

Offenses Appendix – Part Two: Studied Offenses Originating in the United States Senate

Each of the 169 studied offenses originating in the U.S. Senate is listed in the following table. The offenses are listed in numerical order by Senate (S.) bill number. The table entry for each offense includes the following factual information: the bill number and title; a short, general description of the criminal offense; a citation to the section of the bill in which the provision is located; and the specific language of the offense including, where appropriate, definitions from and citations to other relevant provisions of the bill and the United States Code. The table entry for each offense also includes an analysis of the strengths and weaknesses of the offense’s *mens rea* requirement (if any), an explanation of other considerations related to the offense and its *mens rea* analysis; and the offense’s *mens rea* grade.

S. 8	Child Custody Protection Act
Description	Creates criminal liability for interstate transport of minors to obtain abortions.
Language	<p>“[W]hoever knowingly transports a minor across a State line, with the intent that such minor obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor’s abortion decision, in force in the State where the minor resides, shall be” (Sec 2(a), 18 U.S.C. § 2431(a)(1)).</p> <p>“For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the minor, in a State other than the State where the minor resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the minor resides.” (Sec. 2(a), 18 U.S.C. § 2431(a)(2)).</p> <p>“It is an affirmative defense to a prosecution for an offense . . . that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the minor or other compelling facts, that before the minor obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law. . . .” (Sec. 2(a), 18 U.S.C. § 2431(c)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	The analysis of this offense assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” does not apply to the following clause: “thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor’s abortion decision, in force in the State where the minor resides,” and the defendant need not have knowledge of the laws governing abortions or an intent to evade particular legal requirements.
Other Considerations	<p>The bill includes a defense protecting a defendant who “reasonably believed, based on information [he] obtained directly from a parent of the minor or other compelling facts,” that the requisite parental consent had been given or judicial authorization granted. But the provision does not make clear whether the defendant must know of the law requiring parental involvement. Thus, this provision could be used to convict a 17-year-old girl’s 17-year-old boyfriend for transporting her across state lines to get an abortion solely because it is more convenient or less expensive in the other state.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Moderate.”</p>
Grade	Weak-to-Moderate

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S. 25	Fair Tax Act of 2005
Description	Creates criminal liability for the failure to remit taxes, or the filing of a false tax return, under a new national sales-tax regime that would replace the existing federal income tax.
Language	"Each person who is required to and willfully fails as part of a trade or business to collect taxes imposed by this subtitle may be . . ." (Sec. 505(b)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	By its terms, this offense requires the involvement of a trade or business. If properly drafted, this requirement could help ensure that only those in a position to know of the tax and their responsibility to collect it would be exposed to criminal punishment. But the offense is far from clear about which persons involved in the trade or business have potential criminal liability. It is similarly unclear about what it means for a person to fail "as part of" a business to collect taxes.
Grade	Moderate

S. 25	Fair Tax Act of 2005
Description	Creates criminal liability for the failure to remit taxes, or the filing of a false tax return, under a new national sales-tax regime that would replace the existing federal income tax.
Language	"Each person who willfully asserts an invalid intermediate or export sales exemption from the taxes imposed by this subtitle may be . . ." (Sec. 505(c)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The <i>mens rea</i> requirement in this offense would be stronger if it clarified that the person must have knowledge that the exemption is invalid.
Grade	Moderate

S. 25	Fair Tax Act of 2005
Description	Creates criminal liability for the failure to remit taxes, or the filing of a false tax return, under a new national sales-tax regime that would replace the existing federal income tax.
Language	"Each person who willfully fails to remit taxes imposed by this subtitle may be . . ." (Sec. 505(d)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other	The strength of this offense's <i>mens rea</i> requirement depends in part on the level of knowledge each class of persons to which the offense is applied are likely to have of the duty to

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Considerations	remit the new taxes. For example, if it is applied to roadside vendors operating in locales where no permit is required, and thus to whom no information on the tax is provided as part of a permitting process, then it is a far weaker provision than if it is applied only to store managers of national retail chains.
Grade	Moderate

S. 25	Fair Tax Act of 2005
Description	Creates criminal liability for the failure to remit taxes, or the filing of a false tax return, under a new national sales-tax regime that would replace the existing federal income tax.
Language	"A person who willfully files a false claim for a family consumption allowance rebate . . . may be . . ." (Sec. 505(i)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The <i>mens rea</i> requirement in this offense would be stronger if it clarified that the person must have knowledge that the claim is false.
Grade	Moderate

S. 29	Social Security Number Misuse Prevention Act
Description	Creates criminal liability for certain misuses of Social Security Numbers.
Language	"Whoever . . . knowingly and willfully displays, sells, or purchases . . . any individual's Social Security account number . . ." (Sec. 9(b), 42 U.S.C. § 408(a)(9)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. In addition, the "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Grade	Moderate

S. 29	Social Security Number Misuse Prevention Act
Description	Creates criminal liability for certain misuses of Social Security Numbers.
Language	"Whoever . . . obtains any individual's Social Security number for the purpose of locating or identifying the individual with the intent to injure or harm that individual . . ." (Sec. 9(b), 42 U.S.C. § 408(a)(10)).
Strengths	The "for the purpose of" and "with the intent to" clauses require the government to show specific intent to injure or harm an individual. In many instances, this is likely to be <i>malum in</i>

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	se conduct.
Weaknesses	The offense should define “injure or harm.” Because it does not define these terms, it could cover economic or other non-physical injury or harm which may not be <i>malum in se</i> conduct.
Grade	Moderate

S. 29	Social Security Number Misuse Prevention Act
Description	Creates criminal liability for certain misuses of Social Security Numbers.
Language	“Whoever . . . obtains any individual’s Social Security number for the purpose of locating or identifying the individual with the intent to . . . use the identity of that individual for an illegal purpose.” (Sec. 9(b), 42 U.S.C. § 408(a)(10)).
Strengths	---
Weaknesses	The “for the purpose of” and “any illegal purpose” clauses do not add any <i>mens rea</i> protection to this offense because it does not require the person to have engaged in any inherently wrongful conduct or to have any knowledge of the illegality.
Other Considerations	This could include defendants who lawfully obtain the identification information and use it in a manner that may not be clearly wrongful but might be technically unlawful. For example, someone who obtains the information to enter it into a database not knowing that the database does not comply with federal or state regulations could be convicted of this offense.
Grade	None

S. 116	Privacy Act of 2005
Description	Creates criminal liability for certain misuses of Social Security Numbers.
Language	“Whoever . . . knowingly and willfully displays, sells, or purchases . . . any individual’s Social Security account number . . .” (Sec. 208(b), 42 U.S.C. § 408(a)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. In addition, the “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Moderate

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S. 116	Privacy Act of 2005
Description	Creates criminal liability for certain misuses of Social Security Numbers.
Language	"Whoever . . . obtains any individual's [SSN] for the purpose of locating or identifying the individual with the intent to injure or harm that individual . . ." (Sec. 208(b), 42 U.S.C. § 408(a)).
Strengths	The "for the purpose of" and "with the intent to" clauses require the government to show specific intent to injure or harm an individual. In many instances, this is likely to be <i>malum in se</i> conduct.
Weaknesses	The terms "injure or harm" are not defined and could include economic or other non-physical injury or harm which may not be <i>malum in se</i> conduct.
Grade	Moderate

S. 116	Privacy Act of 2005
Description	Creates criminal liability for certain misuses of Social Security Numbers.
Language	"Whoever . . . obtains any individual's [SSN] for the purpose of locating or identifying the individual with the intent to . . . use the identity of that individual for an illegal purpose." (Sec. 208(b), 42 U.S.C. § 408(a)).
Strengths	---
Weaknesses	The "for the purpose of" and "any illegal purpose" clauses do not add any <i>mens rea</i> protection to this offense because it does not require the person to have engaged in any inherently wrongful conduct or to have any knowledge of the illegality.
Other Considerations	This could include defendants who lawfully obtain the identification information and use it in a manner that may not be clearly wrongful but might be technically unlawful. For example, someone who obtains the information to enter it into a database not knowing that the database does not comply with federal or state regulations could be convicted of this offense.
Grade	None

S. 167	Family Entertainment and Copyright Act of 2005
Description	Creates criminal liability for recording movies in theaters and copyright infringement through posting material online and/or copying it for distribution.
Language	"Any person who, without the authorization of the copyright owner, knowingly uses or attempts to use an audiovisual recording device to transmit or make a copy of a motion picture or other audiovisual work protected under title 17, or any part thereof," in a movie theater or screening room. (Sec. 102(a), § 2319B(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences, such as violations by inadvertent transmission or copying, even though such inadvertences seem unlikely.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts

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	<p>constituting the offense.</p> <p>This provision covers not only motion pictures but also “other audiovisual work[s],” and would seem to include even short, non-commercial works. Yet the provision does not require the defendant to have known that the work was copyrighted or that recording it would be a copyright violation. It similarly does not require a defendant to have intended to do anything wrongful with it. This offense would cover, for example, an art student who recorded a short snippet of a work in order to study its use of cinematography, even if he recorded only one scene or a part of one scene.</p>
Other Considerations	Possession of an audiovisual recording device in a theater or screening room “may be considered as evidence” of the commission of an offense “but shall not, by itself, be sufficient to support a conviction” for that offense. (Sec. 102(a), § 2319(a)).
Grade	Weak

S. 167	Family Entertainment and Copyright Act of 2005
Description	Creates criminal liability for recording movies in theaters and copyright infringement through posting material online and/or copying it for distribution.
Language	“Any person who willfully infringes a copyright . . . if the infringement was committed – (A) for purposes of commercial advantage or private financial gain,” (B) by reproduction or distribution of works with over \$1000 of total retail value, or (C) by distribution, through posting on a publicly accessible network, of a work being prepared for commercial distribution “if [the] person knew or should have known that the work was intended for commercial distribution.” (Sec. 103(a), 17 U.S.C. § 506(a)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	<p>Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.</p> <p>Violation by posting on a public network appears to require that the defendant had some knowledge that the work was intended for a commercial purpose. However, the bill does not specify what standard a court must apply to determine whether the person “should have known” that the work was intended for commercial distribution. This lack of specificity substantially undermines the protectiveness of this offense’s knowledge requirement.</p>
Other Considerations	<p>Evidence of reproduction or distribution of a copyrighted work, “by itself, shall not be sufficient to establish willful infringement.” (Sec. 103(a), 17 U.S.C. § 506(a)(2)).</p> <p><i>Actus reus:</i> The provision’s three (disjunctive) restrictive conditions reduce the likelihood of its application to trivial or innocent infringements.</p>
Grade	Moderate

S. 190	Federal Housing Enterprise Regulatory Reform Act of 2005
Description	Creates criminal liability for participation by certain federal officials in the activities of a regulated entity.
Language	“Whoever, being subject to an order in effect under section 1377, without the prior written approval of the Director, knowingly participates, directly or indirectly, in any manner

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	<p>(including by engaging in an activity specifically prohibited in such an order) in the conduct of the affairs of any regulated entity shall be” (Sec. 156, 12 U.S.C. § 1378 [Referenced as 12 U.S.C. § 4638]).</p> <p>“Any order issued under paragraph (4) shall become effective at the expiration of 30 days after the date of service upon the relevant regulated entity and party (except in the case of an order issued upon consent under paragraph (3), which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the Director or a reviewing court.” (Sec. 153, 12 U.S.C. § 1377(c)(5) [Referenced as 12 U.S.C. § 4637(c)(5)])</p> <p>“This section shall only apply to a person who is an individual, unless the Director specifically finds that it should apply to a corporation, firm, or other business entity.” (Sec. 153, 12 U.S.C. § 1377(f) [Referenced as 12 U.S.C. § 4637(f)]).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. “Knowingly” alone appears in this context to provide little or no protection for those who acted without a guilty mind.
Other Considerations	<p>The procedures specified in the Act do not make it clear that the defendant must have had notice of the “order” in order to be convicted. The term “service” is not defined. It does appear that HUD’s Director of the Office of Federal Housing Enterprise Oversight must initiate a criminal referral. If this is correct, it affords an additional opportunity for federal law enforcement officials to exercise proper discretion and protect against over-zealous prosecution.</p> <p>“Participate” is a broad, vague term, and the provision does not define what it means either to “participate[]” or to “knowingly participate[].” This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

S. 263	Paleontological Resources Preservation Act
Description	Creates criminal liability for excavating fossils from federal lands without a permit, mislabeling such fossils, or assisting another in doing so.
Language	<p>“A person may not excavate, remove, damage, or otherwise alter or deface or attempt to excavate, remove, damage, or otherwise alter or deface any paleontological resources located on Federal lands unless such activity is conducted in according with this Act” (Sec. 7(a)(1)).</p> <p>“A person who knowingly violates or counsels, procures, solicits, or employs another person to violate subsection (a) or (b) shall, upon conviction, be” (Sec. 7(c)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.

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	It is quite unclear to what “knowingly” applies in this provision. Is a person guilty who does not know he is on federal lands? That he was excavating a “paleontological resource”? Does a person who contracts to buy a paleontological resource from a second person, who then removes it from federal lands without the first person’s knowledge, “induce” the second person to violate this law?
Other Considerations	The analysis of this offense assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” in Section 7(c) applies only to the clause in Section 7(a)(1) “excavate, remove, damage, or otherwise alter or deface . . . paleontological resources.” This offense includes a savings provision that excludes “casual collecting” of items not protected under the Act. (Sec. 12(3)). However, it is not clear that this adds any substantial safeguards against conviction of a defendant who lacked a guilty mind.
Grade	Weak

S. 263	Paleontological Resources Preservation Act
Description	Creates criminal liability for excavating fossils from federal lands without a permit, mislabeling such fossils, or assisting another in doing so.
Language	A person “may not exchange, transport, export, or receive any paleontological resource, if, in the exercise of due care, the person knew or should have known it was removed from Federal lands in violation” of any Federal provision. (Sec. 7(a)(2)). “Whoever knowingly violates or counsels, procures, solicits, or employs another to violate subsection (a) or (b) shall, upon conviction, be” (Sec. 7(c)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The “in the exercise of due care, the person knew or should have known” requirement is a tort-law standard and should not be used as a basis for imposing criminal punishment. Among other things, it is rarely clear whether an objective or subjective standard should be applied. Thus, the inclusion of this phrase substantially undermines the protectiveness of the “knowingly” term. The final clause is ambiguous. It is unclear whether the person must know that the resource was removed from Federal lands or that it was removed in violation of federal law.
Other Considerations	“Due care” suggests that some persons, such as professional paleontologists, would have a heightened duty and could be convicted more easily under the “should have known” standard. However, common-law “due care” standards are far from fixed, have evolved with changes in case law, and should therefore be applied only to torts or, if in the criminal law, to <i>malum in se</i> conduct.
Grade	None

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S. 263	Paleontological Resources Preservation Act
Description	Creates criminal liability for excavating fossils from federal lands without a permit, mislabeling such fossils, or assisting another in doing so.
Language	A person “may not sell or purchase or offer to sell or purchase any paleontological resource, if, in the exercise of due care, the person knew or should have known” it was removed from Federal lands “in violation of any Federal provision.” (Sec. 7(a)(3)). “Whoever knowingly violates or counsels, procures, solicits, or employs another to violate subsection (a) or (b) shall, upon conviction, be” (Sec. 7(c)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Examples could include defendants who, with proper authorization, removed soil on federal lands without knowing the soil contained “paleontological resources.”
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The “in the exercise of due care, the person . . . should have known” requirement is a tort-law standard and should not be used for criminal law. Among other things, it is rarely clear whether an objective or subjective standard should be applied. Thus, the inclusion of this phrase substantially undermines the protectiveness of this offense’s knowledge requirements.
Other Considerations	“Due care” suggests that some persons, such as professional paleontologists, would have a heightened duty and could be convicted more easily under the “should have known” standard. However, common-law “due care” standards are far from fixed and have evolved with changes in case law and, therefore, should be applied only to torts or, if in the criminal law, to <i>malum in se</i> conduct.
Grade	None

S. 263	Paleontological Resources Preservation Act
Description	Creates criminal liability for excavating fossils from federal lands without a permit, mislabeling such fossils, or assisting another in doing so.
Language	“A person may not make or submit any false record, account, or label for, or any false identification of, any paleontological resource excavated or removed from Federal lands.” (Sec. 7(b)). “Whoever knowingly violates or counsels, procures, solicits, or employs another to violate subsection (a) or (b) shall, upon conviction, be” (Sec. 7(c)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. A literal application of the plain language of this “knowingly” requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the government must prove that the defendant knew of the falsity.

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Grade	Moderate
S. 304	Sportsmanship in Hunting Act of 2005
Description	Creates criminal liability for possession of exotic animals for killing.
Language	<p>“Whoever, in or substantially affecting interstate or foreign commerce, knowingly transfers, transports, or possesses a confined exotic animal, for the purposes of allowing the killing or injuring of that animal for entertainment or for the collection of a trophy, shall be” (Sec 3(a), 18 U.S.C. § 49(a)).</p> <p>“Definitions – In this section – (1) the term ‘confined exotic animal’ means a mammal of a species not historically indigenous to the United States, that has been held in captivity, whether or not the defendant knows the length of captivity, for the shorter of – (A) the majority of the animal’s life; or (B) a period of 1 year; and (2) the term ‘captivity’ does not include any period during which an animal lives as it would in the wild – (A) surviving primarily by foraging for naturally occurring food; (B) roaming at will over an open area of not less than 1,000 acres; and (C) having the opportunity to avoid hunters.” (Sec. 3(a), 18 U.S.C. § 49(b)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” applies to the terms “confined exotic animal” and “for the purpose of allowing the killing or injuring.” The offense does not require knowledge that harming confined exotic animals is illegal or otherwise wrongful.
Grade	Moderate
S. 363	Ballast Water Management Act of 2005
Description	Creates criminal liability for violating agency regulations regarding discharging ballast water by ships.
Language	“Any person who knowingly violates the regulations promulgated under this section is guilty of a class C felony.” (Sec 3(a), Sec. 1101(k)(2)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	<p>Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. Further, blanket criminalization of all regulatory violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.</p> <p>The “good faith” requirement for the safety exception (see next row) is not a commonly used standard for criminal liability. Further, the exceptions (see Other Considerations) are unclear and do not necessarily relieve defendants of criminal liability.</p>
Other Considerations	The bill includes a Partial Compliance provision, (Sec. 3(a) Section 1101(e)(3)(E)(ii)), but it is poorly worded and unclear whether it operates as a safe harbor against criminal conviction for vessel operators who have failed to comply fully despite best efforts.

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	<p>There is also an exception for failures to comply with ballast-water exchange procedures if the “master of a vessel, acting in good faith, decides that the exchange . . . will threaten the safety” of the vessel or its occupants. (Sec 3(a), Sec. 1101(k)(4)).</p> <p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak
S. 382	Animal Fighting Prohibition Act of 2005
Description	Creates criminal liability for the trafficking in animals or equipment to be used in animal fighting.
Language	<p>“[I]t shall be unlawful for any person to knowingly sponsor or exhibit an animal in an animal fighting venture, if any animal in the venture was moved in interstate or foreign commerce.” (Sec. 2(a), 18 U.S.C. § 49(a)(1)).</p> <p>“With respect to fighting ventures involving live birds in a State where it would not be in violation of the law, it shall be unlawful under this subsection for a person to sponsor or exhibit a bird in the fighting venture only if the person knew that any bird in the fighting venture was knowingly bought, sold, delivered, transported, or received in interstate or foreign commerce for the purpose of participation in the fighting venture.” (Sec. 2(a), 18 U.S.C. § 49(a)(2)).</p> <p>Definitions from Sec. 2(a), 18 U.S.C. § 49(g):</p> <ul style="list-style-type: none"> - “‘animal fighting venture’ means any event which involves a fight between at least two animals and is conducted for purposes of sport, wagering, or entertainment except that the term ‘animal fighting venture’ shall not be deemed to include any activity the primary purpose of which involves the use of one or more animals in hunting another animal or animals, such as waterfowl, bird, raccoon, or fox hunting.” - “‘animal’ means any live bird, or any live dog or other mammal, except man.”
Strengths	<p>The “knowingly” requirement should protect some defendants against conviction for some inadvertences. “Knowingly” should protect, for example, those who sponsor an event (e.g., a state fair) without knowing that some of the event’s participants are conducting animal fights.</p> <p>If, as the provision implies, animal fighting is illegal in every state, a person committing this offense’s prohibited conduct is more likely to have been on notice that such conduct is illegal.</p>
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. It appears that “knowingly” does not apply to this provision’s (weak) requirement for federal jurisdiction. In other words, a defendant need not know that his conduct has any federal nexus in order to be convicted of this federal felony.
Other Considerations	Given that the term “sponsor or exhibit” are left undefined and that the definition of “animal fighting venture” includes the term “entertainment,” this provision could cover conduct far removed from the provision’s purpose. An individual who owns pets that happen to fight and who invites friends to watch them fight could be convicted under the “exhibit[ing]” prong of the offense.

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	An express exception is included for bird fighting in states where it is legal. However, a defendant can be convicted under this exception when he has knowledge that the bird was placed into the stream of commerce for the purpose of participation in the fighting venture. This exception is also ungrammatical and unclear as to what it means to say that a bird was “knowingly brought.” The presence of language in the exception adding knowledge of the jurisdictional hook as an element in the particular cases covered by the exception demonstrates that in all other cases the defendant need not have knowledge of the jurisdictional hook. The jurisdictional hook on this offense is very weak and this conduct should be left to the states for regulation.
Grade	Weak

S. 382	Animal Fighting Prohibition Act of 2005
Description	Creates criminal liability for the trafficking in animals or equipment to be used in animal fighting.
Language	“It shall be unlawful for any person to knowingly use the mail service . . . or any instrumentality of interstate commerce for commercial speech promoting an animal fighting venture except as performed outside the limits of the [U.S.]” (Sec. 2(a), 18 U.S.C. § 49(c)). For definitions, see the “Language” section of the preceding entry (above) for S. 382.
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. To the extent that inadvertent use is possible, “knowingly” could protect some defendants who inadvertently used an instrumentality of interstate commerce.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. See, e.g., the hypothetical example in the “Weaknesses” section of the preceding entry (above) for S. 382.
Grade	Weak

S. 382	Animal Fighting Prohibition Act of 2005
Description	Creates criminal liability for the trafficking in animals or equipment to be used in animal fighting.
Language	“It shall be unlawful for any person to knowingly sell, buy, transport, or deliver in interstate or foreign commerce a knife, a gaff, or any other sharp instrument attached, or designed or intended to be attached, to the leg of a bird for use in an animal fighting venture.” (Sec. 2(a) 18 U.S.C. §49(a)(e)). For definitions, see the “Language” section of the first entry (above) for S. 382.
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. A literal application of the “knowingly” requirement would protect against inadvertent sale, purchase, or transport.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts

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	constituting the offense.
Grade	Weak

S. 396	Child Custody Protection Act
Description	Creates criminal liability for transporting a minor across state lines to circumvent parental authorization laws.
Language	<p>"[W]hoever knowingly transports a minor across a State line, with the intent that such minor obtain an abortion, and thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the minor resides, shall be" (Sec 2(a), 18 U.S.C. § 2431(a)(1)).</p> <p>"For the purposes of this subsection, an abridgement of the right of a parent occurs if an abortion is performed on the minor, in a State other than the State where the minor resides, without the parental consent or notification, or the judicial authorization, that would have been required by that law had the abortion been performed in the State where the minor resides." (Sec. 2(a), 18 U.S.C. § 2431(a)(2)).</p> <p>"It is an affirmative defense to a prosecution for an offense . . . that the defendant reasonably believed, based on information the defendant obtained directly from a parent of the minor or other compelling facts, that before the minor obtained the abortion, the parental consent or notification, or judicial authorization took place that would have been required by the law" (Sec. 2(a), 18 U.S.C. § 2431(c)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	The analysis of this offense assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the term "knowingly" does not apply to the following clause: "thereby in fact abridges the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the minor resides," and the defendant need not have knowledge of the laws governing abortions or an intent to evade particular legal requirements.
Other Considerations	<p>The bill includes a defense protecting a defendant who "reasonably believed, based on information [he] obtained directly from a parent of the minor or other compelling facts," that the requisite parental consent had been given or judicial authorization granted. But the provision does not make clear whether the defendant must know of the law requiring parental involvement. Thus, this provision could be used to convict a 17-year-old girl's 17-year-old boyfriend for transporting her across state lines to get an abortion solely because it is more convenient or less expensive in the other state.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate."</p>
Grade	Weak-to-Moderate

S. 406	Small Business Health Fairness Act of 2005
Description	Creates criminal liability for misrepresentations regarding small business associational health plans.
Language	"Any person who willfully falsely represents . . . a plan or other arrangement established or maintained for the purpose of offering or providing any benefit" (Sec. 4(a), 29 U.S.C. § 1311(b)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.

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Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Grade	Moderate

S. 414	Voter Protection Act of 2005
Description	Creates criminal liability for payments made or offered in consideration of a person’s registering to vote.
Language	“Whoever makes, offers to make, or conspires to make an expenditure to any person, either to register to vote, to vote or withhold his vote, or to vote for or against any candidate; and whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote” (Sec. 301, 18 U.S.C. § 597(a)).
Strengths	This is a strict liability offense. The only protection is that it is almost universally known and acknowledged that payments given or received to influence a citizen’s franchise rights are wrongful and illegal.
Weaknesses	This act would amend 18 U.S.C. § 597 to add conspiracy as an offense. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”
Grade	None-to-Weak

S. 414	Voter Protection Act of 2005
Description	Creates criminal liability for destructive or damaging act done with the intent to prevent voting.
Language	“Whoever destroys or damages any property with the intent to prevent or impede an individual from voting in an election for [federal office]. . . .” (Sec. 301, 18 U.S.C. § 597(b)).
Strengths	The “intent” term should protect from conviction most defendants who acted in the absence of a purpose or intention of preventing or impeding a qualified voter from voting.
Weaknesses	---
Other Considerations	The offense is not restricted to conduct affecting persons who are qualified to vote.
Grade	Strong

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S. 450	Count Every Vote Act of 2005
Description	Creates criminal liability for misrepresentations of time, place, manner of federal elections
Language	"Whoever knowingly deceives any person regarding (1) the time, place, or manner of conducting a general, primary, run-off, or special election for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates, or Commissioners from the Territories or possessions; or (2) the qualifications or restrictions of voter eligibility for any general, primary, run-off or special election for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates, or Commissioners from the Territories or possessions . . . shall be . . ." (Sec. 601(b), 18 U.S.C. § 594(b)).
Strengths	A literal application of the plain language of this "knowingly" requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	This provision lacks a clause requiring a defendant to act "with an intent to" interfere with a person's exercise of his/her franchise rights. Thus, it would be possible for someone to knowingly deceive another regarding this information without having a guilty mind. A juvenile or young adult, for example, could as a prank tell a person who is in a hurry the wrong location of the polling place without any intent of denying someone's ability to exercise their franchise rights.
Other Considerations	The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate." This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Weak-to-Moderate

S. 472	Anti-Phishing Act of 2005
Description	Creates criminal liability for phishing or identity theft.
Language	"Whoever knowingly, with the intent to carry on any activity which would be a Federal or State crime of fraud or identify theft[,] (1) creates or procures the creation of a website or domain name that represents itself as a legitimate online business, without the authority or approval of the registered owner of the actual website or domain name of the legitimate online business; and (2) uses that website or domain name to induce, request, ask, or solicit any person to transmit, submit, or provide any means of identification to another shall be . . ." (Sec. 3(a), 18 U.S.C. §1351(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. If interpreted broadly, the "with the intent to" requirement should essentially provide a safe harbor for legitimate websites that collect information for lawful purposes.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. The "with the intent to" requirement does not require specific intent to commit a crime, merely intent to "carry on" or conduct the activities.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the government must prove that the defendant knew that the business being falsely or fraudulently represented was an actual, legitimate business and that the representation lacked authorization. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

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S. 472	Anti-Phishing Act of 2005
Description	Creates criminal liability for phishing or identity theft.
Language	"Whoever knowingly, with the intent to carry on any activity which would be a Federal or State crime of fraud or identify theft [sic] sends any electronic mail message that (1) falsely represents itself as being sent by a legitimate online business; (2) includes an Internet information location tool that refers or links users to an online location on the World Wide Web that falsely purports to belong to or be associated with such legitimate online business; and (3) induces, requests, asks, or solicits a recipient of the electronic mail message directly or indirectly to provide, submit, or relate any means of identification to another; shall be . . ." (Sec. 3(a), 18 U.S.C. §1351(b)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. If interpreted broadly, the "with the intent to" requirement should essentially provide a safe harbor for legitimate websites that collect information for lawful purposes.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. The "with the intent to" requirement does not require specific intent to commit a crime, merely intent to "carry on" or conduct the activities.
Other Considerations	The categorization of this offense as "Weak-to-Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the government must prove that the defendant knew that the business being falsely or fraudulently represented was an actual, legitimate business and that the representation lacked authorization. The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a "Moderate."
Grade	Weak-to-Moderate

S. 509	Energy Markets Improvement Act of 2005
Description	Creates criminal liability for certain violations of commodities rules and regulations.
Language	""It shall be unlawful . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery or in interstate commerce, that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person . . . to cheat or defraud or attempt to cheat or defraud the other person . . ." (Sec. 304, 7 U.S.C. § 6b(a)(1)(i)). "It shall be a felony . . . for [a]ny person willfully to violate any other provision of this chapter . . . but no person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation." (7 U.S.C. § 13(a)(4) [Chapter 1]).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, ""willful"" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The language in 7 U.S.C. § 13(a)(4), reserving prison sentences for only those defendants who "had knowledge of such rule or regulation," makes it clear that the government need only prove that the defendant knew his conduct was "wrongful" and not necessarily "unlawful" in order to obtain a conviction under this offense.
Grade	Moderate

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S. 509	Energy Markets Improvement Act of 2005
Description	Creates criminal liability for certain violations of commodities rules and regulations.
Language	<p>“It shall be unlawful . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery or in interstate commerce, that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person . . . willfully to make or cause to be made to such other person any false report or statement or willfully to enter or cause to be entered for the other person any false record. . . .” (Sec. 304, 7 U.S.C. § 6b(a)(1)(ii)[Chapter 1]).</p> <p>“It shall be a felony . . . for [a]ny person willfully to violate any other provision of this chapter . . . but no person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation.” (7 U.S.C. § 13(a)(4) [Chapter 1]).</p>
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, ““willful”” is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The language in 7 U.S.C. § 13(a)(4), reserving prison sentences for only those defendants who “had knowledge of such rule or regulation,” makes it clear that the government need only prove that the defendant knew his conduct was “wrongful” and not necessarily “unlawful” in order to obtain a conviction under this offense.
Grade	Moderate

S. 509	Energy Markets Improvement Act of 2005
Description	Creates criminal liability for certain violations of commodities rules and regulations.
Language	<p>“It shall be unlawful . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery or in interstate commerce, that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person . . . willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for . . . such person. . . .” (Sec. 304, 7 U.S.C. § 6b(a)(1)(iii)).</p> <p>“It shall be a felony . . . for [a]ny person willfully to violate any other provision of this chapter . . . but no person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation.” (7 U.S.C. § 13(a)(4) [Chapter 1]).</p>
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to ““willfully.”” As the Supreme Court has repeatedly noted, ““willful”” is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The language in 7 U.S.C. § 13(a)(4), reserving prison sentences for only those defendants who “had knowledge of such rule or regulation,” makes it clear that the government need only prove that the defendant knew his conduct was “wrongful” and not necessarily “unlawful” in order to obtain a conviction under this offense.
Grade	Moderate

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S. 509	Energy Markets Improvement Act of 2005
Description	Creates criminal liability for certain violations of commodities rules and regulations.
Language	<p>"It shall be unlawful . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery or in interstate commerce, that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person . . . (I) to bucket an order represented by the person as an order to be executed, for or on behalf of the other person, on an organized exchange; or (II) to fill an order by offset against the order[s] of the other person; or willfully and knowingly and without the prior consent of the other person to become the buyer or seller in respect to any selling or buying order of the other person. . . ." (Sec. 304, 7 U.S.C. § 6b(a)(1)(iv)).</p> <p>"It shall be a felony . . . for [a]ny person willfully to violate any other provision of this chapter . . . but no person shall be subject to imprisonment under this paragraph for the violation of any rule or regulation if such person proves that he had no knowledge of such rule or regulation." (7 U.S.C. § 13(a)(4) [Chapter 1]).</p>
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The language in 7 U.S.C. § 13(a)(4), reserving prison sentences for only those defendants who "had knowledge of such rule or regulation," makes it clear that the government need only prove that the defendant knew his conduct was "wrongful" and not necessarily "unlawful" in order to obtain a conviction under this offense.
Grade	Moderate

S. 509	Energy Markets Improvement Act of 2005
Description	Creates criminal liability for certain violations of commodities rules and regulations.
Language	Language, as per amendment proposed by S. 509, of 7 U.S.C. § 13(a)(2): "It shall be a felony . . . for . . . [a]ny person to . . . knowingly deliver or cause to be delivered for transmission through the mails or interstate commerce by telegraph, telephone, wireless, or other means of communication knowingly false, misleading, or inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce. . . ." (Sec 305(e), 7 U.S.C. § 13(a)(2)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. A literal application of the plain language of this "knowingly" requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions. This is a proper use of the "knowing" standard to require a guilty mind. Commonsense, literal application should prevent unjust prosecutions and convictions.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	This amendment actually improves the provision in this offense by applying "knowingly" to the entire element of "false, misleading, or inaccurate." This affords the defendant who acted without knowledge of the falsity greater protection from conviction. The broad definition of this offense does not require the false, misleading, or inaccurate information to be material in any sense, neither does it require the defendant to have intended to affect the price of a commodity. An immaterial inaccuracy or falsity resulting merely from a defendant's negligence or from a lack of completeness of the information would be sufficient to support a conviction.
Grade	Moderate

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S. 596	Electronic Transmission and Reliability Enhancement Act of 2005
Description	Creates criminal liability for conveying false information related to the price of electricity.
Language	"It shall be a violation of this Act for any person willfully and knowingly to report any information relating to the price of electricity sold at wholesale, which information the person knew to be false at the time of the reporting, to any governmental or non-governmental entity and with the intent to manipulate the data being compiled by such entity." (Sec. 301, Sec. 217 of Federal Power Act.)
Strengths	The explicit language of this offense requires a defendant to have known that the pricing information was false at the time of the allegedly wrongful conduct and to have reported it with the specific purpose of "manipulating" others' data compilations. The "willfully" and "knowingly" requirements should provide additional protection against conviction, respectively, for many or most defendants who did not know that their conduct was unlawful or otherwise wrongful and some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The offense does not define what it means to "manipulate the data" and would have been better drafted if it had said that the defendant's purpose must be to ensure that the compilations based on it were "false" or "inaccurate." The offense also does not require the (undefined) manipulation to be in any sense material. The strength of the <i>mens rea</i> requirement in this offense falls between "Moderate" and "Strong." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Strong."
Grade	Moderate-to-Strong

S. 596	Electronic Transmission and Reliability Enhancement Act of 2005
Description	Creates criminal liability for violations of federal laws regulating energy and power.
Language	"Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter [Chapter 12 of Title 16, "Federal Regulation and Development of Power"] required to be done, or willfully and knowingly causes or suffers such omission or failure, shall be . . ." (Sec. 303, 16 U.S.C. § 825o(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	The "suffers to be done" clause is ambiguous, not defined in Chapter 12 of Title 16, and could allow a person or organization without wrongful or unlawful intent to be convicted for the conduct or omissions of another person who acted neither willfully nor knowingly. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Further, blanket criminalization of all regulatory violations is likely to lead to some applications of the offense that require merely knowledge of the facts constituting the offense (as is usually true for "knowingly").
Other	The existing subsection of the U.S. Code incorporates as criminal offenses a large, open-ended set of regulatory violations. Blanket criminalization of violations of all regulations,

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Considerations	<p>rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Moderate.”</p>
Grade	Weak-to-Moderate

S. 596	Electronic Transmission and Reliability Enhancement Act of 2005
Description	Creates criminal liability for violations of regulations and rules relating energy and power.
Language	“Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, or any rule or regulation imposed by the Secretary of the Army under authority of subchapter I of this chapter shall be” (Sec. 303(d)(2), 16 U.S.C. § 825o(b)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Further, blanket criminalization of all regulatory violations is likely to lead to some applications of the offense that require merely knowledge of the facts constituting the offense (as is usually true for “knowingly”).
Other Considerations	<p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Moderate.”</p>
Grade	Weak-to-Moderate

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S. 629	Railroad Carriers and Mass Transportation Protection Act of 2005
Description	Creates criminal liability for almost any type of physical act against mass transportation, including all mass transit vehicles, structures, and property.
Language	"Whoever . . . knowingly . . . undermines, makes unworkable, unusable, or hazardous to work on or use, or places any biological agent or toxin, destructive substance, or destructive device in, upon, or near any . . . tunnel, bridge, . . . or any other way, structure, property, [facility] or appurtenance used in the operation of, or in support of" various railroad and other transportation equipment "without previously obtaining the permission of the owner of the passenger vessel, and with intent to, or knowing or having reason to know that such activity would likely disable or wreck a passenger vessel . . ." (Section 2(a), 18 U.S.C. § 1992(a)(3)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. The bill does not specify what standard a court must apply to determine whether the person "ha[d] reason to know" the likely consequences of his actions. This lack of specificity substantially undermines the protectiveness of the "with intent to" and "knowing" requirements. This subsection could be applied, for example, to prosecute railroad employees for true accidents and acts of simple negligence.
Other Considerations	Among other things, the categorization of this offense as "Weak" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the term "knowingly" does not apply to the phrase "without previously obtaining the permission of the owner of the passenger vessel."
Grade	Weak

S. 629	Railroad Carriers and Mass Transportation Protection Act of 2005
Description	Creates criminal liability for almost any type of physical act against mass transportation, including all mass transit vehicles, structures, and property.
Language	"Whoever . . . knowingly removes an appurtenance from, damages, or otherwise impairs the operation of a railroad signal system [or related dispatch or signal system], without authorization from the rail carrier or mass transportation provider . . ." (Section 2(a), § 1992(a)(4)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. This should protect from conviction, for example, a teenager whose horseplay by the tracks shorts out a sensor without knowing it, a driver who loses control of his vehicle and damages a traffic control, or a maintenance worker who accidentally severs a signal's power line.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. This <i>mens rea</i> requirement will not necessarily protect, for example, a railroad worker who, while performing maintenance or repair on another system, accidentally or negligently damages a railroad signal system.
Other Considerations	The categorization of this offense as "Weak" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the term "knowingly" does not apply to the phrase "without authorization."
Grade	Weak

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S. 629	Railroad Carriers and Mass Transportation Protection Act of 2005
Description	Creates criminal liability for almost any type of physical act against mass transportation, including all mass transit vehicles, structures, and property.
Language	"Whoever . . . knowingly . . . with reckless disregard for the safety of human life, interferes with, disables, or incapacitates any dispatcher, driver, captain, locomotive engineer, railroad conductor, or other person while the person is employed in dispatching, operating, or maintaining railroad on-track equipment, a passenger vessel, or a mass transportation vehicle . . ." (Section 2(a), 18 U.S.C. § 1992(a)(5)).
Strengths	If interpreted and applied strictly, the recklessness standard should safeguard against conviction of a defendant who did not have a guilty mind.
Weaknesses	Recklessness is inherently a weak <i>mens rea</i> requirement. Further, although it is interpreted consistently in some state courts, particularly in states that have adopted the Model Penal Code's four culpability standards, even in contrast to other federal <i>mens rea</i> requirements recklessness does not appear to have a consistent interpretation in the federal courts. "Reckless" is a term that finds its best definition and interpretation in tort law, not in federal criminal law. Unlike other uses of "reckless" in the bills of the 109th Congress, however, this use is quite similar to the language of one of the oldest uses of "reckless" in the criminal law.
Other Considerations	The government need only prove that a defendant knowingly "interfered with" one of the specified railroad employees and that the person did so recklessly. Although requiring the defendant to have acted with a "reckless disregard for the safety of human life" is generally one of the better uses of the weak <i>mens rea</i> terms involving recklessness, the proscribed conduct, "interfere[ing] with," is undefined and so broad that it undermines the protection that might otherwise be provided by requiring reckless conduct.
Grade	Weak

S. 629	Railroad Carriers and Mass Transportation Protection Act of 2005
Description	Creates criminal liability for almost any type of physical act against mass transportation, including all mass transit vehicles, structures, and property.
Language	"Whoever . . . knowingly conveys false information, knowing the information to be false, concerning an attempt or alleged attempt that was made, is being made, or is to be made, to engage in a violation of this subsection . . ." (Section 2(a), 18 U.S.C. § 1992(a)(7)).
Strengths	A literal application of the plain language of this "knowingly" requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions. This is one of the better uses in the offenses in the 109th Congress of the "knowing" standard to require a guilty mind.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Weak-to-Moderate" assumes that the defendant need not have knowledge that the information being conveyed concerned "a violation" of law, but only knowledge that the information concerned the actual conduct, which is quite broad, that would qualify as a violation of law. Further, the overbroad <i>actus reus</i> defined in this offense covers any type or category of information and does not require the information to be conveyed, for example, to a law enforcement officer or with intent to obstruct an investigation. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate."
Grade	Weak-to-Moderate

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S. 668	Asbestos Standards Enforcement Act of 2005
Description	Creates criminal liability for occupational exposure to asbestos.
Language	"Any employer who willfully violates any standard issued under [29 U.S.C. § 655] with respect to the control of occupational exposure to asbestos, shall be" (Sec. 2, 29 U.S.C. § 656(e)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Further, blanket criminalization of all regulatory violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.
Other Considerations	This offense is categorized as "Weak" because there is not a single criminal offense actually defined by the provisions of the offense. Rather, this offense authorizes unelected federal officials to define the conduct to be penalized. Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	Weak

S. 687	Spy Block Act
Description	Creates criminal liability for unauthorized access of a computer in furtherance of another federal crime.
Language	"Whoever intentionally accesses a protected computer, without authorization, or exceeds authorized access to a protected computer, by causing a computer program or code to be copied onto the protected computer, and intentionally uses that program or code in furtherance of another Federal criminal offense shall be" (Sec. 113(a), 18 U.S.C. § 1030A(a)).
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently. The second "intentionally" term could protect from conviction some defendants who did not intend to use the program or code copied onto the protected computer.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. The first "intentionally" term does not appear to add anything to the analysis. As long as a defendant "caused" a computer program or code to be copied onto the protected computer, the first half of the offense should be satisfied. The second "intentionally" protects only those who unintentionally use the program or code. It does not matter if the defendant knew he was committing, or whether he intended to commit, any unlawful or otherwise wrongful conduct.
Other Considerations	"This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the [U.S.], a State, or a political subdivision of a State, or of an intelligence agency of the [U.S.]." (Sec. 2(a), 18 U.S.C. § 1030A(e)). This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The strength of the <i>mens rea</i> requirement in this offense falls between "None" and "Weak." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is

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	accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”
Grade	None-to-Weak

S. 687	Spy Block Act
Description	Creates criminal liability for unauthorized access of a computer in furtherance of another federal crime.
Language	“Whoever intentionally accesses a protected computer, or exceeds authorized access to a protected computer, by causing a computer program or code to be copied onto the protected computer, and by means of that program or code intentionally impairs the security protection of the protected computer shall be” (Sec. 113(a), 18 U.S.C. § 1030A(b)).
Strengths	The “intentionally” requirements protect against this offense’s application to inadvertences.
Weaknesses	“Intentionally” does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Federal courts use “intentionally” to designate conduct that is committed deliberately and not by accident. This offense does not require a person to know that he is exceeding the authorized access.
Other Considerations	The term “impairs” is vague and undefined. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The phrase “intentionally impairs the security protection” is undefined. This offense could be committed by, for example, a person’s intentionally accessing a protected computer on a network without knowing that he was exceeding authority and then using any communications or other software program to change, for a legitimate, non-wrongful reason, the security settings of the accessed computer’s Internet browser. The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”
Grade	None-to-Weak

S. 770	National Aquatic Invasive Species Act of 2005
Description	Creates criminal liability for violations of agency regulations to be determined by the Secretary regarding ballast water dumping.
Language	“Any person that knowingly violates the regulations promulgated under subsection (b) is guilty of” (Sec. 101(f)(2)). Subsection (b) provides that the Secretary “shall promulgate final regulations establishing performance requirements for vessels to reduce or eliminate introduction by the vessels of invasive species to waters of the [U.S.]” and establishes some perimeters for the regulations. (Sec. 101(b)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will

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	<p>be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

S. 770	National Aquatic Invasive Species Act of 2005
Description	Creates criminal liability for violations of agency regulations to be determined by the Secretary regarding ballast water dumping.
Language	<p>“Except as otherwise provided in this section, it shall be unlawful to import a live aquatic organism of a species not in trade.” (Sec. 202, Sec. 1105 (k)(1)).</p> <p>“Any person that knowingly violates paragraph (1)” (Sec. 202, Sec. 102(k)(2)(B)).</p> <p>“The term ‘species in trade’ means a species that has a documented history of being commercially imported into the United States in the period beginning on January 1, 1990, and ending on January 1, 2002.” (Sec 3, Sec. 1003(28), 16 U.S.C. § 4702(28)).</p>
Strengths	“Knowingly” is likely to protect against this offense’s application to some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. This provides little or no protection for those who do not know that the species in their catch, cargo, or other shipment have been classified as a species not in trade or who do not otherwise know their acts are unlawful.
Other Considerations	<p>The list of “species in trade” is not included in the statutory language and would have to be promulgated through regulation.</p> <p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

S. 793	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the United States.
Language	“A person that negligently violates section 4 or any regulation promulgated under this Act commits” (Sec. 9(d)(1)).
Strengths	---

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Weaknesses	Simple negligence, as opposed to “gross negligence” and other, similarly heightened standards, should never be used as a standard for imposing a criminal sanction.
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	None

S. 793	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the United States.
Language	“Any person that knowingly violates section 4 or any regulation promulgated under this Act commits” (Sec. 9(d)(2)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. Further, blanket criminalization of all regulatory violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct. The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”
Grade	None-to-Weak

S. 793	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the United States.
Language	“Any person that knowingly makes any false statement, representation, or certification in any record, report, or other document filed or required to be maintained under this Act or any regulation promulgated under this Act . . . commits” (Sec. 9(d)(3)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. A literal application of the plain language of this “knowingly” requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Moderate

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S. 793	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the United States.
Language	"Any person . . . that falsifies . . . any testing or monitoring device or method required to be maintained under this Act or any regulation promulgated under this Act, commits" (Sec. 9(d)(3)).
Strengths	The term "falsifies" implies some degree of inherent wrongfulness or moral turpitude.
Weaknesses	There is no <i>mens rea</i> term that applies to "falsifies."
Other Considerations	<p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between "None" and "Weak." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Weak."</p>
Grade	None-to-Weak

S. 793	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the United States.
Language	"Any person . . . that . . . tampers with . . . any testing or monitoring device or method required to be maintained under this Act or any regulation promulgated under this Act, commits" (Sec. 9(d)(3)).
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	<p>This offense contains an overbroad <i>actus reus</i>.</p> <p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p>
Grade	None

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S. 793	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the United States.
Language	"Any person . . . that . . . knowingly renders inaccurate any testing or monitoring device or method required to be maintained under this Act or any regulation promulgated under this Act, commits . . ." (Sec. 9(d)(3)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. "Knowingly rendering inaccurate" is not comparable to, for example, knowingly making false statements and could occur in several ways that do not involve blameworthiness. Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	Weak

S. 852	FAIR Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made to or regarding federal asbestos agencies.
Language	"Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud the Office of Asbestos Disease Compensation or the Asbestos Insurers Commission under title II of the Fairness in Asbestos Injury Resolution Act of 2005 shall be . . ." (Sec. 401(a), 18 U.S.C. § 1348(a)).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. For the purpose of Chapter 63 of Title 18, U.S. Code, "scheme or artifice to defraud" is defined to include "a scheme of artifice to deprive another of the intangible right of honest services." (18 U.S.C. § 1346). This definition is broad, vague, and amorphous.
Grade	Moderate

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S. 852	FAIR Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made to or regarding federal asbestos agencies.
Language	“Whoever, in any matter involving the Office of Asbestos Disease Compensation or the Asbestos Insurers Commission, knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statements or representations; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the award of a claim or the determination of a participant’s payment obligation under title I or II of the Fairness in Asbestos Injury Resolution Act of 2005 shall be” (Sec. 401(a), 18 U.S.C. § 1348(b)).
Strengths	“Knowingly and willfully” should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the terms “knowingly and willfully” apply to “material” and “materially,” “false, fictitious, or fraudulent,” and “in connection with the award of a claim or the determination of a participant’s payment.” The offense is not limited to the context of a government filing, a statement to a government official, or any similar official or on the record conduct.
Grade	Moderate

S. 852	FAIR Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made to or regarding federal asbestos agencies.
Language	“Any employer who willfully violates any standard issued under section 6 [of the Occupational Safety and Health Act of 1970] with respect to the control of occupational exposure to asbestos, shall be” (Sec. 408(d)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Further, blanket criminalization of all regulatory violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.
Other Considerations	This offense is categorized as “Weak” because there is not a single criminal offense actually defined by the provisions of the offense. Rather, this offense authorizes unelected federal officials to define the conduct to be penalized. Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	Weak

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S. 944	Protecting America's Workers Act
Description	Substantially increases maximum criminal penalties for OSHA violations and adds a new criminal offense for employers.
Language	"Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 655 of [Title 29], or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by" (Sec. 308(a)(1), 29 U.S.C. § 666(e)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Further, blanket criminalization of all regulatory violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.
Other Considerations	This offense is categorized as "Weak" because there is not a single criminal offense actually defined by the provisions of the offense. Rather, this offense authorizes unelected federal officials to define the conduct to be penalized. Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	Weak

S. 944	Protecting America's Workers Act
Description	Substantially increases maximum criminal penalties for OSHA violations and adds a new criminal offense for employers.
Language	"Any person who gives advance notice of any inspection to be conducted under this chapter, without authority from the Secretary or his designees, shall, upon conviction, be punished by" (Sec. 308(a)(2), 29 U.S.C. § 666(f)).
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	It is possible that in most instances the person who has advance knowledge of an inspection will be an OSHA employee and will know that providing advance notice to others is illegal. However, if an OSHA official passes information about an upcoming inspection to someone outside of OSHA, it is quite possible that the recipient of that information will not know that it is illegal to pass that information along.
Grade	None

S. 944	Protecting America's Workers Act
Description	Substantially increases maximum criminal penalties for OSHA violations and adds a new criminal offense for employers.
Language	"Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant

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	to this chapter shall, upon conviction, be punished by” (Sec. 308(a)(3), 29 U.S.C. § 666(g)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	This analysis assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the government will be required to prove that the defendant knew that the statement, representation, or certification was false, knew that it was included in a document (etc.), and knew that such document was filed or was required by law to be maintained. This offense does not require, however, that the information be material.
Grade	Moderate

S. 944	Protecting America’s Workers Act
Description	Substantially increases maximum criminal penalties for OSHA violations and adds a new criminal offense for employers.
Language	“Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 [of the Occupational Safety and Health Act of 1970], or any regulation prescribed pursuant to this Act, and that violation causes serious bodily injury to any employee . . . shall be” (Sec. 308(a)(3), 29 U.S.C. § 666(g)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Further, blanket criminalization of all regulatory violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.
Other Considerations	This offense is categorized as “Weak” because there is not a single criminal offense actually defined by the provisions of the offense. Rather, this offense authorizes unelected federal officials to define the conduct to be penalized. Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	Weak

S. 975	Project BioShield II Act of 2005
Description	Dramatically increases maximum criminal penalties for violations of the Quarantine and Inspection provisions of Title 42.
Language	“Any person who violates any regulation prescribed under sections 264 to 266 of [Title 42], or any provision of section 269 of [Title 42] or any regulation prescribed thereunder, or who enters or departs from the limits of any quarantine station, ground, or anchorage in disregard of quarantine rules and regulations or without permission of the quarantine officer in charge, shall be punished by” (Sec. 2503(a)(1), 42 U.S.C. § 271(a)).
Strengths	---

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Weaknesses	This is a strict liability criminal provision.
Other Considerations	The relevant regulations apply to the control of communicable diseases, quarantine in time of war, and sanitary state of vessels sailing to U.S. ports.
Grade	None

S. 978	Healthcare Tax Relief for the Uninsured Act of 2005
Description	Creates criminal liability for misrepresentations that health insurance products are affiliated with or endorsed by the Treasury Department.
Language	“Any person who knowingly misuses Department of the Treasury names, symbols, titles or initials to convey the false impression of association with, or approval or endorsement by, the Department of the Treasury of any insurance products or health coverage in connection with the credit for health insurance costs under 36A shall be” (Sec. 6050U (Sec. 7276)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as “Moderate-to-Strong” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the government must prove that the defendant knowingly intended to convey the “impression of association with, or approval or endorsement by, the Department of Treasury” and that the defendant knew that impression was “false.” This new offense targets providers of health insurance products who represent that their products qualify for the new health insurance allowance for uninsured individuals. The strength of the <i>mens rea</i> requirement in this offense falls between “Moderate” and “Strong.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a “Strong.”
Grade	Moderate-to-Strong

S. 1004	Enhanced Consumer Protection Against Spyware Act of 2005
Description	Creates criminal liability for unauthorized access of computers deemed “protected” because they are used by the U.S. Government, a financial institution, or in interstate or foreign commerce.
Language	“Whoever intentionally accesses a protected computer without authorization, or exceeds authorized access to a protected computer, by causing a computer program or code to be copied onto the protected computer, and intentionally uses that program or code in furtherance of another Federal criminal offense shall be” (Sec. 8(a), 18 U.S.C. § 1030A(a)).
Strengths	The “intentionally” requirement protects against this offense’s application to some inadvertences. The second “intentionally” term could protect from conviction some defendants who did not intend to use the program or code copied onto the protected computer.
Weaknesses	“Intentionally” does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Federal courts generally interpret “intentionally” to require conduct

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	<p>that is not committed by accident.</p> <p>The first “intentionally” term does not appear to add anything to the analysis. As long as a defendant “caused” a computer program or code to be copied onto the protected computer, the first half of the offense should be satisfied. The second “intentionally” protects only those who unintentionally use the program or code. It does not matter if the defendant knew he was committing, or intended to commit, any unlawful or otherwise wrongful conduct.</p>
Other Considerations	<p>“This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the [U.S.], a State, or a political subdivision of a State, or of an intelligence agency of the [U.S.]” (Sec. 2(a), 18 U.S.C. § 1030A(e)).</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

S. 1004	Enhanced Consumer Protection Against Spyware Act of 2005
Description	Creates criminal liability for unauthorized access of computers deemed “protected” because they are used by the U.S. Government, a financial institution, or in interstate or foreign commerce.
Language	“Whoever intentionally accesses a protected computer without authorization, or exceeds authorized access to a protected computer, by causing a computer program or code to be copied onto the protected computer, and by means of that program or code intentionally impairs the security protection of the protected computer shall be” (Sec. 8(a), 18 U.S.C. § 1030A(b)).
Strengths	The “intentionally” requirements protect against this offense’s application to inadvertences.
Weaknesses	“Intentionally” does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Federal courts use “intentionally” to designate conduct that is committed deliberately and not by accident. This offense does not require a person to know that he is exceeding the authorized access.
Other Considerations	<p>The term “impairs” is vague and undefined. This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The phrase “intentionally impairs the security protection” is undefined. This offense could be committed by, for example, a person’s intentionally accessing a protected computer on a network without knowing that he was exceeding authority and then using any communications or other software program to change, for a legitimate, non-wrongful reason, the security settings of the accessed computer’s Internet browser.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

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S. 1398	Lobbying and Ethics Reform Act of 2005
Description	Creates criminal liability for members or employees of Congress using their position to influence personnel decisions.
Language	"Whoever, being a Senator or Representative . . . with the intent to influence on the basis of political party affiliation an employment decision . . . takes or withholds . . . an official act . . . shall be . . ." (Sec. 204(1)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	The phrase "with intent to influence" may appear to be <i>mens rea</i> terminology, however, the way it is used here does not provide any actual <i>mens rea</i> protection and actually makes the offense more confusing.
Grade	None

S. 1398	Lobbying and Ethics Reform Act of 2005
Description	Creates criminal liability for members or employees of Congress using their position to influence personnel decisions.
Language	"Whoever, being a Senator or Representative . . . with the intent to influence on the basis of political party affiliation an employment decision . . . influences . . . the official act of another . . ." (Sec. 204(2)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	The phrase "with intent to influence" may appear to be <i>mens rea</i> terminology, however, the way it is used here does not provide any actual <i>mens rea</i> protection and actually makes the offense more confusing.
Grade	None

S. 1398	Lobbying and Ethics Reform Act of 2005
Description	Creates criminal liability for members or employees of Congress using their position to influence personnel decisions.
Language	"A registered lobbyist may not knowingly make a gift to a Member . . . or employee of Congress except as provided in this section." (Sec.306(a)).
Strengths	Registered lobbyists are professionals who, like physicians, can be expected to know the specialized criminal laws governing their professional conduct.
Weaknesses	Nothing protects from conviction a lobbyist who did not have a guilty mind at the time he committed the acts constituting the offense.
Other Considerations	Gifts may be given "on the basis of a personal friendship unless the gift was given because of" the Member's official position. (Sec. 306(a)(5)(F)(i).)

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	<p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

S. 1567	Surface Transportation Safety Improvement Act of 2005
Description	Creates criminal liability for use of out-of-service vehicles.
Language	“[A]n employer that knowingly and willfully allows or requires an employee to operate a commercial motor vehicle in violation of an out-of-service order shall be” (Sec. 113, 49 U.S.C. § 31310(i)(2)(D)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Moderate

S. 1567	Surface Transportation Safety Improvement Act of 2005
Description	Creates criminal liability for failure to stop for inspection.
Language	“A driver of a commercial motor vehicle, as defined in subsection (a), who knowingly fails to stop for inspection when directed to do so by an authorized employee of the Federal Motor Carrier Safety Administration at or in the vicinity of an inspection site . . . shall be” (Sec. 115, 18 U.S.C. § 39(b)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The definition of “commercial motor vehicle” in 49 U.S.C. § 31132(1) includes vehicles with a gross vehicle weight rating or gross vehicle weight, whichever is greater, of 10,001 pounds and vehicles designed or used to transport more than 15 passengers, including the driver. These definitions probably encompass some rental moving vehicles and buses used by non-profits and church groups. Drivers of such vehicles cannot be expected to know FMCSA practices or regulations.
Grade	Moderate

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S. 1567	Surface Transportation Safety Improvement Act of 2005
Description	Creates criminal liability for leaving an inspection site without authorization.
Language	"A driver of a commercial motor vehicle, as defined in subsection (a), who knowingly . . . leaves [an] inspection site without authorization, shall be . . ." (Sec. 115, 18 U.S.C. § 39(b)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	This analysis assumes that, even under the Supreme Court's decision in <i>Flores-Figueroa</i> , a court will not necessarily require the government to prove that the driver knew he was required to have authorization to leave the inspection site but merely that he did not in fact have express authorization to leave. More precise drafting would resolve this ambiguity. The definition of "commercial motor vehicle" in 49 U.S.C. § 31132(1) includes vehicles with a gross vehicle weight rating of 10,001 pounds and vehicles designed or used to transport more than 15, including the driver. These definitions probably encompass some rental moving vehicles and buses used by non-profits and church groups. Drivers of such vehicles cannot be expected to know FMCSA practices or regulations.
Grade	Weak

S. 1567	Surface Transportation Safety Improvement Act of 2005
Description	Creates criminal liability for tampering with certain required writings and things used to transport hazardous material.
Language	"A person knowingly violating section 5104(b) of this title . . . shall be . . ." (Sec. 340(b)). "No person may alter, remove, destroy, or otherwise tamper unlawfully with—(1) a marking, label, placard, or description on a document required under this chapter or a regulation prescribed under this chapter; or (2) a package, component of a package, or packaging, container, motor vehicle, rail freight car, aircraft, or vessel used to transport hazardous material." (49 U.S.C. § 5104(b)). "Knowing Violations – For the purposes of this section – (1) a person acts knowing when – (A) the person has actual knowledge of the facts giving rise to the violation; or (B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge; and (2) knowledge of the existence of a statutory provision, or a regulation or a requirement required by the Secretary, is not an element of an offense under this section." (Sec. 7121, 49 U.S.C. § 5124(b)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. This offense explicitly states that knowledge of the unlawfulness, the statute, the regulation, or the requirement is not an element of the offense. The "reasonable person acting in the circumstances and exercising reasonable care would have that knowledge" requirement is a tort-law standard and should not be used for criminal law. Among other things, it is rarely clear whether an objective or subjective standard should be applied. Thus, the inclusion of this phrase undermines the protectiveness of the "knowingly" term.

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Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	None

S. 1567	Surface Transportation Safety Improvement Act of 2005
Description	Creates criminal liability for violations of regulations relating to hazardous material shipments.
Language	"A person . . . willfully violating this chapter or a regulation prescribed, or an order, special permit, or approval issued, under this chapter, who thereby causes the release of a hazardous material shall be . . ." (Sec. 340(b)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct. The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate."
Grade	Weak-to-Moderate

S. 1618	International Marriage Broker Regulation Act of 2005
Description	Creates criminal liability for violations of new restrictions on the practices of international marriage brokers.
Language	"An international marriage broker that violates subsections (a), (b), or (c) within the special maritime and territorial jurisdiction of the United States shall be . . ." (Sec. 4(d)(2)). Subsections (a), (b), and (c) impose duties and restrictions on international marriage brokers' collection and use of personal information and forbid their providing information on any person under the age of 18. (Sec. 4(a), (b), (c)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Only applies to international marriage brokers – i.e., people or entities that charge fees for matchmaking.

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Grade	None
S. 1635	Bottom Trawl and Deep Sea Coral Habitat Act
Description	Creates criminal liability for violations of fishing statutes.
Language	<p>"A person is guilty of an offense if the person commits an act prohibited by subparagraph (D) . . . of Section 307(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857(1)) in an area designated as a Coral Habitat Conservation Zone." (Sec. 14(b)).</p> <p>"It is unlawful for any person to refuse to permit any officer authorized to enforce the provisions of this chapter to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C);" (16 U.S.C. § 1857(D)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	None

S. 1635	Bottom Trawl and Deep Sea Coral Habitat Act
Description	Creates criminal liability for violations of fishing statutes.
Language	<p>"A person is guilty of an offense if the person commits an act prohibited by subparagraph (F) . . . of Section 307(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857(1)) in an area designated as a Coral Habitat Conservation Zone." (Sec. 14(b)).</p> <p>"It is unlawful for any person to resist a lawful arrest for any act prohibited by this section. . . ." (16 U.S.C. § 1857(F)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	This offense is included in this study because it appears that the conduct covered by this offense includes non-physical and non-forceful conduct, such as simply walking away from an officer.
Grade	None

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S. 1635	Bottom Trawl and Deep Sea Coral Habitat Act
Description	Creates criminal liability for violations of fishing statutes.
Language	<p>"A person is guilty of an offense if the person commits an act prohibited by subparagraph (H) . . . of Section 307(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857(1)) in an area designated as a Coral Habitat Conservation Zone." (Sec. 14(b)).</p> <p>"It is unlawful for any person to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section . . ." (16 U.S.C. § 1857(H)).</p>
Strengths	---
Weaknesses	Despite the requirement that a defendant must know that the person being apprehended engaged in conduct constituting an offense, no <i>mens rea</i> requirement applies to the actual prohibited conduct ("interfere with, delay, or prevent, by any means"). The plain language of the offense does not require knowledge of an "apprehension or arrest," nor does it require knowledge that the act the other person committed was unlawful or otherwise wrongful. All it requires is knowledge that the other person has committed any act prohibited by this section. A defendant could have delayed an arrest by accident, or perhaps saw what appeared to be a coworker being "attacked" by an unknown man, who happens to be a undercover police officer, and interfered out of concern for the coworker's safety. In both instances, the defendant could be convicted under this offense.
Grade	None

S. 1635	Bottom Trawl and Deep Sea Coral Habitat Act
Description	Creates criminal liability for violations of fishing statutes.
Language	<p>"A person is guilty of an offense if the person commits an act prohibited by subparagraph (I) . . . of Section 307(1) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1857(1)) in an area designated as a Coral Habitat Conservation Zone." (Sec. 14(b)).</p> <p>"It is unlawful for any person to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information . . . regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this chapter;" (16 U.S.C. § 1857(I)).</p>
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. This should generally be interpreted as requiring a defendant to have known of the falsity or falsehoods in order to be convicted.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	<p>The categorization of this offense as "Moderate-to-Strong" assumes that the government must prove that the defendant knew that the information was "false," knew that it was submitted to "a Council, the Secretary, or the Governor of a State," and knew that it was "regarding any matter that the Council, Secretary, or Governor is considering."</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between "Moderate" and "Strong." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a "Strong."</p>
Grade	Moderate-to-Strong

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S. 1640	Protection from Price Gouging Against Disaster Victims Act of 2005
Description	Creates criminal liability for selling oil products at an “unconscionably excessive price,” a term that is defined by a regulatory commission.
Language	<p>“During the 180-day period after . . . a major disaster is declared, no supplier shall provide, or offer to provide, any consumer good or service in an affected area at an unconscionably excessive price.” (Sec. 25 (c)(1)).</p> <p>“A supplier that knowingly commits an offense” (Sec. 25 (c)(4)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	<p>Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.</p> <p>To the extent the “knowingly” requirement is interpreted as applying only to the verb “provides,” it provides no protection against conviction of a defendant who lacked a guilty mind. If it is interpreted as applying to “provides . . . at an unconscionably excessive price,” then it provides some protection.</p>
Other Considerations	<p>This analysis assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i>, courts will require the government to prove that the defendant knew that the price charged met some or all of the factors defining what it means to be “unconscionably excessive.” While the particulars of what price is unconscionably excessive are established <i>ex post</i>, the guidelines for what constitutes an unconsciously excessive price are established by the statute <i>ex ante</i>, sufficient to give some merchants some notice.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak

S. 1680	National Security Letter Reform Act of 2005
Description	Creates criminal liability for disclosure of the fact that the FBI has sought personnel information from a communications company, if the FBI finds such disclosure to be dangerous.
Language	“Whoever knowingly violates section 2709(c)(1) of this title, sections 626(d) or 627(c) of the Fair Credit Reporting Act (15 U.S.C. §§ 1681u(d) or 1681v(c)), §§ 1114(a)(3) or 1114(a)(5)(D) of the Right to Financial Privacy Act (12 U.S.C. §§ 3414(a)(3) or 3414(a)(5)(D)), or § 802(b), of the National Security Act of 1947 (50 U.S.C. § 436(a)(5)(D)), or § 802(b) of the National Security Act of 1947 (50 U.S.C. § 436(b)) shall be” (Sec. 4, 18 U.S.C. § 1510).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Weak

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S. 1680	National Security Letter Reform Act of 2005
Description	Creates criminal liability for disclosure of the fact that the FBI has sought personnel information from a communications company, if the FBI finds such disclosure to be dangerous.
Language	"Whoever knowingly violates section 2709(c)(1) of this title, sections 626(d) or 627(c) of the Fair Credit Reporting Act (15 U.S.C. §§ 1681u(d) or 1681v(c)), §§ 1114(a)(3) or 1114(a)(5)(D) of the Right to Financial Privacy Act (12 U.S.C. §§ 3414(a)(3) or 3414(a)(5)(D)), or § 802(b), of the National Security Act of 1947 (50 U.S.C. § 436(a)(5)(D)), or § 802(b) of the National Security Act of 1947 (50 U.S.C. § 436(b)) . . . and if the violation is committed with the intent to obstruct an investigation or judicial proceeding, shall be" (Sec. 4, 18 U.S.C. § 1510).
Strengths	The "with the intent to obstruct" should require evidence that the defendant knew that his conduct was unlawful or otherwise wrongful.
Weaknesses	---
Other Considerations	This intent requirement protects only against imposition of a greater maximum penalty.
Grade	Strong

S. 1699	Stop Counterfeiting in Manufactured Goods Act
Description	Creates criminal liability for trafficking in goods or services using a counterfeit mark.
Language	"Whoever . . . intentionally traffics or attempts to traffic in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied . . . the use of which is likely to cause confusion, to cause mistake, or to deceive, shall be" (Sec. 1(b)(1), 18 U.S.C. § 2320(a)). "The term 'traffic' means to transport, transfer, or otherwise dispose of, to another, for purposes of commercial advantage or private financial gain, or to make, import, export, obtain control of, or possess, with intent to so transport, transfer, or otherwise dispose of" (Sec. 2(b), 18 U.S.C. § 2320(e)(2)).
Strengths	The "intentionally" requirement protects against this offense's application to inadvertences. The "knowing" requirement should protect against conviction defendants who lacked knowledge of the counterfeit mark.
Weaknesses	Does not require any knowledge that the sale is unlawful or otherwise wrongful.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The language of this offense, particularly the term 'traffic,' is poorly drafted and could cover much innocent or unintended conduct. For example, this offense could cover two juvenile females exchanging fake designer purses or a friend selling a fake designer purse to another friend. The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate."
Grade	Weak-to-Moderate

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S. 1717	Oil and Gas Price Gouging Prevention Act of 2005
Description	Creates criminal liability for raising gas and oil prices more than 15% after a declared natural disaster unless the price increase is due to the increased costs caused by the disaster.
Language	<p>"It shall be unlawful in the [U.S.] during the period of a qualifying natural disaster declaration in the [U.S.] to increase the price of any oil or gas product more than 15 percent above the price of that product immediately prior to the declaration unless the increase in the amount charged is attributable to additional costs incurred by the seller or national or international market trends." (Sec. 3 (a)).</p> <p>"A violation of this section shall be" (Sec. 3 (a)(2)(A)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Grade	None

S. 1735	Energy Emergency Consumer Protection Act of 2005
Description	Creates criminal liability for selling gasoline during a declared emergency at "unconscionably excessive" or "unfair" rates.
Language	<p>"During any energy emergency declared by the President under section 3, it is unlawful for any person to sell crude oil, gasoline, natural gas, or petroleum distillates in, or for use in, the area to which that declaration applies at a price that – (A) is unconscionably excessive; or (B) indicates the seller is taking unfair advantage of the circumstances to increase prices unreasonably." (Sec. 2(a)(1)).</p> <p>Factors considered to determine a violation are found in Sec. 2 (a)(2)-(3):</p> <ul style="list-style-type: none"> - the price represents a gross disparity compared to the price immediately prior to the declaration - the price grossly exceeds the price readily obtainable by other purchasers in the area of the declaration - (mitigating) the price reasonably reflects additional costs, not within the control of the seller, that were paid/incurred by seller <p>"Any person who violates section 2 or any rule or order issued thereunder shall be" (Sec. 5).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	There is little possibility that a seller could know for certain whether he is violating this law. Although some sellers may be on notice of the prohibition on "unconscionably excessive" gasoline sales, this provision covers all sellers regardless of whether they possess industry knowledge.
Grade	None

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S. 1744	Price Gouging Act of 2005
Description	Creates criminal liability for selling gasoline during a declared emergency at “unconscionably excessive” prices, a phrase to be interpreted and defined by regulatory agencies.
Language	<p>“A supplier that knowingly” sells fuel “at an unconscionably excessive price” (Sec 2, Sec. 25(c)).</p> <p>“The term ‘unconscionably excessive price’ means a price charged in an affected area for gasoline or diesel fuel that—(A) represents a gross disparity, as determined by the Commission in accordance with subsection (e), between the price charged for gasoline or diesel fuel and the average price of gasoline or diesel fuel charged by suppliers in the affected area during the 30-day period immediately before the President declares the existence of a major disaster; and is not attributable to increased wholesale or operational costs incurred by the supplier in connection with the sale of gasoline or diesel fuel.” (Sec. 25(a)(4)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The “knowingly” requirement only safeguards sellers who, for example, do not know the price that their resellers are charging. The use of the civil law’s vague unconscionability standard makes it impossible for a seller to know with certainty in advance whether he is violating the law.
Other Considerations	<p>This analysis assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i>, courts will require the government to prove that the defendant knew that the price charged met some or all of the factors defining what it means to be “unconscionably excessive.” While the particulars of what price is unconscionably excessive are established <i>ex post</i>, the guidelines for what constitutes an unconsciously excessive price are established by the statute <i>ex ante</i>, sufficient to give some merchants some notice.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “None” and “Weak.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Weak.”</p>
Grade	None-to-Weak
S. 1798	Medicare Do Not Call Act
Description	Creates criminal liability for deceptive or abusive telemarketing acts, practices, or false statements.
Language	“Whoever knowingly and willfully engages in deceptive or abusive telemarketing acts or practices . . . with respect to a prescription drug plan offered by a PDP sponsor under part D of title XVIII, a Medicare Advantage plan offered by a Medicare Advantage organization under part C of such title, or who falsely alleges to be conducting outbound call telemarketing (as so defined) with respect to either such a plan, shall be” (Sec. 2(c), 42 U.S.C. § 1320a-7b(g)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.

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Grade	Moderate
S. 1798	Medicare Do Not Call Act
Description	Creates criminal liability for deceptive or abusive telemarketing acts, practices, or false statements.
Language	“Whoever knowingly and willfully . . . makes any false, statement or representation of a material fact while conducting outbound call telemarketing . . . with respect to a prescription drug plan offered by a PDP sponsor under part D of title XVIII, a Medicare Advantage plan offered by a Medicare Advantage organization under part C of such title, or who falsely alleges to be conducting outbound call telemarketing (as so defined) with respect to either such a plan, shall be” (Sec. 2(c), 42 U.S.C. § 1320a-7b(g)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The categorization of this offense as “Moderate-to-Strong” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the “knowingly” requirement applies to all the operative terms of the offense. The strength of the <i>mens rea</i> requirement in this offense falls between “Moderate” and “Strong.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a “Strong.”
Grade	Moderate-to-Strong
S. 1896	Schools Safely Acquiring Faculty Excellence Act of 2005
Description	Creates criminal liability, in relation to background checks of potential school employees, for exceeding granted authority or releasing information obtained through such checks.
Language	“An individual who knowingly exceeds the authority in subsection (a), or knowingly releases information in violation of subsection (b)” (Sec. 2(c)). “In General – The Attorney General of the [U.S.] shall, upon request of the chief executive of a State, conduct fingerprint-based checks of the national crime information databases . . . pursuant to a request submitted by a local educational agency or State educational agency in that State, on individuals under consideration for employment by the agency in a position in which the individual would work with or around children. Where possible, the check shall include a fingerprint-based check of State criminal history databases. The Attorney General and the States may charge any applicable fees for these checks.” (Sec. 2(a)). “Protection of Information – An individual having information derived as a result of a check under subsection (a) may release that information only to an appropriate officer of a local educational agency or State educational agency, or to another person authorized by law to receive that information.” (Sec. 2 (b)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.

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Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The “knowingly” requirement primarily safeguards, for example, defendants who did not know the facts of the conduct exceeding the granted authority (such as a supervisor of the person who actually exceeded the authority) or who inadvertently disclosed information.
Other Considerations	The definition of the authority granted is vague and unclear. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Weak

S. 1917	Employment Verification Act of 2005
Description	Creates criminal liability for fraudulent behavior involving the procurement of Social Security numbers.
Language	“Any individual who falsely represents that the individual is a citizen for purposes of obtaining employment . . .” (Sec. 4, 8 U.S.C. § 1324a(1)).
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	Although virtually any non-citizen seeking employment will know that he or she is not a citizen and will know that to represent otherwise is illegal, this offense as written does not require any intent. Therefore, a person who checks the wrong box on a form, or who possesses a green card and does not understand that does not fit the definition of a “citizen,” could be convicted under this offense.
Grade	None

S. 1917	Employment Verification Act of 2005
Description	Creates criminal liability for fraudulent behavior involving the procurement of Social Security numbers.
Language	Whoever[,] for the purpose of causing an increase in any payment authorized under this subchapter . . . or for any other purpose, with intent to deceive, discloses, sells, or transfers his own social security account number . . . to any person . . .” (Sec. 5(a), 42 U.S.C. § 408(a)(7)(D)).
Strengths	In some cases, the requirement that the conduct be done “with intent to deceive” will limit application of this offense to persons who are sufficiently blameworthy to justify criminal punishment.
Weaknesses	The phrase “for the purpose causing an increase in any payment” does not limit the offense because the offense later states “or for any other purpose.”
Other Considerations	Despite requiring intent to deceive, the definition of the offense is very broad and could include conduct that is not otherwise wrongful and causes no harm.
Grade	Moderate

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S. 1919	Immigrant Accountability Act of 2005
Description	Creates criminal liability for disclosure or falsification of documents relating to immigration procedures and record keeping.
Language	<p>"Any person who knowingly uses, publishes, or permits information to be examined in violation of this subsection shall be . . ." (Section 1(e)(3)).</p> <p>"Confidentiality of Information – (1) In General – Except as otherwise provided in this section, no Federal agency or bureau, nor any officer or employee of such agency or bureau, may – (A) use the information furnished by the applicant pursuant to an application filed under paragraph (1) or (2) of subsection (a) for any purpose other than to make a determination on the application; (B) make any publication through which the information furnished by any particular applicant can be identified; or (C) permit anyone other than the sworn officers and employees of such agency, bureau, or approved entity, as approved by the Secretary of Homeland Security, to examine individual application that have been filed." (Section 1(e)(2)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Does not require the defendant to know that he or she is violating the law. Does not apply only, for example, to government officials or persons in other positions of trust who are trained and can be expected to know how to handle immigration information according to this law.
Other Considerations	<p>Even under the Supreme Court's decision in <i>Flores-Figueroa</i>, the categorization of this offense does not assume that the person must know that their use of the information violated the law.</p> <p>Exceptions for required disclosures – "to a duly recognized law enforcement entity in connection with a criminal investigation or prosecution or a national security investigation or prosecution, in each instance about an individual suspect or group of suspects, when such information is requested in writing by such entity." (Sec. 1(e)(3)).</p>
Grade	Weak

S. 1919	Immigrant Accountability Act of 2005
Description	Creates criminal liability for disclosure or falsification of documents relating to immigration procedures and record keeping.
Language	"It shall be unlawful for any person to file . . . an application for adjustment of status under this section and knowingly and willfully falsify, conceal, or cover up a material fact or make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or documents knowing the same to contain any false fictitious or fraudulent statement or entry . . ." (Section 1(f)(1)(A)(i)).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. This should generally be interpreted as requiring a defendant to have known of the falsity or falsehoods in order to be convicted.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

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S. 1919	Immigrant Accountability Act of 2005
Description	Creates criminal liability for disclosure or falsification of documents relating to immigration procedures and record keeping.
Language	"It shall be unlawful for any person to . . . assist in filing an application for adjustment of status under this section and knowingly and willfully falsify, conceal, or cover up a material fact or make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or documents knowing the same to contain any false fictitious or fraudulent statement or entry . . ." (Section 1(f)(1)(A)(i)).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. This should generally be interpreted as requiring a defendant to have known of the falsity or falsehoods in order to be convicted.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. The <i>mens rea</i> terms do not necessarily require the person to have knowledge that their conduct is "assist[ing] in filing an application," and thus the person may not necessarily have a wrongful intent in making those statements.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 1919	Immigrant Accountability Act of 2005
Description	Creates criminal liability for disclosure or falsification of documents relating to immigration procedures and record keeping.
Language	"It shall be unlawful for any person to . . . (ii) create or supply a false writing or document for use in making such an application." (Section 1(f)(1)(A)(ii)).
Strengths	---
Weaknesses	This is a strict liability provision. It does not require the person to know that the writing or document includes a falsity, nor does it require the person to know that the writing or document is to be used in making an application.
Other Considerations	Sec. 101(d)(7)(A)(ii) does not include the <i>mens rea</i> terms, "knowingly and willfully," that are included in Sec. 101(d)(7)(A)(i).
Grade	None

S. 1921	Amendments to Internal Revenue Code
Description	Creates criminal liability for failures to comply with heavily revised federal tax code implementing a national sales tax and business taxes.
Language	"Each person who is required to collect taxes imposed by subtitle B as part of a trade or business and willfully fails to do so may be . . ." (Sec. 2505(b)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.

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Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Grade	Moderate

S. 1921	Amendments to Internal Revenue Code
Description	Creates criminal liability for failures to comply with heavily revised federal tax code implementing a national sales tax and business taxes.
Language	“Each person who willfully asserts an invalid intermediate or export sales exemption from the taxes imposed by subtitle B may be” (Sec. 2505(c)(2)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Grade	Moderate

S. 1921	Amendments to Internal Revenue Code
Description	Creates criminal liability for failures to comply with heavily revised federal tax code implementing a national sales tax and business taxes.
Language	“Each person who is required to remit taxes actually collected pursuant to subtitle B and willfully fails to do so may be” (Sec. 2505(d)(2)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Grade	Moderate

S. 1921	Amendments to Internal Revenue Code
Description	Creates criminal liability for failures to comply with heavily revised federal tax code implementing a national sales tax and business taxes.
Language	“A person who willfully files a false claim for a Family Consumption Allowance rebate may be” (Sec. 2505(i)).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Grade	Moderate

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S. 1921	Amendments to Internal Revenue Code
Description	Creates criminal liability for failures to comply with heavily revised federal tax code implementing a national sales tax and business taxes.
Language	"Any person who violates the requirements relating to confidentiality of tax information (as provided in section 2605(f)) may be" (Sec. 2505(s)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

S. 1926	Animal Enterprise Terrorism Act
Description	Creates criminal liability for disruptions or interference with a commercial enterprise that uses animals.
Language	Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—(1) for the purpose of damaging or disrupting an animal enterprise; and (2) in connection with such purpose— intentionally damages, disrupts, or causes the loss of any property (including animals or records) used by the animal enterprise, or any property of a person or entity having a connection to, relationship with, or transactions with the animal enterprise . . . shall be" (Sec. 2(a), 18 U.S.C. § 43(a)(2)). "[T]he term 'economic damage' means the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, or the loss of profits." (Sec. 2(a), 18 U.S.C. § 43(d)(3)). "[T]he term 'economic disruption' means losses and increased costs that individually or collectively exceed \$10,000 . . . and does not include any lawful economic disruption that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise." (Sec. 2(a), 18 U.S.C. § 43(d)(4)).
Strengths	"Intentionally" restricts criminality to acts purposefully done in order to cause the listed consequences. The offense requires the conduct to be done "for the purpose of damaging or disrupting an animal enterprise."
Weaknesses	Does not protect against economic losses caused by, for example, constitutionally protected protests intentionally conducted to cause economic losses.
Other Considerations	Creates the separate offenses of conspiracy and attempt to do this offense. (Sec. 2(a), 18 U.S.C. § 43(a)(2)(C)). This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Weak

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S. 1973	Energy Tax Rebate Act of 2005
Description	Creates criminal liability for the sale of oil products at “unconscionably excessive” prices or “taking unfair advantage of circumstances”
Language	<p>“It is unlawful for any person to sell crude oil, gasoline, or petroleum distillates at a price that – (A) is unconscionably excessive; or (B) indicates the seller is taking unfair advantage of circumstances to increase prices unreasonably.” (Sec. 301(a)(1)).</p> <p>Factors considered to determine a violation are in Sec. 301(a)(2)-(3):</p> <ul style="list-style-type: none"> - the amount charged represents a gross disparity compared to the amount charged immediately prior to the declaration - the amount charged grossly exceeds the amount charged readily obtainable by other purchasers in the area of the declaration - (mitigating) the price reasonably reflects additional costs, not within the control of the seller, that were paid/incurred by seller
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	There is little possibility that a seller could know for certain whether he or she is violating this law. Although some sellers may be on notice of the prohibition on “unconscionably excessive” gasoline sales, this provision covers all sellers regardless of whether they possess industry knowledge.
Grade	None

S. 1973	Energy Tax Rebate Act of 2005
Description	Creates criminal liability for the sale of oil products at “unconscionably excessive” prices or “taking unfair advantage of circumstances”
Language	<p>“[I]t is unlawful for any person to (A) set different prices for gasoline or petroleum distillates for different geographic locations; or (B) implement a territorial restriction with respect to gasoline or petroleum distillates.” (Sec. 301(b)(1)).</p> <p>“Exceptions – A person may set different prices for gasoline or petroleum distillates for different geographic locations or implement territorial restrictions with respect to gasoline or petroleum distillates only if the price differences or restrictions are sufficiently justified by – (A) differences in the cost of retail space where the gasoline or petroleum distillate is sold; (B) differences in the cost of transportation of gasoline or petroleum distillates from the refinery to the retail location; (C) differences in the cost of storage of gasoline or petroleum distillates at the retail location ; or (D) differences in the formulation of the gasoline or petroleum distillates sold.” (Sec. 301(b)(2)).</p>
Strengths	---
Weaknesses	Strict liability – requires a worldwide fixed price and supply unless justified by a review of various factors, a review that a defendant cannot be expected to understand and apply in advance to determine whether his conduct is criminal.
Other Considerations	“Exceptions – A person may set different prices for gasoline or petroleum distillates for different geographic locations or implement territorial restrictions with respect to gasoline or petroleum distillates only if the price differences or restrictions are sufficiently justified by – (A) differences in the cost of retail space where [it] is sold; (B) differences in the cost of transportation . . . from the refinery to the retail location; (C) differences in the cost of storage . . . at the retail location ; or (D) differences in the formulation of the gasoline or petroleum distillates sold.” (Sec. 301(b)(2)).
Grade	None

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S. 1973	Energy Tax Rebate Act of 2005
Description	Creates criminal liability for the sale of oil products at “unconscionably excessive” prices or “taking unfair advantage of circumstances”
Language	“It is unlawful for any person to report information related to the wholesale price of [fuel] to the [FTC] if (1) that person knew, or reasonably should have known, the information to be false or misleading; . . . and (3) the person intended the false or misleading data to affect data compiled by that department or agency” (Sec. 301(c)).
Strengths	A literal application of the plain language of this “knowingly” requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	The “intended” requirement appears helpful, but it should state that the person intended his act to result in some inaccurate data from the government agency. A person who did not know that information was false still could have “intended it to affect” government data compiled based on it. The “reasonably should have known” requirement is a tort-law standard and should not be used for criminal law. Among other things, it is rarely clear whether an objective or subjective standard should be applied. Thus, the inclusion of this phrase undermines this offense’s knowledge requirement to the point that it is meaningless as a safeguard against conviction.
Grade	None

S. 1975	Deceptive Practices and Voter Intimidation Prevention Act of 2005
Description	Creates criminal liability for misrepresentations of time, place, manner of federal elections.
Language	It shall be unlawful for any person to knowingly deceive another person regarding the time, place, or manner of an election described in subparagraph (B), or the qualifications for or restrictions on voter eligibility for any such election, with the intent to prevent such person from exercising the right to vote in such election. (Sec. 2(b)(2), 18 U.S.C. § 594).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. The “with the intent to prevent” language requires specific intent.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	Voting is a highly regulated activity, and defendants can be expected to know that preventing a person from exercising the right to vote is wrongful. However, the offense is not restricted to conduct affecting or intended to affect persons who are qualified to vote. The strength of the <i>mens rea</i> requirement in this offense falls between “Moderate” and “Strong.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Strong.”
Grade	Moderate-to-Strong

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S. 1978	Tim Fagan's Law or the Counterfeit Drug Enforcement Act of 2005
Description	Creates criminal liability for misbranding and misrepresenting drugs.
Language	"Notwithstanding paragraph (1) or (2), in the case of a person who violates section 301(a), 301(b), or 301(c) with respect to a drug that is subject to section 503(b)(1)(B), if the person knowingly caused the drug to be adulterated or misbranded and sells or trades the drug . . . the person shall be . . ." (Sec. 2(a), 21 U.S.C. 333(a)(3)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	This analysis assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the <i>mens rea</i> term "knowingly" applies to the terms "adulterated" and "misbranded."
Grade	Moderate

S. 1978	Tim Fagan's Law or the Counterfeit Drug Enforcement Act of 2005
Description	Creates criminal liability for misbranding and misrepresenting drugs.
Language	"Notwithstanding paragraph (1) or (2), in the case of a person who violates section 301(a), 301(b), or 301(c) with respect to a drug that is subject to section 503(b)(1)(B), if . . . the person purchases or trades for the drug knowing or having reason to know that the drug was knowingly caused to be adulterated or misbranded, the person shall be . . ." (Sec. 2(a), 21 U.S.C. 333(a)(3)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. "Having reason to know" is somewhat more protective language than "should have known": however, the bill does not specify what standard a court must apply to determine whether the person "ha[d] reason to know" the drug had been "knowingly caused to be adulterated or misbranded." This lack of specificity undermines whatever protection the "knowing . . . that the drug was knowingly caused" requirement might otherwise add. Further, what it means to know that a drug "was <i>knowingly caused</i> to be adulterated or misbranded" is unclear, confusing, and unlikely to add any further protectiveness.
Other Considerations	The strength of the <i>mens rea</i> requirement in this offense falls between "None" and "Weak." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Weak."
Grade	None-to-Weak

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S. 1978	Tim Fagan's Law or the Counterfeit Drug Enforcement Act of 2005
Description	Creates criminal liability for misbranding and misrepresenting drugs.
Language	"Notwithstanding paragraph (1) or (2), in the case of a person who violates section 301(d) with respect to a drug, if the person causes the drug to be misrepresented as a drug that is subject to section 503(b)(1)(B) and for which an approved application is in effect under section 505 and the person sells or trades the drug . . . the person shall be . . ." (Sec. 2(a), 21 U.S.C. 333(a)(4)).
Strengths	---
Weaknesses	This is a strict liability offense. Although this is a highly regulated industry, there is no express <i>mens rea</i> language that would protect even those persons who acted merely by accident.
Grade	None

S. 1978	Tim Fagan's Law or the Counterfeit Drug Enforcement Act of 2005
Description	Creates criminal liability for misbranding and misrepresenting drugs.
Language	"Notwithstanding paragraph (1) or (2), in the case of a person who violates section 301(d) with respect to a drug, if the person causes the drug to be misrepresented as a drug that is subject to section 503(b)(1)(B) and for which an approved application is in effect under section 505 and . . . the person purchases or trades for the drug knowing or having reason to know that the drug was knowingly misrepresented, the person shall be . . ." (Sec. 2(a), 21 U.S.C. 333(a)(4)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. "Having reason to know" is somewhat more protective language than "should have known": however, the bill does not specify what standard a court must apply to determine whether the person "ha[d] reason to know" the drug had been "knowingly misrepresented." This lack of specificity undermines whatever protection the "knowing . . . that the drug was knowingly caused" requirement might otherwise add. Further, what it means to know that a drug "was <i>knowingly misrepresented</i> " is unclear, confusing, and unlikely to add any further protectiveness.
Other Considerations	The strength of the <i>mens rea</i> requirement in this offense falls between "None" and "Weak." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Weak."
Grade	None-to-Weak

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S. 1998	Stolen Valor Act
Description	Creates criminal liability for misrepresentations regarding the awarding of military medals.
Language	Amends 18 U.S.C. § 704 to read: "Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates or receipts for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the [U.S.], or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be . . ." (Sec. 3(b), 18 U.S.C. § 704(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The "authorized" exceptions are not listed as part of the statute, but would be created by regulation. (18 U.S.C. § 704(a)).
Grade	Weak

S. 1998	Stolen Valor Act
Description	Creates criminal liability for misrepresentations regarding the awarding of military medals.
Language	"Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the [U.S.], any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be . . ." (Sec. 3, 18 U.S.C. § 704(b)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Almost all persons can be expected to know whether they have been granted a congressional or military medal or award. However, this offense does not protect defendants who falsely represent due to a mistake of fact – e.g., whether one's commanding officer did or did not "put in" for such a medal.
Grade	None

S. 2012	Magnuson-Stevens Fishery Conservation and Management
Description	Creates criminal liability for a wide range of fishing and shipping activities.
Language	"Any person . . . who knowingly violates [18 U.S.C. § 1857(1)(D)] shall be . . ." (Sec. 309(a), 16 U.S.C. 1859(a)(1)). "It is unlawful for any person to refuse to permit any officer authorized to enforce the provisions of this chapter to board a fishing vessel subject to such person's control for purposes

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	of conducting any search or inspection in connection with the enforcement of this chapter or any regulation, permit, or agreement referred to in subparagraph (A) or (C). . . ." (16 U.S.C. § 1857(1)(D)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	<p>The analysis of this offense assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i>, the term "knowingly" in 18 U.S.C. § 1859(a)(1) only applies to the clause in 18 U.S.C. § 1857(1)(D) "to refuse to permit" and possibly "any officer," but nothing further. The structure of the offense makes it unclear whether the government would be required to prove that the defendant knew that the officer was authorized to board and inspect.</p> <p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p>
Grade	Weak

S. 2012	Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006
Description	Creates criminal liability for a wide range of fishing and shipping activities.
Language	<p>"Any person . . . who knowingly violates [18 U.S.C. § 1857(1)(H)] shall be . . ." (Sec. 309(a), 16 U.S.C. § 1859(a)(1)).</p> <p>"It is unlawful for any person to interfere with, delay, or prevent, by any means, the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this section;" (16 U.S.C. § 1857(1)(H)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences, and the "knowing" term should be interpreted to require the government to prove that a defendant knew that the other person had committed the act that constitutes a violation of this section
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. It is unclear whether the "knowing" term would require the government to prove that a defendant knew that the other person's act violated any law.
Other Considerations	This offense does not define who or what must be conducting the apprehension or arrest. This offense would not protect against conviction a defendant who interferes with the apprehension of a person by a private investigator or an unidentified individual.
Grade	Weak

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S. 2012	Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006
Description	Creates criminal liability for a wide range of fishing and shipping activities.
Language	<p>"Any person . . . who knowingly violates [18 U.S.C. § 1857(1)(I)] shall be . . ." (Sec. 309(a), 16 U.S.C. § 1859(a)(1)).</p> <p>"It is unlawful for any person to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information . . . regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this chapter;" (16 U.S.C. § 1857(1)(I)).</p>
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. This should generally be interpreted as requiring a defendant to have known of the falsity or falsehoods in order to be convicted.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	<p>The categorization of this offense as "Moderate-to-Strong" assumes that the government must prove that the defendant knew that the information was "false," knew that it was submitted to "a Council, the Secretary, or the Governor of a State," and knew that it was "regarding any matter that the Council, Secretary, or Governor is considering."</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between "Moderate" and "Strong." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a "Strong."</p>
Grade	Moderate-to-Strong

S. 2012	Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006
Description	Creates criminal liability for a wide range of fishing and shipping activities.
Language	<p>"Any person . . . who knowingly violates [18 U.S.C. § 1857(2)] shall be . . ." (Sec. 309(a), 16 U.S.C. § 1859(a)(1)).</p> <p>"It is unlawful for any vessel other than a vessel of the [U.S.], and for the owner or operator of any vessel other than a vessel of the [U.S.], to engage [in fishing except recreational fishing permitted under section 1821(i) of this title]. . ." (16 U.S.C. § 1857(2)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.
Grade	Weak

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S. 2020	Tax Relief Act of 2005
Description	Creates criminal liability for failures to pay taxes or make tax returns.
Language	"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall . . . be . . ." (Sec. 531(b), 26 § U.S.C. 7203).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Grade	Moderate

S. 2177	Phone Records Protection Act of 2006
Description	Creates criminal liability for fraudulent handling of personal phone records.
Language	"Whoever knowingly and intentionally sells or fraudulently transfers or uses, or attempts to sell or fraudulently transfer or use, the records of a customer of a telephone service provider shall be . . ." (Sec. 2(a), 18 U.S.C. § 2801(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. "Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	Exceptions for law enforcement. (Sec. 2(a), 18 U.S.C. § 2801(c)). The term "fraudulent" is not a well-defined <i>mens rea</i> term and it has no consistent interpretation by the federal courts.
Grade	Weak

S. 2178	Consumer Telephone Records Protection Act of 2006
Description	Creates criminal liability for fraudulent handling of personal phone records.
Language	"Whoever obtains, or attempts to obtain, confidential phone records information from a covered entity, without authorization from the customer to whom such confidential phone records information relates, by knowingly and intentionally – (1) making false or fraudulent statements or representations to an employee of a covered entity; shall be . . ." (Sec 3, 18 U.S.C. § 1039(a)). "The term 'confidential phone records information' means (A) information that – (i) relates to the quantity, technical configuration, type, destination, location, and amount of use of a

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	service offered by a covered entity subscribed to by any customer of that covered entity; and (ii) is made available to a covered entity by a customer solely by virtue of the relationship between the covered entity and the customer; and (B) information contained in any bill related to the product or service offered by a covered entity and received by any customer of the covered entity.” (Sec. 3, 18 U.S.C. § 1039(e)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret “intentionally” to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. “Intentionally” does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	The categorization of this offense assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” applies to “false” and “fraudulent.”
Grade	Moderate

S. 2178	Consumer Telephone Records Protection Act of 2006
Description	Creates criminal liability for fraudulent acquisition or use of phone records.
Language	“Whoever obtains, or attempts to obtain, confidential phone records information from a covered entity, without authorization from the customer to whom such confidential phone records information relates, by knowingly and intentionally – (2) making [false or fraudulent] statements or representations to a customer of a covered entity; shall be” (Sec 3, 18 U.S.C. § 1039(a)). See preceding offense for definition of ‘confidential phone records information.’
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret “intentionally” to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. “Intentionally” does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	The categorization of this offense assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” applies to “false” and “fraudulent.”
Grade	Moderate

S. 2178	Consumer Telephone Records Protection Act of 2006
Description	Creates criminal liability for fraudulent acquisition or use of phone records.
Language	“Whoever obtains, or attempts to obtain, confidential phone records information from a covered entity, without authorization from the customer to whom such confidential phone records information relates, by knowingly and intentionally – (3) providing false documentation to a covered entity knowing that such document is false; shall be” (Sec 3, 18

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	U.S.C. § 1039(a). See preceding offense for definition of 'confidential phone records information.'
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. "Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	The categorization of this offense assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the term "knowingly" applies to "false." This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 2178	Consumer Telephone Records Protection Act of 2006
Description	Creates criminal liability for fraudulent acquisition or use of phone records.
Language	"Whoever obtains, or attempts to obtain, confidential phone records information from a covered entity, without authorization from the customer to whom such confidential phone records information relates, by knowingly and intentionally – (4) accessing customer accounts of a covered entity via the Internet; shall be" (Sec 3, 18 U.S.C. § 1039(a)). See preceding offense for definition of 'confidential phone records information.'
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. "Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Further, "knowingly and intentionally" does not apply to the element requiring the "customer accounts of a covered entity" to meet the definition of "confidential phone records information" or to the element requiring the defendant to have acted "without authorization."
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. This offense should be drafted more precisely to prevent all access of "customer accounts of a covered entity via the Internet" from being a crime. For example, even if the person has been authorized to access the phone record information by the information's legitimate keeper, that person could be convicted of this offense if the keeper has not obtained the proper authorization from the customer to allow such access.
Grade	Weak

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S. 2178	Consumer Telephone Records Protection Act of 2006
Description	Creates criminal liability for fraudulent acquisition or use of phone records.
Language	"[A]ny person . . . who knowingly and intentionally sells, or attempts to sell, confidential phone records information from a covered entity, without authorization from the customer to whom such confidential phone records information relates, shall be . . ." (Sec. 3, 18 U.S.C. § 1039(b)). See preceding offense for definition of "confidential phone records information."
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently. The "knowingly and intentionally" requirement should protect against this provision's application to acts such as selling or transferring several data disks without taking due care to know that some of them include confidential phone records.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. "Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Grade	Weak

S. 2180	Honest Leadership and Open Government Act of 2006
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements.
Language	"Whoever knowingly and willfully [or knowingly, willfully, and corruptly] fails to comply with any provision of [Section 7 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1606)] shall be . . ." (Sec. 402, 2 U.S.C. § 1606(b)). "Whoever knowing and corruptly fails to comply with any provision of [Chapter 26 – Disclosure of Lobbying Activities] shall be . . ." (2 U.S.C. § 1606(b)).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	If the defendant has failed to comply with any provision "knowingly, willfully, and corruptly," the maximum penalty is increased from 5 to 10 years. (Sec. 402, 2 U.S.C. § 1606(b)). However, "corruptly" is particularly unclear and a court may not interpret it to add significantly to the <i>mens rea</i> requirement. See <i>Arthur Andersen v. United States</i> , 544 U.S. 696, 705 (U.S. 2005). This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. Ethics rules are, almost by definition, standards guiding conduct that is not necessarily wrongful outside of a particular context and that is not a proper subject of criminalization. If violations are criminalized, such criminalization should at least be coupled with a statutory mandate that all persons covered be fully informed of their ethical requirements before being subject to prosecution.

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	The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Moderate.”
Grade	Weak-to-Moderate

S. 2180	Honest Leadership and Open Government Act of 2006
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements.
Language	<p>“Whoever knowingly and willfully [or knowingly, willfully, and corruptly] fails to comply with any provision of [section 403] shall be . . .” (Sec. 403(b)(1)-(2)).</p> <p>“Whoever makes a false certification in connection with the travel of a Member, officer, or employee of either House of Congress (within the meaning given those terms in section 207 of title 18, United States Code), under clause 5 of rule XXV of the Rules of the House of Representatives, shall be . . .” (Sec. 403(a)).</p>
Strengths	“Knowingly and willfully” should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	<p>If the defendant has failed to comply with any provision “knowingly, willfully, and corruptly,” the maximum penalty is increased from 5 to 10 years. (Sec. 402, 2 U.S.C. § 1606(b)). However, “corruptly” is particularly unclear and a court may not interpret it to add significantly to the <i>mens rea</i> requirement. See <i>Arthur Andersen v. United States</i>, 544 U.S. 696, 705 (U.S. 2005).</p> <p>Ethics rules are, almost by definition, standards guiding conduct that is not necessarily wrongful outside of a particular context and that is not a proper subject of criminalization. If violations are criminalized, such criminalization should at least be coupled with a statutory mandate that all persons covered be fully informed of their ethical requirements before being subject to prosecution.</p>
Grade	Moderate

S. 2280	STOP FRAUD Act
Description	Creates criminal liability for fraudulent offers of extension of consumer credit.
Language	“It shall be unlawful for any mortgage professional to knowingly execute, or attempt to execute, a scheme or artifice . . . to defraud . . .” (Sec. 2, 18 U.S.C. § 1351(a)(1)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other	This particular statute does not define “scheme or artifice to defraud.” However, in this chapter (Chapter 63, Title 18), “scheme or artifice to defraud” includes a scheme or artifice to

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Considerations	deprive another of the intangible right of honest services.” (18 U.S.C. 1346). This is a poorly defined and exceedingly broad standard. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The defendant need not have known of the scheme or artifice; he must merely have executed it. This could include a mortgage officer whose company is alleged to have crafted some broad sales scheme or artifice to defraud, and the officer was implementing the scheme unwittingly.
Grade	Weak

S. 2280	STOP FRAUD Act
Description	Creates criminal liability for fraudulent offers of extension of consumer credit.
Language	“It shall be unlawful for any mortgage professional to knowingly execute, or attempt to execute, a scheme or artifice . . . to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property . . .” (Sec. 2, 18 U.S.C. § 1351(a)(2)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	“Knowingly” alone appears in this context to provide little or no protection for those who acted without a guilty mind. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. If anything turns out to be false that the mortgage professional believed to be true, he would be subject to criminal conviction.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. This particular statute does not define “scheme or artifice to defraud.” However, in this chapter (Chapter 63, Title 18), “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.” (18 U.S.C. 1346). This is a poorly defined and exceedingly broad standard.
Grade	Weak

S. 2355	Border Tunnel Prevention Act
Description	Creates criminal liability or increases the penalty for the construction or use of smuggling tunnels beneath the borders of the U.S. and foreign countries.
Language	“Any person who knowingly constructs or finances the construction of a tunnel or subterranean passage that crosses the international border between the [U.S.] and another country, other than a lawfully authorized tunnel or passage known to the Secretary of Homeland Security and subject to inspection by the Bureau of [ICE], shall be . . .” (Sec. 2(a), 18 U.S.C. 554(a)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. This is a proper use of the “knowing” standard to require a guilty mind. Commonsense, literal application should prevent unjust prosecutions and convictions.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as “Moderate-to-Strong” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” applies to “construction of a tunnel or subterranean passage that crosses the international border between the [U.S.] and another country.”

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	The strength of the <i>mens rea</i> requirement in this offense falls between “Moderate” and “Strong.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a “Strong.”
Grade	Moderate-to-Strong

S. 2355	Border Tunnel Prevention Act
Description	Creates criminal liability or increases the penalty for the construction or use of smuggling tunnels beneath the borders of the U.S. and foreign countries.
Language	“Any person who recklessly permits the construction or use of a tunnel or passage described in subsection (a) on land that the person owns or controls shall be” (Sec. 2(a), 18 U.S.C. 554(b)).
Strengths	---
Weaknesses	Recklessness is inherently a weak <i>mens rea</i> requirement. Further, although it is interpreted consistently in some state courts, particularly in states that have adopted the Model Penal Code’s four culpability standards, even in contrast to other federal <i>mens rea</i> requirements recklessness does not appear to have a consistent interpretation in the federal courts. “Reckless” is a term that finds its best definition and interpretation in tort law, not in federal criminal law. Further, what it means to “recklessly permit” construction or use is undefined and does not accord with the more standard usages of the “reckless” <i>mens rea</i> terms in criminal law.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	None

S. 2356	War Profiteering Prevention Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	“Whoever, in a matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war, military action, or relief or reconstruction activities within the jurisdiction of the [U.S.] Government, knowingly and willfully – executes or attempts to execute a scheme or artifice to defraud the [U.S.] . . . shall be” (Sec. 2(a), 18 U.S.C. § 1339(a)(1)(A)(i) [chapter 63]).
Strengths	“Knowingly and willfully” should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. “[S]cheme or artifice to defraud” is defined in 18 U.S.C. § 1346 for the purposes of this chapter (Chapter 63) to include “a scheme of artifice to deprive another of the intangible right of honest services.” This definition is broad, vague, and amorphous.

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Grade	Moderate
S. 2356	War Profiteering Prevention Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	"Whoever, in a matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war, military action, or relief or reconstruction activities within the jurisdiction of the [U.S.] Government, knowingly and willfully – materially overvalues any good or service with the specific intent to defraud and excessively profit from the war, military action, or relief or reconstruction activities; shall be" (Sec. 2(a), 18 U.S.C. § 1349(a)(1)(A)(ii)).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. The conduct must also be done with the specific intent to defraud and excessively profit.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. The terms "materially overvalues" and "excessively profit" are not defined in this offense, Act, or the Title in which the offense would be codified, and the conduct prohibited by this offense is so broad that it undermines the protectiveness of the specific intent provision.
Other Considerations	"Specific intent to defraud" is not defined, and federal criminal law does not uniformly require a defendant to have received, or to have intended to receive, anything of value in order to satisfy the definition of fraud. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate
S. 2356	War Profiteering Prevention Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	"Whoever, in a matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war, military action, or relief or reconstruction activities within the jurisdiction of the [U.S.] Government, knowingly and willfully – falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . . shall be" (Sec. 2(a), 18 U.S.C. § 1339(a)(1)(B)(i) [chapter 63]).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. A literal application of the plain language of this "knowingly" requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the "knowingly and willfully" applies to the term "material fact."

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	<p>Although this conduct must be done with knowledge of the falsity or materiality, the offense is not limited to the context of a statement made to a law enforcement officer, a government official, or any similar official or on the record conduct.</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p>
Grade	Moderate
S. 2356	War Profiteering Prevention Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	"Whoever, in a matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war, military action, or relief or reconstruction activities within the jurisdiction of the [U.S.] Government, knowingly and willfully – makes any materially false, fictitious, or fraudulent statements or representations ; or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry; shall be" (Sec. 2(a), 18 U.S.C. § 1339(a)(1)(B)(ii) – (iii)[chapter 63]).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	<p>The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i>, the "knowingly and willfully" applies to the term "materially false, fictitious, or fraudulent."</p> <p>Although this conduct must be done with knowledge of the falsity and materiality, the offense is not limited to the context of a statement made to a law enforcement officer, a government official, or any similar official or on the record conduct.</p>
Grade	Moderate
S. 2361	Honest Leadership and Accountability in Contracting Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	"Whoever, in any matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war or military action knowingly and willfully – executes or attempts to execute a scheme or artifice to defraud the [U.S.] or the entity having jurisdiction over the area in which such activities occur . . . shall be" (Sec. 101(a), 18 U.S.C. § 1039(a)(1)(A) [chapter 63]).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's

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	knowledge of the facts constituting the offense.
Other Considerations	"[S]cheme or artifice to defraud" is defined in 18 U.S.C. § 1346 for the purposes of this chapter (Chapter 63, Title 18) to include "a scheme of artifice to deprive another of the intangible right of honest services." This definition is broad, vague, and amorphous. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 2361	Honest Leadership and Accountability in Contracting Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	"Whoever, in any matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war or military action knowingly and willfully – falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . . shall be" (Sec. 101(a), 18 U.S.C. § 1039(a)(1)(B) [chapter 63]).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. A literal application of the plain language of this "knowingly" requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the "knowingly and willfully" applies to the term "material fact." Although this conduct must be done with knowledge of the falsity and materiality, the offense is not limited to the context of a statement made to a law enforcement officer, a government official, or any similar official or on the record conduct. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 2361	Honest Leadership and Accountability in Contracting Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	"Whoever, in any matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war or military action knowingly and willfully – makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry . . . shall be" (Sec. 101(a), 18 U.S.C. § 1039(a)(1)(C) [chapter 63]).
Strengths	"Knowingly and willfully" should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.

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Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the “knowingly and willfully” applies to the term “materially false, fictitious, or fraudulent.” Although this conduct must be done with knowledge of the falsity and materiality, the offense is not limited to the context of a statement made to a law enforcement officer, a government official, or any similar official or on the record conduct.
Grade	Moderate

S. 2361	Honest Leadership and Accountability in Contracting Act of 2006
Description	Creates criminal liability for fraud or misrepresentations regarding contracts involving a war or military action.
Language	“Whoever, in any matter involving a contract or provision of goods or services, directly or indirectly, in connection with a war or military action knowingly and willfully – materially overvalues any good or service with the specific intent to excessively profit from the war or military action; shall be” (Sec. 101(a), 18 U.S.C. § 1039(a)(1)(D) [chapter 63]).
Strengths	“Knowingly and willfully” should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful. The conduct must also be done with the specific intent to defraud and excessively profit.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The terms “materially overvalues” and “excessively profit” are not defined in this offense, Act, or the Title in which the offense would be codified, and the conduct prohibited by this offense is so broad that it undermines the protectiveness of the specific intent provision.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 2389	Protecting Consumer Phone Records Act
Description	Creates criminal liability for unauthorized acquisition, use, or sale of confidential customer proprietary network telephone information.
Language	“Any person who willfully and knowingly violates section 2 of the Protecting Consumer Phone Records Act shall be . . . be” (Sec. 4, 47 U.S.C. § 509).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s

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	knowledge of the facts constituting the offense.
Other Considerations	<p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate."</p>
Grade	Weak-to-Moderate

S. 2486	Chemical Security and Safety Act of 2006
Description	Creates criminal liability for violations of and failures to comply with any order issued under the Act by the Secretary of Homeland Security.
Language	<p>"Any owner or operator of a stationary source that is within a high priority category designated under section 5(a) that knowingly violates, or fails to comply with, any order under subsection (a) shall be . . ." (Sec. 10(b)(2)).</p> <p>"An order under paragraph (1) may be issued only after notice and opportunity for a hearing." (Sec. 10 (a)(2)).</p>
Strengths	<p>The "knowingly" requirement should protect some defendants against conviction for some inadvertences.</p> <p>The orders referenced in the offense language may be issued only after notice and opportunity for a hearing. (Sec. 10(a)(2)).</p>
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	<p>This criminal offense makes no provision for failure to comply with orders that would be infeasible, financial ruinous, or practically impossible to fulfill.</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p>
Grade	Moderate

S. 2509	National Insurance Act of 2006
Description	Creates criminal liability for failure or refusal to testify or answer or produce materials in response to a lawful inquiry or subpoena.
Language	"Any person who willfully fails or refuses to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in such person's power so to do, in obedience to the subpoena of the Commissioner, shall be . . ." (Sec. 1147(b)(5)).

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Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context.
Other Considerations	The strength of this <i>mens rea</i> provision is improved because the offense requires a subpoena to have been issued to the defendant. The strength of the <i>mens rea</i> requirement in this offense falls between “Moderate” and “Strong.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Strong.”
Grade	Moderate-to-Strong

S. 2509	National Insurance Act of 2006
Description	Creates criminal liability for participating in the affairs of a National Insurer or Agency in violation of a suspension order.
Language	“Any person who, being subject to an order under section 1145 or 1146 of the National Insurance Act of 2006, without the prior written approval of the Commission of National Insurance, knowingly participates, directly or indirectly, in any manner (including by engaging in an activity specifically prohibited in such an order) in the conduct of the affairs of any National Insurer or National Agency shall be” (Sec. 1149(c), 18 U.S.C. § 404). “Any suspension order issued under this subsection – (A) shall become effective upon service;” (Sec. 1145(b)(2)). The term “service” is not defined in sections 1145, 1146, or 1149.
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The procedures specified in the Act do not make it clear that the defendant must have had notice of the “order” in order to be convicted. “Participate” is a broad, vague term, and the provision does not define what it means either to “participate[]” or to “knowingly participate[].” This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Weak

S. 2509	National Insurance Act of 2006
Description	Creates criminal liability for fraudulent insurance acts.
Language	“Whoever commits a fraudulent insurance act . . . shall be” (Sec. 1713(b), 18 U.S.C. § 1037A(a)). The “term ‘fraudulent insurance act’ means an act or omission committed by a person who, knowingly and with intent to defraud, commits or conceals any material information concerning [several types of claims, payments, documents, etc.]”

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Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Requires a specific “intent to defraud.”
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	“Intent to defraud” is not defined, and federal criminal law does not uniformly require, for example, a defendant to have received, or to have intended to receive, anything of value in order to satisfy the definition of fraud.
Grade	Moderate

S. 2509	National Insurance Act of 2006
Description	Creates criminal liability for interfering with enforcement or investigations under regulations.
Language	“Whoever ... knowingly and intentionally interferes with the enforcement of the provisions of subtitle D of title I of the National Insurance Act of 2006 or investigations of suspected or actual violations of this section shall be” (Sec. 1713(b), 18 U.S.C. § 1037A(a)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Weak

S. 2509	National Insurance Act of 2006
Description	Creates criminal liability for permitting a person from participating in the business of insurance in violation of this Act.
Language	Any insurance person who is engaged in the business of insurance who knowingly and intentionally permits [any individual who has been convicted of any criminal felony involving dishonesty or breach of trust, and who participates in the business of insurance] shall be” (Sec. 1713(b), 18 U.S.C. 1037A(c)(1)). “[T]he term ‘business of insurance’ means – (A) the writing of insurance, or (B) the reinsuring of risks, by an insurer, including all acts necessary or incidental to such writing or reinsuring and the activities of persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons. . . .” (18 U.S.C. § 1033(f)(1)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Similarly, federal courts generally interpret “intentionally” to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. “Intentionally” does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other	The term “participates” is not defined by the statute, is broad, and could include employees who have minimal contact with the “business of insurance.”

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Considerations	
Grade	Weak

S. 2559	Honest Services Act of 2006
Description	Creates criminal liability for attempts to interfere with the right to “honest services” by members of Congress.
Language	“Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice to defraud and deprive . . . of the right to the honest services of a Member of Congress by” offering or receiving anything of value “with the intent to” influence the performance of an official act. (Sec. 2, 18 U.S.C. § 1351(a)).
Strengths	“Knowingly and willfully” should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	The effect of the “knowingly and willfully” language is uncertain because the second part of the offense appears to trump the introductory language. In effect, anything given or received with intent to influence an official act is a crime.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . “[S]cheme or artifice to defraud” is defined in 18 U.S.C. § 1346 for the purposes of this chapter (Chapter 63) to include “a scheme of artifice to deprive another of the intangible right of honest services.” This definition is broad, vague, and amorphous. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Weak

S. 2630	Truth in Caller ID Act of 2006
Description	Creates criminal liability for transmitting misleading or inaccurate caller ID information.
Language	“It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to transmit misleading or inaccurate caller identification information, unless such transmission is exempted pursuant to paragraph (3)(B).” (Sec. 2, 47 U.S.C. (e)(1)). “Any person who willfully and knowingly violates this subsection shall be” (Sec. 2, 47 U.S.C. 227(e)(5)(B)).
Strengths	“Knowingly and willfully” should require a defendant to know the facts constituting the offense and to have knowledge that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Moderate

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S. 2652	Border Tunnel Prevention Act
Description	Creates criminal penalties or increases the penalty for the construction or use of smuggling tunnels beneath the borders of the U.S. and foreign countries.
Language	"Any person who knowingly constructs or finances the construction of a tunnel or subterranean passage that crosses the international border between the [U.S.] and another country, other than a lawfully authorized tunnel or passage known to the Secretary of Homeland Security and subject to inspection by the Bureau of [ICE], shall be" (Sec. 2(a), 18 U.S.C. 554(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. This is a proper use of the "knowing" standard to require a guilty mind. Commonsense, literal application should prevent unjust prosecutions and convictions.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Moderate-to-Strong" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the term "knowingly" applies to "construction of a tunnel or subterranean passage that crosses the international border between the [U.S.] and another country." The strength of the <i>mens rea</i> requirement in this offense falls between "Moderate" and "Strong." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a "Strong."
Grade	Moderate-to-Strong

S. 2652	Border Tunnel Prevention Act
Description	Creates criminal for or increases the penalty for the construction or use of smuggling tunnels beneath the borders of the U.S. and foreign countries.
Language	"Any person who recklessly permits the construction or use of a tunnel or passage described in subsection (a) on land that the person owns or controls shall be" (Sec. 2(a), 18 U.S.C. 554(b)).
Strengths	---
Weaknesses	Recklessness is inherently a weak <i>mens rea</i> requirement. Further, although it is interpreted consistently in some state courts, particularly in states that have adopted the Model Penal Code's four culpability standards, even in contrast to other federal <i>mens rea</i> requirements recklessness does not appear to have a consistent interpretation in the federal courts. "Reckless" is a term that finds its best definition and interpretation in tort law, not in federal criminal law. Further, what it means to recklessly permit construction or use is undefined and does not fit even with the more standard usages of the "reckless" <i>mens rea</i> terms in criminal law.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	None

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S. 2723	Pharmacists Medicare Relief Act of 2006
Description	Creates criminal liability for prescription drug plan co-branding.
Language	"Whoever knowingly and willfully engages in co-branding prohibited under section 1860D-4(1) with respect to a prescription drug plan . . . shall be . . ." (Sec. 3, 42 U.S.C. § 1320a-7b(g)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Grade	Moderate

S. 2781	Wastewater Treatment Works Security Act of 2006
Description	Creates criminal liability for revealing the results of vulnerability assessments regarding water treatment systems.
Language	"[A]ny individual who views a vulnerability assessment . . . and who knowingly or recklessly reveals the vulnerability assessment . . ." (Sec. 2, Sec. 222(e)(4)(D)).
Strengths	---
Weaknesses	Does not require the revelation of the vulnerability assessment's information to be wrongful, merely knowing or reckless. The defendant need not have received the assessment because he held a position of trust or responsibility. Recklessness is inherently a weak <i>mens rea</i> requirement. Further, although it is interpreted consistently in some state courts, particularly in states that have adopted the Model Penal Code's four culpability standards, even in contrast to other federal <i>mens rea</i> requirements recklessness does not appear to have a consistent interpretation in the federal courts. "Reckless" is a term that finds its best definition and interpretation in tort law, not in federal criminal law.
Other Considerations	Should include a different standard for members of the public or others who happen to receive the vulnerability assessment than for those who receive the assessment because they have a position of trust or responsibility.
Grade	None

S. 2781	Wastewater Treatment Works Security Act of 2006
Description	Creates criminal liability for revealing the results of vulnerability assessments regarding water treatment systems.
Language	"An applicant that knowingly submits to the Administrator a false certification or material statement . . ." (Sec. 2, Sec. 222(e)(5)).
Strengths	"Knowingly" should safeguard those, such as managers in other areas of responsibility, who do not know about the submission.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.

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Other Considerations	The categorization of this offense assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the "knowingly" requirement applies to the phrase "to the Administrator" and to the terms "false" and "material."
Grade	Moderate

S. 2803	MINER Act
Description	Creates criminal liability for failure to comply with regulations regarding mine safety standards.
Language	"Any operator who willfully violates a mandatory health or safety standard . . ." (Sec. 8(a)(2)).
Strengths	This "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context.
Other Considerations	Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute's enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct. The strength of the <i>mens rea</i> requirement in this offense falls between "Weak" and "Moderate." For purposes of this report's tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a "Moderate."
Grade	Weak-to-Moderate

S. 2803	MINER Act
Description	Creates criminal liability for failure to comply with regulations regarding mine safety standards.
Language	"Any operator who . . . knowingly violates or fails or refuses to comply with any order . . ." (Sec. 8(a)(2)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Grade	Moderate

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S. 3506	Data Theft Prevention Act
Description	Creates criminal liability for improper use or transfer of personal health information.
Language	<p>"It shall be unlawful for any person knowingly and without authorization (1) to view, use, download, or remove any means of identification or individually identifiable health information that is in a Federal database; or (2) to transfer . . . or store such means of identification in[] any computer, network, database, or other format used to store information that is not a Federal database." (Sec. 2(b), 18 U.S.C. § 2077(b)).</p> <p>"The term 'individually identifiable health information' means any information, including demographic information collected from an individual, that – (A) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and – (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual." (42 U.S.C. § 1320d(b)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	It is not clear whether "knowingly" applies to the phrase "without lawful authority" given the parallel placement of the terms. Thus, the categorization of this offense assumes that "knowingly" does not apply to the phrase "without lawful authority."
Grade	Weak

S. 3506	Data Theft Prevention Act
Description	Creates criminal liability for improper use or transfer of personal health information.
Language	<p>"It shall be unlawful for any person to use a means of identification or individually identifiable health information obtained directly or indirectly from a Federal database in furtherance of a violation of any Federal or State criminal law." (Sec. 2(c), 18 U.S.C. § 2077(c)).</p> <p>See preceding offense for definition of "individually identifiable health information."</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	It does not add any inherent <i>mens rea</i> protection to require that the information be obtained "in furtherance of" another criminal violation, for that violation may, for example, be strict liability as well.
Grade	None

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S. 3547	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made regarding disaster or emergency relief efforts.
Language	"Whoever . . . knowingly falsifies, conceals, or covers up by any trick, scheme, or device any material fact . . . in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a [major disaster or emergency declaration] or in connection with any procurement of property or services related to any emergency or disaster declaration as a prime contractor[,] a subcontractor or supplier on a contract . . . with the [U.S.], shall be . . ." (Sec. 2(a), 18 U.S.C. § 1039(a)(1)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the "knowingly" applies to the term "material fact." Although this conduct must be done "in connection" with a benefit or procurement, the offense is not limited to the context of a government filing, a statement to a government official, or any similar official or on the record conduct. This offense covers such a broad range of conduct, however, that the <i>mens rea</i> provision is less protective. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 3547	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made regarding disaster or emergency relief efforts.
Language	"Whoever . . . knowingly makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation, in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a [major disaster or emergency declaration] or in connection with any procurement of property or services related to any emergency or disaster declaration as a prime contractor[,] a subcontractor or supplier on a contract . . . with the [U.S.], shall be . . ." (Sec. 2(a), 18 U.S.C. § 1039(a)(2)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the "knowingly" applies to the terms "materially false, fictitious or fraudulent." Although this conduct must be done "in connection" with a benefit or procurement, the offense is not limited to the context of a government filing, a statement to a government official, or any similar official or on the record conduct.

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	This offense covers such a broad range of conduct, however, that the <i>mens rea</i> provision is less protective. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 3559	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made regarding disaster or emergency relief efforts.
Language	"Whoever . . . knowingly falsifies, conceals, or covers up by any trick, scheme, or device any material fact . . . in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a [major disaster or emergency declaration] or in connection with any procurement of property or services related to any emergency or disaster declaration as a prime contractor[,] a subcontractor or supplier on a contract . . . with the [U.S.], shall be . . ." (Sec. 2(a), 18 U.S.C. § 1039(a)(1)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the "knowingly" applies to the term "material fact." Although this conduct must be done "in connection" with a benefit or procurement, the offense is not limited to the context of a government filing, a statement to a government official, or any similar official or on the record conduct. This offense covers such a broad range of conduct, however, that the <i>mens rea</i> provision is less protective. This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Moderate

S. 3559	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2005
Description	Creates criminal liability for fraud and misrepresentations made regarding disaster or emergency relief efforts.
Language	"Whoever . . . knowingly makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation, in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a [major disaster or emergency declaration] or in connection with any procurement of property or services related to any emergency or disaster declaration as a prime contractor[,] a subcontractor or supplier on a contract . . . with the [U.S.], shall be . . ." (Sec. 2(a), 18 U.S.C. § 1039(a)(2)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.

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Other Considerations	<p>The categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i>, the “knowingly” applies to the terms “materially false, fictitious or fraudulent.”</p> <p>Although this conduct must be done “in connection” with a benefit or procurement, the offense is not limited to the context of a government filing, a statement to a government official, or any similar official or on the record conduct.</p> <p>This offense covers such a broad range of conduct, however, that the <i>mens rea</i> provision is less protective. This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p>
Grade	Moderate

S. 3560	Federal Election Administration Act of 2006
Description	Creates criminal liability for violations of this Act related to making, receiving, or reporting monies.
Language	“Any person who knowingly and willfully commits a violation of any provision of this Act that involves the making, receiving, or reporting of any contribution, donation, or expenditure. . . .” (Sec. 101, Sec. 379, 2 U.S.C. § 379).
Strengths	This “willfully” requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	<p>The Act includes a defense to criminal charges: “In any criminal action brought for a violation of any provision of this Act or of chapter 95 or 96 of the Internal Revenue Code of 1986, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Administration under section 373(c)(1) which specifically deals with the act or failure to act constituting such violation and which is still in effect. (Sec. 379(e)(1), 2 U.S.C. 379).</p> <p>Blanket criminalization of violations of all regulations, rules, and/or orders to be promulgated by non-legislative bodies after the statute’s enactment effectively diminishes the protectiveness of many <i>mens rea</i> requirements in the express statutory language of the criminal offense. Among other things, it makes it far less likely that potential defendants will be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Moderate.”</p>
Grade	Weak-to-Moderate

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S. 3774	Amendment to prohibit the unauthorized disclosure of classified information
Description	Creates criminal liability for the unauthorized disclosure of classified information available to, or in the possession of, the U.S. government.
Language	Whoever, being an officer or employee of the U.S. "or any other person . . . with access to classified information, knowingly and willfully discloses, or attempts to disclose, . . . knowing that the person is not authorized access to such classified information . . ." (Section 1(a)(2), § 798A(a)).
Strengths	The "knowingly and willfully" requirement should ensure that the defendant both knew the facts constituting his offense and knew that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to "willfully." As the Supreme Court has repeatedly noted, "willful" is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	The requirement that the defendant must have known that the person receiving the classified information was not authorized greatly narrows the offense's potential applications.
Grade	Strong

S. 3834	Online Pharmacy Consumer Protection Act of 2006
Description	Creates criminal liability for an amendment to the controlled substances act in order to address online pharmacies.
Language	"(1) Except as authorized by this title, it shall be unlawful for any person to knowingly or intentionally cause or facilitate the delivery, distribution, or dispensing by means of the Internet of a controlled substance." "(2) Violations of this subsection include (A) delivering, distributing, or dispensing a controlled substance by means of the Internet by a pharmacy not registered under section 303(i); (B) writing a prescription for a controlled substance for the purpose of dispensing by means of the Internet in violation of subsection 309(e); and (C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections 303(i) or 309(e)." (Sec. 2(g), 21 U.S.C. 841(g)).
Strengths	Federal courts generally interpret "intentionally" to require conduct that is committed deliberately and not be accident.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.
Grade	Weak

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S. 3880	Animal Enterprise Terrorism Act
Description	Creates criminal liability for disruptions or interference with a commercial enterprise that uses animals.
Language	<p>"Whoever travels in interstate or foreign commerce, or uses or causes to be used the mail or any facility of interstate or foreign commerce—(1) for the purpose of damaging or interfering with the operations of an animal enterprise; and (A) intentionally damages or causes the loss of any real or personal property (including animals or records) used by an animal enterprise, or any real or personal property of a person or entity having a connection to, relationship with, or transactions with an animal enterprise; . . . or . . . (C) conspires or attempts to do so; shall be . . ." (Sec. 2(a), § 43(a)(2)(A)).</p> <p>"[T]he term 'economic damage' means the replacement costs of lost or damaged property or records, the costs of repeating an interrupted or invalidated experiment, the loss of profits, or increased costs . . . but does not include any lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about the animal enterprise. . . ." (Sec. 2(a), 18 U.S.C. § 43(d)(3)).</p>
Strengths	The "intentionally" requirement restricts criminality to acts purposefully done in order to cause the listed consequences. The offense requires the conduct to be done "for the purpose of damaging or disrupting an animal enterprise."
Weaknesses	Does not fully protect against conviction for constitutionally protected protests intentionally conducted to cause economic losses. The language in 18 U.S.C. § 43(d)(3) is broad and unclear.
Other Considerations	<p>Creates the separate offenses of conspiracy and attempt to do this offense. (Sec. 2(a), 18 U.S.C. § 43(a)(2)(C)).</p> <p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both.</p>
Grade	Weak

S. 3926	Empower America: Securing America's Energy Future Act of 2006
Description	Creates criminal liability for impermissibly raising prices of oil products by an "unconscionable amount" in a presidentially or agency-declared emergency areas where "abnormal market disruption[s]" have, or are expected to, occur.
Language	<p>"It is unlawful for any supplier to increase the price at which that supplier sells, or offers to sell, [fuel] in, or for use in (1) an area covered by a Presidential proclamation issued under section 404(a)(10) by an unconscionable amount during the period beginning on the date the proclamation is issued and ending on the date specified in the proclamation; or (2) an area covered by a [FTC] emergency order issued under section 404(a)(2) by an unconscionable amount during the period beginning on the date the order is issued and ending on the date specified in the order." (Sec. 402).</p> <p>"The term 'unconscionable amount' means, with respect to any supplier to whom section 402 applies, a significant increase in the price at which gasoline or petroleum distillates are sold or offered for sale by that supplier that increases the price, for the same grade of gasoline or petroleum distillate, to an amount that—(A) substantially exceeds the average price at which gasoline or petroleum distillates were sold or offered for sale by that supplier during the 30-day period immediately preceding the sale or offer; (B) substantially exceeds the average price at which gasoline or petroleum distillates were sold or offered for sale by that person's competitors during the period for which the emergency proclamation applies; and C) cannot be justified by taking into account the factors described in section 403(b).</p>
Strengths	---

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Weaknesses	This is a strict liability provision.
Other Considerations	The vague term “unconscionable amount” could appear to provide some <i>mens rea</i> protection, but it is given an equally vague definition, including whether the price “substantially exceeds” certain benchmark average prices. There no specific sale price for gasoline or petroleum distillates that is inherently wrongful, nor can a seller know in advance whether a judge or jury might deem his price to “substantially exceed” the benchmark averages. The Act includes mitigating factors. (Sec. 403(b)).
Grade	None

S. 3993	Securing Aircraft Cockpits Against Lasers Act of 2006
Description	Creates criminal liability for pointing lasers at aircraft cockpits.
Language	“Whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the [U.S.], or at the flight path of such an aircraft, shall be” (Sec. 2, § 39B(a)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. Nothing in the offense requires proof that the defendant caused harm, intended the consequences of his actions, or knew that his conduct was unlawful or otherwise wrongful.
Other Considerations	This offense could be used to convict, for example, a scout leader who directed a laser pointer at an aircraft during a campout for educational purposes.
Grade	Weak

S. 4034	Voter Suppression, Ballot Hacking, and Election Fraud Prevention Act
Description	Creates criminal liability for interference with federal elections.
Language	“Whoever knowingly and willfully interferes with, affects, attempts to interfere with, or attempts to affect an election of a candidate or a ballot initiative by tampering with a voting system, discarding ballots, or altering a vote shall be” (Sec. 2, § 612(a)).
Strengths	“Knowingly and willfully” should require proof that the defendant knew the facts constituting the offense and knew that his conduct was unlawful or otherwise wrongful.
Weaknesses	Federal courts do not apply a standard meaning to “willfully.” As the Supreme Court has repeatedly noted, “willful” is a word of many meanings and its construction is often influenced by its context. Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Grade	Moderate

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S. 4042	Amendment to prohibit disruptions of funerals of members of the Armed Forces
Description	Creates criminal liability for intentional disturbances at the site of funerals for current and former members of the armed forces.
Language	"[I]t shall be unlawful for any person to engage in an activity" before or after a military funeral "any part of which activity (1)(A) "takes place within the boundaries" or near the funeral location; and (B) "includes any individual willfully making or assisting in the making of any noise or diversion . . . with the intent of disturbing the peace or good order of that funeral; or . . . includes any individual willfully and without proper authorization impeding the access to or egress from . . . with the intent to impede the access to or egress from such location." (Section 1, § 1388(a)).
Strengths	"Willfully" requires that the person actually disturbing or impeding the funeral knew that their conduct was unlawful or otherwise wrongful, and the offense also requires specific intent.
Weaknesses	For those a respectful distance from a funeral who merely silently or who passively participate in a demonstration that includes others engaging in wrongful conduct, this offense provides no <i>mens rea</i> protection. The plain language of the offense requires persons "making or assisting in the making of any noise or diversion" to have done so willfully and with the intent of disturbing the peace or the funeral. The plain language does not require others deemed to be part of the demonstration to have acted willfully or with any intent to disturb the peace or the funeral.
Other Considerations	The offense would be Strong if it were limited to those persons who actively engaged in the wrongful conduct "with the intent of disturbing." This offense is not limited to those actors, however, and is a strict liability offense for those who are simply taking part in an activity that includes such wrongdoers.
Grade	None

S. 4069	Deceptive Practices and Voter Intimidation Protection Act of 2005
Description	Creates criminal liability for "knowingly deceiving" others regarding candidate and election specifics.
Language	"Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person by any means, including by means of written, electronic, or telephonic communications, for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate . . ." (Sec. 2(b), 18 U.S.C. § 594).
Strengths	"For the purpose of" add some limits to the application of the offense to conduct undertaken, in some cases, for an improper purpose.
Weaknesses	"For the purpose of" is not a <i>mens rea</i> term that has a consistent or uniform meaning in federal law.
Other Considerations	The terms "intimidates, threatens, coerces" are ambiguous and unqualified. The statute fails to define when persuasion and electioneering become such conduct. Forceful advocacy that is legal and even constitutionally protected can be undertaken "for the purpose of causing" another "to vote for, or not to vote for, any candidate."
Grade	Weak

S. 4069	Deceptive Practices and Voter Intimidation Protection Act of 2005
Description	Creates criminal liability for "knowingly deceiving" others regarding candidate and election specifics.
Language	"It shall be unlawful for any person to knowingly deceive another person regarding . . . the time, place, or manner of an election described in subparagraph (B), or the qualifications for or restrictions on voter eligibility for any such election, with the intent to prevent such person from exercising the right to vote in such election . . ." (Sec. 2(b), 18 U.S.C. 594).

Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law

Brian W. Walsh, The Heritage Foundation, and Tiffany M. Joslyn, National Association of Criminal Defense Lawyers (NACDL)

April 2010

Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. A literal application of the plain language of this “knowingly” requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions. “With the intent to prevent” a person from exercising his rights should properly limit application of this offense to prohibited undertaken with a guilty mind.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	Voting is a highly regulated activity, and defendants can be expected to know that preventing a person from exercising the right to vote is wrongful. However, the offense is not restricted to conduct affecting or intended to affect persons who are qualified to vote. The strength of the <i>mens rea</i> requirement in this offense falls between “Moderate” and “Strong.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. This offense thus is tabulated as a “Strong.”
Grade	Moderate-to-Strong

S. 4069	Deceptive Practices and Voter Intimidation Protection Act of 2005
Description	Creates criminal liability for “knowingly deceiving” others regarding candidate and election specifics.
Language	“It shall be unlawful for any person to knowingly deceive another person regarding . . . the political party affiliation of any candidate running in any election described in subparagraph (B).” (Sec. 2(b), 18 U.S.C. 594.)
Strengths	A literal application of the plain language of this “knowingly” requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. This offense does not include a clause requiring a defendant to act “with intent to” interfere with a person’s exercise of his franchise rights. A juvenile or young adult, for example, could as a prank tell any other person who is uninformed the wrong political party of a candidate without any intent of denying someone’s ability to exercise their franchise rights.
Other Considerations	This offense contains an overbroad <i>actus reus</i> . The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. It is not clear that this offense only covers statements regarding which party the person is registered with, or if it would cover statements regarding which party a person should belong to, shares views with, or acts in accord with. The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a “Moderate.”
Grade	Weak-to-Moderate

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S. 4069	Deceptive Practices and Voter Intimidation Protection Act of 2005
Description	Creates criminal liability for “knowingly deceiving” others regarding candidate and election specifics.
Language	“It shall be unlawful for any person to knowingly deceive another person regarding . . . the sponsor, endorser, or originator of any electronic, written, or telephonic communication, or any other public communication . . . that promotes, supports, attacks, or opposes a clearly identified candidate in any election “ (Sec. 2(b), 18 U.S.C. 594.)
Strengths	A literal application of the plain language of this “knowingly” requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. This offense does not include a clause requiring a defendant to act “with intent to” interfere with a person’s exercise of his franchise rights.
Other Considerations	<p>This offense contains an overbroad <i>actus reus</i>. The protection of a <i>mens rea</i> provision can be diminished when the definition of the prohibited conduct is vague, overbroad, or both. The term “regarding” is vague, unclear, and covers a broad range of information. This offense does not tie the covered conduct to voting and could include any number of statements of fact or opinion that do not and are not intended to interfere with any person’s franchise rights.</p> <p>The strength of the <i>mens rea</i> requirement in this offense falls between “Weak” and “Moderate.” For purposes of this report’s tabulation and statistical analysis, the benefit of the doubt is accorded to the drafters of the legislation. Thus, this offense is tabulated as a “Moderate.”</p>
Grade	Weak-to-Moderate