as possible. She helps collect the offerings, and when I am in Alaska, I help her.

After my grandma was mayor of Fairbanks, she became an assistant for U.S. Senator Ted Stevens. She runs his office in Fairbanks. She helps people in the community contact the government or Senator Stevens. If a person needs help concerning a problem with the government, my grandma will help them.

My grandma and I saw the jump coming closer. We were on the jump, then crash! I went off crooked into some bushes, but my grandma was still going straight. That does not surprise me because my grandma is so incredible. My grandma Ruth is very beautiful and never misses a day of church or work. I wish everyone had a great grandma.

## WELCOMING OUR NEW DEPUTY SERGEANT AT ARMS

Mr. FRIST. Madam President, I rise today to welcome and introduce to my colleague, J. Keith Kennedy, as our new Deputy Sergeant at Arms. Keith is a true professional in every sense of the word, and a great choice to serve as Deputy Sergeant at Arms.

Keith first came to the Senate in 1972 as a legislative assistant to Senator Mark Hatfield. In 1977, Keith was tapped by Senator Hatfield to serve as a professional staff member on the Senate Select Committee on Indian Affairs. In 1979, he joined the staff of the Senate Committee on Appropriations, quickly rising to become staff director, and served with the committee for a remarkable tenure of 16 years.

In accepting the position of Deputy Sergeant at Arms, Keith has fulfilled his desire to return to public service, and we all will benefit greatly from his talent and commitment to this institution. He joins an already outstanding team in the Office of the Sergeant at Arms. In this first week alone, Keith has hit the ground running, and I know he will continue to accomplish great things.

To Keith and his fine family, please accept my heartfelt congratulations, and I look forward to working with you in the weeks and months to come. Thank you for your dedication to the Senate.

## TRIBUTE TO MAURA LASATER

Mr. REID. Madam President, I would like to recognize Maura Lasater, the Cherry Blossom Princess selected to represent the State of Nevada in this year's National Cherry Blossom Festival in Washington, DC.

Maura has long been a part of the Greater Nevada community. As a friend and admirer of her family, I have watched Maura grow up to become a truly wonderful and vibrant young lady. She takes initiative to improve her community and, with her know-how, energy and common sense, she leaves a lasting impression on those around her. Her poise is particularly notable for such a young person. She is a bright light and joy to be around. I am so proud of her many achievements and know that her future is full of promise and possibilities.

Maura comes from a family with deep Nevada roots and a strong commitment to public service. Her mother, Jan Jones, was the successful and legendary mayor of Las Vegas for 8 years. Maura worked with her mother on her campaigns for Mayor, and now she continues her service to Nevada working for Congresswoman SHELLEY BERKLEY. Like her mom, Maura is a smart, focused, and spirited woman. She is a tremendous asset to Congresswoman BERKLEY's office as demonstrated by the extensive work she does directly with Nevadans. We in Nevada are lucky to have such a gifted and dedicated individual working on our behalf, and I am pleased to honor her as the Cherry Blossom Princess from Nevada in 2003.

## CELEBRATING THE ANNIVERSARY OF THE CIVIL RIGHTS ACT OF 1968

Mr. SARBANES. Madam President, I rise today to join with my fellow Marylanders and all Americans in celebrating the 35th anniversary of the Civil Rights Act of 1968. On April 11, 1968, President Lyndon Johnson signed this historic act, one of several landmark pieces of legislation that helped ensure equal treatment for people of all races, and helped bring to life the original founding principles of our Nation.

In 1964, President Johnson signed the Civil Rights Act of 1964, which made segregation in public facilities and discrimination in employment illegal. This remarkable piece of legislation was followed up 4 years later with the Civil Rights Act of 1968, which contained the Fair Housing Act that prohibited discrimination in the sale, rental, and financing of housing.

This law helps to ensure that people of all races have opportunities to live where they choose. The housing pattern in the early 1960s was one of almost complete segregation. In 1967, 80 percent of all nonwhites living in metropolitan areas lived in the central city, while up to one-third of all new factories and stores were locating outside of the central city areas. Equal access to housing was seen not only as a basic right by legislators and advocates, but it was also seen as key to increased employment opportunities. In order for people of all racial groups to advance economically, they needed access to jobs, and housing near those jobs was being denied to African Americans and others in this country.

Unfortunately, 35 years after its passage, the Fair Housing Act is still needed because discrimination in housing continues. Too many minorities, disabled people, and families are unable to live where they choose because of discrimination. Each year, thousands of people turn to the Department for Housing and Urban Development and agencies around the country because they have been denied decent and safe housing based purely on their race, ethnicity, disability or familial status. As we celebrate the anniversary of the Fair Housing Act, an act that promised that we as a nation would work to ensure that all people had equal access to areas of opportunity, we must do more to act on that promise and make it a reality. The Fair Housing Act must be better enforced, so that people around the country understand that we take the act and its protections seriously.

I also want to remind people that, even after achieving the American dream of homeownership, we must remain vigilant. Each year, many homeowners, particularly minority homeowners, are stripped of the wealth and equity they have accumulated in their homes over many years by the unscrupulous practices of predatory lending. The Federal Government took a small step to guard against this abuse when it passed the Home Owners and Equity Protection Act in 1994. However, we need to do more, and I intend to press legislation to move this part of the civil rights agenda forward.

While we continue to make progress to ensure that people of all races are treated equally, we should also honor those great civil rights leaders who gave us their vision of equality. President Johnson signed the Civil Rights Act of 1968 just a week after Martin Luther King, Jr., was assassinated at a hotel in Memphis, TN, affirming that despite this Nation's great loss, the legacy of Dr. King would live on. We must continue to recognize and honor the remarkable achievements and the ultimate sacrifice of Dr. King.

In order to remember and preserve Dr. King's legacy, the Martin Luther King, Jr., Memorial Project Foundation is in the process of planning and building a memorial on The Mall to Dr. King. The process has been ongoing for several years, and I have recently offered legislation that would extend the legislative authority for the memorial by an additional 3 years. This legislation would give the foundation the extra time that it needs to complete this important project. Visitors will be able to come to the memorial from every part of this country, and indeed the world, to be inspired anew by Dr. King's words and deeds and the extraordinary story of his life.

The civil rights movement inspired by Dr. King and others changed the lives of all Americans for the better. However, we can do more to live up to the expectations that he and others set for our Nation. In celebrating the anniversary of the Civil Rights Act of 1968, we are reminded of how far we have come, and how far we have yet to go.

## LEGISLATIVE HISTORY OF TITLE IX OF THE SARBANES-OXLEY ACT OF 2002

Mr. BIDEN. Madam President, I rise today to offer the following section-by-section analysis of Title IX of the ''Sarbanes-Oxley Act of 2002,'' P.L. 107–204, of which I was the primary author along with my good friend from Utah, Senator HATCH. Title IX was derived

from S. 2717, the ''White-Collar Crime Penalty Enhancement Act of 2002,'' which I introduced with Senator HATCH on July 10, 2002. That same day, Senator HATCH and I offered the text of S. 2717 as a floor amendment to the Public Company Accounting Reform and Investment Protection Act of 2002, S. 2673. Our amendment was unanimously adopted by the Senate on July 10, 2002, by a 96–0 vote. S. 2673 was overwhelmingly approved, as amended with the inclusion of S. 2717, on July 15, 2002, by a vote of 97–0. S. 2673 then went to a House-Senate conference. The Biden-Hatch amendment was retained in the final conference report as Title IX, and in substantially identical form to that in S. 2673. The conference report, the Sarbanes-Oxley Act, H.R. 3763, was passed by the Senate on July 25, 2002, by a 99–0 vote. The President signed the Sarbanes-Oxley Act into law on July 30, 2002.

As I mentioned, Title IX of the Sarbanes-Oxley Act, entitled the ''White-Collar Crime Penalty Enhancement Act of 2002,'' closely mirrors the original S. 2717. In order to provide guidance in the legal interpretation of these provisions, I have compiled the following analysis and discussion, which are intended to augment, and not supplant, the legislative history and explanatory statements that accompanied passage of H.R. 3763. This legislative history is intended also to supplement my remarks at the time of the Sarbanes-Oxley Act's final passage. See S7426–S7425 (July 26, 2002). I ask unanimous consent that this section-by-section analysis be included in the CONGRESSIONAL RECORD as part of the official legislative history of these provisions.

The content of Title IX was developed partly in response to a series of white-collar crime hearings I held in my capacity as Chairman of the Senate Judiciary Subcommittee on Crime and Drugs. Through those hearings, the subcommittee heard from a wide range of witnesses with expertise in both corporate law and white-collar crime—including current and former high-ranking officials from the United States Securities and Exchange Commission (SEC), the United States Departments of Justice and Treasury, and the Federal Reserve; business and law professors; corporate practitioners; as well as victims of corporate fraud.

The first hearing, held on June 19, 2002, focused on the disparity in sentences between white-collar offenses, including pension fraud, and federal ''street crimes'' like car theft. Specifically, the hearing explored four broad areas: it focused on the human consequences of white-collar crimes; defined and quantified the problem, including an evaluation of the use of the criminal sanction against white-collar criminals and the severity of penalties typically imposed; explored the reasons that might explain the lighter sentences that white-collar offenders often receive; and discussed recent amendments to the federal sentencing guidelines that purport to address the historic, disparate treatment of economic crimes. The first-panel witnesses included Charles Prestwood, a retiree who lost his retirement savings in the bankruptcy of the Enron Corporation; Janice Farmer, a retiree who similarly lost her retirement savings in the Enron bankruptcy; and Howard Deputy, a former employee of the Metachem Company in Delaware who was at risk of losing a portion of his pension in Metachem's bankruptcy. The second-panel witnesses included James B. Comey, United States Attorney for the Southern District of New York; Glen B. Gainer, Chairman of the Board of Directors of the National White Collar Crime Center and West Virginia State Auditor; Bradley Skolnik, Chief of the Enforcement Section of the North American Securities Administrators Association and Securities Commissioner for the State of Indiana; Frank O. Bowman, Associate Law Professor at the University of Indiana School of Law; and Paul Rosenzweig, Senior Legal Research Fellow at the Heritage Foundation.

The second hearing, held on July 10, 2002, also addressed the adequacy of criminal penalties for white-collar crimes and evaluated the use of the criminal sanction to deter wrongdoing and encourage corporate responsibility. We were particularly interested in learning whether the current federal criminal law, as opposed to civil enforcement mechanisms, was sufficient to address the range of corporate scandals that were then unfolding. Specifically, the hearing addressed the issue through the lense of the recent accounting scandals—exploring the pattern of corporate irresponsibility and the cultural and economic conditions that made the scandals possible; the impact of the scandals on investor confidence and economic health; and the need for investor protection and anti-fraud legislation which includes stiffened criminal penalties. The first-panel witnesses included Michael Chertoff, Assistant Attorney General for the Criminal Division at the United States Department of Justice; and William W. Mercer, United States Attorney for the District of Montana and head of the United States Attorneys' White-Collar Crime Working Group. The second-panel witnesses included John C. Coffee, Jr., Adolf A. Berle Professor of Law at Columbia University School of Law; Thomas Donaldson, Mark O. Winkelman Professor at the Wharton School of Business at the University of Pennsylvania; Charles M. Elson, Edgar S. Woolard, Jr. Chair at the Center for Corporate Governance at the University of Delaware; George Terwilliger, former Deputy Attorney General at the United States Department of Justice; and Tom Devine, Legal Director at the Government Accountability Project.

The third hearing, held on July 24, 2002, continued the discussion initiated in the earlier hearings and featured three former, high-ranking officials in the Executive Branch who commented on a host of suggested reforms—including S. 2717 which, by that time, had been amended to the Senate precursor to the Sarbanes-Oxley Act (the Public Company Accounting Reform and Investment Protection Act of 2002, S. 2673). The witnesses included G. William Miller, former Secretary of the Treasury under President Carter and former Chairman of the Federal Reserve Board; Roderick Hills, former Chairman of the Securities and Exchange Commission under President Ford; and James Doty, former General Counsel to the Securities and Exchange Commission and head of the corporate and securities practice at Baker Botts LLP.

On a final note, the legislation was introduced and subsequently enacted against the backdrop of the Sentencing Commission's ongoing efforts in the area of economic crime. We are aware of the ''Economic Crime Package,'' which was approved by the Commission in April 2001 and went into effect in November 2001. These amendments to the federal sentencing guidelines consolidated the guidelines for theft, property destruction, and fraud offenses; revised the definition of ''loss,'' which largely informs the range of sentencing available for an offense; increased penalties for offenses involving moderate and high-dollar losses and reduced penalties on some lower-level offenses; and revised the loss table for tax offenses to provide for higher penalty levels for offenses involving moderate and high tax losses. Title IX was developed and enacted with full awareness of these new amendments to the guidelines.

I ask unanimous consent that the section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SECTION-BY-SECTION ANALYSIS AND DISCUSSION OF THE ''WHITE-COLLAR CRIME PENALTY ENHANCEMENTS ACT OF 2002'' (TITLE IX OF H.R. 3763)

*Section 901. Short Title*

This section designates this title of the Act as the ''White-Collar Crime Penalty Enhancement Act of 2002.''

*Section 902. Attempts and Conspiracies To Commit Criminal Fraud Offenses*

This section adds a new provision to the United States Code (18 U.S.C. §1349), which indicates that any person who attempts or conspires to commit a fraud offense under Chapter 63 of Title 18 (in other words, 18 U.S.C. §§1341–1348) shall face the same penalties as those provided for in the predicate, or underlying, offense that was the object of the attempt or the conspiracy. (While 18 U.S.C. §2 currently provides for the same penalties for aiding and abetting offenses as the predicate crimes, prosecution under that section requires the government to prove some affirmative act by the defendant. In contrast, prosecution under Section 902 requires no affirmative act, but only an agreement to commit a future crime, as is the case with 18 U.S.C. §371.)

During hearings by the Judiciary Subcommittee on Crime and Drugs on the ''penalty gap'' between white-collar offenses and

other federal crimes, we observed that defendants charged with conspiracy pursuant to 18 U.S.C. §371 were afforded a potential windfall in terms of their sentence, vis-a-vis their co-defendants who were convicted of the actual offenses. That windfall resulted because the charge of conspiracy under Section 371 only subjects a convicted individual to a maximum imprisonment term of 5 years. In contrast, certain fraud offenses in Chapter 63 carry maximum penalties of up to 30 years imprisonment, e.g., 18 U.S.C. §1344 (imposing up to 30 years imprisonment for bank fraud). In the case of a particularly egregious bank fraud case, then, one co-defendant could receive a 30–year sentence while an equally culpable co-conspirator would receive only a 5–year sentence.

Congress responded by creating a new Section 1349 for defendants who attempt or conspire to commit a financial fraud under Chapter 63 of Title 18. The Justice Department may now elect to charge a fraud conspirator under this new section, rather than pursuant to 18 U.S.C. §371, thereby preserving the same maximum penalties. In enacting this new section, we harmonize the penalties for financial fraud conspiracy with those of narcotics offenses. See 21 U.S.C. §846 (''[a]ny person who attempts or conspires to commit any [narcotics] offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.'')

*Section 903. Criminal Penalties for Mail and Wire Fraud*

This section increases the potential maximum term of imprisonment available upon conviction for mail fraud (18 U.S.C. §1341) or wire fraud (18 U.S.C. §1343) from 5 years to 20 years. Fraud affecting financial institutions in both Sections 1341 and 1343 of Title 18 is unaffected by this section, so the potential maximum term of imprisonment for this offense remains 30 years.

By raising the criminal penalties for Sections 1341 and 1343, we intended to harmonize the penalties for mail and wire fraud with the penalties for other serious financial crimes. See, e.g., 18 U.S.C. §1348 (25–year maximum penalty for securities fraud); 18 U.S.C. §1956(a)(3)(A) (20–year maximum penalty for money laundering); 18 U.S.C. 1962 (20–year maximum penalty for racketeering). In addition, we intended to ensure that the penalty structure for these offenses was sufficiently stiff to provide a real deterrent effect. As support for that aim, the Subcommittee on Crime and Drugs heard testimony from several witnesses who insisted that (1) these federal penalties should be toughened; and (2) in order to deter misconduct, offenders should be subject to some amount of actual incarceration.

For example, the Honorable James B. Comey, Jr., the United States Attorney for the Southern District of New York, observed that ''[w]hite collar criminals have broken serious laws, done grave harm to real people . . . [and] should be subject to the same serious treatment that we accord all serious crimes: substantial periods of incarceration. While we have made significant progress on some issues in recent years, especially in improving the applicable sentencing guidelines, we believe that current federal penalties for white collar offenses should be toughened.'' Testimony of Comey before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 2. He continued: ''[E]nforcement can be undermined when criminals perceive the risk of incarceration as minimal and view fines and probation merely as a cost of doing their criminal business. We believe that if it is unmistakable that the automatic consequence for one who commits a significant white collar offense is prison, then many will be deterred. . . . [White collar criminals] commit their crimes not in a fit of passion, but with cold, careful calculation. Accordingly, they are the most rational offenders and are more likely than most to weigh the risks of possible courses of action against the anticipated rewards of criminal behavior.'' Testimony of Comey before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 4.

The Honorable Michael Chertoff, Assistant Attorney General for the Criminal Division at the United States Department of Justice, echoed this sentiment: ''We believe that strong enforcement and tough penalties are especially important in the context of white collar crimes, because business criminals act with calculation rather than in a fit of anger or compulsion. Because white collar criminals act more rationally than most other criminals, they can more easily be deterred. In our experience, one thing is crystal clear: businessmen and women want to avoid jail at any cost. If their calculus includes a reasonable likelihood that they will be caught, and if caught, a reasonable likelihood that they will go to jail rather than get probation, home detention, or some other alternative to incarceration,' they will be much less willing to roll the dice and commit a fraud.'' Testimony of Chertoff before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 3; see also Testimony of G. William Miller, former Secretary of the Treasury and former Chairman of the Federal Reserve Board, before the Senate Judiciary Subcommittee on Crime and Drugs, July 24, 2002, p. 3–4 (''[T]he greed that drives the recent rash of alleged corporate wrongdoing is fostered by the criminal's belief that the rewards are great and the possibility of more than nominal punishment is low. For the corporate wrongdoer the deterrent is only likely to be effective if there is a high likelihood of detection and a high probability of serious punishment. The most powerful deterrent is the threat of jail time. The prospect of substantial monetary penalties also can affect behavior.''); Testimony of Bradley Skolnik, Securities Commissioner of the State of Indiana and Chairman of the Enforcement Division of the North American Securities Administrators Association, before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 2, 3 (''Investor education is an effective crime prevention tool but the strongest deterrent to crime, I believe is criminal prosecution and prison time. . . . [F]rom my perspective as a state securities regulator, white-collar criminals who commit securities fraud deserve prison time just like thieves, muggers and murderers. . . . Someone steals your car, they go to prison; some con artist steals the money your parents needed for retirement, they get fined. That's just not right.'') ''Jail time performs two functions,'' Chertoff explained. ''It holds white collar criminals accountable for their past misdeeds, and it prevents future misbehavior by those executives who might toy with the idea of beating the system.'' Testimony of Chertoff before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 5.

*Section 904. Criminal Penalties for Violations of the Employee Retirement Income Security Act of 1974*

This section increases the maximum criminal penalties for a willful violation of the reporting and disclosure provisions of the Employee Retirement Income Security Act (ERISA), Title I, subtitle B, part 1, or any regulation or order issued thereunder. Section 904 increases the maximum fine for an individual defendant convicted under 29 U.S.C. §1131 from $5,000 to $100,000, and the maximum term of imprisonment from 1 year to 10 years. The increased maximum term of imprisonment converts the offense from a misdemeanor to a felony. In addition, this section increases the maximum fine for a convicted organizational defendant from $100,000 to $500,000.

ERISA imposes on pension managers a number of reporting and disclosure requirements regarding the administration of their pension plans. Among other things, ERISA requires the administrator of a pension plan to notify the United States Department of Labor and the plan's participants and beneficiaries of any material modifications in the terms of the pension plan. It also creates a fiduciary relationship between the pension managers and the pension plan beneficiaries. Criminal penalties apply for violations of Part 1 of ERISA, 29 U.S.C. §1131, which is designed, among other things, to do the following: (1) require the disclosure of significant information about employee benefit plans and all transactions engaged in by those who control the plans; (2) provide specific data to plan participants and beneficiaries about the rights and benefits to which they are entitled and the circumstances that may result in a loss of those rights and benefits; and (3) set forth the responsibilities and proscriptions applicable to persons occupying a fiduciary relationship to employee benefit plans. 29 U.S.C. §§1021–1031.

Hearings by the Judiciary Subcommittee on Crime and Drugs included a discussion of the penalty scheme under ERISA. Section 1131 of ERISA only made it a criminal misdemeanor ''willfully'' to violate Part 1 of ERISA, 29 U.S.C. §1131, even though the potential harm flowing from an ERISA violation could be enormous. A criminal violation of Part 1 of ERISA could occur, for example, where a corporation's pension administrator learns of information relating to the company's financial health which, if not disclosed, could result in a loss of the employees' rights and benefits under the corporation's pension. (A recent study by the Congressional Research Service of the Enron Corporation collapse concluded that one criminal provision which might be implicated is Section 1131 of ERISA. See CRS Report for Congress, ''Possible Criminal Provisions Which May Be Implicated in the Events Surrounding the Collapse of the Enron Corporation,'' RS21177 (March 25, 2002)). In enacting Section 904, Congress concluded that the disproportionately low ERISA penalty constituted one of the ''penalty gaps'' between white-collar offenses and other federal crimes. For example, a defendant convicted of interstate auto theft is subject to up to 10 years in prison, regardless of the value of the stolen automobile. 18 U.S.C. §2312. In contrast, a defendant who violates ERISA—but no other federal fraud statute—was only subject to a maximum penalty of 1 year in prison, regardless of the value of the loss to an employee's pension.

While a defendant who violates the criminal provisions of ERISA may also violate another federal felony statute with higher penalties, that will not always be the case. Accordingly, the intention of this provision is to provide federal prosecutors with an appropriate felony charge to combat willful criminal conduct which devastates employees' pension holdings. The United States Sentencing Commission recognized that there are instances when an ERISA criminal violation occurs in the absence of any other federal criminal offense. The United States Sentencing Guideline provision for the ERISA criminal violation is USSG §2E5.3, entitled ''False Statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security

Act.'' The background notes to §2E5.3 provide that ''this section covers the falsification of documents or records relating to a benefit plan covered by ERISA.'' The background note to §2E5.3 recognizes that while ERISA violations ''sometimes occur in connection'' with other federal offenses, they do not always thus occur. The base offense level under §2E5.3 for a ''stand-alone'' ERISA violation, absent any other violation, is only 6.

If the ERISA criminal offense is accompanied by another criminal violation, however, the guidelines direct the application of USSG §2B1.1, which addresses fraud, theft and other white-collar offenses (which has a base offense level of 6, but may increase to a level of 32 depending on the monetary value of the loss). Thus, under prior law, if a defendant violated both ERISA and the mail fraud statute, §2B1.1 would apply—not §2E5.3—and the defendant's sentence would be calculated with the loss calculations of the guidelines, and apply the higher felony maximum penalties of the mail fraud statute.

In contrast, if the defendant were only convicted of an ERISA criminal violation, the sentencing court would be limited by the statutory cap in 29 U.S.C. §1131 and the base offense level cap of §2E5.3. Accordingly, given the relative potential for devastating economic loss to pensioners who are victims of an ERISA criminal violation, it is entirely appropriate for Congress to close the ''penalty gap'' between ERISA and other federal statutes used to combat securities fraud. Pursuant to Section 905 of the Sarbanes-Oxley Act, Congress expects the Sentencing Commission to examine §2E5.3 of the Sentencing Guidelines and make any appropriate modifications given the enactment of Section 904.

*Section 905. Amendment to Sentencing Guidelines Relating to Certain White-Collar Offenses*

This section directs the United States Sentencing Commission, within 180 days of enactment of the Sarbanes-Oxley Act, to review and, as appropriate, to amend the applicable sentencing guidelines and related policy statements. Section 905(b) directs the Commission, among other things, to ensure that the guidelines and policy statements reflect the seriousness of the offenses and the statutory increases in penalties set forth in the Act, the growing incidence of such fraud offenses, and the need to modify the guidelines and policy statements to deter, prevent, and punish such offenses.

In passing the Sarbanes-Oxley Act, and the criminal and sentencing provisions in particular, Congress was aware of ongoing efforts by the Sentencing Commission to consolidate certain economic crimes, as achieved through the ''Economic Crime Package,'' and to study the effects of that consolidation. Recognizing, however, that the length of an offender's sentence is determined both by the operation of the sentencing guidelines and by the strength of the underlying statute, cf. Testimony of Paul Rosenzweig, Senior Legal Research Fellow at the Heritage Foundation, before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p.6 (noting that disparities in penalties are principally the product of actions of Congress, i.e., the criminal statutes passed by Congress), we amended the federal criminal code to increase penalties significantly for certain offenses (as discussed above). Our expectation is that, similarly, the federal sentencing guidelines will be reviewed and, where appropriate, modified accordingly.

Although the Commission has recently considered the severity of sentences for these economic crimes, we believe that further study is warranted—as did several of the witnesses who testified before the Subcommittee on Crime and Drugs. This is particularly so, given the new and increased penalties for white-collar offenses established by Title IX. For instance, the Honorable Glen B. Gainer, III, State Auditor of the State of West Virginia and Chairman of the National White Collar Crime Center, a nonprofit organization that provides support services to state and local law enforcement agencies and other organizations involved in the prevention, investigation and prosecution of economic crimes, noted: ''In terms of sentence length, research conducted in the early 90's clearly demonstrates the disparity between [white-collar and so-called 'street' crime offenders. Those incarcerated for losses in excess of $100,000 or more as a result of the savings and loan scandals received an average of 36.4 months in prison. During the same time period, those nonviolent federal offenders who committed burglary got 55.6 months, car theft received 38 months, and first-time drug dealing averaged 65 months. While some of this disparity may have been corrected by revisions to the federal sentencing policy for economic crimes, disparate sentencing can still be seen between 'white-collar' cases involving substantial monetary loss, and other crimes with similar financial impact.'' Testimony of Gainer before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 4.

Another witness, also using data that preceded adoption of the ''Economic Crime Package,'' cited statistics that similarly demonstrated a disparity in sentencing between traditional white-collar and other crimes: ''[D]efendants convicted of larceny, embezzlement, fraud, and counterfeiting who were sentenced to federal prison received average (mean) sentences of 15.6 months, 9.9 months, 18 months, and 17 months respectively. By contrast, robbery defendants received 110.6 months, drug defendants 75.3 months, and firearms offenders 64.1 months. Even the average immigration sentence was 27.8 months, ten months longer than the average fraud penalty. Moreover, federal economic crime defendants receive sentences of probation at dramatically higher rates than virtually any other class of defendant. More than one-half of all larceny defendants and one-third of all fraud defendants receive probation.'' Testimony of Frank O. Bowman, Associate Law Professor at the University of Indiana School of Law, before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 2. Similarly, Rosenzweig observed: ''An overwhelming percentage of those who were sentenced for traditional crimes received sentences requiring terms of imprisonment. For example, 94.2 percent of those convicted of drug trafficking were sentenced to prison. 97 percent of those convicted for robbery were imprisoned, as were 93 percent of those convicted of arson, and 97.4 percent of those convicted of murder. By contrast only 53.5 percent of those convicted of fraud and 48.1 percent of those convicted of embezzlement were sentenced to prison.'' Testimony of Rosenzweig before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 4.

While there was not a consensus regarding the reasons for, or desirability of, such a penalty disparity between similarly egregious infractions, many of the witnesses suggested that its existence worked to undermine the integrity of the criminal justice system. For example, Chairman Gainer concluded: ''The conclusion we can safely draw from this body of information is that white-collar criminals, particularly those involved in large, complex frauds that impact hundreds, if not thousands of victims, do not receive punishment that is proportionate to the harm that they cause.'' Testimony of Gainer before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 5.

Finally, in its efforts to comply with the terms of this title, we hope that the Sentencing Commission will take the opportunity to review and advise Congress on a disturbing development cited by the two witnesses from the Justice Department, Assistant Attorney General Chertoff and United States Attorney Comey—namely, an overwillingness in some jurisdictions to depart downward from the mandated sentencing guideline range for certain white-collar offenses. Justifying the need to increase penalties for certain white collar offenses, Chertoff explained: ''Not only are the maximum statutory penalties for fraud and other white collar-type offenses substantially less than those for violent offenders or drug cases, but it appears that judges in some jurisdictions are overly willing to depart downward from the mandated federal sentencing guideline range to sentence such offenders to minimal (if any) jail time, home detention, or even probation.'' Testimony of Chertoff before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 5.

Comey's comments mirrored this concern: ''[I]n some districts, non-substantial assistance downward departures are anything but infrequent (9,286 non-substantial assistance downward departures were made in 2000). . . . While available analyses do not detail the bases of these departures in white collar cases, a number of district judges appear to believe that white collar defendants should not be incarcerated in order to facilitate payment of restitution and fines. Of course, this is at odds with the view that incarceration can deter such crime in the first instance. . . . [F]or a variety of reasons, federal judges are hesitant to incarcerate white collar defendants. If past is prologue, even though the economic crime amendments of 2001 increased penalties for these crimes, departures will be used to undercut the purposes of the new provisions.'' Testimony of Comey before the Senate Judiciary Subcommittee on Crime and Drugs, June 19, 2002, p. 17.

By citing this and other testimony, we underscore Congress' belief that a ''penalty gap'' has existed between white-collar offenses and other offenses. Congress in particular is concerned about base offense levels which may be too low. The increased sentences, while meant to punish the most egregious offenders more severely, are also intended to raise sentences at the lower end of the sentencing guidelines. While Congress acknowledges that the Sentencing Commission's recent amendments are a step in the right direction, the Commission is again directed to consider closely the testimony adduced at the hearings by the Judiciary Subcommittee on Crime and Drugs respecting the ongoing ''penalty gap'' between white-collar and other offenses. To the extent that the ''penalty gap'' existed, in part, by virtue of higher sentences for narcotics offenses, for example, Congress responded by increasing sentences for certain white-collar offenses. Accordingly, we ask the Commission to consider the issues raised herein; determine if adjustments are warranted in light of the enhanced penalty provisions contained in this title; and make recommendations accordingly.

*Section 906. Corporate Responsibility for Financial Reports*

Summary. This section adds a new provision to the United States Code (18 U.S.C.

§1350), which requires the chief executive officer and chief financial officer (or their equivalent) of an issuer, foreign or domestic, to certify the accuracy of periodic financial statements filed by the issuer with the Securities and Exchange Commission under 15 U.S.C. §§78m(a) or 78o(d). (An ''issuer'' is defined, under Section 2(a)(7) of the Act, to mean an entity whose securities are registered under Section 12 of the Securities and Exchange Act of 1934 or that is required to file reports under Section 15(d) of that Act.) The chief executive and financial officers must certify that the periodic financial statement complies with certain specified requirements of the Securities and Exchange Act and that it ''fairly presents, in all material respects, the financial condition and results of operations of the issuer.'' Pursuant to Section 1350(c)(1), anyone who makes such a certification ''knowing'' that the report accompanying the certifying statement does not meet the statutory requirements would, upon conviction, face up to $1 million in fines, up to 10 years in prison, or both. Pursuant to Section 1350(c)(2), anyone who ''willfully'' certifies compliance ''knowing'' that the periodic report accompanying the statement does not comport with the requirements of 18 U.S.C. §1350 would face up to $5 million in fines, up to 20 years in prison, or both.

Financial Reports. The backdrop to Section 906 is the long-standing requirement under Section 13(a) and Section 15(d) of the Securities and Exchange Act (15 U.S.C. §§78m(a) or 78o(d)) that publicly-traded companies file reports with the SEC regarding the financial well-being of the corporation. See 15 U.S.C. §78m(a) (''Every issuer of a security . . . shall file with the Commission . . . such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement [and] such annual reports . . . as the Commission may prescribe.'') Pursuant to this provision, the SEC requires publicly-traded companies to file numerous reports (e.g., Forms 10–K, 20–F, 40–F, 10–Q, 8–K, 6–K), all intended to provide both the Commission and the investing public with information regarding the financial condition of the corporation. Willful failure to file these periodic reports, or the making of materially false statements therein, constitutes a felony. See 15 U.S.C. §78ff (''Any person who willfully violates any provision of this chapter . . . or any person who willfully and knowingly makes . . . [any] false or misleading [statement] with respect to any material fact, shall upon conviction be fined not more than $1,000,000, or imprisoned not more than 10 years, or both[.]'') (We note that, in contrast to the ''willful'' standard we apply in Section 906, courts have ascribed a different meaning to ''willful'' violations of the 1934 Act, e.g., *United States* v. *Dixon*, 536 F.2d 1388 (2d Cir. 1976) (determining that an act is done ''willfully'' if it is done intentionally and deliberately and not the result of innocent mistake, negligence or inadvertence; a specific intent to disregard or disobey is not required). As explained more fully below, Congress uses ''willful'' in Section 906 to create a specific intent crime, not the general intent crime which courts have sometimes used in interpreting the penalty provisions of the 1934 Act.) While defendants have been prosecuted under 15 U.S.C. §§78m and 78ff for filing false financial reports with the SEC, see, e.g., *United States* v. *Colasurdo*, 453 F.2d 585 (2d Cir. 1971), cert. denied. 406 U.S. 917 (1972), the law has never required a company's top corporate official to certify to the accuracy of the company's financial reports. Section 906 closes this loophole by imposing this responsibility upon the CEO and CFO (or their equivalents) of all publicly-traded corporations. Significantly, it does not mandate any additional reporting requirements, but only applies to those companies who are independently required, by Sections 13(a) and 15(d) of the Securities and Exchange Act of 1934, to certify the accuracy of those reports. As noted above, the law has always required that those reports be materially accurate.

Executive Certification. The notion of requiring an organization's primary or senior executive to certify a statement submitted to the government, on threat of possible criminal liability, is hardly novel. For example, Section 911(a)(1) of the National Defense Authorization Act for Fiscal Year 1986 requires a senior executive of a defense contractor to certify, to the best of his or her ''knowledge and belief,'' that all costs included in a proposal for settlement of indirect costs are allowable under the cost principles of the Federal Acquisition Regulation and its supplements. 10 U.S.C. §2324(h); 48 C.F.R. §52.242–4. Like Section 906 of the Sarbanes-Oxley Act, the regulation implementing the certification requirement contained in Section 911(a)(1) mandates that the certificate be executed by a company's senior executives, who face potential criminal liability if the representations contained in the certification are shown to be inaccurate. See 10 U.S.C. §2324(i).

Such a certification of accuracy is especially important in the securities context, since the robustness of financial markets and the success of national securities regulation are based on the full disclosure of a company's financial state. During the summer of 2002, as daily reports of alleged CEO criminal wrongdoing filled the news, congressional testimony from finance experts touted the critical need to impose responsibility upon top corporate officials in ensuring accuracy in financial reports. For example, Federal Reserve Chairman Alan Greenspan testified before the Senate Committee on Banking, Housing and Urban Affairs on July 16, 2002, the day after the Senate passed S. 2673. Much of his testimony focused on (1) the need for top corporate officials to report accurately the financial health of their companies; and (2) the need for criminal penalties for those who knowingly fail to do so. Chairman Greenspan said the following: ''A CEO must . . . bear the responsibility to accurately report the resulting condition of the corporation to shareholders and potential investors. Unless such responsibilities are enforced with very stiff penalties for noncompliance, as many now recommend, our accounting systems and other elements of corporate governance will function in a less than optimum manner. . . . Already existing statutes, of course, prohibit corporate fraud and misrepresentation. But even a small increase in the likelihood of large, possibly criminal penalties for egregious behavior of CEOs can have profoundly important effects on all aspects of corporate governance because the fulcrum of governance is the chief executive officer . . . . And I don't wish to make a generalized statement, but I suspect that if the CEO issue [i.e., accurate reporting of the financial health of a company] were fully and completely resolved—which it never will be, because we're dealing with human beings—I think all the rest of the problems will just disappear . . . . [I]f you do not get the CEO changing in the way that particular position functions, a goodly part of the work of the Senate is not going to be very effective . . . . [W]hat you can do is to try to create an environment and a legal structure which very significantly penalizes malfeasance.''

Likewise, several witnesses before the Judiciary Subcommittee on Crime and Drugs echoed the testimony of Chairman Greenspan, suggesting that the best way to protect investors from fraud is to require corporate executives at publicly-traded companies to disclose detailed information about their companies' financial health. For example, Professor Thomas Donaldson, Mark O. Winkelman Professor at the Wharton School of Business at the University of Pennsylvania, commented: ''The importance of accurate information in fueling efficient economic activity is well substantiated. Rational choice demands accurate information. When companies fail to provide investors with accurate information, investors make worse decisions and markets, in turn, become less efficient.'' Testimony of Donaldson before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 4. Relatedly, he noted: ''Crony capitalism and the lack of transparency were rightly implicated in the Asian melt down of 1997–1998. Without transparency and reliable numbers about the economic health of Asian companies, investors were stymied from responding rationally to the crisis. They were unable to dump their investments in poorer companies and hold their investments in better companies because they simply couldn't trust the numbers. In the ensuing crisis, they dumped everything with pernicious consequences. Today, we appear to be experiencing a transparency discount in the American equity markets. Investors pay less because they believe that they know less.'' See id. at 2; see also Testimony of Devine before the Senate Judiciary Subcommittee on Crime and Drugs, July 10, 2002, p. 2 (''Two long-accepted truths are that secrecy is the breeding ground for corruption, and sunlight is the best disinfectant.'')

Thus, Section 906 simply seeks to facilitate full disclosure and ensure the accuracy of financial reports by requiring corporate executives' personal stamp of approval. As Secretary Miller stated plainly but poignantly, ''[i]f the CEO is required to certify the reports he will be hard pressed later to say he thought the CFO had everything in apple pie shape. So the certificate becomes the hook that establishes accountability.'' Testimony of Miller before the Senate Judiciary Subcommittee on Crime and Drugs, July 24, 2002, p. 5.

State of Mind Requirement for Criminal Liability. Section 906 provides for a two-tiered penalty scheme for corporate officials who certify financial statements which they know to be false. It should be kept in mind that both penalties only apply to corporate executives who certify statements ''knowing that the periodic report accompanying the statement does not comport with all the requirements set forth in this section.''

While it is common for drafters of legislation to use the mens rea terms ''knowing'' and ''willful'' interchangeably, there are some criminal statutes which distinguish between them. See, e.g., 18 U.S.C. §35 (knowingly conveying false information triggers civil liability, while willfully conveying false information is a felony). When these two mens rea requirements are used in setting forth graduated penalties for the same predicate conduct, courts construe ''knowing'' to embody a general intent standard and ''willful'' to embody a specific intent standard. As such, knowing conduct is distinct from, and less intentional than, willful conduct. See *Bryan* v. *United States*, 524 U.S. 184, 193 (1998) (noting that ''more is required'' for a finding of ''willful'' misconduct; ''[t]he jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful'').

''Knowing.'' Section 906 establishes 18 U.S.C. §1350(c)(1), making it a 10-year felony

for a corporate official to certify financial statements ''knowing'' that they contain false or misleading information. As explained above, ''knowing'' as used here is meant to embody a general intent standard. It refers to knowledge of the facts constituting the offense, as distinguished from knowledge of the law. See *Bryan*, 524 U.S. at 192 (quoting Justice Jackson). In other words, to certify financial statements ''knowing'' them to be false simply means to certify the financial statements intentionally, voluntarily and with an awareness of their duplicity, rather than by mistake or accident. Knowledge of the law is not required, nor is a willful and intentional desire to evade the law's requirements. Stated differently, Section 1350(c)(1) imposes criminal liability for corporate officials who certify a financial statement ''knowing'' that it fails to ''fairly present, in all material respect, the financial condition and the operations of the issuer.'' It is not required that the corporate official intended to violate the statute (or even knew of the statute's certification requirements). Rather, the government must only prove that the corporate officer knew that the financial statements were materially misleading or inaccurate.

That is not to say, however, that certifying executives can evade liability by avoiding acquiring knowledge. We agree with the sentiments of Secretary Miller, who noted that ''[t]he certifying officer should be judged upon whether he has been diligent, exercised due care, established procedures for verification, made adequate investigations, and provided appropriate supervision.'' Testimony of Miller before the Senate Judiciary Subcommittee on Crime and Drugs, July 24, 2002, p. 5. It is our intent that courts impose a duty on these individuals to be reasonably informed of the material facts necessary to prepare financial information for submission to the SEC and for dissemination to the public. This position is consistent with well-established law that conscious avoidance, or a deliberate attempt to avoid knowledge of the crime, will not be a defense to the criminal penalties contained in a statute. See, e.g., *United States* v. *de Francisco-Lopez*, 939 F.2d 1405, 1409 (10th Cir. 1991) (''[T]he act of avoidance of knowledge of particular facts may itself circumstantially show that the avoidance was motivated by sufficient guilty knowledge to satisfy the . . . 'knowing' element of the crime.''); *United States* v. *Hanlon*, 548 F.2d 1096, 1101 (2d Cir. 1977) (''It is settled law that a finding of guilty knowledge may not be avoided by a showing that the defendant closed his eyes to what was going on about him; 'see no evil' is not a maxim in which the criminal defendant should take any comfort.''); *United States* v. *Jewel*, 532 F.2d 697 (9th Cir.) (en banc) (''To act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question.''), cert. denied, 426 U.S. 951 (1976); see also *Leary* v. *United States*, 395 U.S. 6, 46 n. 93 (1969).

On the other hand, the standard articulated here is not tantamount to negligence or recklessness. We simply note the well-established proposition that conscious avoidance of certain facts should not provide immunity from prosecution; in contrast, if lower-level corporate officials conspire to hide the true financial health of the company from the CEO for whatever reasons, the CEO will not be held liable if he or she did not know these facts. We expect that this would be a rare event, however, given the requirement that a CEO be aware of the contents of their company's financial reports filed with the SEC. See, e.g., *Howard* v. *Everix Systems, Inc.*, 228 F.3d 1057, 1062 (9th Cir. 2000) (''Key corporate officials should not be allowed to make important false financial statements knowingly or recklessly, yet still shield themselves from liability in the preparation of those statements. Otherwise, the securities laws would be significantly weakened, because corporate officers could stay out of loop such that . . . only the SEC could bring suit against them in an individual capacity for their misrepresentations.'') Nor does Congress intend Section 906 to be a so-called ''public welfare law'' which would create strict liability. See, e.g., *United States* v. *Dee*, 912 F.2d 741 (4th Cir. 1990) (holding that one who possesses hazardous wastes will be presumed to be aware of federal regulations governing such wastes, notwithstanding law's inclusion of a knowledge mens rea requirement).

''Willful.'' Section 906 also creates a new 20-year felony provision, 18 U.S.C. §1350(c)(2), which applies to corporate officials who ''willfully'' certify financial statements which they know to be false. ''Willfully'' here is meant to denote a specific intent standard. When used in the criminal context, a ''willful'' act is generally one undertaken with a bad purpose, or with knowledge that the prohibited conduct is unlawful. See *Bryan*, 524 U.S. at 191–92. Under Section 906, certifying financial statements which the CEO knows are false is not enough to be ''willful.'' Rather, the act also must be done with an evil intent to evade the law. That evil intent is an intent to disobey or disregard the law, rather than an intent to do wrong in some more general sense. A corporate executive who certifies financial statements which he knows to be false is not guilty under this section unless, in addition to knowing what he was doing, he voluntarily and intentionally engaged in conduct that he knew was prohibited. See *Ratzlaf* v. *United States*, 510 U.S. 135, 142 (1994) (describing a '' 'willful' actor as one who violates 'a known legal duty' ''); *Cheek* v. *United States*, 498 U.S. 192, 201 (1991) (establishing that ''the standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty' '').

Section 1350(c)(2)'s construction is consistent with prior judicial interpretations of the word ''willful.'' As the Supreme Court has observed, ''the word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears.'' *Bryan*, 524 U.S. at 191. ''Willfully'' may mean either a requirement of general intent or specific intent. Recognizing that ignorance of the law typically is no defense to a criminal charge, Congress here intended to require a more particularized showing of knowledge in order to access the tougher criminal penalties under §1350(c)(2)—i.e., knowledge of the specific law or rule that a defendant's conduct is alleged to violate. In passing this section, Congress relied on the Court's determination in cases like *Ratzlaf*, 510 U.S. 135, and *Cheek*, 498 U.S. 192.

In these cases, the Court interpreted the term ''willfully'' in two different statutes, one dealing with structuring transactions and the other dealing with tax evasion, as requiring a finding of specific intent. *Ratzlaf*, 510 U.S. at 141; *Cheek*, 498 U.S. at 200. Part of the Court's reasoning was that the complex nature of these laws justified an inference that Congress intended ''willfully'' to be a specific intent requirement so that those who were ignorant of the law, but exercised reasonable care, would not be subjected to the same punishment as bad actors with an evil intent. *Ratzlaf*, 510 U.S. at 144–46; *Cheek*, 498 U.S. at 200, 205. Stated differently, Congress made violations of these statutes ''specific intent crime[s] because, without knowledge of the . . . requirement, a would-be violator cannot be expected to recognize the illegality of his otherwise innocent act.'' *United States* v. *Eisenstein*, 731 F.2d 1540, 1543 (11th Cir. 1984). Like the anti-structuring and tax evasion provisions at issue in *Ratzlaf* and *Cheek*, securities laws are complex, which is why Section 906 incorporates different penalties for ''knowing'' violations committed with general intent and ''willful'' violations characterized by a specific intent to violate the law. In effect, for the heightened penalties triggered by ''willful'' violations, Section 906 carves out a limited and rebuttable exception to the traditional rule that ''ignorance of the law is no excuse.'' See *Bryan*, 524 U.S. at 196.

Finally, for purposes of clarity, we should mention that we are aware that the term ''willfully'' is invoked and interpreted differently in the context of civil administrative disciplinary proceedings instituted by the SEC under federal securities laws. For example, under Sections 15(b)(4) and 15(b)(6) of the Securities Exchange Act of 1934, the SEC may discipline a registered broker-dealer in securities or anyone associated or participating with the broker-dealer if it finds in such proceedings that the respondent has ''willfully'' violated or ''willfully'' aided and abetted the violation by any person of any provision of certain securities laws or rules. While, as we have noted, the meaning of ''willfully'' depends on statutory context, in the SEC administrative disciplinary context, it has been held to mean ''no more than the person charged with the duty knows what he is doing.'' *Hughes* v. *Securities and Exchange Commission*, 174 F.2d 969, 977 (D.C. Cir. 1949); see also *Seaman* v. *Securities and Exchange Commission*, 603 F.2d 1126, 1135 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981); *Arthur Lipper Corp.* v. *Securities and Exchange Commission*, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 430 U.S. 1009; *Stead* v. *Securities and Exchange Commission*, 444 F.2d 713, 714–15 (10th Cir. 1971), cert. denied, 404 U.S. 1059. See also the discussion of willfulness in *Wonsover* v. *Securities and Exchange Commission*, 205 F.3d 408, 413 (D.C. Cir. 2000). The court reiterated its ''traditional formulation of willfulness'' for purposes of Section 15(b) of the Exchange Act. Citing its prior holding in *Gerhard & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F.2d 798 (D.C. Cir. 1965), the Court noted that ''willfully'' in that provision ''means intentionally committing the act which constitutes the violation,'' not that ''the actor [must] also be aware that he is violating [the law].'' *Tager* v. *Securities and Exchange Commission*, 344 F.2d 5, 8 (2d Cir. 1965); *Edward J. Mawood & Co.* v. *Securities and Exchange Commission*, 591 F.2d 588, 595–96 (10th Cir. 1979) (same). Needless to say, for purposes of Section 906, we do not adopt the ''general intent'' interpretation of ''willful.''

Expert Advice. Some defendants charged in white-collar cases have attempted to avert criminal liability by claiming reliance on expert advice. See, e.g., *Ratzlaf*, 510 U.S. at 142 n.10 (''[S]pecific intent to commit the crimes' . . . might be negated by, e.g., proof that defendant relied in good faith on advice of counsel.''); *Eisenstein*, 731 F.2d at 1543–44 (same). To the extent that it exists, the so-called ''reliance on expert'' defense is held to apply only when the defendant can demonstrate that he fully disclosed all relevant facts to his accountant or attorney and that he relied in good faith on the expert's advice. See *United States* v. *Johnson*, 730 F.2d 683, 686 (11th Cir.), cert. denied, 469 U.S. 867 (1984); *United States* v. *McLennan*, 563 F.2d 943, 946 (9th Cir. 1977), cert. denied, 435 U.S. 969 (1978) (noting that ''[a]dvice of counsel is no defense unless the defendant gave his attorney all of the facts, and unless counsel specifically advised the course of conduct taken by the defendant''). It is not Congress' intent to

disrupt this line of authority. We presume that, where it is a reliance on expert advice that is truly at issue, see *Johnson,* 730 F.2d at 686–87 (discounting defendants' defense where reliance on expert advice was irrelevant to the real claims at issue), the same standard articulated in the above-cited and other authority would apply to the criminal provisions contained in this title.

Finally, the duty imposed by the Section 906 certification requirement is not intended to end once a financial statement and accompanying certification are submitted. Upon discovery that a statement contains an error, immediate correction and disclosure of the correction should be required.

Interplay With Section 302 of S. 2673: Scope of Certification Requirement. At the time I offered the Biden-Hatch Amendment to S. 2673, that bill already had a provision (now codified at Section 302), which is similar to Section 906, with three significant exceptions. First, the provision does not apply to the chairperson of a company's board of directors (my original legislation and subsequent amendment to S. 2673 applied the certification requirement to chief executive officers, chief financial officers, and board chairpersons). Second, it contains no criminal enforcement provisions. Third, the scope of corporate filing activity subject to the requirements of Section 302 is far narrower, as I explain below.

Section 302 provides that the SEC must require, for each company filing periodic reports under Section 13(a) or 15(d) of the Exchange Act, that the principal executive officer and the principal financial officer, or persons performing equivalent functions, make certain certifications in each annual or quarterly report filed with or submitted to the SEC. Section 302, by its terms, only applies to annual and quarterly reports and, accordingly, its scope is so cabined. Section 906, on the other hand and quite intentionally, includes no such limitation of its scope. It is intended to apply to any financial statement filed by a publicly-traded company, upon which the investing public will rely to gauge the financial health of the company. So, Section 906 applies to annual and quarterly reports (e.g., Forms 10–K, 20–F, 40–F, 10–Q) but, unlike Section 302 certifications, is also intended to apply to so-called ''current'' reports like Forms 8–K and 6–K (foreign issuer submissions), as well as submissions of Form 11–K by employee benefit plans. The above list is merely illustrative, not exhaustive, and Congress intends the SEC to issue guidance on any additional reports which are subject to Section 906.

We are aware of the SEC's historic position that the term ''periodic reports'' describes Forms 10–Q, 10–K, 10–QSB, 10–KSB, 40–F and 20–F, which are required to be filed at specified intervals in time, and not Forms 8–K and 6–K, which are only required to be filed upon the occurrence of specified events. We in no way intend to import the more expansive scope of Section 906 into broader securities regulation; the wider view of ''periodic report'' is for purposes of implementing this specific certification requirement only.

Note that Section 906 does not require certification that the financial statements are in accordance with generally accepted accounting principles (GAAP). That omission is intentional in that the certification is designed to ensure an overall accuracy and completeness that is broader than financial reporting requirements under generally accepted accounting principles. In so doing, for purposes of this section, Congress effectively establishes possible liability where statements may be GAAP-compliant but materially misleading. See *States* v. *Simon,* 425 F.2d 796, 808 (2d Cir. 1969) (finding that accountants can be criminally liable for preparing financial statements that are GAAP-compliant but materially misleading).

Certification Form. We do not intend to prescribe the precise form or format of certification (e.g., whether the certification should appear on the signature page or among the exhibits or appendices to the report) or method of submission to the appropriate regulators. On these questions, Congress properly defers to the expert judgment of experienced officials at the SEC, who we trust will fully consider the liability implications of these administrative options. What is important is that the ultimate form reflect the substantive requirements of the Sarbanes-Oxley Act—including a recognition that, as the text of the statute and the foregoing explanation should make clear, certification under Section 302 applies to a subset of the certifications required by Section 906. Nevertheless, I have encouraged the SEC and the Justice Department to develop a single form which could be used for certifications under both Sections 302 and 906. Section 906 certification establishes a ''floor'' of minimum certification requirements, while Section 302 cites some additional factors. Accordingly, any company properly certifying under Section 302 will also satisfy the requirements of Section 906. Thus, it may be possible for the SEC to develop a unitary certification for the sake of administrative ease. However, for companies that need only certify under Section 906, a separate certification satisfying the somewhat lesser requirements of Section 906 may be appropriate.

Penalties for Failure to File Section 906 Certification. Some observers have asked whether failure to file a certification pursuant to 18 U.S.C. §1350(a)—as opposed to certifying a false financial report as accurate in violation of 18 U.S.C. §1350(c)—triggers criminal liability. It does. Pursuant to Section 3(b) of the Sarbanes-Oxley Act, ''a violation by any person of this Act . . . shall be treated for all purposes in the same manner as a violation of the Securities Exchange Act of 1934 . . . and any such person shall be subject to the same penalties, and to the same extent, as for a violation of that Act or such rules and regulations.'' As noted above, the criminal provisions of the Securities Exchange Act of 1934 (15 U.S.C. §78ff) include a 10-year felony for ''willful'' violations. Accordingly, willful failure to file a certification pursuant to Section 1350(a) of Title 18 triggers the criminal provisions of 15 U.S.C. §78ff. (As noted above, courts have interpreted ''willful'' violations of the 1934 Act to require only general intent to commit the crime.) Significantly, the U.S. Department of Justice concurs with this analysis. See Letter from Assistant Attorney General Daniel J. Bryant to the Honorable Joseph R. Biden, Jr., December 26, 2002 (''[A]s you have suggested, the Department may utilize Section 78ff's criminal penalties to prosecute executives who violate the Sarbanes-Oxley Act by willfully failing to file Section 906's required certification.''). Of course, in addition to this penalty scheme, failure to file the required Section 1350(a) certification may also result in an economic penalty, since Wall Street analysts and investors would surely take note of the failure and punish offending companies by shifting their investment dollars to compliant companies. This potential economic penalty should in no way mitigate application of the criminal penalty.

## ARMENIAN GENOCIDE

Mr. LEVIN. Madam President, I rise today in commemoration of the Armenian genocide. As the 88th anniversary of this horrific event approaches, I would like to take a few moments to pay tribute to the men, women and children who were murdered or displaced in the 20th century's first systematic attempt to extinguish an entire people.

On April 24, 1915, the Turkish Ottoman government initiated a campaign to expel 1.75 million ethnic Armenians from its borders. Turkish authorities operated under the baseless claim that its Armenian community would be disloyal in a time of war since they were neither Turks nor Muslims. On April 24, government leaders rounded up 300 Armenian leaders, writers, thinkers and professionals in what was then Constantinople for their deportation or, for many, their deaths. In nearby areas, 5,000 of the poorest Armenians were killed in their homes or on the streets. Over the course of the subsequent 2 years, between 500,000 and 1 million Armenians were killed and 750,000 were forced to leave their homes.

Henry Morgenthau, who served as U.S. Ambassador to the Ottoman Empire remarked, ''I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared to the sufferings of the Armenian race in 1915.''

Records of eyewitness accounts allow us to gain an incomplete yet painful understanding of the atrocities the Armenian people faced. An American missionary wrote, '' . . . All tell the same story and bear the same scars: their men were all killed on the first days [sic] march from their cities, after which the women and girls were constantly robbed of their money, bedding, clothing and beaten, criminally abused and abducted along the way.''

Another account by an Armenian and corroborated by a German missionary said, ''We all had to take refuge in the cellar for fear of our orphanage catching fire. It was heartrending to hear the cries of the people and children who were being burned to death in their houses. The soldiers took great delight in hearing them, and when people who were out in the street during the bombardment fell dead, the soldiers merely laughed at them. . . . ''

I wish we could say that such events are in the past and that history will never again have not been learned and millions of other people and races have suffered at the hands of malicious leaders who have acted upon their messages of hate and intolerance.

Each year during my tenure in the Senate, I have spoken out about the Armenian genocide. I believe the highest tribute we can pay to the victims of any genocide is by acknowledging the horrors they faced and reaffirming our commitment to fight against such heinous acts in the future. It is important that we take the time to remember and honor the victims, and pay respect to the survivors, especially as that generation passes on.