

Financial Crime's Forgotten Statute: SDNY Rediscovered a Powerful Tool

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Federal white-collar indictments often charge a familiar mix of offenses—fraud, money laundering, and tax crimes among them. When the U.S. Attorney's Office for the Southern District of New York unsealed its indictment against the founder and CEO of First Brands Group and another senior executive, it included a collection of those crimes—and one more. In Count One, prosecutors charged the defendants with managing a continuing financial crimes enterprise in violation of 18 U.S.C. §225, marking the return of one of the most powerful tools in the white-collar prosecutor's arsenal.

Section 225 applies when an individual (1) organized, managed, or supervised a "continuing financial crimes enterprise," and (2) received at least \$5 million in receipts from the enterprise over a two-year period. A "continuing financial crimes enterprise," in turn, is a series of violations of specified federal fraud statutes—including bank fraud, false bank entries, wire fraud affecting financial institutions, and related offenses—committed



white collar crime

by at least four people acting in concert. Taken together, all that is required to meet the elements is leading a criminal fraud operation involving at least four people in a scheme that generates at least \$5 million.

These elements are relatively commonplace, at least in the large-scale fraud prosecutions brought in SDNY. And when the elements are met, the statute imposes enormous penalties. Most significantly, Section 225 is an outlier in the white-collar space, in that it carries a mandatory minimum sentence. That mandatory minimum is long: ten

years, comparable to those imposed by the statutes applicable to serious violence and drug crimes. And Section 225 also permits a sentence up to life imprisonment, rather than the twenty-year statutory maximum available for money laundering or the thirty-year maximum for bank fraud or wire fraud affecting a financial institution.

These penalties are transformative in white-collar cases. Absent the mandatory minimum, the Sentencing Guidelines range for a first-time non-violent offender who commits a \$5 million fraud will often be well below 120 months. And the actual sentence imposed is frequently even lower, as the Guidelines in these cases are driven by a widely criticized loss-based sentencing enhancement that applies in virtually every white-collar case.

The mandatory minimum would affect sentencing for even the biggest offenders: many major white-collar defendants, like Charlie Javice and Trevor Milton, received sentences of less than ten years' imprisonment, and even Elizabeth Holmes received a sentence of 135 months, not far above the mandatory minimum had she been convicted under Section 225. But the mandatory minimum could have an even larger effect on co-conspirators with lesser culpability and the possibility of obtaining a cooperation agreement from the Government that would let them evade the ten-year floor. For instance, Patrick Halligan, a co-defendant of Bill Hwang in the Archegos case, received a sentence of eight years' imprisonment. In all these cases, a Section 225 count would have been a central consideration in strategic

decisions regarding plea negotiations, at trial, and at sentencing.

Despite the significant power the statute provides prosecutors, Section 225 has remained largely dormant since it was enacted almost forty years ago. Congress enacted Section 225 as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), in the wake of the savings and loan crisis that rocked the American financial system in the late 1980s. The statute was designed to mirror the approach federal prosecutors had successfully employed against drug trafficking organizations under 21 U.S.C. §848, commonly known as the "Kingpin Statute," which criminalized engaging a "continuing criminal enterprise."

In its nearly 40 year history, Section 225 has been charged only a handful of times. Those cases typically involved sophisticated bank fraud schemes involving multiple co-conspirators. In one case, a defendant organized a scheme to fraudulently obtain bank loans through systematic misrepresentations and false documentation. Working with numerous accomplices, the defendant created the appearance of legitimate loan applications while concealing the true financial condition of borrowers and the actual purpose of loan proceeds.

In another, a defendant managed an enterprise that submitted false information to banks to secure loans and credit facilities. The scheme required preparing fraudulent financial statements, fabricating supporting documentation, and presenting false information to loan officers. And in a third

case, a defendant submitted fabricated information to a bank to float longstanding fraud schemes. In each of those cases, Section 225 charges were brought as part of larger indictments charging liability under a number of other statutes.

In Section 225 cases, some defendants were able to obtain dismissal where prosecutors could not demonstrate that the defendant actually managed or supervised the enterprise or where they ultimately failed to show that the enterprise generated \$5 million. At other times, defendants avoided the ten-year minimum sentence through plea deals in which prosecutors bargained away liability under Section 225, as is common with counts that carry mandatory minimums.

Whatever surge of activity that followed Section 225's enactment has petered out. We have found no Section 225 cases charged in any district court within the Second Circuit in the last decade, until this year. But two notable exceptions have occurred in recent months: the First Brands indictment, and

an indictment a few weeks before it, in *United States v. Chu and Goodgame*. The *Chu* indictment alleges that two executives at a company defrauded lenders through double-pledging collateral and other schemes. Like the First Brands indictment, *Chu* was also brought by the Securities and Commodities Fraud Unit of the SDNY.

SDNY's use of Section 225 in the First Brands case was not an aberration or an exception rediscovered for only the largest of frauds. Rather, these two indictments signal the return of Section 225. This Administration's charging policy requires prosecutors to charge the most serious, readily provable offense. Section 225 will often be the most serious offense available in major fraud cases, and SDNY—and other components of DOJ—can be expected to charge it when it is readily provable. When that happens, Section 225 will change the calculus for lawyers and white-collar defendants alike.

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