investigations that require quick action. The most important pieces of evidence may disappear within months, weeks, or even days. Moreover, quick action is needed to stop bags of cash from leaving the United States Treasury.

The Department of Justice's Tax Division has recognized that SIRF cases are different from traditional tax cases and has instituted different procedures for handling them. *See* DEP'T OF JUSTICE, TAX DIVISION DIRECTIVE NO. 144 3-7 (2012); DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-4.209 (2012). The Tax Division has responsibility for all criminal proceedings arising under the internal revenue laws, with limited exceptions. The Tax Division must approve all criminal charges that a United States Attorney intends to bring against a defendant in connection with conduct arising under the internal revenue laws, regardless of the statutes charged.

Effective October 1, 2012, the Tax Division issued Directive 144, which delegates to United States Attorneys the authority to: (1) open tax-related grand jury investigations in all SIRF matters, (2) federally charge by criminal complaint a person engaged in a SIRF crime, and (3) seek and obtain a seizure warrant for forfeiture of criminally-derived proceeds arising from SIRF crimes, all without prior authorization of the Tax Division. Whenever a defendant is charged by complaint with a SIRF crime, any subsequent charge, whether by indictment or information, must be authorized by the Tax Division. In connection with the new directive, the Tax Division implemented expedited review procedures in SIRF prosecutions when individuals are arrested on complaints based on evidence of a SIRF crime.

## **II. Investigating a SIRF case**

### **A. Origin of a SIRF investigation**

A SIRF case has hit your desk and a grand jury investigation has been opened. Understanding how and where the investigation began can be critical, because the initial lead will only give you one piece of a larger puzzle.

The referring agency may be IRS-Criminal Investigation (IRS-CI). More often than not, IRS-initiated SIRF cases arise out of other SIRF investigations or out of a referral from the IRS's Scheme Development Center (SDC), a group of investigative analysts whose job is to analyze tax filings and identify patterns of conduct that are indicative of fraud. For example, the SDC may have noticed an

unusual pattern of apparent falsities on a batch of tax returns filed through the same EFIN or filed from the same Internet Protocol (IP) address. The SDC is an invaluable resource in any SIRF investigation and should be consulted regardless of the referring agency.

Alternatively, whether through the IRS or another federal agency, a SIRF case may have arisen from a lead from a bank, informally or by way of a Currency Transaction Report (CTR) or Suspicious Activity Report (SAR). For example, a bank may have identified a suspicious pattern of deposits of federal tax refunds into a particular bank account, often leading to a SAR. Similarly, transactions in large amounts of cash may have led a bank to submit a CTR. Districts with SAR Review Teams should pay particularly close attention to indicia of refund fraud, as a single SAR may be the only meaningful lead to an important SIRF investigation.

A SIRF investigation may very well have arisen from a referral by a local law enforcement agency. For example, it is becoming increasingly common for a routine traffic stop to turn up a stash of prepaid debit cards instead of (or in addition to) a stash of illegal drugs. It is critical that federal law enforcement and local law enforcement work together to detect possible SIRF cases, either through formal task forces or informal cooperation. Similarly, a series of citizen complaints may have led local law enforcement to identify a pattern suggestive of federal tax refund fraud.

On the federal level, SIRF cases often arise from investigations by the United States Postal Inspection Service and the United States Secret Service. Postal Inspectors may have detected a pattern of Treasury checks or prepaid debit cards mailed to the same address or to nearby addresses, or the target of an investigation may be a mail carrier in on the scheme. Secret Service may have investigated the negotiation of fraudulent Treasury checks and/or fraudulent state tax refund checks.

## **B. Finding evidence**

An investigation should focus on three facets of a SIRF scheme and the associated players. First, look for evidence regarding the actual filing of a fraudulent tax return in the name of an identity theft victim—that is, find the preparer. Second, track down the runners and look for evidence regarding receiving, transferring, and/or spending fraudulent tax refunds. Third, look for evidence regarding the unlawful procurement of stolen identity information and/or the transfer of stolen identity information by the identity thief—the source—to the preparer. Each avenue of investigation may lead not only to important pieces of evidence, but will also help to establish and define the scope of a particular scheme.

**Using the IRS Scheme Development Center:** Regardless of whether a SIRF case was initiated with the IRS, bringing IRS-CI on board can be an immense benefit to the prosecution. With its monopoly on tax information and tax databases, the SDC is often the most valuable asset in a SIRF investigation. The SDC is the primary provider of the IP addresses used to file suspicious tax returns and of information about where and when refunds were sent, both of which are critical pieces of evidence to obtain early in an investigation. Additionally, through its analysis of IRS databases, the SDC can begin with a single piece of data (for example, one false tax return filed from a particular IP address or one false tax refund deposited into a particular bank account) and assist in identifying the scope of a particular scheme. Among other evidence, the SDC can identify the universe of tax returns filed with the same EFIN and/or filed from the same IP address, the universe of tax refunds deposited into a particular bank account, and/or the universe of Treasury checks mailed to particular addresses. Essentially, any one fraudulent item can be analyzed to determine if similar fraud was committed as part of the same scheme. This determination can help establish the scope of the scheme from an early stage and provide a huge number

of leads to investigate. Moreover, this evidence can be critical not only for charging purposes, but also for sentencing.

**Using an IP address to identify a suspect:** When fraudulent tax returns are filed electronically, tracking IP address information is critical. Speedy investigative work is required to obtain the necessary evidence before the companies that provide Internet service purge records. The SDC, or in some cases a tax preparation software company, can provide an IP address associated with the filing of a particular tax return or set of tax returns. Once the IP address is identified, a grand jury subpoena must be sent quickly to the Internet Service Provider (ISP). Only the ISP can link a particular IP address to a subscriber, and therefore to a physical location. Unfortunately, that information is often purged by ISP's within months, making a timely subpoena or preservation letter under 18 U.S.C. § 2703(f) a high priority.

As with any investigation involving IP addresses, it is important to be aware of the fact that a suspect may be using an anonymizer, which will make it look like tax returns were filed from locations around the world, or may have hijacked or taken over an innocent party's wireless Internet, making it look like the innocent party is the fraudster when, in fact, the innocent party knows absolutely nothing about the scheme. In these instances, it is critical that investigative agents work with computer forensic experts and also use traditional law enforcement techniques—for example, interviews, traditional surveillance, Wi-Fi surveillance, common sense, etc.—to ensure that an apparent criminal was, in fact, part of the scheme and not a victim. In some cases, it may be possible to identify a MAC address or Data Link Control address to identify the particular computer or router used to perpetrate fraud. Finally, more savvy fraudsters use public Wi-Fi. In these cases, video footage, or old-fashioned physical surveillance, may help you identify the preparer. When all else fails, there is always the old adage: follow the money! For much more information on IP address-based investigation, consult the resources published by the Computer Crime and Intellectual Property Section (CCIPS) and the Child Exploitation and Obscenity Section.

**Bank and financial records:** First, subpoena bank records relating to the deposit and/or withdrawal of SIRF proceeds. When drafting bank subpoenas in SIRF cases, explicitly request “ACH information and all other known funds verification information.” ACH information, the actual wire transfer information for a particular deposit of a tax refund, will provide significantly more detail regarding a particular fraudulent tax refund than most banks will otherwise provide. ACH information is what ties a particular line item in a bank statement to a particular fraudulent tax return.

Next, prepaid debit cards have several twists that can catch the unsuspecting prosecutor:

- Prepaid debit cards have multiple account numbers, such as an account number on the card and a separate direct deposit number. The account number listed on the card itself is generally *not* the account number into which money was transferred from the IRS. That number is typically the direct deposit number and is the number listed on the tax return and on SDC-created reports. At a minimum, subpoena the prepaid debit card issuer for all records pertaining to a specific card/account number, and subpoena any banks for all records associated with a specific card/account number.
- The prosecutor needs to understand that multiple entities may be involved with a single debit card and needs to be careful to subpoena the correct entity. For instance, Wal-Mart sells Wal-Mart Money Cards and may have useful information regarding the purchase of the debit card, such as video of the transaction. However, Wal-Mart does not maintain the financial records. The

servicing financial institution keeps those records, which in the case of Wal-Mart is GE Capital Retail Bank.

Third, where a tax preparation business is involved, subpoena relevant bank and financial records that are associated with the individual preparer and/or any corporate entities at issue (for example, bank records of a tax preparation business owned by the preparer).

Fourth, if RALs are at issue, subpoena records associated with particular loans directly from the refund anticipation loan provider. In SIRF cases involving a tax preparation business, RAL providers can provide copies of the cashed checks, customer service records, records regarding the mailing of the RAL checks, and the like.

**Tax software records:** If fraudulent tax returns were filed using commercial tax software (for example, Turbo Tax, Tax Wise, Drake software, etc.), subpoena tax software records. Include a request for all business records associated with a particular account and all customer service records relating to the particular account. Tax software companies, especially when your investigation involves software used for an EFIN, typically keep detailed call logs and/or audio recordings of calls, a great source of information to determine who committed the crime. Furthermore, records obtained by tax software companies are generally not subject to the tax secrecy laws imposed by 26 U.S.C. § 6103.

One additional practice tip: Certain spreadsheets provided by tax software companies may be admissible at trial as business records, provided the particular spreadsheet was not prepared for litigation purposes. In the right circumstances, summary spreadsheets maintained by the business for accounting and other purposes may be useful exhibits to introduce at trial.

**ATM and other surveillance videos:** Videos are especially powerful evidence in SIRF cases to answer the “who done it” question. Where debit cards are used, ATM videos obtained as quickly as possible can be the single piece of evidence to link a particular suspect to a scheme. Indeed, an individual currently serving more than 25 years in federal prison for orchestrating a massive SIRF scheme was caught largely due to an ATM video!

In addition to withdrawing cash from ATM machines, fraudsters often use their cards at stores to purchase something cheap—say, a candy bar—and then obtain \$100 cash back or buy gift cards. These transactions may be caught on video. Video is also available where cards are purchased from a store. Where a fraudulent check is deposited or cashed with a bank teller or with a legitimate check cashing business, subpoena any surveillance video footage that may be available.

In this day and age, surveillance video footage is available in many areas. If all else fails and that ATM video is no longer available, you may find that nearby businesses may also have video footage that captured the crime.

## C. Search warrants

Search warrants can be an immensely valuable investigative tool in SIRF cases. Generally, search warrants should be executed as early as possible in a SIRF investigation in an effort to catch the operation in action. In addition to recovering evidence of an identity theft ring and developing leads, the execution of a search warrant may stop the identity theft operation, spare additional victims the hardship of having their identities stolen, and lead lesser-involved suspects to cooperate with law enforcement.

Most commonly, prosecutors should consider obtaining warrants to search:

- Residences and businesses, where there is probable cause to believe tax returns were filed from the location at issue
- Vehicles, where there is probable cause to believe a suspect used a particular vehicle to travel to various locations to file tax returns or obtain proceeds
- Email addresses for the content of email, where there is probable cause to believe stolen identity information was transferred by email and/or where an email address is listed on a registration for a particular prepaid debit card, and/or
- Computers and other electronic devices involved

(Please note: CCIPS should be consulted for the most up-to-date advice regarding computer and other electronic evidence, legal standards governing warrants for searches and seizures, and best practices regarding execution of searches involving electronic evidence.)

Proper execution of the warrant can be critical in these cases. More often than not, suspects claim that somebody else used the suspect's Wi-Fi and committed the fraudulent acts without the suspect's involvement—a common defense that can be quite compelling in establishing reasonable doubt in certain circumstances. Accordingly, law enforcement executing a search warrant should be sure to determine on the date of execution whether the Wi-Fi was secure and, upon seizing important evidence, identify circumstantial evidence, if possible, to establish the suspect's ownership and/or possession of the seized material (for example, photographs in the room from which evidence is seized). Ideally, law enforcement should take photographs and/or video during the execution of the search. When permitted by a warrant, law enforcement should be sure to seize wireless routers, printers, external hard drives, and similar computer devices that may contain electronic evidence. Furthermore, because forensic evidence such as fingerprinting can be a valuable asset in SIRF cases, seizing agents should wear gloves, establish proper chain of custody, and carefully follow agency protocol when executing the search and when reviewing the evidence.

Upon seizing evidence pursuant to a search warrant (or by consent or other exception to the warrant requirement), it is critical that investigating agents review the evidence as soon as possible. Lists and other documents containing stolen identity information should be fingerprinted in an attempt to identify the source of stolen identity information. Receipts documenting the use of debit cards at a store or an ATM should prompt agents to follow up in an effort to identify who was involved in the particular transactions. Computer forensic analysis should begin immediately, looking for evidence of filing (Practice tip: Where Turbo Tax is involved, have the analyst look for UID information, which identifies particular sessions with Turbo Tax.), Web sites visited by the user including, but not limited to, tax software Web sites and emails on the hard drive. DVR's and other surveillance equipment seized should be reviewed and analyzed for evidence of physical presence at a scene when a crime was committed (for example, who was present at a house when a fraudulent tax return was filed). Cellular telephone analysis including a review of text messages and contacts should also be conducted.

## **D. Undercover operations, surveillance, and similar tactics**

In certain circumstances, undercover operations, surveillance, and similar tactics can be useful tools in determining who is responsible for various aspects of a SIRF crime. After all, sometimes the best way to determine who is filing false tax returns from a coffee shop with free Wi-Fi is for a federal agent to wear street clothes and drink a cup of coffee with an eye toward who in the coffee shop is actually filing tax returns. If nothing more, the agent will get a cup of coffee out of the operation!

The IRS has approved several undercover techniques helpful to investigating SIRF crimes, including techniques designed to catch a target buying or selling names and SSNs, and techniques designed to catch targets involved in receiving and/or cashing false tax refund checks or debit cards. Other agencies also have approved undercover techniques helpful to investigating SIRF crimes. For example, the United States Postal Service has the capacity to have a federal agent pose as a mail carrier. How best to craft an undercover operation depends on the facts. Any undercover operation can have unintended and undesirable consequences, so it is important to be careful. Various agencies are continuing to evaluate and reevaluate their undercover capabilities and undercover policies. Thus, as with any investigative tool, prior to conducting undercover operations, prosecutors and agents should ensure that any operation is consistent with agency and Department of Justice policy, is appropriately planned and reviewed, and is executed in a manner consistent with the approvals received.

## **E. Cooperators, informants, and other key witnesses**

Cooperators are often key in SIRF investigations, especially to identify and prosecute the leaders of the scheme and the sources of stolen identities. The same rules that apply to using cooperators in other cases apply in SIRF cases. Of course, beyond obtaining records through the grand jury's subpoena power, prosecutors should consider using the grand jury to lock in cooperating witnesses, as well as other tax preparers, people who cashed checks or used ATM's, and should identify theft victims on tax returns if there is any question as to whether the named taxpayer had anything to do with the filing of that tax return.

## **F. The universe of IRS records**

In addition to obtaining third party records, obtain the following IRS records, at a minimum, if applicable:

- EFIN Applications (Note: It is common for suspects in SIRF cases to obtain an EFIN in a nominee name, often with a stolen identity.)
- PTIN Applications: An application for a particular person to file returns, usually in conjunction with an EFIN (Note: It is common for suspects in SIRF cases to obtain a PTIN in a nominee name, including the name of a stolen identity.)
- Certified Tax Returns: If paper returns were mailed to the IRS, it can take the IRS a long time to locate and provide them. If electronic returns were filed, the IRS will usually call the documents you need "TRPRT printouts" or "Me File" records.
- SDC records, including any investigative summaries or reports



- IRS Audit Files (if any)
- IRS Collections Files (if any)
- All memoranda of interviews pertaining to this case *and* related investigations

In addition to the possible evidentiary value of these IRS records, prosecutors should also review these records for discovery purposes with an eye toward the existence of *Brady*, *Giglio*, and Federal Rule of Criminal Procedure 16 material requiring disclosure. At a minimum, any federal prosecutor handling a SIRF case needs to know the universe of what is out there in order to make discovery decisions.

### **III. Investigating the source of the stolen identity information**

It is important to catch and prosecute people filing fraudulent tax returns using stolen identities. However, the bigger fish in many SIRF schemes is the source providing stolen identity information to the person filing false tax returns. Preparers in these schemes are a dime a dozen, but it takes special access or skills to be a source. A case against a source is generally another investigation, often an investigation that begins after a ring is brought down.

Every investigation targeting a source is different, but the game is typically the same: you need to prove your target provided names and SSNs to a co-conspirator.

In the absence of direct evidence, perhaps from a sting or surveillance operation, you need to build a circumstantial case. Forensic evidence can be key. If you have obtained papers with names and SSNs, fingerprint it. Analyze stolen identity information for patterns that may provide evidence of where a data breach occurred in the first place. For instance, are the victims all prisoners, nursing home patients, or patients of a particular medical practice? When you locate a breach, look for ways to pin down who could have been responsible. Realize the preparer may have multiple sources and the source may have multiple ways to obtain stolen identity information, so look for patterns, but do not let outliers convince you to abandon an otherwise compelling lead. Flip filers of fraudulent tax returns into cooperating witnesses, but be aware that corroboration can be particularly important in these cases. Flip runners of money into cooperating witnesses to identify other players and to assist in tracing the proceeds. And follow the money—sources do not often work for free. If you can prove the source was paid, the game is over.

### **IV. Charging a SIRF Case**

When you finally sit down at your computer with your Pumpkin Spice Latte ready to draft a SIRF indictment, you may wonder what you can charge. But the paradox is this: too many options are available. For better or worse, SIRF schemes tend to involve violations of a host of federal laws. It often seems easier to list what crimes were *not* committed.

This section of the article is meant to be a practical overview for charging a SIRF case, not an exhaustive analysis of the law. Other attorneys have produced more detailed studies of many of the statutes mentioned here and those resources should be consulted. False refund schemes involving stolen identities have actually been around for a long time. Until recently, however, they tended to be small, under the radar, and/or infrequently prosecuted. Consequently, charging SIRF cases is an evolving area of law, and sometimes the answers are not always clear about what can be charged.

Before plunging into the statutes themselves, a brief discussion on charging strategy may be useful. First, these are often ongoing crimes, so do not be afraid to charge now and seek a superseding indictment later, or to indict just part of a scheme while continuing to develop other aspects of a conspiracy. Second, depending on the nature of your victim-witnesses, you may find that some will not be easily located when you need them for trial. Prepare for this possibility from the outset by carefully selecting your substantive counts and by charging several counts involving different identity theft victims, rather than just one or two, in case you need to dismiss some counts before trial without jeopardizing the case. Third, make sure you include, where possible, charges that will support forfeiture and aggravated identity theft—two major tools the prosecution has in this area. Finally, to deal with the wealth of charging options, the best bet is usually to focus on your strongest piece of evidence against each defendant and pick the charge that most directly tracks that evidence. For example, you may have a target that you can convict on a wire fraud count, but if the best evidence is video footage of the defendant withdrawing funds from an ATM, consider charging an access device fraud count instead.

### **A. The false claims statutes: 18 U.S.C. §§ 286 and 287**

For those with a background in tax cases, conspiracy to defraud the Government with respect to claims (18 U.S.C. § 286), and filing false claims (18 U.S.C. § 287), will likely be familiar charges that could apply to SIRF crimes. In basic terms, these statutes cover making false claims on the United States, such as fraudulent claims for tax refunds. For a detailed treatment of these crimes, consult the Criminal Tax Manual.

On the plus side, §§ 286 and 287 are relatively straightforward and easy for a jury to understand, and § 286 has a 10-year statutory maximum, as opposed to the 5-year maximum in 18 U.S.C. § 371. And, unlike many other statutes, you will not have to worry about finding a proper interstate jurisdictional hook with § 286 and § 287. But neither will support forfeiture in a SIRF case, and neither is a predicate for aggravated identity theft. False claims charges are perhaps most useful when building a case against a preparer because of the simplicity of the theory.

There is one particular pitfall to watch out for when charging § 286. Proving that a defendant was aware that the conspiracy involved false claims on the Government is required. This charge may therefore not be appropriate for some situations. This problem is especially likely to arise when you want to charge lower-level members of the scheme who were aware they were helping perpetrate a fraud, but may not have known that *tax refunds* were the vehicle of the fraud.

### **B. Theft of public funds: 18 U.S.C. § 641**

Section 641 is a versatile statute. Its broad language encompasses a wide array of situations involving misappropriation of federal money, including tax refunds. Any time someone wrongfully receives or exercises control over fraudulently obtained refund money, you will probably be able to prove a charge under 18 U.S.C. § 641.

Aside from its flexibility, § 641 has some other benefits. Unlike § 287, it is a predicate to aggravated identity theft (and money laundering), while still retaining the advantage of not requiring an interstate nexus. And the circuit courts are unanimous in holding that § 641 charges do not require proving that the defendant knew that the money in question belonged to the Federal Government. *See United States v. Jeffery*, 631 F.3d 669, 675-78 (4th Cir. 2011) (collecting cases). This holding can be

especially useful when dealing with lower-level players in a SIRF scheme who are involved as runners for the proceeds. All you need to prove from a knowledge standpoint is that they knew they were helping commit theft of *something*. Indeed, a surprising number of targets will be adamant that they had no idea where the money was coming from, yet will freely admit that the money they were receiving or spending did not belong to them. In trying to insulate themselves from tax fraud, they will effectively confess to committing § 641 violations. Often, the only real downside to § 641 charges is that they require actual theft or misappropriation of funds, so § 641 cannot be charged for refunds that are not actually paid out (if only this was a bigger problem for us!). Likewise, when charging someone who is not directly involved with the proceeds, successful prosecution under this statute requires a more tenuous and complicated aiding and abetting theory.

Theft of public funds charges is especially useful in a couple of different situations. One is where you are able to place Treasury checks in a target's hands, either because of a search, an informant, or some other reason. In those scenarios, § 641 focuses the jury on the basic idea of actually having stolen goods. *See, e.g., United States v. Gill*, 193 F.3d 802, 804-05 (4th Cir. 1999) (Treasury checks remain government property after issuance); *United States v. McRee*, 7 F.3d 976, 980-81 (11th Cir. 1993) (holding that Government retains interest in erroneously issued check after person's receipt of check). Another common scenario is where a person allows his bank account to be used to receive refunds.

There are also a couple of easy mistakes to be aware of with § 641. First, remember that the statute only covers *federal* money. Thus, it does not apply to a scheme that uses RALs to get the money (but bank fraud may be an appropriate charge). Also, while the initial receipt of funds into a bank account is chargeable under § 641, after that point, some courts may hold that title has passed to the account owner or that the funds have lost their government character, so if you want to charge subsequent withdrawals or transfers, a different theory will be needed. Depending on the facts, money laundering or wire fraud might apply. Second, § 641 has distinct charging provisions. Particularly for sting scenarios or other situations involving Treasury checks that have not been negotiated, or scenarios where the Government is providing the checks, be sure that what you are charging matches the underlying facts.

### **C. Access device fraud: 18 U.S.C. § 1029**

Commonly used in credit card fraud cases, charges under 18 U.S.C. § 1029 are frequently applicable in a SIRF case, thanks to prepaid debit cards becoming the SIRF fraudster's favorite way to get the money. More aggressively, § 1029 can also be used to target those dealing in stolen identities.

**Debit cards:** Section 1029 has numerous subsections, but a few are of particular relevance here:

- § 1029(a)(2) applies to using or trafficking in unauthorized access devices, and
- § 1029(a)(5) applies to conducting fraudulent transactions with access devices issued to another person

Both variations require proving that someone received at least \$1,000 in connection with the offense during a one-year period. *See* § 1029(a)(2), (5). Section 1029(a)(3) covers anyone who, with intent to defraud, possesses 15 or more unauthorized or counterfeit access devices. Any § 1029 charge requires showing that the crime affected interstate commerce. Proving that the card came from out-of-state or that the transactions involved out-of-state funds can usually satisfy this jurisdictional element.

Access device fraud charges are especially useful when someone is caught on camera using a debit card or caught during a search with cards. When you have surveillance video showing someone conducting transactions with a debit card in someone else's name, loaded with refund money, the defendant will be hard-pressed to come up with a plausible innocent explanation. Similarly, § 1029(a)(3) charges are especially useful when law enforcement catches someone with a stack of debit cards in his possession, which is fairly common during a traffic stop or during the execution of a search warrant.

When charging § 1029(a)(2) or § 1029 (a)(5), you can aggregate transactions, which will likely be necessary because ATM withdrawal limits are under \$1,000. *See, e.g., United States v. Dees*, 215 F.3d 378, 379-80 (3d Cir. 2000). Though aggregation is allowed, courts have also held that different transactions can be charged separately. *See, e.g., United States v. Turcks*, 41 F.3d 893, 900-01 (3d Cir. 1994). In other words, you should typically charge multiple transactions on a card as a single count to get to the \$1,000 threshold, but charge different cards as different counts. By contrast, a single § 1029(a)(3) count should be charged for a single discrete possession even when the suspect had 15 cards several times over. Also, possession at different times cannot be lumped together to meet the magic number, 15. One last word of caution on § 1029(a)(3): SIRF fraudsters will often buy temporary debit cards from stores. If these cards have not yet been activated in someone else's name or otherwise fraudulently used or obtained, they are not unauthorized access devices.

**Stolen identities:** Another, more aggressive approach for § 1029 in a SIRF case is to treat the stolen identities themselves as access devices. It is not uncommon to encounter suspects with lists of names, SSNs, and dates of birth. Especially in a traffic stop or an undercover operation unconnected to a broader investigation, it may be tough to prove other charges, and the possession of the stolen identities may be all you have to go on. Access devices include “any personal identification number . . . or other means of account access that can be used, *alone or in conjunction* with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds.” 18 U.S.C. § 1029(e)(1) (2012) (emphasis added). No published opinion has addressed the issue yet, but the Third Circuit approved of treating SSNs as access devices in *United States v. Komolafe*, 246 F. App'x 806, 810-11 (3d Cir. 2007) (unpublished). In that case, the defendant had lists of stolen identities, and the surrounding facts showed that he would have used those identities to fraudulently open new bank accounts and credit card and debit card accounts.

Similarly, in a SIRF case, a SSN can undoubtedly be used “to obtain money,” from the United States and can also, as in *Komolafe*, be used to open debit card accounts. It is also a common authenticator for various financial accounts. You may need to prove these surrounding facts, and also perhaps prove that the circumstances show that the stolen identities would likely be used for some sort of purpose that makes them access devices, but the statutory language is broad enough to include SSNs as access devices in certain circumstances.

#### **D. The fraud statutes: 18 U.S.C. §§ 1341, 1343, 1344, and 1349**

Wire fraud (18 U.S.C. § 1341), mail fraud (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), and conspiracy to commit any of the tripartite (18 U.S.C. § 1349), are familiar tools for most white collar prosecutors, and they are just as applicable to a SIRF case as to other fraud schemes. The core of all three statutes—the scheme to defraud—will usually be readily proven in a SIRF case. Which of the three to charge, and whether to charge any at all, will usually be a choice largely driven by considerations of venue and what jurisdictional hook or hooks (use of mails, interstate wires, targeting an FDIC-insured financial institution) are present in a particular case.

All three statutes have many benefits: they are all predicates to aggravated identity theft and money laundering; all will support a broad, scheme-based forfeiture allegation; all can be charged in a way to allow targets at different levels to be responsible for substantive fraud charges; and all will start the guidelines calculations at seven instead of six. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2012).

Many SIRF cases will involve wire fraud charges because many SIRF cases involve the electronic filing of tax returns. Using the filing of the false tax returns as your interstate wire communication creates a straightforward wire fraud story for the jury. The main issue is that this theory will not be available in every state. IRS Service Centers, where filed tax returns are directed, are located around the country, so in some states, the wire communication may never leave the state. If you are in such a state, you may nonetheless be able to prove the interstate requirement if the filing was routed through the server of a tax software company in a different state before returning to the state for filing at the IRS Service Center. Or, instead of focusing on filing, look at refund deposits. Often, the proceeds will be wired to a bank account or debit card account in such a way that the wire crosses state lines. (In fact, virtually every banking transaction in the modern world will involve, at a minimum, a funds verification through ACH, FedWire, or some other clearinghouse, and that verification will likely involve the use of interstate wires.) Focusing on the receipt of proceeds can get you the interstate nexus without sacrificing the simplicity of making the wire communication a central and easily-understood part of the scheme.

As technology progresses, mail fraud charges are becoming less frequent. But SIRF fraudsters are doing their best to ensure the continued vitality of § 1341. In contrast to wire fraud, mail fraud charges do not require that the mailing itself cross state lines. Rather, the hook is the use of the United States Postal Service or an interstate mail carrier such as FedEx or UPS. Most SIRF schemes involve electronically-filed returns, though sometimes the returns may be prepared on paper and sent through the mail (not uncommon in Individual Taxpayer Identification Number (ITIN) schemes or schemes involving Puerto Rican SSNs). But even schemes involving electronic filing will frequently involve the use of the mails to receive proceeds. As part of the scheme, refund checks, or more commonly, debit cards, will often be mailed to addresses controlled or accessible to the conspiracy, providing straightforward mail fraud counts.

Bank fraud charges may also be available in the right situation. In particular, these charges might be your best bet when the scheme involves an FDIC-insured RAL provider that is really the victim of the scheme. It is not uncommon for a RAL provider to pay out substantial money in loans, only for the IRS to reject many of the underlying tax returns as fraudulent. In that situation, the RAL provider is on the hook for the money, and bank fraud charges help focus the case on the lender as the victim.

Many SIRF schemes involve multiple districts—the fraudsters may file returns in one or multiple cities, have checks and cards mailed to another, and then go on a multi-state road trip draining the cards at ATMs along the way. While these schemes may span districts, most of the circuits addressing the issue have held that venue under the mail and wire fraud statutes lies only in the districts where the mailing or wire originated or terminated, and not in any district where the scheme may have been hatched or advanced. *See, e.g., United States v. Jefferson*, 674 F.3d 332, 368-69 (4th Cir. 2012) (holding that venue is based on where wire transmission originates or is received and noting a lopsided circuit split on the issue).

## **E. Social security fraud: 42 U.S.C. § 408**

Because the misuse of SSNs is a necessary part of every SIRF scheme, the social security fraud statute may provide other charging possibilities. In particular, 42 U.S.C. § 408(a)(7)(B) broadly applies whenever a person, “for any . . . purpose,” “falsely represents” a SSN to be his, when in fact the number is not assigned to him. It is not clear how broad the term “represents” is. However, if Person A files a tax return with Person B’s SSN (without identifying himself or herself as the preparer), Person A is representing to the IRS that he or she is that person, and the statute is violated. This theory may be particularly useful where the “victim” is somewhat complicit (for example, the victim sold a SSN for cash). This is not a defense, but rather a § 408 theory based on protecting the integrity of the SSN that may have more practical jury appeal.

Section 408(a)(8) arguably has a broader sweep. It covers anyone who “discloses, uses, or compels the disclosure of the social security number of any person in violation of the laws of the United States.” Case law on this provision is scarce, but using a SSN to aid a fraud scheme would seem to clearly violate federal law. In addition to addressing complicit victim situations, § 408(a)(8) may also provide an alternative charging theory for those stealing or trafficking in identity information.

## **F. Aggravated identity theft and identity theft: 18 U.S.C. §§ 1028A and 1028(a)(7)**

At its heart, one of the differences between SIRF crimes and other tax crimes is that SIRF crimes have flesh-and-blood victims, not just financial losses to the ever-sympathetic IRS. Aggravated identity theft is a tool that Congress has provided to deal with such crimes. Additionally, as a matter of policy, prosecutors should generally seek to charge 18 U.S.C. § 1028A where possible in a SIRF case. It also does not hurt that it carries a two-year mandatory, consecutive sentence. (For more information, see the Sentencing section.)

Section 1028A applies whenever someone, “during and in relation to any” predicate felony, “knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person.” 18 U.S.C. § 1028A(a) (2012). Plenty of predicate felonies are available to pick from when prosecuting a SIRF case. The average SIRF case will also generally present some clear-cut, easy-to-prove § 1028A theories, although other situations will present some thornier questions. After first comparing § 1028A with 18 U.S.C. § 1028(a)(7), this section will review some of the issues likely to arise in SIRF cases regarding various elements of § 1028A.

**Identity theft vs. aggravated identity theft:** Section 1028(a)(7) applies to misuse of a means of identification as part of any federal crime or any state felony. In that sense, it is similar to § 1028A, but do not let the similarities fool you. Section 1028(a)(7) is generally not a good charge in a SIRF case. Because predicates for § 1028A are readily provable in virtually any SIRF case, there are rarely any benefits to charging § 1028(a)(7). It lacks the mandatory minimum of § 1028A, and is actually more difficult to prove because the felony provision requires proving that at least \$1,000 was made as a result of the offense. *See* 18 U.S.C. § 1028(b)(1)(D) (2012). The one instance in which you may want to consider § 1028(a)(7) charges is where your only real evidence involves stealing identities or selling identities and you have no broader scheme to which to tie it. In that case, especially if your local court is skeptical of § 1029 or § 408(a)(8) charges, § 1028(a)(7) may at least give you a charge. Many states have enacted privacy laws that can provide the necessary underlying state felony without having to prove anything more than the possession of another person’s SSN.

**The existential question: What is a “means of identification of another person?”:** While many things count as a means of identification, the focus in a SIRC case is usually on just one: SSNs. SSNs are specifically listed in the statute, § 1028(d)(7)(A), and are probably the quintessential means of identification. Anyone dealing in them, like sources, or using them, like return preparers, will clearly be liable under § 1028A. Similarly, Individual Tax Identification Numbers issued to immigrants without SSNs can be used to file tax returns and also count as means of identification. But § 1028A casts a broader net than that. Think of runners with debit cards. A means of identification includes an “access device” that can be used to identify another person, and debit cards obtained in the names of others count. 18 U.S.C. § 1028(d)(7)(D) (2012). The same is true of suspects with checks in others’ names—a name, standing alone, is also listed in the statute. But it does have to be enough to identify a particular person. *See, e.g., United States v. Mitchell*, 518 F.3d 230, 233-35 (4th Cir. 2008) (reversing a § 1028A conviction because of insufficient evidence that a fake driver’s license with the name “Marcus Jackson” identified a specific Marcus Jackson). While the name must identify a particular person, it can do so “alone or in conjunction with any other information.” 18 U.S.C. § 1028(d)(7) (2012). In SIRC cases, you can meet this requirement by proving that, for instance, the name on the check is traceable back to a particular tax refund issued to a particular person.

The means of identification has to be that of an actual person, not a fictional one. This requirement is not a problem in SIRC cases. Notwithstanding the other existential question of what happens when a natural life ends, for purposes of aggravated identity theft, dead people are actual people, too, and their identities are sometimes used in SIRC crimes. *See, e.g., United States v. Zuniga-Arteaga*, 681 F.3d 1220, 1225 (11th Cir. 2012); *United States v. Maciel-Alcala*, 612 F.3d 1092, 1100 (9th Cir. 2010). The “actual person” requirement also means that you may be able to charge § 1028A in an undercover operation that involves buying Treasury checks or stolen identities from a target, but you will not be able to charge it in an operation that involves agents or cooperators selling checks or “stolen” identities relating to fictitious people.

**Getting past Flores-Figueroa: proving knowledge in a SIRC case:** In *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court held that the Government must prove that the defendant *knew* that the means of identification belonged to an actual person. *Id.* at 657. This requirement may be easily proven where the defendant is a true source of the stolen identities. It is also not uncommon to be able to prove it based upon stolen identity information uncovered in a search that bears some indication of the source. For example, if a defendant is caught with patient information sheets from a hospital or nursing home, or with prison roster records, clear circumstantial evidence exists that the suspect must have known the information was that of real people.

Another approach that can be used in most SIRC cases to prove knowledge is the fraudster’s willingness to subject the stolen information to Government scrutiny. When a tax return is filed, the IRS verifies that the SSN is valid and matches the name and date of birth. As the Eleventh Circuit has repeatedly held, a willingness to “test” the means of identification by submitting it to a verification process is proof of knowledge. *See, e.g., United States v. Doe*, 661 F.3d 550, 562-64 (11th Cir. 2011); *United States v. Holmes*, 595 F.3d 1255, 1258 (11th Cir. 2010) (holding that successful use of identifying information in connection with Government programs that verify information is probative of knowledge). This approach was also recently endorsed by the First Circuit in *United States v. Valerio*, 676 F.3d 237, 244-45 (1st Cir. 2012). In a related vein, the repeated successful filing of false returns is proof of knowledge. There is simply no way that someone will randomly guess what happens to be a real SSN over and over again. Even if the source cannot be identified, such a string of successes is powerful

circumstantial evidence that the person must have thought he or she was using real identities—otherwise, there would inevitably have been several fictional SSNs that did not work.

**The meaning of lawful authority:** Finally, in a certain subset of SIRF cases and related cases, the question of “without lawful authority” will rear its head. In a typical case, there is no real dispute about this element—you will put on a victim to testify, everyone will agree that there was identity theft, and the defense will apologize to the victim for having to testify while impugning the Government for falsely accusing the defendant of being the perpetrator. Sometimes, however, the issue of identity theft will be shrouded in shades of gray. It is not uncommon for an individual to sell his or her SSN. The person may sell it without a clue of what will be done with it, and/or the person may sell his or her children’s information. In a shade of irony, frequently, the scammer will be scammed—a person will sell or allow his or her SSN to be used as a *dependent* on a tax return, but the purchaser/preparer will instead use the information as the named taxpayer in an attempt to pocket the entire tax refund.

These different scenarios fall all over the jury-appeal spectrum, but as a *legal* matter, every one of them can be charged as aggravated identity theft. They may be charged in this way because “aggravated identity theft” is merely a term of art—the shorthand statutory title—but the actual element in question is “without lawful authority.” Every court to have addressed the question has concluded that the identity need not be stolen—it can be obtained lawfully and later misused, *see, e.g., United States v. Abdelshafi*, 592 F.3d 602, 607-09 (4th Cir. 2010)—and also that “lawful authority” is different from mere permission; that is, no one can give another lawful authority to use his or her SSN to commit a crime. *See, e.g., United States v. Spears*, 2012 WL 4372522, at \*1 (7th Cir. Sept. 26, 2012) (holding that aggravated identity theft applied where document forger sold person a fake permit in the buyer’s own name); *United States v. Retana*, 641 F.3d 272, 273-75 (8th Cir. 2011) (father’s permission to use his SSN does not amount to “lawful authority”); *United States v. Mobley*, 618 F.3d 539, 547-48 (6th Cir. 2010) (holding that permission to use SSN is still identity theft).

## G. Other statutes

Other potential Title 18 charges to consider include the following:

- §§ 510, 513. These statutes cover, respectively, the forgery of Treasury checks and the forgery of state and non-government checks and securities.
- § 1028. While § 1028(a)(7) is of little benefit in most SIRF cases, other subsections of the statute, which cover a range of crimes dealing with identification documents, may be useful.
- § 1030. The computer fraud statute may be useful, especially in source cases in which the identity thief steals from the databases at his or her company or agency. This usefulness, however, is somewhat hampered by recent court decisions in some circuits that have construed the statute not to apply to those who steal from databases they otherwise have permission to access for legitimate reasons. *See United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (en banc); *WEC Carolina Energy Solutions LLC v. Miller*, 2012 WL 3039213, at \*7 (4th Cir. July 26, 2012).
- §§ 1956, 1957. As with any scheme involving fraud proceeds, money laundering charges are frequently available in SIRF cases. (IRS-CI is well-equipped to trace financial proceeds.)



- §§ 1708, 1709. These statutes cover mail theft by anyone, and mail embezzlement by a Postal employee. One way that SIRF schemes obtain proceeds is by directing checks or debit cards to the addresses of innocent third parties and then taking them out of the person’s mailbox.
- § 2314. Interstate transportation of stolen property.

Consider also charging 26 U.S.C. § 7206, the false tax returns statute under the Tax Code. See the Criminal Tax Manual for details.

<b>Statute</b>	<b>§ 1028A Predicate?</b>	<b>Forfeiture Available?</b>	<b>Statutory Maximum</b>
§ 286	No	No	10 years
§ 287	No	No	5 years
§ 371	N/A	N/A	5 years
§ 510, 513	No	Proceeds (§ 510 only)	10 years
§ 641	Yes (§ 1028(c)(1))	Proceeds	10 years
§ 1028	Yes (§ 1028(c)(4))*	Proceeds	Varies
§ 1028A	N/A	No	2 year minimum
§ 1029	Yes (§ 1028(c)(4))	Proceeds	Varies
§ 1030	Yes (§ 1028(c)(4))	Proceeds	Varies
§ 1341, 1343, 1344, 1349	Yes (§ 1028(c)(5))	Proceeds	20 years usually, 30 years for § 1344
§ 1956	No	Property involved in crime	20 years
§ 1957	No	Property involved in crime	10 years
§ 1708, 1709	No	Proceeds (§ 1708 only)	5 years
§ 2314	No	Proceeds	10 years
42 U.S.C. § 408	Yes (§ 1028(c)(11))	No	5 years

\*Section 1028(a)(7) is not a predicate offense.

## **V. SIRF trials and common defenses**

As one defense attorney aptly stated in his opening, “If you like a good ‘who done it’ mystery, this is the case for you.” Almost invariably, SIRF trials come down precisely to that: proof that the defendant on trial is the one who committed the criminal acts alleged—proof that the defendant filed the false tax return, negotiated a fraudulent check, knowingly received SIRF proceeds into his or her bank account, used a debit card containing SIRF proceeds, or provided stolen identities to a tax preparer. In a

typical tax evasion trial, there is no dispute about what the defendant did, but there is heated disagreement regarding the defendant's state of mind. In a typical SIRC trial, the exact opposite is true. The dispute centers largely on two factual questions: (1) who did what, and (2) what was done. These cases rarely involve a dispute about the accuracy of the tax returns at issue. After all, the named taxpayer is going to testify that his identity was stolen and that the tax return is patently false. The only question is who is responsible for the blatantly false tax return.

As any trial lawyer knows, nothing is unheard of in the courtroom, but good luck to any defendant who tries a *Cheek* defense in a SIRC case—that is, a defendant who admits to knowingly filing a false tax return in the name of an identity theft victim, but claims that his or her conduct was nevertheless done in good faith due to a misunderstanding of the federal tax laws! See *Cheek v. United States*, 498 U.S. 192, 200 (1991).

The remainder of this section of the article discusses unique considerations in trying a SIRC case.

### **A. Using IRS resources at trial**

Almost invariably, any SIRC prosecution will require the introduction of tax returns and other IRS records. This necessity will require obtaining certified copies from the IRS. The IRS will certainly work with prosecutors when necessary, but as a general matter, obtaining certified copies, even when IRS-CI agents have an interest in the case, can take a significant amount of time. IRS paper filings will take even longer for the IRS to locate and certify, so build this into trial preparation whenever possible. Certified IRS records are self-authenticating documents under the Federal Rules of Evidence, but the IRS will provide a custodian of records to admit IRS records upon request. In a SIRC case, eliciting the testimony of an IRS custodian of records can be useful in two respects: (1) to explain tax documents to the jury, and (2) to testify that the IRS matches names and SSNs when processing a claim for a tax refund, for purposes of proving knowledge for aggravated identity theft charges.

In SIRC cases, it is unlikely that tax computations will provide evidentiary value, but if a case involves tax computations, it is usually the best practice to have an IRS Revenue Agent testify as an expert and/or a summary witness.

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### **B. Common trial issues**

SIRC trials are certainly “who done it” cases, but trials in which the defendant is accused of filing stolen identity tax returns often come down to the defendant's knowledge in one sense: proof that the defendant tax preparer knew he or she was filing a false tax return. In other words, in any case where the prosecution has evidence that the defendant filed a number of tax returns in the names of identity theft victims, there is really only one somewhat plausible defense: the defendant thought he or she was filing a legitimate tax return for a client who had apparently stolen somebody else's identity.

This defense can be blown out of the water in a number of different ways, depending on the facts. Here are a few to consider:

- Think about the defense for a second. It is really patently ridiculous when the prosecution brings forth enough identity theft victims to prove that what is already unlikely to happen, actually happened 10 or 15 times. In other words, where the prosecution presents evidence that the defendant filed 10 false tax returns using stolen identity information, this defense really morphs into the argument that 10 identity thieves conspired to trick the defendant into unknowingly committing a crime, and shared their criminal proceeds with this unknowing victim. Such an argument is unlikely at best.
- Follow the money. Proof that the defendant kept the proceeds of the crime gives the prosecution a rock-solid argument that the defendant was not an unknowing victim.
- Find credible cooperators. SIRF fraudsters rarely work alone. If possible, find an insider, incentivize cooperation through plea or statutory immunity, and have the insider testify about how the scheme worked and who was involved.

SIRF trials in which a defendant’s involvement is limited to opening a bank account and receiving stolen proceeds from the IRS can be trickier. In these cases, the defendant’s state of mind does become critical. These defendants often say they allowed a friend or family member to use their bank account. Fortunately, it is not uncommon in these cases for these same people to admit to receiving and spending the proceeds—which, as explained earlier, may be direct evidence of theft of public funds (18 U.S.C. § 641). When such direct evidence is not available, a circumstantial case can often be established through financial analysis of the defendant’s bank records in the time preceding the receipt of stolen funds and in the time following the receipt of stolen funds. Did the defendant receive the money and keep it? If so, it is tough to argue that he or she was not a player in the scheme. Or did the defendant all of a sudden receive tens of thousands of dollars after years of having a balance substantially smaller? If so, unless the money immediately left the defendant’s account, it is tough to argue that he or she had no idea that the money was connected to fraud. It is also not uncommon for bank accounts to be shut down for fraud and for the same person to then open up an account at a new bank—clear evidence of subsequent fraud.

Ultimately, each and every trial will be different, but recognizing that SIRF cases are “who done it” cases instead of traditional white collar cases can be the difference between a conviction and an acquittal.

### **C. Unique considerations in trying a SIRF case against a “source”**

Cases against sources of stolen identity information present unique issues. Ultimately, these are factual disputes in which the prosecution’s entire case should be focused on tying the source to the stolen identities (perhaps by forensic fingerprint evidence and/or circumstantial evidence proving the defendant had unique access to the names and SSNs), to the broader scheme itself, or to both. These trials have very little to do with tax documents, and it is often a foregone conclusion that the tax returns were false. The only question is whether the defendant, who did not file the returns, had anything to do with providing names and SSNs to the person who filed the returns—and the prosecution’s strategy should be centered on that. In the narcotics context, these are much more analogous to proving a defendant sold drugs on a given date. Only in this case, the defendant sold names and SSNs and may not have been paid until the tax refunds were obtained—or ever.

A case study is illustrative. A defendant pleads guilty to filing false tax returns and becomes the prosecution’s cooperating witness (CW). CW reports that she obtained names and SSNs that she used to

file false tax returns from Source. Only, as in any case predicated on the testimony of a cooperating witness, CW's credibility is an issue. After all, thanks to you, CW has at least one federal fraud conviction. Source's defense at trial is simple and predictable: "I didn't do it." Thus, *corroboration is everything*. CW will testify that Source provided the stolen identities, but due to CW's credibility issues, Source must be connected to the crime in some way beyond CW's self-serving testimony. Perhaps Source's fingerprints can be found on a list of stolen identities recovered from a search warrant. Perhaps Source can be connected to a data breach through circumstantial evidence proving she had access to the names and SSNs that were fraudulently used. Perhaps following the money leads to clear-cut evidence that Source received proceeds from the scheme. The facts will differ, but be prepared to try a "who done it" and recognize the inherent credibility issues with cooperating defendants who have federal fraud convictions.

## VI. Sentencing

Now that you have successfully prosecuted your SIRF case and obtained a conviction or guilty plea, you are faced with several sentencing issues. How do you arrive at the appropriate Sentencing Guidelines calculation? How do you handle victim issues? What about restitution? Forfeiture?

### A. Guidelines calculations

The first step is to determine which offense guidelines section actually applies to the crime. U.S. SENTENCING GUIDELINES MANUAL § 1B1.2 (2012). Unlike traditional tax cases, SIRF cases generally should be sentenced using § 2B1.1, the fraud guidelines, instead of Part 2T, the tax guidelines. First, for the statutes generally charged in SIRF cases, Appendix A of the Guideline Manual provides that § 2B1.1 is the appropriate guideline section. Second, although § 2B1.1 does contain a cross-reference to other guidelines, *see* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(c)(3), the tax guidelines fail to capture the full range of conduct in a SIRF scheme and, in particular, fail to account for the presence of real victims. This factor is addressed in § 2B1.1 but not in the tax guidelines, meaning that SIRF cases are not "more aptly covered" by the tax guidelines. *Id.* § 2B1.1 cmt. n.15.

**Fraud loss and number of victims:** Fraud loss and number of victims tend to drive the sentence in a SIRF case. The starting point in determining an appropriate offense level under § 2B1.1 is the fraud loss. The loss is not limited to just the counts charged in an information or indictment. "[I]n calculating the amount of loss, the Guidelines require a district court to take into account 'not merely the charged conduct, but rather all "relevant conduct," in calculating a defendant's offense level.' " *United States v. Foley*, 508 F.3d 627, 633 (11th Cir. 2007). Loss is the greater of "actual loss or intended loss." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3. "Intended loss" is the "pecuniary harm that was intended to result from the offense." *Id.* In a SIRF case, the intended loss tends to be materially higher than the actual loss because the IRS sometimes detects and stops payment on a substantial number of false returns.

The intended fraud loss associated with a particular return is simply the refund amount claimed by that return. These returns are completely fabricated and designed to obtain money from the Treasury.

The harder aspect is determining how many false tax returns were filed in the SIRF scheme. This part goes back to the SDC. By including the returns identified by the SDC and your investigation as returns involved in the fraud, you can readily establish fraud loss numbers. For instance, all the returns filed from the same IP address or EFIN, returns having the same pattern of false items, refunds directed to

the same bank accounts or prepaid debit cards, or refunds sent to the same addresses, are likely part of the same scheme. “The guidelines do not require the government to make a fraud loss determination with precision; the figure need only be a reasonable estimate, given the information available to the government.” *United States v. Cabrera*, 172 F.3d 1287, 1292 (11th Cir. 1999). Courts have frequently accepted fraud loss numbers based on a pattern of criminal conduct in SIRF cases and other cases.

In some cases, especially when the number of returns filed is minimal (as when a sting or search catches the targets preparing for filing), there are other ways to compute the fraud loss. For instance, when a defendant has been caught with a list of names and SSNs or other access devices, the Guidelines provide that the loss “shall be not less than \$500 per access device.” U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. n.3(F)(i).

After the number of tax returns involved in the scheme is determined, the next step is to compute the number of victims to determine the appropriate enhancement under § 2B1.1(b)(2). Even though identity theft victims in SIRF cases usually do not suffer financial losses from the crime, they are nonetheless still victims. “[I]n a case involving means of identification ‘victim’ means . . . any individual whose means of identification was used unlawfully or without authority.” § 2B1.1 cmt. n.4(E). The number of distinct individuals who had their identities stolen in the scheme and used to file returns should be included. In a SIRF case, it is important to also determine if dependents were used on any of the tax returns, as these are also almost certainly stolen identities. There may be two or more dependents on each return, so even though a particular scheme, for example, only involved 100 returns being filed, there might actually be 300 victims.

In addition to the enhancement due to the number of victims, a prosecutor should consider whether the vulnerable victim enhancement applies. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (2012). Disabled or elderly individuals in nursing or retirement homes, and individuals receiving social security disability benefits, are frequent targets of SIRF fraudsters because these individuals typically are not required to file their tax returns—a SSN stolen from such a person can be used to file a tax return any time of year without the possibility that the real person has already filed.

**Other enhancements:** As you continue looking through the Sentencing Guidelines while drinking your Pumpkin Spice Latte (An exploration of the fraud guidelines certainly may require caffeine!), you may wonder what other enhancements may apply to your SIRF case. There are many possibilities.

A common enhancement in SIRF cases involves the use of “sophisticated means.” U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(10)(C). The “sophisticated means” can come through the filing of the returns or the concealment of the funds. For instance, the preparer may have used anonymizers, hijacked wireless routers of innocent third parties, or filed the returns through a fictitious tax preparation business. *See id.* § 2B1.1 cmt. n.8(B) (use of fictitious entities and corporate shells indicative of sophisticated means). On the money side, the fraudsters may employ classic money laundering techniques with respect to the proceeds. For instance, the tax refunds may be laundered through multiple bank accounts or debit cards, or sent to a large number of runners. *See, e.g., United States v. Ghertler*, 605 F.3d 1256, 1268 (11th Cir. 2010) (activities such as using “couriers to pick up and deliver some of the proceeds” and having “funds transferred to the accounts of unwitting third parties, who in turn withdrew and transferred cash to [the defendant]” support a finding of sophisticated means).

Another possible enhancement is the so-called “breeder” enhancement, which applies to the use of a means of identification to produce or obtain other means of identification, or to the possession of five or more means of identification so produced or obtained. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(11)(C). Using SSNs to obtain RALs, which involve opening up a loan account, or to obtain debit cards, will fall into this category. Because SIRF cases often involved aggravated identity theft charges, however, the interplay between § 2B1.6 cmt. n.2, which arguably limits the use of the breeder enhancement when 18 U.S.C. § 1028A is charged, and § 2B1.1(b)(11)(C) can become quite complicated. See the Department’s resources on sentencing for more guidance.

Other common enhancements involve obstruction of justice, *see* § 3C1.1, and, because the schemes tend to involve conspiracies, a role in the offense enhancement. *See id.* § 3B1.1(a).

In cases involving a true source, an abuse of trust enhancement may apply. Even though sources are often lower-level employees who happen to have access to personal identifying information, the Guidelines have a special provision for identity theft cases that broadens the scope of the guideline. Under § 3B1.3 cmt. n.2(B), individuals such as “a hospital orderly who exceeds or abuses the authority of his or her position by obtaining or misusing patient identification information from a patient chart” is subject to the enhancement. And if you convicted a source of computer fraud charges, do not forget that there are special enhancements specifically for 18 U.S.C. § 1030 offenses. *See id.* § 2B1.1(b)(16), (17).

## **B. Aggravated identity theft**

Section 1028A requires a mandatory term of two years of imprisonment, to run consecutive to any sentence imposed by a court. 18 U.S.C. § 1028A(a)(1) (2012). Section 1028A also instructs that “a court shall not in any way reduce the term to be imposed” for other crimes “so as to compensate for, or otherwise take into account, any separate term of imprisonment imposed or to be imposed for” the aggravated identity theft conviction. *Id.* § 1028A(b)(3). Be aware, however, that some circuits have held that non-predicate crimes *may* have their sentences reduced to compensate for the consecutive sentence. *See United States v. Wahid*, 614 F.3d 1009, 1014 (9th Cir. 2010); *United States v. Vidal-Reyes*, 562 F.3d 43, 56 (1st Cir. 2009). Thus, it may be important to ensure that a guilty plea includes a plea to the predicate crime, as opposed to some other charge in the indictment. Additionally, although the § 1028A sentence must be consecutive to any other sentence imposed, multiple counts of § 1028A may be run concurrently or consecutively to each other. In other words, when convicted on multiple counts of § 1028A, a court may, but is not statutorily required to, stack the two-year sentences. *See* 18 U.S.C. § 1028A(d) (2012).

## **C. Section 3553(a) and SIRF cases**

Do not let 18 U.S.C. § 3553(a) be exclusively the domain of defense arguments at sentencing. In particular, it can be beneficial to ensure that the victims form a major part of your sentencing argument and of your narrative. Victims have a right to be heard at sentencing and, in these cases, prosecutors should actively seek their input. The statements and testimony of victims provide powerful evidence of the impact of SIRF cases. Victims typically have to spend considerable time to rectify their tax issues, often experience substantial delays in receiving their legitimate tax refunds, and have suffered emotional stress from the invasion of their privacy. Often, because many SIRF fraudsters target for identity theft people who are on disability and are unlikely to file tax returns, you may have victims who have had their disability payments lowered because the IRS reported to the Social Security Administration information

that the victims were now receiving income. Some victims may even have had the IRS file levies against them due to the false returns. By bringing home the impact of a SIRF case, a prosecutor is better able to argue for and receive the appropriate sentence. If nothing more, reminding the court that there are victims beyond the IRS is important.

Moreover, identity theft, and especially SIRF crime, is a growing problem in this country and the need for deterrence is even greater. *See, e.g., United States v. Landry*, 631 F.3d 597, 607-08 (1st Cir. 2011) (holding that district court did not err in considering the growth of identity theft crimes and the resulting need for deterrence in imposing a sentence). Notably, the Federal Trade Commission's most recent report on identity theft found that tax-related identity theft complaints are now *greater* than credit card fraud identity theft complaints. *See* 2011 Consumer Sentinel Data Book, *available at* <http://www.ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2011.pdf>.

#### **D. Restitution**

Pursuant to 18 U.S.C. § 3663A(c)(1), restitution is mandatory for most of the common SIRF offenses. Restitution cannot be ordered with respect to “relevant conduct.” *United States v. Scott*, 250 F.3d 550, 553 (7th Cir. 2001) (noting that “relevant conduct” may not be the basis of a restitution award under the MVRA unless it is also “charged [convicted] conduct” or covered in a plea agreement); *United States v. Campbell*, 106 F.3d 64, 69-70 (5th Cir. 1997) (“relevant conduct” provisions of guidelines are inapplicable to determination of amount of restitution). Restitution is limited to the “loss” associated with the counts of conviction and is limited to the actual loss incurred by the United States or any known victims. However, if the counts of conviction include a conspiracy or a count that charges a scheme, then restitution covers the conduct involved in the conspiracy and scheme. *See United States v. Dickerson*, 370 F.3d 1330, 1338, 1341 (11th Cir. 2004) (collecting cases).

#### **E. Recovery of funds**

In many situations, it may not be necessary to go through administrative forfeiture to return fraudulent proceeds to the Treasury. For instance, many debit card companies and other financial institutions have agreements with the IRS under which fraudulent refunds can be returned directly to the IRS with little more than a phone call by a federal agent (formally known as the IRS Return Integrity Correspondence Services' External Leads Program).

In other cases, it may be necessary to recover funds stolen from the Treasury through forfeiture proceedings. Many common SIRF charges will support forfeiture. Asset forfeiture is a topic unto itself and the Asset Forfeiture and Money Laundering Section has great resources on the subject. As set out in Tax Division Directive 144, Tax Division authorization is required in certain circumstances before forfeiting funds administratively or judicially.

It is important to note that seizing a debit card is not the same as seizing the money because a fraudster could simply report the card lost or stolen and get the money anyway, if the issuer is not notified of the seizure. To make matters worse, if you just notify the issuer, they may reject the refund deposit from the IRS, and the IRS computer will then actually send out a check to the address on the tax return. In other words, when cards are seized, make sure both the card companies and the IRS are notified.

## VII. Conclusion

Improving investigative and prosecution strategies to tackle the nationwide epidemic of SIRC crimes remains a work-in-progress. But by recognizing that these are white collar crimes-in-progress, obtaining time-sensitive evidence, and exploring the many statutes you can charge, you will no doubt serve the public interest by cracking down on what has become the crime of choice for many criminals. ❖

### ABOUT THE AUTHORS

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# Tax Directive 144 and SIRC Expedited Review: United States Attorneys' Offices and the Tax Division Working Together in SIRC Cases

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## I. Introduction

Tax Directive 144 was issued on September 18, 2012, and became effective on October 1, 2012. See DEP'T OF JUSTICE, TAX DIVISION DIRECTIVE NO. 144 3-7 (2012). A companion memorandum, titled *Expedited and Parallel Review of Proposed Indictments Arising from Stolen Identity Refund Fraud* (Expedited Review Memorandum), was issued contemporaneously with Directive 144. These two documents form the basis of the discussion in this article.

Two guiding principles impel Tax Directive 144 and the Expedited Review Memorandum. First, "Get out of the way." SIRC investigations are often fast-paced, real-time criminal investigations ill-suited for centralized review and layers of advance approval. Accordingly, Directive 144 delegates significant authority to the United States Attorneys during the investigative phase of SIRC investigations. Second, "Stay at the table." The Tax Division is congressionally mandated to oversee the uniform enforcement of criminal tax laws throughout the country. As such, information-sharing between the United States Attorneys and the Tax Division is critical to this charge. Directive 144 imposes certain reporting requirements upon United States Attorneys, thereby ensuring that all tax-related matters are brought within the jurisdiction of the Tax Division. Guided by these two principles, Directive 144 and the Expedited Review Memorandum strike a balance: the Tax Division delegates certain authority to United States Attorneys, making it easier to actively investigate ongoing SIRC crimes, while at the same time imposing reporting requirements upon the United States Attorneys' offices, thereby keeping the Tax Division fully apprised of all SIRC cases throughout the country.

## II. What is a SIRC crime?

Tax Directive 144 defines SIRC offenses as:

cases involving a fraudulent claim (or attempted claim) for a tax refund wherein the fraudulent claim for refund (i.e. tax return) is in the name of a person whose personal identification information appears to have been stolen or unlawfully used to make the claim, and the claim is intended to benefit someone other than the person to whom the

personal identification information belongs.

*Id.* at 5. SIRF crimes generally entail the making of wholly fraudulent tax returns. Each line item on the tax return is false and the documentation supporting income and withholding information is fabricated. The stated refund amount on the tax return is wholly fraudulent and the refund recipient is someone other than the named taxpayer whose identity has been stolen or unlawfully used in the SIRF scheme.

Notably, SIRF crimes may implicate a host of federal criminal statutes. SIRF schemes typically entail three parts: (1) a source of stolen identities, (2) the preparation and filing of fraudulent tax returns, and (3) the receipt and disposition of refund proceeds. At each stage of the SIRF scheme, participants engage in criminal conduct that may support stand-alone charges separate and apart from the overall scheme. For example, individuals in possession of stolen identities may have committed identity theft (18 U.S.C. § 1028) and access device fraud (18 U.S.C. § 1029). SIRF participants who prepare and file fraudulent tax returns are typically charged with making a false claim (18 U.S.C. § 287), conspiracy to make a false claim (18 U.S.C. § 286), mail fraud (18 U.S.C. § 1341), and/or wire fraud (18 U.S.C. § 1343). Finally, those in possession of proceeds of the SIRF crime are generally charged with theft of public money (18 U.S.C. § 641), access device fraud (18 U.S.C. § 1029), and theft of mail matter (18 U.S.C. § 1708). Other crimes generally associated with SIRF crimes include aggravated identity theft (18 U.S.C. § 1028A) and social security fraud (42 U.S.C. § 408). Directive 144 includes a non-exhaustive list of SIRF crimes at footnote 2 of the directive. *See* DEP'T OF JUSTICE, TAX DIVISION DIRECTIVE NO. 144 2 (2012).

Given the many variants of refund fraud schemes, Directive 144 attempts to draw a bright line between what is and is not a SIRF crime. That line stops at a tax preparer's file cabinet. On one hand, individuals who freelance in the filing of fraudulent tax returns involving the use of stolen identities clearly fall within the scope of Directive 144. On the other hand, tax preparers run the gambit of tax misconduct. They may engage in a variety of misdeeds ranging from falsifying specific items on a client's tax return (with or without the client's knowledge), to "hijacking" client information, to soliciting and obtaining stolen personal identification information (PII) from third party sources. Directive 144 makes clear that if a tax preparer creates fraudulent returns using *client* information, then the case falls outside the scope of Directive 144 and is not considered a SIRF case. Client records are generally kept and maintained by the tax preparer and are available to law enforcement authorities per traditional investigative avenues. These cases typically result in Title 26 offenses, including aiding and assisting in the preparation of a false tax return in violation of 26 U.S.C. § 7206(2). Accordingly, the reach of Directive 144 ends when return preparers use client information to further a refund scheme.

Nevertheless, some tax preparers go beyond their client files in search of personal identification information. In those circumstances in which the return preparer obtains PII from a third party source for use in making a fraudulent claim for refund, and the named taxpayer is an unwitting victim of the fraud, that conduct constitutes SIRF as defined in Directive 144. In nearly all circumstances, IRS-Criminal Investigation (IRS-CI) will be the agency investigating a return preparer and is well versed in making Directive 144 determinations. If an Assistant United States Attorney has any questions concerning the scope and application of Directive 144 in any given tax investigation, he or she is strongly encouraged to discuss the matter with the Special Agent in charge of the investigation and/or direct any questions to the Tax Division.

### **III. What authority does Directive 144 delegate to the United States Attorneys?**

Tax Directive 144 makes a three-part delegation of authority to United States Attorneys in SIRF cases. First, it permits the United States Attorney to open a SIRF case and/or SIRF grand jury investigation with or without participation of IRS-CI and without Tax Division approval. SIRF cases often come to the attention of law enforcement authorities in real time, such as a car stop made by local law enforcement agencies, a search warrant executed by authorities investigating other crimes, or a postal worker who intercepts Treasury checks in the mail. SIRF crimes are often more akin to street crime than white collar crime, and Directive 144 gives the United States Attorney the authority to open a SIRF investigation on referral from any agency including, but not limited to, IRS-CI. Note, however, that although Tax Directive 144 recognizes that some SIRF cases will take place without IRS-CI participation, it strongly encourages IRS-CI participation. If IRS-CI is not involved in the SIRF investigation, tax return and tax information that may otherwise be available to the prosecution team cannot be disclosed by the IRS due to disclosure prohibitions imposed by 26 U.S.C. § 6103. In many cases, the lack of access to tax returns or tax information will limit the investigation to lower level participants, reducing the impact of the convictions that are obtained.

With this grant of authority comes reporting obligations. Each United States Attorney's office, through its SIRF Point of Contact, must keep the Tax Division apprised of all SIRF cases opened in the office and provide certain details about the case, including dates of opening, targets, investigating agency, etc. A SIRF form has been created and made available to all SIRF Points of Contact for ease in fulfilling these reporting obligations. This reporting obligation applies to all stages of the three-part delegation of authority.

Second, Tax Directive 144 delegates to United States Attorneys the authority to issue criminal complaints in SIRF cases without Tax Division approval. Often, in reactive cases, stops are made, people are arrested, and prosecutors are asked to make charging decisions on short notice. SIRF crimes often entail the possession of stolen identities in the forms of handwritten lists and computer printouts, stacks of debit cards embossed with names of victims of stolen identities, and Treasury checks made payable to victims of identity theft. Many times, the SIRF scheme is first discovered with the stop and arrest of a low-level courier whose role is to transport names, debit cards, or Treasury checks from one place to another. Maintaining leverage over these individuals is often crucial to furthering the SIRF investigation. Directive 144 recognizes that prosecutors need full complaint authority in these instances, and therefore permits the United States Attorney to charge individuals with SIRF crimes by criminal complaint without Tax Division approval or IRS-CI participation.

Prosecutors should be mindful, however, that Tax Division approval is still required in advance of all ensuing indictments and/or informations. This second delegation of authority in Directive 144 relates solely to the issuance of a criminal complaint. Expedited review procedures have been implemented between the Tax Division and the United States Attorneys' offices to facilitate the timely review of all proposed indictments and/or informations that are subject to deadlines imposed by the rules of criminal procedure. (*See* discussion of Expedited Review Procedures below.) Generally, the Tax Division's major count policy will not apply in SIRF cases, and the United States Attorney will have the authority to resolve a SIRF case consistent with Departmental policy. However, in SIRF cases involving an elaborate scheme or lengthy conspiracy, the Tax Division may impose a major count policy to ensure that a plea agreement adequately reflects the seriousness of the offense.

Third, Tax Directive 144 delegates to United States Attorneys the authority to seek and obtain seizure warrants for proceeds of SIRF crimes without Tax Division approval. The money trails left by SIRF proceeds take many forms. It can be simple and linear, such as a direct wire transfer into the preparer's bank account, or it can be multi-dimensional, featuring a network of couriers and handlers having discreet duties aimed at converting refund proceeds into cash. Law enforcement authorities that come upon SIRF proceeds, whether in the form of a Treasury check, debit card, or funds deposited into a bank account, must have the authority to act quickly in restraining and seizing the asset. Directive 144 delegates this seizure authority to the United States Attorney, thereby eliminating the need for advance approval from the Tax Division in most SIRF cases.

Directive 144 does, however, make one significant exception to the general delegation of authority regarding the seizure of SIRF proceeds. If a legitimate taxpayer's refund is at risk of seizure or forfeiture, Tax Division approval is needed to proceed, even if the funds are, or will be, targeted for administrative forfeiture. The risk of this situation occurring is greatest when a tax preparer's bank account is targeted for seizure and the preparer has co-mingled clients' legitimate refunds with proceeds of the SIRF scheme. In these circumstances, the prosecution team should immediately seek the advice and consent of the Tax Division before moving forward in the forfeiture process. In addition, Directive 144 makes clear that any and all judicial forfeitures involving SIRF proceeds must be approved in advance by the Tax Division.

#### **IV. Expedited review procedures in SIRF cases**

Coupled with the issuance of Tax Directive 144 in September 2012, is a memorandum authored by Assistant Attorney General Kathryn Keneally setting forth expedited review procedures of SIRF indictments and informations between the Tax Division and the United States Attorneys' offices. The Expedited Review Memorandum derives from a proposal made by the Stolen Identity Refund Fraud Working Group of the Attorney General's Advisory Committee. It establishes procedures for review of SIRF indictments and informations in situations when time is of the essence, namely, when an arrest has been made or a complaint has been filed. Here, the law imposes a deadline for bringing an indictment against an arrestee or defendant, and it is paramount to the SIRF prosecution that the Tax Division and United States Attorney's office work together to meet that deadline. Three important points emanate from the Expedited Review Memorandum.

First, in all SIRF cases, the United States Attorney will make the prosecution referral to the Tax Division, regardless of which agency participates in the investigation. The referral should be made through the United States Attorney's SIRF Point of Contact. In traditional criminal tax investigations, IRS-CI makes the prosecution referral to the Tax Division only after reviewing and authorizing the Special Agent's Report and after the completion of Criminal Tax Counsel's memorandum. The United States Attorney must wait while IRS-CI and the Tax Division conduct their respective reviews of the case. In SIRF cases, the United States Attorney controls both the timing and content of the prosecution referral to the Tax Division. The United States Attorney will submit an indictment package to the Tax Division consistent with the circumstances of the investigation. For example, in reactive cases, the United States Attorney must often act promptly, and, therefore, the indictment package may consist of little more than a prosecution memorandum and a proposed indictment. However, if the SIRF case features a longer historical investigation led by IRS-CI, the indictment package will likely include a written submission from IRS-CI, to include a Special Agent's Report (or Summary of Investigation), as well as a review memorandum prepared by Criminal Tax Counsel. Although circumstances will dictate what is, and is not, included in the indictment package presented to the Tax Division, in all SIRF cases,

the United States Attorney will make the prosecution referral and control the contents of the indictment package forwarded to the Tax Division.

Second, in time-sensitive situations in which an indictment deadline is looming due to an arrest and/or the filing of a criminal complaint, the United States Attorney must transmit the SIRF prosecution referral to the Tax Division no later than three days before the date of indictment. However, this three-day rule requires that at least one of these days be a business day, and the indictment package must contain a prosecution memorandum and draft indictment. Either the Tax Division or the United States Attorney's office may request additional written input from an investigating agency. However, neither Directive 144 nor the Expedited Review Memorandum mandates a written report from any of the investigating agency, including IRS-CI.

Third, if, in the situation described above, the Tax Division does not respond with an email taking final action on the SIRF referral by the time the matter is to be presented to the grand jury, the United States Attorney's office has authority to proceed with presentation to the grand jury and seek an indictment as though approval had been received. Note, however, that on the day preceding the scheduled indictment date, the United States Attorney's office must alert the Tax Division of the pending matter by emailing the Tax Division's SIRF Point of Contact as well as the Section Chief and Assistant Chiefs requesting final action by close of business. All SIRF email submissions can be directed to the appropriate Criminal Enforcement Section within the Tax Division via specially designated email addresses found in the Outlook address book. These email addresses are SIRF-TAX-N, SIRF-TAX-S, and SIRF-TAX-W, all of which correspond, respectively, to the Northern, Southern, and Western Criminal Enforcement Sections in the Tax Division. Email submissions to these accounts will ensure that all parties at the Tax Division who are responsible for taking final action on SIRF matters are properly notified of the pending action.

## **V. Conclusion**

SIRF crimes often entail real-time conduct that requires immediate response from law enforcement authorities. Directive 144 is responsive to these needs. It makes a three-part delegation of authority to the United States Attorney to: (1) open a SIRF case and/or grand jury investigation with or without IRS-CI participation, (2) issue criminal complaints in SIRF cases, and (3) seek and obtain seizure warrants for forfeiture of criminally derived proceeds arising from SIRF crimes, all without prior approval from the Tax Division. In return, Directive 144 imposes reporting requirements upon the United States Attorneys to keep the Tax Division informed as to the SIRF matters that are opened within their respective offices.

The Tax Division retains authority to approve all indictments and informations in SIRF cases. However, the Expedited Review Memorandum, issued by Assistant Attorney General Kathryn Keneally in accord with the Attorney General's Advisory Committee, provides for expedited and simultaneous review of proposed indictments and informations in SIRF cases. In all SIRF cases, prosecution referrals will be made directly from the United States Attorney's office to the Tax Division. The United States Attorney will control both the timing of the referral and the contents of the referral package. In SIRF cases in which an arrest or complaint has issued and an indictment deadline date is looming, the United States Attorney may have until three days prior to indictment to make the prosecution referral to the Tax Division. If the Tax Division does not respond to the prosecution request by the time the matter is scheduled to be presented to the grand jury, the United States Attorney may proceed with the indictment presentation as if approval had been granted from the Tax Division.

By issuing these policy and procedure changes in SIRF cases, the Tax Division is committed to “getting out of the way” of quickly-moving SIRF investigations that are best managed at the district level, while “staying at the table” so that it can fulfill its congressionally mandated role of supervising all criminal tax enforcement prosecutions throughout the United States. These changes permit the Tax Division and United States Attorneys’ offices to work together in responding to the ever-growing SIRF problem that adversely impacts the country during tax season and beyond. ❖

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# Prosecuting Tax Defier and Sovereign Citizen Cases—Frequently Asked Questions

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Defendants who identify as sovereign citizens or tax defiers (also known as illegal tax protesters) have many similarities, both in terms of the types of crimes they commit and the way they conduct themselves in the criminal arena. It is often difficult to distinguish between sovereign citizens and tax defiers because the schemes, tactics, and rhetoric they use are the same or similar. “Sovereign citizens” are generally defined as a loose network of individuals who claim that local, state, and federal governments have no authority over them. Similarly, many “tax defiers” claim to be “sovereign citizens” to justify their tax crimes. Their arguments usually focus around some form of absurd constitutional challenge to the tax laws. Historically, the schemes, tactics, and rhetoric used by tax defiers and sovereign citizens were confined to tax cases. Recently, however, they have appeared in many different types of criminal cases. As a result, recognizing these schemes, tactics, and rhetoric can be useful in a myriad of cases.

This article is intended as an overview of some of the issues and questions that frequently arise in the prosecution of tax defier and sovereign citizen cases. Part One of this article provides an overview of some of the hallmarks of tax defier and sovereign citizen cases, including how to identify these cases, a brief discussion of the good faith defense, and the potential for violence. Part Two discusses the “redemption theory” or the “redemption scheme,” which continues to be the most prevalent scheme currently in use by tax defiers and sovereign citizens. This section also discusses the three primary components of the redemption scheme: the use of fictitious financial instruments, the filing of false retaliatory liens, and the filing of false tax returns. Part Three touches on mental health issues that often arise in tax defier and sovereign citizen cases. Part Four discusses the additional resources that are available to prosecutors handling these cases.

## I. Overview

### A. How do you recognize a tax defier or sovereign citizen case?

Tax defier and sovereign citizen cases are easily identified by the schemes, tactics, and rhetoric they use. For instance, in tax cases, the arguments will center around some absurd challenge to the validity of the income tax laws, including claims that the Sixteenth Amendment (giving Congress the power “to lay and collect taxes on incomes”) was not properly ratified, claims that only federal employees and residents of the District of Columbia are required to pay taxes, and the claim that there is a Fifth Amendment right not to file tax returns. Other spurious claims have included arguments that wages are not income, English is an invalid language, and the gold fringed American flag denotes a court of admiralty. Chapter 40 of the Criminal Tax Manual discusses additional tax defier schemes and tactics.

Typically, tax defiers and sovereign citizens will file pleadings that contain legalistic gibberish, use archaic titles and language, and include the bizarre use of punctuation. *See, e.g., United States v. Bray*, 546 F.2d 851, 853 (10th Cir. 1976) (referring to the defendant, who had filed a tax return with no relevant information of earnings, but which included the statement “Inscribed: 5th Amendment. Go to Hell; do not pass go; do not collect \$200,” as a tax protester); *United States v. Kriemelmeyer*, No. 07-CR-052, 2007 WL 5479293, at \*1 (W.D. Wis. July 26, 2007) (discussing the background for a “subgroup of tax protestors within the Sovereign Citizen Movement” who use a dialect that “purports to be based on mathematics and is characterized by the abundant use of prepositional phrases, the absence of action verbs (except in gerund form) and the overuse of hyphens and colons”). Tax defiers and sovereign citizens will often stamp correspondence with “Accepted for Value” and other meaningless phrases. *See, e.g., Douglass v. Martin*, No. CV12-0604, 2012 WL 3890248, at \*2 n.2 (D. Ariz. Sept. 7, 2012) (finding plaintiff’s complaint seeking the enforcement of a \$7,250,000 lien for a wrongful criminal conviction as frivolous); *Crain v. Comm’r*, 737 F.2d 1417, 1418 (5th Cir. 1984) (finding appeal was a “hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish”).

Tax defiers and sovereign citizens may exhibit odd and disruptive behavior, especially in the courtroom or when dealing with another legal authority. *See, e.g., Ali v. Bragg*, No. EP-08-CA-90, 2008 WL 5683432, at \*3 (W.D. Tex. Dec. 23, 2008) (defendant found in contempt of court for refusal to remain quiet in the courtroom, and defendant continually asked the judge for his or her name and whether the judge had a claim against defendant). Many tax defiers and sovereign citizens will seek to represent themselves. If counsel is appointed, they may refuse to cooperate with or even meet with them. *See, e.g., United States v. Reed*, 668 F.3d 978, 985 (8th Cir. 2012) (Defendants, charged with filing false liens against Government officials, were described as “uncooperative, often belligerent.” One defendant covered his ears while the charges were read, threatened to fire any standby counsel who might be appointed, and demanded that the magistrate judge present her “oath of office.”); *United States v. Staten*, No. 10-CR-00179, 2012 WL 2389871, at \*8-9 (M.D. Pa. June 25, 2012) (permitting the defendant to proceed pro se following defendant’s stated desire to represent himself and his refusal to cooperate with his defense attorney).

Tax defiers and sovereign citizens also use their purported “sovereign citizen” status as justification for not titling vehicles, for not obtaining or using a state issued driver’s license, or for participating in so-called common law or other anti-government, anti-tax organizations. Some claim that they do not have to pay state or local taxes. *See, e.g., Augustinowicz v. Nevelson*, No. 10-CV-564-PB, 2011 WL 6300962, at \*1 (D.N.H. Dec. 16, 2011) (claiming that Town of Acworth could not legally tax them because, as sovereign citizens, Town had no jurisdiction). They are also known to use bogus but



legitimate-looking badges or other credentials in an attempt to lend some credibility to their sovereignty claims.

## **B. Are the schemes, rhetoric, and tactics new?**

The schemes, rhetoric, and tactics have been used—and rejected—for decades. *See, e.g., Porth v. Brodrick*, 214 F.2d 925, 925-26 (10th Cir. 1954) (describing as far-fetched and frivolous the defendant’s allegations that the Sixteenth Amendment was “illegal and unconstitutional” because it placed the taxpayer “in a position of involuntary servitude contrary to the Thirteenth Amendment”); *United States v. Lesonik*, No. 12-65 Erie, 2012 WL 4611950, at \*1 (W.D. Pa. Oct. 2, 2012) (finding that Lesonik’s assertion that no statute makes an individual liable for income tax, “as well as countless other ‘frivolous tax-protester arguments,’ has been ‘uniformly and conclusively rejected by every court that has examined the issue . . . .’ “); *United States v. Berryman*, No. 11-CV-02708, 2012 WL 3245415, at \*6 (D. Colo. Aug. 8, 2012) (noting that Berryman’s “tax protestor arguments have been rejected as meritless and frivolous by many courts . . . .”); *United States v. Ross*, No. 11-CR-032, 2012 WL 1565384, at \*1 (E.D. Tenn. May 2, 2012) (rejecting defendant’s pro se filing as “nothing more than variations on the ‘hackneyed tax protester refrain’ that the Sixth Circuit . . . has deemed ‘completely without merit and patently frivolous’ “); *United States v. Hart*, No. 86-3141, 1989 WL 69882, at \*1 (C.D. Ill. Jan. 5, 1989) (finding no citation of authority was necessary because defendant’s claims that the income tax laws do not apply to him had been rejected so often by so many courts); *see also* Jen E. Ihlo, *The Gold Fringed Flag: Prosecuting the Illegal Tax Protester*, 3 U.S. ATTORNEYS’ BULLETIN 15, 15-21 (Apr. 1998), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usab4603.pdf](http://www.justice.gov/usao/eousa/foia_reading_room/usab4603.pdf).

Likewise, asserting sovereign citizen status as a purported justification for not paying taxes is decades old and has repeatedly been rejected by the courts. *See United States v. Jagim*, 978 F.2d 1032, 1036 (8th Cir. 1992) (rejecting as “completely without merit” arguments that defendant was not subject to the tax laws because he was a sovereign citizen and the IRS was controlled by a foreign entity); *United States v. White*, No. 89-10533, 1990 WL 212593, at \*1 (9th Cir. Dec. 20, 1990) (finding that district court did not overstep its authority by ordering defendant, a self-described “sovereign citizen of the State of Nevada,” to file federal income tax returns as a special condition of probation); *United States v. Ross*, No. 3:11-CR-032, 2012 WL 1565384, at \*1 (E.D. Tenn. May 2, 2012) (finding that “sovereign citizen and tax protester” issues such as those presented by the defendant to have been “consistently and summarily rejected by the courts”); *United States v. Hart*, No. 86-3141, 1989 WL 69882, at \*1 (C.D. Ill. Jan. 5, 1989) (finding that defendant’s claim that the income tax laws do not apply to “a free born, lifelong, citizen of the sovereign state of Illinois” to be “completely frivolous and meritless”).

## **C. Are tax defier and sovereign citizen schemes, rhetoric, and tactics limited to tax cases?**

No. Common tax defier and sovereign citizen schemes and tactics are being used by defendants in all types of federal crimes. *See, e.g., United States v. Benabe*, 654 F.3d 753, 761-62 (7th Cir. 2011) (two defendants charged with RICO, murder, conspiracy, drug trafficking, and weapons offenses related to gang involvement, removed from the courtroom for disruptive behavior that included challenges to the court’s jurisdiction with claims that they were “sovereign citizens,” “secured-party creditor[s]” and “flesh-and-blood human beings”); *United States v. Brown*, 597 F.3d 399, 399-400 (D.C. Cir. 2010) (defendant charged with bank fraud and passing “fictitious financial instruments” for trying to deposit “bills of exchange” at a federal credit union); *United States v. Schreier*, No. 12-4155, 2012 WL 4088858, at \*4 (D.S.D. Sept. 17, 2012) (state inmate convicted of rape asserts sovereign citizen status as basis for

frivolous civil lawsuit); *United States v. Staten*, No. 1:10-CR-00179, 2012 WL 2389871 (M.D. Pa. June 25, 2012) (redemption scheme claims used by defendant charged with drug crimes); *United States v. Call*, No. 2:09-CR-00079, 2009 WL 6047137, at \*3 (D. Nev. Nov. 24, 2009) (defendant who followed the redemption scheme and participated in the “sovereign movement” charged with possession and transfer of a machine gun and possession of an unregistered machine gun); *Bryant v. Washington Mut. Bank*, 524 F. Supp. 2d 753, 755 (W.D. Va. 2007) (civil case involving use of Bill of Exchange to pay mortgage debt).

#### **D. What if the defendant asserts a good faith defense in one of these cases?**

The Supreme Court has interpreted the term “willfully” for criminal tax offenses as “a voluntary, intentional violation of a known legal duty.” *Cheek v. United States*, 498 U.S. 192, 202 (1991). Tax crimes requiring proof of willfulness are an exception to the general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution. *Id.* at 199-201. Tax defiers and sovereign citizens charged with tax crimes that require proof of “willfulness” often will assert a “good faith” defense by claiming that their “good faith” misunderstanding of the law negates the knowledge aspect of the “willfulness” element. As stated in *Cheek*, “the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.” *Id.* at 202. Although a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law need not be objectively reasonable in determining whether a defendant subjectively knew what the law required, one of the things the jury may consider is the unreasonableness of the asserted belief. *Id.* at 203-04. A defendant’s “views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper.” *Id.* at 206. Likewise, a defendant’s contention that a law is unconstitutional is not within the purview of the good faith defense, as such a contention does not “arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue . . . .” *Id.* at 205.

What evidence refutes a good faith defense will depend on the facts and circumstances of each case. It is often helpful to focus on evidence that shows the defendant knew the law but disregarded it or was simply defying it. For instance, evidence that the defendant received proper advice from a CPA or tax preparer, or that the defendant failed to consult legitimate sources about his or her understanding of the tax laws can be helpful. To refute claims that wages are not income, that the defendant did not understand the meaning of “wages,” or that the defendant is a state citizen but not a citizen of the United States, look for loan applications during the prosecution period. Tax defiers and sovereign citizens never seem to have a problem understanding the definition of income on a loan application. They also do not hesitate to check the “yes” box to the question “are you a U.S. citizen.” Any evidence that the defendant accepted Government benefits, such as unemployment, Medicare, social security, or the Alaska Permanent Fund Dividend will also be helpful to refute the defendant’s claims that he or she is not a citizen subject to federal laws.

Additional information about willfulness, the good faith defense, and evidence of willfulness in tax cases can be found in the 2012 Criminal Tax Manual, Chapter 8 (Attempts to Evade or Defeat Tax (26 U.S.C. § 7201)); Chapter 12 (Fraud and False Statement (26 U.S.C. § 7206(1))); and Chapter 40 (Tax Defiers).

## E. Is there a potential for violence with these cases?

Unfortunately, tax defiers and sovereign citizens do sometimes resort to violence. While it is not common, it is also not new. In 1983, as the result of a probation violation that resulted in an arrest warrant, Gordon Kahl was involved in two confrontations with law enforcement that resulted in the deaths of three United States Marshals, a county sheriff, and a police officer, before Kahl himself was killed. *United States v. Faul*, 748 F.2d 1204, 1208-10 (8th Cir. 1984); *United States v. Udey*, 748 F.2d 1231, 1234-35 (8th Cir. 1984). Kahl had been convicted in 1977 for failure to file his 1973 and 1974 federal income tax returns. See *United States v. Kahl*, 583 F.2d 1351 (5th Cir. 1978). In 1990, Andrew Schneider was convicted of using the mail to threaten to kill an Illinois circuit court judge. *United States v. Schneider*, 910 F.2d 1569 (7th Cir. 1990). Schneider's sole defense was based on his contention that the federal courts had no jurisdiction over him because he was a "free, sovereign citizen." *Id.* at 1570. In 1994, a Modesto County, California County Recorder was severely beaten for refusal "to remove IRS liens [from] a common law court member's property." *Common-Law Victims: 'Paper Terrorism' Isn't Just on Paper*, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, Spring 1998, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/1998/spring/common-law-victims?page=0,1>. In 2010, two West Memphis, Arkansas police officers, Brandon Paudert and Bill Evans, were murdered during a routine traffic stop of Jerry Kane and his 15-year old son, Joe. See Robert Steinback, *With 'Sovereign Citizen' Movement Growing, New SPLC Video Promotes Law Enforcement Safety*, HATEWATCH (Nov. 1, 2010), available at <http://www.splcenter.org/blog/2010/11/01/sovereign-citizen-movement-growing-new-splc-video-promotes-law-enforcement-safety/>. Jerry Kane was a promoter of the redemption scheme. *Id.* The murders of Officers Paudert and Evans highlight the need for state and local law enforcement officials to be aware of sovereign citizens, the potential for violence, their ties to the tax defier movement, and the schemes and tactics they employ. See Bill Morin, *Sovereigns Arrested After Police Stand-off Near Spokane*, HATEWATCH (Aug. 9, 2012), available at <http://www.splcenter.org/blog/2012/08/09/sovereigns-arrested-after-police-stand-off-near-spokane>.

## II. Redemption theory

### A. What is the "Redemption Theory" or the "Redemption Scheme"?

The redemption scheme continues to be the most prevalent nationwide scheme in use by tax defiers and sovereign citizens. Variations of the scheme have been used by tax defiers and sovereign citizens since at least 1987. See *United States v. Grosshans*, 821 F.2d 1247, 1253 (6th Cir. 1987) (defendant attempted to satisfy financial obligations with "Public Office Money Certificates"); see also Jen Ihlo & Melissa Schraibman, *Recycled "Redemption": The Latest Illegal Tax Protester Scheme*, 49 U.S. ATTORNEYS' BULLETIN 25, 25-30 (July 2001), available at [http://www.justice.gov/usa/eousa/foia\\_reading\\_room/usab4904.pdf](http://www.justice.gov/usa/eousa/foia_reading_room/usab4904.pdf); CRIMINAL TAX MANUAL ch. 40, available at <http://dojnet.doj.gov/tax/public/2008ctm/CTM%20Chapter%2040.htm>.

The specific details of the scheme vary, but the theory behind it is generally as follows: when the United States went off the gold standard in 1933, the Government used citizen birth certificates to collateralize paper money by creating a fictitious strawman identity in the name of each United States citizen. The strawman identity is signified by using all capital letters when spelling a person's name, such as in a federal indictment. The value of one's birth certificate is held in the person's strawman identity by the Treasury Department in a Treasury Direct Account and the strawman account purportedly can be "redeemed" and used to pay tax and other debts, purchase homes, vehicles, and so on. See *Monroe v.*

*Beard*, 536 F.3d 198, 203 n.3 (3d Cir. 2008); *United States v. Waalee*, 133 F. App'x 819, 822 n.2 (3d Cir. 2005); *United States v. Getzschman*, 81 F. App'x 619, 620-21 (8th Cir. 2003); *Gravatt v. United States*, 100 Fed. Cl. 279 (Fed. Cl. 2011); *Buczek v. Bruce*, No. 09-CV-1129, 2011 WL 1899769, at \*1-2 (W.D.N.Y. May 19, 2011); *United States v. Morris*, 09-CV-02381-WYD-KMT, 2011 WL 588060, at \*1 (D. Colo. Jan. 14, 2011); *United States v. Call*, No. 09-CR-00079-KJD-RJJ, 2009 WL 6047137, at \*3 n.1 (D. Nev. Nov. 24, 2009); *United States v. Dilley*, No. 1:08-CR-37, 2009 WL 1608979, at \*1 (N.D. Ind. June 5, 2009); *Bryant v. Washington Mut. Bank*, 524 F. Supp. 2d 753, 758-760 (W.D. Va. 2007). This scheme has different versions and different names. Regardless of its name or mutation, however, it has been repeatedly rejected by the courts. *United States v. Allison*, 264 F. App'x 450, 452 (5th Cir. 2008) (redemption scheme is nonsensical and soundly rejected in this and other jurisdictions); *United States v. Levy*, 849 F. Supp. 2d 1353, 1357-58 (S.D. Fla. 2012) (“every court which has considered the ‘redemption theory’ has dismissed it as frivolous”).

The scheme in use today has three primary components: (1) using fictitious financial obligations to pay tax and other debts; (2) filing false liens and other retaliatory documents, such as UCC Financing Statements, against Government officials who have tangled with the sovereign citizen/tax defier; and (3) filing false tax returns often based on false IRS Forms 1099-OID (described later in this article).

**Fictitious financial instrument cases:** In these cases, a defendant uses a fictitious financial instrument to pay taxes and other debts. Tax defiers and sovereign citizens have been using fictitious financial instruments since the 1980s. *See, e.g., Grosshans*, 821 F.2d at 1253 (defendant attempted to satisfy financial obligations with “Public Office Money Certificates”); *see also* CRIMINAL TAX MANUAL ch. 40.02, available at [http://dojnet.doj.gov/tax/public/2008ctm/CTM%20Chapter%2040.htm#TOC3\\_2](http://dojnet.doj.gov/tax/public/2008ctm/CTM%20Chapter%2040.htm#TOC3_2). Recently used names for these fictitious financial instruments include “Discharging and Indemnity Bond,” “Bonded Promissory Note,” and “Registered Bond.” These documents are usually printed on 8.5- by 11-inch paper with some form of elaborate border. The language used is dense and often archaic.

In 1996, in response to bogus monetary instruments, then titled “comptroller warrants,” used by the Montana Freeman and others, Congress enacted 18 U.S.C. § 514. 142 Cong. Rec. S10155-02, S1013 (daily ed. Sept. 10, 1996). Since then, § 514, which carries a maximum prison sentence of 25 years, has been the key statute used to prosecute fictitious financial instrument cases. The elements of § 514 and a discussion of issues relating to this statute can be found in Chapter 40.02[1][b] of the Criminal Tax Manual.

While a redemption scheme expert is not advisable, it is a good idea to consult with an expert in negotiable instruments in fictitious financial instrument cases. A negotiable instruments expert may be used to explain why and how the document is fictitious. *See United States v. Pansier*, 576 F.3d 726, 737 (7th Cir. 2009) (allowing testimony about Treasury Direct Accounts in the context of Office of Comptroller of Currency (OCC) expert witness’s analysis that sight drafts were fictitious financial instruments); *United States v. Heath*, 525 F.3d 451, 455 (6th Cir. 2008). A negotiable instruments expert can also address the use of the label “non-negotiable,” which often appears on fictitious financial instruments. “Non-negotiable” means that negotiation of the instrument is limited to the parties named within. It does not preclude prosecution. *See United States v. Salman*, 531 F.3d 1007, 1012-14 (9th Cir. 2008) (holding that instruments with the label “non-negotiable” were within the purview of § 514 and discussing testimony of witness from OCC about the meaning of the phrase); *but see Heath*, 525 F.3d at 455 (noting that the district court, in a non-appealable order, had granted a motion under Federal Rule of Criminal Procedure 29 to dismiss one § 514 charge because face of instrument stated it was “not negotiable”).

**Harassment cases:** Historically, tax defiers and sovereign citizens have used a number of IRS forms, such as Forms 8300 and 1099-MISC, as well as common law court documents, such as arrest warrants, to intimidate and harass Government officials. *See, e.g., United States v. Saldana*, 427 F.3d 298 (5th Cir. 2005) (following the redemption scheme, defendants used false IRS Forms 8300 to retaliate against various Government officials); CRIMINAL TAX MANUAL ch. 40.02[1]. Most recently, tax defiers and sovereign citizens have been filing false retaliatory liens, such as UCC Financing Statements and Notices of Maritime Liens, against Government officials. Cecelia Lutz’s article, “18 U.S.C. § 1521—Combating the Filing of Retaliatory Liens Against Federal Officials” in this publication, provides a thorough discussion of the documents utilized and the primary charging statute, 18 U.S.C. § 1521.

**False refund cases:** The third component of the Redemption scheme, sometimes referred to as “OID,” involves the filing of false tax returns, usually based on fraudulent IRS Forms 1099-OID, 1099-A, and/or Schedules A or B of IRS Forms 1040. The Forms 1099-OID are sometimes filed with the IRS separately from the return. Other times they are attached to the return. The Forms 1099-OID can be filed with individual income tax returns (IRS Forms 1040) or tax returns for estates and trusts (IRS Forms 1041). Either way, the numbers on the returns are false—either because they were simply made up and are wholly fictitious, or because they are based on some convoluted theory related to the amount of debt the defendant owes his creditors and/or the IRS. These cases are best charged and tried as the refund schemes that they are. Because the tax returns typically have wholly fictitious numbers on them, the false returns are often charged as violations of the false claims statute, 18 U.S.C. § 287. *See* Chapter 22 of the Criminal Tax Manual for a discussion of the criminal false claims statute and cases related thereto. The following cases describe this component of the scheme: *United States v. Jones*, No. 09-CV-00547-EJL, 2011 WL 2680742, at \*5-6 (D. Idaho July 7, 2011); *United States v. McIntyre*, 715 F. Supp. 2d 1003, 1006 (C.D. Cal. 2010); *United States v. Knupp*, No. 09-CV-2724, 2010 WL 2245551, at \*2-3 (N.D. Ga. May 14, 2010); *United States v. Marty*, No. CIV S-09-0600 FCB EFB PS, 2010 WL 323518, at \*5-6 (E.D. Cal. Jan. 14, 2010).

## **B. What if there is no actual loss?**

The issue of loss frequently arises in fictitious financial instrument cases, particularly when there is no actual loss. Prosecution should not be precluded solely because the IRS, bank, or other creditor recognized or determined that the instrument was bogus and did not release property or credit accounts. In those instances, however, the prosecutor should ensure that the Government’s evidence clearly demonstrates the defendant’s willfulness or intent. In some cases, a fictitious financial instrument or harassment case may be the only viable charge.

The United States Sentencing Guidelines instruct that loss calculations should be determined by the “greater of the actual loss or intended loss.” U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, app. 3(A)(i)-(iii) (2012). “Actual loss” is the reasonably foreseeable pecuniary loss that resulted from the offense. *Id.* “Intended loss” is “the pecuniary harm that was intended to result from the offense” and includes “intended pecuniary harm that would have been impossible or unlikely to occur.” *Id.* Unfortunately, this calculation is not always as simple as it sounds. In *United States v. Dilley*, the district court capped the loss at the amounts defendant’s debtors would have lost if they had relied on the notes, after discussing the need to consider Dilley’s actual, not constructive, intent and the loss relation to “economic reality.” No. 08-CR-37, 2009 WL 1564389 (N.D. Ind. June 3, 2009); *but cf. United States v. Rogozinski*, 339 F. App’x 963 (11th Cir. 2009) (where the Eleventh Circuit found reasonable a sentence based, in part, on an intended loss of more than \$10 million).

### **C. Should a scheme “expert” be used to explain the redemption scheme, Forms 1099-OID, and other scheme-related terms?**

There is usually no need to use a scheme expert to explain the redemption scheme or the Form 1099-OID. An IRS Form 1099-OID is legitimately used to report “Original Issue Discount” income, a reportable form of taxable interest based on the difference between the maturity and issuance prices of a debt instrument. See *United States v. Jones*, No. 4:09-CV-00547-EJL, 2011 WL 2680742, at \*5 n.3 (D. Idaho July 7, 2011); *McIntyre*, 715 F. Supp. 2d at 1006-07; *United States v. Knupp*, No. 1:09-CV-2724, 2010 WL 2245551, at \*2 (N.D. Ga. May 14, 2010); *Marty*, 2010 WL 323518, at \*1.

The most important fact regarding the Forms 1099-OID is not the form itself or how it should be used, but that the amounts on the form are completely false and the defendant knew that when he or she filed or used it. Putting on evidence about how the form should have been used or how it is typically used may only confuse the jury. The key is to keep the jury focused on the fact that the numbers are false. Additionally, having a scheme “expert” testify about how the redemption scheme works or how the form should have been used may appear to lend credibility to the scheme or the defendant’s use of the form. The best advice is to stay focused on the facts of the case and not to get sidetracked by the defendant’s nonsense.

## **III. Mental health issues in tax defier and sovereign citizen cases**

### **A. Are these defendants mentally ill?**

Tax defier and sovereign citizen conduct or rhetoric alone is not indicative of a mental illness. Unfortunately, however, this conduct is sometimes so unusual that even mental health professionals may confuse the conduct and rhetoric with a mental disease or defect, if they are unfamiliar with the subculture. According to the Diagnostic and Statistical Manual of Mental Disorders (DSM), mental health professionals should take into account an individual’s subculture when making a mental health diagnosis. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISIONS (DSM-IV-TR) (2000) (“An individual’s cultural and religious background must be taken into account in evaluating the possible presence of Delusional Disorder. Some cultures have widely held and culturally sanctioned beliefs that might be considered delusional in other cultures.”). Those who are familiar with the tax defier and sovereign citizen subculture can easily distinguish tax defier conduct from conduct associated with mental illness.

A key difference between a bona fide mental illness and tax defier or sovereign citizen conduct and rhetoric is that tax defier behavior is learned, and is not particular to a specific individual. Tax defiers and sovereign citizens follow scripts and parrot information that is taught in seminars and found in newsletters, books, and on the Internet. Often the conduct and rhetoric will appear only in the context of a conflict with the government or legal authority. Typical tax defier behavior that is sometimes erroneously confused with an actual mental illness includes making nonsensical claims in documents filed with the court, giving nonsensical responses to questions posed by the court, refusing to provide information to a Pretrial Services officer, or making claims about ineligibility of the court or the prosecutors.

## B. What type of things can prove the defendant is not mentally ill?

In order to determine whether mental illness is actually an issue that must be investigated, look at how the defendant functions in other areas of his or her life. Is the defendant able to perform everyday tasks, such as taking public transportation, paying bills, driving, and sustaining personal relationships? Is there a history of mental illness? The defendant's educational background and job history may also be helpful in making this determination. If the defendant is in custody, recorded telephone calls can be a good indication about how the defendant conducts his or her financial and personal affairs and how he or she interacts with others outside the courtroom. See *United States v. Lupi*, No. 8:05-CR-131-T-30MSS, 2007 WL 2729657, at \*4 (M.D. Fla. Sept. 18, 2007). It may also be helpful to provide the court with cases discussing other defendants who have used similar arguments, or the "script" of the nonsense that the defendant is spewing. See *id.*; *United States v. Brown*, 669 F.3d 10, 16-20 (1st Cir. 2012); *United States v. Johnson*, 610 F.3d 1138, 1140 (9th Cir. 2010); *United States v. Alden*, 527 F.3d 653, 659-61 (7th Cir. 2008); *United States v. Hall*, No. CR 111-270, 2012 WL 899635, at \*3 (S.D. Ga. Feb. 23, 2012).

## C. When and how do mental health issues arise in these cases?

Mental health issues can arise at any point during a tax defier or sovereign citizen case and may be raised by any party or the court. The mental health of the defendant is significant at two different times: competency at the time of trial (or sentencing) and defendant's state of mind at the time of the offense conduct. The defendant may seek to introduce expert testimony relating to his state of mind at the time of the offense, either at trial or during sentencing. Some courts have referred to this type of evidence as "diminished capacity" evidence. See *United States v. Twine*, 853 F.2d 676, 678 (9th Cir. 1988); but see *United States v. Cameron*, 907 F.2d 1051, 1060-63 (11th Cir. 1990) (describing confusion surrounding the term "diminished capacity"); *United States v. Pohlot*, 827 F.2d 889, 897, 903-05 (3d Cir. 1987) (same).

**Competency:** Either the defendant, an attorney for the Government, or the court on its own motion, can move for a judicial determination of competency. 18 U.S.C. § 4241(a) (2012). In order to find a defendant incompetent, the court must find by a preponderance of the evidence that "the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense . . ." *Id.* § 4241(d); accord *Dusky v. United States*, 362 U.S. 402 (1960). The threshold for finding a defendant incompetent is quite high. If a defendant is found to be incompetent, the remedy is to hospitalize him for treatment, typically at a Bureau of Prisons facility, until he regains competency. 18 U.S.C. § 4241(d) (2012). If the request for a competency evaluation is based on nothing more than a defendant's tax defier or sovereign citizen behaviors, the Government may consider opposing the evaluation and/or a competency hearing.

After the issue of competency is raised, the court may order a psychiatric or psychological examination of the defendant, if one has not already been conducted. *Id.* § 4241(b). The competency report must be filed with the court. *Id.* The court should make a determination about whether a competency hearing is necessary, based on the report. This is a factual determination that is reviewed for abuse of discretion. See *United States v. Marks*, 530 F.3d 799 (9th Cir. 2008). If the court orders a competency evaluation, the order should include a deadline to ensure that the examination is done promptly. After the examination is completed, the Government should request a copy of the evaluator's report, pursuant to 18 U.S.C. § 4247(c).

**Admissibility of mental health evidence:** The Insanity Defense Reform Act of 1984 (IDRA) limits a defendant's ability to raise a mental health issue as a defense. The statute provides that a mental disease or defect is not a defense unless a defendant presents an affirmative defense of insanity, which requires the defendant to present clear and convincing evidence that "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a) (2012). The insanity defense operates to completely excuse the defendant of a crime, whether or not guilt can be proven. *Twine*, 853 F.2d at 678. In the absence of an insanity defense, a defendant may not offer any type of "legal excuse based upon one's lack of volitional control [or] diminished ability or failure to reflect adequately upon the consequences or nature of one's actions." *Cameron*, 907 F.2d at 1061; see 18 U.S.C. § 17 (2012).

An exception to the IDRA's general prohibition on the presentation of mental health evidence exists in cases when a defendant seeks to present mental health evidence to rebut the Government's evidence of specific intent. See *United States v. Brown*, 326 F.3d 1143, 1147 (10th Cir. 2003); *United States v. Worrell*, 313 F.3d 867, 873 (4th Cir. 2002); *United States v. Pohlot*, 827 F.2d 889, 905 (3d Cir. 1987). Courts have reasoned that such evidence is not an affirmative defense, but rather "goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime." *Cameron*, 907 F.2d at 1063. Normally, such mental health evidence takes the form of expert psychological or psychiatric testimony, which is admissible if it "will help the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a). An expert, however, "must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." *Id.* 704(b). Thus, while an expert might be permitted to testify as to a mental condition that may have affected the defendant's state of mind at the time of the offense conduct, the expert cannot opine as to whether the defendant acted wilfully or intentionally.

District courts must carefully scrutinize proffered mental health evidence, as "the . . . use of psychiatric evidence to negate mens rea may easily slide into wider usage that opens up the jury to theories of defense more akin to justification." *Pohlot*, 827 F.2d at 905; see also *Cameron*, 907 F.2d at 1067 (explaining that psychiatric evidence only rarely negates specific intent and presents an inherent danger of distracting the jury from focusing on the actual presence or absence of mens rea). Defendants must make a clear link between the proffered mental health evidence and the specific intent required to commit the crime. Evidence that a defendant is unable to control his or her actions or to reflect upon the consequences of those actions is inadmissible. See *Worrell*, 313 F.3d at 874-75. An example of admissible mental health testimony comes from *United States v. Staggs*, 553 F.2d 1073 (7th Cir. 1977), in which the defendant was charged with threatening to shoot a police officer. The court held that the defendant was entitled to present psychiatric evidence that the defendant was more likely to try to hurt himself than to threaten others. *Id.* at 1075-76. Note that the case law distinguishes between evidence tending to show that a defendant lacked the required specific intent, and evidence showing that a defendant lacked *the capacity* to form the required specific intent. See *Cameron*, 907 F.2d at 1066. Evidence of an inability to form the required specific intent constitutes an effort to justify or excuse criminal behavior, which the IDRA does not permit. *Id.*

In tax defier and sovereign citizen cases, the typical proffered expert testimony will support the inadmissible defense that the defendant committed the crime, but did not have the requisite mens rea because he or she could not conform his or her behavior to the law or did not fully appreciate the consequences of his or her actions. This type of testimony is inadmissible at trial. See *Worrell*, 313 F.3d at 873; *Cameron*, 907 F.2d at 1066; *Pohlot*, 827 F.2d at 906-07.



Those practicing in the Ninth Circuit should be aware of two cases in which the court held that a criminal tax defendant was entitled to present mental health evidence. *See United States v. Cohen*, 510 F.3d 1114 (9th Cir. 2007) (permitting evidence of narcissistic personality disorder in tax evasion case where defendant asserted a good faith defense); *United States v. Finley*, 301 F.3d 1000, 1018 (9th Cir. 2002) (permitting evidence of defendant's delusional disorder in bank fraud and tax evasion case). These cases suggest that the Ninth Circuit takes a broader view of the type of mental health evidence that a defendant may present at trial.

#### **D. Is a psychological evaluation of the defendant always necessary?**

Whether a psychological evaluation of the defendant is necessary is a complicated issue that should be approached cautiously. If there is no indication that a defendant suffers from a mental illness beyond the bizarre behaviors and rhetoric associated with the tax defier and sovereign citizen subculture, a psychological evaluation may not be necessary. *See, e.g., United States v. Landers*, 564 F.3d 1217, 1223 (10th Cir. 2009) (upholding the district court's refusal to order a competency evaluation because the defendant, who had no history of mental illness and a long history of rejecting government authority, parroted bizarre courtroom behavior designed to disrupt proceedings). As a practical matter, many courts will order a competency evaluation, out of an abundance of caution, even when one may not be legally necessary.

If a psychological evaluation is ordered, several options are available. The court may order that an evaluation be conducted inpatient, by the Bureau of Prisons, or outpatient, by a professional designated by the court. There are advantages and disadvantages to both inpatient and outpatient evaluations. An inpatient evaluation requires that the defendant be incarcerated while he or she is evaluated (typically four to six weeks). Inpatient evaluations are lengthy and costly, but they are also very thorough. An outpatient evaluation is usually done more quickly and does not require the defendant to be incarcerated. In either instance, the Government should supply the evaluator with information about where the defendant obtained the tax defier or sovereign citizen information he or she is spouting.

#### **E. Mental health issues at sentencing**

If a defendant's mental health has been an issue prior to the sentencing phase in a tax defier or sovereign citizen case, it will certainly be an issue at the defendant's sentencing. The defendant may ask for a downward departure under the United States Sentencing Guidelines (U.S.S.G.), in addition to a *Booker* variance based on mental health issues. Departures on the grounds of mental illnesses are relatively uncommon. In almost all cases where a court departed or varied downward for reasons relating to mental health issues, an expert witness testified about the defendant's diagnosed mental illness.

Section 5K2.13 of the U.S.S.G. outlines the requirements for a departure based on diminished capacity grounds. A departure based on diminished capacity grounds requires: (1) a significantly reduced mental capacity at the time of the offense, and (2) a causal link between that reduced capacity and the commission of the offense. *United States v. Leandre*, 132 F.3d 796, 803-05 (D.C. Cir. 1998); *United States v. Cantu*, 12 F.3d 1506, 1515 (9th Cir. 1993); *United States v. Lauzon*, 938 F.2d 326, 330-31 (1st Cir. 1991); *United States v. Prescott*, 920 F.2d 139, 146 (2d Cir. 1990). The extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense. *United States v. Jimenez*, 212 F. Supp. 2d 214, 216 (S.D.N.Y. 2002). If the significantly reduced mental capacity did not contribute to the offense, a departure is not permitted. *Id.*

A survey of the case law on diminished capacity departures indicates that these departures are rare. *See United States v. Goossens*, 84 F.3d 697, 701 (4th Cir. 1996) (overturning district court's downward departure because, despite a diagnosis of dysthymic disorder and generalized anxiety disorder, the defendant had above average intellectual capacity with no signs of psychosis or gross organic dysfunction, and his mental problems did not "impair the formations of reasoned judgments"); *United States v. Sammoury*, 74 F.3d 1341, 1346 (D.C. Cir. 1996) (finding that a defendant, who had exercised sound judgment in other matters and committed an offense that required extensive planning, did not suffer from a reduced mental capacity); *United States v. Johnson*, 979 F.2d 396, 401 (8th Cir. 1992) (reversing a diminished capacity departure on the basis that the defendant, a bank vice president, demonstrated mental agility in professional affairs); *United States v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991) (upholding the district court's decision not to depart on the basis of diminished capacity because the defendant was able to absorb information in the usual way and exercise the power of reason).

The court may consider a "variance," or a sentence outside the Guidelines range other than as provided for in the Guidelines, only after departures have been considered. In some cases, a circumstance that is prohibited for departure may be considered as a basis for a variance. *See United States v. Chase*, 560 F.3d 828, 832 (8th Cir. 2009) (holding that "departure precedent does not bind district courts with respect to variance decisions, it is merely persuasive authority"). If mental health is an issue, the court may vary downwards based on two 18 U.S.C. § 3553(a) factors: (1) characteristics of the defendant and (2) the defendant's health problems. *See United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (affirming a downward variance of 43 months below the bottom of the guideline range based on the defendant's combination of physical and mental disabilities); *United States v. Huckins*, 529 F.3d 1312 (10th Cir. 2008) (affirming a downward variance based on the defendant's depression at the time of the offense and the short time period in which the offense took place).

#### **F. Is there a difference between being competent to stand trial and being competent to represent oneself?**

Yes. Even if the defendant is determined to be competent to stand trial, the trial court may need to make a separate determination that the defendant is "competent" to represent himself or herself. *See Indiana v. Edwards*, 554 U.S. 164, 178 (2008) (holding that the "Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"). In *Edwards*, the defendant, who suffered from schizophrenia, was ultimately determined to be competent to stand trial, but the trial court found that he was not competent to represent himself. *Id.* at 178; *but cf. United States v. Reed*, 668 F.3d 978, 985 (8th Cir. 2012) (discussing *Edwards* and concluding that "the Constitution *may* have allowed the trial judge to block his request to go it alone, but it certainly didn't require it."); *United States v. Berry*, 565 F.3d 385, 392 (7th Cir. 2009) (stating that "Berry was just a con man who couldn't quit, a swindler who 'never dropped [] his mask.' He tried to hustle the jury with the same story he told his victims, but that doesn't mean he actually believed the story, and it certainly doesn't mean he suffered from a 'severe mental illness.'"); *United States v. Johnson*, 610 F.3d 1138, 1140 (9th Cir. 2010) (a debt elimination case where both defendants were "adamant in their desire to represent themselves and assert an absurd legal theory wrapped up in Uniform Commercial Code gibberish," but had no mental disorders, and where the court stated, "The record clearly show[ed] that the defendants are fools, but that is not the same as being incompetent. Under both *Faretta* and *Edwards*, they had the right to represent themselves and go down in flames if they wished.").

## IV. Resources

One key resource—the Criminal Tax Manual—has been cited within this document. Chapter 40 of the Criminal Tax Manual, *available at* <http://www.justice.gov/tax/readingroom/2008ctm/TaxManual2008.htm>, has a comprehensive chapter on tax defiers along with chapters on each of the Title 26 criminal tax statutes and some Title 18 statutes that are commonly used in tax cases. It also contains indictment and jury instruction forms. In addition, as National Director, Jen Ihlo is available to provide sample pleadings, review indictments, and discuss investigative and trial strategies in any tax defier or sovereign citizen case—whether or not tax charges are contemplated. The Tax Division has decades of experience prosecuting these cases. Give one of us a call for guidance or sample pleadings. One phone call may well save you hours of time and keep you from reinventing the wheel! ❖

### ABOUT THE AUTHORS

❑ **Jen E. Ihlo**, Senior Litigation Counsel and National Director for the Tax Defier Initiative, has been a trial attorney with the Tax Division since July 1989. In April 2008, she was appointed National Director of the Tax Defier Initiative. Prior to appointment as National Director, she served as Special Counsel for Tax Protest Matters (Criminal) for 12 years. Ms. Ihlo has prosecuted numerous tax protester cases, including members of the Republics of Texas and Oklahoma, proponents of the 861 scheme, operators of a warehouse bank, and redemption scheme followers who filed retaliatory liens against Government officials. She also regularly lectures on the subjects of investigating and prosecuting tax defier cases. Ms. Ihlo is the author of *The Gold Fringed Flag: Prosecution of the Illegal Tax Protester*, 46 UNITED STATES ATTORNEYS' BULLETIN 15 (Apr. 1998), and co-author of *The Pro Se Defendant*, 46 UNITED STATES ATTORNEYS' BULLETIN 29 (July 1998), and of *Recycled "Redemption": The Latest Illegal Tax Protester Scheme*, 49 UNITED STATES ATTORNEYS' BULLETIN 25 (July 2001). ❖

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# 18 U.S.C. § 1521—Combating the Filing of Retaliatory Liens Against Federal Officials

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## I. Introduction

Your day at the office takes a decided turn for the worse when the bank handling the refinancing of your home mortgage calls to tell you that there is a big problem with your title. On file with the county recorder of deeds is a multi-million dollar lien against you, listing your house and everything else you own as collateral. The bank would like an explanation. Your spouse is displeased. Lots of questions pop into your mind. How could this have happened? Who filed the lien? How could the recorder's office just accept a clearly bogus lien? What does this mean to your credit? How can this be fixed? You recall receiving strange letters from a former defendant demanding that you pay him millions in damages. You wish that you had done something with them besides locking them in your file cabinet. As far-fetched as this seems, Assistant United States Attorneys, Department of Justice attorneys, judges, other federal employees have sometimes found themselves on the receiving end of these liens or, more commonly, assigned to prosecute those responsible for filing false liens against other Government officials.

The filing of retaliatory liens against Government officials has been used by tax defiers and sovereign citizens with increasing frequency in the last few years. *See Jones v. Caruso*, 569 F.3d 258, 261 (6th Cir. 2009) (citing cases). The liens potentially harm these Government officials by damaging their credit and publishing their identifying information, and also cause the expenditure of Government resources to have the liens expunged. Internal Revenue Service (IRS) officials involved in civil audits and collection, and in criminal investigations, are frequently targeted. Additionally, federal judges, prosecutors, and other highly placed Government officials have been the subject of such retaliation. This scheme is an outgrowth of the 1980s "redemption scheme," which often involved harassing Government officials by reporting to the Government that the officials received income or were involved in large currency transactions, through the filing of Forms 1099, Forms 8300, Currency Transaction Reports, and Suspicious Activity Reports. *See Jen E. Ihlo & Melissa E. Schraibman, Recycled "Redemption": The Latest Illegal Tax Protester Scheme*, 49 UNITED STATES ATTORNEYS' BULLETIN 25, 25-28 (July 2001). These false filings are intended to harass the victims, retaliate against them for the performance of their official duties, and to divert their attention from their work.

To address this problem, Congress, in 2007, enacted Section 201 of the Court Security Improvement Act, codified at 18 U.S.C. § 1521, which made it a 10-year felony to file fictitious liens in retaliation for official acts performed by federal officials. The Act "creates a new Federal criminal offense for the filing of fictitious liens against real and personal property owned by Federal judges, attorneys and

employees [and] is intended to penalize individuals who seek to intimidate and harass Federal judges and employees by filing false liens against their real and personal property.” H.R. REP. NO. 110-218, at 827 (2007). Because of its recent enactment, there are few judicial opinions—published or unpublished—interpreting the statute. Some of the legal questions that have arisen in the review and prosecution of these cases, include: What is a lien or encumbrance? Must the lien document have to specifically describe property belonging to the Government official? If a lien document lists more than one victim or is filed with more than one government office, what is the unit of prosecution? How can a prosecutor find out if liens have been filed against him or her? This article intends to give a brief overview of § 1521 and discuss how these issues have been addressed in recent cases.

## II. The statute

Section 1521 provides:

[w]hoever files, attempts to file, or conspires to file, in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in section 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation, shall be fined under this title or imprisoned for not more than 10 years, or both.

18 U.S.C. § 1521 (added by Pub. L. 110-177, 121 Stat. 2536 (2008)).

In order to establish a violation of § 1521, the Government must prove the following beyond a reasonable doubt:

1. That the defendant filed, attempted to file, or conspired to file, in a public record, a false lien or encumbrance against the real or personal property of an individual
2. That such individual was an officer or employee of the United States or of any agency in any branch of the United States Government
3. That the defendant filed the lien or encumbrance on account of the performance of such individual’s official duties, and
4. That the defendant knew or had reason to know that such lien or encumbrance was false or contained any materially false, fictitious, or fraudulent statement or representation

### A. What is a lien or encumbrance?

Tax defiers and sovereign citizens often file confusing and oddly named documents that raise the issue of whether the document qualifies as a lien or encumbrance under the statute. They may file documents using their unique lexicon, entitled “Claim of Injury” or “Notice of Debt.” In most cases, however, defendants file financing statements under the Uniform Commercial Code (UCC) with the Secretary of State, County Recorder of Deeds, or other office in the state where the purported debtor resides. *See* U.C.C. §§ 9-301(1), 9-307(b)(1), (c), and 9-501(a). The UCC Financing Statements (Forms UCC-1) purport to report that the defendant has a security interest in the real or personal property of the

federal official. The federal official is listed as the debtor and the defendant is listed as the creditor. In some cases, the IRS or United States Treasury is listed as the debtor, and an amendment is filed that adds the name of a Government official as debtor. The amount of the debt and collateral purportedly attached are described in the form. Another common type of lien is a “Notice of Claim of Maritime Lien,” which, like the Form UCC-1, is an actual security document intended to be filed with the United States Coast Guard’s National Vessel Documentation Center, regarding mortgaged vessels. These maritime notices report the name of the official victim as the name of the “vessel,” the Secretary of the Department of Transportation as the owner of the vessel, and the filer as claimant. An amount of the purported debt is also listed on the form.

Regardless of whether the “lien” is evidenced by a form used commercially or one devised by tax defiers or sovereign citizens, the debt reported on the form is a fiction. In tax-related cases, defendants generally set up the lien by submitting demands for payment from their official victims. These demands resemble notices that the IRS sends to taxpayers prior to filing a federal tax lien. After the stated time for payment has expired, defendants declare the victim in default, and then file lien documents in a public record reflecting the purported debt arising from the default. Forms UCC-1 frequently have attached affidavits or other documents that outline the purported basis for the debt based on the failure of the official to respond to these demands for payment. Because of the unusual language used on these forms, the first question that often arises when reviewing them is, is that thing a lien or an encumbrance?

In the only published court of appeals decision involving § 1521, *United States v. Reed*, 668 F.3d 978 (8th Cir. 2011), the court took a legalistic approach to determining the meaning of “liens and encumbrances” and the proper purpose of these public filings. The court explained that:

[t]he words “lien” and “encumbrance,” though encompassing a wide variety of commercial and financial devices, have a universally accepted meaning in this country. A lien is a property right, usually a legal right or interest that a creditor has in a debtor’s property, whether perfected or merely claimed. [citation omitted]. Likewise, an encumbrance is a claim or liability that attaches to property, usually though not always real property. *Permanent Mission*, 551 U.S. at 198; *Black’s, supra*, at 568; UCC § 9–102(32). The act of filing does not create the lien or encumbrance. Rather, filing is a method, often the exclusive method, of *perfecting* a lien claim against the rights of those who assert competing claims against the property. *See, e.g.*, UCC § 9–310(a). . . . Most liens are created by a contract between the debtor and a creditor, such as a security agreement. Some arise by operation of law, such as a materialman’s [sic] lien or a federal tax lien. *See, e.g.*, 26 U.S.C. § 6321. Filing requirements to perfect a lien are prescribed by statute and vary with the type of lien. We deal here with a filing under the UCC, which has been adopted with minor variations by every State. The UCC governs the creation, attachment, and perfection of “security interests,” which are contractual “liens” within the meaning of 18 U.S.C. § 1521. *See* UCC §§ 9–102(72)(A), 9–201(a), 9–203(a), 9–301. Under the UCC, most security interests are perfected by the filing of a financing statement, typically a Form UCC-1. § 9–310(a).

*Id.* at 982-83. Reed and co-defendant Davis were convicted of filing and conspiring to file a false Form UCC-1 against a federal judge and United States Attorney for the District of North Dakota. Reed and Davis claimed that their membership in the Little Shell Nation, an unrecognized Indian tribe, meant that they were not United States citizens or subject to the jurisdiction of the federal courts. After the judge denied a motion to dismiss a firearm charge against Reed, Davis filed a Form UCC-1 against the judge

and the United States Attorney claiming that they owed Davis \$3.4 million. As is common, the financing statement was filed electronically and accepted by the Recorder of Deeds in Washington, D.C. without review.

There is no requirement that a putative lien meet all of the technical requirements of a lien to be charged under § 1521. That lien documents are generally technically incomplete, virtually incomprehensible, or facially absurd, is not an impediment to successful prosecution under § 1521. The broad language of the statute covers attempts and conspiracies to file the liens. In *Reed*, the court stated that the fact that the UCC filings would not have succeeded in perfecting a priority claim as a matter of law was not a defense. *Id.* at 984-86. The Eighth Circuit noted that:

[t]he prohibition in 18 U.S.C. § 1521 is triggered by the filing of a false or fictitious lien, whether or not it effectively impairs the government official's property rights or interests. Indeed, legal insufficiency is in the nature of the false, fictitious, and fraudulent liens [] that Congress intended to proscribe.

*Id.* at 984-85.

The defendant in *United States v. Davenport*, 2011 WL 1155191, at \*1 (E.D. Wash. Mar. 29, 2011) challenged the sufficiency of the liens in a motion to dismiss the indictment. *See id.* Davenport filed a "Notice of Claim of Maritime Liens" in the amount of \$5,184,000,000 against the United States Attorney, an AUSA, the United States District Court Clerk, and an IRS Revenue Officer involved in a civil tax collection action. Davenport argued that the documents that he filed were not liens, but facially invalid notices of liens because the liens attached to a "vessel," which did not exist. In an unpublished opinion, the district court denied the motion to dismiss, noting that even if the documents were not liens, the statute also prohibited the filing of an encumbrance, suggesting that Congress intended that "any document that looks like a lien is prohibited." *Id.* The court stated:

[t]hat [the] defendant entitled the documents a "notice" and a "maritime" lien does not bring his actions outside the net of the statute. The statute does not require that the "false lien or encumbrance" meet technical requirements to be a "lien" or "encumbrance." Indeed, the statute punishes the filing of "false liens" not "false [valid] liens" since all false liens are invalid. The words "false lien" must be read together—"bogus records intended to function as liens by burdening and impairing another's interest in property." Gov't. Resp. 3.

This interpretation is consistent with the legislative history of the statute. The statute was enacted as part of the Court Security Improvement Act in 2007. The House Report states that the statute "creates a new Federal criminal offense for the filing of fictitious liens against real and personal property owned by Federal judges, attorneys and employees [and] is intended to penalize individuals who seek to intimidate and harass Federal judges and employees by filing false liens against their real and personal property." H.R. Rep. No. 110-218, pt. 1 at 827 (2007) (emphasis added). The use of the term "fictitious" undermines defendant's argument that the false lien must meet the technical requirements of a "lien."

*Id.* at \*1-2. A similar defense was raised and rejected in *United States v. Hoodenpyle*, 461 F. App'x 675, 680, 682-83 (10th Cir. 2012).

## B. What is property of the official?

The descriptions of the property belonging to the Government official range from precise real estate descriptions of an official's personal residence to broad general descriptions that encompass all of the official's real and personal property. A defense that has been raised in lien cases is that the lien document does not specifically describe the property of the official victim. In *Reed*, the defendant appealed his conviction on the grounds that the Form UCC-1 filed against a federal judge and the United States Attorney did not identify the property of the victims. The appellate court noted that the "appeal focuses on the incoherent 'collateral' section of his Form UCC-1 financing statement." *Reed*, 668 F.3d at 983. The Eighth Circuit upheld the conviction, noting that the document "description named types of personal property against which valid liens can be filed—'sliver [sic] coinage' and 'proceeds, products, accounts and fixtures.'" *Id.* at 984.

In another case, *United States v. Chance*, 2012 WL 5395263, at \*1 (4th Cir. Nov. 6, 2012), the Form UCC-1 filed against the AUSA did not include a detailed property description. The form claimed that the AUSA owed Chance \$1,313,000,000, but stated only that it attached to "All proceeds, products, accounts, baggage and fixtures, the [sic] order therefrom are to be released to the Secured Party/Claimant as the authorized representative of the Debtor and/or Claim Debtor." The only address listed on the form for the prosecutor was his office address, and the prosecutor's name was misspelled on the form. *Trial Transcript for November 16, 2011* at 41; *United States v. Chance*, AW-10-CR-0760 (D. Md. Apr. 26, 2012) (No. 166). Because the statute also prohibits attempts, the Government successfully prosecuted Chance for violating § 1521 by filing the form despite the vague property description.

## C. Who is a federal official?

Section 1521 prohibits the filing of false liens against federal officials referenced in 18 U.S.C. § 1114. Section 1114 describes an official as:

any officer or employee of the United States or of any agency in any branch of the United States Government . . . while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee, in the performance of such duties . . . .

*Id.*

As the court noted in the *Reed* case, the filing must claim an interest in the property of a Government official—not just a Government agency—to be within the reach of § 1521.

This confirms that Congress limited the prohibition in § 1521 to financial harassment—filings that harass by claiming rights to the property of public officials—and not to all types of false public agencies or officials in other ways. Thus, if Davis, the co-defendant in *Reed*, had filed his lien against the District of North Dakota, without naming Judge Hovland and United States Attorney Jordheim as "debtors," he might or might not have committed some other offense, but he would not have violated § 1521.

*Reed*, 668 F.3d at 983.

In some cases, defendants file a Form UCC-1, naming the United States Treasury or IRS as the



debtor, and then file an amendment including the name of a government employee as a debtor. The most common scenario is the filing of liens against IRS officials who are involved in filing a federal tax lien, including Revenue Officers or Revenue Agents, or any other official listed on an IRS collection notice. Defendants who have been prosecuted for tax offenses may retaliate against the Special Agents who handled the investigation, the prosecutor, or the judge who presided over their trial. In *United States v. Hoodenpyle*, 2009 WL 1883919, at \*2 (D. Colo. June 30, 2009), the district court rejected the defendant's contention that the victim, an IRS agent, was not an employee of the Government for purposes of § 1521. The district court in *Hoodenpyle* noted that the Tenth Circuit had previously called the argument that the IRS is not an agency of the United States "legally frivolous." *Id.* at \*1.

#### **D. How to prove retaliation?**

The first step in proving retaliation is to establish the nature of the relationship between the Government official and the defendant. The official nature of the relationship is generally proven by the testimony of the official or other Government witness. In tax-related cases, IRS collection officials are often targeted. The collection history with the defendant and correspondence between the defendant and the IRS may be introduced in evidence. In addition to establishing that the Government official is being targeted for his or her official actions, the falsity of the lien may be established by testimony that the official did not owe the defendant the money claimed on the forms. *See, e.g., United States v. Hoodenpyle*, 461 F. App'x 675, 679 (10th Cir. 2012). The official may testify that he was assigned to the defendant's tax case, had no other relationship with the defendant, did not owe the defendant the debt, and did not consent to the filing of the lien. The Commissioner of Internal Revenue, Comptroller of Currency, or Secretary of the Treasury are also sometimes targeted. *See, e.g., United States v. Huffaker*, No. 2:12-cr-00084 (D. Utah filed Feb. 22, 2012) (liens filed against Commissioner and Comptroller of Currency). When highly placed Government officials are victims, it may not be practical or advisable to have them testify at trial, and other officials involved in the collection process may testify about the defendant's dealings with the IRS. These issues may, of course, factor into charging decisions if several official victims are involved in the case.

The lien documents themselves often explicitly state why the lien is being filed. On some occasions, the individual filing the lien attaches a letter or other document that recounts the filer's history with the IRS and problems with the Government, and outlines the rationale for the filing of the liens. The lien document may also reference the tax liens filed by the IRS against the defendant's property or the defendant's tax liability in the collateral section. For example, in the *Reed* case, the collateral section of the lien documents referenced a pending gun prosecution against Reed.

The timing of events can also be significant. In *Reed*, the Government introduced evidence that the day after the judge issued an order denying Reed's motion to dismiss his gun case, Reed and Davis discussed filing the liens during a recorded telephone call. The next day, Davis filed the Form UCC-1 against the judge and United States Attorney for \$3.4 million with the Recorder of Deeds in Washington, D.C. Additionally, a "Notice of Default" filed by Reed with the North Dakota Clerk of Court demanded payment in the same amount and referenced the 10-digit number that the Recorder of Deeds assigned to the financing statement filed by Davis. The Government also introduced admissions made by the defendant to an FBI agent.

Finally, as noted above, many defendants set up the purported lien by sending documents to the victim alleging violations of the defendant's rights and making a demand for payment. The documents generally give the official a specific amount of time to respond to the defendant's demands, after which

the defendant pronounces the victim to be in default, and the filing of the fictitious liens, purportedly based on these “default judgments,” follows. In *Chance*, the defendant sent the AUSA a “Notice of Fault Opportunity to Cure,” followed by an “Affidavit of Notice of Default” and an “Affidavit of Non-Response” prior to filing the UCC financing statement. *United States v. Chance*, 2011 WL 7762593, at \*1 (D. Md. Nov. 18, 2011) (No. 125).

### **E. The knowledge requirement**

To establish a violation of § 1521, the Government must only prove that the defendant had reason to know the liens were false, fictitious, or fraudulent. In *United States v. Chance*, 2012 WL 5395263, at \*3 (4th Cir. Nov. 6, 2012), the defendant appealed his conviction on the grounds that the trial court should not have excluded expert psychiatric testimony that his actions were the result of a “confused and irrational mind” because “he has a rigid personality style, is mentally inflexible, has certainty in the righteousness of his behavior, and is unwilling to consider alternative explanations.” The Fourth Circuit agreed with the district court that the testimony was properly excluded because it fell into the category of defenses which Congress intended to preclude under the Insanity Defense Reform Act (IDRA), 18 U.S.C. § 17. The Fourth Circuit noted that without objection by the defendant, the district court charged the jury to determine whether “the defendant knew or had reason to know that such lien or encumbrance contained a materially false or fictitious statement or representation.” *Id.* at \*3. In reference to the false claim counts, the district court also instructed the jury,

An act is done knowingly if it is done voluntarily and purposefully and not done by mistake, carelessness or other innocent reasons. However, the government does not have to prove that the defendant knew of the relevant criminal provisions governing his conduct as long as it proves—the government—proves that the defendant knew the claim was false or fictitious.

*Id.* Whether such psychiatric evidence is admissible in other cases will depend on the facts and may vary from circuit to circuit. This edition of the [United States Attorneys’ Bulletin](#) includes the article, “*Prosecuting Tax Defier and Sovereign Citizen Cases—Frequently Asked Questions*.” The article gives more specific information regarding psychological issues in tax defier and sovereign citizen cases.

To establish a violation of § 1521, the Government does not have to prove that the defendant acted willfully, that is “in violation of a known legal duty,” as it does for most tax offenses. See *Cheek v. United States*, 498 U.S. 192 (1991). As discussed below, establishing the defendant’s intent may be straightforward because, in many cases, the defendant has made admissions in documents filed with the liens, mailed to the victims, or during interviews with agents or conversations with third parties.

### **F. Venue**

A word of warning regarding venue: no reported cases regarding venue for § 1521 offenses exist. Generally, venue is determined by the nature of the crime alleged and the location of the acts constituting it. *United States v. Anderson*, 328 U.S. 699, 703 (1946). Defendants frequently file liens in several different states and judicial districts. In tax cases, the venue for substantive tax offenses is frequently different than the district where the liens are filed, making it difficult to establish common venue for the substantive tax and lien offenses. In *United States v. Marsh*, 144 F.3d 1229, 1231 (9th Cir. 1998), a large tax defier conspiracy case, the Government charged the defendants with impeding and impairing tax administration (26 U.S.C. § 7212(a)) by filing false commercial liens against IRS officials in Nevada and

Washington. The IRS officials were located in the Eastern and Northern Districts of California, and the lien documents were mailed from the Eastern District of California. The case was tried in the Northern District of California, and the jury found that venue existed there. The Government argued that venue was proper in the Northern District of California because the lien filings had an impact on the IRS officers in San Jose, California, who were conducting a criminal investigation of the defendants. The Ninth Circuit overturned the conviction, holding that the crime was complete when the endeavor was made, which occurred when the liens were filed. *Id.* at 1242. The Ninth Circuit noted that “[t]he government did not have to show that its agents abandoned their investigation or even that the agents were anxious about the effect of the liens on their credit. No effect need be proved. The filing of the lien is the crime.” *Id.*

### III. Trial considerations

#### A. How to explain liens

To explain how liens operate, the Government may call representatives from the Secretary of State or the County Recorder, or other state office where the documents were filed. These representatives are generally competent to testify about how lien documents are filed, how liens work, the potential impact on the “debtor’s” credit, and the duration of the lien. In *Hoodenpyle*, No. 09-cr-00013 (D. Col. July 1, 2010) (No. 159), the Government also introduced testimony from a title examiner who examined the title on the IRS Revenue Agent victim’s property. He testified that he discovered the “Notice” filed by the defendant against the agent during a routine title examination of the property as part of a mortgage refinancing application. The examiner testified that because he had been unable to find a judgment supporting the \$1 million claim, it did not have to be paid off by the agent prior to refinancing the mortgage, but that it delayed the refinancing.

The impact of the lien filing against the victim can be long-lasting. In *United States v. Chance*, No. AW-10-Cr-0760 (D. Md. Apr. 26, 2012) (No. 166), the Government called a witness from the Maryland Department of Assessments and Taxation. The witness testified regarding the filing of a Form UCC-1 against an AUSA in retaliation for a prior criminal prosecution. The witness testified about the length of time a lien document remains in the public record. She noted that the normal period in Maryland was five years (which could be extended). She explained, however, that if the form stated that the “Debtor is a Transmitting Utility,” as it did in the *Chance* case, the lien notice would remain in the public domain forever or until it is terminated. The impact of a lien on the targeted victim can be powerful evidence of the criminal intent of the defendant.

Expert testimony is usually not necessary or advisable to prove that the lien is false. Expert testimony proffered by a tax defier or sovereign citizen defendant is especially likely to confuse the jury. In *Chance*, the Government filed a motion in limine to exclude the testimony of the defendant’s proposed expert witness on the use of bonds and liens and commercial disputes. The district court granted the motion, ruling that because the case involved relatively simple concepts, the expert testimony would be likely to only confuse or mislead the jury. *United States v. Chance*, No. AW-10-Cr-0760 (D. Md. Nov. 21, 2011) (No. 121). The court noted that the testimony of the expert “regarding the use of bonds and liens—especially in commercial disputes—is unhelpful in determining whether the defendant had filed a false lien against a prosecutor. Moreover, the evidence presented during the first day of trial corroborated the Court’s conclusion that jurors will not need specialized knowledge to understand the false lien and false claims at issue.” *Id.* In an unpublished opinion, the Fourth Circuit affirmed *Chance*’s conviction, holding that the exclusion of the evidence was not an abuse of the trial court’s discretion. *United States v. Chance*, 2012 WL 5395263, at \*11 (4th Cir. Nov. 6, 2012).

Jury instructions are also a useful tool to educate the jury regarding the legal impact of filing liens in the public record. For example, in *Reed*, the court instructed the jury as follows:

A person may file a Uniform Commercial Code financing statement in a non-agricultural lien situation only if the claimed debtor was first authorized in writing, normally by what is called a security agreement.

A financing statement filed against another individual gives notice to all interested parties that someone claims a secured interest in any personal property listed. The financing statement may create a cloud upon the alienability and title of the debtor's personal property.

Jury Instructions, Instruction 14, at 15, *United States v. Reed*, No. 1:10-cr-00041-cbk (D. ND Oct. 14, 2010) (No. 114).

A similar instruction was given in *United States v. Davenport*:

You are instructed that a lien or encumbrance includes any document claiming an interest in property as security for a debt.

In the state of Washington, the lien or encumbrance is “false” unless a specific statute provides for it, the property owner consents to it, or a court has imposed it. A lien or encumbrance that asserts a fictitious debt, or a debt in excess of what is actually owed, contains a false or fictitious statement or representation.

Jury Instructions, Instruction 13, *United States v. Davenport*, No. 2:10-cr-00061-KI (E.D. Wash. Nov. 29, 2011) (No. 182).

In *United States v. Hoodenpyle*, the defendant unsuccessfully claimed that the district court incorrectly instructed the jury on the meaning of the terms “lien or encumbrance.” The trial court instructed the jury:

For purposes of determining whether Mr. Hoodenpyle filed a “lien or encumbrance,” you are instructed that a “Lien or encumbrance” is a document, filed with the County Clerk and Recorder, that states that the owner of the property described is indebted [sic] to or owes an obligation to the person filing the document.

*United States v. Hoodenpyle*, 461 F. App'x 675, 679 (10th Cir. 2012). Hoodenpyle objected to the reference of the lien being a document filed with the County Clerk because it implied that the lien was embodied in the document. He also claimed that the instruction incorrectly stated that the underlying lien must be one owed to the person filing the lien, when it could also be owed to a third party. The Tenth Circuit affirmed the conviction, holding that Hoodenpyle failed to demonstrate plain error in the court's instruction. *Id.* at \*681-82.

## B. What is the unit of prosecution?

If a defendant files a false Form UCC-1 naming two federal officials as debtors, is that one lien or two? If the same Form UCC-1 is filed in several different counties, is that one lien or one lien per county? If more than one lien document is included in a single filing, is that one lien or more? Because the statute refers to the filing of a lien against an “individual,” if one lien document refers to two victims, is it appropriate to charge each as a separate offense? For example, in *Reed*, the indictment charged separate violations of § 1521 regarding each victim where the Form UCC-1 listed both the judge and United States Attorney as debtors on the form. *United States v. Reed*, 668 F.3d 978, 982 (8th Cir. 2011).

Another question that may arise is whether to charge separate offenses if the same false lien document is filed in several locations. Counts are not facially multiplicitous if distinct from one another in time, place, or both. See *United States v. Grant*, 114 F.3d 323, 330 (1st Cir. 1997) (indictment charging defendant with possession of 11 firearms in 2 different cities on 3 different dates is not multiplicitous). As discussed below, the sentencing guidelines provide for a two-level enhancement when more than two liens are filed against the property of the same victim, and an upward departure when substantially more than two liens are filed against the same victim, to reflect the additional time and resources that are required to remove multiple liens from the public domain. These provisions are consistent with charging lien filings in separate locations as separate offenses. However, if a false lien document were repeatedly filed with the same office, charging each filing in a separate count may be multiplicitous. See *United States v. Graham*, 60 F.3d 463, 467 (8th Cir. 1995) (noting that under the unitary harm rule “repetition of a false statement which does not ‘constitute an additional impairment of . . . governmental functions’ [citation omitted] should not be charged separately in an indictment.”); *United States v. Salas-Camacho*, 859 F.2d 788, 791-92 (9th Cir. 1988) (holding that identical false statements made to different Government agents could each be prosecuted separately if the repetition of the statement constituted an additional impairment of the operations of the Government). If the defendant filed more than one lien document at the same time with the same government office—a Form UCC and a Notice of Maritime Claim—for example, that purport to arise from the same underlying “debt”—no matter how nonsensical—it would be appropriate to charge them in one § 1521 count.

## C. Proving knowledge

In tax defier cases stemming from collection efforts, the defendants frequently submit numerous documents espousing tax defier arguments to the IRS. The IRS generally responds to the initial documents submitted by the defendant by sending letters advising the defendant that the arguments that he is espousing have been repeatedly rejected by the courts. The collection file will indicate what letters the IRS may have sent the defendant warning him of civil and criminal penalties related to his conduct. Additionally, individuals who have filed liens against IRS personnel may have been contacted by the Treasury Inspector General for Tax Administration (TIGTA), and may have been warned that the filing of such liens is illegal. Some defendants proudly admit that they filed the false documents when questioned by TIGTA or other Government agents. In *Reed*, during an interview with the FBI, defendant Davis “admitted to filing this lien, threatened to file more liens, and referred to the statute prohibiting false liens as ‘ass wipe.’” *Reed*, 668 F.3d at 982.

In prisoner cases, the Government may be able to present evidence that the prison officials posted notices or conducted seminars warning the prisoners about the illegality of filing retaliatory liens. Additionally, defendants may discuss the liens with other prisoners or on jail phone calls. For example, in the *Petersen* case prosecuted in the District of Minnesota, the Government introduced evidence that the

defendant, who filed retaliatory liens against three federal judges, had ignored warnings by prison officials that the filing of the liens was illegal, a letter from the Texas Attorney General's office advising him that filing false liens was a federal crime, and written warnings by the FBI. *United States v. Petersen*, No. Cr- 09-087 (D. Minn. Dec. 16, 2009) (No. 70). In *United States v. Leitner*, the defendant also ignored paperwork explaining the illegality of filing retaliatory liens. He received the paperwork after a prior criminal conviction and after he could be heard on jail calls discussing the filing of the retaliatory liens. *United States v. Leitner*, No. 3:11-cr-0049-LC (N.D. Fla. Sept. 16, 2011) (No. 13). Statements regarding lien filings made during phone calls between the defendants were also admitted in the *Reed* case. *Reed*, 668 F.3d at 981-82.

It is also important to remember that a false lien filed against a public official may be only the tip of the iceberg in terms of the number of liens filed by the defendant. In some cases, the defendant filed lien documents in several different counties or states. Defendants also often use the tactic against other individuals or entities that they believe have injured them. It is possible to search electronically for liens filed by the defendant (or filed against the prosecutor or agents) by using the "ULJ-all" database in Westlaw. Most defendants file a Form UCC-1 in their own name as part of the redemption scheme. Defendants may also file liens against creditors or state or local government officials. Admissions made during litigation regarding these liens and court orders expunging the liens and enjoining the defendant from filing additional liens also evidence the defendant's knowledge.

#### **D. Defense tactics: *pro se* defendants, jurisdictional challenges, and mental competency**

Prosecution of these cases presents other challenging issues. Many defendants proceed *pro se*. See, e.g., *United States v. Reed*, 668 F.3d 978, 985-87 (8th Cir. 2011). They often challenge the jurisdiction of the court and file many nonsensical motions with the trial court. See *United States v. Hoodenpyle*, 2009 WL 1883919, at \*1-2 (D. Colo. June 30, 2009). In *Hoodenpyle*, the district court denied the defendant's motion to dismiss for lack of jurisdiction. *Id.* at \*2. The defendant's motion was grounded upon arguments that: (1) the United States is a "created fiction" and (2) the defendant's name was improperly capitalized. The court explained that it "considered the other arguments in the motion, to the extent they are comprehensible, and finds them to be without merit, and in many instances, outright frivolous." *Id.* at \*1.

Others claim, for tactical reasons, that they are mentally incompetent or attempt to introduce expert medical testimony that they could not have formed the requisite mens rea at the time of the offense. As discussed above, in *Chance*, the district court excluded medical testimony on the grounds that none of the experts diagnosed the defendant with a mental disorder or offered an opinion regarding the defendant's state of mind at the time of the offenses. *United States v. Chance*, No. 8:10-cr-760-AW (D. Md. Nov. 17, 2011) (No. 121). Similarly, in *United States v. Leitner*, the Government successfully opposed the defendant's motion for a mental exam. *United States v. Leitner*, No. 3:11-cr-00027-LC (N.D. Fla. June 6, 2011) (No. 28). Aided by transcripts of the defendant discussing the request for a psychological evaluation on jailhouse telephone calls, the Government was able to show that the request was made for purposes of delay and to improve the defendant's living conditions. *Id.* These tactics are frequently used by tax defiers and are discussed in this [Bulletin](#) in Jen Ihlo's article, "[Prosecuting Tax Defier and Sovereign Citizen Cases—Frequently Asked Questions](#)" and in Chapter 40 of the [Criminal Tax Manual](#).

## IV. Sentencing considerations

Section 1521 violations are sentenced pursuant to United States Sentencing Guidelines (U.S.S.G.) § 2A6.1. The base offense level is 12. A two-level increase under § 2A6.2(b)(2) applies when the offense involves more than two false liens or encumbrances against the real or personal property of the same victim. Application Note 1 of § 2A6.1 speaks in terms of multiple acts directed toward the same victim for the application of that adjustment. Thus, as charged, each “offense” is victim-specific, which is consistent with the wording of 18 U.S.C. § 1521 (providing for criminal penalties when a lien is filed against “an individual”). Additionally, an upward departure may be warranted if the offense involved substantially more than two false liens or encumbrances against the same victim, multiple victims, or substantial pecuniary harm to a victim. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A6.1 app. 4(B) (2012). Referencing the two-level enhancement and upward departure provisions for multiple liens, the Commission noted, “[t]hese modifications reflect the additional time and resources required to remove multiple false liens or encumbrances and provide proportionality between such offenses and other offenses referenced to this guideline that involve more than two threats.” U.S. SENTENCING GUIDELINES MANUAL Appendix C-Volume III 295.

If the defendant is convicted under § 1521, the Official Victim Adjustment under § 3A1.2 should apply. U.S. SENTENCING GUIDELINES MANUAL § 2A6.1 app. 2 (2012). A six-level enhancement is warranted under U.S.S.G. § 3A1.2(b) if the victim was a current or former government officer or employee, the offenses were each motivated by such status, and the offenses each involved a threatening or harassing communication, hoax, or false lien covered by § 2A6.1. *See id.* § 2A6.1 app. 2; § 3A1.2. Amendment 718 in Appendix C states that “[t]he addition of this note clarifies that the official status of the victim is not taken into account in the base offense level.” U.S. SENTENCING GUIDELINES MANUAL Appendix C-Volume III 295. Additionally, the application notes provide that liens against different victims do *not* group under § 3D1.2. *See* U.S. SENTENCING GUIDELINES MANUAL § 2A6.1 app. 3 (2012). If the defendant filed the liens while on supervised release in violation of 18 U.S.C. § 3147, as is frequently the case, the enhancement under § 3C1.3 applies.

According to the United States Sentencing Commission, in FY 2010, in cases in which § 1521 was one of the counts of conviction, 81.5 percent of defendants received a prison term, with an average sentence of 20 months. In cases in which the § 1521 offense was the only statute of conviction, 75 percent received a sentence of incarceration, with an average total sentence of 17 months. U.S. SENTENCING COMMISSION, 2010 DATAFILE (2010). The sentences given to some of the defendants discussed in this article were significantly longer: Chance (65 months); Davenport (41 months); Leitner (27 months after guilty plea); Petersen (90 months); Reed (36 months) and co-defendant Davis (41 months).

## V. Expungement of the liens

As noted by the Court of Appeals for the Third Circuit:

These liens and judgments, accessible on financing statement forms, are easy to file. Once registered, however, the fraudulent liens are very burdensome to remove. For example, in a New Jersey incident, criminal defendants registered a fraudulent \$14.5 million lien with the New Jersey Department of Revenue against a federal prosecutor and a \$3.5 million lien against a federal judge for using their “copyrighted” names in court papers and hearings; it took a federal court order to remove them. In addition to the

substantial effort and expense required to expunge the liens, the fraudulent filings ruined the victims' credit reports.

*Monroe v. Beard*, 536 F.3d 198, 203 (3d Cir. 2008) (citing civil and criminal cases involving prisoners filing retaliatory liens against Government officials). Adding insult to injury, the lien documents often publish personal identifying information of the victims.

Many Secretary of State and County Recorder's offices allow electronic filing of these documents, which are accepted without any screening. These offices generally do not have the authority to reject the filing of these documents, despite the fact that they are obviously being filed only to harass the named officials. See *United States v. Gordon*, 2005 WL 2237640, at \*1-2 (S.D. Ga. Aug. 25, 2005) (noting that fictitious filings "are indexed or filed in such a manner that they . . . could in the future affect the credit ratings of the so-called 'lien debtors' as well as their ability to alienate or acquire property").

In many cases, the Government is forced to seek a court order to declare the financing statements ineffective, order the financing statements or other lien documents expunged from the Secretary of State records or County Recorder records or other office, and request a permanent injunction to preclude the defendant from filing liens against other federal officials or employees without leave of the court. See, e.g., *United States v. McCloud*, 2008 WL 4277302, at \*9 (E.D. Mich. Sept. 17, 2008). On rare occasions, a defendant may voluntarily withdraw the lien documents after being approached by investigators. In some cases, immediately after the defendant's conviction, the Government has requested that the trial court order that the liens are null and void and that they be expunged. See, e.g., *Motion For Expungement Of False Liens And Bounties, United States v. Petersen*, Cr-09-87 (D. MN Dec. 7, 2009) (No. 68). In others, the prosecutors have coordinated with the civil components who have handled the expungement.

## **VI. When the prosecutor is the victim**

What can you do if you discover that a false lien has been filed against you? First, find out if it is the only one. You can search for liens filed against you in the "ULJ-all" database in Westlaw. Second, notify the investigating agency involved in the case or the FBI, and your supervisors. In tax cases, TIGTA investigates false lien filings. Third, you can order a title examination of your property to see whether the lien has any impact on the title. Finally, coordinate with the Civil Division of your United States Attorney's office or the Tax Division regarding having the liens expunged.

## **VII. Conclusion**

Although § 1521 was only enacted a few years ago, it appears to be a very effective weapon in the Government's arsenal to protect Government officials against retaliation. Most of the defendants prosecuted under the statute have received significant sentences of incarceration. The courts have rejected defense arguments that the filing of technically invalid liens cannot be prosecuted under the statute, and have also rejected other tax defier/sovereign citizen defenses. Many of the tactics and arguments that are being raised have been used by tax defiers for decades. ❖



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