Memorandum Concerning Criminal Penalties of Section 906 of the Sarbanes-Oxley Statute

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Section 906 of the Sarbanes-Oxley Act of 2002 requires financial reports filed by a corporate issuer with the SEC pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 be accompanied by a written statement of the CEO and CFO, certifying, inter alia, that the financial report "fairly presents, in all material respects, the financial condition and results of operations of the issuer." That statute also fixes criminal penalties for anyone who certifies a financial statement that does not "comport with" this requirement at a maximum of ten years imprisonment if the officer made such certificate ""knowing that the periodic report accompanying the statement does not comport with all the requirements," and up to twenty years for the same act if done "willfully."

It is apparent that the authors of this legislation were relying on Supreme Court definitions, in other contexts, of the elements of "knowingly" and "willfully." Thus, the Supreme Court explained that "the term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law;" rather " 'the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.'" *Bryan v. United States*, 524 U.S. 184, 192 (1998)(the latter quotation from Justice Jackson's dissent in *Boyce Motor Lines, Inc. v. United States*, 242 U.S. 337 (1952)). In contrast, "willfully" requires proof "that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Bryan v United States, supra*, 524 U.S. at 193.

Similarly, in *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Supreme Court held that "willfully" required proof that the defendant knew not only the facts of the conduct in which he engaged, but also that the conduct was unlawful.

Applying these definitions to this new statute allows a simple, but simplistic, conclusion: the twenty year more severe sanction applies where the certifying officer acted with "an evil-meaning mind" which would be established by proof "that he acted with knowledge that his conduct was unlawful," while the ten-year maximum would apply without such evil intent.

The problem with this analysis is two-fold. First, other Supreme Court decisions have enunciated definitions of these two terms which, at the least, fudge the distinction between them. For example, in *Liparota v. United States*, 471 U.S. 419 (1985), the court considered a statute that criminalized knowing use of food stamps in any manner not authorized by the statute. The court phrased the issue as "whether in a prosecution under this provision the Government must prove that the defendant knew that he was acting in a manner not authorized by statute" *Id*. at 420-21. The court held that the word "knowingly" required proof that the defendant "knew that his conduct was unauthorized or illegal." *Id*. at 433. Applying that definition to § 906 would require the conclusion that proof that the certifying officer knew that his certificate was contrary to statutory requirement was necessary to convict on both the 10-year maximum "knowingly" and the 20-year maximum "willfully."

Moreover, the specific conduct made criminal, by the statute's definition, is conduct limited to a certification that violates the statute. Thus, "knowingly" must apply to knowledge that the certificate violates the statute.

In the end, it is likely that whatever facts would convict of a knowing violation would also suffice to support a willful violation. Thus, the two degrees of violation will end up as a prosecutor's option or tool to reward a cooperating defendant or induce a plea of guilty by offering the opportunity of sentencing at a ten-year maximum rather than a twenty-year maximum -- an opportunity that will be denied a defendant who decides to go to trial in an attempt to obtain an acquittal.