Department of Justice

STATEMENT

OF

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BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

CONCERNING

ICO LEGISLATION - H.R. 2517 AND H.R. 2943

ON

SEPTEMBER 18, 1985

Mr. Chairman and Members of the Subcommittee, it is a pleasure to be here today to discuss the views of the Department of Justice concerning proposed amendments to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, particularly the amendments contained in two bills pending before the Subcommittee -- H.R. 2517 and H.R. 2943.

H.R. 2517 would make a number of changes in RICO's definitional and offense provisions. Several of these would seriously interfere with the government's use of the statute in criminal cases, and would substantially reduce the statute's utility to plaintiffs in civil actions as well. By contrast, the amendments proposed in H.R. 2943 would apply only to civil RICO suits for damages. However, these amendments would also virtually eliminate civil enforcement of the statute by private plaintiffs, and would seriously diminish the deterrent and remedial potential of suits for damages to the United States caused by RICO violations. For these and other reasons, the Department has serious reservations concerning the wisdom of adopting the changes proposed in these two bills.

Before discussing the specific proposals embodied in H.R. 2517 and H.R. 2943, however, I think it might be helpful to place in context the various issues raised by proposals to alter RICO's criminal and civil provisions. To that end, I would like

to begin by describing the Department's experience in the use of criminal RICO, including the use of the procedures by which the Department's Criminal Division controls and authorizes the filing of RICO cases initiated by the government. That experience demonstrates RICO's extraordinary value as a law enforcement tool for reducing the influence that organized criminal groups exercise at all levels of society, and cautions against unnecessary changes in the statute's criminal provisions. Next, I will address the use of RICO's civil provisions -- both by the government and by private parties -- and will offer some general observations regarding proposed changes in those provisions. I will then turn to the specific changes that would be made by H.R. 2517 and H.R. 2943, to explain the bases for our reservations concerning these proposals. In this connection, I wish to emphasize that -- despite these reservations -- we stand willing and ready to assist in your efforts to improve the statute so that it can be used more effectively and more fairly against ongoing, systematic, organized forms of criminality. Finally, I will suggest three amendments to RICO that we believe will materially enhance its value as a law enforcement tool in the hands of the government.

I. CRIMINAL RICO

A. Introduction

Although RICO was enacted some fifteen years ago, the statute was used sparingly by federal prosecutors prior to 1980. By that date, only about 250 RICO prosecutions had been initiated and RICO was still subject to widely contrasting interpretations and confusion in the courts, most notably with respect to the definition and application of terms such as "enterprise," "pattern of racketeering," and "forfeiture."

In more recent years, however, as prosecutors and courts have become more familiar with the enterprise concept and more aware of RICO's considerable strengths, use of RICO has increased dramatically . By the end of 1984, federal prosecutors had brought more than 500 criminal RICO cases. Moreover, since 1980, the Criminal Division has asserted greater control of RICO prosecutions by requiring federal prosecutors to secure Criminal Division approval of RICO cases prior to indictment.

The results of the government's use of criminal RICO have been impressive. Since it would take several hours to describe the significant RICO cases that have been brought in the past four years, I will instead indicate statistically how our use of RICO has increased and briefly summarize a few particularly significant cases. The point, of course, is to underscore the

need to preserve criminal RICO as the leading statutory weapon against all forms of organized criminal conduct.

B. Number and Types of Cases

In 1981, the Criminal Division received some 71 requests for approval to initiate RICO prosecutions. In 1982, the number dipped slightly to 68. In 1983, the figure rose to 109, and in 1984 it rose again -- to 123.

These annual numbers by no means reflect the true magnitude of criminal RICO's importance, even in a statistical sense, since individual RICO cases typically include a number of defendants. To convey the impact of RICO prosecutions more accurately in this respect, I should note that, during the past two years, close to 400 defendants have been charged with RICO violations by the Organized Crime Drug Enforcement Task Forces alone.

With our continued emphasis on organized crime, public corruption, labor racketeering, infiltration of legitimate business, and on our most serious current problem -- narcotics trafficking -- bigger, more complicated investigations have been undertaken, utilizing sophisticated court-approved electronic surveillance, extensive undercover operations, and other similar investigative techniques. Such investigations invariably develop evidence of large scale criminal operations, encompassing

multiple and varied offenses, sometimes spanning five or more years, and involving a wide range of actors. These are the kinds of cases for which RICO was specifically designed.

Our analysis of requests to initiate RICO prosecutions in 1984 indicates that narcotics and bribery offenses, the latter usually involving official corruption, were the most frequent predicate crimes charged. Mail and wire fraud, while far and away the most frequently alleged predicate activities in private civil RICO cases, were used as predicates in only 26% and 8%, respectively, of the criminal RICO cases, and almost always in conjunction with other substantive predicates. (Only 9 of 117 cases were based on mail or wire fraud alone.) The 1985 RICO approvals to date continue to reflect narcotics offenses and bribery as the most frequently recurring RICO predicates; there has been only one case based soley on mail fraud or wire fraud. We also found that while 44% of RICO prosecutions approved in the past year alleged only federal crimes as predicate acts, 34% contained combined allegations of state and federal predicates, and 22% alleged only state predicates, such as murder, bribery of state officials, and arson. These figures reflect one of RICO's greatest virtues: it permits federal and state prosecutors, working together, to combine evidence of serious federal and state crimes into comprehensive prosecutions in order to strike at the heart of criminal cartels.

C. Most Significant Cases

Statistics, of course, rarely provide the full picture. It is not the increase in the number of RICO cases that reflects increased effectiveness -- although the numbers do suggest an increased awareness by prosecutors of RICO's potential -- it is the outstanding quality of recent cases that demonstrates our effective application of RICO, both criminally and, most recently, civilly. Let me give you a few examples.

In 1984, the Court of Appeals for the Sixth Circuit upheld RICO-murder convictions of Cleveland's mob boss and several key lieutenants. All received lengthy prison sentences. Another federal jury in Cleveland thereafter convicted the remainder of Cleveland's mob leadership for RICO-murder and narcotics offenses, effectively removing the entire mob leadership from the streets of Cleveland.

RICO was used, of course, to convict New Orleans mob boss Carlos Marcello for bribery offenses. It was RICO that sent Los Angeles mob boss Dominic Phillip Brooklier and fellow racketeers to jail for extortion and murder.

The hierarchy of the Bonanno crime family of New York City was convicted of RICO-murder charges in 1982; also convicted of RICO-murder charges were leaders of the mob in Rochester, New York, on October 30, 1984. More recently, in St. Louis a group of union racketeers who engaged in a series of car bombings was convicted on RICO-murder charges, and the key defendants were sentenced to 55 years in prison. In fact, both the Cleveland and St. Louis cases, to name but two, involved murderous explosions on public highways.

In New York City, RICO indictments are pending against the leadership of the Colombo crime family, against the heads of the mob's five families (the "Commission" case), against several significant leaders of the Genovese and Luchese crime families, against labor racketeers who allegedly controlled trucking at New York's JFK Airport, and finally, against 35 individuals who allegedly imported into the United States hundreds of millions of dollars worth of heroin from Europe.

In Kansas City, alleged leaders of both the Kansas City and Chicago syndicates are awaiting trial on RICO charges relating to skimming operations at Las Vegas casinos.

The collective impact of these cases against the mob is truly staggering and would have been unheard of five years ago.

It is important to note that RICO has not been limited to traditional organized crime. In Chicago, RICO was effectively used in Operation GREYLORD to convict corrupt local judges, lawyers, and policemen. In Louisiana, Governor Edwin Edwards is awaiting trial on RICO-mail fraud charges. In New York City, a RICO case is pending against Marc Rich, a fugitive, for an alleged hundred-million dollar oil miscertification scheme.

For the same reason that RICO has proved so effective against the mob, it has become an effective tool against domestic terrorism, as evidenced by two RICO indictments earlier this year. A case in Seattle, in which trial has just begun, alleges that twenty-three members of "The Order" engaged in acts of terrorism and violence, including the murder of a well-known Denver radio personality. In Arkansas, a RICO indictment was filed against members of a neo-Nazi organization called "The Covenant, the Sword, and the Arm of the Lord" for alleged arson of religious buildings and an attempt to blow up a natural gas pipeline.

The above cases, while among our most dramatic, are by no means the only significant RICO achievements. The list literally goes on and on.

D. Departmental Control over RICO Prosecutions

Although RICO remains both broad in scope and powerful in execution, I wish to emphasize our recognition that, for these very reasons, we have a special obligation to use the statute responsibly, and to stress the efforts we make to discharge that obligation. In September 1980, the Criminal Division promulgated written guidelines to all federal prosecutors governing RICO indictments. These guidelines, which have been most recently updated in March 1984, remain in effect today and are designed to: (1) weed out the ill-advised RICO case, (2) provide consistency in legal pleadings throughout all of the federal districts, and (3) encourage the teamwork between prosecutors and agents on the federal and state levels that the RICO approach to the "big case" invariably requires.

To secure approval to file a RICO indictment (or complaint in the case of civil RICO) the prosecutor -- usually an Assistant United States Attorney or an attorney assigned to the Criminal Division, such as a Strike Force attorney -- must submit a written request (called a prosecution memo) and a copy of a proposed indictment to our Organized Crime and Racketeering Section.

The prosecution memo identifies the defendants, summarizes the evidence, anticipates potential defenses or legal problems, describes proposed forfeitures or other special

remedies, and articulates the prosecutor's justification for the use of RICO. The prosecution memo is reviewed by an experienced RICO staff reviewer and by at least one Deputy Chief of the Organized Crime and Racketeering Section. We independently assess the significance of the case and the sufficiency of the RICO count. We pay special attention, for example, to ensure in each case that the "pattern of racketeering" required under RICO involves two or more distinguishable criminal episodes. I mention this particular point because a frequent criticism of civil RICO cases filed by private plaintiffs is that the RICO complaint is predicated on a single fraud of a single victim carried out through multiple mailings.

No RICO indictment is approved until the Section is satisfied that the evidence as represented is sufficient to obtain a conviction, that the indictment is in proper form and consistent with similar RICO cases elsewhere in the country, that the use of RICO is necessary to reflect adequately the nature and seriousness of the crimes charged, and that, when state crimes are proposed as RICO predicate acts, state authorities are either unlikely to proceed themselves or have requested the Department to prosecute the case, frequently in conjunction with their own prosecutors. For your convenience, a copy of our official RICO guidelines is attached to my statement.

II. GOVERNMENTAL USE OF CIVIL RICO

A. Suits for Injunctions

Section 1964, the principal civil RICO provision, permits the district courts, upon application of the Attorney General, to enter appropriate orders to prevent and restrain violations of criminal RICO. This provision is designed to allow the United States to remove organized criminal influence from the business and financial communities. In part because prosecutors prefer, and are trained, to achieve this exorcism through criminal prosecutions that result in lengthy jail sentences, stiff fines, and forfeiture of criminal proceeds, we have made very little use of civil RICO in the past. On only five occasions in the past fifteen years, by our research, has the Department filed a civil RICO injunctive action; of these five cases, only one merits comment, the recent Local 560 case in New Jersey, which is now pending appeal in the Third Circuit. We hope to build upon the legal principles established in Local 560, to produce similar cases in the future.

In United States v. Local 560, International Brotherhood of Teamsters, 581 F. Supp. 279 (D.N.J. 1984), the government proved that mob members had continuously committed acts of murder, extortion, violence, and labor racketeering for twenty years as part of their effort to seize control of Teamster Local 560 in Union City, New Jersey. Despite repeated arrests,

prosecutions, convictions, and even lengthy incarceration of these racketeers, they returned again and again to their union offices with appalling effrontery. At the time the RICO complaint was filed in 1982, these mobsters -- either directly or through friends and relatives -- utterly dominated the local's Executive Board, and had used their positions to gain access to union funds. As the district court put it, these "gangsters, aided and abetted by their relatives and sycophants, engaged in a multifaceted orgy of criminal activity."

Applying sanctions permitted by Section 1964, the court enjoined the defendants from further acts of racketeering, removed the entire Executive Board from their positions as trustees, created a temporary trusteeship for the union, and ordered a democratic election under governmental supervision following an eighteen month cooling off period. The granting of these extraordinary remedies, which the court described as the use of a judicial scalpel to remove a "malignancy," may well accomplish a goal that prosecutors once thought unattainable in a civil context, namely, the liberation of a large labor organization from the tentacles of organized crime.

The Local 560 case has, in many ways, opened our eyes to the potential of civil RICO. Over the years, the Department, as well as the Congress, has identified other labor organizations and legitimate businesses (for example, casinos) that have been or still are influenced to some degree by criminal groups. We

are confident that the courts will continue to construe civil RICO liberally to help eradicate these influences and that future cases along the lines of Local 560 will be instituted.

B. Suits for Damages

Even more recently, the government has sought to use civil RICO to protect its interests by bringing two actions for damages under the statute's treble damage provision. This provision, section 1964(c) of Title 18, provides that "any person injured in his business or property by a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains."

The first treble damage action brought by the government was filed by the Federal Deposit Insurance Corporation (FDIC) in April of this year. The complaint, which charges several defendants with fraud in connection with the collapse of the Indian Springs State Bank in Kansas, includes a RICO count alleging mail and wire fraud as predicate acts of racketeering. The FDIC, suing both in its corporate capacity and in its capacity as receiver, is seeking over $16 million in actual damages, plus treble damages, plus $35 million in punitive damages. The Department of Justice is not a party to the FDIC suit.

The second civil RICO suit for damages to the United States was filed by the Department of Justice in May of 1985 in the Middle District of Florida. That suit seeks to recover more than $47 million from two businessmen and three companies previously convicted of criminal RICO and other offenses involving a massive fraud against the government in connection with the awarding of Department of Defense laundry contracts. This suit represents a major step forward in the Department's effort to use effectively the powerful civil provisions of RICO in appropriate cases. However, the success of this suit will depend on the courts' upholding our view that the federal government is a "person" as defined in Section 1961(3) of the RICO statute. Since RICO specifically authorizes the Attorney General to bring suits for injunctive relief, the statute's failure to expressly refer to the Attorney General in the treble damages section raises an arguable inference that RICO presently does not provide for treble damage recovery by the federal government. I am pleased to note that just two weeks ago the district court rejected that argument in the course of sustaining the complaint against a motion to dismiss.

The initiation of these section 1964(c) suits by the federal government is particularly noteworthy for two reasons: first, because it reflects our intention to make full use of all of the deterrent and remedial tools provided by the statute; and, second, because it underscores the importance of invoking RICO

uniformly and wisely, in order to preserve our ability -- achieved through gradual and diligent efforts -- to make the most effective use of the statute.

To elaborate on these points, as you know, allegations of contract and program fraud, such as in the area of defense contracts, have been the subject of much concern expressed recently by federal agencies and much attention in the national media. Every federal agency is a potential victim -- a very rich victim I need not add -- of schemes that fit within one definition or another of fraud encompassed by the RICO statute. Although the Department is not a party to the FDIC action, that suit is related to a joint investigation conducted by the FDIC and our Organized Crime and Racketeering Section, and we are confident that it is fully warranted. However, we believe that it is imperative for the future development of civil RICO that the approval of the Attorney General be obtained before federal agencies file civil RICO suits. We all know that bad cases result in bad law. Without the Attorney General's review of governmental RICO suits, it is conceivable that one agency of the government could proceed under a RICO theory, or seek a type of remedy, that is inconsistent with a position taken in some other case by the Department or another federal agency. As it is, the Department occasionally suffers an adverse judicial interpretation of RICO growing out of a private suit; it would hurt doubly if such a result occurred because the government itself could not agree on a uniform approach.

III. USE OF CIVIL RICO BY PRIVATE LITIGANTS

A. Introduction

As has been true of RICO's criminal provisions, aggressive use of the statute's private civil remedy has been a relatively recent development. However, in the few years since the plaintiff's bar discovered the attractiveness of RICO's private civil remedy, private RICO suits have generated considerable controversy among litigants and courts. This controversy has led to growing pressure for statutory changes, and a number of specific proposals have been advanced that would modify the private right of action to one degree or another. Our study and analysis of this extremely complex subject leads us to conclude that some change in RICO's civil provisions may be advisable. However, the matter is still under discussion within the Department. For this reason, except as indicated below in the discussion of the bills pending before the subcommittee, we express no preference at this time for any of the specific proposals that have been put forward. We will, of course, be pleased to address these matters at a future date, if the Subcommittee wishes.

At this point we think it may be most helpful to attempt to place in perspective the major questions that have arisen regarding private uses of civil RICO. To that end, I propose in this section of my statement to review briefly the history and current applicability of the private remedy

provision, to describe the findings of a Department of Justice study of reported private civil RICO litigation, to summarize the debate over private uses of the statute and identify the fundamental issues that we believe are raised by that debate, to discuss the interests of the government that seem to us to bear upon the resolution of those issues, and to summarize the range of options available to the Subcommittee regarding the future of private civil RICO enforcement, commenting briefly on some of the apparent advantages and disadvantages of the major possible approaches.

B. Private Civil RICO's History and Application

As I have already mentioned, RICO's private civil remedy permits a person who has been injured in his business or property by reason of a violation of section 1962 to sue for treble damages. He may also recover the cost of suit, including a reasonable attorney's fee.

At the outset, we think it is important to place this provision in context -- not only in the context of the RICO statute, but also in the context of the far broader legislative undertaking of which that statute itself was only a part. As you recall, RICO was enacted as title IX of the Organized Crime Control Act of 1970, the purpose of which was to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process,

by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." First among the factors recited by Congress as providing the impetus for the Organized Crime Control Act was the finding that "organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually draws billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."

RICO itself was aimed at one particular area of organized criminal activity -- the increasing use of power and money obtained from illegal activities to infiltrate and corrupt legitimate businesses, labor unions, and other enterprises. However, rather than attempting the futile and probably unconstitutional exercise of defining and outlawing "organized crime", Congress appropriately chose to focus on the types of conduct characteristic of organized criminal behavior. In doing so, Congress rejected criticisms that the legislation was too broad and would reach beyond organized crime. As Senator McClellan, the principal Senate sponsor of the legislation, put it: "It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." In a similar vein, Congressman Poff, the principal House sponsor, stated: "[E]very effort was made to produce a strong and effective tool with which to combat

organized crime -- and at the same time deal fairly with all who might be affected by...[the] legislation -- whether part of the crime syndicate or not."

RICO's provision of a private treble damage remedy was a late addition to the statute. Two of the predecessor bills had included such a remedy, but that provision was dropped in the process of the Senate's conversion of the legislation from an antitrust form of statute to a broader, criminal law measure. The principal objection to the treble damage remedy had come from the American Bar Association's Antitrust Section, which -- in the course of criticizing the commingling of antitrust concepts with criminal law enforcement goals -- expressed particular concern that the antitrust requirements of "standing" and "proximate cause" would create "inappropriate and unnecessary obstacles" for persons seeking treble damages for injuries caused by organized crime activities. However, at the specific suggestion of the American Bar Association, the bill was amended in the House Judiciary Committee to include among its civil remedies a private right of action for treble damages. With this and other amendments, the bill was passed by the House, returned to the Senate, and accepted by that body without further ado.

In enacting RICO, Congress declared that "[t]he provisions of this title...shall be liberally construed to effectuate its remedial purposes." Given this mandate, as well as the broad purpose and language of RICO, federal courts have

generally interpreted the statute quite liberally in criminal cases, but in private civil cases some courts have been reluctant to construe RICO as expansively as its terms seem to permit. Initially, some district courts sought to limit the availability of the treble damage remedy by construing the statute to require allegations that the defendant was affiliated with organized crime or that the plaintiff had suffered a "competitive injury". However, following the Supreme Court's reminder in United States v. Turkette, 452 U.S. 576, 587 (1981), that Congress had specified that RICO's provisions were to be construed liberally to effectuate the statute's remedial purposes, the courts of appeals consistently rejected these and similarly crabbed interpretations. Then, in the summer of 1984, the Court of Appeals for the Second Circuit rendered a series of three decisions that once more severely restricted the broad applicability of civil RICO.

In Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), the leading case in the Second Circuit trilogy, the court held that a private RICO plaintiff must show both that the defendant has been convicted either of a RICO violation or of the predicate acts of racketeering on which the suit is based, and that the plaintiff suffered some form of "racketeering injury" beyond the direct injury caused by the predicate offenses themselves. The prior conviction requirement had previously been rejected by the Sixth Circuit, as had the "racketeering injury" limitation by the Seventh Circuit. Subsequent to Sedima, the Seventh Circuit, in Haroco, Inc. v. American National Bank and

Trust Company of Chicago, 747 F.2d 384 (7th Cir. 1984), re-examined the "racketeering injury" requirement in the light of the Second Circuit cases, and expressly decided to follow its earlier decision rather than the Second Circuit decisions. This conflict among the circuits was resolved in July, when the Supreme Court reversed the Second Circuit in Sedima and affirmed the Seventh Circuit in Haroco. See Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985), and American National Bank and Trust Co. of Chicago v. Haroco, Inc., 105 S. Ct. 3291 (1985). As a result, a civil RICO plaintiff need not allege either a prior conviction of the defendant or special injury.

As matters now stand, therefore, RICO offers private plaintiffs a very attractive remedy for a wide range of unlawful conduct, including conduct bearing little resemblance to organized crime activity in the traditional sense. Apart from the prospect it holds for treble damages and attorney's fees, the statute provides ready access to federal courts -- with their liberal procedures governing such matters as service of process and discovery -- to plaintiffs whose claims would otherwise not merit federal attention at all or would be cognizable only upon compliance with strict standing or other procedural requirements.

RICO's availability in such cases results from the conjunction of two factors: the inclusion of various forms of fraud in its definition of "racketeering activity", and the ease with which the statutorily required "pattern of racketeering

activity" can be derived from what is essentially a single fraudulent scheme, executed in a manner that twice gives rise to federal jurisdiction. These factors make it possible, for example, for a plaintiff involved in an ordinary commercial dispute to seek recovery under RICO by alleging a scheme to defraud on the part of his adversary, the involvement of an "enterprise" in the scheme, and the mailing of two letters or the making of two telephone calls for the purpose of carrying out the scheme. Similarly, in the securities area, a RICO claim can be brought against an organization on the basis of a single allegedly fraudulent sale of securities effected by means of two filings, mailings, or telephone calls. In other words, RICO makes it possible to seek treble damages in virtually every case of commercial mail or wire fraud committed by or through an organization, and in many securities fraud cases as well.

C. Department of Justice Study of Private Civil RICO Litigation

In an effort to obtain data concerning the actual use of RICO's private civil remedy, the Department of Justice has attempted to locate and analyze the reported judicial decisions in private civil RICO suits. The following statistics reflect the data available to the Department through the end of 1984.

Approximately 230 decisions in private RICO suits were found to have been reported. By comparison, during the same period there were 16 published decisions in civil RICO proceedings initiated by governments -- 5 in injunction cases brought by the federal government, and 11 in damage suits brought by state or local governments.

As mentioned above, the federal government has also commenced more than 500 criminal prosecutions under RICO since the statute was enacted. Roughly half of these criminal cases has resulted in published decisions. If the same ratio of total cases filed to total published decisions is applied with respect to private civil cases, the actual number of private actions filed to date is probably close to 500.

The number of published opinions rendered annually in private civil RICO actions has been increasing steadily -- from 1 in 1978, to 2 in 1979, to 6 in 1980, to 18 in 1981, to 40 in 1982, to 68 in 1983, to 97 in 1984.

About two thirds of the reported private RICO suits have been predicated on mail fraud, wire fraud, or fraud in the sale of securities. Roughly seven percent appear to have been brought against organized crime figures or on the basis of violent or other non-fraudulent conduct common to organized crime (e.g., murder, arson, extortion, organized theft, public corruption, obstruction of justice, labor racketeering).

Of the 123 cases for which data are available, 58 percent involved either multiple criminal episodes or multiple victims, while 42 percent were based on a single episode having only one victim.

In approximately 65 percent of the private cases for which data are available, the conduct complained of formed the basis for a federal cause of action other than the RICO claim. With respect to RICO cases based on fraud, 51 percent could have been predicated on non-RICO grounds.

Ten percent of the reported private actions were brought following some sort of federal, state, or local government action against the defendant. About half of the prior government actions had resulted in criminal convictions.

Of the 163 private cases for which disposition information could be found, 61 percent were decided in favor of defendants prior to trial. Very few private suits appear to have resulted in judgment for the plaintiff after trial.

Data are not available concerning the number of private suits that have been settled or the amounts of the settlements.

The Department's study of reported private RICO cases suggests several conclusions that may be important in considering the future of civil RICO.

First: Solely in terms of numbers of cases, the use of RICO's criminal provisions far outweighs the use of its civil provisions in the fight against organized crime.

Second: Although civil RICO filings have grown rapidly, the total number of private civil RICO suits brought in recent years constitutes less than half of one percent of the total annual federal civil caseload attributable to private litigation, and a majority of these cases could have been brought in the federal courts even if RICO's private remedy had been unavailable.

Third: While private RICO actions have been predicated most frequently on allegations of commercial fraud, a not insignificant number have involved types of criminal activities that the statute was more clearly intended to prevent.

Fourth: Although plaintiffs who bring private civil RICO suits on the basis of only one criminal episode are in the minority, this practice is common enough to warrant concern that the purpose of the statute's "pattern" requirement -- to limit RICO to ongoing criminal activity -- is not being fully realized.

Fifth: The difficulty of assessing the probable long-term effects of private civil RICO actions is compounded by the fact that a substantial majority of reported private suits has been decided favorably to the defendants prior to trial, and

the fact that settlement data are unavailable concerning both reported and unreported cases.

Sixth: With the notable exception of the Local 560 case which I discussed earlier, neither the use of RICO's injunction provisions by the federal government nor the use of its damage remedy by state and local governments has been a significant factor in the fight against traditional organized crime, either directly or as a spur to private civil enforcement.

D. The Debate over Private Civil RICO

It has generally been recognized that RICO was intended to provide new and more effective weapons with which to combat organized crime, and that the use of these weapons could have a potentially far-reaching impact. Initial concern over the scope of the statute focused on the potential for prosecutorial abuse. We believe that any basis for that concern has been eliminated by the Department's adoption of strict guidelines regarding the use of RICO in criminal prosecutions. However, no comparable voluntary restrictions on the exercise of discretion exist -- or can exist -- with respect to private civil litigation under RICO, and the courts have generally acknowledged the inappropriateness and difficulty of imposing any such limitations in the guise of statutory interpretations. The consequent proliferation of private civil RICO cases arising out of commercial disputes and

alleging fraud on the part of otherwise respectable businessmen has prompted growing objections to the statute.

The first major point made by critics of private civil RICO is that the statute has not been used for the principal purpose for which it was adopted -- to assist in deterring infiltration by organized crime into legitimate business. In support of this argument it is pointed out that very few civil RICO cases have been filed against organized crime; instead, the vast majority has been brought against legitimate businesses. Thus, the argument goes, private civil RICO has simply not provided the additional measure of deterrence to organized crime activity that Congress hoped it would.

The second principal criticism by opponents of private civil RICO is that its use primarily as a remedy for fraud has resulted in the unnecessary and unwise federalization of an area of law that should be reserved to the states. On the question of necessity, these opponents argue that Congress never explicitly considered the need for a federal fraud remedy and that no such remedy is necessary in any event, given the fact that federal and state statutes make serious fraud a crime, federal laws afford civil redress for securities frauds, and state laws permit recovery for other types of fraud. With respect to the wisdom of a federal fraud remedy, it is claimed that -- in the absence of a compelling need for a federal remedy -- it is inconsistent with the nation's constitutional principles to federalize an area of

the law that has traditionally been a matter for state concern. In addition, the argument goes, federalization of state fraud cases imposes inappropriate burdens on the federal courts.

In addition to questioning the need for private civil RICO as a general federal fraud remedy, critics cite a number of problems that they say have been caused by the increasing use of the statute for this purpose. First, because RICO is generally perceived as a statute directed against organized crime (as the "racketeering" title emphasizes), it is claimed that the use of civil RICO against legitimate businesses tars them with an association that is often unfair. Furthermore, it is argued, the stigma of a "rackeetering" complaint subjects legitimate businesses to undue coercion to settle frivoulous RICO claims, and places them at a significant disadvantage in defending against such claims.

Second, critics contend that private civil RICO has skewed the normal dispute resolution process in many ordinary commercial cases. This has occurred, it is claimed, because of the attraction of the treble damages remedy, the availability of the statute in every commercial lawsuit in which fraud could conceivably be alleged (including securities actions and suits involving otherwise straightforward contract claims), and the consequent increase in litigation costs (both procedural costs and increased settlement costs).

Third, many critics have argued that the growing use of private civil RICO in the securities area has undermined the carefully crafted set of federal remedies and procedures specifically designed to deter and redress securities violations.

Finally, critics of private civil RICO point out that inappropriate cases are being filed with increasing frequency, and warn that the adverse consequences to legitimate businesses and the federal courts will become far more burdensome as more and more imaginative plaintiffs, and plaintiff's attorneys, seek to avail themselves of the statute's generous remedies.

Defenders of private civil RICO suits begin by arguing that even small numbers of private actions are helpful in the fight against organized crime, and that the threat of such actions adds to the statute's overall deterrent effect. Moreover, it is argued, the number of private suits against organized crime members and activities is likely to grow in the wake of federal prosecutions and injunctive actions that demonstrate the vulnerability of organized crime groups to counterattacks by state governments and other institutional plaintiffs, as well as by individuals.

Second, supporters of civil RICO contend that there exists a heightened concern about the pervasive pattern of fraud in the United States, and that private RICO suits are beneficial in addressing that problem. It is neither unfair nor unwise,

according to this argument, to allow the use of civil RICO against apparently legitimate defendants who regularly resort to criminal fraud in the operation of their businesses. In this connection, it is claimed that existing provisions of law are adequate to prevent abusive litigation, and that -- in fact -- legitimate businessmen who are subjected to frivolous RICO suits are often so outraged that they refuse even to consider settlement. Moreover, it is pointed out, the vast majority of private RICO suits has been disposed of at the complaint stage, usually in favor of defendants, and there is no way of telling how many claims will be found to be meritorious when plaintiffs are put to their proof.

Last, defenders of civil RICO point out that private RICO suits based on fraud are sufficiently dissimilar in their elements from fraud actions under state or other federal laws to warrant their resolution in the federal courts, and that -- since RICO is not the sole federal jurisdictional predicate for most of these suits -- their current and potential burden on the federal courts has been exaggerated.

In short, the defenders of private civil RICO argue that private suits have considerable actual and potential utility, that their short-term consequences are not as alarming as some critics claim, and that, therefore, it would be premature to impose substantial restrictions on private uses of the statute.

The debate over civil RICO raises two fundamental issues. The first is whether RICO should include any private civil enforcement component at all. If it should, the second basic issue is whether that component should include a broad, general remedy for fraud as well as other offenses, or whether it should be focused only on the more violent types of organized, systematic illegality with which the sponsors of the statute were primarily concerned.

F. Government Interests to be Considered

In our view, the development of a sound position concerning the appropriate future of private civil RICO requires recognition and accommodation of a variety of governmental interests -- some fairly specific, others of a broader nature. Some of the more specific interests have already been alluded to. The broader interests of the government include: assuring an effective remedy against large-scale, continuing organized criminal activities; observing sound principles of federalism; avoiding unnecessary burdens on the federal civil justice system; and assuring the fair operation of the federal civil justice system. Each of these interests warrants brief comment.

Large organized crime and racketeering ventures inevitably infiltrate or otherwise affect the nation's legitimate business and economic structures. For this reason, they are generally recognized as presenting the single most serious

challenge to the maintenance of a free and democratic society. No matter what particular crimes are committed by these ventures to accumulate or extend their wealth and influence, it is their acquisition of legitimate facades that aggravates the problem, and it is their scale of activity and their organized nature that perpetuates it. Moreover, the operation of such enterprises not only depends upon the direct and indirect commission of numerous crimes, but it is otherwise criminogenic. The example of criminal enterprises, and also supposedly legitimate enterprises, routinely operating by means of kickbacks, bribes, persistent frauds, and other kinds of illegal conduct, is infectious. The attitude develops that, since "everybody does it", it makes no sense for a small business or an individual to try to succeed solely by honest means. The result is widespread public cynicism, and an overall erosion of deterrence.

Assuring an effective remedy against this particularly corrosive form of crime should, therefore, be considered the principal governmental interest to be kept in mind in assessing civil RICO issues. Later in my statement I will discuss two aspects of this interest -- maintaining and enhancing the effectiveness of criminal RICO, and strengthening civil RICO by clearly permitting government suits for damages. At this point, I want to mention a third aspect -- encouraging supplementary private initiatives to enforce RICO's prohibitions -- that also deserves consideration.

The attention that federal investigators and prosecutors can focus on crime -- even on large-scale organized crime -- is limited. Only a small percentage of suspected activities can be investigated thoroughly, and only a fraction of those investigated can be effectively prosecuted. It was in recognition of these practical limitations that Congress elected to augment governmental efforts against organized crime by encouraging private initiatives. Whether or not the potential of that approach has been realized in any significant degree over the few years that private civil RICO suits have been tested, the strategy of supplementing governmental activity with private initiatives is itself a matter of legitimate federal interest.

The second broad interest of the government that should be kept in mind is the obvious governmental interest in adhering to sound principles of federalism -- leaving to the states all matters for which there is not a persuasive and constitutionally justifiable reason for federal involvement. With regard to providing federal criminal law jurisdiction over activities of large-scale organized criminal enterprises, the issue appears to have been worked out, over a course of decades, to the general satisfaction of most state and federal authorities. The same cannot be said, however, concerning the reach of federal civil jurisdiction. Prior to 1970, federal courts were not permitted to entertain private civil suits against organized crime, absent the meeting of independent jurisdictional requirements. Although Congress elected to open the door to such suits in 1970, it

remains a legitimate question whether an adequate philosophical foundation was presented in justification of the extension of civil jurisdiction.

As to cases alleging traditional forms of organized crime activities, the national effect of those collective activities, and the desirability of augmenting limited federal enforcement resources with private initiatives, may provide sufficient justification for continued acceptance of the statutory expansion of federal civil jurisdiction. As to cases alleging predicate acts of a fraudulent nature, however, there is a greater question whether the extension accords with principles of federalism; certainly, if Congress initially had provided only a simple fraud remedy, the justification for the extension of federal jurisdiction might have been considered dubious. Still, since the remedy adopted provides for recovery of treble damages and attorney's fees rather than simply actual damages, the statute's design appears clearly to accord with its purpose of providing a special incentive to private initiatives that supplement the government's efforts against organized crime. The private action theoretically serves, in part, as a punishment mechanism as well as a recovery mechanism. As such, it can be argued that the action is somewhat more deserving of the extension of federal jurisdiction than it would have been were it designed simply to provide a means of private redress.

In any event, we think that the interests of federalism should be re-examined independently in assessing the various options for changing the statute.

Closely related to the governmental interest in maintaining sound principles of federalism, is the governmental interest in assuring that the federal judiciary is not unduly burdened by an influx of civil cases that might otherwise be presented, if at all, in state courts. This interest, like some others, competes with that of assuring effective remedies against organized crime. The issue is one of balancing the judicial burden of civil RICO's private suits against its law enforcement value. In assessing the weight of this burden, it is important to bear in mind the results of the Department's study indicating that most civil RICO cases could have been brought in federal courts on other grounds. Of course, some of those cases probably would not have been filed on alternate grounds absent the lure, and the settlement-inducing value, of potential treble damage recoveries. Nevertheless, this finding, among others, suggests that the burden of private RICO suits on the judiciary is not a particularly heavy one.

Finally, the government has a clear interest in assuring the fair operation of the federal civil justice system. That interest encompasses concern that the system provide evenhanded treatment of all parties in individual cases, and concern that

federal remedies not be used in a manner that undermines carefully constructed regulatory systems.

The governmental interest in assuring that the civil justice system is not weighted unfairly in favor of one litigant over another requires serious attention to the claim that the civil RICO provisions, in effect, provide plaintiffs with tempting opportunities to coerce defendants into settlements based on matters extrinsic to the merits of the case. There is also an equally legitimate basis for concern that a reputable enterprise charged as a defendant may elect quietly to settle a case out of court rather than risk the chance of being adjudged a "racketeer." Certainly there is also a legitimate basis for concern that the prospect of liability for three times the actual damages might prompt such a defendant to settle a case rather than risk adjudication of a charge against which it believes it has a meritorious, but arguable, defense. While liability for treble damages under a civil racketeering statute does not seem an inappropriate consequence in any well-founded case, the question arises whether, as drafted, the statute invites abusive use -- particularly in cases involving a single, uncharacteristic instance of fraud on the part of an otherwise legitimate corporation.

There is also a plain government interest in assuring that a carefully crafted regulatory scheme, designed to control the operations of a particular industry, not be undermined by the

unwitting creation of a means of circumventing that scheme. If, for example, relatively routine securities violations are being used as predicates for private civil RICO actions, the system for regulating securities markets is being evaded in a manner that was not contemplated by the Congress.

F. Range of Major Options Available to Congress

In its consideration of the future of private civil RICO, Congress will undoubtedly want to examine a number of options. The major possibilities range from maintaining the status quo to abolishing the private right of action entirely. Between these extremes lie a variety of intermediate alternatives. Some of these involve amendments that would preserve private civil RICO enforcement, while making clarifying modifications in statutory language to restrict the statute's availability in private suits based on fraud. Others involve more far-reaching statutory changes -- changes that would substantially restrict private civil actions of all types. Because we recognize the desirability of some change, and because the debate to date has focused on alternatives short of abolishing the private right of action, it may be helpful to make a few general observations about some of these intermediate approaches before turning to the the specific proposals contained in H.R. 2517 and H.R. 2943.

Three clarifying changes might be made in response to inappropriate use of the predicate acts of mail fraud, wire fraud, and fraud in the sale of securities.

The first would be to define the term "fraud in the sale of securities" to make it clear that the term covers only criminal fraud in the sale or other disposition of securities, rather than all possible violations of the federal securities laws, or of the rules and regulations issued thereunder. The second clarifying change in this area would be to define the term "pattern of racketeering activity" in a manner that precludes private suits based on a single criminal episode or transaction, with only one victim. Such suits are now possible because -- due to the peculiar manner in which the federal mail fraud and wire fraud statutes are drafted -- each use of the mails or of a telephone pursuant to a scheme to defraud arguably constitutes a separate offense for purposes of establishing a "pattern of racketeering activity." Third, language could be added to the statute to provide that -- at least in private suits based on fraud -- the plaintiff must prove his case by clear and convincing evidence, as opposed to the usual standard for recovery in civil cases -- proof by a preponderance of the evidence.

As a group, these changes would seem to be responsive to legitimate concerns that the statute unfairly subjects reputable businessmen to unwarranted consequences merely because they may have committed isolated or sporadic criminal acts in the

otherwise legitimate conduct of their businesses. At the same time, however, these changes would permit continued use of the statute by private plaintiffs against systematic, continuing illegal acts committed by or through legitimate, as well as illegitimate, business enterprises.

Amendments that would impose more substantial limitations on private civil suits include deletion of mail fraud, wire fraud, and fraud in the sale of securities from the definition of "racketeering activity"; preclusion of private suits based on types of conduct that are actionable under other provisions of law; imposition of a prior criminal conviction requirement; and limitation of recovery solely to cases involving "racketeering injury", i.e., injury other than that caused by the predicate acts underlying the section 1962 violation.

All or most of these more far-reaching amendments appear to share certain characteristics. First, they would all reduce substantially the ability of private plaintiffs to bring RICO suits for damages arising out of ordinary commercial transactions with ostensibly reputable business organizations. Second, although it appears that the problem posed by private RICO suits is inappropriate use of civil RICO in what would normally be considered ordinary fraud cases, most of these "solutions" are not limited to such cases; they would apply to all private RICO suits. Third, each of these amendments would have the effect of substantially curtailing -- if not virtually

eliminating -- private suits and, to that extent, of negating whatever deterrent potential private enforcement might otherwise add to the deterrence achieved by criminal prosecutions. Finally, most of these changes could also make it more difficult for the government to avail itself of civil RICO's equitable and treble damage remedies.

IV. SPECIFIC PROPOSALS FOR CHANGE

A. H.R. 2517

H.R. 2517 proposes essentially five amendments to the criminal provisions of the RICO statute: (1) substitution of the term "criminal", and variants thereof, for the term "racketeering"; (2) redefinition of the "enterprise" concept; (3) redefinition of the "pattern" requirement; (4) substitution of a new "criminal syndicate" offense for the existing RICO conspiracy offense; and (5) specification that the conduct prohibited by RICO must be engaged in "knowingly." Although several of these proposed amendments have implications for civil RICO litigation, we are concerned primarily with their potential influence on criminal cases. We do not think that impact would be salutary. Two of the proposed amendments seem unnecessary at best; the remainder would be likely to hinder rather than assist the government's enforcement efforts.

1. The "racketeering" label

The first of these proposals -- dealing with terminology -- requires little comment. To begin with, we note the apparently inadvertent failure of the bill to delete all references to "racketeering" (e.g., in sections 1961(7), 1961(8), 1963(a)(3), and 1968). We also suggest that, if this amendment is adopted, a corresponding change be made in other sections of Title 18 that employ the term "racketeering" (e.g., sections 1952B and 2516(c)).

More to the point, the change in terminology from "racketeering" to "criminal" would not alter the substance of the statute's prohibitions, and would be responsive to criticism that the "racketeering" label unfairly stigmatizes defendants in civil RICO cases. On the other hand, as the Supreme Court noted in Sedima, "a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings." 105 S. Ct. at 3283. Moreover, in both the criminal and the civil contexts, the term "racketeering" provides a useful shorthand reference to a wide variety of criminal conduct, generally typical of racketeers. Courts have used the term and seem accustomed to it. In another section of the criminal code -- section 1952 -- Congress has used the term "racketeering" in the heading but not in the text describing the offense. In addition, it is difficult to think of an apt, but arguably less pejorative, substitute; the proffered alternative -- "criminal" -- may be too general to describe the

special focus of the statute. Finally, although we do not feel strongly about this proposed change -- as it would have no effect on our use of the statute -- we question its value.

2. The "enterprise" definition

H.R. 2517 would redefine the key term "enterprise." The existing definition is backed by fifteen years of case law elaborating on its meaning. H.R. 2517 would discard that body of law, substituting a new definition with new ambiguities that would require new case law to resolve. We would be back to square one. For example, the Supreme Court did not clarify an important aspect of the current definition until its decision in 1981 in United States v. Turkette, 452 U.S. 576, some eleven years after RICO's 1970 enactment. Such uncertainty requires a great deal of effort and time to resolve. Moreover, each time a district court or appeals court issues an inappropriate interpretation, valid RICO prosecutions may be blocked in that district or circuit until the interpretation is corrected. This is precisely what happened after the First Circuit's decision in the Turkette case. In the meantime, opportunities for prosecution may be lost forever in that district or circuit because of expiring statutes of limitation. Otherwise guilty racketeers remain free to threaten the legitimate economy.

As an example of H.R. 2517's ambiguity, H.R. 2517 would redefine "enterprise" to mean, essentially, a "business or other

similar business-like undertaking." Criminals who are not associated with traditional forms of businesses could argue that the statute does not apply to them. While the phrase "business-like" does retain some flexibility, the term is not self-defining. It is not clear just what it includes. Is it limited to groups whose motive is principally economic, or whose structure is hierarchical, or does it apply to both? Does it include only such "near-businesses" as labor unions, political clubs, and nonprofit groups that have a structured hierarchy or does it also encompass a wider range of groups such as political terrorists, violent street gangs, and organized rings of narcotics importers? If enacted, the definition will require courts to answer these and perhaps other questions.

H.R. 2517's redefinition of "enterprise" also requires that a business-like undertaking be an "association" of persons. This aspect of the new definition could be interpreted to exclude one-person enterprises. Moreover, depending upon how the proposed new definition is construed, it is possible that the phrase "undertaking by an association of persons" may be applied to qualify the term "business" as well as the term "business-like." Thus, even some traditional business entities -- such as corporations having only one shareholder and officer -- might be excluded from the statute's scope.

The overall result of the proposed redefinition of "enterprise" could be at worst a shielding of activity from the reach of RICO's criminal sanctions, and at best a period of

prolonged litigation and uncertainty over precisely which groups constitute enterprises. For these reasons, we think that H.R. 2517's revision of the definition of "enterprise" is less desirable than the existing definition.

3. The "Pattern" definition

H.R. 2517 would substantially change the definition of RICO's central element of "pattern of racketeering activity." Under the bill, predicate acts would have to meet four requirements in order to form a "pattern." First, they would have to be separate in time and place; second, all of them would have to occur within five years of indictment; third, they could not all be violations of the same statute, if that statute prohibits mail fraud, wire fraud, or travel fraud; and fourth, they would have to be interrelated by a common scheme, plan, or motive.

These changes would seriously hinder the statute's effectiveness for criminal law enforcement purposes. The new definition would damage the types of important cases we are winning today. To be frank, we are not sure what the proposed changes mean. Like the redefinition of "enterprise," if this new definition is enacted courts will take years to hammer out its parameters. We do not need to reinvent the wheel.

In general, pursuant to the Department's RICO guidelines, the federal government declines to bring criminal RICO

charges based solely on predicate acts arising from a single criminal episode. However, a statutory requirement that predicate acts occur at separate times and places could unduly constrain RICO's flexibility. The bill's use of the conjunctive "and" could be read to require that each predicate act be separate from all other acts in both time and place. Under this interpretation, once an initial criminal act is performed at a certain location, such as the defendant's regular place of business, subsequent predicate acts performed at the same location pursuant to an ongoing criminal enterprise could not be considered as establishing a pattern of racketeering activity. Or, acts performed simultaneously at separate locations by defendants acting in concert (such as simultaneous acts of murder against several victims) might not possess the requisite separateness in time, exempting all but one of the acts as RICO predicates.

The proposed redefinition of "pattern" to require that all acts have occurred within five years prior to the indictment would present a serious obstacle to prosecution of some of the most longstanding criminal enterprises. In part because RICO was designed to attack continuing criminal conduct, and in part because of the difficulty in detecting and proving especially sophisticated criminal operations that are carried out over a lengthy period of time, we believe a more appropriate limitations period is the existing one, which requires at least one act within the past five years and other acts within ten years of a more recent act.

The new "pattern" definition would also require that not all predicate acts be violations of the same provision of law, if that provision is the second paragraph of U.S.C. § 2314 (travel fraud), */ 18 U.S.C. § 1341 (mail fraud), or 18 U.S.C. § 1343 **/ (wire fraud). Although the language of this portion of the definition is not entirely clear, it appears to be intended to preclude a finding of a "pattern" on the basis of two or more acts of mail fraud, of wire fraud, or of fraud through travel. While a "fraud plus" requirement would probably satisfy many critics of civil RICO, we note that the bill's formulation would not appear to prevent civil RICO suits based solely on combinations of mail and wire fraud, or based on combinations of either kind of fraud and fraud through travel. In this respect, the bill is in contrast to S. 1521, recently introduced in the Senate, which would preclude cases based solely on a combination of the listed statutes. In any event, such an approach would severely limit the use of civil RICO against particularly pervasive forms of ongoing, organized criminality. More to the point from our perspective, however, this change would apparently make RICO unavailable as a basis for criminal prosecution in some cases in which it ought to be used. For example, it could exempt some efforts to defraud the federal procurement process.

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*/ We note a discrepancy between the bill's reference to the second paragraph of section 2314 and its parenthetical description of that provision as relating to interstate transportation of stolen property. Since the provision in question relates to fraud through travel, we assume that the parenthetical description is erroneous.

**/ The bill's reference to the wire fraud statute as 18 U.S.C. § 1342 appears to be a typographical error.

Finally, the requirement that predicate acts be "interrelated by a common scheme, plan, or motive" would add an additional element to RICO's existing elements, with uncertain consequences. The terms "scheme," "plan," and motive" are not defined, and there is no way of telling how strictly or broadly they might be construed. On the one hand, they could be interpreted very rigorously, with the result that a businessman who bribes a public official to obtain one particular government contract and soon thereafter commits an act of arson against a business competitor to obtain another contract will not have committed two acts that are sufficiently interrelated for purposes of a RICO prosecution. On the other hand, if "making money" or "obtaining influence" are common motives, many RICO predicate acts would qualify. In the criminal context, we think it better to avoid these ambiguities, mindful of the formal case-by-case review by the Department's Criminal Division before RICO charges are brought. Thus, the definition of "pattern" should remain unaltered for criminal RICO. We have yet to see a redefinition which would not jeopardize our criminal enforcement efforts. Until one is found, we should not abandon the existing definition.

However, in the civil area, we are not confident of what the best formulation is. If change is necessary, section 1964(c) should be amended specifically. One approach would begin by considering the definition of "pattern" provided in 18 U.S.C. § 3575(e): "criminal conduct forms a pattern if it embraces criminal

acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

4. The conspiracy and criminal syndicate offenses

H.R. 2517 proposes to delete the RICO conspiracy offense currently set forth in section 1962(d), replacing it with a new offense consisting of major participation in a "criminal syndicate." This would be a disaster. Senior leaders of criminal organizations go to great lengths to insulate themselves from personal commission of serious crimes. I cannot state strongly enough the damage that would result from this change. The availability of RICO's conspiracy provision is especially important when defendants who have agreed to engage in multiple predicate crimes in order to acquire or operate an enterprise are interrupted or apprehended before actually carrying out their plans.

Although elimination of the RICO conspiracy provision in section 1962(d) presumably would not preclude the use of section 371, Title 18's general conspiracy provision, to charge a conspiracy to violate RICO's substantive provisions, the latter provision is far less effective than the former from a law enforcement perspective. A conspiracy conviction under section 371 subjects the offender to a maximum term of imprisonment of five years, in contrast to the maximum term of twenty years for violating the RICO conspiracy provision, and courts may not uniformly apply general conspiracy law to RICO offenses.

Moreover, the proposed "criminal syndicate" provisions are not an adequate substitute for the existing RICO conspiracy offense. Under these provisions, it would be an offense knowingly to organize, own, control, finance, or otherwise participate in a supervisory capacity in a criminal syndicate, which is defined as "an enterprise of five or more persons, a significant purpose of which is to engage on a continuing basis in a pattern of criminal activity" other than certain gambling offenses. Apart from the fact that this new offense would require a showing of completed conduct on the part of a defendant, prosecution would be possible only if the joint criminal activities involved at least five persons and if the defendant was a major participant in the syndicate. Since the cases that meet these requirements -- as well as cases that do not -- can now be prosecuted under section 1962(c), the question arises whether the new offense would materially strengthen current law. We recognize that an argument that it would do so can be made on the basis of the maximum penalties that would be provided -- a $250,000 fine and imprisonment for thirty years. We note, however, that as a result of recent increases in fine levels for all federal crimes -- set out in 18 U.S.C. § 3623 -- a fine of $250,000 is already permitted for RICO offenses committed on or after January 1, 1985. Thus, the sole remaining justification for the new offense appears to be the enhanced prison term that could be imposed. If it is

thought that a prison term of more than twenty years should be available for particularly egregious RICO violations, a general enhancement of the maximum sentence to thirty years, to be applied at the court's discretion, would achieve the same end in a more manageable fashion. Consequently, we do not think this new offense is necessary. Courts are accustomed to hearing conspiracy cases; the RICO criminal syndicate would be a new offense.

5. The state of mind requirement

Finally, we question the wisdom of including an explicit requirement that RICO violations be committed "knowingly." Although the substantive provisions of the statute currently contain no scienter requirement, this does not mean -- as some have suggested -- that it imposes strict liability. Rather, the requisite criminal state of mind for conviction is derived from the mens rea requirements of the underlying acts of racketeering activity that must be proved to establish a RICO violation. Moreover, superimposing an additional state of mind requirement on the proof of scienter already required would complicate jury instructions and tend to confuse juries in what are already extremely complex cases. For these reasons, we think this proposal is both unnecessary and undesirable.

B. H.R. 2943

H.R. 2943 addresses only section 1964(c), RICO's civil damage provision. The bill would limit the availability of this provision in two ways -- by requiring a prior criminal conviction of the defendant and by imposing a one-year statute of limitations. We do not favor either of these proposed amendments.

1. The prior criminal conviction requirement

Under H.R. 2943, a civil RICO suit for damages could only be brought against a person who had previously been convicted of racketeering activity or of a violation of section 1962. The imposition of such a prior conviction requirement would, as the Supreme Court pointed out in Sedima, 105 S.Ct. at 3282 n.9, have a number of significant consequences. I will mention only three, two of which would be particularly serious from the Department's point of view.

First, a prior conviction requirement would, in effect, limit RICO damage actions to those predicated on crimes that survive the screening process employed by federal and state prosecutors in deciding whether to bring criminal charges, against whom such charges should be brought, and of what they should consist. The constraints of limited resources and other law enforcement considerations preclude prosecution of all but a fraction of the conduct that might legitimately serve as a

predicate for civil RICO recovery. For these reasons, imposition of a prior conviction requirement would, as the Supreme Court pointed out in Sedima, 105 S.Ct. at 3284, "severely handicap potential plaintiffs," in their efforts to obtain redress for RICO injuries. In this connection, we think it important to bear in mind that potential RICO plaintiffs include the federal government as well as state and local governments. In addition, a prior conviction requirement would virtually eliminate the deterrent potential of private and government damage actions, both with respect to traditional organized crime activity and with respect to more sophisticated forms of organized, persistent criminality.

These considerations lead us to conclude that adoption of a prior conviction requirement is not the best approach to limiting the scope of RICO's treble damage action. This conclusion is reinforced when we consider two additional consequences of this approach, both of which are likely to have negative effects on the Department's law enforcement efforts -- informal "lobbying" of prosecutors, and added grounds for attacking the credibility of key prosecution witnesses in criminal RICO trials.

If prosecutors are made the arbiters of the availability of RICO's unique private remedies, these officials are likely to face unhealthy pressures in connection with their charging and plea bargaining decisions, those decisions will become more complex and time consuming, and grounds for public

and private questioning of their fairness and impartiality may be multiplied. While I am confident that our formal review process would continue to screen cases for prosecution based solely on their merits, rather than on the degree of pressure exerted by outside parties, such lobbying would surely drain time and energy from the criminal law enforcement activities for which we are responsible. Moreover, to avoid even the appearance that a particular lobbying campaign had resulted in a prosecution not otherwise appropriate, our review process would likely require cumbersome record keeping to document more thoroughly all aspects of the decision making process.

Finally, in trials of criminal offenses which, if proved, could serve as predicates for civil actions, the credibility of the government's victim-witnesses would be subject to a new and potentially very damaging avenue of attack. Defense counsel could point out that their testimony could not help but be influenced by a desire to ensure the defendant's conviction in order to open the way for them to recover treble damages at a later date.

2. The statute of limitations

H.R. 2943 would impose a one-year statute of limitations on RICO suits for damages, with the period running from the entry of the latest judgment of conviction against the defendant for racketeering activity or a violation of section 1962. RICO

currently contains no express statute of limitations for civil actions, and -- unlike the situation with respect to criminal prosecutions -- there is no generally applicable period of limitations for federal civil actions. This situation has led to uncertainty, inconsistency, and wasteful litigation as courts have taken differing approaches to determining the applicable period of limitations in different jurisdictions and in cases based on different predicate offenses.

We agree that it would make sense to adopt a uniform federal statute of limitations for civil RICO actions, but think that the one-year period proposed by H.R. 2943 may be too short. We recognize, of course, that the period chosen is related to the prior conviction requirement, and that its unusual brevity can be defended on the ground that it does not begin to run until the entry of a judgment of conviction. Nevertheless, bearing in mind the lengthy appeals process that ordinarily follows convictions in racketeering cases, we suggest either that the period be extended or that a tolling provision be added to ensure that the period does not expire before convictions have become final.

C. Amendments recommended by the Department

As I hope I have made clear, the Department's primary concern is that Congress take no action that would diminish RICO's extraordinary law enforcement value. This concern is based primarily on our successful use of RICO's criminal provisions,

but it extends to the use of the statute's civil provisions as well. However, we certainly do not oppose amendments that would enhance RICO's utility in the hands of the government, and I will discuss in a moment three areas in which we think such improvements can be made.

Before doing that, however, I should first acknowledge the steps recently taken by Congress to make the statute more effective. In recognition of RICO's value, Congress last session buttressed the statute in several important respects. Pornography, currency-reporting and automobile-theft offenses were added to the list of RICO predicates. The scope of RICO forfeiture was expanded by relating back the government's interest in forfeitable property to the date of offense. And more authority was provided for courts to issue pre-trial restraining orders. These latter two provisions help prevent defendants from avoiding forfeiture by disposing of their assets before conviction.

I will now turn to our suggestions for additional improvements.

1. Forfeiture of substitute assets

First, we strongly recommend that RICO be amended to include the forfeiture of substitute assets. At the present time, when a defendant is convicted of a RICO violation, the court must order forfeiture of any interests the defendant has

acquired or maintained in the illegal enterprise, any property affording the defendant a source of influence over the illegal enterprise, and any proceeds the defendant has derived from the illegal activity. However, in many cases the property subject to forfeiture cannot be located, is beyond the jurisdiction of the court, or has been transferred to a third party. To meet these problems, the Department recommends that the RICO statute be amended to authorize the forfeiture of other property of the defendant up to the value of any property with which the subject has enriched himself but has dissipated or otherwise made unavailable. This provision would close a large loophole which undercuts the effectiveness of the criminal forfeiture statute.

The most common example of this situation occurs when drug dealers deposit proceeds from drug trafficking into offshore banks or use proceeds to purchase property outside of the United States. Such property is usually beyond the reach of the court. However, the defendant may have property or bank accounts within the United States which are not related to the racketeering activity. The substitute assets provision would allow the court to reach this property in lieu of the assets that the defendant has deliberately placed beyond the reach of the court.

Both legal theory and case law support such a provision. Section 1963(c) provides that "all right, title, and interest in property ... vests in the United States upon the commission of the act giving rise to the forfeiture." Under this "relation back" doctrine, the property is forfeitable as of the

time of the violation, even though the property would not be transferred to the government until after conviction. By taking post-violation steps that make forfeitable property unavailable to the court after conviction, a defendant deprives the United States of property to which it is entitled. Thus, if the defendant has other assets available, the government should be entitled to substitution.

A recent court ruling supports this rationale. In United States v. Conner, 752 F. 2d 566 (11th Cir. 1985), the court held that, when the forfeiture involves a specific sum of money, it acts as a money judgment against the defendant for the same amount of money which came into his hands illegally, regardless of whether the government has traced the path of the specific illegal funds. It matters not whether the government receives the identical money which the defendant received or other "substitute" money. While the Conner decision effectively applies the substitute assets concept to fungible items such as money, it does not cover all situations which may arise and does not remove the need for enacting the substitute assets provision.

A substitute assets provision was included in forfeiture legislation which three times passed the Senate in the 98th Congress. However, this provision was not included in the Comprehensive Crime Control Act of 1984. The Department believes strongly that this provision is important and that the justification for such a provision, in light of the Conner decision, has become compelling.

2. Obstruction of justice offenses

Our second recommendation concerns the predicate acts relating to obstruction of justice. At the present time, Section 1503 of Title 18, the basic obstruction of justice statute, is a RICO predicate crime. However, in 1982, when the Victim and Witness Protection Act was enacted, all references to witnesses were removed from Section 1503 and new Sections 1512 and 1513 were enacted to provide greater protection for witnesses than did Section 1503. Unfortunately, Sections 1512 and 1513 were not added to the list of RICO predicates. As a result, serious criminal conduct, such as intimidating a witness (now covered in Section 1512) or retaliating against a witness (now covered in Section 1513) arguably cannot be included as part of a RICO violation, even though it is clear that such conduct was intended to be included. Since it is uncertain whether such conduct can be prosecuted under Section 1503, we recommend that this anomaly be rectified by adding Sections 1512 and 1513 to the definition of "racketeering activity" in Section 1961(1) of Title 18.

3. Civil damage actions by the United States

Third, we believe that the statute should be amended to clarify the authority of the United States to file damage suits for injuries suffered by it as a direct result of RICO violations. The government already has authority to sue for injunctive relief on behalf of others and, presumably, on its own

behalf as well. Thus, it would be anomalous to deny it the right to sue for damages when the United States has been injured by a RICO violation. As I indicated earlier, we believe that the statute's definition of "person" already permits the United States to sue for damages under section 1964(c), as we have recently done in Florida. Nevertheless, an amendment making this authority explicit would be useful in avoiding unnecessary litigation over the question in the future.

Damage suits by the United States could provide a particularly valuable method of protecting the public treasury from fraudulent misuse of federal funds. Such suits make possible the recovery of federal funds -- provided either through government programs or government contracts -- that have been fraudulently obtained or misused, as well as the recovery of other losses suffered by the government, such as in the FDIC case that I referred to earlier.

The option to sue under such a provision would provide other benefits as well. For example, the possibility of recovering treble damages under RICO might make litigation worthwhile in situations in which the recovery of actual damages only might not be cost effective. Second, the possibility of a treble damage suit by the government would have a significant deterrent effect on persons contemplating the fraudulent acquisition or misuse of government funds. With all of the recent revelations of possible fraud in the area of government contracts, such added deterrence

would certainly be welcome. In this connection, it is important to remember that the federal interest in an effective effort against organized, systematic illegality -- whether manifested by fraud against the government or other conduct detrimental to the interests of the United States -- is, in essence, an interest in a result. There is no apparent reason for limiting the government to the use of criminal prosecutions or civil injunction actions to achieve that result.

If the government were authorized to bring treble damage actions, the measure of such damages should be treble the loss that the government suffered as a result of the acts which gave rise to the RICO violation. For example, if a person obtained $1 million from a government program under false pretenses, constituting a RICO violation, the amount of damages should be three times $1 million. The important point is that there should be no requirement of a separate "racketeering" injury such as the Supreme Court rejected in Sedima. The damages should be based on the actual amount of damages proven by the government.

Adoption of this proposal could provide significant benefits to the government, and substantially enhance the deterrent impact of civil RICO. At the same time, because the Department would be screening and controlling these cases, there would be no basis for criticisms such as are now being generated by some types of civil RICO actions brought by private plaintiffs.

V. CONCLUSIONS

When Congress enacted RICO, the sponsors expected that private civil suits would provide a significant deterrent to organized and systematic criminal infiltration and misuse of legitimate enterprises. At the same time, they realized that a possible result of the broadly drafted statute would be its use against other types of defendants and activities. Experience has shown, however, that the instances of private civil RICO's use against traditional organized criminal activities are far outweighed by examples of its application as a general federal anti-fraud remedy against seemingly reputable businessmen.

The development of private civil RICO enforcement in this fashion has had two principal consequences. The first -- and more serious from our point of view, because it directly affects the law enforcement interests of the Department -- is that the potential of private enforcement as a deterrent to structured and continuing criminal activity has not been fully realized. The first question the Subcommittee must face, therefore, is whether the apparent failure so far to achieve RICO's potential as a weapon against organized crime warrants abandonment of the original Congressional strategy of using a combination of criminal prosecutions and civil actions to deter and punish or redress organized, systematic illegality.

In this connection, it is true, of course, that the deterrent value of private civil RICO enforcement does not seem very significant when judged in terms of the number of private actions that have been brought against known or suspected members of organized crime. On the other hand, in gauging the overall deterrent value of auxiliary enforcement by private plaintiffs, the deterrence provided by the mere threat of private suits must be added to the deterrence supplied by the suits that are actually filed. Furthermore, as the federal government's enforcement efforts continue to weaken organized crime and dispel the myth of invulnerability that has long surrounded and protected its members, private plaintiffs may become more willing to pursue RICO's attractive civil remedies in organized crime contexts. It should be remembered, too, that civil RICO has significant deterrent potential when used by institutional and governmental plaintiffs, which are not likely to be intimidated at the prospect of suing organized crime members. Finally, civil RICO's utility against continuous large-scale criminality not involving traditional organized crime elements should be kept in mind. These considerations suggest that private civil RICO enforcement in area of the organized criminality may have had a greater deterrent impact than is commonly recognized, and that both the threat and the actuality of private enforcement might be expected to produce even greater deterrence in the future.

If the Subcommittee concludes that private enforcement of RICO's prohibitions should be continued as a supplement to

government enforcement, it must consider the second major consequence of civil RICO's transformation into a federal anti-fraud remedy -- the burdens that private civil RICO actions have imposed on legitimate businessmen, on the federal courts, and on the federal civil justice system. Analysis of the available evidence seems to suggest that the collective weight of these burdens may not be as great as is claimed, and that the burdens in individual cases may be balanced by the social value of the remedy's availability against large-scale, systematic illegality. If its inquiry confirms these tentative conclusions, then the Subcommittee may wish to limit changes in the private right of action to statutory clarifications designed to reduce the likelihood of misuses in the area of principal concern -- actions predicated on an event involving ordinary fraud. If, on the other hand the testimony presented to the Subcommittee demonstrates that the actual or potential burdens of private suits significantly outweigh their benefits, then the Subcommittee may wish to consider imposing more substantial limitations on the statute's private right of action.

As I stated earlier, we believe there is a clear need to preserve and strengthen RICO's criminal provisions, and we think that enactment of H.R. 2517 would be inconsistent with

these goals. We are also inclined to think that it may be premature to limit severely private uses of civil RICO -- as is proposed in H.R. 2943 -- without first testing the effects of more modest changes that hold promise for preventing inappropriate applications of the statute. While we do not at this time endorse any specific modifications in private civil RICO, we recognize that failure to confine private RICO actions within reasonable bounds may not only be unfair to defendants and unduly burdensome for the federal courts, but may also encourage judicial interpretations in civil suits that could have adverse consequences for the government's enforcement efforts. We are ready, therefore, to work with the Subcommittee as it considers the need for legislative change, in the context of preserving -- and, we hope, strengthening -- the RICO statute for use by the government in criminal and civil cases brought to eradicate organized, systematic illegality.

I appreciate the opportunity to share our thoughts on this important statute with you today, and would welcome any questions the subcommittee may have.

UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

DETAILED
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FOR CHAPTER 110

9-110.000 ORGANIZED CRIME AND RACKETEERING

9-110.100 RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO)

On October 15, 1970, the Organized Crime Control Act of 1970 became law. Title IX of the Act is the Racketeer Influenced and Corrupt Organizations Statute (18 U.S.C. §§1961-1968), commonly referred to as the "RICO" statute. The purpose of the RICO statute is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. REP. NO. 91-617, 91st Cong., 1st Sess. 76 (1969). However, the statute is sufficiently broad to encompass any illegitimate enterprise affecting interstate or foreign commerce.

9-110.101 Division Approval

No RICO criminal or civil prosecutions or civil investigative demand shall be issued without the prior approval of the Organized Crime and Racketeering Section, Criminal Division. See RICO Guidelines at USAM 9-110.200, infra.

9-110.102 Investigative Jurisdiction

18 U.S.C. §1961(10) provides that the Attorney General may designate any department or agency to conduct investigations authorized by the RICO statute and such department or agency may use the investigative provisions of the statute or the investigative power of such department or agency otherwise conferred by law. Absent a specific designation by the Attorney General, jurisdiction to conduct investigations for violations of 18 U.S.C. §1962 lies with the agency having jurisdiction over the violations constituting the pattern of racketeering activity listed in 18 U.S.C. §1961.

9-110.110 Prohibited Activities

The RICO statute creates three new substantive offenses, and one conspiracy offense contained in 18 U.S.C. §1962, subsections (a), (b), (c), and (d).

18 U.S.C. §1962(a), which outlaws the acquisition of an enterprise with income derived from illegal activity, provides in pertinent part:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal derivation of the funds. The acquisition can in all respects be legitimate. Congress simply makes it illegal to invest ill-gotten gains. (See United States v. Cauble, 706 F.2d, Crim. No. 82-2087 (5th Cir. May 31, 1983); United States v. Zang, 703 F.2d 1186 (10th Cir. 1982); United States v. McNary, 620 F.2d 621 (7th Cir. 1980)).

18 U.S.C. §1962(b), which outlaws the acquisition or maintenance of an interest or control in an enterprise through illegal activity, provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. (Emphasis supplied)

The gravamen of the offense is the illegal acquisition or maintenance of an interest or control. Examples are the acquisition of control through extortion or a scheme to defraud, see United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), and the maintenance of an interest through bribery. United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982); United States v. Gambino, 566 F.2d 414 (2d Cir. 1977), cert. denied 435 U.S. 952 (1978).

18 U.S.C §1962(c), which outlaws the use of an enterprise to commit illegal acts, provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's

> affairs through a pattern of racketeering activity or collection of an unlawful debt. (Emphasis supplied)

This section is designed to reach those persons who by employment or association in an enterprise use that enterprise to engage in unlawful activities. The enterprise may be legitimate, but need not be. See USAM 9-110.100. For example, a group of individuals could organize an enterprise without legal form or title, but with the appearance of legitimacy, to perpetrate a scheme to defraud certain banking institutions and the U.S. Small Business Administration, as alleged in United States v. Rafsky, Cr. No. 75-0247R (E.D. Va.). United States v. Martino, 648 F.2d 367 (3d Cir), 648 F.2d 407 (1981), vacated in part 650 F.2d 952 (1982).

18 U.S.C. §1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

See United States v. Sutherland, 656 F.2d 1181, reh'g denied 663 F.2d 101 (5th Cir. 1981).

9-110.120 Common Elements

Violations of 18 U.S.C. §1962(a), (b) or (c) require proof of either a pattern of racketeering activity or the collection of an unlawful debt. In a pervasive scheme of criminal activity it is not uncommon to find both elements. Where both are present, each can be charged in a separate count.

In addition, violations of 18 U.S.C. §1962(a), (b) or (c) require that the enterprise involved be engaged in or affect interstate or foreign commerce. This element, the basis for federal jurisdiction, must be proved in all RICO statute cases. It is not, however, an element of proof that the particular acts with which a defendant is charged have, in and of themselves, any effect on interstate or foreign commerce. See United States v. Groff, 643 F.2d 396 (6th Cir. 1981); United States v. Rone, 598 F.2d 564, cert. denied 445 U.S. 946 (10th Cir. 1979); United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), cert. denied sub nom. Walgren v. United States, 102 S. Ct. 2040 (1982); United States v. Allen, 565 F.2d 964 (4th Cir. 1981).

9-110.121 Pattern of Racketeering Activity

To establish a "pattern of racketeering activity," as defined in 18 U.S.C. §1961(5), requires proof of at least two acts of "racketeering activity." Each racketeering activity must itself be an act subject to criminal sanction, that is, violative of an independent statute. United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). 18 U.S.C. §1961(1) enumerates, either generically (state) or specifically (federal), acts which qualify as racketeering activity:

A. Violations of State Law - any act or threat involving:

1. Murder
2. Kidnapping
3. Gambling
4. Arson
5. Robbery
6. Bribery
7. Extortion
8. Dealing in Narcotic or Other Dangerous Drugs

B. Violations of 18 U.S.C:

1. Section 201 (Bribery)
2. Section 224 (Sports Bribery)
3. Sections 471, 472, 473 (Counterfeiting)
4. Section 659 (Theft From Interstate Shipment) (Felony)
5. Section 664 (Embezzlement from Pension and Welfare Fund)
6. Sections 891, 892, 894 (Extortionate Credit Transactions)
7. Section 1084 (Transmission of Gambling Information)
8. Section 1341 (Mail Fraud)
9. Section 1343 (Wire Fraud)
10. Section 1503 (Obstruction of Justice)
11. Section 1510 (Obstruction of Criminal Investigation)
12. Section 1511 (Obstruction of State or Local Law Enforcement)
13. Section 1951 (Interference with Commerce, Bribery, or Extortion)
14. Section 1952 (Interstate Transportation In Aid of Racketeering)
15. Section 1953 (Interstate Transportation of Wagering Paraphernalia)
16. Section 1954 (Unlawful Welfare Fund Payments)

17. Section 1955 (Prohibition of Illegal Gambling Business)
18. Section 2314 (Interstate Transportation of Stolen Property)
19. Section 2315 (Sale of Stolen Goods)
20. Sections 2421, 2422, 2423, 2424 (White Slave Traffic)

C. Violations of 29 U.S.C.:

1. Section 186 (Restrictions of Payments and Loans to Labor Organizations)
2. Section 501(c) (Embezzlement from Union Funds)

D. Bankruptcy Fraud

E. Fraud in the Sale of Securities

F. Felonious Activity Involving Narcotic or Dangerous Drugs, such as:

1. Manufacture
2. Importation
3. Receiving
4. Concealment
5. Buying
6. Selling
7. Dealing

Any combination of the above-listed crimes can form a pattern of racketeering activity, even if both acts constitute state crimes only. See, however, RICO guidelines on judicial prosecution of cases involving only state predicate crimes. The basis for federal jurisdiction, as mentioned above, is the effect of the enterprise on interstate or foreign commerce. However, nexus or relationship between the acts of racketeering charged must be proved to establish the pattern.

> The concept of "pattern" is essential to the operation of the statute. One isolated "racketeering activity" was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity. The infiltration of legitimate business normally requires

> more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

S. REP. No. 91-617, 91st Cong. 1st Sess. 158. See United States v. Martino, 648 F.2d 367 (11th Cir. 1981); United States v. Aleman, 609 F.2d 298, cert. denied 445 U.S. 946 (7th Cir. 1979); United States v. Parness, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Moreover, one of the acts must have occurred after the effective date of the RICO statute (Oct. 15, 1970) and the more recent act must have occurred "within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering." 18 U.S.C. §1961(5); United States v. Walsh, 700 F.2d 846 (2d Cir. 1983); United States v. Welsh, 656 F.2d 1059 (5th Cir. 1981), cert. denied sub nom Castell v. United States, 102 S.Ct. 1767 (9182). The Criminal Division requires that each defendant must have committed one act of racketeering within the five-year statute of limitation in order to be charged with violating 18 U.S.C. §1962(c). See United States v. Walsh, supra.

Finally, the "social status" of the actor is immaterial. It is not an element of the offense that the defendant is associated with organized crime. He need only have committed acts prohibited by the RICO statute. United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975).

9-110.122 Collection of an Unlawful Debt

The alternative element in a 18 U.S.C. §1962 violation is the collection of an unlawful debt. Unlike the pattern of racketeering element, only one collection is necessary to make out a violation. There are two methods of proving the collection of an unlawful debt. The circumstances are narrow but are peculiarly designed to combat common methods of organized criminal activity.

A. The first method requires:

1. A gambling activity or business illegal under federal, state or local law;

2. A debt incurred or contracted in that gambling activity or business; and

3. Collection of that debt.

B. The second method requires:

1. A debt incurred in connection with the business of lending money which is unenforceable in whole or in part because of federal or state usury laws (to be usurious the rate of interest must be double the legally enforceable rate of interest under state of federal law); and

2. Collection of that debt.

The first method permits a new avenue of attack on the illegal gambling business in that the new forfeiture provisions of 18 U.S.C. §1963, discussed in USAM 9-110.130, permit the forfeiture of the legitimate front used to cover the illegal activity. The second method is designed to attack the loanshark where there is an absence of proof of violence in the collection of the debt.

9-110.130 Criminal Penalties

18 U.S.C. §1963(a) provides for the imposition of a maximum term of imprisonment of twenty years and a fine of $25,000 for each violation of 18 U.S.C. §1962. In addition, 18 U.S.C. §1963(a) provides for a forfeiture proceeding in personam against the defendant in that, upon conviction, the violator:

> shall forfeit to the United States (1) any interest he has acquired or maintained in violation of Section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of Section 1962.

Any forfeiture is subject, of course, to the rights of innocent persons. Once the property interests of the accused are forfeited, 18 U.S.C. §1963(c) grants the courts the power to authorize the Attorney General to seize the forfeited property or interest and dispose of the same in accordance with the provisions of the subsection.

At the time of an indictment charging a violation of 18 U.S.C. §1962, the United States may move pursuant to 18 U.S.C. §1963(b) for a restraining order or prohibition or other device, including a request for a performance bond, to protect any property interest subject to forfeiture

under 18 U.S.C. §1963(a). Where forfeiture of the enterprise and other property interests used in the commission of a 18 U.S.C. §1962 violation will be sought, the United States can and should move to protect that property interest from liquidation and disposal during the pendency of the criminal proceeding via this provision.

The Federal Rules of Criminal Procedure require the inclusion of an allegation in the indictment specifying the property interests to be forfeited. The purpose of this allegation is to apprise the accused, in accordance with the standards of due process, that he stands to lose his property interests which are utilized in violation of 18 U.S.C. §1962. See United States v. Bello, 470 F. Supp. 723 (S.D. Calif. 1979).

9-110.140 Civil Remedies

9-100.141 Of the United States

The civil remedies contained in the RICO statute are designed "to free the channels of commerce from predatory activities" and not to punish the violator, which remains within the province of the criminal provisions discussed in USAM 9-110.130. S. REP. NO. 91-617, 91st Cong., 1st Sess. 81 (1969); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Local 560, International Brotherhood of Teamsters, 560 F. Supp. 511 (D. N.J. 1982).

A. 18 U.S.C. §1964(a) grants district courts the power to hear civil actions by the United States to:

1. Divest a person of any interest in an enterprise;

2. Restrain future activities or investments of any person;

3. Dissolve or reorganize any enterprise, subject to the rights of innocent persons.

B. 18 U.S.C. §1964(b) authorizes the Attorney General, as defined in 18 U.S.C. §1961(10), to institute civil proceedings and directs the courts to expedite such matters. 18 U.S.C. §1964(b) also provides for interlocutory restraining orders and prohibitions and the acceptance of performance bonds pending the final disposition of the civil proceeding.

C. A preceding criminal action is not a prerequisite to the institution of a civil action. However, careful consideration should be

given to filing a civil action initially where informants who could be identified by discovery under the Federal Rules of Civil Procedure are concerned. In fact, since the discovery tools provided in a civil action could jeopardize a criminal case prior to trial, the initial finding of a civil case where a criminal proceeding is anticipated, or the simultaneous seeking of an indictment and filing of a Section 1964 civil action is not recommended. Furthermore, in the event that a civil action is filed subsequent to a conviction in a criminal proceeding, Section 1964(d) provides for the assertion of the doctrine of collateral estoppel by the United States in a civil proceeding.

9-110.200 RICO GUIDELINES PREFACE

The decision to institute a federal criminal prosecution involves a balancing process, in which the interests of society for effective law enforcement are weighed against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.

Despite the broad statutory language of RICO and the legislative intent that the statute ". . . shall be liberally construed to effectuate it remedial purpose," it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every case in which technically the elements of a RICO violation exist, will result in the approval of a RICO charge. Further, it is not the policy of the Criminal Division to approve "imaginative" prosecutions under RICO which are far afield from the Congressional purpose of the RICO statute. Stated another way, a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances cases, will not be added to an indictment unless it serves some special RICO purpose as enumerated herein.

Further, it should be noted that only in exceptional circumstances will approval be granted when RICO is sought merely to serve some evidentiary purpose, rather than to attack the activity which Congress most directly addressed--the infiltration of organized crime into the nation's economy.

These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative perogratives of the Department of Justice.

9-100.210 Authorization of Prosecution: The Review Process

Effective September 15, 1980, the review and approval function for all RICO matters has been centralized within the Organized Crime and Racketeering Section. To commence the review process, a final draft of the proposed indictment and a prosecutive memorandum shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. The guidelines provide detailed guidance for the use of RICO charges in criminal investigations and prosecutions, as well as in all civil applications of RICO. Attorneys are, however, encouraged to seek guidance from the Organized Crime and Racketeering Section, telephonically or by letter, prior to the time an investigation is undertaken and well before a final indictment and prosecutive memorandum are submitted for review. Communication with the Organized Crime and Racketeering Section well in advance of indictment may result in the resolution of problems with a proposed RICO indictment and effect an expeditious review.

The submitting attorney must anticipate that the RICO review process, which is handled on a first-in-first-out basis, is a time consuming process, in which the reviewer has no control over the number of cases submitted for review during a given time frame. Accordingly, the submitting attorney must allocate sufficient lead time to permit review, revision, conferences, and the scheduling of the grand jury. Unless there is a backlog, 15-working days is usually sufficient. The review process will not be dispensed with because a grand jury, which is about to expire, has been scheduled to meet to return a RICO indictment. Therefore, submitting attorneys are cautioned to budget their time and to await receipt of approval before scheduling the presentation of the indictment to a grand jury.

If modifications in the indictment are required, they must be made by the submitting attorney before the indictment is returned by the grand jury. Once the modifications have been made and the indictment has been returned, a copy of the indictment filed with the clerk of the court shall be forwarded to Organized Crime and Racketeering Section, Box 571, Ben Franklin Station, Washington, D.C. 20044. If, however, it is determined that the RICO count is inappropriate, the submitting attorney will be

advised of the Section's disapproval of the proposed indictment. The submitting attorney may wish to redraft the indictment based upon the Section's review and submit a revised indictment and/or prosecutive memorandum at a later date.

9-110.211 Duties of the Submitting Attorney

Once a RICO indictment has been approved by the Organized Crime and Racketeering Section and has been returned by the grand jury, the Section shall be notified in writing of any significant rulings which have an impact upon the RICO statute. For example, any ruling which results in a dismissal of a RICO count, or any ruling affecting or severing any aspect of the forfeiture provisions under RICO. In addition, copies of RICO motions, jury instructions and briefs filed by the U.S. Attorney as well as the defense should be forwarded to the Organized Crime and Racketeering Section for retention in a central reference file. The government's briefs and motions will provide assistance to other U.S. Attorneys' offices handling similar RICO matters.

Once a verdict has been obtained, the U.S. Attorney should forward the following information to the Organized Crime and Racketeering Section for retention: (a) the verdict on each count of the indictment, (b) a copy of the judgment of forfeiture, (c) estimated value of the forfeiture, (d) judgment and sentence(s) received by each RICO defendant.

9-110.300 RICO SPECIFIC GUIDELINES

9-100.310 Considerations Prior to Seeking Indictment

Except as hereafter provided, the attorney for the government should seek authorization for an indictment charging a RICO violation only if in his judgment those charges:

A. Are necessary to ensure that the indictment:

1. Adequately reflects the nature and extent of the criminal conduct involved; and

2. Provides the basis for an appropriate sentence under all the circumstances of the case; or

B. Are necessary for a successful prosecution of the government's case against the defendant or a co-defendant; or

C. Provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct.

9-110.311 Commentary

All-encompassing examples are difficult, if not impossible, to formulate when discussing RICO; however, by way of illustration only:

A. When a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate, charging a RICO conspiracy may be appropriate;

B. When the course of criminal conduct has aspects which aggravate the seriousness of the crime (including prior criminal activity by a RICO defendant) which realistically can be foreseen as grounds for the sentencing judge imposing a heavier sentence under RICO than for the underlying acts, a RICO count may be appropriate;

C. When, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct in a pattern of racketeering activity can be shown to be admissible only under RICO, and not under other evidentiary theories (such as: prior similar acts, continuing crime or conspiracy), a RICO count my be appropriate;

D. When a substantial prosecutive interest will be served by forfeiting an individual's interest in or source of influence over the enterprise which he has acquired, maintained, operated or conducted in violation of 18 U.S.C. §1962, RICO may be appropriate.

9-110.320 Approval of Organized Crime and Racketeering Section Necessary

No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division.

9-110.321 Commentary

It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal

Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Box 571, Ben Franklin Station, Washington, D.C. 20044, at least 15-working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, as authorizations based on oral presentations will not be given.

These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violations of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. §1962 is not required.

In addition to the above considerations, the use of RICO in a prosecution is also governed by the Principles of Federal Prosecution (July 1980). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the Principles of Federal Prosecution.

9-110.330 Charging RICO Counts

A RICO count of an indictment will not be charged where the predicate acts consist solely and only of state offenses except in the following circumstances:

A. Cases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest;

B. Cases in which significant organized crime involvement exists; or

C. Cases in which the prosecution of significant political or governmental individuals may pose special problems for local prosecutors.

9-110.331 Commentary

The purpose of this guideline is to underscore the principle that prosecution of state crimes, except in the circumstances set forth above, is primarily the responsibility of the state authorities. These guidelines will be construed in light of a practical understanding of the realities of state law enforcement rather than a theoretical view of the reach of state law.

9-110.340 Charging a Violation of 18 U.S.C. §1962(c)

No indictment shall be brought charging a violation of 18 U.S.C. §1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction.

9-110.341 Commentary

The purpose of this guideline is to prevent a pattern of racketeering activity being charged which lacks the attributes which Congress had in mind but which is literally within the language of the statute.

9-110.350 Relation to Purpose of the Enterprise

In order to constitute a violation of 18 U.S.C. §1962, the pattern of racketeering activity or collection of unlawful debt must have some relation to the purpose of the enterprise.

9-110.351 Commentary

This guideline covers the type of situation that occurred in United States v. Nerone, 563 F.2d 836 (7th Cir. 1977), cert. denied 435 U.S. 957 (1978) in which mere geographic co-location between the enterprise (a trailer park) and the pattern of racketeering activity (gambling) was held insufficient under 18 U.S.C. §1962(c).

9-110.360 Charging Enterprise as a Group Associated in Fact

No RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic or other identifiable goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

9-110.361 Commentary

The purpose of this guideline is to restrict the use of the RICO statute by requiring that the "enterprise" have a demonstrable existence apart from the mere confederation of the individuals committing the underlying predicate acts. However, RICO counts may be approved in otherwise appropriate circumstances when it can be demonstrated that the enterprise has the attributes required by this guideline.

For example, such an enterprise could be an existing club or unincorporated association, with an organizational framework and hierarchy, with individuals occupying offices or positions of authority in the hierarchy over a regular membership; who function in diversified roles. The enterprise must have some common denominator such as an interest, avocation, or other regular activity separate and apart from the criminal acts, but which is directed toward an economic or other identifiable goal. Other indicia of the enterprise's separate existence may include formalized membership, recruitment and induction and/or membership insignia.

Stated another way, independent of the proof of the requisite pattern of racketeering, the evidence must be forthcoming to demonstrate the structure and existence of the enterprise. See United States v. Turkette, 452 U.S. 576 (1981); United States v. Errico, 635 F.2d 152 (2d Cir. 1980).

9-110.400 RICO PROSECUTIVE (PROS) MEMO FORMAT

9-110.401 Preface

A well written, carefully organized pros memo is the greatest guarantee that a RICO prosecution will be authorized quickly and efficiently. This section sets out the criteria by which a RICO pros memo is evaluated by the Organized Crime and Racketeering Section. Close

attention by attorneys to the comments below will ensure that delays and declinations are kept to a minimum.

9-110.402 Purpose

The purpose of standardizing the format for RICO prosecutive memoranda is threefold:

A. To ensure compliance with the policy of the RICO guidelines;

B. To ensure legally sufficient indictments and theories of prosecution; and,

C. To provide a manageable means of conveying sufficient information for the timely review of RICO indictments.

9-110.403 General Requirements

A RICO pros memo shall be an accurate, candid and thorough analysis of the strengths and weaknesses of the proposed prosecution. In the interests of uniformity, a RICO pros memo should be divided into the following categories:

A. Identification of the Defendant

B. A Statement of Proposed Charges

C. A Summary of the Case

D. A Statement of the Law

E. A Statement of the Facts

F. Anticipated Defenses/Special Problems or Considerations

G. Forfeiture Section

H. RICO Policy Section

I. Conclusion

J. Final Draft of Proposed Indictment

9-110.404 Specific Requirements

Identification of the Defendants

This section should identify each proposed defendant by name and aliases, date and place of birth (if known), criminal arrests and convictions, current employment and major business or labor interests (if any), and connection to or membership in an organized crime family, corrupt union or other criminal organization. If relevant, the defendant's health, age and potential for flight to avoid prosecution should be noted as factors in determining whether he/she will actually stand trial or receive incarceration. The memo should also indicate whether a defendant's current incarceration is likely to diminish the merit of the proposed charges.

9-110.405 A Statement of Proposed Charges

Since the pros memo will not receive final approval until the proposed indictment is reviewed, it is required that the memo provide a schematic of the proposed charges, such as:

Defendant	Charge	Indictment
Smith	Hobbs Act	Counts 3, 4, 5
	Taft-Hartley	Counts 6-10
	RICO	Counts 1 and 2
Jones	Taft-Hartley	Counts 6-10
	Tax Evasion	Count 11
	RICO	Counts 1 and 2

9-110.406 Summary of the Case

This section summarizes the significant highlights of the evidence in the case and the prosecutive theory upon which it is based. The summary should marshall the evidence in a manner likely to provide a clear understanding of the nature and strength of the evidence. While the Summary section covers the same ground as the Statement of Facts, the latter section requires greater detail and witness attribution.

Because the Summary is a narrative outline of the Facts section, which in turn is to be based strictly on admissible evidence, neither section should contain informant information, general intelligence data or interesting but inadmissible hearsay. It is not the function of the Summary, once the case reaches the pros memo stage, to establish the significance of the prosecution beyond that suggested by the evidence itself. The strength of the case becomes blurred, not enhanced, by resorting to irrelevant references (from an evidentiary standpoint) to organized crime's involvement or similar allegations. The Summary is essentially equivalent to the government's summation; the Facts section is comparable to a trial brief; neither should stray into areas which the court at trial would not likely permit.

9-110.407 Statement of the Law

This section should state the legal elements of proof for each of the crimes alleged, to include the relevant case law (particularly from the appropriate circuit) governing those elements. Even though the reviewer has undoubtedly seen these elements and cases many times before, the Law section serves the important role of establishing that the writer is knowledgeable of his/her burden and has prepared the memo accordingly. Except in unusual cases the Statement of Law should precede the Statement of Facts; this sequence provides the reviewer with the legal standards against which the evidence is to be evaluated.

The Statement of Law section relates only to the elements of proof and relevant case law in that area. Legal problems and solutions which relate to other areas, such as the Federal Rules of Evidence, anticipated attacks against wiretaps, photo spreads, or joinder of offenses, to name but a few, should be discussed in the Anticipated/Defenses/Special Problems section.

The Statement of Law must provide the following information:

A. The precise formulation of the RICO enterprise.

B. The relevant case law of the circuit which supports this formulation of the enterprise.

C. Any case law, regardless of the circuit it originated in, which would preclude this prosecution.

D. How the enterprises's affairs were conducted through the pattern of racketeering activity.

E. How the enterprise was engaged in or its activities affected interstate commerce.

F. If applicable, the elements and theory of any conspiracy to violate 18 U.S.C. §1962.

9-110.408 Statement of Facts--Proof of the Offense

As the title suggests, this section should state facts, not opinions, hearsay, information or colorful asides. The facts must be recited concisely, accurately, and logically--if for no other reason than that the time within which a pros memo is approved is in inverse proportion to the accuracy and quality of the Facts section. Obviously not every fact unearthed during the investigation should be included and a pros memo which contains needless or peripheral detail has no better chance for prompt approval than one that contains too little. Accordingly, pros memos which merely incorporate by reference investigative reports or grand jury material, or which boilerplate extensive portions of investigative reports within the Statement of Facts section, are not sufficient.

The recommended format for the Facts section is to set out the relevant gist of each key witness' anticipated testimony, individually and in chronological sequence. Not all cases are best articulated in this manner but there should be good reason to depart from the general format. Although it is usually more convenient to write up the case in a single narrative which combines the testimony of several witnesses, do not do so. For many of the reasons set out below, and based on past experience, such narratives are to be discouraged. The Summary section, if done well, will be sufficient to put each witness' testimony in correct context. Where there are groups of witnesses who will merely authenticate documents or who will testify to essentially the same recurring events, their testimony need not be individually summarized.

Before the substance of a particular witness' testimony is set out, the writer must indicate whether the witness has been immunized or promised any considerations and, if so, the details thereof. The witness' past criminal record should be stated. And, importantly, the writer should note whether the witness has already testified in the grand jury; if not, an explanation should be supplied together with the basis for believing that the testimony will be available at trial.

The prospective testimony should be specific on all major points, providing, where possible, the names, dates and places of key events and

conversations to the extent the witness has and can do so. For example, where two government witnesses have attended a conspiratorial meeting with two-proposed defendants, the description of each witness' testimony of that meeting should cover the areas of when, where and who said what. Key meetings or conversations must not be summarized to the point where it is unclear to the reader what was said and by whom. A phrase such as "It was then suggested and agreed by the defendants that they would pay the kickback to 'A'" is unacceptable; because, upon close analysis, it is uncertain whether each defendant specifically and verbally "agreed" to something or whether "agreement" was simply inferred by the witness. And the passage also suggests that the defendants agreed specifically to a "kickback," which would be a significant inculpatory admission, when in fact the testimony may only allege that they agreed to a make a "payment" which arguably constituted a kickback. Avoid such characterizations and/or generalizations of this type. If the evidence results from a wiretapped or recorded conversation, the key remarks of a defendant should be quoted verbatim. If the evidence was not recorded, the correct procedure is to set forth, as precisely as recalled by the witness, what was said. For example, "A" will testify that "B" showed a loan application to the group and complained that "C," a union trustee, was balking at processing the loan. "D" responded, "Let's pay 'C,' two points as a fee." "B" said "Good idea, I'll tell him." Although this recitation doesn't explicitly indicate that the "fee" was intended to be a kickback, it is obvious from the context that it was, especially since "C," as a fiduciary of the fund, could not legally receive a fee for processing the loan application. In the Anticipated Defenses section the writer would, of course, anticipate the claim that the defendants intended only to pay a legal fee. The writer would then refute the claim both on its factual incredulity and by citing the case law and union constitution (if applicable) which prohibit such a conflict of interest.

A frequent defect in a pros memo, for which the above hypothetical also serves as an example, is for the writer to gloss over, or fail to recognize, inconsistencies or weaknesses in the case. If two or more government witnesses participated in an event or conversation which is critical to the case, the extent to which the witnesses are consistent or contradictory on any key point is also critical. The pros memo should supply, in the example above, "E's" account of the same meeting with "A," "B" and "D." A general statement, often made in pros memos, that "E" corroborates "A's" testimony that the meeting with "B" and "D" occured is unacceptable. The critical questions are: Does "E" attribute the same responses to "B?" If not, were "A" and "E" asked to cover the same ground in the grand jury and, if not, why not? It is not usual for one government witness to corroborate another government witness on some points while being in dispute on others. The writer must recognize and

discuss those points which are critical and indicate the extent of the problem. Not all differences in recollection warrant discussion in the pros memo but material differences do. A pros memo should also alert the reviewer if a government witness has contradicted himself in past statements on major points.

The Statement of Facts should not contain conjecture or opinion, except as allowed by the Rules of Evidence (e.g., state of mind). Frequently pros memos include assumptions or conclusions drawn by a witness based on extrinsic events. For the most part, objections to testimony along these lines will be sustained as hearsay. The writer must also avoid asserting his/her own subjective opinions as if they are fact. For example, "Immediately after his meeting with "E" and "A," according to airline records and cancelled checks, defendant "D" flew to Chicago and discussed the kickback with "C," the union trustee." In fact, the airline records and checks may only establish that "D" flew to Chicago, from which the inference is drawn that a meeting occurred.

9-110.409 Anticipated Defenses/Special Problems of Considerations

The Defense section should cover the factual and evidentiary weaknesses in the case and the likely legal defenses or theories. It would be impossible here to list all of the recurring defenses encountered in RICO prosecutions. In any event, each case is unique. It is the writer's job to recognize, based upon a thorough review of the grand jury transcripts, investigative reports, court papers, etc., which potential defenses merit discussion. For illustrative purposes, the writer should always consider the following:

A. If a search warrant was involved, is there a probable cause issue? Was there proper inventory served? Has the writer personally reviewed the warrant and affidavit and been satisfied that the search will pass muster at a suppression hearing? If the search is questionable, how will the loss of its fruits affect the case; how difficult is the taint problem?

B. If a wiretap was involved, was there proper minimization; prompt service of inventory; adequate voice identification; accurate transcriptions made; are key conversations audible; were the original tapes properly sealed and stored; were 18 U.S.C. §2517(5) orders obtained for use of recorded conversations in unrelated prosections, etc.?

C. If a defendant's prior sworn testimony, confession, or inculpatory admissions are relevant, what will be his defense: failure to warn; failure to comply with Departmental regulations; earlier promise of immunity or non-prosecution?

D. Does the case involve an unusual application of a federal statute, such as the applicability of the Travel Act to a particular state's commercial bribery statute? If so, what is the prevailing case law in the circuit? How unique is the enterprise that is alleged; what is the prosecutive theory of each defendant's participation in a pattern or racketeering acts; is the theory of participation against one defendant different than as against another?

E. If the indictment contains a RICO conspiracy charge, how does the proof aliunde stack up against each defendant? What is the test and procedural technique in the district of prosecution for proving a conspiracy? How serious will be the spill-over prejudice if the court strikes the evidence against a particular defendant?

F. Are there problems involving:

1. Statute of limitations and pre-indictment delay;

2. Prosecutorial vindictiveness;

3. Tax disclosures;

4. Pre-indictment publicity; Fed. R. Crim. P. 6(e) violations;

5. Chain of custody and authenticity questions for key prosecution documents;

6. Alibis; entrapment; Bruton.

In addition to the selected category above and/or whatever unique problems exist in the case, the writer should make every effort to convey the seriousness of a potential problem instead of skirting it. If a key government witness, upon whom part or all of the prosecution rests, has been convicted of perjury or fraud or has testified in a series of acquittals, it would not be enough to note that his credibility will be severely tested, which states the obvious. In such a case, the pros memo should indicate why the witness' testimony, despite these handicaps, will be credible.

Obviously, it is not necessary to address every conceivable defense nor is it required that the writer negate a defense that would be inapplicable simply to show that an effort was made to anticipate defenses. On the other hand, it ought to be a rare case where a defendant

raises a substantial issue at trial which was not discussed in the pros memo but the existence of which was or should have been anticipated.

Special problems should also be anticipated. Examples include recordings of poor audibility, the exercise of a privilege (marital or constitutional), the need to depose gravely ill witnesses, and the availability of protected witnesses in multidistrict prosecutions.

9-110.410 Forfeiture

The purpose of this section is to set forth the proof by defendant when the indictment charges that interests of that defendant are subject to forfeiture pursuant to 18 U.S.C. §1963. This section must deal with the following issues:

A. The identity of the interest(s) sought.

B. The proof that those interests are exclusively owned by the defendant.

C. The theory upon which forfeiture is predicated (i.e., interest acquired/maintained or interest affording a source of influence over the enterprise);

D. The identity of any third parties who have a claim to the property sought to be forfeited (e.g., victims of extortion, lien holders, bona fide purchasers for value) or third parties whose property rights will be substantially affected by a forfeiture of the defendant's interest (e.g., minority stockholders in a closely held corporation, partners, individuals with an undivided interest in the property).

E. How the submitting attorney plans to preserve the interests of the United States and innocent third parties in the property during the interval between the entry of the judgment of forfeiture and the time when the government may seize and dispose of the property.

F. What the ultimate disposition of the property should be (e.g., is it commercially feasible to sell it, should it be returned to third parties, should it be destroyed, etc.).

G. Is the forfeiture sought disproportionate to the criminal conduct charged?

As the foregoing questions illustrate, there are many troublesome issues surrounding RICO forfeitures which will surface after the property has been forfeited. It is the submitting attorney's responsibility to anticipate these problems and develop a forfeiture plan before the indictment is returned.

9-110.411 RICO Policy Section

In this section of the pros memo the submitting attorney must explain how the facts in this case relate to the RICO Guidelines. The submitting attorney must do more than restate the guidelines in a conclusory fashion; he/she must explain "why" RICO is appropriate. In addition, the RICO Guidelines must be read as a whole. In other words, to be approved, a proposed RICO must not only evidence those principles which justify RICO's use, but also must not be contrary to those principles which weigh against its use. For example, where a proposed RICO prosecution would be prohibited under one guideline, prosecution will not necessarily be authorized simply because it does fit within one of the other guidelines.

9-110.412 Conclusion

This section is self-explanatory. It can also be used to indicate miscellaneous items such as anticipated length of trial, the date by which the indictment must be returned, and other matters.

9-110.413 Proposed Indictment--Final Draft

A pros memo will not receive final action unless the final draft of the proposed indictment is simultaneously submitted for review. It goes without saying that indictments must be proofread carefully. While the section's review will pick up the more obvious errors in pleading, other errors involving allegations of fact, time, or place will only be caught by the trial attorney's personal familiarity with the evidence. All statutory citations, particularly of state statutes, should be double-checked for typographic errors. Review by the Organized Crime and Racketeering Section of all proposed RICO cases is not a substitute for the necessary first line review at the field level before the case is submitted to the Criminal Division.

One of the principal reasons RICO reviews take longer than anticipated is that the case either has not been reviewed at the originating office by a supervisor, or the draft indictment is incomplete and/or unaccompanied by a pros memo. Another recurring problem is the

submission by the submitting attorney of a "final" draft indictment to Strike Force 18, which the author continues to modify without informing the reviewer, or simultaneously submits for review within the orginating office. In any event, the indictment being reviewed turns out not to be the same indictment ultimately submitted for approval. Therefore in order to avoid wasted effort, the submitting attorney must not forward as a final draft indictment one which he/she has not in fact finalized or which has not been approved by the originating office.

Further, it is the responsibility of the submitting attorney after the indictment has been returned to forward a copy bearing the seal of the clerk of court, to the Organized Crime and Racketeering Section.

9.110.500 FORMS

9-110.600 SYNDICATED GAMBLING

Sections 801-811 of the Organized Crime Control Act of 1970, which amend Title 18, United States Code, by adding Sections 1511 and 1955, are designed to combat "illegal gambling business" or syndicated gambling. 18 U.S.C. §1511 is directed at the political and police corruption which makes widespread illegal gambling possible, while 18 U.S.C. §1955 is directed at the illegal gambling itself.

9-110.601 Basis for Federal Jurisdiction

Congress enacted this legislation pursuant to its power to regulate interstate commerce. In so doing, Congress made the finding that illegal gambling does involve widespread use of and does have an effect upon interstate commerce. Hence, the federal government has jurisdiction to initiate investigations and prosecutions of persons conducting large scale illegal gambling businesses without showing that the proscribed activity has affected interstate commerce. Perez v. United States, 402 U.S. 146 (1971); United States v. Harris, 460 F.2d 1041, 1048 (5th Cir.), cert. denied, 409 U.S. 877 (1972); Schneider v. United States, 459 F.2d 540 (8th Cir.), rehearing denied, 478 F.2d 1403, cert. denied, 409 U.S. 877 (1972).

9-110.602 Scope of Federal Jurisdiction

Congress did not intend to occupy the field of illegal gambling exclusively nor to relieve local law enforcement bodies of their