No. _____

In The
Supreme Court of the United States

KENNETH R. SPIRITO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

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APPENDIX TABLE OF CONTENTS

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4393

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
KENNETH R. SPIRITO,
Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Raymond A. Jackson, District Judge. (4:19-cr-00043-RAJ-DEM-1)

Argued: September 24, 2021
Decided: May 31, 2022

Before GREGORY, Chief Judge, MOTZ, and THACKER, Circuit Judges.

Reversed and vacated in part, affirmed in part, and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Motz and Judge Thacker joined.

ARGUED: Erin Harrigan, GENTRY LOCKE, Richmond, Virginia, for Appellant. Brian James Samuels, OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for Appellee. **ON BRIEF:** Raj Parekh, Acting United States Attorney, Alexandria, Virginia, Lisa R. McKeel,

Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Newport News, Virginia, for Appellee.

GREGORY, Chief Judge:

In 2012, Kenneth R. Spirito and members of the Peninsula Airport Commission began searching for an airline carrier that would bring low-cost air service and attendant passenger traffic to Newport News-Williamsburg International Airport. They came upon a start-up airline called People Express; but People Express had trouble securing funding. So Spirito spearheaded an effort to use restricted state and federal funds as collateral to secure a bank loan for People Express. After People Express defaulted on the loan and millions of dollars were lost, Spirito was indicted, tried, and convicted of federal program fraud, money laundering, and perjury. On appeal, Spirito maintains that there was insufficient evidence to support conviction on some counts, as well as that the district court erred by refusing to give a particular jury instruction, excluding a certain piece of evidence, and entering a forfeiture money judgment without notice. Finding one of these arguments persuasive, we reverse the conviction on Count 19 (a federal program fraud charge for three credit card transactions), and affirm the district court's judgment of convictions and sentences as to the other counts.

I.
A.

Kenneth R. Spirito served as Executive Director of the Newport News-Williamsburg International Airport from 2009 to 2017, and the Peninsula Airport Commission ("PAC")—made up of six individuals appointed by the City of Newport News

and City of Hampton—serves as the airport's governing body.[1] In his role, Spirito executed the decisions of the PAC and oversaw the airport's daily operations.

The airport receives funds from at least five government programs (individually and collectively, "PAC funds"). State Entitlement funds are subject to Virginia state law and are regulated by the Virginia Department of Aviation ("DOAV"). These funds can be used for capital projects, and the airport must report its use annually via Entitlement Utilization Reports. The Federal Aviation Administration ("FAA") oversees the remaining four programs: (i) the Airport Improvement Program requires airport revenue to cover operating and capital needs; (ii) "passenger facility charges" may be used for FAA-approved airport development projects and the airport must submit reports detailing its use against specific projects; (iii) Small Community Air Service Development ("SCASD") funds are reimbursable grants for marketing and air service development after the incursion of expenses related to flights

[1] The facts described below are drawn from the evidence introduced at trial and viewed in the light most favorable to the government. *See United States v. Palacios*, 677 F.3d 234, 250 (4th Cir. 2012) (citation omitted).

operating at a loss; and (iv) the Regional Air Service Enhancement Group ("RAISE") provides $700,650 in matching funds for money the airport receives from the SCASD and such funds are to be placed in escrow. At trial, all state and federal regulators testified that, under relevant regulations, manuals, and policies, PAC funds could not be used to collateralize a loan or subsidize an airline. Several witnesses testified that Spirito knew of these restrictions and that he could contact regulators to clear up any ambiguity regarding the restrictions.

In 2012, AirTran Airways stopped providing services at the airport. As a result, the airport lost low-cost air service and attendant passenger traffic. Hoping to abate the negative effect on the airport and local community, Spirito and PAC member James Bourey tried to identify and recruit a new air service provider. Eventually, they came upon People Express. At the time, People Express was not operational, but it obtained terminal space rent free at the airport with plans to make the airport its headquarters and start flying by the fall of 2012. But it could not attract investors, so People Express remained grounded.

As 2014 began, People Express still had no planes in the air. It planned a deal with another airline—Vision Airways—to lease planes and crew for use under the People Express name. This deal required People Express to raise at least $10 million. The airline eventually applied for funding from TowneBank, a regional bank headquartered in Virginia. Uninterested in giving People Express a loan because of its lack of tax returns, lack of profitability, and significant debts, TowneBank decided in May 2014 that it would extend a $5

million loan if the airline procured a guarantor and a third-party source of cash collateral. TowneBank required the cash collateral to be placed in accounts with the bank. Once these accounts were funded, the money could not be removed without the bank's approval.

Soon after, Spirito told Bourey and People Express CEO Jeff Erikson that he had a way to make it happen: the loan could be secured using PAC funds. On June 5, Spirito emailed TowneBank confirming the creation of three collateral accounts, providing the titles of the accounts, and noting the total funds that would be put into each account. Spirito met with Renee Carr, the airport's Director of Finance, and instructed her on how to fund the collateral accounts, providing handwritten notes detailing which funds would go into which accounts. When Carr expressed concern about the airport guaranteeing a private loan for People Express, Spirito asked, "Well, do you know what it takes to start an airline?" J.A. 1658.

About two weeks later, it became official: then-PAC Chairperson LaDonna Finch executed various contracts on behalf of the PAC to guarantee performance of a $5 million line of credit issued by TowneBank to People Express. PAC members testified that they did not fully understand the implications of or appreciate that PAC funds would be used as collateral for the loan.[2] And they relied on

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[2] Finch did not know specifics about the collateral or understand the details of the loan; Finch admitted to signing the relevant documents after "leaf[ing] through [the] pages." J.A. 755. PAC member George Wallace did not understand that the loan would be guaranteed by the airport. PAC member Stephen Mallon did not understand that the airport was

Spirito for advice and recommendations related to the management of PAC funds. As Spirito confirmed during cross-examination: "[The PAC] executed the [loan] agreement . . . . The funding was my idea."[3] J.A. 2103.

The testimony of Special Agent Christopher Waskey, as well as the bank records introduced at trial, revealed which PAC funds were used to populate each collateral account. Counts 1-6 of the superseding indictment, charging misapplication of funds in violation of 18 U.S.C. § 666(a)(1)(A), relate to Spirito directing the initial transfer of PAC funds into the collateral accounts in June and July 2014:

- Count 1: $720,000 in State Entitlement funds;
- Count 2: $1,280,000 million in airport revenue;
- Count 3: $700,650 in RAISE funds;
- Count 4: $565,000 in airport revenue;
- Count 5: $385,000 in Passenger Facilities Charges; and
- Count 6: $460,119.37 in State Entitlement funds.

Counts 7-11, also charging misapplication of funds in violation of 18 U.S.C. § 666(a)(1)(A), relate to Spirito directing the transfer of additional PAC funds into the collateral accounts in September,

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putting its own assets at risk in the form of collateral and was unaware of how the loan guaranty was funded until 2017.

[3] Also in June 2014, Spirito sought RAISE funds for People Express. He procured $700,000, and RAISE had no idea that the funds would be used as collateral for a loan to People Express. After People Express obtained the loan proceeds, it sent $650,650 of the $700,000 to Vision Airways.

October, and December 2014, as well as January and April 2015:

- Count 7: $148,213.96 in State Entitlement funds;
- Count 8: $26,000 in Passenger Facilities Charges;
- Count 9: $666,666.66 in State Entitlement funds;
- Count 10: $13,000 in Passenger Facilities Charges; and
- Count 11: $249,312.79 in State Entitlement funds.

In November 2014, People Express fell behind on the interest payments and were without funds to catch up. TowneBank turned to the PAC, seeking the money owed. Between December 2014 and April 2015, Spirito authorized a series of transfers from the collateral accounts to make interest and principal payments on the loan. These transactions support Counts 12-17 of the superseding indictment, charging money laundering in violation of 18 U.S.C. § 1957.

But ultimately, the $5 million loan was not enough to keep People Express in the air. People Express drew down the entire line of credit by August 2014 (one month after the loan's inception), suspended service in September 2014, and defaulted on the loan in January 2015. In early 2015, TowneBank called the loan and cleaned out the collateral accounts to satisfy People Express' debt.

B.

Evidence adduced at trial suggested that Spirito, at the time he ordered the collateral accounts funded and after, concealed the fact that PAC funds were used to guarantee a commercial loan.

For example, the titles Spirito gave to each collateral account—"State Entitlement," "SCASD," and "RAISE"—did not reflect the PAC funds placed into the accounts. J.A. 1666; *see also* J.A. 36–37. The "State Entitlement" account contained State Entitlement funds, airport revenue, and passenger facility charges. *See* J.A. 1664, 1670, 1875, 2017. The "SCASD" account contained airport revenue. J.A. 1664–65. And the "RAISE" account contained RAISE funds and passenger facility charges. J.A. 1669.

In one instance, in the fall of 2014, Spirito instructed airport staff to delay submitting audited financial statements to the City of Newport News because he was concerned that the loan guaranty would be reflected as a potential liability.

In another instance, in May 2014, Spirito submitted a discretionary funds application to the DOAV, but did not tell the state that, at the same time, State Entitlement funds were being committed as collateral for a loan. And Spirito did not include the loan guaranty in the airport's 2014 Entitlement Utilization Report.

The airport did not file its 2015 and 2016 Entitlement Utilization Reports by the relevant deadlines. After several follow-up requests, the reports were submitted in October 2016. As to the 2015 report, Spirito directed the inclusion of an entry entitled "Air Service Development" in the amount of $3.5 million. In early 2017, more than two

years after the loan was collateralized and defaulted, Carr revealed in response to an inquiry about the line item that the funds were used for a loan guaranty.

And in another instance, in January 2017, after learning of the defaulted loan via a news article, the FAA emailed Spirito, asking: "How much was paid and specifically what type of funds were used to make the payment?" J.A. 2086. In his response, Spirito stated that State Entitlement, SCASD, and RAISE funds were used, and listed amounts for each. *See* J.A. 2346. He did not reveal that passenger facility charges and airport revenue were also used. This conduct underlies Count 18, charging falsification of records in federal investigations, in violation of 18 U.S.C. § 1519.

Earlier on, when People Express failed, Spirito circulated press talking points that discussed "[f]unds used to help launch an [a]ir [s]ervice," but did not reference the loan guaranty. J.A. 2165. At one point, Spirito told the owner of the airport restaurant that his career in the airline industry "would be over" if the loan guaranty went public. J.A. 1599.

And all the regulator witnesses testified that Spirito did not ask if the PAC funds could be used to guarantee a commercial loan, and they were informed only well after the fact that PAC funds were used this way.

C.

In May 2017, the PAC terminated Spirito's employment as Executive Director, after discovering that he used an airport credit card to buy a vehicle

warranty and pay for repairs to his personal vehicle. Spirito characterized the auto expenses as "vehicle maintenance" on reimbursement receipts and admitted that he made these purchases and later remitted funds back to the Airport Commission in the amount of approximately $5,800. This conduct underlies Count 19, charging misapplication of funds in violation of 18 U.S.C. § 666(a)(1)(A).

In 2018, Spirito filed a civil defamation suit against the PAC and certain airport employees. He eventually provided testimony in a deposition during which he testified about several matters related to the loan guaranty. He denied using airport revenue as collateral for the loan and said he told the PAC that airport revenue could not be used for this purpose; claimed that he opposed the loan guaranty; and denied his role in designing the collaterization schedule. The statements Spirito made during this civil deposition underlie Counts 20, 21, and 23, charging perjury in violation of 18 U.S.C. § 1623(a).

D.

A superseding indictment charged Spirito with 24 counts, and a forfeiture allegation sought a monetary judgment of $3,817,931.29.

Spirito proceeded to trial on February 25, 2020. During his case-in-chief, Spirito sought to present evidence that, in 2017, the Virginia General Assembly passed Senate Bill 1417, which amended Virginia Code § 5.1-2.16 relating to the use of State Entitlement funds. The amendment added the following sentence to the statute: "State moneys . . . shall not be used for (i) operating costs unless otherwise approved by the Board or (ii) purposes

related to supporting the operation of an airline, either directly or indirectly, through grants, credit enhancements, or other related means." J.A. 320. In a letter sent to some members of the Virginia General Assembly (with Wallace and Spirito carbon copied), the Virginia Secretary of Transportation stated that this addition was prompted by the PAC's unauthorized use of state entitlement funds. S.A. 471–72. Spirito's counsel proffered the amendment and letter as evidence that, in 2014, Spirito could use the funds the way he did, as well as evidence that Spirito lacked intent to misuse restricted funds. The district court precluded mention of this evidence.[4]

At the close of his case, Spirito asked the district court to provide the following limiting instruction:

> [E]vidence of alleged violations as to any . . . handbooks, rules, publications, guidelines and regulations should not be considered by you as a violation of criminal law *per se*. You may consider, however, evidence of the . . . handbooks, rules, publications, guidelines and regulations as you would any other evidence in determining whether or not the defendant had the required intent to violate the criminal statute charged in the indictment.

J.A. 2182. The district court refused this instruction, finding that "the charge, as a whole, is sufficient to

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[4] The district court also excluded evidence related to another airport in Virginia—specifically, in Lynchburg—which used State Entitlement funds for an ineligible project in 2013.

avoid any confusion that this conduct has to be a violation of [a] criminal statute." J.A. 2216.

The jury returned guilty verdicts on all but one of the counts, acquitting Spirito on one perjury charge (Count 22).

E.

Spirito filed post-trial motions for judgments of acquittal, challenging all counts of conviction. The district court denied these motions except as to Count 24, the conviction for obstruction of justice.

On July 1, 2020, the government filed a motion for a preliminary order of forfeiture, requesting a $3,817,931.29 money judgment, as well as forfeiture of two Wells Fargo bank accounts and two Jeeps. Five days later, on July 6, the district court entered the order.[5] According to trial counsel, "[t]he [preliminary] order expressly incorporates itself into the Judgment." *United States v. Spirito*, No. 4:19-CR-43, (E.D. Va., Pacer No. 138 at 2) (citing Preliminary Order of Forfeiture, ¶ 9); *see* Preliminary Order of Forfeiture, J.A. 2484 ("Pursuant to Rule 32.2(b)(4)(B), this order of forfeiture shall be included in the Judgment imposed in this case."). Spirito did not object to the preliminary order of forfeiture before the sentencing that followed two weeks later, during the sentencing, or before the entry of judgment.

On July 15, the district court departed below the advisory sentencing guidelines range, and sentenced

[5] According to the preliminary order of forfeiture, the money judgment corresponds with the sum involved in the money laundering transactions for which the jury found Spirito guilty. J.A. 2481.

Spirito to 48 months of probation, with a special condition of home detention for 30 months. The district court also ordered Spirito to pay $2,511,153.16 in criminal restitution.[6]

Spirito timely appealed. He challenges the sufficiency of the evidence supporting some of his convictions, as well as the district court's decision not to provide the requested jury instruction; exclusion of evidence regarding the change in state law; and issuance of a forfeiture order without notice.

II.

A.

The Court reviews "challenges to the sufficiency of evidence de novo." *United States v. Graham*, 796 F.3d 332, 373 (4th Cir. 2015). If, viewing the evidence in the light most favorable to the government, the Court concludes there is substantial evidence to uphold the jury's decision, this Court will affirm the verdict. *Burks v. United States*, 437 U.S. 1, 17 (1978). "Substantial evidence is such evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Hager*, 721 F.3d 167, 179 (4th Cir. 2013). In reviewing the sufficiency of the evidence, the Court "allow[s] the government the benefit of all reasonable inferences from the facts proven to those sought to be established," *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982), and does not weigh the credibility of the evidence or resolve

[6] Spirito does not challenge the district court's order to pay criminal restitution.

conflicts in the evidence, *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997). Reversal of a conviction for insufficient evidence is limited to "cases where the prosecution's failure is clear." *United States v. Foster*, 507 F.3d 233, 244–45 (4th Cir. 2007).

1.

Spirito first argues that there was insufficient evidence for the jury to find him guilty of federal program fraud, as charged in Counts 1-11. Section 666 prohibits an agent of an organization receiving in any one-year period federal benefits in excess of $10,000 from "embezzl[ing], steal[ing], obtain[ing] by fraud or otherwise without authority knowingly convert[ing] to the use of any person other than the rightful owner or intentionally misappl[ying]" property owned or controlled by that organization and carrying a value of $5000 or more. 18 U.S.C. § 666(a)(1)(A).

Spirito concedes that the government prosecuted him under the theory of "intentional misapplication." Opening Br. at 28. Spirito argues that, for several reasons, there was insufficient evidence for a reasonable jury to convict him under this theory. These reasons include that he (i) acted "with[] authority"; (ii) did not receive a "bribe, kickback, or personal benefit"; and (iii) did not "obtain[] the property" of another or "deprive" another of their property. Opening Br. at 28, 30–31.

First, Spirito contends that he acted at the direction and with the authority of the PAC. The district court concluded otherwise, explaining: "[T]he Government presented adequate evidence to support

the jury's conclusion that the Defendant—not the [Airport Commission], [its] employees, or [its] counsel—was responsible for allocating restricted funds for a loan guarantee to [People Express]." J.A. 2527. We agree, and Spirito's attempt to blur the facts to prove otherwise is unavailing.

To be clear, the PAC executed the loan guaranty, but Spirito single-handedly decided how to fund the collateral accounts that were pledged in support of the loan. The evidence adduced at trial demonstrated that he knew of the restrictions on the PAC funds; he selected the PAC funds to be placed in the collateral accounts; he named the collateral accounts; he directed the funding of the collateral accounts; and he knew that the PAC would be unable to withdraw funds from the collateral accounts without TowneBank's permission.

The evidence also suggested that Spirito knew that his actions were unauthorized and illegal. He did not seek clarification from state and federal regulators; he used misleading titles on the collateral accounts; he concealed use of the PAC funds by delaying submission of audited financial statements and Entitlement Utilization Reports, and by omitting mention of the loan in the Entitlement Utilization Reports and press talking points; he lied about the use of the PAC funds when directly questioned by the FAA and lied about other issues related to the loan and collateral accounts when questioned during the civil deposition; and, at one point, he proclaimed that his career "would be over" if the loan guaranty went public. This evidence permits a reasonable jury to conclude Spirito did not act at the direction and with the authority of the PAC.

Second, Spirito argues that he did not intentionally misapply the funds because he received no "bribe, kickback, or personal benefit." Opening Br. at 31. But nothing in the statute suggests that a bribe, kickback, or personal benefit must flow from the intentional misapplication of property. The Second Circuit spells this point out well:

> Section 666(a)(1)(A) prohibits embezzling, stealing, obtaining by fraud, converting, or intentionally misapplying funds. The first four prohibitions cover any possible taking of money for one's own use or benefit. Intentional misapplication, in order to avoid redundancy, must mean intentional misapplication for otherwise legitimate purposes; if it were for illegitimate purposes, it would be covered by the prohibitions against embezzlement, stealing, obtaining by fraud, or conversion.

United States v. Urlacher, 979 F.2d 935, 938 (2d Cir. 1992). Other sister circuits have also refused to limit intentional misapplication under § 666(a)(1)(A) by applying a personal benefit or illegitimate purpose requirement. *See, e.g.*, *United States v. Cornier-Ortiz*, 361 F.3d 29, 37 (1st Cir. 2004) (citing *Urlacher* to conclude that using funds for legitimate purposes, but in violation of conflict of interest rules, is still an intentional misapplication); *United States v. Shulick*, 18 F.4th 91, 107–13 (3d Cir. 2021) (rejecting argument that a § 666(a)(1)(A) violation under the intentional misapplication theory may never occur unless the defendant misapplied property for his benefit and to the detriment of the proper recipient

of federal funds); *United States v. Frazier*, 53 F.3d 1105, 1114 (10th Cir. 1995) (concluding that there was a misapplication even though "[t]he funds were [still] used to purchase computers and computer equipment for the [victim] organization"); *United States v. Freeman*, 86 F. App'x 35, 41 (6th Cir. 2003) (unpublished) (finding no error where district court instructed jury that "[§ 666] prohibits a defendant from intentionally misapplying or misappropriating funds, even if the funds are used for otherwise legitimate purposes"); *United States v. Cameron*, 86 F. App'x 183, 189 (7th Cir. 2004) (unpublished) (concluding that § 666(a)(1)(A) "does not require conversion of funds to one's own use; it requires only an intentional misapplication of funds, even if the funds are used for what would otherwise be a legitimate purpose").

Third, Spirito maintains that he did not "obtain[] the property" of another or "deprive" another of their "property." But the statute requires the "*misapplication*" of property owned by, or under the care, custody, or control of another—it does not require the defendant to "obtain" the property or "deprive" the owner of the property.

Spirito further argues that he made a mere regulatory decision regarding the funds and, even if the decision was bad or made for sinister reasons, it does not amount to the "misapplication" of property. Opening Br. at 31–33. To support this argument, Spirito points to a recent Supreme Court case: *United States v. Kelly*, 140 S. Ct. 1565 (2020). In *Kelly*, two officials in the administration of former New Jersey Governor Chris Christie conspired to shut down toll lanes on the George Washington Bridge to punish the mayor of Fort Lee for refusing

to endorse Christie's reelection bid. *Id.* at 1569–70. A jury convicted the two government officials under § 666(a)(1)(A) and the Supreme Court reversed, explaining that the federal program theft statute sought to safeguard against "*property* fraud"—not to "criminaliz[e] all acts of dishonesty." *Id.* at 1571 (emphasis added). In *Kelly*, the government officials never sought "to take the government's property"—they sought only to divert the State's regulatory power to injure a political adversary. *Id.* at 1572. Just as the defendants in *Kelly* merely exercised their regulatory power, Spirito contends, so too did he exercise his right to "allocate[e] airport funds among airport uses," even if such allocations broke the rules. Opening Br. at 35.

But Spirito did not use his regulatory power to allocate airport funds "among airport uses." He used his regulatory power to pledge airport funds to a private entity (TowneBank) for the exclusive benefit of another private entity (People Express). In other words, TowneBank was a mere middleman for what amounted to a loan to a private company. Unlike *Kelly*, which involved the use of regulatory power for political retribution, the object of the crime here was property and the goal was to misapply property owned by the airport. And the PAC funds were indeed lost when TowneBank emptied the collateral accounts to satisfy the defaulted loan. As the district court aptly explained: "[A]n intentional, unauthorized distribution of public funds to a private entity falls squarely within the meaning of misapplication as found in § 666(a)(1)(A)." J.A. 2528.

2.

Having found that Spirito's federal program fraud convictions under Counts 1-11 are affirmed, his appeal with respect to the money laundering convictions under Counts 12-17 can now be disposed of rather easily. His sole argument is that the money laundering convictions cannot stand because his federal program fraud convictions are infirm. Opening Br. at 35. Because we affirm his federal program fraud convictions, his sole argument for reversing his money laundering convictions fails.

3.

Spirito next argues that there was insufficient evidence for a reasonable jury to find that his statements to a federal agency as charged in Count 18 were false and made with the requisite intent to impede an investigation. Title 18 U.S.C. § 1519 "requires the government to prove the following elements: (1) the defendant made a false entry in a record, document, or tangible object; (2) the defendant did so knowingly; and (3) the defendant intended to impede, obstruct, or influence [a federal] investigation." *United States v. Powell*, 680 F.3d 350, 355–56 (4th Cir. 2012). Spirito challenges the second element only.[7]

According to Spirito, the government did not provide sufficient evidence for a jury to find that he violated § 1519 upon sending his 2017 email in

[7] Spirito also states that "the government has failed to prove that . . . he acted with intent to obstruct a federal investigation." Opening Br. at 46. Such a bare assertion—unadorned by argument—does not preserve a claim.

response to the FAA's question about "[the] type of funds [] used to make the [loan] payment." Opening Br. at 44–45; S.A. 420. Spirito maintains that "[t]he government did not point to evidence to show that [his] statements were knowingly false at the time they were made, aside from pointing to the evidence adduced in support of Counts 1 through 17." Opening Br. at 45.[8]

In his email response to the FAA, Spirito stated that the loan used about $3.5 million in State Entitlement Funds, $300,000 in SCASD funds, and $700,000 in RAISE funds. S.A. 420. This response was false because it omitted mention of the airport revenue and passenger facility charges used and mentions SCASD funds, which were not in fact ever used.

Spirito's arguments to the contrary are unavailing. First, he asserts that "[t]he government elicited testimony from its own witness that calls . . . into question" whether he "knowingly" provided false statements as suggested by the evidence adduced in support of Counts 1-17. Opening Br. at 45. Spirito points to the testimony of Michael Swain, a supervisor at the DOAV, who Spirito maintains provided evidence suggesting that he properly used State Entitlement Funds and passenger facility charges. Reply Br. at 19–20. But Spirito does not suggest that this witness provided evidence tending

[8] The government contends that Spirito waived this argument and—if reviewable—it fails on plain-error review. *See* Response Br. at 34; *United States v. Robinson*, 744 F.3d 293, 298 (4th Cir. 2014) ("Where courts may review a forfeited claim for plain error, a claim that has been waived is not reviewable on appeal, even for plain error.") We need not decide whether Spirito waived or forfeited this claim because it fails even under de novo review.

to show that he properly used airport revenue—a line item omitted from the email response to the FAA. Moreover, even assuming the government's witness "called into question" the issue of whether Spirito properly used government funds, "determining witness credibility and weighing conflicting evidence are the responsibility of the factfinder." *United States v. Chavez*, 894 F.3d 593, 608 (4th Cir. 2018). So, to the extent there existed conflicting testimony about Counts 1-17—and thereby, the mens rea element in Count 18—we are unpersuaded by Spirito's argument. *United States v. Millender*, 970 F.3d 523, 529 (4th Cir. 2020) ("[W]e assume that the jury resolved any conflicting evidence in the prosecution's favor."); *United States v. Northcutt*, 619 F. App'x 235, 236 (4th Cir. 2015) ("[W]e do not review the jury's credibility determination . . . .").[9]

Second, Spirito suggests that he did not "knowingly" provide a false statement because any falsehood he may have told was "unwitting." Opening Br. at 45. This argument is belied by the record. Spirito was questioned about his email response while on the stand, and he did not claim that his answers were mistaken; he maintained that he responded accurately.

For these reasons, the evidence was sufficient for a reasonable jury to find that Spirito's statements to a federal agency as charged in Count 18 were false and made with the requisite intent to impede an investigation, in violation of 18 U.S.C. § 1519.

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[9] Spirito's perjury conviction related to his denial of using airport revenue further supports the conclusion that the jury resolved credibility determinations as to the mens rea element of the § 1519 violation against Spirito.

4.

Spirito next challenges the federal program fraud conviction related to the three unauthorized credit card transactions, as charged in Count 19.

Recall that § 666 prohibits an agent of an organization receiving in any one-year period federal benefits in excess of $10,000 from "embezzl[ing], steal[ing], obtain[ing] by fraud or otherwise without authority knowingly convert[ing] to the use of any person other than the rightful owner or intentionally misappl[ying]" property owned or controlled by that organization and carrying a value of $5000 or more. 18 U.S.C. § 666(a)(1)(A).

The question presented is whether § 666(a)(1)(A)(i) criminalizes multiple conversions of less than $5,000, if the government must point to conversions that took place over more than one year to reach the $5,000 statutory minimum. Spirito notes that, though the three transactions totaled just over $5,000, they occurred over the course of a year and a couple of days. Those couple of days, Spirito argues, save him from culpability under § 666(a)(1)(A). The government contends that a § 666 violation occurs even when a defendant converts property valued at $5,000 beyond a one-year time frame. The district court denied Spirito's motion for judgment of acquittal as to this issue, explaining: "[T]he Court [] rejects Defendant's request to impose a one-year temporal limitation on his conversion of PAC funds. . . . The Fourth Circuit is going to have to set its own precedent on this because the Court has an issue [here]." J.A. 2531 (third alteration in original) (internal quotation marks and citation omitted).

We first look to the language of the statute to resolve this dispute. The government correctly states that, though subsection (b) prohibits converting the funds of an organization that receives, "in any one year period, benefits in excess of $10,000," 18 U.S.C. § 666(b), the subsection establishing the $5,000 conversion threshold, 18 U.S.C. § 666(a)(1)(A)(i), includes no such temporal limit. But we must also consider "the specific context in which that language is used, and the broader context of the statute as a whole." *Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 530 (4th Cir. 2005) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The phrase "in any one-year period," as associated with the $10,000 federal funding requirement, is defined as "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense" and "[s]uch period may include time both before and after the commission of the offense." 18 U.S.C. § 666(d)(5). In other words, the one-year time restriction related to the $10,000 federal funding requirement can be satisfied in one of three ways: the one-year period can (i) start 12 months before the conversion, (ii) end 12 months after the conversion, or (iii) include time both before and after the conversion. Considering that the one-year period can include time both before and after the conversion, the statute most naturally reads as requiring the offense to fall within a 12-month window.[10]

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[10] *See United States v. Valentine*, 63 F.3d 459, 463 (6th Cir. 1995) (concluding the same and explaining that "[t]he interrelationship between subsections (a) and (b) of the statute

In other words, the government must present evidence showing that, within a one-year period, the defendant committed one or more acts of conversion with an aggregate value of $5,000 or more.[11]

Our reading is not contrary to clearly expressed congressional intent. Congress enacted § 666 as part of the Comprehensive Crime Control Act of 1984. Pub.L. No. 98–473, 98 Stat. 1837 (1984). According to the Senate Report, the purpose of § 666 was to "augment the ability of the United States to vindicate *significant acts* of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations of State and local governments pursuant to a Federal program." S.Rep. No. 225, 98th Cong., 2d Sess. 369, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510 (emphasis added). Congress intended the terms of the statute to be construed "consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery." S.Rep. No. 98–225 at 370; 1984 U.S.C.C.A.N. at 3511. "The phrase 'significant acts of theft, fraud, and bribery' suggests that Congress did not intend the statute to reach theft of minimal amounts . . . ." *United States v. Valentine*, 63 F.3d 459, 463 (6th Cir. 1995). The temporal limitation requirement, paired with the monetary threshold requirement, brings this stated

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mandate that a one-year limitation likewise attaches to the $5,000 threshold requirement").

[11] *See also Valentine*, 63 F.3d at 463 (noting that the statute is violated by a $5,000 theft only "if the circumstance described in subsection (b) . . . exists" and subsection (a) specifically incorporates the elements of subsection (b), and concluding that, "if subsection (b) contains a time restraint, it is applicable to subsection (a)").

objective to life: without the temporal limitation, the government could aggregate small thefts over years, decades, or even a defendant's lifetime to meet the $5,000 statutory minimum. In other words, the government's proposed statutory construction would nullify congressional intent by allowing the statute to reach insignificant acts of theft over an indefinite time period.

Our conclusion that § 666 requires each transaction used to reach the aggregate $5,000 requirement to occur within the same one-year period aligns with the conclusions of other circuit courts that have considered the issue. *Valentine*, 63 F.3d at 464 (concluding that "[t]he interrelationship between subsections (a) and (b) of the statute mandates that a one-year limitation likewise attaches to the $5,000 threshold requirement"); *United States v. Hines*, 541 F.3d 833, 837 (8th Cir. 2008) (concluding that "[s]ignificant longstanding schemes that extend for longer than one year . . . may be charged in multiple counts so long as the $5,000 requirement is met in each one-year time period" "wherein the government agency or organization received $10,000 or more in federal funds"); *United States v. Newell*, 658 F.3d 1, 24 (1st Cir. 2011) ("We have previously held that the government may aggregate transactions occurring within a one-year time period in order to meet the $5000 jurisdictional minimum of § 666(a)(1)(A)." (first citing *United States v. Cruzado-Laureano*, 404 F.3d 470, 484 (1st Cir. 2005); then citing *Hines*, 541 F.3d at 837))[12]

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[12] This result also aligns with our unpublished decision in *United States v. Doty*:

The government states that "[t]he First Circuit has ruled that by the plain text of the [statute] the one-year limitation in § 666(b) does not require a court to 'treat[] all qualifying transactions within a one-year period as aggregated together to state one offense under § 666(a)(1)(A).'" Response Br. at 43 (third alteration in original) (quoting *Newell*, 658 F.3d at 24). Instead, the government argues, "the First Circuit 'concluded the unit of prosecution in § 666(a)(1)(A) is transactional,'" *id.* (quoting *Newell*, 658 F.3d at 24), and "'each theft or group of thefts equaling at least $5000' is a unit of prosecution," *id.* (quoting *United States v. Ayala*, 821 F. App'x 761, 763 (9th Cir. 2020)), as long as the unit of prosecution involves a "singular stream" of transactions and not "multiple distinct transactions,"

> We do not suggest, and need not find, that this aggregation has no bounds. Although the statute does not explicitly articulate a temporal limitation, it does provide a context clue. To be prosecuted under § 666(a), "the circumstance described in subsection (b) of [that] section [must] exist[ ]." 18 U.S.C. § 666(a). The relevant "circumstance" is that the government organization "receives, in any one year period, benefits in excess of $10,000 under a Federal program." [18 U.S.C.] § 666(b). And the one-year period must be "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense" and may include "time both before and after the commission of the offense." [18 U.S.C.] § 666(d)(5). Conditioning the commission of the offense on the "exist[ence]" of this "circumstance" at least suggests a temporal limit.

832 F. App'x 174, 180 n.4 (4th 2020) (internal citations omitted).

id. at 42–43 (quoting *United States v. Lopez-Cotto*, 884 F.3d 1, 11–12 (1st Cir. 2018)).

The government misreads the decisions it cites. The *Newell* court said that cases like the one at bar did not resolve the controversy before it, explaining:

> [Those] cases were concerned with the propriety of aggregation when the transactions involved sums which fell below the jurisdictional minimum and hence did not make out independent violations of § 666. However, one of the rationales for allowing aggregation under such circumstances is to ensure that poorly motivated officials do not evade liability under § 666 simply by stealing less than $5000 at a time. *See Webb*, 691 F. Supp. at 1168; *Sanderson*, 966 F.2d at 189. Worries about opportunistic evasion of liability do not apply to transactions that involve sums larger than the statutory minimum. Since most of the bundled transactions in this case involved sums greater than $5000, it is not clear whether this line of precedent would support the aggregation that occurred in this case.

658 F.3d at 24–25 (citing *Cruzado–Laureano*, 404 F.3d 470; *Hines*, 541 F.3d 833). The question in *Newell* was whether the transactions bundled under counts 2, 7, 8, 9, 11, 29 and 30 were duplicitous—that is, whether they described distinct violations of § 666(a)(1)(A) and another statutory provision. *Id.* at 23. Though the *Newell* court pontificated about a problem that could arise when bundling transactions

involving amounts less than $5,000, it only held that the bundled transactions in that case, which involved amounts more than $5,000, "were duplicitous, and that the failure to provide a specific unanimity instruction was error." *Id.* at 28. And notably, when noting that the First Circuit "[has] previously held that the government may aggregate transactions occurring within a one-year time period in order to meet the $5000 jurisdictional minimum of § 666(a)(1)(A)," *id.* at 24 (citing *Cruzado-Laureano*, 404 F.3d at 484), the *Newell* court cited to the Eighth Circuit's decision in *Hines*, which found that § 666 permits the government to aggregate multiple transactions in single count to reach the $5,000 minimum as long as the transactions fall within a one-year period, *id.* (citing *Hines*, 541 F.3d at 837). Still, as the *Newell* court made clear, *Cruzado-Laureano*, *Hines*, and other like-cases were not dispositive of the controversy before the court. *Id.*

Moreover, contrary to the government's suggestion, the *Ayala* court also did not decide whether a one-year temporal limitation applies in a case like this one; instead, it concluded that it need not decide because, "even if the district court erred in failing to treat § 666(a)(1)(A) as transactional, as opposed to calendar-based, that error [was] not plain." 821 F. App'x. at 763. And the *Lopez-Cotto* court considered whether the government may prove an agreement for the ongoing stream of benefits worth at least $5,000, rather than an agreement for stand-alone bribes—it did not consider whether stand-alone bribes that occur beyond a period of one year may be aggregated to satisfy the $5,000 statutory minimum. 884 F.d at 8 (describing a "stream of benefits" prosecution approach as one in

which a government official "enter[s] into an ongoing agreement to accept benefits in exchange for providing government business to the briber" and, "in the aggregate, under the ongoing scheme, the government business conferred had a value of at least $5,000").[13]

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[13] The government also argues that "the jury could have determined that the conversion of funds occurred within a one-year period." Response Br. at 40. The government explains: "[With] the posting date on the credit card statement reflecting payment for the first transaction was on November 28, 2014, and Spirito ma[king] payment on the third transaction on November 27, 2015 (with the obligation of funds beginning even earlier when repairs commenced), Spirito either obligated funds or made payments to which he was not entitled within a one-year period." *Id.* at 40–41.

We cannot accept this unreasonable interpretation of the record. Spirito first obligated funds to which he was not entitled on November 25, 2014—the day he first swiped his airport-issued credit card to cover an impermissible expenditure; this transaction happened to be posted on the credit card statement on November 28. S.A. 444; *see also* J.A. 1817–25. He last obligated funds to which he was not entitled on November 27, 2015—the day he used the credit card to pay for a third unauthorized expenditure; this transaction happened to be posted on November 30. S.A. 465; *see also* J.A. 1810. Whether we look to the November 25, 2014 and November 27, 2015 credit card transaction dates, or the November 28, 2014 and November 30, 2015 credit card transaction posting dates, the conversions occurred over the course of one year and two days. The government does not explain why we should mix-and-match the transaction and transaction posting dates when considering this issue. In our view, it seems illogical to resolve this issue by considering the transaction date related to one conversion and the posting date related to another conversion. Nor does the government explain how Spirito managed to obligate funds when the repairs began (and before any credit card transaction occurred).

Because § 666 requires each transaction used to reach the $5,000 statutory requirement to occur within the same one-year period, we reverse Spirito's conviction on Count 19.

5.

Spirito further complains that there was insufficient evidence for a reasonable jury to find that his sworn statements charged in Counts 20, 21, and 23 were false and material to the civil matter in which those statements were made. Recall that Count 20 charged Spirito with making false statements when he testified that he did not divert airport revenue for the loan guaranty. J.A. 361–63. Count 21 charged Spirito with making false statements when he testified that he opposed the loan guaranty while the PAC supported it. J.A. 364–65. And Count 23 charged him with making false statements when he testified that he did not know that TowneBank would not lend money to People Express without a loan guaranty and that he had no role in selecting and authorizing the funds to be placed in the collateral accounts. J.A. 369–71.

A defendant commits perjury under 18 U.S.C. § 1623(a) when he has "(1) knowingly made a (2) false (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court of the United States." *United States v. Wilkinson*, 137 F.3d 214, 224 (4th Cir. 1998). Spirito does not deny making these statements. Nor does he reject the government's assertion that they were false, made under oath, and in an ancillary proceeding. Instead, he contends that these statements were immaterial.

"A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *United States v. Littleton*, 76 F.3d 614, 617–18 (4th Cir. 1996). This Court observed in *Wilkinson* that, because "a deponent's testimony is not actually addressed to a decision-making body," the materiality standard "does not neatly apply when, as here, the defendant is charged with committing perjury during a civil deposition." 137 F.3d at 225.

The Second and Fifth Circuits have adopted broad standards for evaluating the materiality of a statement made during a civil deposition. *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991) (explaining that material statements include those "with respect to matters properly the subject of and material to the deposition, even if the information elicited might ultimately turn out not to be admissible at a subsequent trial"); *United States v. Kross*, 14 F.3d 751, 754 (2d Cir. 1994) (explaining that statements made in civil depositions are material when "a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at the trial of the underlying suit"). The Sixth Circuit has adopted a narrower materiality standard for civil depositions. *United States v. Adams*, 870 F.2d 1140, 1147 (6th Cir. 1989) (holding that "a false statement during a civil deposition is material if the topic of the statement is discoverable and the false statement itself had the tendency to affect the outcome of the underlying civil suit for which the deposition was taken"). In *Wilkinson*, this Court did not reach the question of which standard of materiality should apply to statements made in

the context of a civil deposition because the statements at issue met the most stringent standard. 137 F.3d at 225, 228–29.

Spirito encourages this Court to adopt a narrower approach. But more importantly, Spirito contends that, "[i]n order to answer [the materiality] question, the government must offer evidence to show, *at a minimum*, the nature of the underlying civil proceeding." Opening Br. at 52. Here, Spirito argues, "the government did not introduce any evidence about the nature of the underlying civil litigation and pointed simply to the evidence adduced at trial regarding the program fraud counts in the criminal case." *Id.*

But this is not true. Consider the following exchange during Spirito's cross-examination:

> Q. And describe what happened . . . when you first interacted with the agents.
> A. Well, the doorbell rang, and I answered the door, and a gentleman and a representative from the . . . Department of Transportation . . . identified themselves. They . . . said, [w]e would like to ask you some questions about the People Express loan and, I guess, the airport's involvement in that. . . .
> Q. Now, at that time, did you think or know that you were a suspect?
> A. Well, no. No. Because *I was involved in a civil suit* and . . . they were going to ask me questions. *I assumed they were . . . . going to ask me questions about the People Express loan and the airport's involvement while my civil suit was in federal court.*

Q. *You were the plaintiff in that civil suit?*
A. *Yes.*
Q. *You were suing the Peninsula Airport Commission, correct?*
A. *Yes*. . . .
Q. All right. Now, did there come a point [during] the [] visit where you spoke with your lawyer?
A. Well, . . . I invited them in the house, *and when it became apparent to me that I probably should have my attorney at the time at least on the phone*, because I just didn't know what to do, I mean . . . was going to answer the questions, but I didn't want to have—you know, I had a light bulb go off in my head, like, oh, *maybe it's going to interrupt my civil suit*, and *I don't know if that conflicts*. So I contacted my attorney, and *my attorney said, in fact, it was going to, possibly*. . . . So we were going to contact them at a later date, but the civil suit was getting heavier and heavier post-February.
Q. Okay. And ultimately, agents came back to your house in May of 2019, correct?
A. Yes. . . .
Q. And, Mr. Spirito, *in the course of that deposition, you were also asked many questions about the credit card usage* that you've testified to about here today, correct?
A. *Yes*.
Q. *Because your performance and some of the issues that occurred while you were employed at the airport were issues that were subjects of inquiry at the deposition?*
A. *That's correct.*

J.A. 2064–66, 2093 (emphasis added).

Spirito's argument—which focuses on whether the government offered any evidence of the underlying proceedings—fails because, as can be seen, the government did offer such evidence during the trial. Spirito testified that, when investigators first attempted to interview him, he was a plaintiff in a civil lawsuit against the PAC. He "assumed" the investigators were "going to ask [him] questions about the [People Express] loan and the airport's involvement," which he thought were so connected to his civil defamation suit that answering the investigator's questions may "interrupt" or "conflict[]" with the civil suit. J.A. 2065–66. And, "[his] attorney said, in fact, it was going to, possibly." *Id.* Though both Spirito and his attorney used qualifying language to describe the potential impact of the deposition testimony on the underlying civil suit, the government did present evidence on the underlying civil defamation case and that evidence was sufficient for a reasonable jury to find that Spirito's false declaration met even the more stringent materiality standards.

B.

Spirito next contends that the district court erroneously rejected his request to instruct the jury that a violation of a policy, guideline, or regulation does not amount to a crime, thereby inviting the jury to convict him for civil infractions, not federal program fraud and money laundering.

This Court reviews a district court's refusal to give a jury instruction for abuse of discretion. *United States v. Brooks*, 928 F.2d 1403, 1408 (4th Cir. 1991).

Such refusal is only reversible error if the instruction (i) was correct; (ii) was not substantially covered by the court's charge to the jury; and (iii) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense. *United States v. Lewis*, 53 F.3d 29, 32 (4th Cir. 1995).[14]

Spirito asked the district court to instruct the jury that:

> [E]vidence of alleged violations as to any . . . handbooks, rules, publications, guidelines and regulations should not be considered by you as a violation of criminal law *per se*. You may consider, however, evidence of the . . . handbooks, rules, publications, guidelines and regulations as you would any other evidence in determining whether or not the defendant had the required intent to violate the criminal statute charged in the indictment.

J.A. 2182. The district court refused this instruction, finding that "the charge, as a whole, is sufficient to avoid any confusion that this conduct has to be a violation of [a] criminal statute." J.A. 2216. To be sure, the proposed instruction is a correct statement

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[14] Spirito states that this issue should be reviewed de novo because it concerns whether "a jury instruction failed to correctly state the applicable law." *United States v. Raza*, 876 F.3d 604, 613–14 (4th Cir. 2017). The question here is not that. As Spirito concedes in his briefs, the question is whether the district court erred in failing to instruct the jury. *See* Opening Br. at 36, 37.

of law and would draw a clear line between the appropriate use of civil regulations to define the contours of a criminal law and the inappropriate replacement of a criminal law with civil regulations, but the district court's charge to the jury substantially covered the proposed instruction.

As to federal program fraud, the district court instructed:

> In order to prove the defendant guilty . . ., the government must prove each of the following elements beyond a reasonable doubt: Number one, . . . the defendant was an agent of . . . The Peninsula Airport Commission . . .; Number two, that in . . . calendar years of 2014 and 2015, the Peninsula Airport Commission received federal benefits in excess of $10,000; Three, that the defendant . . . intentionally misapplied property; Four, that such property was in the care, custody, and control of the Peninsula Airport Commission; and, Five, that the provider of such property had an aggregate value of at least $5,000.

J.A. 2335–36. As to the "intentional misapplication" theory, the district court explained:

> To intentionally misapply money or property means to intentionally use money or property of the [] Airport Commission knowing that such use is unauthorized or unjustifiable or wrongful. Misapplication includes the wrongful use of the money or property for an unauthorized purpose, even

> if such use benefitted the [] Airport Commission.

J.A. 2337. And as to intent, the district court said:

> The term "intentionally[]" . . . means that he knowingly performed an act, deliberately and willfully on purpose as contrasted with accidentally, carelessly, or unintentionally. . . .
>
> The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there's no way of scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent. . . . It is entirely up to you, however, to decide what facts to find from the evidence received in the trial.

J.A. 2327–29.

The jury instructions make clear that, to convict Spirito, the jury must conclude that he "misapplied" the funds—i.e., used them for "an unauthorized purpose"—and that he did so "intentionally"—not accidentally. Spirito's civil violation-transformed-to-crime accusation cannot be reconciled with the district court's separate and distinct instruction on

"intent," which makes clear that something more than a regulatory violation is required. This specific-intent aspect of the instruction disabuses a juror of any notion that mere misapplication of funds or violation of a regulation, standing alone, amounts to criminal liability.[15] *See United States v. Herder*, 594 F.3d 352, 360–61 (4th Cir. 2010) (sustaining jury charge that did not include a "mere proximity" instruction because the instructions given required proof of knowledge and control). Nor was there any statement regarding civil or administrative law incorporated in the jury instructions that could confuse the jury into finding criminal liability on that basis alone. *But cf. United States v. Ransom*, 642 F.3d 1285 (10th Cir. 2011) (affirming conviction where district court instructed jury on specific regulation and further instructed that regulatory violation was not "a violation of criminal law *per se*" but was relevant to the defendant's intent). Instead, the district court told the jury to look to "all [] facts and circumstances received in evidence" to determine "[Spirito's] knowledge or intent" and explained that "[i]t is entirely up to [them] [] to decide what facts to find from th[at] evidence." J.A. 2319, 2329. This instruction would not permit the jury to convict Spirito had the government's proof

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[15] In his reply brief, Spirito argues that, "[i]n enacting 18 U.S.C. § 666, Congress never intended a jury to wade through a complex web of overlapping federal and state regulations, or to interpret a government agency policy manual, to determine whether a defendant had committed the crime of federal program fraud." Reply Br. at 1. Spirito did not make this argument in his opening brief. And, no doubt, it was appropriate for the jury to consider any handbooks, rules, publications, guidelines, and regulations to determine whether the funds were "misapplied."

shown no more than a civil or administrative law violation.

Thus, the district court did not abuse its discretion in denying Spirito's requested jury instruction.

C.

Spirito also challenges the district court's exclusion of evidence related to a change in state law and another entity's operations under that law. Spirito asserts that this evidence was critical to his defense against the government's theory that he acted in violation of state policies in allocating airport funds. We afford substantial deference to the district court's decision to admit or exclude evidence and will not reverse absent an abuse of discretion. *See United States v. White*, 810 F.3d 212, 227 (4th Cir. 2016).

Trial counsel sought to introduce evidence of the January 2017 letter written by the Virginia Secretary of Transportation and a copy of the legislation discussed in it, explaining:

> [W]hen the jury has to determine if there was a misappropriation, they will have to determine if there was a law that this use of State entitlement funds violated, and in determining if there's been a violation of the law, . . . a relevant factor . . . is . . . if the people who make the laws decided they had to change it so as to make this act subsequently illegal. . . . [I]f the legislature turns around and changes the law for the specific reason of making this illegal, then it

> can follow . . . that before they changed the law, it wasn't illegal.

J.A. 1934–35. The trial court denied trial counsel's request to introduce evidence of the amended state statute, explaining: "No, it doesn't follow. It may follow that they amended the law in some way. It doesn't mean that it was not improper or unlawful before the fact." J.A. 1935. We agree.

Evidence of the amended state statute would not help the jury determine the legality of Spirito's actions because, even if the state legislature added a line that makes obvious the prohibition on the conduct that catalyzed this case, it does not mean that the conduct was lawful before the statute's amendment.

Even if the district court had abused its discretion, any error was harmless. *See* Fed. R. Crim. P. 52(a); *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010) (explaining that evidentiary rulings are subject to harmless error review). The January 2017 letter specifically noted that using "$3.55m in state funds to pay off the loan" was an "unauthorized use of state entitlement funds." S.A. 472. In addition, as discussed above, Spirito concealed his use of PAC funds to fund the collateral accounts. With this overwhelming evidence of the illegality of his actions, any error did not prejudice Spirito.[16] *See United States v. Caldwell*, 7 F.4th 191, 206–07 (4th Cir. 2021) (citing *United States v.*

[16] Spirito also contends that the district court erred by excluding evidence as to the circumstances surrounding the Lynchburg airport's use of "ineligible" funds in 2013. Opening Br. at 41. Considering the overwhelming evidence discussed above, any error did not contribute to the outcome.

Baxter, 54 F.3d 774, at *6 (4th Cir. 1995) (per curiam) (finding an abuse of discretion when the court refused to permit questions related to the key government witness's juvenile adjudication but nevertheless concluding the error was harmless because the witness's "credibility was attacked on the stand despite the exclusion of the juvenile adjudication evidence" and there was otherwise "overwhelming evidence of [the defendant's] guilt")).

D.

Finally, we consider Spirito's arguments regarding the forfeiture money judgment. To the extent that Spirito's cursory reference to the forfeiture amounting to an excessive fine in violation of the Eighth Amendment is sufficient to raise the issue on appeal, *see* Opening Br. at 55–57, his argument is not persuasive.

We weigh several factors to determine whether a challenged forfeiture amounts to an excessive fine: (i) the nature and extent of the illegal activity; (ii) whether the defendant fit into the class of persons for whom the statute was principally designed; (iii) the harm caused by the charged crime; (iv) the amount of the forfeiture and its relationship to the authorized penalty; and (v) the relationship between the crime charged and other crimes. *United States v. Bajakajian*, 524 U.S. 321, 337–39 (1998)). Spirito concedes that he did not raise this excessive fine issue below. Thus, plain error review applies.

As an initial matter, Spirito's laundering activities, which involved $3,817,931.29, could have subjected him to a criminal fine of up to $7,635,862.58—a total that far exceeds the amount

to be forfeited. "Such punishment does not suggest 'a minimal level of culpability.'" *United States v. Jalaram, Inc.*, 599 F.3d 347, 356 (4th Cir. 2010) (quoting *Bajakajian*, 524 U.S. at 339). In addition, Spirito argues that "to hold him responsible for the full amount of the loss is grossly disproportional to the gravity of [his] actions" because the PAC voted to issue and carry out the contractual obligations associated with the loan, and ultimately, "he acted with the best of intentions and without obtaining any personal benefit." Opening Br. at 56–57. Even if true, Spirito does not explain how these facts pull him outside of the class of persons for whom the money laundering statute was principally designed, negate the harm caused by his money laundering activities, or change the close relationship between the money laundering and federal program fraud crimes. For these reasons, we find that the forfeiture order does not constitute an excessive fine and, at a minimum, any contrary conclusion on the part of the district court did not rise to the level of plain error.

Spirito also argues that the district court erred in entering a forfeiture order without providing him notice and an opportunity to be heard. Under the rule governing forfeiture in criminal cases, a court shall not enter a judgment of forfeiture unless the defendant first receives notice via the indictment or information that the government will seek forfeiture as part of any sentence. Fed. R. Crim. P. 32.2(a). Second, the court must determine, as soon as is practicable following a verdict of guilty on the substantive charges, what property is subject to forfeiture,[17] and enter a preliminary order of

[17] "If the government seeks forfeiture of specific property, the court must determine whether the government has

forfeiture. Fed. R. Crim. P. 32.2(b)(1)-(2). "Unless doing so is impractical, the court must enter the preliminary order sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4)." Fed. R. Crim. P. 32.2(b)(2)(B). "Third, "[a]t sentencing[,] . . . the order of forfeiture becomes final," Fed. R. Crim. P. 32.2(b)(4)(A), and "[t]he court must include the forfeiture when orally announcing the sentence or must otherwise ensure that the defendant knows of the forfeiture at sentencing," Fed. R. Crim. P. 32.2(b)(4)(B). "The court must also include the forfeiture order, directly or by reference, in the judgment, but the court's failure to do so may be corrected at any time under Rule 36." Fed. R. Crim. P. 32.2(b)(4)(B).

Spirito complains that the district court signed the preliminary order less than 14 days after the draft order was submitted by the government, thereby depriving him of any meaningful opportunity to challenge the money judgment as a violation of his Eighth Amendment right to be free from excessive fines.[18] Spirito further argues that the district court erred in neither mentioning forfeiture when orally announcing his sentence nor taking steps to ensure that Spirito knew of the forfeiture at the time of his sentencing. Spirito

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established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Fed. R. Crim. P. 32.2(b)(1)-(2).

[18] Under the Eastern District of Virginia's Local Criminal Rule 47(F)(1), opposing parties shall file response briefs within 14 calendar days after service of a motion.

concedes that he did not raise these objections below; thus, plain error review applies.

In *United States v. Martin*, the district court ordered criminal forfeiture of the appellants' property, but did not reference forfeiture when sentencing appellants. 662 F.3d 301, 307 (4th 2011). We explained that Rule 32.2's requirement that district courts "include the forfeiture when orally announcing the sentence or [] otherwise ensure that the defendant know of the forfeiture at sentencing" is "not [meant] to create a coercive sanction, but to ensure that a defendant is on notice as to all aspects of his sentence, including forfeiture." *Id.* at 309 (emphasis omitted). We affirmed the criminal forfeiture of the appellants' assets because "there [was] no dispute that [the] [a]ppellants were fully aware of both the pending forfeiture itself and . . . the exact amount." *Id.* The appellants "[did] not—and indeed could not—argue that they were caught off-guard" because the district court held hearings on forfeiture, in which both the fact of liability and the amount were determined, and made clear at the end of the final forfeiture hearing that it intended to enter the forfeiture order. *Id.*

This case presents no substantial difference. Spirito had notice that forfeiture would be a part of his case through the issuance of a Presentence Investigation Report, motion for a preliminary order of forfeiture, and preliminary order of forfeiture—the latter two of which noted the precise forfeiture amount. J.A. 2600, 2465–66, 2474, 2479, 2481–83.[19]

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[19] Forfeiture was also mentioned in the superseding indictment, but that document noted "[a] monetary judgment in the amount of not less than $4,563,312.78, representing the proceeds of the scheme alleged in Counts 1-11," J.A. 373—not

And trial counsel conceded, in Spirito's reply to his Motion to Stay Forfeiture Pending Appeal filed below, that "[t]he [preliminary] order expressly incorporates itself into the Judgment." *United States v. Spirito*, No. 4:19-CR-43, (E.D. Va., Pacer No. 138 at 2) (citing Preliminary Order of Forfeiture, ¶ 9); Opening Br. at 22 n.7 (noting motion to stay forfeiture order). So Spirito understood that, if he did not object sometime before the district court entered judgment, he would have to forfeit the specified amount. Yet Spirito made no attempt to object during the nine days that passed between entry of the preliminary forfeiture order and sentencing. Nor did he object during or immediately after sentencing. Instead, he waited 41 days after sentencing—until the day the government seized a bank account belonging to him and his family—to object for the first time.

Ultimately, because Spirito, like the appellant in *Martin*, was "indisputably on notice at the time of sentencing that the district court would enter [a] forfeiture order[]" and had ample opportunity to object, "we refuse to vacate the district court's [] forfeiture order[]." 662 F.3d at 309–10.

III.

For the foregoing reasons, we reverse and vacate the conviction and sentence on Count 19, and affirm the convictions, sentences, and judgment on the remaining counts. We remand to the district court with instructions to conduct such further

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the ultimate $3,817,931.29 money judgment, which represented the proceeds of the money laundering scheme alleged in Counts 12-17.

proceedings as may be appropriate and consistent with this opinion.

REVERSED AND VACATED IN PART, AFFIRMED IN PART, AND REMANDED

FILED: JULY 10, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CRIMINAL ACTION NO. 4:19-cr-43

UNITED STATES OF AMERICA

v.

KENNETH R. SPIRITO,
Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Kenneth R. Spirito's ("Defendant") Motion for Judgment of Acquittal. ECF No. 98.

I. FACTUAL AND PROCEDURAL HISTORY

From January 4, 2009 through May 15, 2017, Defendant was the Executive Director of the Peninsula Airport Commission ("PAC"), the entity responsible for operating the Newport News/Williamsburg International Airport ("the Airport"). During Defendant's tenure as Executive Director, the PAC experienced major stressors after the Airport's main source of traffic decided to discontinue flights out of Newport News in favor of Norfolk. Hoping to ward off prolonged consequences to the Airport and the surrounding community,

Defendant and the PAC Board began to look for ways to increase air traffic into the Airport. In 2014, Defendant enacted a plan for a loan guarantee that benefited People Express Airlines ("PEX"), a fledgling company that was attempting to begin flights out of the Airport. PEX quickly defaulted on the loan and the PAC was left responsible for PEX's obligations to TowneBank. The instant criminal prosecution began as a probe into Defendant's allocation of the PAC funds supporting the loan guarantee, as well as his manipulation of the PAC Board to gain approval for his plan. The prosecution expanded after scrutiny of Defendant's conduct on the following matters: (1) Defendant's use of PAC credit cards for his own purposes; (2) Defendant's testimony as the plaintiff in a civil case against the PAC after he was terminated from his position as Executive Director; and (3) Defendant's interactions with investigators who were looking into PAC finances during his tenure as Executive Director.

Defendant was named in an eighteen-count Indictment on May 13, 2019 ("Indictment 1"). ECF No. 3. Indictment 1 charged Defendant with Counts 1-11, Misapplication of Property from an Organization Receiving Federal Funds, in violation of 18 U.S.C. §§ 666(a)(1)(A) and 2 ("the Misapplication Counts"); Counts 12-17, Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity, in violation of 18 U.S.C. §§ 1957 and 2 ("the Money Laundering Counts"); and Count 18, Falsification of Records in Federal Investigations, in violation of 18 U.S.C. § 1519.

On August 27, 2019, Defendant filed a Motion to Dismiss on Counts 1-17 of Indictment 1 ("Motion to Dismiss 1"). ECF No. 26. On September 9, 2019, the

Government obtained a twenty-four-count superseding indictment ("Indictment 2"). ECF No. 29. Indictment 2 maintained Counts 1-18 of Indictment 1, but added Count 19, Conversion of Property from an Organization Receiving Federal Funds, in violation of 18 U.S.C. §§ 666(a)(1)(A) and 2("the Conversion Count"); Counts 20-23, Perjury, in violation of 18 U.S.C. § 1623(a); and Count 24, Obstruction of Justice, in violation of 18 U.S.C. § 1503. ECF No. 29. On November 25, 2019, filed a Motion to Dismiss Count 19 of Indictment 2 ("Motion to Dismiss 2"). ECF No. 41. The Court denied Defendant's requested relief in both Motions to Dismiss in an order dated January 13,2020. ECF No. 48.

Defendant's jury trial began on February 25, 2020 and lasted ten days. ECF Nos. 56-59, 61-64, 68, 84. At the close of the Government's evidence. Defendant moved for a judgment of acquittal on Counts 1-17, 19, and 20-23. ECF No. 63. The Court denied Defendant's motion for a judgment of acquittal on Counts 1-17 and 19 withheld its ruling on Counts 20-23. *Id.* At the conclusion of all the evidence, Defendant renewed his motion for judgment of acquittal on the aforementioned Counts and added an additional motion for judgment of acquittal on Count 24. ECF No. 68. The Court withheld its ruling on Count 24 and maintained its rulings on all other Counts. *Id.* On March 10, 2020, the jury returned the following verdict: guilty on Counts 1-21, 23-24 and not guilty on Count 22. ECF No. 86.

After trial, the period for filing of post-trial motions was extended. ECF No. 97. On April 21, 2020, Defendant timely filed his Motion for

Judgment of Acquittal. ECF No. 98. After being granted an extension in time to file its response, the Government responded on May 8, 2020. ECF No. 101. Defendant replied to the Government's response on May 12, 2020. ECF No. 102. Defendant's sentencing is scheduled for July 15, 2020. This matter is ripe for disposition.

II. LEGAL STANDARD

After the government closes its evidence or after the close of all the evidence, the court may consider whether the evidence presented is sufficient to sustain a conviction. Fed. R. Civ. P 29(a). The court may reserve decision on a motion for judgment of acquittal until after the jury renders a verdict. Fed. R. Civ. P 29(b). A defendant may renew his or her motion for a judgment of acquittal within 14 days after a guilty verdict. Fed. R. Civ. P 29(c)(1).

When reviewing a motion for judgment of acquittal after a guilty verdict, the court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016) (emphasis in original). This inquiry is a "limited review [that] does not intrude on the jury's role to 'resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Id. quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In meeting its burden to prove each of the elements of the crimes of conviction beyond a reasonable doubt, "[t]he

government may rely on circumstantial evidence and inferences." *United States v. Rodriguez-Soriano*, 931 F.3d 281, 286 (4th Cir. 2019). Because the jury resolves any conflict between differing reasonable interpretations of the evidence, the court must "assume that the jury resolved all contradictions in testimony in favor of the government" after the jury renders a guilty verdict. *United States v. Moye*, 454 F.3d 390, 394 (4th Cir. 2006) {en banc).

III. DISCUSSION

Defendant's Motion claims that relief from the guilty verdict against him is proper on Counts 1-18, 19, 20, 21, 23, and 24. ECF No. 98. The Court will address some Counts individually and other Counts collectively as appropriate.

A. Counts 1-17

As discussed in the Court's order denying Defendant's Motion to Dismiss, Counts 1-11 (the Misapplication Counts) and Counts 12-17 (the Money Laundering Counts) are inseparable. ECF No. 48 at 7. As a factual matter, it is undisputed that the PAC funds at issue in the Misapplication Counts were involved in monetary transactions, as defined in 18 U.S.C. § 1957, the statutory foundation of the Money Laundering Counts. In seeking acquittal on Counts 1-17, Defendant maintains the following contentions: the use of PAC funds at issue was legal; and Defendant "acted in good faith based on the advice of the PAC's counsel and the informed authorization of his employer." ECF No. 98 at 6-7. The Court also notes that Defendant references

previously raised arguments regarding the scope of 18 U.S.C. § 666(a)(1)(A) in seeking acquittal. The Court will address each of these contentions in turn.

1. The Jury Properly Found Illegal Use of Restricted PAC Funds

State Entitlement Funds ("SEE") are subject to Virginia state law and the Virginia Department of Aviation ("DOAV"), while airport revenue, Passenger Facilities Charges ("PFC"), Small Community Air Service Development grants ("SCASD"), and Regional Airport Service Enhancement funds ("RAISE") are subject to federal law and the Federal Aviation Administration ("FAA"). As a factual matter, the Government's evidence demonstrated that PAC funds from SEF, airport revenue, PFC, and RAISE were comingled and used to fund a loan guarantee for PEX. Further, the evidence clearly showed that Defendant used bank accounts with misleading titles that inaccurately identified their funding sources to pay on PEX's defaulted loan, transfer money between PAC accounts that were supposed to have defined purposes, and conceal the fallout from PAC payment on the PEX loan guarantee. *See e.g.* ECF No. 109 at 82- 87 (discussing the transfers between restricted PAC accounts ordered by Defendant and his instructions designed to obscure this wrongdoing). In fact, the bank records detailing the transfer of funds between PAC accounts with the foregoing titles was exhaustive and, at times, bordered on cumulative. Cf. ECF No. 106 at 164 (documenting the following statement at sidebar: "[t]he Court believes you're putting on

cumulative testimony here about the problems they had trying to get People Express going").

Defendant's contention on the legality of using PAC funds from the foregoing restricted sources for the PEX loan guarantee is also deficient. The PAC funds used to guarantee the PEX loan could only be used for the following purposes: SEF for capital projects, PFC for FAA approved projects, airport revenue for projects benefiting the airport, and SCASD and RAISE funds as reimbursable grants for air service development after the incursion of expenses related to flights operating at a loss. The Government presented overwhelming evidence of the limited purposes for these funds, including testimony from state and federal regulators and regulatory handbooks and materials that were in effect at the time of the PEX loan guarantee. *See e.g.* ECF No. 106 at 121 (confirming that a loan guarantee was not an authorized use of federal SCASD funds or the associated RAISE funds). Multiple witnesses also confirmed that Defendant had knowledge of the limited purposes of these funds and the means to resolve any ambiguity about how the funds could be used. *See e.g.* ECF No. 109 at 148 ("[Defendant] said if we had used airport revenue, then we would lose our jobs"). Further, state and federal regulators testified that Defendant concealed incriminating financial transactions from required disclosure documents, which was confirmed by Government exhibits. *See e.g.* ECF No. 107 at 37-38 (documenting that the PAC's use of SEF to for the PEX loan guarantee was not reported to the DOAV in the PAC's required Entitlement Utilization Reports).

The Court previously declined to "examine the machinations of the Virginia legislature" in denying Defendant's motion to dismiss the charges against him at the pretrial stage. ECF No. 48 at 6. Once again, any contention that the use of SEF, airport revenue, PFC, SCASD, and RAISE to fund a loan guarantee was legal at the time the funds were used is still incorrect. State and federal regulators testified in painstaking detail about the approved uses of the funds at issue, operation of the relevant regulations, and the opportunities Defendant had to clarify the boundaries of the regulations. *See e.g.* ECF No. 107 at 26, 38, 44, 46 (confirming that the restricted PAC funds at issue could not be used for a loan guarantee and that SEF were used for the PEX loan guarantee without permission from the DOAV, reporting through Entitlement Utilization Reports, or any appropriate inquiry). Importantly, part of Defendant's wrongdoing was his intentional mismanagement of the accounts containing restricted funds, effectively comingling state and federal dollars and obscuring a proper accounting of PAC funds from public sources. The fact that the Virginia legislature chose to clarify the permissible uses of SEF (just one of the restricted funding sources at issue) in statute after Defendant's tenure as Executive Director does not absolve him of violating the state and federal regulations in effect at the time of the PEX loan guarantee. It also does not excuse the comingling of public funds in an attempt to float the balance of restricted accounts and obscure the problematic nature of the loan guarantee. In sum, the Court finds no issue with the jury's conclusion that PAC funds from the foregoing

sources were improperly used to fund the PEX loan guarantee.

2. The Jury Properly Found Defendant Responsible for Ordering the Misapplication of Funds

Defendant's contentions that he "acted in good faith based on the advice of the PAC's counsel and the informed authorization of his employer" are each without merit. The Government presented several witnesses who verified that Defendant knew that restricted PAC funds could not be used to support a loan guarantee but directed the PEX loan guarantee anyway. *See e.g.* ECF No. 109 at 163, 188 (describing Defendant as the "spearhead" for presentations on PAC finances to the PAC Board and explaining that his leadership style created a "very oppressive environment" for the accountant who had concerns about Defendant's directives on PAC finances); ECF No. 111 at 178 (documenting Defendant's attempt to characterize his management of the PAC's SEF as "allowable," instead of eligible or ineligible). Multiple witnesses also testified that the PAC Board relied on the Defendant's expertise to manage the PAC's day-to-day operations, including its finances and funding. *See e.g.* ECF No. 104 at 139-41 (documenting the PAC Board chair's near-total dependence on Defendant at the time of his offense conduct). Further, the jury considered and rejected Defendant's claim that he was simply relying on the PAC's counsel for cover to justify his use of restricted PAC funds after the Court instructed the jury on this issue. *See* ECF No. 112 at 135-37 (stating the "Reliance on Counsel" jury instruction). In sum, the Government presented adequate evidence to support

the jury's conclusion that the Defendant—not the PAC Board, PAC employees, or the PAC's counsel—was responsible for allocating restricted funds for a loan guarantee to PEX. Therefore, Defendant's attempts to shift blame for the loan guarantee to other people affiliated with the PAC provides no basis for overturning the jury's verdict.

3. Title 18, United States Code, Section 666(a)(1)(A) Covers Defendant's Conduct

Defendant has repeatedly challenged the conclusion that 18 U.S.C. § 666(a)(1)(A) covers the conduct alleged in Counts 1-19, which was not initiated for his direct personal benefit, but did result in a substantial loss of public funds. *See e.g.* ECF No. 26 at 6 (arguing that a conviction under this section is improper without a showing of "actual theft or schemes that convey a personal benefit to the defendant").

Section 666(a)(1)(A) prevents the "agent of an organization" receiving more than $10,000 of federal funding per year from "intentionally misappl[ying]...property that is valued at $5,000 or more, and is owned by, or is under the care, custody, or control of such organization." To sustain a conviction under this section, a defendant's conduct must result in an actual loss of public funds. *See United States v. Thompson*, 484 F.3d 877, 881—82 (7th Cir. 2007) (invalidating a conviction where no public funds were lost after an official took political considerations into account in awarding a contract); *United States v. Jimenez*, 705 F.3d 1305, 1311 (invalidating a conviction where it was not clear that the defendant directed the misapplication of the

funds at issue). Most recently, the United States Supreme Court affirmed that a property fraud application of § 666(a)(1)(A) cannot criminalize all wrongdoing that constitutes "deception, corruption, [or] abuse of power." *Kelly v. United States*, 140 S. Ct. 1565, 1568 (2020). A conviction for political corruption is not permissible when "implementation costs...[are] an incidental byproduct of their regulatory object." *Id*. at 1565. In short, limitations on the applicability of § 666 focus on prosecutions of officials who are accused of abusing state regulatory power for political motivations.

However, "fraudulent schemes violate [the] law...when...they are 'for obtaining money or property.'" *Id*. at 1572. Nothing in the text of § 666 requires proof of a personal benefit to a defendant to sustain a conviction and there is no case law imposing such a broad limitation. *See Thompson*, 484 F.3d at 883 (disallowing criminal prosecutions for "private gains" that do not result in the loss of public funds). Further, a conviction for a scheme wherein loss of public money or property was "an object of the fraud" is still very much appropriate under § 666. *Kelly*, 140 S. Ct. at 1573. Although "misapplies" is an undefined term, it does cover disbursement in exchange for services not rendered, payment to suppliers who would not have received any contract but for bribes, payment for services that were overpriced to cover the cost of a bribe, or payment for shoddy goods at the price prevailing for high quality goods. *Thompson*, 848 F.3d at 881. It follows that an intentional, unauthorized distribution of public funds to a private entity falls squarely within the meaning of misapplication as found in § 666(a)(1)(A).

In this case, there is no doubt that money was both the motive and the object of Defendant's misapplication of PAC funds. While Defendant may have believed using PAC funds for a loan guarantee to PEX was in the best interest of PAC, it was the PAC's money that was lost after PEX defaulted on the loan that Defendant ordered to be guaranteed. Of course, this means the PAC was left responsible for paying on the defaulted loan, resulting in a loss of public funds and the inescapable conclusion that the PAC's money was the object of Defendant's scheme. Further, Defendant's misapplication of restricted PAC funds was not the product of a simple mistake, an interpretive judgment, or a shady political favor. *See Thompson*, 848 F.3d at 881 (rejecting an interpretation of § 666 "that turns all...state law errors or political considerations in state procurement into federal crimes"). Instead, the Government presented evidence that Defendant knew that the loan guarantee was not allowed under state and federal regulations and did it anyway. *See e.g.* ECF No. 109 at 72 ("[Defendant] said that we were going to use $4 million in State entitlements, there was $300,000 in the SCASD grant, and then the $700,000 from RAISE funds"); *id* at 115 ("Mr. Spirito did not want [information about the loan guarantee divulged]" to state regulators). This sort of intentional disregard for the restrictions attached to public funds is exactly the sort of wrongdoing that § 666(a)(1)(A) is meant to address.

B. Count 18

Count 18 charges Defendant with Falsification of Records in Federal Investigations. The relevant

statute prohibits the knowing falsification of any record or document with the intent to impede an investigation of a federal agency. 18 U.S.C. § 1519. Defendant's Motion for Judgment of Acquittal absorbs Count 18 into his arguments on Counts 1-17 and raises no independent basis for acquittal. *See* ECF No. 98 at 6-7; ECF No. 102 at 5-6. At trial, the Government's evidence showed that Defendant emailed regulators from the FAA, claiming that "$3,510,642 VA State Entitlements allowable under section 3.1.1.3.2 of the DOAV Airport Program Manual...$299,513.00 U.S. DoT Small Community Air Service Grant...$700,998.00 RAISE contribution" was used to fund the loan guarantee for the benefit of PEX. In fact, Defendant knew that airport revenue and PFC were used to fund the loan guarantee at the time he obscured this fact from FAA investigators. *See e.g.* ECF No. 109 at 148 ("[Defendant] said if we had used airport revenue, then we would lose our jobs"); *id.* at 148^9 (confirming that airport revenue was, in fact, used to fund the collateral accounts supporting the PEX loan guarantee). Therefore, the Government's evidence is sufficient to sustain a conviction on Count 18.

C. Count 19

Count 19 charges Defendant with Conversion of Property from an Organization Receiving Federal Funds for his use of a PAC credit card for personal expenses during his tenure as Executive Director. Defendant makes the following arguments in support of acquittal on Count 19: (1) his use of the PAC credit card was an authorized employment benefit; (2) his use of the PAC credit card did not

exceed $5,000, as required by § 666(a)(l)(A)(i); and (3) the transactions at issue did not occur within I year, as required by the Sixth Circuit in *United States v. Valentine*, 63 F.3d 459 (6th Cir. 1995).

The Court and the jury have already rejected Defendant's contention that his use of a PAC credit card to pay for an extended warranty on his vehicle and vehicle accidents outside of the airport insurance policy was an authorized employment benefit. ECF No. 110 at 76 ("there's some factual issues left here, but there's sufficient evidence in the record for the jury to determine, either by direct evidence or circumstantial evidence, that the Defendant [converted more than $5,000 of PAC property]"). Specific to the issue of the dollar amount of the expenditures at issue, the Government presented evidence that after the termination of Defendant's employment, an audit found $5,800 of unauthorized expenditures on Defendant's PAC-issued credit card. ECF No. 98-2 at II (documenting that Defendant reimbursed the PAC with two checks for his unauthorized expenditures, one for $5,000 and another for $800); *see also* ECF No. 110 at 70 (discussing credit card receipts leading to the conclusion that Defendant's unauthorized expenditures were at least $5,241). Finally, the Court again rejects Defendant's request to impose a one-year temporal limitation on his conversion of PAC funds. ECF No. 110 at 69-70 ("the Court is not inclined to follow the Sixth Circuit precedent. The Fourth Circuit is going to have to set its own precedent on this because the Court has an issue [here]"). Therefore, Defendant presents no meritorious grounds for acquittal on Count 19.

D. Counts 20, 21, and 23

Defendant faces perjury convictions related to his deposition testimony in his civil suit against the PAC after he was terminated from the position of Executive Director. Count 20 charges Defendant for his sworn statement that he never gave authorization to use airport revenue for the loan guarantee and told the PAC Board airport revenue could not be used for such a purpose. Count 21 charges Defendant for claiming that the Board—not the Defendant—was in full control of the decisions made about the loan guarantee. Count 23 charges Defendant for denying his role in designing the collateralization schedule for the PEX loan guarantee and advancing the plan to the PAC Board for approval. The Defendant's perjured testimony can be found in Indictment 2, was played to the jury during trial, and provided to the jury again in the Court's Jury Instructions. ECF No. 29, ECF No. 110 at 40-44, and ECF No. 112 at 154-61.

"Whoever under oath...in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration" shall be guilty of perjury. 18 U.S.C. § 1623(a). A perjurious statement must be "material to the proceeding in which it is given." *United States v. Zagari*, 111 F.3d 307, 329 (2d Cir. 1997). A false statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (internal quotations omitted). The issue of materiality is a mixed issue of law and fact to be decided by the jury in all but the most extraordinary

cases. *Id.* at 522-23. The power to prosecute the declarant of materially false statements made in a civil deposition is a critical element of a properly functioning judicial system and is authorized under § 1623(a). *See e.g. In re Sealed Case*, 162 F.3d 670, 673-74 (D.C. Cir. 1998) (discussing Monica Lewinsky's perjured affidavit after she was subpoenaed to testify in a civil case brought against President Clinton by Paula Jones); *United States v. Forde*, 740 F. Supp. 2d 406, 412 (S.D.N.Y. 2010) (holding that a declarant may be prosecuted for perjury if their statement in a civil deposition could influence the decision making body or prevent the discovery of admissible evidence in the underlying suit).

As an initial matter, it is difficult to imagine a scenario wherein a plaintiff provides a materially false response to a relevant and substantive question without subjecting him or herself to perjury. In this particular case, the jury was well aware that Defendant was the plaintiff in a civil suit against the PAC after he was terminated from his position of Executive Director because he testified to this fact himself. ECF No. 111 at 137 ("I was involved in a civil suit...they were going to ask me questions about the People Express loan and the Airport's involvement while my civil suit was in federal court."); *see* also ECF No. 110 at 40 (documenting law enforcement's awareness of Defendant's testimony in *Kenneth R. Spirilo v. Peninsula Airport Commission*, docketed 4:18cv58). In the same segment of Defendant's direct examination, he confirms that he was the plaintiff and that he was suing the PAC. ECF No. 111 at 137.

Based solely on Defendant's own testimony, the following issues were made plain to the jury: (1) Defendant's testimony in his civil suit against the PAC included claims about the management of restricted PAC funds; (2) Defendant's claims regarding the management of restricted PAC funds were material to his firing from his position as Executive Director; and (3) the subject of Defendant's civil suit against the PAC was his firing from the position of Executive Director. ECF No. 110 at 40-44 (admitting Defendant's deposition testimony and playing the relevant clips to the jury). Quite simply, materiality is not in question because the jury knew that Defendant's misapplication of PAC funds was relevant to his firing and the issues in his civil case, just as it is relevant to his criminal wrongdoing in this case. Therefore, Defendant's Motion for Judgment of Acquittal on the perjury counts is wholly without merit.

E. Count 24

Count 24 charges Defendant with Obstruction of Justice for transmitting a copy of his deposition testimony in his civil case against the PAC "to an investigator with the Virginia State Police...in connection with a federal investigation." ECF No. 29 at 32.

The "Omnibus Clause" of 18 U.S.C. § 1503 prohibits "persons from endeavoring to influence, obstruct, or impede the due administration of justice," which includes a federal grand jury investigation. *United States v. Aguilar*, 515 U.S. 593, 598-99. A conviction for obstruction of justice is not proper without knowledge of a pending proceeding

and satisfaction of the "nexus" requirement. *Id.* at 599. In order to satisfy the nexus requirement, the defendant's endeavor must have the natural and probable effect of interfering with the due administration of justice. *Id.* Further, knowledge of a grand jury proceeding or making false statements to an investigating agent are not sufficient standing alone to constitute a violation of the Omnibus Clause of § 1503. *Id.* (emphasis added).

A simple examination of the record confirms that federal investigators were not even aware of Defendant's perjured civil testimony until after he had already been indicted for misapplying the restricted PAC funds. *Compare* ECF No. 3 (listing the filing date of Indictment 1 as May 13, 2019) with ECF No. 29 at 32 (noting that Defendant's perjured civil testimony was given on May 16, 2019); *see also id.* (filing Indictment 2 on September 9, 2019). In other words, it was impossible for Defendant's perjurious civil testimony on the loan guarantee to have interfered with the federal investigation in the instant case for the following reasons: (1) federal investigators already knew Defendant was lying about the loan guarantee in his civil deposition testimony; and (2) the grand jury had already decided there was probable cause to indict Defendant for Misapplication and Money Laundering anyway. In such a situation, a false statement cannot have "the natural and probable effect of interfering with the due administration of justice" necessary to satisfy the nexus requirement. *See Aguilar*, 515 U.S. at 601 (negating an obstruction conviction wherein the evidence went no further than the defendant testified falsely to an investigating agent). Moreover, Defendant was

properly convicted for perjury for his false deposition testimony in his civil case against the PAC. *Id.* at 601 ("testif[ying] falsely to an investigating agent...all but assures that the grand jury will consider the material in its deliberations"); *see supra* Part III.D. (affirming Defendant's convictions for perjury that were brought forth by a grand jury in Indictment 2). The Government's attempt to tack on an additional obstruction charge in addition to the perjury counts is not supported by precedent as a legal matter and unnecessarily duplicative as a practical matter. Therefore, Defendant's Motion for Judgment of Acquittal on Count 24 is granted.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal is **DENIED** on Counts 1-21 and 23 and **GRANTED** on Count 24. The Court **DIRECTS** the Clerk to provide a copy of this Order to the parties.

IT IS SO ORDERED.

/s/ Raymond A. Jackson
United States District Judge

Newport News, Virginia
July 10, 2020

FILED: June 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4393
(4:19-cr-00043-RAJ-DEM-1)

UNITED STATES OF AMERICA
Plaintiff- Appellee

v.

KENNETH R. SPIRITO
Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

18 U.S.C. § 666

Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier

than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

18 U.S.C. § 1957

Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the

criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are-

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section-

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in

or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

49 U.S.C. § 46301

(From United States Code Title 49 Transportation, Subtitle VII Aviation Programs, Part A Air Commerce and Safety, Subpart IV-Enforcement and Penalties, Chapter 463)

(a) General Penalty.

(1) A person is liable to the United States Government for a civil penalty of not more than $25,000 (or $1,100 if the person is an individual or small business concern) for violating-

(A) chapter 401 (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 411, chapter 413 (except sections 41307 and 41310(b)–(f)), chapter 415 (except sections 41502, 41505, and 41507–41509), chapter 417 (except sections 41703, 41704, 41710,

41713, and 41714), chapter 419, subchapter II or III of chapter 421, chapter 423, chapter 441 (except section 44109), section 44502(b) or (c), chapter 447 (except sections 44717 and 44719–44723), chapter 449 (except sections 44902, 44903(d), 44904, 44907(a)–(d)(1)(A) and (d)(1)(C)–(f), and 44908), chapter 451, section 47107(b) (including any assurance made under such section), or section 47133 of this title;

(B) a regulation prescribed or order issued under any provision to which clause (A) of this paragraph applies;

(C) any term of a certificate or permit issued under section 41102, 41103, or 41302 of this title; or

(D) a regulation of the United States Postal Service under this part.

(2) A separate violation occurs under this subsection for each day the violation (other than a violation of section 41719) continues or, if applicable, for each flight involving the violation (other than a violation of section 41719).

(3) Penalty for diversion of aviation revenues. The amount of a civil penalty assessed under this section for a violation of section 47107(b) of this title (or any assurance made under such section) or section 47133 of this title may be increased above the otherwise applicable maximum amount under this section to an amount not to exceed 3 times the amount of revenues that are used in violation of such section.

(4) Aviation security violations. Notwithstanding paragraph (1) of this subsection, the maximum civil penalty for violating chapter

449 shall be $10,000; except that the maximum civil penalty shall be $25,000 in the case of a person operating an aircraft for the transportation of passengers or property for compensation (except an individual serving as an airman).

(5) Penalties applicable to individuals and small business concerns.

(A) An individual (except an airman serving as an airman) or small business concern is liable to the Government for a civil penalty of not more than $10,000 for violating

(i) chapter 401 (except sections 40103(a) and (d), 40105, 40106(b), 40116, and 40117), section 44502 (b) or (c), chapter 447 (except sections 44717–44723), chapter 449 (except sections 44902, 44903(d), 44904, and 44907–44909), or chapter 451, or section 46314(a) of this title; or

(ii) a regulation prescribed or order issued under any provision to which clause (i) applies.

(B) A civil penalty of not more than $10,000 may be imposed for each violation under paragraph (1) committed by an individual or small business concern related to

(i) the transportation of hazardous material;

(ii) the registration or recordation under chapter 441 of an aircraft not used to provide air transportation;

(iii) a violation of section 44718(d), relating to the limitation on construction or establishment of landfills;

(iv) a violation of section 44725, relating to the safe disposal of life-limited aircraft parts; or

(v) a violation of section 40127 or section 41705, relating to discrimination.

(C) Notwithstanding paragraph (1), the maximum civil penalty for a violation of section 41719 committed by an individual or small business concern shall be $5,000 instead of $1,000.

(D) Notwithstanding paragraph (1), the maximum civil penalty for a violation of section 41712 (including a regulation prescribed or order issued under such section) or any other regulation prescribed by the Secretary by an individual or small business concern that is intended to afford consumer protection to commercial air transportation passengers shall be $2,500 for each violation.

(6) Failure To Collect Airport Security Badges. Notwithstanding paragraph (1), any employer (other than a governmental entity or airport operator) who employs an employee to whom an airport security badge or other identifier used to obtain access to a secure area of an airport is issued before, on, or after the date of enactment of this paragraph and who does not collect or make reasonable efforts to collect such badge from the employee on the date that the employment of the employee is terminated and does not notify the operator of the airport of such termination within 24 hours of the date of such termination shall be liable to the Government for a civil penalty not to exceed $10,000.

(b) Smoke Alarm Device Penalty.

(1) A passenger may not tamper with, disable, or destroy a smoke alarm device located in a lavatory on an aircraft providing air transportation or intrastate air transportation.

(2) An individual violating this subsection is liable to the Government for a civil penalty of not more than $2,000.

(c) Procedural Requirements.

(1) The Secretary of Transportation may impose a civil penalty for the following violations only after notice and an opportunity for a hearing:

(A) a violation of subsection (b) of this section or chapter 411, chapter 413 (except sections 41307 and 41310(b)–(f)), chapter 415 (except sections 41502, 41505, and 41507–41509), chapter 417 (except sections 41703, 41704, 41710, 41713, and 41714), chapter 419, subchapter II of chapter 421, chapter 423, or section 44909 of this title.

(B) a violation of a regulation prescribed or order issued under any provision to which clause (A) of this paragraph applies.

(C) a violation of any term of a certificate or permit issued under section 41102, 41103, or 41302 of this title.

(D) a violation under subsection (a)(1) of this section related to the transportation of hazardous material.

(2) The Secretary shall give written notice of the finding of a violation and the civil penalty under paragraph (1) of this subsection.

(d) Administrative Imposition of Penalties.

(1) In this subsection-

(A) "flight engineer" means an individual who holds a flight engineer certificate issued under part 63 of title 14, Code of Federal Regulations.

(B) "mechanic" means an individual who holds a mechanic certificate issued under part 65 of title 14, Code of Federal Regulations.

(C) "pilot" means an individual who holds a pilot certificate issued under part 61 of title 14, Code of Federal Regulations.

(D) "repairman" means an individual who holds a repairman certificate issued under part 65 of title 14, Code of Federal Regulations.

(2) The Administrator of the Federal Aviation Administration may impose a civil penalty for a violation of chapter 401 (except sections 40103(a) and (d), 40105, 40106(b), 40116, and 40117), chapter 441 (except section 44109), section 44502(b) or (c), chapter 447 (except sections 44717 and 44719–44723), chapter 451, section 46301(b), section 46302 (for a violation relating to section 46504), section 46318, section 46319, or section 47107(b) (as further defined by the Secretary under section 47107(l) and including any assurance made under section 47107(b)) of this title or a regulation prescribed or order issued under any of those provisions. The Secretary of Homeland Security may impose a civil penalty for a violation of chapter 449 (except sections 44902, 44903(d), 44907(a)–(d)(1)(A), 44907(d)(1)(C)–(f), 44908, and 44909), section 46302 (except for a violation relating to section 46504), or section 46303 of this title or a regulation prescribed or order issued under any

of those provisions. The Secretary of Homeland Security or Administrator shall give written notice of the finding of a violation and the penalty.

(3) In a civil action to collect a civil penalty imposed by the Secretary of Homeland Security or Administrator under this subsection, the issues of liability and the amount of the penalty may not be reexamined.

(4) Notwithstanding paragraph (2) of this subsection, the district courts of the United States have exclusive jurisdiction of a civil action involving a penalty the Secretary of Homeland Security or Administrator initiates if-

(A) the amount in controversy is more than-

(i) $50,000 if the violation was committed by any person before the date of enactment of the Vision 100-Century of Aviation Reauthorization Act;

(ii) $400,000 if the violation was committed by a person other than an individual or small business concern on or after that date; or

(iii) $50,000 if the violation was committed by an individual or small business concern on or after that date;

(B) the action is in rem or another action in rem based on the same violation has been brought;

(C) the action involves an aircraft subject to a lien that has been seized by the Government; or

(D) another action has been brought for an injunction based on the same violation.

(5)(A) The Administrator may issue an order imposing a penalty under this subsection against an individual acting as a pilot, flight engineer, mechanic, or repairman only after advising the individual of the charges or any reason the Administrator relied on for the proposed penalty and providing the individual an opportunity to answer the charges and be heard about why the order shall not be issued.

(B) An individual acting as a pilot, flight engineer, mechanic, or repairman may appeal an order imposing a penalty under this subsection to the National Transportation Safety Board. After notice and an opportunity for a hearing on the record, the Board shall affirm, modify, or reverse the order. The Board may modify a civil penalty imposed to a suspension or revocation of a certificate.

(C) When conducting a hearing under this paragraph, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

(D) When an individual files an appeal with the Board under this paragraph, the order of the Administrator is stayed.

(6) An individual substantially affected by an order of the Board under paragraph (5) of this subsection, or the Administrator when the Administrator decides that an order of the Board

under paragraph (5) will have a significant adverse impact on carrying out this part, may obtain judicial review of the order under section 46110 of this title. The Administrator shall be made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence.

(7)(A) The Administrator may impose a penalty on a person (except an individual acting as a pilot, flight engineer, mechanic, or repairman) only after notice and an opportunity for a hearing on the record.

(B) In an appeal from a decision of an administrative law judge as the result of a hearing under subparagraph (A) of this paragraph, the Administrator shall consider only whether-

(i) each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence;

(ii) each conclusion of law is made according to applicable law, precedent, and public policy; and

(iii) the judge committed a prejudicial error that supports the appeal.

(C) Except for good cause, a civil action involving a penalty under this paragraph may not be initiated later than 2 years after the violation occurs.

(D) In the case of a violation of section 47107(b) of this title or any assurance made under such section-

(i) a civil penalty shall not be assessed against an individual;

(ii) a civil penalty may be compromised as provided under subsection (f); and

(iii) judicial review of any order assessing a civil penalty may be obtained only pursuant to section 46110 of this title.

(8) The maximum civil penalty the Under Secretary, Administrator, or Board may impose under this subsection is-

(A) $50,000 if the violation was committed by any person before the date of enactment of the Vision 100-Century of Aviation Reauthorization Act;

(B) $400,000 if the violation was committed by a person other than an individual or small business concern on or after that date; or

(C) $50,000 if the violation was committed by an individual or small business concern on or after that date.

(9) This subsection applies only to a violation occurring after August 25, 1992.

(e) Penalty Considerations. In determining the amount of a civil penalty under subsection (a)(3) of this section related to transportation of hazardous material, the Secretary shall consider-

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue doing business; and

(3) other matters that justice requires.

(f) Compromise and Setoff.

(1)(A) The Secretary may compromise the amount of a civil penalty imposed for violating-

(i) chapter 401 (except sections 40103(a) and (d), 40105, 40116, and 40117), chapter 441 (except section 44109), section 44502(b) or (c), chapter 447 (except sections 44717 and 44719–44723), chapter 449 (except sections 44902, 44903(d), 44904, 44907(a)–(d)(1)(A) and (d)(1)(C)–(f), 44908, and 44909), or chapter 451 of this title; or

(ii) a regulation prescribed or order issued under any provision to which clause (i) of this subparagraph applies.

(B) The Postal Service may compromise the amount of a civil penalty imposed under subsection (a)(1)(D) of this section.

(2) The Government may deduct the amount of a civil penalty imposed or compromised under this subsection from amounts it owes the person liable for the penalty.

(g) Judicial Review. An order of the Secretary or the Administrator imposing a civil penalty may be reviewed judicially only under section 46110 of this title.

(h) Nonapplication.

(1) This section does not apply to the following when performing official duties:

(A) a member of the armed forces of the United States.

(B) a civilian employee of the Department of Defense subject to the Uniform Code of Military Justice.

(2) The appropriate military authority is responsible for taking necessary disciplinary action and submitting to the Secretary (or the Under Secretary of Transportation for Security

with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator with respect to aviation safety duties and powers designated to be carried out by the Administrator) a timely report on action taken.

(i) Small Business Concern Defined. In this section, the term "small business concern" has the meaning given that term in section 3 of the Small Business Act (15 U.S.C. 632).

14 C.F.R. § 13.15

Civil penalties: Other than by administrative assessment (From Code of Federal Regulations Title 14 Aeronautics and Space, Chapter I Federal Aviation Administration, Department of Transportation, Subchapter B Procedural Rules, Part 13 Investigative and Enforcement Procedures)

(a) The FAA uses the procedures in this section when it seeks a civil penalty other than by the administrative assessment procedures in § 13.16 or § 13.18.

(b) The authority of the Administrator to seek a civil penalty, and the ability to refer cases to the United States Attorney General, or the delegate of the Attorney General, for prosecution of civil penalty actions sought by the Administrator is delegated to the Chief Counsel, each Deputy Chief Counsel, and the Assistant Chief Counsel for Enforcement. This delegation applies to cases involving one or more of the following:

(1) An amount in controversy in excess of:

(i) $400,000, if the violation was committed by a person other than an individual or small business concern; or

(ii) $50,000, if the violation was committed by an individual or small business concern.

(2) An in rem action, seizure of aircraft subject to lien, suit for injunctive relief, or for collection of an assessed civil penalty.

(c) The Administrator may compromise any civil penalty proposed under this section, before referral to the United States Attorney General, or the delegate of the Attorney General, for prosecution.

(1) The Administrator, through the Chief Counsel, a Deputy Chief Counsel, or the Assistant Chief Counsel for Enforcement sends a civil penalty letter to the person charged with a violation. The civil penalty letter contains a statement of the charges; the applicable law, rule, regulation, or order; and the amount of civil penalty that the Administrator will accept in full settlement of the action or an offer to compromise the civil penalty.

(2) Not later than 30 days after receipt of the civil penalty letter, the person cited with an alleged violation may respond to the civil penalty letter by

(i) Submitting electronic payment, a certified check, or money order in the amount offered by the Administrator in the civil penalty letter. The agency attorney will send a letter to the person charged with the violation stating that payment is accepted in full settlement of the civil penalty action; or

(ii) Submitting one of the following to the agency attorney:

(A) Written material or information that may explain, mitigate, or deny the violation or that may show extenuating circumstances; or

(B) A written request for an informal conference to discuss the matter with the agency attorney and to submit any relevant information or documents that may explain, mitigate, or deny the violation; or that may show extenuating circumstances.

(3) The documents, material, or information submitted under paragraph (c)(2)(ii) of this section may include support for any claim of inability to pay the civil penalty in whole or in part, or for any claim of small business status as defined in 49 U.S.C. 46301(i).

(4) The Administrator will consider any material or information submitted under paragraph (c)(2)(ii) of this section to determine whether the person is subject to a civil penalty or to determine the amount for which the Administrator will compromise the action.

(5) If the parties cannot agree to compromise the civil penalty, the Administrator may refer the civil penalty action to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings in a U.S. district court to prosecute and collect a civil penalty.

14 C.F.R. § 13.16

Civil penalties: Administrative assessment against a person other than an individual acting as a pilot, flight engineer, mechanic, or repairman; administrative assessment against all persons for hazardous materials violations. (From Code of Federal Regulations Title 14 Aeronautics and Space, Chapter I Federal Aviation Administration, Department of Transportation, Subchapter B Procedural Rules, Part 13 Investigative and Enforcement Procedures)

(a) General. The FAA uses the procedures in this section when it assesses a civil penalty against a person other than an individual acting as a pilot, flight engineer, mechanic, or repairman for a violation cited in the first sentence of 49 U.S.C. 46301(d)(2), or in 49 U.S.C. 47531, or any implementing rule, regulation, or order, except when the U.S. district courts have exclusive jurisdiction.

(b) District court jurisdiction. The U.S. district courts have exclusive jurisdiction of any civil penalty action initiated by the FAA for violations described in paragraph (a) of this section if -

(1) The amount in controversy is more than $400,000 for a violation committed by a person other than an individual or small business concern;

(2) The amount in controversy is more than $50,000 for a violation committed by an individual or a small business concern;

(3) The action is in rem or another action in rem based on the same violation has been brought;

(4) The action involves an aircraft subject to a lien that has been seized by the Government; or

(5) Another action has been brought for an injunction based on the same violation.

(c) Hazardous materials violations. An order assessing a civil penalty for a violation under 49 U.S.C. chapter 51, or a rule, regulation, or order issued under 49 U.S.C. chapter 51, is issued only after the following factors have been considered:

(1) The nature, circumstances, extent, and gravity of the violation;

(2) With respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) Other matters that justice requires.

(d) Delegation of authority. The authority of the Administrator is delegated to each Deputy Chief Counsel and the Assistant Chief Counsel for Enforcement, as follows:

(1) Under 49 U.S.C. 46301(d), 47531, and 5123, and 49 CFR 1.83, to initiate and assess civil penalties for a violation of those statutes or a rule, regulation, or order issued under those provisions;

(2) Under 49 U.S.C. 5123, 49 CFR 1.83, 49 U.S.C. 46301(d), and 49 U.S.C. 46305, to refer cases to the Attorney General of the United States or a delegate of the Attorney General for collection of civil penalties;

(3) Under 49 U.S.C. 46301(f), to compromise the amount of a civil penalty imposed; and

(4) Under 49 U.S.C. 5123(e) and (f) and 49 CFR 1.83, to compromise the amount of a civil penalty imposed.

(e) Order assessing civil penalty.

(1) An order assessing civil penalty may be issued for a violation described in paragraph (a) or (c) of this section, or as otherwise provided by statute, after notice and opportunity for a hearing, when:

(i) A person charged with a violation agrees to pay a civil penalty for a violation; or

(ii) A person charged with a violation does not request a hearing under paragraph (g)(2)(ii) of this section within 15 days after receipt of a final notice of proposed civil penalty.

(2) The following also serve as an order assessing civil penalty:

(i) An initial decision or order issued by an administrative law judge as described in § 13.232(e).

(ii) A decision or order issued by the FAA decisionmaker as described in § 13.233(j).

(f) Notice of proposed civil penalty. A civil penalty action is initiated by sending a notice of proposed civil penalty to the person charged with a violation, the designated agent for the person, or if there is no such designated agent, the president of the company charged with a violation. In response to a notice of proposed civil penalty, a company may designate in writing another person to receive documents in that civil penalty action. The notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty. Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation may -

(1) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case

either an order assessing civil penalty or compromise order under paragraph (n) of this section may be issued in that amount;

(2) Submit to the agency attorney one of the following:

(i) Written information, including documents and witness statements, demonstrating that a violation of the regulations did not occur or that a penalty or the amount of the penalty is not warranted by the circumstances.

(ii) A written request to reduce the proposed civil penalty, stating the amount of reduction and the reasons and providing any documents supporting a reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business.

(iii) A written request for an informal conference to discuss the matter with the agency attorney and to submit relevant information or documents; or

(3) Request a hearing conducted in accordance with subpart G of this part.

(g) Final notice of proposed civil penalty. A final notice of proposed civil penalty will be sent to the person charged with a violation, the designated agent for the person, the designated agent named in accordance with paragraph (f) of this section, or the president of the company charged with a violation. The final notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty and, as a result of information

submitted to the agency attorney during informal procedures, may modify an allegation or a proposed civil penalty contained in a notice of proposed civil penalty.

(1) A final notice of proposed civil penalty may be issued -

(i) If the person charged with a violation fails to respond to the notice of proposed civil penalty within 30 days after receipt of that notice; or

(ii) If the parties participated in any procedures under paragraph (f)(2) of this section and the parties have not agreed to compromise the action or the agency attorney has not agreed to withdraw the notice of proposed civil penalty.

(2) Not later than 15 days after receipt of the final notice of proposed civil penalty, the person charged with a violation may do one of the following:

(i) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing civil penalty or a compromise order under paragraph (n) of this section may be issued in that amount; or

(ii) Request a hearing conducted in accordance with subpart G of this part.

(h) Request for a hearing. Any person requesting a hearing, under paragraph (f)(3) or (g)(2)(ii) of this section must file the request with the FAA Hearing Docket Clerk and serve the request on the agency attorney in accordance with the requirements in subpart G of this part.

(i) Hearing. The procedural rules in subpart G of this part apply to the hearing.

(j) Appeal. Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker under the procedures in subpart G of this part. The procedural rules in subpart G of this part apply to the appeal.

(k) Judicial review. A person may seek judicial review only of a final decision and order of the FAA decisionmaker in accordance with § 13.235.

(l) Payment.

(1) A person must pay a civil penalty by:

(i) Sending a certified check or money order, payable to the Federal Aviation Administration, to the FAA office identified in the notice of proposed civil penalty, the final notice of proposed civil penalty, or the order assessing civil penalty; or

(ii) Making an electronic payment according to the directions specified in the notice of proposed civil penalty, the final notice of proposed civil penalty, or the order assessing civil penalty.

(2) The civil penalty must be paid within 30 days after service of the order assessing civil penalty, unless otherwise agreed to by the parties. In cases where a hearing is requested, an appeal to the FAA decisionmaker is filed, or a petition for review of the FAA decisionmaker's decision is filed in a U.S. court of appeals, the civil penalty must be paid within 30 days after all litigation in the matter is completed and the civil penalty is affirmed in whole or in part.

(m) Collection of civil penalties. If an individual does not pay a civil penalty imposed by an order assessing civil penalty or other final order, the Administrator may take action to collect the penalty.

(n) Compromise. The FAA may compromise the amount of any civil penalty imposed under this section under 49 U.S.C. 5123(e), 46301(f), or 46318 at any time before referring the action to the United States Attorney General, or the delegate of the Attorney General, for collection.

(1) When a civil penalty is compromised with a finding of violation, an agency attorney issues an order assessing civil penalty.

(2) When a civil penalty is compromised without a finding of violation, the agency attorney issues a compromise order that states the following:

(i) The person has paid a civil penalty or has signed a promissory note providing for installment payments.

(ii) The FAA makes no finding of a violation.

(iii) The compromise order will not be used as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.