

Offenses Appendix – Part One: Studied Offenses Originating in the United States House of Representatives

Each of the 277 studied offenses originating in the U.S. House of Representatives is listed in the following table. The offenses are listed in numerical order by House (H.R.) 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.

HR 3	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
Description	Creates criminal liability for tampering with documents related or connected to the transportation of hazardous materials or the packaging or vessel used to transport hazardous materials.
Language	<p>“A person knowingly violating section 5104(b)” (Sec. 7121, 49 U.S.C. § 5124(a)).</p> <p>“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.” (Sec. 7106(b), 49 U.S.C. § 5104(b)).</p> <p>“Knowing Violations – For the purposes of this section – (1) a person acts knowingly 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)).</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. This offense explicitly states that knowledge of the unlawfulness, the statute, the regulation, or the requirement is not an element of the offense.</p> <p>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 substantially undermines the protectiveness of the “knowingly” term.</p>
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

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

HR 3	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users
Description	Creates criminal liability for violating regulations, orders, permits, etc., dealing with transportation of hazardous materials.
Language	<p>"A person . . . willfully or recklessly violating this chapter or a regulation, order, special permit, or approval issued under this chapter . . ." (Sec. 7121, 49 U.S.C. § 5124(a)).</p> <p>"Willful" - "the person has knowledge of the facts giving rise to the violation and . . . has knowledge that the conduct was unlawful." (Sec. 7121, 49 U.S.C. § 5124(c)).</p> <p>"Reckless" – "the person displays a deliberate indifference or conscious disregard to the consequences of that person's conduct." (Sec. 7121, 49 U.S.C. § 5124(d)).</p>
Strengths	---
Weaknesses	Recklessness is inherently a weak <i>mens rea</i> requirement. 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	<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. Thus, this offense is tabulated as a "Weak."</p>
Grade	None-to-Weak

HR 20	Southeast Crescent Authority Act of 2005
Description	Creates criminal liability for outside payments taken by officials of SECA agency, once it is created.
Language	<p>"Violation – Any person that violates [paragraph 4] shall be . . ." (Sec. 3(h)(4)(B)).</p> <p>Paragraph (4) – "(A) In General – No person detailed to serve the Authority under subsection (e)(6) shall receive any salary or any contribution to or supplementation of salary for services provided to the Authority from – (i) any source other than the State, local, or intergovernmental department or agency from which the person was detailed; or (ii) the Authority." (Sec. 3(h)(4)).</p> <p>The Authority may "request the head of any State department or agency or local government to detail to the Authority such personnel as the Authority requires to carry out duties of the Authority, each such detail to be without loss of seniority, pay, or other employee status." (Sec. 3(e)(6)).</p>
Strengths	Most individuals covered by this provision will have knowledge of these prohibitions by virtue of the process in which they are detailed. In addition, most individuals will be on notice if they receive additional compensation.
Weaknesses	There is not explicit <i>mens rea</i> terminology in the language of this offense.
Other Considerations	<p>Although there is no explicit <i>mens rea</i> terminology in the language of this offense, the offense applies to a limited and discrete class of defendants. Most of these individuals will be on notice of the rules and procedures surrounding their detail and will be on notice if they receive additional compensation. However, there is nothing in this provision requiring those "detailed" to be notified of these prohibitions.</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</p>

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

	accorded to the drafters of the legislation. Thus, this offense is tabulated as a “Weak.”
Grade	None-to-Weak

HR 20	Southeast Crescent Authority Act of 2005
Description	Creates criminal liability for failure to abide by and comply with conflict of interest rules.
Language	<p>“Violation - Any person that violates [subsection i] shall” (Sec. 3(i)(3))</p> <p>Subsection (i) “Conflicts of Interest – (1) In General – Except as provided under paragraph (2), no State member, alternate, officer, or employee of the Authority shall participate personally and substantially as a member, alternate, officer, or employee of the Authority, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in any proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other matter in which, to knowledge of the member, alternate, officer, or employee any of the following persons has a financial interest: (A) The member, alternate, officer, or employee. (B) The spouse, minor child, or partner of the member, alternate, officer, or employee. (C) Any organization (other than a State or political subdivision of the State) in which the member, alternate, officer, or employee is serving as an officer, director, trustee, partner, or employee. (D) Any person or organization with whom the member, alternate, officer, or employee is negotiating or has any arrangement concerning prospective employment.</p> <p>“(2) Disclosure – Paragraph (1) shall not apply if the State member, alternate, officer, or employee – (A) immediately advises the Authority of the nature and circumstances of the proceeding, application, request for a ruling or other determination, contract, claim, controversy, or other particular matter presenting a potential conflict of interest; (B) makes full disclosure of the financial interest; and (C) before the proceeding concerning the matter presenting the conflict of interest, receives a written determination by the Authority that the interest is not so substantial as to be likely to affect the integrity of the services that the Authority may expect from the State, member, alternate, officer, or employee.” (Sec. 3(i)).</p>
Strengths	Requires knowledge of the financial interest that may constitute the conflict of interest. Some of those covered by this offense may be on notice of the requirements of this offense.
Weaknesses	This is a strict liability provision.
Other Considerations	<p>Unlike the preceding offense, HR 20 Sec. 3(h)), the application of this offense goes beyond a limited and discrete class of defendants. The class of defendants is large and this offense covers such a broad array of attenuated conflicts that even those generally aware of their duties under this offense may not be on notice. This offense also 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>Ethics rules are, almost by definition, standards guiding conduct that is not necessarily wrongful outside of a particular context and that is often 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	None

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

HR 32	Stop Counterfeiting in Manufactured Goods Act
Description	Creates criminal liability for trafficking in goods with counterfeit marks (fake designer labels).
Language	<p>"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 . . ." (Sec. 1(b)(1), 18 U.S.C. § 2320(a)).</p> <p>"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)).</p>
Strengths	The "knowing" requirement should protect against conviction defendants who lacked knowledge of the counterfeit mark's application. Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	<p>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 girls exchanging fake designer purses or a friend selling a fake designer purse to another friend. 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. Thus, this offense is tabulated as a "Moderate."</p>
Grade	Weak-to-Moderate

HR 52	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 authorization . . . and with intent to, or knowing or having reason to know such activity would likely derail, disable, or wreck" said equipment. (Sec. 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 this offense's "with intent to" and "knowing" terms. This subsection could be applied, for example, to prosecute railroad employees for accidents.
Grade	Weak

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

HR 52	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 railroad carrier or mass transportation provider . . ." (Sec. 2(a), 18 U.S.C. § 1992(a)(4)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. For example, this should protect 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.
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

HR 52	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 or a mass transportation vehicle . . ." (Sec. 2(a), 18 U.S.C. § 1992(a)(5)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. If interpreted and applied strictly, the intent and recklessness standards 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 109 th 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 be provided by requiring reckless conduct.
Grade	Weak

HR 52	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 . . ." (Sec. 2(a), 18 U.S.C. § 1992(a)(7)).

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	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. The “knowing the information to be false” standard to requires 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	<p>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 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 it concerned the actual conduct, which is quite broad, that would qualify as a violation of law. Further, this offense covers a broad range 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. This offense contains an overbroad <i>actus reus</i>.</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

HR 97	Service Members Anti-Predatory Lending Protection Act
Description	Criminalizes certain lending practices by lenders of service members.
Language	“Any creditor who knowingly violates this section shall . . .” (Sec. 2(a), 50 U.S.C. App. 521, § 208(f)(1)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	---
Other Considerations	This Act does not create, or delegate authority to create, regulations.
Grade	Weak

HR 98	Illegal Immigration Enforcement and Social Security Act of 2005
Description	Creates criminal liability for hiring an illegal alien.
Language	“Any person who . . . hires for employment any individual in the United States in any capacity who such person knows not to be authorized to work in the United States in such capacity . . . shall . . .” (Sec. 6(a), 8 U.S.C. § 1324a(e)(3)(a)).
Strengths	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 “Strong” assumes that the government must prove that the defendant “knew” such person was not authorized to work in such capacity and hired that person in that capacity despite this knowledge.
Grade	Strong

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

HR 98	Illegal Immigration Enforcement and Social Security Act of 2005
Description	Creates criminal liability for hiring an illegal alien.
Language	"Any person who – hires for employment any individual in the United States and fails to comply with the procedures prescribed by the Secretary pursuant to section 5(b) in connection with the hiring of such individual . . . shall . . ." (Sec. 6(a), 8 U.S.C. § 1324a(e)(3)(a)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 173	Anti-Terrorism and Port Security Act of 2005
Description	Creates criminal liability for failure to heave to.
Language	"Failure to Heave to - It shall be unlawful for the master, operator, or person in charge of a vessel of the [U.S.], or a vessel subject to the jurisdiction of the [U.S.], to knowingly fail to obey an order to heave to on being ordered to do so by an authorized Federal law enforcement officer." (Sec. 105(a), 18 U.S.C. § 2237(a)). "Any person who intentionally violates this section shall be . . ." (Sec. 105(a), 18 U.S.C. § 2237(e)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. 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 committee knowing that it is unlawful or otherwise wrongful.
Grade	Moderate

HR 173	Anti-Terrorism and Port Security Act of 2005
Description	Creates criminal liability for providing false information.
Language	"It shall be unlawful for any person on board a vessel of the [U.S.], or subject to the jurisdiction of the [U.S.] to provide information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination [etc.] . . . that the person knows is false." (Sec. 105(a), 18 U.S.C. § 2237(b)(2)). "Any person who intentionally violates this section shall be . . ." (Sec. 105(a), 18 U.S.C. § 2237(e)).
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.. A literal application of the plain language of the phrase "that the person knows is false," should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	"Intentionally" does not limit the offense to conduct committee knowing that it is unlawful or otherwise wrongful.
Other Considerations	This offense does not require the defendant to have knowledge that the person giving the order was an "authorized Federal law enforcement officer." Further, 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.

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

Grade	Weak
HR 229	Jane's Law
Description	Creates criminal liability for failure to pay support to spouse/ex-spouse.
Language	"Any person who – (1) willfully fails to pay a court ordered obligation with respect to a spouse or former spouse who resides in another State, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000; [or] (2) travels in interstate or foreign commerce with the intent to evade a court ordered obligation with respect to a spouse or former spouse, if such obligation has remained unpaid for a period longer than 1 year, or is greater than \$5,000 . . . shall . . ." (Sec. 2, 18 U.S.C. § 228A(a)).
Strengths	The "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. The requirement that the defendant act with the specific "intent to evade" should preclude conviction of defendants who lacked a guilty mind.
Weaknesses	---
Other Considerations	The categorization of this offense as "Strong" assumes that 18 U.S.C. § 228A(a)(1) requires the government to prove that the defendant knew of the court order and willfully failed to pay it.
Grade	Strong
HR 239	Freedom From Union Violence Act of 2005
Description	Creates criminal liability for interfering with commerce by threats or violence.
Language	"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion, or attempts or conspires so to do . . . shall . . ." (Sec. 2, 18 U.S.C. § 1951(a)).
Strengths	---
Weaknesses	This offense includes no <i>mens rea</i> terminology.
Other Considerations	Although this offense involves robbery or extortion, the actual language of the offense does not define those terms and focuses on conduct that is not necessarily violent in nature. Exempted Conduct – Does not apply to any conduct that (A) is incidental to otherwise peaceful picketing during the course of a labor dispute; (B) consists solely of minor bodily injury, or minor damage to property, or threat or fear of such minor injury or damage; and (C) is not part of a pattern of violent conduct or coordinated violent activity. (Sec. 2, 18 U.S.C. § 1951(c)).
Grade	None
HR 252	Infant Protection and Baby Switching Prevention Act of 2005
Description	Creates criminal liability for altering or destroying hospital infant identification records.
Language	"Whoever being in interstate commerce knowingly alters or destroys an identification record of a newborn patient with the intention that the newborn patient be misidentified by any person . . ." (Sec. 3(a), 18 U.S.C. § 1205(a)).

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

	"[T]he term 'identification record' means a record maintained by a hospital to aid in the identification of newborn patients of the hospital, including any of the following: (1) The footprint, fingerprint, or photograph of the newborn patient. (2) A written description of the infant. (3) An identification bracelet or anklet put on the newborn patient, or the mother of the newborn patient, by a staff member of the hospital." (Sec. 3(a), 18 U.S.C. § 1205(b)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. The specific intent to misidentify will require a guilty mind. Commonsense, literal application should prevent many 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 term "misidentify" is broad and could cover non-wrongful conduct such as making immaterial changes to the identification of the infant's race, parentage, weight, etc.
Grade	Weak

HR 357	Family Entertainment and Copyright Act of 2005
Description	Creates criminal liability for recording movies in theatres.
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, from a performance of such work in a motion picture exhibition facility, shall . . ." (Sec. 102(a), 18 U.S.C. § 2319B(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences, such as violations by inadvertent transmission or copying. But any inadvertences seem highly unlikely for this offense.
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 covers not only motion pictures but also "other audiovisual work[s]," and would seem to include even short, non-commercial works. Yet the offense 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 could 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.
Other Considerations	Possession of an audiovisual recording device in a theater or screening room "may be considered as evidence" of an offense "but shall not, by itself, be sufficient to support a conviction" for that offense. (Sec. 102(a), § 2319(a)).
Grade	Weak

HR 357	Family Entertainment and Copyright Act of 2005
Description	Creates criminal liability for copyright infringement through posting material online and/or copying it for distribution.
Language	"Any person who willfully infringes a copyright shall be punished . . . if the infringement was committed – (A) for purposes of commercial advantage or private financial gain;" (B) by the reproduction or distribution of works with over \$1000 of total retail value; or

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

	(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	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. 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. But 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.
Other Considerations	Evidence of reproduction of 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)). <i>Actus reus</i> : The provision’s three (disjunctive) restrictive conditions reduce the likelihood of its application to trivial or innocent infringements.
Grade	Moderate

HR 373	Federal Propaganda Prohibition Act of 2005
Description	Creates criminal liability for federal officials using public funds for propaganda purposes.
Language	“An officer or employee of the United States Government may not make or authorize an expenditure or obligation of funds for publicity or propaganda purposes within the United States unless authorized by law.” (Sec. 4(a), 31 U.S.C. § 1355(a)). “An officer or employee of the United States Government knowingly and willfully violating subsection (a) shall” (Sec. 4(a), 31 U.S.C. § 1355(b)(2)).
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

HR 440	Bipartisan Retirement Security Act of 2005
Description	Creates criminal liability for making misrepresentations regarding investments.
Language	“Any person who makes, or causes to be made, a statement or representation of a material fact for use in selecting an investment option that the person knows or should know is false or misleading or knows or should know omits a material fact or makes such a statement with knowing disregard for truth shall” (Sec. 2(a)(1)(B), 42 U.S.C. §§ 401 et seq., Sec. 288).
Strengths	---
Weaknesses	The bill does not specify what standard a court must apply to determine whether the person “should know” or acts “with knowing disregard for the truth.” These requirements are flexible, subjective, and dependent on the perspective of the person making the judgment. This lack of specificity substantially undermines the protectiveness of these requirements.

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

Grade	None
--------------	-------------

HR 525	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, to any employee . . . a plan or other arrangement established or maintained for the purpose of offering or providing any benefit" (Sec. 4(a), 29 U.S.C. § 1131, Sec. 501(b)).
Strengths	The "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

HR 533	Voting Opportunity and Technology Enhancement Rights Act of 2005
Description	Criminalizes deceit or coercion in federal elections and obstructing an investigation of election malfeasance.
Language	"It shall be unlawful for any person to engage in unfair or deceptive acts or practices in or affecting voting in Federal elections" (Sec. 3(a)(1)(A)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 533	Voting Opportunity and Technology Enhancement Rights Act of 2005
Description	Criminalizes obstructing an investigation of election malfeasance.
Language	"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce any documentary evidence under this subsection, if in his power to so, in obedience to an order of a District Court of the [U.S.] directing compliance with the subpoena or lawful requirement of the Attorney General shall" (Sec. 3(a)(2)(B)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	The offense does not include any <i>mens rea</i> terminology, and it is not clear from this offense what rules and procedures, if any, are in place to ensure a person is on notice of the order, subpoena, etc.
Grade	None

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

HR 649	Sunshine in Journalism Act of 2005
Description	Creates criminal liability for journalists who take money to promote government positions.
Language	<p>"[W]hoever violates subsection (A) by failing to make the required timely disclosure shall" (Sec. 3(a), 18 U.S.C. § 1343a(d)).</p> <p>"Any print journalist or broadcast journalist within the [U.S.] who accepts, or agrees to accept, any money, service, or other valuable consideration from any Federal Government agency for promoting, opposing, or commenting on legislation, policies, regulations, or laws, shall file a disclosure form with the Department of Justice within 30 days of any such acceptance or agreement, whichever is earlier." (Sec. 3(a), 18 U.S.C. § 1343a(a)).</p> <p>"The term 'print journalist' means a person employed by a newspaper, magazine, or other publication which is in one or more issues each year in interstate commerce, and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion." (Sec. 3(a), 18 U.S.C. § 1343a(b)).</p> <p>"The term 'broadcast journalist' means a person employed by a radio, television, or cable television network or channel which broadcasts or otherwise transmits news and editorial opinion." (Sec. 3(a), 18 U.S.C. § 1343a(c)).</p>
Strengths	Strict liability for print or broadcast journalists who accept any type of payment from federal agencies and fail to disclose under this Act.
Weaknesses	---
Other Considerations	Only applies to print and broadcast journalists and they may have knowledge of these requirements.
Grade	None

HR 744	Internet Spyware (I-SPY) Prevention Act of 2005
Description	Criminalizes various uses of spyware, including use in furtherance of another federal offense.
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" (Sec. 2(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 the 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 they knew they were committing, or intended to commit, any unlawful or otherwise wrongful conduct.
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. Thus, this offense is tabulated as a "Weak."</p>

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

Grade	None-to-Weak
--------------	---------------------

HR 744	Internet Spyware (I-SPY) Prevention Act of 2005
Description	Criminalizes various uses of spyware, including use in furtherance of another federal offense.
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 obtains, or transmits to another, personal information with the intent to defraud or injure a person or cause damage to a protected computer . . . shall . . ." (Sec. 2(a), 18 U.S.C. § 1030A(b)(1)).
Strengths	If interpreted and applied strictly and according to its plain language, the "intent to defraud or injure a person or cause damage to a protected computer" requirement should greatly reduce the likelihood of convictions of defendants who lacked a guilty mind.
Weaknesses	---
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)).
Grade	Strong

HR 744	Internet Spyware (I-SPY) Prevention Act of 2005
Description	Criminalizes various uses of spyware, including use in furtherance of another federal offense.
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 with the intent to defraud or injure a person or damage a protected computer; shall . . ." (Sec. 2(a), 18 U.S.C. § 1030A(b)(2)).
Strengths	If interpreted and applied strictly and according to its plain language, the "intent to defraud or injure a person or cause damage to a protected computer" requirement should greatly reduce the likelihood of convictions of defendants who lacked a guilty mind.
Weaknesses	---
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)).
Grade	Strong

HR 817	Animal Fighting Prohibition Enforcement Act of 2005
Description	Criminalizes the trafficking in animals or equipment to be used in animal fighting.
Language	"[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)).

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

	<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:</p> <ul style="list-style-type: none"> - "the term '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." (Sec. 2(a), 18 U.S.C. § 49(g)(1)). - "the term 'animal' means any live bird, or any live dog or other mammal, except man." (Sec. 2(a), 18 U.S.C. § 49(g)(4)).
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	<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. 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.</p>
Other Considerations	<p>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.</p> <p>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.</p>
Grade	Weak

HR 817	Animal Fighting Prohibition Enforcement Act of 2005
Description	Criminalizes the trafficking in animals or equipment to be used in animal fighting.
Language	<p>"[I]t shall be unlawful for any person to knowingly sell, buy, transport, or deliver, or receive for purposes of transportation, in interstate or foreign commerce, any dog or other animal for purposes of having the dog or other animal participate in an animal fighting venture." (Sec. 2(a), 18 U.S.C. § 49(b)).</p> <p>For definitions, see the "Language" section of the preceding entry (above) for H.R. 817.</p>
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

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

	constituting the offense.
Grade	Weak

HR 817	Animal Fighting Prohibition Enforcement Act of 2005
Description	Criminalizes the trafficking in animals or equipment to be used in animal fighting.
Language	<p>"[I]t 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 [U.S.]." (Sec. 2(a), 18 U.S.C. § 49(c)).</p> <p>For definitions, see the "Language" section of the preceding entry (above) for H.R. 817.</p>
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	<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>See, e.g., the hypothetical example in the "Weaknesses" section of the preceding entry (above) for H.R. 817.</p>
Grade	Weak

HR 817	Animal Fighting Prohibition Enforcement Act of 2005
Description	Criminalizes the trafficking in animals or equipment to be used in animal fighting.
Language	<p>"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. § 48(e)).</p> <p>For definitions, see the "Language" section of the preceding entry (above) for H.R. 817.</p>
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 constituting the offense. It is unclear what knowledge the defendant must have other than being conscious of the acts that constitute the violation.
Grade	Weak

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

HR 884	Agricultural Job Opportunities, Benefits, and Security Act of 2005
Description	Criminalizes fraud regarding claims filed for benefits.
Language	"Any person who knowingly uses, publishes, or permits information to be examined in violation of this paragraph shall" (Sec. 101(d)(6)(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.
Grade	Weak

HR 884	Agricultural Job Opportunities, Benefits, and Security Act of 2005
Description	Criminalizes fraud regarding claims filed for benefits.
Language	"Any person who – (i) files an application for status under statute (a) or (c) and knowingly and willfully falsifies, conceals, or covers up a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry" (Sec. 101(d)(7)(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	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

HR 884	Agricultural Job Opportunities, Benefits, and Security Act of 2005
Description	Creates criminal liability for creating or supplying a false writing or document.
Language	"Any person who – (ii) creates or supplies a false writing or document for use in making such an application, shall" (Sec. 101(d)(7)(A)(ii)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Sec. 101(d)(7)(A)(ii) does not include the <i>mens rea</i> terms "knowingly and willfully," which are included in Sec. 101(d)(7)(A)(i).
Grade	None

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

HR 939	Count Every Vote Act of 2005
Description	Criminalizes misrepresentations of time, place, or manner of, or voter eligibility for, 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 (including a Delegate or Resident Commissioner to the Congress); 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 (including a Delegate or Resident Commissioner to the Congress) shall . . ." (Sec. 601(a), 42 U.S.C. § 15544(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	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	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 "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

HR 975	TRAIL Act
Description	Creates criminal liability for violations of National Park Systems, or National Forest System laws or regulations promulgated by federal agencies.
Language	"Any person who knowingly violates or fails to comply with any of the provisions of this Act or any regulation issued under this Act shall . . ." (Sec. 2(a)(3), 43 U.S.C. § 1733(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 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. This is especially true here where the statute punishes those who fail to act ("fails to comply").
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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

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

HR 975	TRAIL Act
Description	Creates criminal liability for violations of National Park Systems, or National Forest System laws or regulations promulgated by federal agencies.
Language	"Any person who otherwise violates or fails to comply with any of the provisions of this Act or any regulation issued under this Act shall" (Sec. 2(a)(3), 43 U.S.C. § 1733(a)(3)).
Strengths	---
Weaknesses	This is a strict liability provision.
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

HR 975	TRAIL Act
Description	Creates criminal liability for violations of National Park Systems, or National Forest System laws or regulations promulgated by federal agencies.
Language	"Any person who knowingly violates or fails to comply with any rule or regulation issued under this section shall" (Sec. 2(b)(1)(c), 16 U.S.C. § 3(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 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. This is especially true here where the statute punishes those who fail to act ("fails to comply").
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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 975	TRAIL Act
Description	Creates criminal liability for violations of National Park Systems, or National Forest System laws or regulations promulgated by federal agencies.
Language	"Any person who otherwise violates or fails to comply with any rule or regulation issued under this section shall" (Sec. 2(b)(1)(c), 16 U.S.C. § 3(a)(3)).
Strengths	---
Weaknesses	This is a strict liability provision.

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

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

HR 1099	Anti-phishing Act of 2005
Description	Criminalizes phishing or identity theft through fraudulent internet activities.
Language	"Website – Whoever knowingly, with the intent to carry on any activity which would be a Federal or State crime of fraud or identity 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" (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

HR 1099	Anti-phishing Act of 2005
Description	Criminalizes phishing or identity theft through fraudulent internet activities.
Language	"Messenger – Whoever knowingly, with the intent to carry on any activity which would be a Federal or State crime of fraud or identity theft (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.

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

	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

HR 1122	Safe Intersections Act of 2005
Description	Creates criminal liability for the unauthorized sale of traffic signal preemption transmitters.
Language	“A person who knowingly sells a traffic signal preemption transmitter in or affecting interstate or foreign commerce to a person who is not acting on behalf of a public agency or private corporation authorized by law to provide fire protection, law enforcement, emergency medical services, transit services, maintenance, or other services for a Federal, State, or local government entity, shall” (Sec. 2(a)(1), 18 U.S.C. § 39(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	It is unclear whether the defendant must “know” that the person was not authorized in order to be convicted of this offense.
Grade	Weak

HR 1122	Safe Intersections Act of 2005
Description	Creates criminal liability for the unauthorized use of traffic signal preemption transmitters.
Language	“A person who makes unauthorized use of a traffic signal preemption transmitter . . . shall” (Sec. 2(a), 18 U.S.C. § 39(a)(2)). “The term ‘unauthorized use’ means use of a traffic signal preemption transmitter by a person who is not acting on behalf of a public agency or private corporation authorized by law to provide fire protection, law enforcement, emergency medical services, transit services, maintenance, or other services for a Federal, State, or local government entity. The term ‘unauthorized use’ does not apply to use . . . for classroom or instructional purposes.” (Sec. 2(a), 18 U.S.C. § 39(b)(2)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although most defendants who make unauthorized use of this device will do so with the wrongful intent to change traffic signals, the offense does not require the defendant to do the conduct constituting the offense knowingly or to use the device with knowledge of its capabilities. For example, this offense provides no <i>mens rea</i> protection for the defendant who possesses the device legitimately but operates it accidentally.
Grade	None

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

HR 1189	Personal Pictures Protection Act of 2005
Description	Creates criminal liability for unauthorized placement of sexually explicit photos on the internet.
Language	"Whoever, with the intent to embarrass or cause emotional distress to another person places on a computer photographs of the sexually explicit conduct of that person so that such photographs are accessible on the Internet, without the permission of that person shall . . ." (Sec. 2(a), 18 U.S.C. § 1631).
Strengths	Must have the "intent to embarrass or cause emotional distress" - i.e. prevents against conviction for accidents, inadvertency, or actions without mal intent. This clause also implies some level of inherent wrongfulness or moral turpitude. Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	The offense includes an exception for circumstances in which permission is granted. 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 "embarrass" is not defined by the statute and is a low standard for imposing criminal liability. 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

HR 1295	Responsible Lending Act
Description	Creates criminal liability for intentional unlawful disclosures of information concerning mortgage brokers or applicants for mortgage broker licenses.
Language	"It shall be unlawful to willfully disclose to any person any information concerning any person who is a mortgage broker or is applying for licensing as a mortgage broker knowing the disclosure to be in violation of any provision of this title -- (a) requiring the confidentiality of such information; or (b) establishing a privilege from disclosure . . ." (Sec. 515(b)).
Strengths	The "willfully" requirement should protect against conviction many or most defendants who did not know that their conduct was unlawful or otherwise wrongful. This offense also requires knowledge that the disclosure violates the law.
Weaknesses	---
Grade	Strong

HR 1349	Regional Economic and Infrastructure Development Act of 2005
Description	Criminalizes receipt of outside income by Commission members.
Language	"Conflicts of Interest . . . No Role Allowed – Except as permitted by paragraph (2), an individual who is a State member or alternate, or an officer or employee of a Commission, shall not participate personally and substantially as a member, alternate, officer, or employee of the Commission, through decision, approval, disapproval, recommendation, request for a ruling, or other determination, contract, claim, controversy, or other matter in which, to the individual's knowledge, any of the following has a financial interest: (A) The individual. (B) The individual's spouse, minor child, or partner. (C) An organization (except a State or political subdivision of a State) in which the individual is serving as an officer, director, trustee, partner, or employee. (D) Any person or organization with whom the individual is negotiating or has any arrangement concerning prospective employment." (Sec. 3(a), 40 U.S.C. § 15306(a)(1)).

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

	"Violation – An individual violating this subsection shall be" (Sec. 3(a), 40 U.S.C. § 15306(a)(3)).
Strengths	Requires knowledge of the financial interest that may constitute the conflict of interest. Some of those covered by this provision may be on notice of the requirements of the provision.
Weaknesses	No <i>mens rea</i> requirement actually applies to the conduct constituting the offense, which is participation.
Other Considerations	<p>Exception – "shall not apply if the individual, in advance of the . . . matter presenting a potential conflict of interest – (A) advises the Commission . . . , (B) makes a full disclosure of the financial interest; and (C) receives a written decision of the Commission" (Sec. 3(a), 40 U.S.C. § 15306(a)(2)).</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. This offense covers such a broad array of attenuated conflicts that even those generally aware of their duties under this law may not be on notice.</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 criminal punishment.</p>
Grade	None

HR 1360	FAIR Act of 2005
Description	Creates criminal liability for fraud and false statements in connection with the Asbestos Injury Fund.
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" (Sec. 401(a), 18 U.S.C. § 1348(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 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, "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

HR 1360	FAIR Act of 2005
Description	Creates criminal liability for fraud and false statements in connection with the Asbestos Injury Fund.
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 of 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 . . . shall" (Sec. 401(b), 18 U.S.C. § 1348(b)).

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	"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	Although this conduct must be done "in connection" with an award or determination, 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

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	<p>"It shall be unlawful – (1) for any person to engage in the business as a manufacturer or importer of tobacco products or cigarette papers and tubes, or to engage in the business as a wholesaler or an export warehouse proprietor, without filing the bond and obtaining the permit where required by this chapter or regulations thereunder" (Sec. 107 (b), I.R.C. § 5762(b)(1)).</p> <p>Definitions:</p> <ul style="list-style-type: none"> - "Manufacturer of tobacco products . . . means any person who manufactures cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco, except that such terms shall not include – (1) a person who produces [such items] solely for the person's own personal consumption or use, and (2) a proprietor of a customs bonded manufacturing warehouse with respect to the operation of such warehouse." (I.R.C. § 5702(d)). - "Manufacturer of cigarette papers and tubes . . . means any person who manufactures cigarette paper, or makes up cigarette paper into tubes, except for his own personal use or consumption." (I.R.C. § 5702(g)). - "Importer . . . means any person in the [U.S.] to whom nontaxpaid tobacco products or cigarette papers or tubes manufactured in a foreign country, Puerto Rico, the Virgin Islands, or a possession of the [U.S.] are shipped or consigned; any person who removes cigars or cigarettes for sale or consumption in the [U.S.] from a customs bonded manufacturing warehouse; and any person who smuggles or otherwise unlawfully brings tobacco products or cigarette papers or tubes into the [U.S.]." (I.R.C. § 5702(k)). - "Export Warehouse Proprietor – "means any person who operates an export warehouse or any person engaged in the business of exporting tobacco products from the [U.S.] for purposes of sale or distribution. Any duty free store that sells, offers for sale, or otherwise distributes to any person in any single transaction more than 30 packages of cigarettes, or its equivalent for other tobacco products as the Secretary shall by regulation prescribe, shall be deemed an export warehouse proprietor under this chapter." (Sec. 109(a), I.R.C. § 5702(i)). - "Wholesaler . . . means any person engaged in the business of purchasing tobacco products for resale at wholesale, or any person acting as an agent or broker for any person engaged in the business of purchasing tobacco products for resale at wholesale." (Sec. 109(b), I.R.C. § 5702(p)).
Strengths	---
Weaknesses	This is a strict liability provision.
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. This offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements. However, the definitions of the terms in this offense cover a broad range of conduct and are vague enough that those without knowledge of the requirements, or knowledge that their conduct is covered by this offense, may be convicted.</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>

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

Grade	None
--------------	-------------

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	<p>"It shall be unlawful . . . (2) for a manufacturer, importer, or wholesaler permitted under this chapter intentionally to ship, transport, deliver, or receive any tobacco products from or to any person other than a person permitted under this chapter or a retailer, except a permitted importer may receive foreign tobacco products from a foreign manufacturer or a foreign distributor that have not previously entered the [U.S.]." (Sec. 107(b), I.R.C. § 5762(b)(2)).</p> <p>"Intentionally defined – means doing an act, or omitting to do an act, deliberately, and not due to accident, inadvertence, or mistake, regardless of whether the person knew that the act or omission constituted an offense." (Sec. 107(d)).</p>
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Further, the offense specifically provides that "intentionally" does not require a defendant to have knowledge that the act or omission constituted an offense.
Other Considerations	<p>This offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements.</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. Thus, this offense is tabulated as a "Weak."</p>
Grade	None-to-Weak

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	"It shall be unlawful . . . (3) for any person (other than the original manufacturer of such tobacco products or an export warehouse proprietor authorized to receive any tobacco products that have previously been exported and returned to the [U.S.]) to receive any tobacco products that have previously been exported and returned to the [U.S.]." (Sec. 107(b), I.R.C. § 5762(b)(3)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense is not limited to those with industry knowledge. Because this is a strict liability offense, even those defendants on notice of, and attempting in good faith to comply with, the regulations could be convicted where, for example, they receive the previously exported tobacco products in error and without knowledge that they were previously exported.
Grade	None

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

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	<p>"It shall be unlawful . . . (4) for any export warehouse proprietor intentionally to ship, transport, sell, or deliver for sale any tobacco products to any person other than the original manufacturer of such tobacco products, another export warehouse proprietor, or a foreign purchaser." (Sec. 107(b), I.R.C. § 5762(b)(4)).</p> <p>"Intentionally defined – means doing an act, or omitting to do an act, deliberately, and not due to accident, inadvertence, or mistake, regardless of whether the person knew that the act or omission constituted an offense." (Sec. 107(d)).</p>
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Further, the offense specifically provides that "intentionally" does not require a defendant to have knowledge that the act or omission constituted an offense.
Other Considerations	This offense covers a highly regulated industry in which most of those covered by this offense should be on notice of these requirements.
Grade	Weak

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	<p>"It shall be unlawful . . . (5) for any person (other than a manufacturer or an export warehouse proprietor permitted under this chapter) intentionally to ship, transport, receive, or possess, for purposes of resale, any tobacco product in packages marked pursuant to regulations issued under section 5723, other than for direct return to a manufacturer for repacking or for re-exportation or to an export warehouse proprietor for re-exportation." (Sec. 107(b), I.R.C. § 5762(b)(5)).</p> <p>"Intentionally defined – means doing an act, or omitting to do an act, deliberately, and not due to accident, inadvertence, or mistake, regardless of whether the person knew that the act or omission constituted an offense." (Sec. 107(d)).</p>
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. Further, the offense specifically provides that "intentionally" does not require a defendant to have knowledge that the act or omission constituted an offense.
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. While this offense covers a highly regulated industry where many of those covered by the provisions may be on notice of the requirements, the protectiveness of the "intentionally" term is undermined because the offense (1) is not limited in application to those with industry knowledge and (2) covers such a broad range of conduct that even those with industry knowledge may not be on notice of the requirements as it pertains to their conduct.</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. Thus, this offense is tabulated as a "Weak."</p>

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

Grade	None-to-Weak
--------------	---------------------

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	<p>"It shall be unlawful . . . (6) for any manufacturer, importer, export warehouse proprietor, or wholesaler permitted under this chapter to make intentionally any false entry in, to fail willfully to make appropriate entry in, or to fail willfully to maintain properly any record or report that such person is required to keep as required by this chapter or the regulations promulgated thereunder." (Sec. 107(b), I.R.C. § 5762(b)(6)).</p> <p>"Intentionally defined – means doing an act, or omitting to do an act, deliberately, and not due to accident, inadvertence, or mistake, regardless of whether the person knew that the act or omission constituted an offense." (Sec. 107(d)).</p>
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful and does not require a defendant to have knowledge that the entry is "false." Further, the offense specifically provides that "intentionally" does not require a defendant to have knowledge that the act or omission constituted an 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

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	"It shall be unlawful . . . (7) for any person to alter, mutilate, destroy, obliterate, or remove any mark or label required under this chapter upon a tobacco product held for sale, except pursuant to regulations of the Secretary authorizing relabeling for purposes of compliance with the requirements of this section or of State law." (Sec. 107(b), I.R.C. § 5762(b)(7)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Criminalizes tobacco smuggling practices.
Language	"It shall be unlawful . . . (8) for any person to sell at retail more than 5,000 cigarettes in a single transaction or in a series of related transactions, or, in the case of other tobacco products, an equivalent quantity as determined by regulation." (Sec. 107(b), I.R.C. § 5762(b)(8)).
Strengths	---

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

Weaknesses	This is a strict liability provision.
Other Considerations	Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense is not limited to those with industry knowledge. 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

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	"It shall be unlawful for any person knowingly to ship, transport, receive, possess, sell, distribute, or purchase contraband tobacco product." (Sec. 201(b), 18 U.S.C. § 2432(a)). The term "contraband tobacco product" is defined in the Act as tobacco in excess of a certain quantity that is not in compliance with applicable state tax obligations. (Sec. 201(a)(1), 18 U.S.C. § 2341(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 the government must only prove that the defendant knew the facts that made the tobacco contraband; it need not prove that the defendant actually knew the tobacco was "contraband."
Grade	Moderate

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	"It shall be unlawful for any person knowingly to make any false statement or representation with respect to the information required by this chapter to be kept in the records or reports of any person who ships, sells, or distributes . . . any quantity of tobacco product in excess of the quantity specified in or pursuant to section 2341(2)(A) with respect to such product . . ." (Sec. 201(b), 18 U.S.C. § 2432(b)(1)(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	Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense is not limited to those with industry knowledge. 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 had

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

	<p>knowledge that the statement or representation was false. However, this offense does not merely prohibit false statements in written reports, but covers statements or representations “with respect to” any information required to be kept. This could, for example, include a false oral statement as to when a written report will be completed and submitted.</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. Thus, this offense is tabulated as a “Moderate.”</p>
Grade	Weak-to-Moderate

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	“It shall be unlawful for any person knowingly . . . to fail to maintain records or reports, alter or obliterate required markings, or interfere with any inspection, required under this chapter.” (Sec. 201(b), 18 U.S.C. § 2432(b)(1)(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	<p>Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense is not limited to those with industry knowledge.</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

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	“It shall be unlawful for any person knowingly to transport tobacco products under a false bill of lading . . .” Sec. 201(b), 18 U.S.C. § 2432(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	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 had

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

Considerations	knowledge that the bill of lading is false.
Grade	Moderate

HR 1377	Smuggled Tobacco Prevention Act of 2005
Description	Creates criminal liability for tobacco smuggling practices and violations of laws, regulations, and rules relating to tobacco.
Language	"It shall be unlawful for any person knowingly to transport tobacco products . . . without any bill of lading." Sec. 201(b), 18 U.S.C. § 2432(c)). The term "tobacco products" "means cigars, cigarettes, smokeless tobacco, pipe tobacco, and roll-your-own tobacco." (I.R.C. § 5702(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. "Knowingly" alone appears in this context to provide little or no protection for those who acted without a guilty mind.
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 protectiveness of the "knowingly" term is substantially undermined because the offense is not limited to those defendants with knowledge that a bill of lading is required. 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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 1400	Securing Aircraft Cockpits Against Lasers Act of 2005
Description	Creates criminal liability for pointing a laser at an aircraft or an aircraft cockpit.
Language	"Whoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States, or at the flight path of such an aircraft . . ." (Sec. 2(a), 18 U.S.C. § 39(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.
Grade	Weak

HR 1442	To complete the codification of title 46, United States Code, 'Shipping,' as positive law.
Description	Creates criminal liability for false statements to the Secretary of Treasury.
Language	"A person that knowingly makes a false statement of a material fact to the Secretary of Transportation [or inferiors] to obtain the Secretary's approval under section 56101 or 56102

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

	of this title shall be" (Sec. 8(b), 46 U.S.C. § 56104). [§ 56101 is "Approval required to transfer vessel to noncitizen" and § 56102 is "Additional controls during war or national emergency"]
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 knew that the statement was made "to the Sec. of Treasury [or inferiors]" and knew that it was made "to obtain the Secretary's approval." 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

HR 1442	To complete the codification of title 46, United States Code, 'Shipping,' as positive law.
Description	Creates criminal liability for violating regulations related to subsidies for intercoastal or coastwise operations.
Language	"An individual convicted of violating section 58101(d) . . . of this title shall . . ." (Sec. 8(b), 46 U.S.C. § 58109). "If an application under subsection (b) is approved, a person referred to in this section may not divert, directly or indirectly, money, property, or any other thing of value, used in a foreign-trade operation for which a subsidy is paid by the [U.S.] Government into intercoastal or coastwise operations." (46 U.S.C. § 58101(d)).
Strengths	---
Weaknesses	There is no <i>mens rea</i> terminology in any provision of 46 U.S.C. § 58101. This is a strict liability provision.
Other Considerations	Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense does not require knowledge of the requirements nor of the facts constituting the offense. 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

HR 1442	To complete the codification of title 46, United States Code, 'Shipping,' as positive law.
Description	Creates criminal liability for violating regulations related to the operating-differential subsidy program.
Language	"An individual convicted of violating section . . . 58103 . . . shall . . ." (Sec. 8(b), 46 U.S.C. § 58109). "Except with the written consent of the Secretary of Transportation, a contractor holding a contract under the operating-differential subsidy program or under chapter 575 of this title may not – (1) employ another person as the managing or operating agent of the operator; or (2) charter a vessel, on which as operating-differential subsidy is to be paid, for operation by another person." (46 U.S.C. § 58103).

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	---
Weaknesses	There is no <i>mens rea</i> terminology in any provision of 46 U.S.C. § 58103. This is a strict liability provision.
Other Considerations	<p>Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense does not require knowledge of the requirements nor the facts constituting the offense.</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	None

HR 1442	To complete the codification of title 46, United States Code, 'Shipping,' as positive law.
Description	Creates criminal liability for violating regulations related to the operating-differential subsidy program.
Language	<p>"An individual convicted of violating section . . . 58105 of this title shall . . ." (Sec. 8(b), 46 U.S.C. § 58109).</p> <p>"A contractor receiving an operating-differential subsidy, or a charterer under chapter 575 of this title, may not unjustly discrimination in any manner so as to give preference, directly or indirectly, to cargo in which the contractor or charterer has a direct or indirect ownership, purchase, or vending interest." (46 U.S.C. § 58105).</p>
Strengths	---
Weaknesses	There is no <i>mens rea</i> terminology in any provision of 46 U.S.C. § 58105. This is a strict liability provision.
Other Considerations	<p>Although this offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements, the offense does not require knowledge of the requirements nor the facts constituting the offense.</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	None

HR 1461	Federal Housing Finance Reform Act of 2005
Description	Criminalizes continued working with regulatory entities after being censured by agency personnel and cut off from future contracts.
Language	<p>"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 (including by engaging in an activity specifically prohibited in such an order) in the conduct of the affairs of any regulated entity shall . . ." (Sec. 167, 12 U.S.C. § 1378 [Referenced as 12 U.S.C. § 4638]).</p> <p>"Any suspension order issued under this subsection – (A) shall become effective upon service . . ." (Sec. 166, 12 U.S.C. § 1377(b)(2) [Referenced as 12 U.S.C. § 4637]).</p> <p>"Applicability – 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</p>

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

	enterprise.” (Sec. 166, 12 U.S.C. § 1377(f))
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 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, and “service” is not defined.</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. “Participate” is a broad, vague term, and the provision does not define what it means either to “participate[]” or to “knowingly participate[].”</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. Thus, this offense is tabulated as a “Weak.”</p>
Grade	None-to-Weak

HR 1507	Safe Food Act of 2005
Description	Creates criminal liability for producing or introducing unsafe or misbranded food into interstate commerce.
Language	<p>“[A] person that knowingly produces or introduces into commerce food that is unsafe or otherwise adulterated or misbranded shall be” (Sec. 405(b)(1)).</p> <p>“Exception - No person shall be subject to the penalties of this subsection (A) for having received, proffered, or delivered in interstate commerce any food, if the receipt, proffer, or delivery was made in good faith, unless that person refused to furnish (on the request of an officer or employee designated by the Administrator) - [certain information related to the source of the food] or (B) if that person establishes a guaranty signed by . . . the person from whom that person received in good faith the food” (Sec. 405(b)(3)).</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	<p>Good faith exception – an individual who held a good faith belief and satisfies certain other requirements cannot be convicted.</p> <p>A court is unlikely to apply “knowingly” to the term “unsafe,” even under the Supreme Court’s decision in <i>Flores-Figueroa</i>, because such an application would render the good faith exception superfluous.</p>
Grade	Weak

HR 1558	Computer-Assisted Remote Hunting Act
Description	Criminalizes computer assisted remote hunting.
Language	<p>“Whoever, using an instrumentality of interstate or foreign commerce, knowingly makes available a computer-assisted remote hunt” (Sec. 2(a), 18 U.S.C. § 49(a)).</p> <p>“Providing an instrumentality of commerce, such as equipment or access to the Internet, is not a violation of this section unless the provider intends the use of the equipment or access for a computer-assisted remote hunt.” (Sec. 2(a), 18 U.S.C. § 49(b)).</p>

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.
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	There is an exception for Internet service and equipment providers who do not intend for their services to be used for a computer-assisted remote hunt. (Sec. 2(a), 18 U.S.C. § 49(b)).
Grade	Weak

HR 1562	Chemical Facility Security Act of 2005
Description	Creates criminal liability for unauthorized disclosures of information.
Language	“[A]ny individual who acquires any information described in paragraph (2)(A) (including any reproduction of that information or any information derived from that information), and who knowingly or recklessly discloses the information shall” (Sec. 5(j)(3)).
Strengths	---
Weaknesses	Recklessness is inherently a weak <i>mens rea</i> requirement. 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	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. Thus, this offense is tabulated as a “Weak.”
Grade	None-to-Weak

HR 1636	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the [U.S.] and failure to comply with water discharge regulations for cruise ships.
Language	“A person that negligently violates section 4 or any regulations promulgated under this Act commits” (Sec. 9(d)(1)).
Strengths	---
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

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

HR 1636	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for discharge from cruise ships of sewage into the territorial waters of the [U.S.] and failure to comply with water discharge regulations for cruise ships.
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.
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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 1636	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for making false statements, representations or certifications in relation to water discharge regulations for cruise ships.
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.
Other Considerations	The categorization of this offense as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , a court would require the government to prove that the defendant knew the "statement, representation or certification" was "false" and knew that it was made in a "record, report, or other document filed or required to be maintained" under the act.
Grade	Moderate

HR 1636	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for falsifying devices or methods in relation to water discharge regulations for cruise ships.
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 that some level of inherent wrongfulness is required to be convicted under this offense.

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

Weaknesses	This offense contains no <i>mens rea</i> requirements or terminology.
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. Thus, this offense is tabulated as a "Weak."</p>
Grade	None-to-Weak

HR 1636	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for tampering with devices or methods in relation to water discharge regulations for cruise ships.
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>. 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>
Grade	None

HR 1636	Clean Cruise Ship Act of 2005
Description	Creates criminal liability for rendering inaccurate devices or methods in relation to water discharge regulations for cruise ships.
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 covers a very broad range of activity and includes "knowingly rendering inaccurate," which is not comparable to knowingly making false statements. Knowingly rendering something inaccurate can occur in many ways, arguably including conducting an incorrect analysis.

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

	<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>
Grade	Weak

HR 1638	Commodities Exchange Improvements Act of 2005
Description	Amends language in the Violations Provision of the Commodity Exchanges Chapter.
Language	Language, as per amendment proposed by H.R. 1638, 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 6(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

HR 1651	Consumer Rental Purchase Agreement Act
Description	Creates criminal liability for failure to disclose information about rental purchase agreements.
Language	"Whoever willfully and knowingly gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this title or any regulation issued thereunder . . ." (Sec. 3, Sec. 1017, [Consumer Credit Protection Act]).
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.
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.

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

	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

HR 1660	Payday Borrower Protection Act of 2005
Description	Creates criminal liability for violations of payday loan statute.
Language	"The law of any State meets the requirements of this subsection if a statute in effect in such State includes . . . A criminal penalty for anyone . . . making any payday loan within the State after the effective date of such State statute without a license issued by the State." (Sec. 4(b)(11)).
Strengths	---
Weaknesses	This is a strict liability offense.
Grade	None

HR 1660	Payday Borrower Protection Act of 2005
Description	Creates criminal liability for violations of payday loan statute.
Language	"The law of any State meets the requirements of this subsection if a statute in effect in such State includes . . . A provision that any person who knowingly violates any provision of the statute, or any regulation prescribed under the statute, shall . . ." (Sec. 4(b)(12)).
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. 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. Although the actual language of this offense does not define a federal offense, it does specify the provisions that must be included in any state offense enacted in order to meet the federal requirements. 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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

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

HR 1688	Sportsmanship in Hunting Act of 2005
Description	Criminalizes possession of exotic animals for killing or harming.
Language	<p>"Whoever, in or affecting interstate or foreign commerce, knowingly transfers, transports, or possesses a confined exotic animal, for the purpose of allowing the killing or injuring of that animal for entertainment or for the collection of a trophy, shall be" (Sec. 2(a), 18 U.S.C. § 49(a)).</p> <p>"Definitions – (1) the term 'confined exotic animal' means a mammal of a species not indigenous to the [U.S.], that has been held in captivity – (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. 2(a), 18 U.S.C. § 49(b)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. The requirement that the conduct be done "for the purpose of allowing the killing or injuring" should safeguard against conviction of a defendant who did not have 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 "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

HR 1710	Internet Police Protection Act of 2005
Description	Criminalizes making certain information about federal officials, safety officers who work for any public agency receiving federal support, or federal jurors, publically available.
Language	<p>"Whoever knowingly makes restricted personal information about a covered official publicly available through the Internet shall be" (Sec. 2(a), 18 U.S.C. § 117(a)).</p> <p>Restricted personal information is defined as: "with respect to an individual, the Social Security number, the home address, home phone number, mobile phone number, personal email, or home fax number of, and identifiable to, that individual" (Sec. 2(a), 18 U.S.C. § 117(c)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Although federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof of the defendant's knowledge of the facts constituting the offense.
Other Considerations	<p>Defenses include: Internet providers who did not knowingly participate and instances where the official gave permission to make it public. (Sec. 2(a), 18 U.S.C. § 117(b)).</p> <p>The definition of this offense does not make it clear that the "knowingly" <i>mens rea</i> term requires the person to know that the public official is "covered" by this statute and that personal information about the official thus may not be disclosed.</p>
Grade	Weak

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

HR 1738	End Institutionalized Abuse Against Children Act of 2005
Description	Creates criminal liability for owners or operators of foreign facilities in which American children are abused or neglected.
Language	<p>"If a child residential treatment facility engages in the abuse or neglect of a child, each person who owns or operates the facility . . . shall be . . ." (Sec. 4(a), 42 U.S.C. § 5101 et seq., § 303(c)(2)(B)).</p> <p>Defines abuse or neglect as a "knowing act or omission that the officer, employee, or contractor involved knows or should know will result in death, serious physical or emotional harm, sexual abuse or exploitation, or will present an imminent risk of serious harm." (Sec. 4(a), 42 U.S.C. § 5101 et seq., § 303(c)(2)(C)).</p>
Strengths	---
Weaknesses	This is a strict liability offense. It imposes criminal liability vicariously to the owners and operators of the facility without any requirement that they knew of the abuse or neglect.
Grade	None

HR 1745	Social Security Number Privacy and Identity Theft Prevention Act of 2005
Description	Creates criminal liability for the sale, purchase, or display to the general public of a Social Security number.
Language	<p>"[I]t shall be unlawful for any person to - sell or purchase a social security account number or display to the general public a social security account number . . ." (Sec. 107(a), Sec. 208A(b)(1)(A), 42 U.S.C. § 408A(b)(1)(A)).</p> <p>"Any person who violates this section shall . . ." (Sec. 107(a), Sec. 208A(h), 42 U.S.C. § 408A(h)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	<p>Sec. 107(b)(2): Sale and/or purchase exceptions for: law enforcement, national security, public health, emergency situations, tax purposes, consumer credit reporting, or specific government agency uses. (Sec. 107(a), Sec. 208A(b)(2), 42 U.S.C. § 408A(b)(2)).</p> <p>Sale, purchase, and/or display exception with voluntary, written affirmative consent. (Sec. 107(a), Sec. 208A(b)(3), 42 U.S.C. § 408A(b)(3)).</p>
Grade	None

HR 1745	Social Security Number Privacy and Identity Theft Prevention Act of 2005
Description	Creates criminal liability for obtaining or using an individual's Social Security number with intent to injure or harm the person.
Language	<p>"[I]t shall be unlawful for any person to - obtain or use any individual's social security account number for the purpose of locating or identifying such individual with the intent to physically injure or harm such individual . . ." (Sec. 107(a), Sec. 208A(b)(1)(B), 42 U.S.C. § 408A(b)(1)(B)).</p> <p>"Any person who violates this section shall . . ." (Sec. 107(a), Sec. 208A(h), 42 U.S.C. § 408A(h)).</p>
Strengths	The "for the purpose of" and "with the intent to" clauses require the government to show specific intent to physically injure or harm an individual, which in many instances is likely to be <i>malum in se</i> conduct.

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

Weaknesses	It is not clear that “physically” modifies the term “harm” and thus the conduct could include economic or other non-physical harm which may not be <i>malum in se</i> conduct.
Other Considerations	See preceding offense entry for exceptions.
Grade	Moderate

HR 1745	Social Security Number Privacy and Identity Theft Prevention Act of 2005
Description	Creates criminal liability for obtaining or using an individual's Social Security number with intent to use the identity illegally.
Language	“[I]t shall be unlawful for any person to - obtain or use any individual's social security account number for the purpose of . . . using the identity of such individual for any illegal purpose.” (Sec. 107(a), Sec. 208A(b)(1)(B), 42 U.S.C. § 408A(b)(1)(B)). “Any person who violates this section shall” (Sec. 107(a), Sec. 208A(h), 42 U.S.C. § 408A(h)).
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 conduct's unlawfulness.
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 that may be technically unlawful. An example would be someone who obtains the information to enter it into a database that does not comply with a particular regulation. See preceding offense entry for exceptions.
Grade	None

HR 1745	Social Security Number Privacy and Identity Theft Prevention Act of 2005
Description	Creates criminal liability for communicating another person's Social Security number to the government.
Language	“It shall be unlawful for any person to communicate by any means to any agency or instrumentality of the government the social security account number of any individual other than such person without the written permission of such individual, unless the number was requested by the government” (Sec. 107(a), Sec. 208A(c)(1), 42 U.S.C. § 408A(c)(1)). “Any person who violates this section shall” (Sec. 107(a), Sec. 208A(h), 42 U.S.C. § 408A(h)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Example – If a parent gives a Social Security number to a private investigator, in order to locate a missing college student, then the parent could be convicted of this offense. Exceptions for law enforcement and national security purposes as determined by regulations. (Sec. 107(a), Sec. 208A(c)(2), 42 U.S.C. § 408A(c)(2)).
Grade	None

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

HR 1745	Social Security Number Privacy and Identity Theft Prevention Act of 2005
Description	Creates criminal liability for displaying or using another person's Social Security number to obtain items.
Language	"No person may display a social security account number on any card or tag issued to any other person for the purpose of providing such other person access to any goods, services, [etc.] . . . or other means of communication which conveys such number . . ." (Sec. 108(a), Sec. 208A(d), 42 U.S.C. § 408A(d)). "Any person who violates this section shall . . ." (Sec. 107(a), Sec. 208A(h), 42 U.S.C. § 408A(h)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Social Security numbers are so widely asked for and used today that there is no reason to be confident that individuals still have a clear idea of what uses are permitted and what uses are prohibited.
Grade	None

HR 1745	Social Security Number Privacy and Identity Theft Prevention Act of 2005
Description	Creates criminal liability for employers displaying Social Security numbers on IDs.
Language	"No person that is an employer . . . may display a social security account number on any card or tag that is commonly provided to employees of such employer . . ." (Sec. 107(a), Sec. 208A(e), 42 U.S.C. § 408A(e)). "Any person who violates this section shall . . ." (Sec. 107(a), Sec. 208A(h), 42 U.S.C. § 408A(h)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	This could apply to an employer of any size. Social Security numbers are so widely asked for and used today that there is no reason to be confident that individuals still have a clear idea of what uses are permitted and what uses are prohibited.
Grade	None

HR 1872	Health Coverage for the Uninsured Act of 2005
Description	Criminalizes misuse of Department of Treasury images or logos to assist in misleading people regarding insurance premium credits.
Language	"Any person who knowingly misuses Department of Treasury names, symbols, titles, or initials to convey the false impression of association with, or approval or endorsement by, the Department of Treasury of any insurance products or health coverage in connection with the credit for health insurance costs under section 36A shall . . ." (Sec. 4(c), I.R.C. § 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

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

	constituting the offense.
Other Considerations	<p>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.”</p> <p>This new offense targets providers of health insurance products who represent that their products qualify for the new health insurance allowance for uninsured individuals.</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

HR 1988	Protect Our Veterans Memorials Act of 2005
Description	Extends federal jurisdiction to destruction of veteran memorials on state and local property.
Language	This bill extends federal jurisdiction to the conduct prohibited by 18 U.S.C. § 1369 when committed on state or local property. (Sec. 3). The prohibited conduct is as follows: “Whoever . . . willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statute, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States . . .” (18 U.S.C. § 1369).
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	This offense extends federal jurisdiction to conduct that is confined to state and local property.
Grade	Moderate

HR 2004	Protecting America's Workers Act
Description	Amendment increases penalties for employers who violate whistleblower protections.
Language	“Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6, or any regulation prescribed pursuant to this Act, and that violation causes serious bodily injury to any employee but does not cause death to any employee, shall . . .” (Sec. 308(a), 29 U.S.C. § 666(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.
Other Considerations	<p>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 criminalized.</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</p>

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

	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

HR 2237	Chemical Security Act of 2005
Description	Creates criminal liability for violating or not complying with a compliance order.
Language	“Any owner or operator of a chemical source that knowingly violates, or fails to comply with, any [compliance] order issued [under Section 7 (c)] shall” (Sec. 9(b)). “An order under [Sec. 7(c)] may be issued only after notice and opportunity for a hearing.” (Sec. 7(c)(2)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Under this Act defendants must receive notice and an opportunity for a hearing before an order will issue.
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 criminal offense makes no provision for failure to comply with orders that would be infeasible, financially ruinous, or practically impossible to fulfill.
Grade	Moderate

HR 2250	Valuing Our Trust in Elections Act
Description	Creates criminal liability for distributing voter registration forms as a felon or failure to provide required information or meet state requirements.
Language	“Any person who distributes a voter registration application form for elections . . . who does not meet the standards established by the State . . . pursuant to [HAVA], or who collects and transmits a form which does not include the information required . . . shall be guilty of a misdemeanor” (Sec. 3(b)(1), 42 U.S.C. § 14853).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	This is a misdemeanor.
Grade	None

HR 2250	Valuing Our Trust in Elections Act
Description	Creates criminal liability for employing an individual to distribute voter registration forms who does not meet the standards established by the state or HAVA.
Language	“Any person who employs an individual to distribute voter registration [forms] who knows, or should reasonably be expected to know, that the individual does not meet the standards” (Sec. 3(b)(2), 42 U.S.C. § 14853).

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	---
Weaknesses	"Should reasonably be expected to know" undermines the strength of this standard to the point that it is essentially meaningless as a safeguard against conviction. It is vague, open-ended and dependent on the perspective of the person making the judgment. Such tort-like standards should not be used in the criminal law.
Other Considerations	This is a misdemeanor.
Grade	None

HR 2250	Valuing Our Trust in Elections Act
Description	Creates criminal liability for fraudulently handling an absentee ballot.
Language	"Any person who knowingly and willfully handles an absentee ballot . . . in a fraudulent manner shall . . ." (Sec. 4(c), 18 U.S.C. § 15381 et seq.).
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

HR 2298	Indentured Servitude Abolition Act of 2005
Description	Creates criminal liability related to recruiting employees abroad, information disclosure and discrimination.
Language	"Whoever knowingly violates this Act shall be . . ." (Sec. 3(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Although federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof 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. 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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

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

HR 2428	Yellowstone Buffalo Preservation Act
Description	Creates criminal liability for agents who kill, haze or capture buffalo.
Language	<p>"No agent may kill, haze, or capture any buffalo on Federal land or land held under Federal conservation easements or use any form of bait to lure buffalo from any Federal land" (Sec. 1(e)).</p> <p>"The term 'hazing' means any individual effort to drive away, obstruct, chase, scare, or deter natural movements of wildlife, including efforts carried out on foot or horseback or efforts aided by machinery, aircraft, or any type of noise making device." (Sec. 1(d)(1)).</p> <p>"The term 'agent' means any person acting on behalf of a State or Federal Government." (Sec. 1(d)(2)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	The application of this provision is limited to "agents" of the government as defined in (Sec. 1(d)(2)). Exceptions for "legally-authorized, State-managed buffalo hunts," removal by "National Park Service employees who, in the line of duty, need to move buffalo to address immediate physical public safety threats or to end the suffering of an injured buffalo," and some forms of "non-lethal Federal research." (Sec. 1(e)(1)-(2)).
Grade	None

HR 2601	Foreign Relations Authorization Act, Fiscal Years 2006 and 2007
Description	Creates criminal liability for obstructing Federal law enforcement agent's activities.
Language	"Whoever knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions authorized by" (Sec. 201, 18 U.S.C. § 3064).
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	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, overly broad and/or far-reaching.
Grade	Moderate

HR 2651	Reducing Crime and Terrorism at America's Seaports Act of 2005
Description	Creates criminal liability for failure to heave to.
Language	"It shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel" (Sec. 3(a), 18 U.S.C. § 2237(a)(1)).

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

	"Any person who intentionally violates the provisions of this section" (Sec. 3(a), 18 U.S.C. § 2237(e)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. 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.
Grade	Moderate

HR 2651	Reducing Crime and Terrorism at America's Seaports Act of 2005
Description	Creates criminal liability for obstruction of boarding.
Language	"It shall be unlawful . . . to forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding or other law enforcement action authorized by any Federal law or to resist a lawful arrest." (Sec. 3(a), 18 U.S.C. § 2237(a)(2)(A)). "Any person who intentionally violates the provisions of this section" (Sec. 3(a), 18 U.S.C. § 2237(e)).
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not require knowledge of the facts constituting the offense nor limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. It does not require knowledge that the boarding or other law enforcement action was conducted by a law enforcement officer.
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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 2651	Reducing Crime and Terrorism at America's Seaports Act of 2005
Description	Creates criminal liability for providing false information.
Language	"It shall be unlawful . . . to provide information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination, origin, ownership, registration, nationality, cargo or crew, which that person knows is materially false." (Sec. 3(a), 18 U.S.C. § 2237(a)(2)(B)). "Any person who intentionally violates the provisions of this section" (Sec. 3(a), 18 U.S.C. § 2237(e)).
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently. A literal application of the plain language of this "knows is materially false" requirement should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	"Intentionally" does not require knowledge of the facts constituting the offense nor limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. It does not require knowledge that the boarding or other law enforcement action was conducted by a law enforcement officer.
Other Considerations	The categorization of this offense as "Weak-to-Moderate" assumes that the government must prove that the defendant knew that the information was "false" but need not prove that the defendant had knowledge that the person giving the order was "a Federal law enforcement officer."

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

	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

HR 2843	To prohibit the use of remote control locomotives to carry hazardous materials, and for other purposes
Description	Creates criminal liability for using remote control locomotives to carry hazardous materials.
Language	<p>“A railroad carrier knowingly violating this Act shall be” (Sec. 6(a)).</p> <p>“Knowing Violations – For purposes of this section – (1) a railroad carrier acts knowingly when – (A) the railroad carrier has actual knowledge of the facts giving rise to the violation; or (B) a reasonable railroad carrier 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 issued . . . is not an element.” (Sec 6(b)).</p> <p>Prohibitions under Act include:</p> <ul style="list-style-type: none"> - Operating a remote control locomotive to carry hazardous materials on the general system railroad transportation. (Sec. 2(a)). - Non-compliance with rules promulgated concerning inventory and security of remote control transmitters. (Sec. 3) - Non-compliance with rules promulgated concerning the security of remote control locomotives. (Sec. 4).
Strengths	The “knowingly requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Although federal courts should generally interpret “knowingly,” when used as an introductory or blanket <i>mens rea</i> term, to require proof of the defendant’s knowledge of the facts constituting the offense, the language defining “acts knowingly” to include “a reasonable carrier acting in the circumstances and exercising reasonable care would have that knowledge” substantially undermines the protectiveness of the “knowingly” term. It is vague, open-ended and dependent on the perspective of the person making the judgment. Such tort-like standards should not be used in the criminal law.
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

HR 2870	Youth Worker Protection Act
Description	Creates criminal liability for youth peddling and violating this act.
Language	<p>“No employer may employ a minor in youth peddling.” (Sec. 101(a), 29 U.S.C. § 207).</p> <p>“‘Youth peddling’ means sale of goods or services by a minor in a public place (including any street corner, roadway median, sports facility, performing arts facility, or public transportation station), at the residence of the customer, at the place of business of the customer, or from a vehicle” (Sec. 106(b), 29 U.S.C. § 203(z)).</p> <p>“‘Minor’ means an individual who is under the age of 18 years.” (Sec. 106(b), 29 U.S.C. § 203(aa)).</p>
Strengths	---

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

Weaknesses	This is a strict liability offense.
Other Considerations	Exceptions include: "(1) newspaper delivery to a customer at the residence of the customer or at the place of business of the customer; (2) sale of goods or services at a fixed retail location; or (3) sale of goods or services on behalf of [a 501(c), 501(a) exempt, organization], if the minor is a volunteer and does not receive compensation for the sale." (Sec. 106(b), 29 U.S.C. § 203(z)).
Grade	None

HR 2870	Youth Worker Protection Act
Description	Creates criminal liability for youth peddling and violating this act.
Language	"Whoever violates [Title II – Employment of Minors] shall . . ." (Sec. 101(a), 29 U.S.C. § 208(d)). "Title II – Employment of Minors" establishes the requirements for employment of minors (Sec. 201), the rules and requirements regarding work permits (Sec. 203), the working-hour restrictions for minors (Sec. 204), rules and procedures regarding serious work-related injuries (Sec. 205), and a prohibition on youth peddling (Sec. 207).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 3094	Secure America's Vote Act of 2005
Description	Creates criminal liability for voter suppression.
Language	"It is unlawful . . . to assert to any State election official that an individual is not eligible to vote . . . unless the assertion is made in good faith on the basis of facts known to the person . . ." (Sec. 6(c)(1)(A), 42 U.S.C. § 15544 (c)(1)(A)).
Strengths	---
Weaknesses	"Good faith" is not a traditional or customary <i>mens rea</i> term and has no fixed, definite meaning in federal criminal law.
Grade	None

HR 3094	Secure America's Vote Act of 2005
Description	Creates criminal liability for voter suppression.
Language	"It is unlawful for any person . . . to knowingly provide any person with false information regarding an individual's eligibility to vote in an election for Federal office or regarding the time, place, or manner of voting in such an election." (Sec. 6(c)(1)(B), 42 U.S.C. § 15544(c)(1)(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.

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

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 provide false 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	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 “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

HR 3150	Criminal Alien Accountability Act
Description	Amendment creates (1) mandatory minimum terms for illegally re-entering country and (2) creates a new criminal offense for aiding an alien entering the country illegally.
Language	“Any person who knowingly aids or assists any alien violating section 276(b) to reenter the United States . . . shall be fined . . .” (Sec. 2(c)(2), 8 U.S.C. § 1327(b)(1)). Section 276(b) establishes criminal penalties for reentry of certain removed aliens. Specifically, aliens removed subsequent to conviction for certain offenses or for prior unlawful entry. (8 U.S.C. § 1326(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 categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the government must prove the defendant acted with knowledge that the alien was prohibited from reentering.
Grade	Moderate

HR 3150	Criminal Alien Accountability Act
Description	Amendment creates (1) mandatory minimum terms for illegally re-entering country and (2) creates a new criminal offense for aiding an alien entering the country illegally.
Language	“Any person . . . who connives or conspires with any person or persons to allow, procure, or permit any such alien to reenter the United States, shall be fined . . .” (Sec. 2(c)(2), 8 U.S.C. § 1327(b)(1)).
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	Although the phrase “connives or conspires” seems to imply <i>mens rea</i> protection, this phrase is not defined and will not necessarily afford a defendant any meaningful <i>mens rea</i> protection.
Grade	None

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

HR 3192	Paid Family and Medical Leave Act of 2005
Description	Creates criminal liability for four actions relating to fraudulently seeking government benefits.
Language	"Whoever (1) makes or causes to be made any false statement in support of an application for benefits under [Title I – Family and Medical Insurance Program]" (Sec. 107(1)).
Strengths	---
Weaknesses	This is a strict liability offense.
Grade	None

HR 3192	Paid Family and Medical Leave Act of 2005
Description	Creates criminal liability for four actions relating to fraudulently seeking government benefits.
Language	"Whoever . . . (2) knowingly presents or causes to be presented any false written or oral material statement in support of any claim for benefits under [Title I – Family and Medical Insurance Program]" (Sec. 107(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 government must prove that the defendant knew that the statement was "false" and that it was "in support of" a claim for government benefits.
Grade	Moderate

HR 3192	Paid Family and Medical Leave Act of 2005
Description	Creates criminal liability for four actions relating to fraudulently seeking government benefits.
Language	"Whoever . . . (3) knowingly solicits, receives, offers, pays or accepts any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for soliciting a claimant to apply for benefits under [Title I – Family and Medical Insurance Program], except to the extent authorized by a law of the [U.S.]" (Sec. 107(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.
Grade	Weak

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

HR 3192	Paid Family and Medical Leave Act of 2005
Description	Creates criminal liability for four actions relating to fraudulently seeking government benefits.
Language	"Whoever . . . (4) knowingly assists, abets, solicits, or conspires with any person who engages in an act that is prohibited under paragraph (1), (2), or (3), shall" (Sec. 107(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.
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

HR 3199	USA Patriot Improvement and Reauthorization 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 and without lawful authority or permission . . . 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 "with intent to, or knowing or having reason to know, such activity would likely derail, disable, or wreck" said equipment. (Sec. 110(a), 18 U.S.C. § 1992(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. 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	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

HR 3199	USA Patriot Improvement and Reauthorization 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 and without lawful authority or permission . . . removes an appurtenance from, damages, or otherwise impairs the operation of a railroad signal system [or related dispatch or signal system]." (Sec. 110(a), 18 U.S.C. § 1992(a)(5)).
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

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

	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	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

HR 3199	USA Patriot Improvement and Reauthorization 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 dispatching, operating, controlling, or maintaining railroad on-track equipment or a mass transportation vehicle." (Sec. 110(a), 18 U.S.C. § 1992(a)(6)).
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 109 th 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

HR 3199	USA Patriot Improvement and Reauthorization 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 and without lawful authority or permission . . . surveils, photographs, videotapes, diagrams, or otherwise collects information with the intent to plan or assist in planning any of the acts described in paragraphs (1) through (6)." (Sec. 110(a), 18 U.S.C. § 1992(a)(8)).
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. 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

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

	"knowingly" does not apply to the phrase "without lawful authority."
Grade	Weak

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for conveying false information about almost any type of physical act against mass transit, including all mass transit vehicles, structures, and property.
Language	"Whoever . . . knowingly and without lawful authority or permission . . . conveys false information, knowing the information to be false, concerning an attempt or alleged attempt to engage in violation of this subsection." (Sec. 110(a), 18 U.S.C. § 1992(a)(9)).
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	<p>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.</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

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for obstructing an investigation or judicial proceeding.
Language	"Whoever, having been notified of the applicable disclosure prohibitions or confidentiality requirements of section 2709(c)(1) of this title, or [list of other titles], knowing and with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or requirements applicable by law to such person shall . . ." (Sec. 117, 18 U.S.C. § 1510(e)).
Strengths	The requirement that the conduct be done "with the intent to obstruct" should safeguard against conviction of a defendant who did not have a guilty mind. Commonsense, literal application should prevent unjust prosecutions and convictions.
Weaknesses	---
Grade	Strong

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

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for failure to heave to.
Language	<p>"It shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to knowingly fail to obey an order by an authorized Federal law enforcement officer to heave to that vessel." (Sec. 303(a), 18 U.S.C. § 2237(a)(1)).</p> <p>"Any person who intentionally violates this section shall be . . ." (Sec. 303(a), 18 U.S.C. § 2237(b)).</p>
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. 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 as "Moderate" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the government must prove that the defendant had knowledge that the person giving the order was an "authorized Federal law enforcement officer."
Grade	Moderate

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for interfering with a boarding or other law enforcement action.
Language	<p>"It shall be unlawful for any person on board a vessel of the [U.S.], or a vessel subject to the jurisdiction of the [U.S.], to . . . forcibly resist, oppose, prevent, impede, intimidate, or interfere with a boarding or other law enforcement action authorized by any Federal law or to resist a lawful arrest . . ." (Sec. 303(a), 18 U.S.C. § 2237(a)(2)(B)).</p> <p>"Any person who intentionally violates this section shall be . . ." (Sec. 303(a), 18 U.S.C. § 2237(b)).</p>
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not require knowledge of the facts constituting the offense nor limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
Other Considerations	<p>This offense does not require the defendant to have any knowledge regarding the boarding, action or arrest that he or she opposes, interferes with, etc. As such, even if the defendant believed that boarding was by private citizens, not law enforcement officers, he or she could still be convicted.</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. Thus, this offense is tabulated as a "Weak."</p>
Grade	None-to-Weak

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for providing false information.
Language	"It shall be unlawful for any person on board a vessel of the [U.S.], or a vessel subject to the jurisdiction of the [U.S.], to . . . provide materially false information to a Federal law enforcement officer during a boarding of a vessel regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew." (Sec. 303(a), 18 U.S.C. §

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

	2237(a)(2)(B)). "Any person who intentionally violates this section shall be . . ." (Sec. 303(a), 18 U.S.C. § 2237(b)).
Strengths	Federal courts generally interpret "intentionally" to require conduct that is not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not require knowledge of the facts constituting the offense nor limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful. This offense does not require the defendant to have knowledge of the falsity.
Grade	Weak

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for interfering with national security events.
Language	"It shall be unlawful for any person or group of persons to willfully and knowingly to enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting . . ." (Sec. 602(a), 18 U.S.C. § 1752(a)(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. 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.
Grade	Moderate

HR 3199	USA Patriot Improvement and Reauthorization Act of 2005
Description	Creates criminal liability for interfering with national security events.
Language	"It shall be unlawful for any person or group of persons to willfully and knowingly to enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds so restricted in conjunction with an event designated as a special event of national significance . . ." (Sec. 602(a), 18 U.S.C. § 1752(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. 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.
Grade	Moderate

HR 3270	Secure Trains Act
Description	Creates criminal liability for retaliation against whistleblowers.
Language	"It shall be unlawful for any person employing a covered individual to commit an act prohibited by subsection (a) ["No covered individual may be discharged, demoted, . . . or in any

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

	other manner discriminated against . . . if such discrimination is due, in whole or in part, to any actual or perceived whistleblowing].” (Sec. 206(e)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Many employers will be knowledgeable about and on notice of whistleblower and employment rules.
Grade	None

HR 3352	Stolen Valor Act of 2005
Description	Amends the current criminal statute to include more activity.
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 of 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” (Sec. 3, 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

HR 3352	Stolen Valor Act of 2005
Description	Creates criminal liability for making false statements about awards of valor.
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” (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 (or have not) received or been nominated for particular awards. 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

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

HR 3442	Inhumane Trapping Prevention Act
Description	Creates criminal liability for trafficking in interstate commerce of animals caught using steel leg traps.
Language	"It shall be unlawful for any person . . . to import, export, or transport in interstate commerce an article of fur, if any part or portion of such article is derived from an animal that was trapped in a conventional steel-jawed leghold trap . . ." (Sec. 3(a)(1)). "Whoever knowingly violates subsection (a) shall . . ." (Sec. 3(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.
Grade	Weak

HR 3442	Inhumane Trapping Prevention Act
Description	Creates criminal liability for trafficking in interstate commerce of animals caught using steel leg traps.
Language	"It shall be unlawful for any person . . . to import, export, deliver, carry, or transport by any means whatever, in interstate commerce, any conventional steel-jawed leghold trap. . . ." (Sec. 3(a)(2)). "Whoever knowingly violates subsection (a) shall . . ." (Sec. 3(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.
Grade	Weak

HR 3442	Inhumane Trapping Prevention Act
Description	Creates criminal liability for trafficking in interstate commerce of animals caught using steel leg traps.
Language	"It shall be unlawful for any person . . . to sell, receive, acquire, or purchase any conventional steel-jawed leghold trap that was delivered, carried, or transported in violation of paragraph (2) . . ." (Sec. 3(a)(3)). "Whoever knowingly violates subsection (a) shall. . ." (Sec. 3(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.
Grade	Weak

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

HR 3442	Inhumane Trapping Prevention Act
Description	Creates criminal liability for trafficking in interstate commerce of animals caught using steel leg traps.
Language	<p>"It shall be unlawful for any person . . . to violate any rule made by the Secretary under this Act." (Sec. 3(a)(4)).</p> <p>"Whoever knowingly violates subsection (a) shall . . ." (Sec. 3(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	<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. Thus, this offense is tabulated as a "Weak."</p>
Grade	None-to-Weak

HR 3469	Coral Reef Conservation and Protection Act of 2005
Description	Creates criminal liability for three violations or attempted violations of the new coral reef species act.
Language	<p>"Any person who knowingly violates section 3 shall . . ." (Sec. 7(c)(1)).</p> <p>"[I]t is unlawful for any person to . . . (1) take any covered coral reef species within waters under the jurisdiction of the [U.S.]; (2) import into or export from the [U.S.] any covered coral reef species; (3) possess, sell, purchase, deliver, carry, transport, or receive in interstate or foreign commerce any covered coral reef species taken or imported in violation of paragraphs (1) and (2) . . ." (Sec. 3(a)).</p> <p>Covered coral reef species means "any species of coral or ornamental reef fish," any coral reef species listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or any other coral species listed by the Secretary of Commerce to be endangered. (Sec. 3(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. This offense references a Treaty to define the terms of the offense, which is tantamount to regulatory criminalization and blanket criminalization of all such violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.
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>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. Thus, this offense is tabulated as a "Weak."</p>

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

Grade	None-to-Weak
--------------	---------------------

HR 3469	Coral Reef Conservation and Protection Act of 2005
Description	Creates criminal liability for three violations or attempted violations of the new coral reef species act.
Language	<p>“Any person engaged in business as an importer or exporter of coral reef species who knowingly violates section 3 shall” (Sec. 7(c)(2)).</p> <p>“[I]t is unlawful for any person to . . . (1) take any covered coral reef species within waters under the jurisdiction of the [U.S.]; (2) import into or export from the [U.S.] any covered coral reef species; (3) possess, sell, purchase, deliver, carry, transport, or receive in interstate or foreign commerce any covered coral reef species taken or imported in violation of paragraphs (1) and (2)” (Sec. 3(a)).</p> <p>Covered coral reef species means “any species of coral or ornamental reef fish,” any coral reef species listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora, or any other coral species listed by the Secretary of Commerce to be endangered. (Sec. 3(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. This offense references a Treaty to define the terms of the offense, which is tantamount to regulatory criminalization and blanket criminalization of all such violations is likely to undermine the protectiveness of this <i>mens rea</i> requirement.
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>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. Thus, this offense is tabulated as a “Weak.”</p>
Grade	None-to-Weak

HR 3469	Coral Reef Conservation and Protection Act of 2005
Description	Creates criminal liability for three violations or attempted violations of the new coral reef species act.
Language	<p>“Any person who knowingly makes, causes to be made, or submits any false statement or representation in a certification under section 4(b)(1)(B) shall be” (Sec. 7(c)(3)).</p> <p>4(b)(1)(B) Certification means – “certification by the importer or exporter that the covered coral reef species to be imported or exported was not taken through the use of any destructive collection practice.” (Sec. 4(b)(1)(B)).</p> <p>Destructive collection practices includes: reef-dredging, explosives, poisons, any other destructive collection practices listed in regulations to be promulgated. (Sec. 4(b)(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.

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

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 the “statement or representation” was “false” and knew that it was made “in a certification.”
Grade	Moderate

HR 3482	CARE Act of 2005
Description	Amendment creates criminal liability for violations of child labor laws that result in death or permanent disability of a child.
Language	<p>“Any person who repeatedly or willfully violates any of the provisions of section 12 [29 U.S.C. § 212, the Child Labor Provisions of the Fair Labor Standard Act], and such violations result in or contribute to the death or permanent disability of an employee under 18 years . . . shall . . .” (Sec. 4, 29 U.S.C. § 216(f)).</p> <p>29 U.S.C. § 212 reads: “(a) Restrictions on shipment of goods; prosecution; conviction - No producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: Provided, That any such shipment or delivery for shipment of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the requirements of this section, and who acquired such goods for value without notice of any such violation, shall not be deemed prohibited by this subsection: And provided further, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution. (b) Investigations and inspections - The Secretary of Labor or any of his authorized representatives, shall make all investigations and inspections under section 211 (a) of this title with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 217 of this title to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this chapter relating to oppressive child labor. (c) Oppressive child labor - No employer shall employ any oppressive child labor in commerce or in the production of goods for commerce or in any enterprise engaged in commerce or in the production of goods for commerce. (d) Proof of age - In order to carry out the objectives of this section, the Secretary may by regulation require employers to obtain from any employee proof of age.”</p>
Strengths	---
Weaknesses	A person could be convicted of this offense as long as the violation of the Child Labor Provisions of the FLSA was “repeated.” 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. However, the use of the term “repeatedly” makes this a potentially strict liability offense.
Grade	None

HR 3657	International Marriage Broker Regulation Act of 2005
Description	Creates criminal liability for violating the Act’s provisions on marketing children, obtaining informed consent and collecting required information.
Language	<p>“An international marriage broker that, within the special maritime and territorial jurisdiction of the [U.S.], violates subsection (a), (b), or (c) shall be . . .” (Sec. 2(d)(2)).</p> <p>“An international marriage broker shall not provide any [U.S.] client or other person with the personal contact information, photograph, or general information about the background or interest of any individual under the age of 18.” (Sec. 2(a)).</p> <p>“Obligation of International Marriage Broker with Respect to Informed Consent – [establishes requirements regarding information collection on [U.S.] clients prior to providing information to [U.S.] clients and confidentiality rules]” (Sec. 2(b)).</p> <p>“Obligation of International Marriage Broker with Respect to Mandatory Collection of Information – [establishes form and substance requirements for the information required to be</p>

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

	collected under subsection (b).]" (Sec. 2(c)).
Strengths	---
Weaknesses	Subsections (a), (b), and (c) do not contain any <i>mens rea</i> language. (Sec. 2(a)-(d)). This is a strict liability provision.
Other Considerations	Only applies to international marriage brokers - i.e. people or entities that charge fees for matchmaking.
Grade	None

HR 3705	Protection Against Gouging Activities Act
Description	Amendment creates criminal liability for price gouging (defined) during a declared national emergency.
Language	"Whoever engages in price gouging during a period of national emergency . . ." (Sec. 2(a), 18 U.S.C. § 881(a)). Definitions: - Price gouging "means selling or renting any product, service, dwelling, or facility at a price that grossly exceeds the average price at which the same or similar product, service, dwelling, or facility was obtainable in the same geographic area during the 30-day period immediately preceding the period of national emergency, and the increase in price is not – (A) attributable to any reasonable attendant business risk resulting from the national emergency; or (B) consistent with national or international market trends;" - Period of national emergency "means the period of 90 days immediately following the declaration of an emergency or major disaster as defined in section 102 of . . . 42 U.S.C. 5122 . . ." (Sec. 2(a), 18 U.S.C. § 881 (b)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although some merchants may be on notice of the prohibition on price gouging and have a general idea of what conduct might be included within the definition of "price gorging," this provision is not limited to merchants and covers all individuals regardless of whether they possess industry knowledge. A price that "grossly" exceeds the average price is not a fixed price nor is it even defined by the statute.
Grade	None

HR 3778	Bottom Trawl and Deep Sea Coral Habitat Act
Description	Creates criminal liability for violations of fishing statutes.
Language	"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)). "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)).
Strengths	---

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

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

HR 3778	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	The inclusion of this offense in this study, as well as its categorization, assumes that the conduct covered by this offense includes non-physical and non-forceful conduct, such as simply walking away from an officer.
Grade	None

HR 3778	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	This is a strict liability offense.
Grade	None

HR 3778	Bottom Trawl and Deep Sea Coral Habitat Act
Description	Creates criminal liability for violations of fishing statutes.
Language	"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

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

	Act (16 U.S.C. § 1857(1)) in an area designated as a Coral Habitat Conservation Zone.” (Sec. 14(b)). “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(l)).
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. In the context of this offense, these terms 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	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.” 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

HR 3780	Wholesale Motor Fuel Fairness and Competition Restoration Act
Description	Creates criminal liability for price discrimination by gasoline retailers.
Language	“It shall be a violation of this Act for an owner or operator of a terminal facility to sell motor fuel from the terminal facility to any person at a price in excess of the price it charges any other person, including a distributor or trailer which it owns or with which it is affiliated.” (Sec. 3(a)(1)). “For purposes of this subsection, the price an owner or operator of a terminal facility charges a distributor or retailer which it owns or with which it is affiliated shall be the price determined pursuant to the regulations issued under section 4(a).” (Sec. 3(a)(2)). “Whoever knowingly violates subsection (a)” (Sec. 3(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.
Grade	Weak

HR 3808	Prohibiting Reprehensible Increases in Costs of Essentials (PRICE) Act of 2005
Description	Creates criminal liability for price gouging during disasters (25% increase in rental rates).
Language	“Whoever engages in price gouging in a time and place of disaster shall” (Sec. 2(a), 18 U.S.C. § 1822(a)). Definitions:

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

	<ul style="list-style-type: none"> - "The term 'price gouging' means charging a grossly disproportionate price." (Sec. 2(a), 18 U.S.C. § 1822(d)(1)). - "The term 'time and place of disaster' means a time during which and a place with respect to which the chief executive of a State . . . or the President . . . has declared a disaster to have taken place." (Sec. 2(a), 18 U.S.C. § 1822(d)(2)). - "The term 'grossly disproportionate' means there is a gross disparity between the price of the commodity or rental or lease of any dwelling unit or self-storage facility that is subject of the offer or transaction and the average price at which that [thing] was rented, leased, sold, or offered for rent or sale in the usual course of business during the 30 days immediately prior to the declaration of a state of emergency." (Sec. 2(a), 18 U.S.C. § 1822(d)(3)). - "The term 'gross disparity' means a 25 percent increase." (Sec. 2(a), 18 U.S.C. § 1822(d)(5)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although some merchants may be on notice of the prohibition on price gouging and have a general idea of what conduct might be included within the definition of "price gouging," this provision is not limited to merchants and covers all individuals regardless of whether they possess industry knowledge.
Grade	None

HR 3838	Hurricane Katrina Accountability and Contracting Reform Act
Description	Creates criminal liability for violations of required reporting practices for federal officials and the accepting of compensation from government contractors by former federal officials.
Language	<p>"Whoever engages in conduct constituting a violation of subsection (a) [of 41 U.S.C. § 423] for the purpose or either – (i) exchanging the information covered by such subsection for anything of value or (ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract . . . shall . . ." (Sec. 214(d), 41 U.S.C. § 423(e)(1)(A)).</p> <p>"A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information related. In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, [this extends for three years] after the end of the assignment of such employee." (41 U.S.C. § 423(a)(1)).</p> <p>Application: "[A]pplies to any person who is a present or former official of the [U.S.], or a person who is acting or has acted for or on behalf of, or who is advising or has advised the [U.S.] with respect to, a Federal agency procurement; and by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information." (41 U.S.C. § 423(a)(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	Most federal officials covered by this offense may be on notice of its requirements; however, this offense applies to such a broad class of defendants and range of conduct that many potential defendants will not know their conduct is violative and be on notice.
Grade	Weak

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

HR 3838	Hurricane Katrina Accountability and Contracting Reform Act
Description	Creates criminal liability for violations of required reporting practices for federal officials and the accepting of compensation from government contractors by former federal officials.
Language	<p>"Whoever engages in conduct constituting a violation of subsection (a) or (b) [of 41 U.S.C. § 423] for the purpose or either – (i) exchanging the information covered by such subsection for anything of value or (ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract . . . shall . . ." (Sec. 214(d), 41 U.S.C. § 423(e)(1)(A)).</p> <p>"A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." (41 U.S.C. § 423(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	Most federal officials covered by this offense may be on notice of its requirements; however, this offense applies to such a broad class of defendants and range of conduct that many potential defendants will not know their conduct is violative and be on notice.
Grade	Weak

HR 3838	Hurricane Katrina Accountability and Contracting Reform Act
Description	Creates criminal liability for violations of required reporting practices for federal officials and the accepting of compensation from government contractors by former federal officials.
Language	<p>"Whoever engages in conduct constituting a violation of subsection (c) or (d) [of 41 U.S.C. § 423] . . . shall . . ." (Sec. 214(d), 41 U.S.C. § 423(e)(1)(B)).</p> <p>"Actions required of procurement officers when contacted by offerors regarding non-Federal employment" – establishes procedures and rules for handling such conduct and provides that "[a]n official who knowingly fails to comply with the requirements of this subsection shall. . . ." (41 U.S.C. § 423(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.
Other Considerations	Most federal officials covered by this offense may be on notice of its requirements; however, this offense applies to such a broad class of defendants and range of conduct that many potential defendants will not know their conduct is violative and be on notice.
Grade	Weak

HR 3838	Hurricane Katrina Accountability and Contracting Reform Act
Description	Creates criminal liability for violations of required reporting practices for federal officials and the accepting of compensation from government contractors by former federal officials.
Language	<p>"Whoever engages in conduct constituting a violation of subsection (c) or (d) [of 41 U.S.C. § 423] . . . shall . . ." (Sec. 214(d), 41 U.S.C. § 423(e)(1)(B)).</p> <p>"Prohibition on former official's acceptance of compensation from contractor" – establishes rules and prohibitions regarding former officials' acceptance of compensation, and</p>

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

	provides that “[a] former official who knowingly accepts compensation in violation of this subsection shall . . .” (41 U.S.C. § 423(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>“Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor.” (41 U.S.C. § 423(d)(5)).</p> <p>The categorization of this offense as “Strong” assumes that, under <i>Flores-Figueroa</i>, the government must prove that the defendant knew that his conduct constituted a violation.</p>
Grade	Strong

HR 3936	Federal Response to Energy Emergencies Act of 2005
Description	Creates criminal liability for selling gasoline at “unconscionably excessive” prices, false price reporting and market manipulation.
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 listed 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. . . .” (Sec. 5).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although many gasoline merchants may be on notice of the prohibition on “unconscionably excessive” gasoline sales, this provision is not limited in application to gasoline merchants and covers all individuals regardless of whether they possess industry knowledge.
Grade	None

HR 3936	Federal Response to Energy Emergencies Act of 2005
Description	Creates criminal liability for selling gasoline at “unconscionably excessive” prices, false price reporting and market manipulation.
Language	“It is unlawful for any person to report information related to the whole sale price of . . . [fuel] to the Federal Trade Commission if – (1) that person knew, or reasonably should have known, the information to be false or misleading; (2) the information was required by law to be reported; (3) and the person intended the false or misleading data to affect data compiled by the department or agency for statistical or analytical purposes with respect to the market for [fuel].” (Sec. 2(b)).

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

	"Any person who violates section 2 or any rule or order issued thereunder shall . . ." (Sec. 5).
Strengths	A literal application of the plain language of the requirement that the defendant "knew" should protect against mere misstatements, representations based on mistaken facts, and similar inadvertent deceptions.
Weaknesses	The "intended" requirement may appear to be 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 upon 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 substantially undermines the protectiveness of the "knowingly" term.
Grade	None

HR 3936	Federal Response to Energy Emergencies Act of 2005
Description	Creates criminal liability for selling gasoline at "unconscionably excessive" prices, false price reporting and market manipulation.
Language	"It is unlawful for any person, directly or indirectly, to use or employ, in connection with the purchase or sale of . . . [fuel], any manipulative or deceptive device or contrivance, in contravention of such rules and regulations as the [FTC] may prescribe as necessary or appropriate in the public interest or for the protection of [U.S.] citizens." (Sec. 2(c)). "Not later than 180 days after the date of the enactment of this Act, the [FTC] shall promulgate rules necessary and appropriate to enforce this section." (Sec. 2(d)). "Any person who violates section 2 or any rule or order issued thereunder shall . . ." (Sec. 5). "A violation of section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under [15 U.S.C. § 57a(a)(1)(B)]." (Sec. 4(a)). "[T]he Commission may prescribe rules which define with specificity acts or practices in or affecting commerce . . . except that the Commission shall not develop or promulgate any trade rule or regulations with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices." (15 U.S.C. § 57a(a)(1)(B)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 3938	Enforcement First Immigration Reform Act of 2005
Description	Creates criminal liability for hiring illegal immigrants.
Language	"Any person who hires for employment any individual in the [US] in any capacity who such person knows not to be authorized to work in the [U.S.] in such capacity . . . shall . . ." (Sec. 405(a), 8 U.S.C. § 1324(a)(e)(3)(A)).
Strengths	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.

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

Other Considerations	The categorization of this offense as “Strong” assumes that the government must prove that the defendant “knew” the person was not authorized to work in such a capacity and nevertheless hired the person to work in that capacity despite this knowledge.
Grade	Strong

HR 3938	Enforcement First Immigration Reform Act of 2005
Description	Criminal penalty for failing to comply with hiring regulations.
Language	“Any person who hires for employment any individual in the [U.S.] and fails to comply with the procedures prescribed by the Secretary pursuant to section 5(b) in connection with the hiring of such individual . . . shall . . .” (Sec. 405(a), 8 U.S.C. § 1324(a)(e)(3)(B)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 3968	Federal Mineral Development and Land Protection Equity Act of 2005
Description	Creates criminal liability for false statements and tampering.
Language	“Any person who knowingly . . . makes any false statements, representation, or certification in, . . . or conceals material information from, or unlawfully alters, any mining claim, notice of location, application, record, report, plan or other documents filed or required to be maintained under this Act . . . shall . . .” (Sec. 506(f)(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 government must prove that the defendant knew that the “statements, representation or certification” was “false” or that the legal status of the mining claim, notice of location, etc. depended on the “conceal[ed information].”
Grade	Moderate

HR 3968	Federal Mineral Development and Land Protection Equity Act of 2005
Description	Creates criminal liability for false statements and tampering.
Language	“Any person who knowingly . . . omits . . . material information from . . . any mining claim, notice of location, application, record, report, plan or other documents filed or required to be maintained under this Act . . . shall . . .” (Sec. 506(f)(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.

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

Other Considerations	This offense only requires a defendant to know that material information was omitted in order to be convicted.
Grade	Weak

HR 3968	Federal Mineral Development and Land Protection Equity Act of 2005
Description	Creates criminal liability for false statements and tampering.
Language	"Any person who knowingly . . . falsifies, tampers with, renders inaccurate, or fails to install any monitoring device or method required to be maintained under this Act, shall" (Sec. 506(f)(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	This offense covers a very broad range of activity and includes "knowingly render[ing] inaccurate" which is not comparable to knowingly making false statements. Knowingly rendering something inaccurate can occur in many ways, arguably including conducting an incorrect analysis. Further, this offense includes "knowingly . . . fail[ing] to install" which could cover a defendant who did not have knowledge of the requirement to install.
Grade	Weak

HR 3968	Federal Mineral Development and Land Protection Equity Act of 2005
Description	Creates criminal liability for knowing violations of the act.
Language	"Any person who knowingly . . . engages in mineral activities without a permit required under title III . . . shall" (Sec. 506(g)(1)). "The term 'mineral activities' means any activity on Federal lands for, related to, or incidental to, mineral exploration, mining, beneficiation, processing, or reclamation activities for any locatable mineral." (Sec. 2(a)(14)).
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 government must prove that the defendant knew that he did not have a permit. Mining has a long history of being a highly regulated industry, and most of those engaged in mining can be expected to know that a permit is required.
Grade	Moderate

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

HR 3968	Federal Mineral Development and Land Protection Equity Act of 2005
Description	Creates criminal liability for knowing violations of the act.
Language	"Any person who knowingly . . . (2) violates any other environmental protection requirement set forth in title III or any regulation issued by the Secretaries to implement this Act, any provision of a permit issued under this Act (including any exploration or operations plan on which such permit is based), or any condition or limitation thereof ... shall ..." (Sec. 506(g)(2)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Although federal courts should generally interpret "knowingly," when used as an introductory or blanket <i>mens rea</i> term, to require proof 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. 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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 4029	Fuel Price Fairness Act
Description	Creates criminal liability for selling oil products at an "unreasonable price."
Language	"During a national energy price emergency declared under section 3, or in a region declared to be in a regional energy price emergency under such section, it shall be unlawful for any person to sell at retail [fuel] at an unreasonable price." (Sec. 5(a)). The term "unreasonable price" shall be established by the Federal Trade Commission within 60 days of this provision's enactment. (Sec. 5(c)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although some gasoline merchants may be on notice of the prohibition on "unreasonable" gasoline sales, this provision is not limited in application to gasoline merchants and covers all individuals regardless of whether they possess industry knowledge.
Grade	None

HR 4029	Fuel Price Fairness Act
Description	Creates criminal liability for selling oil products at an "unreasonable price."
Language	"During a national energy price emergency declared under section 3, or in a region declared to be in a regional energy price emergency under such section, it shall be unlawful for any integrated oil company or refinery to sell at retail [fuel] at an unreasonable price. (Sec. 5 (b)).

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

	The term “unreasonable price” shall be established by the Federal Trade Commission within 60 days of this provision’s enactment. (Sec. 5 (c)).
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although this provision only applies to organizations operating in a highly regulated industry, the reasonableness standard (“unreasonable price”) is not even defined by the statute.
Grade	None

HR 4114	Energy Price Discipline Act of 2005
Description	Creates criminal liability for selling oil products at “unjust or unreasonable prices.”
Language	<p>“It shall be unlawful for any entity engaged in the petroleum or gasoline business to sell crude oil, gasoline, diesel fuel, natural gas, or petroleum distillates at an unjust or unreasonable price.” (Sec. 2).</p> <p>The term “unreasonable price” shall be established by the Federal Trade Commission within 90 days of this provision’s enactment. (Sec. 3).</p> <p>Entity – “for the purpose of this Act, the term ‘entity engaged in the petroleum or gasoline business means an individual or corporation engaged in the refining, sale, exchange, or shipping of crude oil, gasoline, diesel fuel, natural gas, or petroleum distillates.” (Sec. 6).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Although many gasoline merchants and companies may be on notice of the prohibition on “unjust or unreasonable prices,” the definition of “entity” is broad and not limited to those with industry knowledge. The reasonableness standard (“unjust or unreasonable price”) is not even defined by the statute.
Grade	None

HR 4132	Law Enforcement Cooperation Act of 2005
Description	Creates criminal liability for an FBI agent or employee’s failure to inform state/local officials of criminal activity.
Language	“Whoever, being an officer or employee of the [FBI], obtains information that a confidential informant or other individual has committed a serious violent felony . . . and knowingly and intentionally fails to promptly inform the chief state law enforcement officer and local prosecut[or]” (Sec. 2, 18 U.S.C. § 1521(a)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. 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	Although most FBI agents will be on notice of this regulatory duty, the application of this offense extends to all FBI employees.

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

Grade	Weak
--------------	-------------

HR 4148	Federal Disaster Profiteering Prevention Act of 2005
Description	Creates criminal liability for excessive charges by government suppliers in connection with relief and reconstruction of declared disaster or emergency areas.
Language	"Whoever, in a matter involving a contract with the Federal Government for the provision of goods or services, directly or indirectly, in connection with relief or reconstruction efforts provided in response to a presidentially declared major disaster or emergency, knowingly and willfully . . . executes or attempts to execute a scheme or artifice to defraud the United States . . ." (Sec. 2(a), 18 U.S.C. § 1351(a)(1) [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.
Grade	Moderate

HR 4148	Federal Disaster Profiteering Prevention Act of 2005
Description	Creates criminal liability for excessive charges by government suppliers in connection with relief and reconstruction of declared disaster or emergency areas (1-4).
Language	"Whoever, in a matter involving a contract with the Federal Government for the provision of goods or services, directly or indirectly, in connection with relief or reconstruction efforts provided in response to a presidentially declared major disaster or emergency, knowingly and willfully . . . falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . ." (Sec. 2(a), 18 U.S.C. § 1351(a)(2)).
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. Although this conduct must be done "in connection" with government relief or reconstruction efforts, 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

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

HR 4148	Federal Disaster Profiteering Prevention Act of 2005
Description	Creates criminal liability for excessive charges by government suppliers in connection with relief and reconstruction of declared disaster or emergency areas (1-4).
Language	"Whoever, in a matter involving a contract with the Federal Government for the provision of goods or services, directly or indirectly, in connection with relief or reconstruction efforts provided in response to a presidentially declared major disaster or emergency, 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 . . ." (Sec. 2(a), 18 U.S.C. § 1351(a)(3)).
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	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 "false, fictitious, or fraudulent." 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. Although this conduct must be done "in connection" with government relief or reconstruction efforts, 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

HR 4148	Federal Disaster Profiteering Prevention Act of 2005
Description	Creates criminal liability for excessive charges by government suppliers in connection with relief and reconstruction of declared disaster or emergency areas (1-4).
Language	"Whoever, in a matter involving a contract with the Federal Government for the provision of goods or services, directly or indirectly, in connection with relief or reconstruction efforts provided in response to a presidentially declared major disaster or emergency, knowingly and willfully . . . materially overvalues any good or service with the specific intent to excessively profit from the federal disaster or emergency . . ." (Sec. 2(a), 18 U.S.C. § 1351(a)(4)).
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 terms "materially overvalues" and "excessively profit" are not defined in this offense, this act, or the Title in which the offense would reside. 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. Although this conduct must be done "in connection" with government relief or reconstruction efforts, 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

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

HR 4239	Animal Enterprise 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 for the purpose of damaging or disrupting an animal enterprise; and in connection with such purpose -- intentionally damages, disrupts, or causes the loss of 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" (Sec. 2(a), 18 U.S.C. § 43(a)(1)-(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, or the loss of profits." (Sec. 2(a), 18 U.S.C. § 43(d)(3)).</p> <p>"[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)).</p>
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	<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

HR 4356	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2005
Description	Creates criminal liability for fraud in connection with major disaster or emergency benefits.
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 . . ." (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	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. Although this conduct must be done "in connection" with any 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
Grade	Moderate

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

HR 4356	Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2005
Description	Creates criminal liability for fraud in connection with major disaster or emergency benefits.
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 . . ." (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 term "materially 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. Although this conduct must be done "in connection" with any 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.
Grade	Moderate

HR 4406	Medicare Plan Enrollment Fraud Protection Act of 2005
Description	Creates criminal liability for fraud in connection with enrollment in Medicare plans.
Language	"Whoever knowingly and willfully . . . defrauds an individual in connection with the enrollment (or nonenrollment) of the individual with a Medicare Advantage plan under this part or a prescription drug plan under part D . . ." (Sec. 2(a), 42 U.S.C. § 1395w-27(j)(1)).
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 term "defrauds" is not defined by the statute and does not have a clear, precise, or definitive interpretation in federal law.
Grade	Moderate

HR 4406	Medicare Plan Enrollment Fraud Protection Act of 2005
Description	Creates criminal liability for fraud in connection with enrollment in Medicare plans.
Language	"Whoever knowingly and willfully . . . fraudulently or falsely represents an entity to be [a Medicare Advantage plan under this part or a prescription drug plan under part D] for purposes of inducing enrollment in such entity . . ." (Sec. 2(a), 42 U.S.C. § 1395w-27(j)(2)).

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	"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. The offense application is further limited by the "for the purposes of inducing enrollment" language, which creates an additional specific intent requirement.
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 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

HR 4411	Internet Gambling Prohibition and Enforcement Act
Description	Creates criminal liability for the transmission of bets or funds related to wagering to or from the country from territories in US jurisdiction, or a territory outside any nation's jurisdiction.
Language	"[W]hoever, being engaged in a gambling business, knowingly uses a communication facility for the transmission in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the [U.S.], or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the [U.S.], of – (A) bets or wagers; (B) information assisting in the placing of bets or wagers; or (C) a communication, which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall" (Sec. 102, 18 U.S.C. § 1084(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	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 act includes exceptions for transmissions for news reporting, where this activity is legal, or by lawful gambling businesses. (Sec. 102, 18 U.S.C. § 1084(b)).
Grade	Weak

HR 4411	Internet Gambling Prohibition and Enforcement Act
Description	Prohibits the transmission of bets or funds related to wagering to or from the country from territories in US jurisdiction, or a territory outside any nation's jurisdiction.
Language	"[W]hoever, being engaged in a gambling business, knowingly accepts, in connection with the transmission of a communication in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the [U.S.], or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the [U.S.] of bets or wagers or information assisting in the placing of bets or wagers – (A) credit, or the proceeds of credit, extended to or on behalf of another (including credit extended through the use of a credit card); (B) an electronic fund transfer or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of the other person; (C) any check, draft, or similar instrument which is drawn by or on behalf of the other person and is drawn on or payable through any financial institution; or (D) the proceeds of any other form of financial transaction as . . . prescribe[d] by regulation which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of the other person, shall" (Sec. 102, 18 U.S.C. § 1084(a)(2)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.

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

Weaknesses	"Knowingly" alone appears in this context to provide little or no protection for those who acted without a guilty mind.
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 act includes exceptions for transmissions for news reporting, where this activity is legal, or by lawful gambling businesses. (Sec. 102, 18 U.S.C. § 1084(b)).
Grade	Weak

HR 4463	Deceptive Practices and Voter Intimidation Prevention Act of 2005
Description	Creates criminal liability for committing deceptive acts related to elections.
Language	"It shall be unlawful for any person to knowingly deceive another person regarding the time, place, or manner of an [federal] election . . . 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(b)(1)). "Any person who violates paragraph (1) shall . . ." (Sec. 2(b), 18 U.S.C. § 594(b)(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. "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

HR 4567	Sodium Fluoroacetate Elimination Act
Description	Creates criminal liability for the possession of a certain poisonous substance.
Language	"No person may manufacture, process, or distribute in commerce sodium fluoroacetate (known as 'Compound 1080')." (Sec. 2(a), 15 U.S.C. § 2605(f)).
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

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

HR 4567	Sodium Fluoroacetate Elimination Act
Description	Creates criminal liability for the possession of a certain poisonous substance.
Language	<p>"Whoever (other than a person acting under the authority of section 3(c)) possesses sodium fluoroacetate shall . . ." (Sec. 4).</p> <p>"Destruction – The Secretary of Agriculture shall destroy all sodium fluoroacetate acquired under this section and all stocks of sodium fluoroacetate held by the Department of Agriculture as of the date of the enactment of this act . . ." (Sec. 3(c)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 4569	Digital Transition Content Security Act of 2005
Description	Creates criminal liability for unlawfully converting analog signals for commercial or private financial gain.
Language	<p>"Any person who violates section 101 willfully and for purposes of commercial advantage or private financial gain . . . shall . . ." (Sec. 107(a)).</p> <p>"No person shall (1) manufacture, import, offer to the public, provide or otherwise traffic in [listed types of analog conversion devices]; (2) manufacture, import, offer to the public, provide, or otherwise traffic in any technology product, service, device, component, or part thereof, that [listed types of analog conversion devices]." (Sec. 101).</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. The terms "willfully and for purposes of" protect against innocent conversion, unknowing conversion, or accidental conversion.
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	Exceptions for "a nonprofit library, archives, educational institution, or public broadcasting entity." (Sec. 107(b)).
Grade	Moderate

HR 4572	Export Administration Renewal Act of 2005
Description	Creates criminal liability for violating the export administration act and laws, regulations, licenses, and orders promulgated under the Act.
Language	"Any individual [or any person, other than an individual] who willfully violates, conspires to violate, or attempts to violate any provision of this Act or any regulation, license, or order issued under this Act shall be . . ." (Sec. 5, 50 U.S.C. App. § 2410(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	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.

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

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. Thus, this offense is tabulated as a "Moderate."
Grade	Weak-to-Moderate

HR 4657	Secure Telephone Operations Act of 2006
Description	Creates criminal liability for selling telephone customer proprietary network information.
Language	"Whoever knowingly sells telephone customer proprietary network information shall . . ." (Sec. 2(a), 18 U.S.C. § 1802(a)). "[T]he term 'telephone customer proprietary network information' means customer proprietary network information as that term is defined in [47 U.S.C. § 222]." (Sec. 2(a), 18 U.S.C. § 1802(b)). "Customer proprietary network information . . . means – (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." (47 U.S.C. § 222(h)(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 offense only applies to sales, not possession, distribution, publication or any other form of dissemination. The categorization of this offense as "Weak" assumes that the government must prove only that the defendant knew the facts that made the information "telephone customer proprietary network information"; it need not prove that the defendant actually knew the information was "telephone customer proprietary network information."
Grade	Weak

HR 4658	Amendment to Prohibit Former Members of Congress from Engaging in Certain Lobbying Activities
Description	Eliminates the 1-year cap on former Congress members being prohibited from lobbying.
Language	"Any person who is a Member of Congress and who, after that person leaves office, knowingly makes, with intent to influence, any communication to or appearance before any of the persons described in clause (ii), on behalf of any other person (except the [U.S.]) in connection with any matter on which such former Member of Congress seeks action by a Member, officer, or employee of either House of Congress, in his or her official capacity, shall . . ." (Sec. 1(a), 18 U.S.C. § 207(e)(1)(A)). "The persons referred to . . . are any Member, officer, or employee of either House of Congress, and any employee of any other legislative officer of the Congress." (Sec. 1(a), 18 U.S.C. § 207(e)(1)(A)(ii)).

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. This offense also requires the government to show that the conduct was done “with intent to influence.”
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a 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 is limited in application only to Members of Congress who hold positions of great trust and responsibility and who should generally be expected to know reasonable criminal laws governing their conduct.
Grade	Moderate

HR 4658	Amendment to Prohibit Former Members of Congress from Engaging in Certain Lobbying Activities
Description	Eliminates the 1-year cap on former Congress members being prohibited from lobbying.
Language	<p>“Any person who is an elected officer of either House of Congress and who, within 1 year after that person leaves office, knowingly makes, with intent to influence, any communication to or appearance before any of the persons described in clause (ii), on behalf of any other person (except the [U.S.] in connection with any matter on which such former Member of Congress or elected officer seeks action by a Member, officer, or employees of either House of Congress, in his or her official capacity, shall” (Sec. 1(a), 18 U.S.C. § 207(e)(1)(B)).</p> <p>“The person referred to . . . are any Member, officer, or employee of the House of Congress in which the elected officer served.” (Sec. 1(a), 18 U.S.C. § 207(e)(1)(B)(ii)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. This offense also requires the government to show that the conduct was done “with intent to influence.”
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a 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 is limited in application only to Members of Congress who hold positions of great trust and responsibility and who should generally be expected to know reasonable criminal laws governing their conduct.
Grade	Moderate

HR 4662	Consumer Telephone Records Protection Act
Description	Creates criminal liability for fraudulently acquiring proprietary customer information.
Language	<p>“It shall be unlawful for any person to obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person, customer proprietary network information relating to any other person by – (1) making a false, fictitious, or fraudulent statement or representation to an officer, employee, or agent of a telecommunications carrier” (Sec. 3(a)(1)).</p> <p>“Whoever knowingly and intentionally violates section 3 shall” (Sec. 6(a)).</p> <p>“[T]he term ‘telephone customer proprietary network information’ has the meaning given such term in [47 U.S.C. § 222].” (Sec. 7).</p> <p>“Customer proprietary network information . . . means – (A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a</p>

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

	telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.” (47 U.S.C. § 222(h)(1)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. 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 a 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 as “Weak” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” applies to “obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person.” Creates the separate offenses of solicitation and sale of information that is obtained in the manner described in Section 3(a). (Secs. 3(b)-(c)).
Grade	Weak

HR 4662	Consumer Telephone Records Protection Act
Description	Creates criminal liability for fraudulently acquiring proprietary customer information.
Language	“It shall be unlawful for any person to obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person, customer proprietary network information relating to any other person – (2) by providing, through any means including the internet, any document or other information to a telecommunications carrier or an officer, employee, or agent of a telecommunications carrier, knowing that the document or other information is forged, counterfeit, lost, or stolen, was obtained fraudulently or without the customer’s consent, or contains a false, fictitious, or fraudulent statement or representation.” (Sec. 3(a)(2)). “Whoever knowingly and intentionally violates section 3 shall be” (Sec. 6(a)). See preceding entry for definition of “customer proprietary network information.”
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Federal courts generally interpret “intentionally” to require conduct that is not committed by accident or otherwise inadvertently. The term “knowing” requires the government to prove that the defendant had knowledge that the document or other information is “forged, counterfeit, lost, or stolen, was obtained fraudulently or without the customer’s consent, or contains a false, fictitious, or fraudulent statement or representation.”
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a 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 as “Weak” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” only applies to “obtain or attempt to obtain, or cause to be disclosed or attempt to cause to be disclosed to any person.” Creates the separate offenses of solicitation and sale of information obtained in the manner described in Section 3(a). (Secs. 3(b)-(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

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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	"Whoever, being a Senator or Representative in, or a Delegate or Resident Commissioner to, the Congress or an employee of either House of Congress, with intent to influence on the basis of partisan political affiliation an employment decision or employment practice of any private entity . . . takes or withholds, or offers or threatens to take or withhold, an official act . . . shall . . ." (Sec. 105(a), 18 U.S.C. § 226(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 necessarily provide any <i>mens rea</i> protection and makes the offense much more unclear and confusing.
Grade	None

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	"Whoever, being a Senator or Representative in, or a Delegate or Resident Commissioner to, the Congress or an employee of either House of Congress, with intent to influence on the basis of partisan political affiliation an employment decision or employment practice of any private entity . . . influences, or offers or threatens to influence, the official act of another . . . shall . . ." (Sec. 105(a), 18 U.S.C. § 226(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 necessarily provide any <i>mens rea</i> protection and makes the offense much more unclear and confusing.
Grade	None

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Criminalizes failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
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 . . ." (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 . . ." (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

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

	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 strength of the <i>mens rea</i> requirement. See <i>Arthur Andersen v. United States</i>, 544 U.S. 696, 705 (U.S. 2005).</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>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> <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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	<p>“Whoever knowingly and willfully [or knowingly, willfully, and corruptly] fails to comply with any provision of [section 403] shall” (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” (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. 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>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 strength of 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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.

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

Language	"Whoever, in any matter involving a Federal contract or the provision of goods or services, knowingly and willfully . . . executes or attempts to execute a scheme or artifice to defraud the United States . . . shall . . ." (Sec. 705(a), 18 U.S.C. § 1039(a)(1)(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. "[S]cheme or artifice to defraud" is not defined in this offense, Act, or the title in which this offense would reside. This phrase is broad, vague, and amorphous.
Grade	Moderate

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	"Whoever, in any matter involving a Federal contract or the provision of goods or services, knowingly and willfully . . . falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . . shall . . ." (Sec. 705(a), 18 U.S.C. § 1039(a)(1)(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	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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	"Whoever, in any matter involving a Federal contract or the provision of goods or services, 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 . . ." (Sec. 705(a), 18 U.S.C. § 1039(a)(1)(C)).
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 the government to prove that the defendant knew of the falsity or the 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.

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

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 terms “materially 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. 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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	“Whoever, in any matter involving a Federal contract or the provision of goods or services, knowingly and willfully . . . materially overvalues any good or service with the specific intent to excessively profit from war, military action, or relief or reconstruction activities . . . shall” (Sec. 705(a), 18 U.S.C. § 1039(a)(1)(D)).
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 offense also requires the prohibited conduct to be committed with the specific intent to 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 conduct prohibited by this offense is so broad, however, that it renders the <i>mens rea</i> provisions less protective.
Other Considerations	The terms “materially overvalues” and “excessively profit” are not defined in this offense, Act, or the Title in which this offense would reside. 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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	“Whoever engages in conduct constituting a violation of subsection (a) [of 41 U.S.C. § 423] for the purpose or either – (i) exchanging the information covered by such subsection for anything of value or (ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract . . . shall” (Sec. 709(d), 41 U.S.C. § 423(e)(1)(A)). “A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information is related. In the case of an employee of a private sector organization assigned to an agency under chapter 37 of title 5, [this extends for three years] after the end of the assignment of such employee.” (41 U.S.C. § 423(a)(1)). Application: “[A]pplies to any person who is a present or former official of the [U.S.], or a person who is acting or has acted for or on behalf of, or who is advising or has advised the [U.S.] with respect to, a Federal agency procurement; and by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.” (41 U.S.C. § 423(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

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

	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. Many of those covered by this offense should be on notice of the requirements; however, this offense applies to such a broad class of defendants and range of conduct that there may be those who do not know their conduct is violative or who are not on notice.
Grade	Weak

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	<p>"Whoever engages in conduct constituting a violation of subsection . . . (b) [of 41 U.S.C. § 423] for the purpose or either – (i) exchanging the information covered by such subsection for anything of value or (ii) obtaining or giving anyone a competitive advantage in the award of a Federal agency procurement contract . . . shall" (Sec. 709(d), 41 U.S.C. § 423(e)(1)(A)).</p> <p>"A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." (41 U.S.C. § 423(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	Many of those covered by this offense should be on notice of the requirements; however, this offense applies to such a broad class of defendants and range of conduct that there may be those who do not know their conduct is violative or who are not on notice.
Grade	Weak

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	<p>"Whoever engages in conduct constituting a violation of subsection (c) or (d) [of 41 U.S.C. § 423] . . . shall" (Sec. 709(d), 41 U.S.C. § 423(e)(1)(B)).</p> <p>"Actions required of procurement officers when contacted by offerors regarding non-Federal employment" – establishes procedures and rules for handling such conduct and provides that "[a]n official who knowingly fails to comply with the requirements of this subsection shall" (41 U.S.C. § 423(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.
Grade	Weak

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

HR 4682	Honest Leadership and Open Government Act of 2005
Description	Creates criminal liability for failure to adhere to federal lobbying reporting requirements and fraud regarding government contracts.
Language	<p>"Whoever engages in conduct constituting a violation of subsection (c) or (d) [of 41 U.S.C. § 423] . . . shall . . ." (Sec. 709(d), 41 U.S.C. § 423(e)(1)(B)).</p> <p>"Prohibition on former official's acceptance of compensation from contractor" – establishes rules and prohibitions regarding former officials' acceptance of compensation, and provides that "a former official who knowingly accepts compensation in violation of this subsection shall . . ." (41 U.S.C. § 423(d)).</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	<p>"Regulations implementing this subsection shall include procedures for an official or former official of a Federal agency to request advice from the appropriate designated agency ethics official regarding whether the official or former official is or would be precluded by this subsection from accepting compensation from a particular contractor." (41 U.S.C. § 423(d)(5)).</p> <p>The categorization of this offense as "Strong" assumes that, under <i>Flores-Figueroa</i>, the government must prove that the defendant knew that her conduct constituted a violation of law.</p>
Grade	Strong

HR 4690	Foreign Agents Compulsory Ethics in Trade Act of 2006
Description	Creates criminal liability for former members of the executive or legislative branches who advise foreign entities on matters involving the United States' interests.
Language	<p>"Any person who is an officer or employee described in paragraph (3) [or within five years after that person's termination of service] knowingly acts as an agent or attorney for or otherwise represents or advises, for compensation - (A) a person outside of the United States, unless such person -- (i) [is a U.S. citizen domiciled in the U.S.], (ii) if not an individual, is [a business organized and principally located in the U.S.], or (B) [foreign business], if the representation or advice relates directly to a matter in which the [U.S.] is a party or has a direct and substantial interest, shall . . ." (Sec. 2, 18 U.S.C. § 207(f)(1)-(2)).</p> <p>"The officers and employees referred to in paragraphs (1) and (2) to who the restrictions contained in such paragraphs apply are (A) the President of the United States; and (B) any person subject to the restrictions contained in subsection (c), (d), or (e)." (Sec. 2, 18 U.S.C. § 207(f)(3)).</p> <p>The aforementioned application includes: senior personnel of the executive branch and independent agencies (18 U.S.C. § 207(c)); very senior personnel of the executive branch and independent agencies (18 U.S.C. § 207(d)); and members of Congress and officers and employees of the legislative branch (18 U.S.C. § 207(e)).</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	<p>Although many of those who are covered by this offense may be on notice of these rules, the offense and related provisions are lengthy, broad, and vague. It is unlikely that all potential defendants will be on notice that this offense applies to them or that their conduct is covered by the offense.</p> <p>There are exceptions for statements made on behalf of state governments, international organizations, and others, if made in accord with other provisions of the statute. There is also a grandfather clause making this section only applicable to those employed on or after this statute's enactment. (Sec. 3).</p>

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

Grade	Weak
--------------	-------------

HR 4692	Ethics in Foreign Lobbying Act of 2006
Description	Creates criminal liability for disclosure of certain information or the sale of that information for profit-making.
Language	<p>“Any person who discloses information in violation of section 4(b) . . . shall . . .” (Sec. 6).</p> <p>“The disclosure by the clearinghouse, or any officer or employee thereof, of any information other than that set forth in subsection (a) is prohibited, except as otherwise provided by law.” (Sec. 4(b)).</p> <p>“There shall be established within the Federal Election Commission a clearinghouse of public information regarding the political activities of foreign principals and agents of foreign principals. The information comprising this clearinghouse shall include only the following . . . [various registrations, reports, filings, listings regarding hearings, etc. under various disclosure and ethics Act].” (Sec. 4(a)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 4692	Ethics in Foreign Lobbying Act of 2006
Description	Creates criminal liability for disclosure of certain information or the sale of that information for profit-making.
Language	<p>“[A]ny person who sells or uses information for the purpose of soliciting contributions or for any profit-making purpose in violation of section 5(a)(2), shall . . .” (Sec. 6).</p> <p>“[N]otwithstanding any other provision of law, to make copies of registrations, reports, and other information comprising the clearinghouse available for public inspection and copying, beginning not later than 30 days after the information is first available to the public, and to permit copying of any such registration , report, or other information by hand or by copying machine or, at the request of any person, to furnish a copy of any such registration, report, or other information upon payment of the cost of making and furnishing such copy, except that no information contained in such registration or report and no such other information shall be sold or used by any person for the purpose of soliciting contributions or for profit-making purpose. . . .” (Sec. 5(a)(2)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 4696	Restoring Trust in Government Act
Description	Creates criminal liability for violations of lobbying reporting and restriction laws.
Language	“Whoever knowingly and willfully falsifies any information that the individual is required to report pursuant to section 102 shall . . .” (Sec. 202, Title 5 App. Ethics in Government Act of 1978, § 104(e)).

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

	Section 102 – “Contents of reports – Each report filed . . . shall include a full and complete statement with respect to the following . . . [large amount of information covering, generally, the source, type and amount of income, property, etc.].” (Title 5 App. Ethics in Government Act of 1978, § 102).
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.
Grade	Moderate

HR 4709	Telephone Records and Privacy Protection Act of 2006
Description	Creates criminal liability for the fraudulent acquisition and exploitation of phone records.
Language	<p>“Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by ... making false or fraudulent statements or representations to an employee of a covered entity . . . shall” (Sec. 3(a), 18 U.S.C. § 1039(a)(1)).</p> <p>“The term ‘confidential phone records information’ means information that – (A) relates to the quantity, technical configuration, type, destination, location, or amount of use of a service offered by a covered entity, subscribed to by any customer of that covered entity, and kept by or on behalf of that covered entity solely by virtue of the relationship between that covered entity and the customer; (B) is made available to a covered entity by a customer solely by virtue of the relationship between that covered entity and the customer; or (C) is contained in any bill, itemization, or account statement provided to a customer by or on behalf of a covered entity solely by virtue of the relationship between that covered entity and the customer.” (Sec. 3(a), 18 U.S.C. § 1039(h)(1)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. 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	<p>The categorization of this offense assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i>, the terms “knowingly and intentionally” apply to “false or fraudulent.”</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

HR 4709	Telephone Records and Privacy Protection Act of 2006
Description	Creates criminal liability for the fraudulent acquisition and exploitation of phone records.
Language	“Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by . . . making such false or fraudulent statements or representations to a customer of a covered entity . . . shall” (Sec. 3(a), 18 U.S.C. § 1039(a)(2)).

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

	See preceding offense for definition of “confidential phone records information.”
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. 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 terms “knowingly and intentionally” apply to “false or fraudulent.” 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

HR 4709	Telephone Records and Privacy Protection Act of 2006
Description	Creates criminal liability for the fraudulent acquisition and exploitation of phone records.
Language	“Whoever, in interstate or foreign commerce, knowingly and intentionally obtains or attempts to obtain, confidential phone records information of a covered entity, by . . . providing a document to a covered entity knowing that such document is false or fraudulent . . . shall . . .” (Sec. 3(a), 18 U.S.C. § 1039(a)(3)). See preceding offense for definition of “confidential phone records information.”
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. This is a proper use of the “knowing” term to require a guilty mind. 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 terms “knowingly and intentionally” apply to “false or fraudulent.” 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

HR 4709	Telephone Records and Privacy Protection Act of 2006
Description	Creates criminal liability for the fraudulent acquisition and exploitation of phone records.
Language	“Whoever, in interstate or foreign commerce, knowingly and intentionally obtains, or attempts to obtain, confidential phone records information of a covered entity, by . . . accessing customer accounts of a covered entity via the Internet, or by means of conduct that violates section 1030 of this [Title 18 U.S.C.], without prior authorization from the customer to whom such confidential phone records information relates; shall . . .” (Sec. 3(a), 18 U.S.C. § 1039(a)(4)). See preceding offense for definition of “confidential phone records information.”
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. Federal courts generally interpret “intentionally” to require conduct that is

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

	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	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. A defendant can know that he does not have prior authorization but not know that such authorization is needed. The range of conduct set forth in 18 U.S.C. § 1030 is expansive.
Grade	Weak

HR 4709	Telephone Records and Privacy Protection Act of 2006
Description	Creates criminal liability for the fraudulent acquisition and exploitation of phone records.
Language	“Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall” (Sec. 3(a), 18 U.S.C. § 1039(c)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. 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. A defendant can know that he does not have prior authorization but not know that such authorization is needed. Further, the bill does not specify what standard a court must apply to determine whether the person “ha[d] reason to know” such information was obtained fraudulently, and the “ha[d] reason to know” language substantially undermines the protectiveness of this offense’s “knowingly” requirement.
Grade	Weak

HR 4714	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” (Sec. 2(a), 18 U.S.C. § 2801 (a)). “The term ‘records of a customer’ means any data or information associated with an individual contained in a database, networked or integrated databases, or other data system of a telephone service provider.” (Sec. 2(a), 18 U.S.C. § 2801(d)).
Strengths	The “knowingly and intentionally” requirement protects against this provisions application to mere inadvertences. 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 “fraudulent” is not a well-defined <i>mens rea</i> term and it has no consistent interpretation by the federal courts.

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

Considerations	Exceptions for law enforcement. (Sec. 2(a), 18 U.S.C. § 2801(c)).
Grade	Weak

HR 4780	Global Online Freedom Act of 2006
Description	Creates criminal liability for willful violations or attempts to violate this act.
Language	<p>"Any [U.S.] business [or officer, director, employee, agent, or stockholder acting on behalf of U.S. business] that willfully violates, or willfully attempts to violate section 206(a) shall . . ." (Sec. 207(b)(1)).</p> <p>"Any [U.S.] business that maintains an Internet content hosting service may not provide to any foreign official of an Internet-restricting country information that personally identifies a particular user of such content hosting service, except for legitimate foreign law enforcement purposes as determined by the Department of Justice." (Sec. 206(a)).</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	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

HR 4780	Global Online Freedom Act of 2006
Description	Creates criminal liability for willful violations or attempts to violate this act.
Language	<p>"Any [U.S.] business [or officer, director, employee, agent, or stockholder acting on behalf of U.S. business] that willfully violates, or willfully attempts to violate sections 201-205 of this Act shall . . ." (Sec. 207(b)(2)).</p> <p>"Any [U.S.] business that creates, provides, or hosts any Internet search engine or maintains an Internet content hosting service may not locate, within a designated Internet-restricting country, any computer hardware used to house, store, serve, or maintain files or other data involved in providing such search engine or content hosting service." (Sec. 201).</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	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

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

HR 4780	Global Online Freedom Act of 2006
Description	Creates criminal liability for willful violations or attempts to violate this act.
Language	<p>“Any [U.S.] business [or officer, director, employee, agent, or stockholder acting on behalf of U.S. business] that willfully violates, or willfully attempts to violate [section 202] of this Act shall” (Sec. 207(b)(2)).</p> <p>“Any [U.S.] business that creates, provides, or hosts any Internet search engine may not alter the operation of such search engine with respect to protected filter terms either – (1) at the request of, or by reason of any other direct or indirect communication by, of a foreign official of an Internet-restricting country; or (2) in a manner intended or likely to produce different search engine results for users accessing the search engine from within an Internet-restricting country as compared to users elsewhere.” (Sec. 202).</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	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

HR 4780	Global Online Freedom Act of 2006
Description	Creates criminal liability for willful violations or attempts to violate this act.
Language	<p>“Any [U.S.] business [or officer, director, employee, agent, or stockholder acting on behalf of U.S. business] that willfully violates, or willfully attempts to violate [sections 203] of this Act shall” (Sec. 207(b)(2)).</p> <p>“Any [U.S.] business that creates, provides, or hosts an Internet search engine shall provide the Office of Global Internet Freedom, in a format and with a frequency to be specified by the Office, with all terms and parameters submitted, entered, or otherwise provided by any foreign official or an Internet-restricting country, that are used to filter, limit, or otherwise affect the results provided by the search engine when used by other users.” (Sec. 203).</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.
Grade	Moderate

HR 4780	Global Online Freedom Act of 2006
Description	Creates criminal liability for willful violations or attempts to violate this act.
Language	<p>“Any [U.S.] business [or officer, director, employee, agent, or stockholder acting on behalf of U.S. business] that willfully violates, or willfully attempts to violate [section 204] of this Act shall” (Sec. 207(b)(2)).</p> <p>“A [U.S.] business that maintains an Internet content hosting service may not conduct Internet jamming of a [U.S.]-supported website of [U.S.]-supported content in an internet</p>

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

	restricting country.” (Sec. 204).
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	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

HR 4780	Global Online Freedom Act of 2006
Description	Creates criminal liability for willful violations or attempts to violate this act.
Language	<p>“Any [U.S.] business [or officer, director, employee, agent, or stockholder acting on behalf of U.S. business] that willfully violates, or willfully attempts to violate [sections 205] of this Act shall” (Sec. 207(b)(2)).</p> <p>“Any [U.S.] business that maintains an Internet content hosting service shall provide the Office of Global Internet Freedom, in a format and with a frequency to be specified by the Office, with copies of all data and content that such business has, at the request of, or by reason of any other direct or indirect communication by, any foreign official of an Internet-restricting country – (1) removed from the content hosting service of such business; (2) blocked from availability on the Internet; or (3) blocked from transmission via the Internet into or within an Internet-restricting country.” (Sec. 205).</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.
Grade	Moderate

HR 4816	Amendment to prohibit the unauthorized construction of tunnels between the U.S. and another country
Description	Creates criminal liability for the financing of construction of tunnels under U.S. borders.
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” (Sec. 1(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.”

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

	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

HR 4816	Amendment to prohibit the unauthorized construction of tunnels between the U.S. and another country
Description	Creates criminal liability for the construction and use of tunnels under U.S. borders.
Language	“Any person who knowingly permits the construction or use of a tunnel or passage described in subsection (a) on land that the person owns or controls shall” (Sec. 1(a), 18 U.S.C. 554(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 categorization of this offense as “Moderate” assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the term “knowingly” applies to “construction or use of a tunnel or subterranean passage that crosses the international border between the [U.S.] and another country.” 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

HR 4817	To prohibit entities owned or controlled by foreign governments from carrying out operations at seaports in the United States
Description	Creates criminal liability for violations of the prohibition on operation of US seaports by foreign entities.
Language	“Any person who violates any requirement of subsection (a) . . . shall be subject to the penalties under [50 USC § 1705] to the same extent as penalties apply to violations under that act” (Sec. 1(c)). “No entity that is owned or controlled by a foreign government may – (1) conduct operations at any seaport in the [U.S.]; or (2) enter into any contract or other agreement to conduct such operations.” (Sec. 1(a)). “Unlawful acts - It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.” (50 U.S.C. § 1705(a)). “Criminal penalty – [a] person who willfully commits, willfully attempts to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall” (50 U.S.C. § 1705(c)).
Strengths	---
Weaknesses	This is a strict liability offense.
Other	This is so poorly drafted that it seems unreasonable to assume that a court would apply the <i>mens rea</i> requirement in Section 1705(c) to the conduct prohibited by Section 1(a) and

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

Considerations	(c).
Grade	None

HR 4817	To prohibit entities owned or controlled by foreign governments from carrying out operations at seaports in the United States
Description	Creates criminal liability for violations of the prohibition on operation of US seaports by foreign entities.
Language	<p>"Any person who violates . . . any regulation promulgated under subsection (b) shall be subject to the penalties under [50 USC § 1705] to the same extent as penalties apply to violations under that act . . ." (Sec. 1(c)).</p> <p>"Regulations – The President shall promulgate such regulations as may be necessary to enforce the requirements of subsection (a), including requiring any person to furnish, in the form of reports or otherwise, such information as is necessary to enforce such requirements." (Sec. 1(b)).</p> <p>"Unlawful acts - It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter." (50 U.S.C. § 1705(a)).</p> <p>"Criminal penalty – [a] person who willfully commits, willfully attempts to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall . . ." (50 U.S.C. § 1705(c)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	This is so poorly drafted that it seems unreasonable to conclude that a court would apply the <i>mens rea</i> requirement in Section 1705(c) to the conduct prohibited by Section 1(a) and (c).
Grade	None

HR 4830	Border Tunnel Prevention Act of 2006
Description	Creates criminal liability for the financing of construction of tunnels under U.S. borders.
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 . . ." (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."

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

	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

HR 4830	Border Tunnel Prevention Act of 2006
Description	Creates criminal liability for the allowance of construction and use of tunnels under U.S. borders.
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” (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.
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

HR 4839	To prohibit entities owned or controlled by foreign governments from conducting certain operations at seaports in the United States, and from entering into agreements to conduct such operations
Description	Creates criminal liability for willful violations of the prohibition on foreign governments conducting operations at US seaports.
Language	<p>“Any person who violates any requirement of subsection (a) . . . shall be subject to the penalties under [50 § USC 1705] to the same extent as penalties apply to violations under that Act.” (Sec. 1(d)).</p> <p>“No entity that is owned or controlled by a foreign government, or any agency or instrumentality thereof, may – (1) conduct operations at any seaport in the [U.S.] relating to – (A) the import or export of cargo by vessel, or the movement of cargo in connection with such import or export; or (B) the arrival or departure of the crew and passengers on a cargo vessel; or (2) enter into any contract or other agreement to conduct operations described in paragraph (1).” (Sec. 1(a)).</p> <p>“Unlawful acts - It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.” (50 U.S.C. § 1705(a)).</p> <p>“Criminal penalty – [a] person who willfully commits, willfully attempts to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall” (50 U.S.C. § 1705(c)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Other	This is so poorly drafted that it seems unreasonable to conclude that a court would apply the <i>mens rea</i> requirement in Section 1705(c) to the conduct prohibited by Section 1(a) and

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

Considerations	(c).
Grade	None

HR 4839	To prohibit entities owned or controlled by foreign governments from conducting certain operations at seaports in the United States, and from entering into agreements to conduct such operations
Description	Creates criminal liability for willful violations of the prohibition on foreign governments conducting operations at US seaports.
Language	<p>Any person who violates . . . any regulation promulgated under subsection (b) shall be subject to the penalties under [50 USC § 1705] to the same extent as penalties apply to violations under that Act.” (Sec. 1(d)).</p> <p>“Regulations – The President shall promulgate such regulations as may be necessary to enforce the requirements of subsection (a), including requiring any person to furnish, in the form of reports or otherwise, such information as is necessary to enforce such requirements.” (Sec. 1(b)).</p> <p>“Unlawful acts - It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.” (50 U.S.C. § 1705(a)).</p> <p>“Criminal penalty – [a] person who willfully commits, willfully attempts to commit, or aids or abets in the commission of, an unlawful act described in subsection (a) shall” (50 U.S.C. § 1705(c)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Other Considerations	This is so poorly drafted that it seems unreasonable to conclude that a court would apply the <i>mens rea</i> requirement in Section 1705(c) to the conduct prohibited by Section 1(a) and (c).
Grade	None

HR 4850	Pharmaceutical Products Price Equality Act
Description	Creates criminal liability for violating regulations limiting the profits of pharmaceutical products.
Language	<p>“Whoever knowingly violates any regulation prescribed or order issued under section 3 shall be fined not more than the amount equal to 200 percent of the amount of the sale related to each violation.” (Sec. 4(b)(1)).</p> <p>Section 3 is titled “reasonable limits on profits of pharmaceutical products” and provides the President with authority to issue regulations regarding pricing of such products. The President may delegate his rulemaking authority. (Sec. 3).</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

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

	<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. Thus, this offense is tabulated as a “Weak.”</p>
Grade	None-to-Weak

HR 4925	Paul Revere Freedom to Warn Act
Description	Creates criminal liability for whistleblower discrimination practices if used against members of the uniformed services.
Language	<p>“It shall be unlawful for any person to discharge, demote, suspend, reprimand, investigate, or take or fail to take any other personnel action that in any manner discriminates against any covered individual . . . or to threaten [such action], or other manner of discrimination if such action, discrimination, or recommendation is due, in whole or in part, to any lawful act done, perceived to have been done, or intended to be done by the covered individual [to whistleblow, to participate in legal proceedings, or to refuse to participate in unlawful activity].” (Sec 2).</p> <p>“Any person violating section 2 may be” (Sec. 6).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	Many employers will be knowledgeable and on notice of whistleblower and employment rules.
Grade	None

HR 4954	SAFE Port Act
Description	Creates criminal liability for money transfers related to internet gambling.
Language	<p>“No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling -- [credit, an electronic fund transfer, a check or similar instrument, or any form of a financial/money transfer].” (Sec. 802(a), 31 U.S.C. § 5363).</p> <p>“Any person who violates section 5363 shall” (Sec. 802(a), 31 U.S.C. § 5366).</p> <p>“The term ‘business of betting or wagering’ does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.” (Sec. 802(a), 31 U.S.C. § 5362(bb)(2)).</p> <p>“The term ‘unlawful Internet gambling’ means to place, receive or otherwise knowingly transmit a bet or wager by any means which involved the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” (Sec. 802(a), 31 U.S.C. § 5362(bb)(10)).</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

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

	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	Weak

HR 4975	527 Reform Act of 2006
Description	Creates criminal liability for violations of lobbying restrictions.
Language	<p>"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 . . ." (Sec. 106, 2 U.S.C. § 1606(b)).</p> <p>"Whoever knowing and corruptly fails to comply with any provision of [Chapter 26 – Disclosure of Lobbying Activities] shall . . ." (2 U.S.C. § 1606(b)).</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>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>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> <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

HR 4999	Chemical Facility Anti-Terrorism Act of 2006
Description	Creates criminal liability for failure to comply with chemical plan security plans.
Language	"An owner or operator of a chemical source who knowingly violates any order issued by the Secretary under this Act or knowingly fails to comply with a site security plan approved by the Secretary under this Act shall . . ." (Sec. 8(c)).

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. The orders referenced in the offense language may be issued only after notice and opportunity for a hearing. (Sec. 4(c)).
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 criminal offense makes no provision for failure to comply with orders that would be infeasible, financial ruinous, or practically impossible to fulfill. 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

HR 4999	Chemical Facility Anti-Terrorism Act of 2006
Description	Creates criminal liability for disclosure of certain records by government officials.
Language	“An officer or employee of a Federal State, or local government agency who, in a manner or to an extent not authorized by law, knowingly discloses any record described in paragraph (1)(B), (2)(C), or (3)(B) of subsection (a) shall” (Sec. 9(j)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	Does not require the defendant to know that they are violating the law. The class of potential defendants and restricted records to which this offense may be applied is broad and is not limited, for example, to those officers or employees who are in positions of trust or trained in these laws and regulations.
Grade	Weak

HR 5030	Prevention of Aquatic Invasive Species Act of 2006
Description	Creates criminal liability for violations of agency regulations regarding ballast water management.
Language	“Any person who knowingly violates the regulations promulgated under this section is guilty of a class C felony.” (Sec. 101(a), 16 U.S.C. § 1101(l)(2), [Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990]).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The exceptions (see next row) are not clear and do not necessarily relieve defendants of criminal liability.
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

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

	<p>be on notice of the criminalization of <i>malum prohibitum</i> conduct.</p> <p>Exceptions if uptake or discharge is: “solely for the purpose of ensuring the safety of the vessel in an emergency situation; or saving a life at sea,” “accidental and the result of damage to the vessel or its equipment,” “all reasonable precautions” were taken, and the owner did not “willfully or recklessly cause the damage.” (Sec. 101(a), 16 U.S.C. § 1101 (b)(2)).</p> <p>This bill includes a “Safety or Stability Exception” for failures to comply where compliance would “threaten the safety or stability of the vessel, its crew, or its passengers because of adverse weather, equipment failure, or any other relevant condition,” (Sec. 101 (a), 16 U.S.C. § 1101 (f)(4)(A)), and a “Partial Compliance” provision, (Sec. 101 (a), 16 U.S.C. § 1101 (f)(8)). However, conduct under these provisions is subject to review and does not necessarily operate as a safe harbor against criminal conviction for vessel operators who have failed to comply.</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. Thus, this offense is tabulated as a “Weak.”</p>
Grade	None-to-Weak

HR 5037	Respect for America's Fallen Heroes Act
Description	Criminal penalty for demonstrations on the grounds of national cemeteries.
Language	<p>“No person may carry out (1) a demonstration on the property of a [national cemetery] unless the demonstration has been approved by the cemetery superintendent or the director of the property on which the cemetery is located” (Sec. 2(a), 38 U.S.C. § 2413(a)(1)).</p> <p>“Whoever violates [38 U.S.C. § 2413] shall” (Sec. 3, 18 U.S.C. 1387).</p> <p>“[T]he term ‘demonstration’ includes . . . (1) [a]ny picketing or similar conduct. (2) [a]ny oration, speech, use of sound amplification equipment or device, or similar conduct that is not part of a funeral, memorial service, or ceremony. (3) [t]he display of any placard, banner, flag, or similar device, unless such a display is part of a funeral, memorial service, or ceremony. (4) [t]he distribution of any handbill, pamphlet, leaflet, or other written or printed matter other than a program distributed as part of a funeral, memorial service, or ceremony.” (2(a), 38 U.S.C. § 2413(b)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	<p>Exception for authorized demonstrations.</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	None

HR 5037	Respect for America's Fallen Heroes Act
Description	Criminal penalty for demonstrations near national cemeteries.
Language	“No person may carry out (2) with respect to such a cemetery, a demonstration during the period beginning 60 minutes before and ending 60 minutes after a funeral, memorial service, or ceremony is held, any part of which demonstration – (A) (i) takes place within 150 feet of a road, pathway, or other route of ingress to or egress from such cemetery

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

	<p>property; and (ii) includes, as part of such demonstration, any individual willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral, memorial service, or ceremony; or (B) is within 300 feet of such cemetery and impedes the access to or egress from such cemetery.” (Sec. 2(a), 38 U.S.C. § 2413(a)(2)).</p> <p>“Whoever violates [38 U.S.C. § 2413] shall” (Sec. 3, 18 U.S.C. 1387).</p> <p>See preceding entry for the definition of the term “demonstration.”</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	A defendant could be convicted under this offense for “carry[ing] out” a demonstration in which another person, acting with or without the defendant’s knowledge or permission, “mak[es] any noise or diversion that disturbs or tends to disturb the peace or good order.”
Grade	None

HR 5051	Magnuson-Stevens Fishery Conservation and Management Amendments Act of 2006
Description	Creates criminal liability for violating parts of this Act related to fishing, fishing vessels, inspection, etc.
Language	<p>“Any person . . . who knowingly violates [16 U.S.C. § 1857(1)(D)] shall” (Sec. 119(b), 16 U.S.C. § 1859(a)(1)).</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(1)(D)).</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	<p>The analysis of this offense assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i>, the term “knowingly” in 16 U.S.C. § 1859(a)(1) only applies to the clause in 16 U.S.C. § 1857(1)(D) “to refuse to permit” and possibly “any officer,” but nothing further.</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

HR 5051	Magnuson-Stevens Fishery Conservation and Management Amendments Act of 2006
Description	Creates criminal liability for violating parts of this Act related to fishing, fishing vessels, inspection, etc.
Language	“Any person . . . who knowingly violates [16 U.S.C. § 1857(1)(H)] shall” (Sec. 119(b), 16 U.S.C. § 1859(a)(1)).

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

	"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)).
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>This offense does not define who or what agency 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.</p> <p>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.</p>
Grade	Weak

HR 5051	Magnuson-Stevens Fishery Conservation and Management Amendments Act of 2006
Description	Creates criminal liability for violating parts of this Act related to fishing, fishing vessels, inspection, etc.
Language	<p>"Any person . . . who knowingly violates [16 U.S.C. § 1857(1)(I)] shall . . ." (Sec. 119(b), 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	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	The categorization of this offense as "Strong" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the terms "knowingly and willfully" apply to the terms "submit," "to a Council, the Secretary, or the Governor of a State," and "false information."
Grade	Strong

HR 5051	Magnuson-Stevens Fishery Conservation and Management Amendments Act of 2006
Description	Creates criminal liability for violating parts of this Act related to fishing, fishing vessels, inspection, etc.
Language	<p>"Any person . . . who knowingly violates [16 U.S.C. § 1857(2)] shall . . ." (Sec. 119(b), 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</p>

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

	fishing permitted under section 1821(i) of this title]" (16 U.S.C. § 1857(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	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

HR 5100	Great Lakes Collaboration Implementation Act
Description	Creates criminal liability for violations of agency regulations regarding the exchange of ballast water by ships in the Great Lakes Region.
Language	"Any person that knowingly violates the regulations promulgated under subsection (b) is guilty of a class C felony." (Sec. 108, 16 U.S.C. § 1101(g)(2) [Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990]).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense. The "good faith" requirement for the safety exception (see next row) is not a commonly used standard for criminal liability.
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 bill includes a partial compliance provision, (Sec. 107, 16 U.S.C. § 1101 (e)(3)(D)(ii)), but it is poorly worded and unclear whether it operates as a safe harbor against criminal conviction of vessel operators who have failed to comply fully despite best efforts. There is also an exception for failure to exchange ballast water if the "master of a vessel, acting in good faith, decides that the exchange of ballast water will threaten the safety or stability of the vessel or the crew or passengers of the vessel" and the vessel complies with recordkeeping, contingency, and reporting requirements. (Sec. 108, 16 U.S.C. § 1101(g)(4)). 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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 5188	Jane's Law
Description	Creates criminal liability for evasion of ordered child support payments.

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

Language	"Whoever knowingly, travels in interstate or foreign commerce, with the intent to evade compliance with a court ordered property distribution as part of a separation or divorce settlement involving more than \$5000, with respect to a spouse or former spouse, shall . . ." (Sec. 2(a), 18 U.S.C. § 228A).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. The requirement that the defendant act with the specific "intent to evade" compliance with a court order should preclude conviction of defendants who lacked a guilty mind.
Weaknesses	Federal courts should generally interpret "knowingly," when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Grade	Strong

HR 5209	Safe Tissue Act
Description	Creates criminal liability for fraudulently obtaining consent for tissue donation.
Language	"An establishment, or an individual employed by an establishment, that knowingly uses fraudulent information for, or fraudulent means of, obtaining the consent described under the model form under subsection (a) shall be . . ." (Sec. 4(d)(2)). "The Secretary shall publish in the Federal Register a model form containing minimum requirements for establishments to use in obtaining consent from a potential donor, or the legally authorized representative of a potential donor, of human cells, tissues, or cellular or tissue-based products." (Sec. 4(a)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. This is a proper use of the "knowingly" 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" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the government must prove that the defendant knew that the "information" or "means" was "fraudulent."
Grade	Moderate

HR 5248	Prevent Unfair Manipulation of Prices Act of 2006
Description	Creates criminal liability for violating the prohibitions on fraudulent transactions.
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. 5, 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.

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

Other Considerations	The offense does not define “cheat.” Given the language in 7 U.S.C. § 13(a)(4) that reserves a prison sentence for only those defendants who “had knowledge of such rule or regulation,” the government need only prove that the defendant knew his conduct was wrongful and not necessarily unlawful in order to obtain a conviction for this offense.
Grade	Moderate

HR 5248	Prevent Unfair Manipulation of Prices Act of 2006
Description	Creates criminal liability for violating the prohibitions on fraudulent transactions.
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. 5, 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	Given the language in 7 U.S.C. § 13(a)(4) that reserves a prison sentence for only those defendants who “had knowledge of such rule or regulation,” the government need only prove that the defendant knew his conduct was wrongful and not necessarily unlawful in order to obtain a conviction for this offense.
Grade	Moderate

HR 5248	Prevent Unfair Manipulation of Prices Act of 2006
Description	Creates criminal liability for violating the prohibitions on fraudulent transactions.
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. 5, 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	Given the language in 7 U.S.C. § 13(a)(4) that reserves a prison sentence for only those defendants who “had knowledge of such rule or regulation,” the government need only prove that the defendant knew his conduct was wrongful and not necessarily unlawful in order to obtain a conviction for this offense.
Grade	Moderate

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

HR 5248	Prevent Unfair Manipulation of Prices Act of 2006
Description	Creates criminal liability for violating the prohibitions on fraudulent transactions.
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. 5, 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	Given the language in 7 U.S.C. § 13(a)(4) that reserves a prison sentence for only those defendants who "had knowledge of such rule or regulation," the government need only prove that the defendant knew his conduct was wrongful and not necessarily unlawful in order to obtain a conviction for this offense.
Grade	Moderate

HR 5248	Prevent Unfair Manipulation of Prices Act of 2006
Description	Amends language in the violations provision of the Commodity Exchanges Chapter.
Language	Language, as per amendment proposed by H.R. 5248, 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 6(e), 7 U.S.C. § 13(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	<p>This amendment would actually improve the <i>mens rea</i> provision in the existing 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.</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. Thus, this offense is tabulated as a "Moderate."</p>
Grade	Weak-to-Moderate

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

HR 5253	Federal Energy Price Protection Act of 2006
Description	Creates criminal liability for “price gouging” on oil products, a term that is to be defined by regulatory agencies.
Language	<p>“It shall be an unfair or deceptive act or practice . . . for any person to sell crude oil, gasoline, diesel fuel, home heating oil, or any biofuel at a price that constitutes price gouging as defined by rule pursuant to subsection (b).” (Sec. 2(a)(1)).</p> <p>“Not later than 6 months after the date of the enactment of this Act, the [FTC] shall promulgate . . . any rules necessary for the enforcement of this section.” (Sec. 2(b)(1)).</p> <p>“Criminal Penalty . . . a violation of subsection (a) is punishable” (Sec. 2(f)(1)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Other Considerations	The term “price gouging” is not a fixed term defined by the statute, but rather is defined by regulations to be promulgated after enactment of this offense.
Grade	None

HR 5304	Preventing Harassment through Outbound Number Enforcement Act
Description	Creates criminal liability for modifying caller ID information while intending to harass or defraud.
Language	<p>“Whoever knowingly modifies caller ID information with the intent to defraud or harass another person . . . shall” (Sec. 2(a), 18 U.S.C. § 1039(a)).</p> <p>“The term ‘caller ID information’ means information transmitted – (i) by a service or device; (ii) to the recipient of a telephone call; and (iii) regarding the telephone number of, or other information regarding the origination of, the telephone call.” (Sec. 2(a), 18 U.S.C. § 1039(d)).</p>
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences. The specific “intent to defraud or harass” requirement should preclude conviction of defendants who lacked a guilty mind.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	The terms “defraud” and “harass” are not defined and do not have precise, clear, and fixed meanings in federal criminal law. “This section does not prohibit the following: (1) Any blocking of caller ID information. (2) Any lawfully authorized [law enforcement activity] or any activity authorized under chapter 224 of this title.” (Sec. 2(a), 18 U.S.C. § 1039(c)).
Grade	Moderate

HR 5304	Preventing Harassment through Outbound Number Enforcement Act
Description	Creates criminal liability for modifying caller ID information while intending to harass or defraud.
Language	<p>“Whoever knowingly modifies caller ID information . . . to use another person’s caller ID information without consent, shall” (Sec. 2(a), 18 U.S.C. § 1039(a)).</p> <p>“The term ‘caller ID information’ means information transmitted – (i) by a service or device; (ii) to the recipient of a telephone call; and (iii) regarding the telephone number of, or other</p>

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

	information regarding the origination of, the telephone call.” (Sec. 2(a), 18 U.S.C. § 1039(d)).
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	“This section does not prohibit the following: (1) Any blocking of caller ID information. (2) Any lawfully authorized [law enforcement activity] or any activity authorized under chapter 224 of this title.” (Sec. 2(a), 18 U.S.C. § 1039(c)).
Grade	Weak

HR 5307	Pharmacists Medicare Relief Act of 2006
Description	Creates criminal liability for unlawfully co-branding.
Language	<p>“Whoever knowingly and willfully engages in co-branding prohibited under [42 U.S.C. § 1395w-104(l)] with respect to a prescription drug plan offered by a PDP sponsor under part D of title XVIII or a Medicare Advantage plan offered by a Medicare Advantage organization under part C of such title, shall” (Sec. 3(b), 42 U.S.C. § 1320a-7b(g)).</p> <p>“Co-Branding Prohibited – A card that is issued under subsection (b)(2)(A) for use under a prescription drug plan offered by a PDP sponsor or an MA-PD plan offered by a Medicare Advantage organization and any marketing materials distributed with respect to such a plan shall not display the name or brand of any pharmacy.” (Sec. 3(a), 42 U.S.C. § 1395w-104)(l)).</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.
Grade	Moderate

HR 5318	Cyber Security Enhancement and Consumer Data Protection
Description	Creates criminal liability for failure to inform federal law enforcement officials regarding a security breach involving personal identification data.
Language	<p>“Whoever owns or possesses data in electronic form containing a means of identification (as defined in section 1028), having knowledge of a major security breach of the system containing such data maintained by such person, and knowingly fails to provide notice of such breach [to the Secret Service or FBI], with intent to prevent, obstruct, or impede a lawful investigation of such breach, shall” (Sec. 7(a), 18 U.S.C. § 1039(a)).</p> <p>“The term ‘major security breach’ means any security breach – (A) whereby means of identification pertaining to 10,000 or more individuals is, or is reasonably believed to have been acquired, and such acquisition causes a significant risk of identity theft; (B) involving databases owned by the Federal Government; or (C) involving primarily data in electronic form containing means of identification of Federal Government employees or contractors involved in national security matters or law enforcement.” (Sec. 7(a), 18 U.S.C. § 1039(b)(1)).</p> <p>“The term ‘significant risk of identity theft’ means such risk that a reasonable person would conclude, after a reasonable opportunity to investigate, that it is more probably than not that identity theft has occurred or will occur as a result of the breach.” (Sec. 7(a), 18 U.S.C. § 1039(b)(2)).</p>

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. The specific intent to “prevent, obstruct, or impede” should protect from conviction those defendants who lacked a guilty mind.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense.
Other Considerations	Exception - If the data is encrypted or otherwise been rendered unusable then there shall be a rebuttable presumption that the breach has not caused a significant risk of identity theft. (Sec. 7(a), 18 U.S.C. § 1039(b)(2)(B)).
Grade	Strong

HR 5414	To enact certain laws relating to public contracts as title 41, United States Code, 'Public Contracts'
Description	Creates criminal liability for corruption regarding federal procurement awards.
Language	<p>“A person that violates section 2102 of this title to exchange information covered by section 2102 of this title for anything of value or to obtain or give a person a competitive advantage in the award of a federal agency procurement contract shall . . .” (Sec. 2105(a), § 41 U.S.C. 2105(a)).</p> <p>“Prohibition on disclosing procurement information – [A] person described in paragraph (3) shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.” (Sec. 2102(a)(1)).</p> <p>Application: (i) present and former officials of the Federal Government; (ii) persons acting on behalf of or advising those in (i); or (iii) persons who have access to such information; and applies to private sector employees assigned to agencies during the 3-year period after the end of the assignment. (Sec. 2102(a)(2)-(3)).</p> <p>“Prohibition on obtaining procurement information – [A] person shall not knowingly obtain contractor bid or proposal information or source selection information before the aware of a Federal agency procurement contract to which the information related.” (Sec. 2102(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	Although the disclosure provisions are limited in application to many who should be on notice, the scope of potential application is to a broader class of persons and the prohibited conduct is both broad and undefined. Further, the “obtaining” provision is not limited in application to those who should be on notice.
Grade	Weak

HR 5432	MINER Act
Description	Creates criminal liability for willfully violating health and safety standards and orders.
Language	“Any operator who willfully violates a mandatory health or safety standard . . . shall . . .” (Sec. 8(a), 30 U.S.C. § 820(e)(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	Willfully standing alone may not require knowledge of the standards.

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

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. Thus, this offense is tabulated as a "Moderate."
Grade	Weak-to-Moderate

HR 5432	MINER Act
Description	Creates criminal liability for knowingly violating orders issued under this Act.
Language	"Any operator who . . . knowingly violates or fails or refuses to comply with any order issued under [30 U.S.C. §§ 814 and 817], or any order incorporated in a final decision issued under this title . . . shall . . ." (Sec. 8(a), 30 U.S.C. § 820(e)(1)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences.
Weaknesses	Federal courts should generally interpret "knowingly," when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant's knowledge of the facts constituting the offense.
Other Considerations	Under the Supreme Court's decision in <i>Flores-Figueroa</i> , the court should require the defendant to know of the "order." It appears from the statutory scheme that the only "orders" referred to in these provisions may be "withdrawal orders" that are issued only after a citation has been issued, which should put the operator on notice.
Grade	Moderate

HR 5467	Veterans Identity Security Act of 2006'
Description	Creates criminal liability for disclosure of veterans' personal records held by the government.
Language	"Any person described in subsection (b) who other than as authorized by section 5901 of this title or as otherwise authorized by law knowingly discloses, or causes the disclosure of, records specified in subsection (c) with intent to sell, transfer, or use personal information contained in the disclosed records for commercial advantage, personal gain, or malicious harm shall . . ." (Sec. 2(a), 38 U.S.C. § 5706(a)). Applies to: an officer, employee, contractor, employee of a contractor, or a volunteer of the Department of Veterans Affairs. (Sec. 2(a), 38 U.S.C. § 5706(b)). Specified records: "records of the Department that are covered by section 5701(a) of this title and that contain personal information about a veteran or any other person receiving benefits, or applying for benefits, under laws administered by the Secretary." (Sec. 2(a), 38 U.S.C. § 5706(c)). "All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary . . . shall be confidential and privileged, and no disclosure thereof shall be made . . ." (38 U.S.C. § 5701(a)). "[T]he term 'personal information' means one or more of the following: name, date of birth, address, phone number, Social Security number, and (if applicable) disability rating." (Sec. 2(a), 38 U.S.C. § 5706(d)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. The "with intent to" reduces the likelihood of conviction of defendants who

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

	lacked a guilty mind.
Weaknesses	Federal courts should generally interpret “knowingly,” when used as a blanket <i>mens rea</i> term, to require proof merely of the defendant’s knowledge of the facts constituting the offense. The “with intent to” phrase covers conduct that is not <i>malum in se</i> .
Grade	Moderate

HR 5481	MINERS for Mining Act
Description	Creates criminal liability for willfully violating health and safety standards and orders.
Language	“Any operator who willfully violates a mandatory health or safety standard . . . shall . . .” (Sec. 8(a), 30 U.S.C. § 820(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. Thus, this offense is tabulated as a “Moderate.”
Grade	Weak-to-Moderate

HR 5481	MINERS for Mining Act
Description	Creates criminal liability for knowingly violating orders issued under this Act.
Language	“Any operator who . . . knowingly violates or fails or refuses to comply with any order issued under [30 U.S.C. §§ 814 and 817], or any order incorporated in a final decision issued under this title . . . shall . . .” (Sec. 8(a), 30 U.S.C. § 820(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	Under the Supreme Court’s decision in <i>Flores-Figueroa</i> , the court should require the defendant to know of the “order.” It appears from the statutory scheme that the only “orders” referred to in these provisions are “withdrawal orders” that are issued only after a citation has been issued and should put the operation on notice.
Grade	Moderate

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

HR 5577	Veterans' Identity Protection Act of 2006
Description	Creates criminal liability for any unauthorized removal of documents from the Department of Veterans Affairs.
Language	<p>"Any officer or employee of the Department of Veterans Affairs, who, except as authorized by law or by the Secretary of Veterans Affairs, removes from the custody of the [Department] any file, record, report, or document of the [Department] that is subject to [38 U.S.C. § 5701], shall . . ." (Sec. 5).</p> <p>"All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Secretary . . . shall be confidential and privileged, and no disclosure thereof shall be made. . . ." (38 U.S.C. § 5701(a)).</p>
Strengths	---
Weaknesses	This is a strict liability provision.
Grade	None

HR 5676	Federal Election Administration Act of 2006
Description	Creates criminal liability for violating this Act with regard to contributions.
Language	"Any person who knowingly and willfully commits a violation of any provision of [the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 et seq.] that involves the making, receiving, or reporting of any contribution, donation, or expenditure [aggregating \$2,000 or more during a calendar year] shall . . ." (Sec. 101(a), 2 U.S.C. § 379(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	<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. Thus, this offense is tabulated as a "Moderate."</p>
Grade	Weak-to-Moderate

HR 5714	Rail and Public Transportation Security Act of 2006
Description	Creates criminal liability for violating orders issued under this Act.
Language	"A railroad carrier or public transportation system owner or operator who knowingly and intentionally violates any order issued by the Secretary under this title shall. . ." (Sec. 3, 6 U.S.C. § 1803(e)(3)).
Strengths	The "knowingly" requirement should protect some defendants against conviction for some inadvertences. Federal courts generally interpret "intentionally" to require conduct that is

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

	not committed by accident or otherwise inadvertently.
Weaknesses	"Intentionally" does not limit the offense to conduct committed knowing that it is unlawful or otherwise wrongful.
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. Thus, this offense is tabulated as a "Weak."
Grade	None-to-Weak

HR 5726	Intercountry Adoption Reform Act of 2006 - ICARE Act
Description	Creates criminal liability for violating the act.
Language	"Whoever knowingly and willfully commits a violation described in paragraph (1) or (2) of section 401(a) shall . . ." (Sec. 402). "A person shall be subject to . . . if such person – (1) violates a provision of this Act or an amendment made by this Act . . ." (Sec. 401(a)(1)).
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. This offense covers every provision in this act, which is actually 16 pages long and includes 19 separate actions.
Grade	Moderate

HR 5726	Intercountry Adoption Reform Act of 2006 - ICARE Act
Description	Creates criminal liability for making false statements or engaging in bribery.
Language	"Whoever knowingly and willfully commits a violation described in paragraph (1) or (2) of section 401(a) shall . . ." (Sec. 402). "A person shall be subject to . . . if such person – (2) makes a false or fraudulent statement, or misrepresentation, with respect to a material fact . . . intended to influence or affect in the [U.S.] or a foreign country – (A) a decision for an approval under title II; (B) the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child; or (C) a decision or action of any entity performing a central authority function . . ." (Sec. 401(a)(2)).
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 offense requires proof that the defendant intended his false statement to influence an official act.
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

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

	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 the statement was “false or fraudulent” and knew that it was made “with respect to a material fact.”</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

HR 5726	Intercountry Adoption Reform Act of 2006 - ICARE Act
Description	Creates criminal liability for making false statements or engaging in bribery.
Language	<p>“Whoever knowingly and willfully commits a violation described in paragraph (1) or (2) of section 401(a) shall . . .” (Sec. 402).</p> <p>“A person shall be subject to . . . if such person – (2) . . . offers, gives, solicits, or accepts inducement by way of compensation, intended to influence or affect in the [U.S.] or a foreign country – (A) a decision for an approval under title II; (B) the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child; or (C) a decision or action of any entity performing a central authority function” (Sec. 401(a)(2)).</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	The categorization of this offense as “Moderate” assumes that the government must prove that the defendant knew the conduct was “intended to influence” However, the language of this offense is so poorly drafted that it is not entirely clear what conduct is prohibited.
Grade	Moderate

HR 5945	Prescription Privacy Protection Act of 2006
Description	Creates criminal liability for misusing prescriber health information.
Language	<p>“A drug manufacturer (as defined for purposes of section 1927) may not, directly or indirectly, use prescriber identifiable health information for commercial purposes.” (Sec. 2(a), Title XI of the Social Security Act (42 U.S.C. § 1301 et seq.) Sec. 1180(a)).</p> <p>“Any manufacturer that violates subsection (a) shall” (Sec. 2(a), Title XI of the Social Security Act (42 U.S.C. § 1301 et seq.) Sec. 1180(b)).</p>
Strengths	---
Weaknesses	This is a strict liability offense.

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

Other Considerations	This offense covers a highly regulated industry in which many of those covered by this offense may be on notice of these requirements.
Grade	None

HR 5962	Medicare Fraud Prevention and Enforcement Act of 2006
Description	Creates criminal liability for misusing information in health databases.
Language	"Whoever knowingly uses information maintained in the health integrity protection database maintained in accordance with section 1128E for a purpose other than a purpose authorized under that section shall . . ." (Sec. 4(b), 42 U.S.C. § 1320a-7b(b)(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.
Other Considerations	This categorization of this offense as "Weak" assumes that, under the Supreme Court's decision in <i>Flores-Figueroa</i> , the term "knowingly" does not require the defendant to know what purposes are "authorized under [section 1128E]" and what purposes are not authorized.
Grade	Weak

HR 6109	Stop Endangering the Records of Veterans Act of 2006
Description	Creates criminal liability for disclosure of sensitive personal information processed or maintained by the Secretary of Veterans Affairs.
Language	"Any person who engages in the unauthorized disclosure of sensitive personal information processed or maintained by the Secretary or by a contractor performing a function on behalf of the Secretary shall . . ." (Sec. 3(a), 38 U.S.C. § 5725).
Strengths	---
Weaknesses	This is a strict liability offense.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to – (1) make any false or misleading statement, guarantee, or promise to any client, prospective client, or the public while providing, offering, or advertising services." (Sec. 4(a)). "Any immigration consultant who commits any act set forth in subsection (a) shall . . ." (Sec. 4(b)). "The term 'immigration consultant' – (A) means any individual, organization, or entity that in exchange for compensation or the expectation of compensation, promises to provide or

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

	provides assistance or advice on an immigration matter; and (B) does not include any attorney, individual employed by and working under the direct supervision of one or more attorneys, or any accredited representative.” (Sec. 3(4)).
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	“It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to make any statement indicating or implying that the immigration consultant can or will obtain special favors from, or has special influence with, any government agency.” (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	“It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to demand or retain any fees or compensation for services not performed, or costs that are not actually incurred.” (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

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

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to represent that a fee may be charged, or charge a fee for the distribution, provision, or submission of any official document or form issued or promulgated by a State or Federal governmental entity, or for a referral of the client to another individual or entity that is qualified to provide services or assistance which the immigration consultant will not provide." (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to refuse to return any document or fail to provide copies supplied by, prepared on behalf of, or paid for by, any client or prospective client, even in the event of a fee dispute." (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to select forms to be filed with any government agency in connection with an immigration matter." (Sec. 4(a)). See preceding offense for definitions.
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

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

	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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to disclose any information to, or file any forms or documents with, immigration or other authorities without the knowledge or consent of the client." (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to engage in unauthorized practice of law in connection with an immigration matter, as such is defined by applicable State statutes, regulations, rules, or municipal ordinances, in conjunction with an immigration matter." (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	"It shall be unlawful for any immigration consultant to intentionally or with reckless disregard for the truth to hold himself or herself out to any client, prospective client, or to the public

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

	as engaging in or entitled to engage in the practice of law, or uses any title in any language, such as ‘notario’ or ‘notary public,’ to convey attorney status.” (Sec. 4(a)). See preceding offense for definitions.
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.
Grade	None

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for misleading immigration consultant practices and prohibits certain advertising and consultation practices regarding immigration.
Language	“It shall be unlawful for an immigration consultant to make any advertisement unless the advertisement includes a statement that the immigration consultant is not an attorney, that the immigration consultant cannot provide legal advice or select forms for use by clients or prospective clients, and that the immigration consultant cannot obtain special favors from and has no special influence with, [U.S.] Citizenship and Immigration Services.” (Sec. 5(a)). “Any immigration consultant who knowingly fails to perform any requirement set forth in this section shall” (Sec. 5(d)). See preceding offense for definitions.
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

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for certain advertising practices and violations of rules for advertising regarding immigration.
Language	“It shall be unlawful for an immigration consultant to perform immigration consulting services unless, in any office in which an immigration consultant meets with clients or prospective clients, the immigration consultant has conspicuously displayed a notice, no smaller than 12 inches by 20 inches and in boldface print no smaller than 1 inch in height, that includes – (1) a statement that the immigration consultant is not an attorney, cannot select forms for use by the client, and cannot provide legal services in any immigration matter; and (2) a statement that the immigration consultant cannot obtain special favors from, and has no special influence with, [U.S.] Citizenship and Immigration Services.” (Sec. 5(b)). “Any immigration consultant who knowingly fails to perform any requirement set forth in this section shall” (Sec. 5(d)). See preceding offense for definitions.
Strengths	The “knowingly” requirement should protect some defendants against conviction for some inadvertences.

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

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

HR 6190	Immigration Relief and Protection Act of 2006
Description	Creates criminal liability for certain advertising practices and violations of rules for advertising regarding immigration.
Language	<p>“It shall be unlawful for an immigration consultant knowingly to act in an immigration matter unless the immigration consultant has entered into a written contract (in both English and the other principal language of the client, if not English) with the client that includes – [description of services, fees, the statement in Sec. 5(b), and other procedural matters].” (Sec. 5(c)).</p> <p>“Any immigration consultant who knowingly fails to perform any requirement set forth in this section shall” (Sec. 5(d)).</p> <p>See preceding offense for definitions.</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	This analysis does not assume that the government must prove that the defendant had knowledge of the specifics of the required disclosure.
Grade	Weak

HR 6225	National Insurance Act of 2006
Description	Creates criminal liability for participating in national insurance affairs without authorization.
Language	<p>“Any person who, being subject to an order under section 145 or 146 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” (Sec. 149(c), 18 U.S.C. § 404).</p> <p>“Any suspension order issued under this subsection – (A) shall become effective upon service” (Sec. 145(b)(2)). “service” is not defined in this sections 145, 146, or 149.</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	<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.</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>

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

	<p>“Participate” is a broad, vague term, and the provision does not define what it means either to “participate[]” or to “knowingly participate[].”</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. Thus, this offense is tabulated as a “Weak.”</p>
Grade	None-to-Weak

HR 6281	Medicare Prescription Drug Savings for Our Seniors (Medicare Prescription Drug SOS) Act of 2006
Description	Creates criminal liability for fraud in connection with enrollment under an MA Plan or Prescription Drug Plan.
Language	“Whoever knowingly and willfully -- (1) defrauds an individual in connection with the enrollment [in a Medicare plan] . . .” (Sec. 301(a), 42 U.S.C. § 1395w-27(j)).
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 term “defrauds” is not defined by the statute, and does not have a precise, clear, and fixed meaning in federal criminal law.
Grade	Moderate

HR 6281	Medicare Prescription Drug Savings for Our Seniors (Medicare Prescription Drug SOS) Act of 2006
Description	Creates criminal liability for fraud in connection with enrollment under an MA Plan or Prescription Drug Plan.
Language	“Whoever knowingly and willfully . . . fraudulently or falsely represents an entity to be such a plan for purposes of inducing enrollment . . .” (Sec. 301(a), 42 U.S.C. § 1395w-27(j)).
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 term “knowingly” applies to the phrase “for purposes of inducing enrollment.”
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 assumes that, under the Supreme Court’s decision in <i>Flores-Figueroa</i>, the government must prove that the defendant knew the representation was fraudulent or false and knew that it was done for the specific intent of “inducing enrollment.”</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

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

HR 6338	Geneva Distinctive Emblems Protection Act of 2006
Description	Criminal penalty for displaying Geneva emblems (etc) for fraudulent purpose.
Language	<p>"Whoever wears or displays the sign of the Red Crescent of the Third Protocol Emblem (the Red Crystal), or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for an authorized national society using the Red Crescent or the Third Protocol Emblem, the International Committee of the Red Cross, or the International Federation of Red Cross and Red Crescent Societies shall" (Sec. 2(a), 18 U.S.C. § 706a(a)).</p> <p>"The following may use such emblems and designations consistent with the Geneva Conventions of August 12, 1949, and, if applicable, the Additional Protocols: Authorized national societies that are members of the International Federation of Red Cross and Red Crescent Societies and their duly authorized employees and agents; [The International Committee of the Red Cross and The International Federation of Red Cross and Red Crescent Societies and the duly authorized employees and agents of both; and] The sanitary and hospital authorities of the armed forces of State Parties to the Geneva Conventions of August 12, 1949." (Sec. 2(a), 18 U.S.C. § 706a(d)).</p> <p>"This section does not make unlawful the use of any such emblem, sign, insignia, or words which was lawful on or before December 8, 2005, if such use would not appear in time of armed conflict to confer the protections of the Geneva Conventions of August 12, 1949, and, if applicable, the Additional Protocols." (Sec. 2(a), 18 U.S.C. § 706a(d)).</p>
Strengths	Requires a "fraudulent purpose."
Weaknesses	The term "fraudulent purpose" is not a well-defined <i>mens rea</i> term, and does not have a precise, clear, and fixed meaning in federal criminal laws.
Grade	Weak

HR 6338	Geneva Distinctive Emblems Protection Act of 2006
Description	Creates criminal liability for displaying Geneva emblems and related items for a fraudulent purpose.
Language	<p>"[W]hoever, whether a corporation, association, or person, uses the emblem of the Red Crescent or the Third Protocol Emblem on a white ground or any sign or insignia made or colored in imitation thereof or the designations 'Red Crescent' or 'Third Protocol Emblem' shall" (Sec. 2(a), 18 U.S.C. § 706a(b)).</p> <p>See preceding offense for exceptions.</p>
Strengths	---
Weaknesses	This is a strict liability offense.
Grade	None