DOJ is Prosecuting Customs Fraud Through Sarbanes-Oxley's Obstruction-of-Justice Statute

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If you don't think customs fraud is rampant, consider this: On July 25, the Department of Justice ("DOJ") accused the president of the San Diego Customs Brokers Association of fraudulently avoiding $10 million in customs duties on imported goods his company had promised to re-export "in bond" to Mexico, but instead resold within the United States.[1] The imports were entered through the Port of Long Beach in 60 shipments over one year, and comprised over $100 million in Chinese textiles, Indian and German cigarettes, and food products from Mexico – including prickly pear tainted with Salmonella Agona, and snack foods adulterated with a prohibited dye.

Of special note: The customs broker and his eight alleged co-conspirators each faces up to 20 years in prison under each of 53 counts in the criminal complaint for a maximum possible sentence of 1,060 years. Those counts are based on a relatively new obstruction of justice statute – 18 U.S.C. § 1519 – which Congress included in the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[2] in response to the government's problems in prosecuting document destruction cases related to Enron's collapse.

United States v. Chavez appears to be the first case in which DOJ – supported by Immigrations and Customs Enforcement ("ICE") and Customs and Border Protection ("CBP") – has based criminal customs fraud charges on the ground that an importer's submission of falsified entry documents – and its efforts to cover up the fraud – constitute obstruction of justice under Section 1519. This suggests that DOJ will increasingly use Section 1519 and its 20-year incarceration penalty in an effort to deter future acts of customs fraud.

Customs Fraud in Context

Most products sold in this country – whether imported or made here – are subject to a matrix of federal laws and regulations intended to provide Americans with significant benefits, such as safe food, safe cars and a cleaner environment. The compliance costs for producers here and abroad are substantial. Further, imports are often subject to additional costs and restrictions, such as import duties and quotas.

But it is much more difficult for federal regulators to enforce regulatory compliance on imports than American-made goods. Unlike domestic producers, foreign producers – and their principals and production assets – are effectively beyond the reach of U.S. regulators. U.S. importers typically execute compliance-avoidance schemes by including false information in the substantial paperwork they submit for each entry to CBP, the agency primarily charged with ensuring import compliance.

While importers are within the regulators' reach, their fraud is difficult to detect, and when it is, the importer typically is thinly capitalized, rendering it judgment proof, and its principals quickly disappear and thereby avoid being charged.

Given the huge savings generated by imports that avoid regulatory compliance, the low risk of detection, and the minimal loss incurred if caught, dishonest foreign exporters and U.S. importers have a significant incentive to feign regulatory compliance on their imports. But such customs fraud comes at a substantial public cost, because it deprives citizens of the benefits sought by the avoided regulations, and gives the cheating parties a significant unlawful cost advantage in the U.S. market over competing domestic producers and honest importers. Successful customs fraud thus encourages the foreign relocation of domestic production.

Past Problems With False Statement and Obstruction of Justice Prosecutions

The materially false data a cheating importer includes in its entry documents amount to "false statements" made to the U.S. Government. Each such statement could qualify as a crime under one or more of the laws codified in Chapter 47 ("Fraud and False Statements") of Title 18 of the United States Code. These include Section 1001 ("Statements or entries generally"), which DOJ has frequently used to criminally prosecute customs fraud.

DOJ has had some success in winning false-statement prosecutions against customs fraud, but not enough to deter the rising wave of compliance-avoidance schemes.[3] This results largely from the complexity of the import-entry process and the false statement statutes.

While DOJ has relied heavily on Title 18's "obstruction of justice" laws to prosecute a wide range of fraud cases, no obstruction law effectively addressed customs fraud prior to Sarbanes-Oxley. Most of those laws criminalize efforts to influence or intimidate judges, jurors and witnesses in specific judicial or administrative proceedings, and thus do not apply to customs fraud.

One statute – 18 U.S.C. § 1505 – does apply to "pending proceedings" before "departments" such as CBP. Court rulings, however, have limited that law's use by requiring that the "proceeding" be enforcement-related, that it exist at the time of the challenged obstructive actions, and that the defendant then be aware of the proceeding.[4] Further, in 1995, the Supreme Court, in reviewing language similar to Section 1505 in another obstruction law (i.e., "corruptly obstruct or influence"), ruled that such language required the government to make the difficult showing that the defendant believed his obstructive acts were likely to succeed.[5]

Sarbanes-Oxley's Section 1519 Obstruction of Justice Provision

DOJ's problems in prosecuting wide-scale document destruction related to the Enron collapse revealed significant shortcomings in the obstruction laws, which Congress addressed in Sarbanes-Oxley through Section 1519:

- Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in
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    - any record, document, or tangible object

- with the intent to impede, obstruct, or influence
- the investigation or proper administration of any matter
- within the jurisdiction of any department or agency of the United States . . . ,
- or in relation to or contemplation of any such matter or case,
- shall be fined under this title, imprisoned not more than 20 years, or both.[6]

Sarbanes-Oxley's Senate report notes that the existing obstruction laws were then "a patchwork" that had been "interpreted, often very narrowly, by federal courts."[7] The report further states that Section 1519 is "meant to apply broadly," and is<

> specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. . . . It is sufficient that the act is done 'in contemplation' of or in relation to a matter or investigation.[8]

A stand-out feature of Section 1519 is its prison term of up to 20 years per violation – 12 to 18 years longer than the incarceration penalties of other obstruction and false-statement statutes. Congress clearly intended Section 1519 to result in more convictions, and to pack a stronger deterrence kick, than the existing obstruction laws.

Thus far, Section 1519 has fared well under appellate review. Two Circuits have ruled the law is not constitutionally void for vagueness,[9] and two have ruled that the government need not show that the defendant believed his effort to obstruct would likely succeed.[10] The Eighth Circuit also has held that the government need not show that the defendant knew the relevant "investigation" or "matter" was within the jurisdiction of a federal department or agency, as long as it was.[11]

Can the Initial Submission of False Information Trigger Section 1519 Liability?

One unresolved issue is the precise meaning of "proper administration of any matter within the jurisdiction of any department or agency," which appears as the companion to the term "investigation" in Section 1519, and is the first appearance of that phrase in an obstruction statute. Would CBP's day-to-day administration of the import entry process be sufficient to constitute a "matter" under Section 1519 with regard to an importer's submission of false or misleading entry documents (which would be the broadest reading)? Or would additional facts be needed, such as an inquiry from CBP to the importer about the veracity of the documents, and the importer's false response?

The Eighth Circuit recently dodged this issue in United States v. Yielding.[12] There, the defendant had bribed a hospital's inventory buyer to order Medicare-funded surgical products from the defendant's wife at inflated prices, but then tried to hide the scheme after learning of the hospital's internal investigation. An FBI investigation – which followed the hospital's – fully exposed the defendant's scheme and cover-up.

At trial, the jury was instructed, as requested by the government, that the defendant could be viewed by the jury either (1) as having acted "in . . . contemplation of" of the FBI's as-yet uninitiated "investigation"; or (2) as having intended to obstruct "the proper administration" by a federal

agency of a pending "matter" – namely, Health and Human Service's administration of the provision to patients of products paid for by Medicare at the time the defendant acted.[13] Noting that the jury did not reveal which of the two theories it accepted, the Eighth Circuit found there was sufficient evidence to support the first theory – that the defendant tried to cover-up his scheme in order to obstruct or influence a foreseeable federal investigation in which his scheme could be discovered.[14] The court thus avoided having to rule on the government's second theory.

Whether the initial submission of false information to an agency such as CBP could trigger Section 1519 liability may be academic, for the relevant agency will always have to perform some follow-up "investigation" in which the submitter is likely to repeat its falsification, thereby creating a clear case of liability under Section 1519. This is demonstrated by DOJ's customs fraud complaint in U.S. v Chavez, mentioned above. For each of its 53 counts under Section 1519, the complaint alleges that the defendants responded to CBP's inquiries by falsely claiming that they had shipped the imports to Mexico, and by submitting forged documents to this effect. While the defendants might win the argument that Section 1519 does not reach their mere submission of false entry documents, it seems unlikely that the defendants would escape Section 1519 liability for their "cover up" actions.

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[1] United States v. Chavez, et al., No. 12MJ2756 , Complaint (S.D. CA, June 23 2012). The complaint is available at: http://www.ice.gov/doclib/news/releases/2012/120725sandiego.pdf.

[2] Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800, § 802 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy").

[3] A recent success under 18 U.S.C.§ 1001 involved the breaking of a scheme to avoid $5 million in antidumping duties owed on steel garment hangers from China by falsely claiming that entries of such imports had been made in Mexico. None of the indictment's 50 counts was based on 18 U.S.C. § 1519. See http://media.al.com/bn/other/ Indictment%20on%20evading%20import%20duties.pdf.

[4] See, e.g., United States v. Bhagat, 436 F.3d 1140, 1147 (9th Cir. 2006).

[5] United States v. Aguilar, 515 U.S. 593, 599 (1995).

[6] 18 U.S.C. § 1519.

[7] S. Rep. No. 107-146, at 6 (2002).

[8] Id. at 7.

[9] United States v. Yielding, 657 F.3d 688, 715 (8th Cir. 2011); United States v. Hunt, 526 F.3d 739, 743 (11th Cir. 2008).

[10] Yielding, 657 F.3d at 713; United States v. Gray, 642 F.3d 371, 377-78 (2d Cir. 2011).

[11] Yielding, 657 F.3d at 713-14.

[12] 657 F.3d at 715-716.

[13] Id. at 715.

[14] Id. at 716.