21 U.S.C. § 841(A)(1) DISTRIBUTION OF A CONTROLLED SUBSTANCE – ELEMENTS

[The indictment charges the defendant[s] with; Count __ of the indictment charges the defendant with] distribution of [identify controlled substance alleged in charge]. In order for you to find the defendant guilty of this charge, the government must prove both of the following propositions beyond a reasonable doubt:

1. The defendant knowingly distributed [identify controlled substance alleged in charge].

2. The defendant knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance alleged in charge.]

If you find from your consideration of all the evidence that the government has proved both of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 841 prohibits knowing or intentional distribution of a controlled substance. Knowing distribution is sufficient. *See, e.g., United States v. Graham*, 315 F.3d 777, 781 (7th Cir. 2003).

The second element explains both what the government must prove and what it need not prove. Because the concept is simple, there is no need for a separate instruction concerning what the government need not prove, as in the former pattern instructions. If there is no evidence that might suggest the defendant could have thought the substance something other than what the government alleges, it may be prudent to omit the sentence concerning what the government need not prove.

If the charge involves a controlled substances analogue, *see* 21 U.S.C. § 802(32)(A), the government must prove that the defendant knew the chemical he possessed met the definition of a controlled substance analogue. *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005). In such a case, the first sentence of the second element should be modified, and the second sentence should be omitted.

21 U.S.C. § 841(A)(1) DEFINITION OF DISTRIBUTION

A person "distributes" a controlled substance if he [delivers or transfers possession of the controlled substance to someone else] [causes a person to deliver or transfer possession of the controlled substance to another person].

Committee Comment

To prove distribution, the government need not prove that the defendant had a financial interest in the transaction. *United States v. Gilmer*, 534 F.3d 696, 702 (7th Cir. 2008) (conspirator need not have financial interest in drug distribution to support conspiracy conviction). The jury may, however, consider whether the defendant had such an interest in determining distribution. *See, e.g., United States v. Catchings*, 922 F.2d 777 (11th Cir. 1991); *United States v. Morales*, 987 F.2d 849, 852 (1st Cir. 1993). In a case in which this is an issue, the court may wish to consider supplementing the pattern instruction to address this point.

21 U.S.C. § 841(A)(1) POSSESSION WITH INTENT TO DISTRIBUTE – ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] possession of [identify controlled substance alleged in charge] with intent to distribute. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant knowingly possessed [identify controlled substance alleged in charge].

2. The defendant intended to distribute the substance to another person.

3. The defendant knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify the controlled substance alleged in charge.]

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee modified this instruction to track the instruction for distribution of a controlled substance under 21 U.S.C. § 841(a)(1). *See United States v. Irby*, 558 F.3d 651, 654 (7th Cir. 2009).

21 U.S.C. § 841(C)(1) POSSESSION OF LISTED CHEMICAL WITH INTENT TO MANUFACTURE – ELEMENTS

[The indictment charges the defendant[s] with; Count __ of the indictment charges the defendant with] possession of [identify chemical alleged in charge] with intent to manufacture a controlled substance. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant knowingly possessed [identify chemical alleged in charge];

2. The defendant intended to use [identify chemical] to manufacture a controlled substance;

3. [Identify chemical] is a listed chemical. The government is not required to prove that the defendant knew [the chemical] was a listed chemical.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In *United States v. Estrada*, 453 F.3d 1208 (9th Cir. 2006), the Ninth Circuit held that the government is not required to prove that the defendant knew the chemical was a listed chemical. The Seventh Circuit has not yet addressed this argument in any reported case. However, the reasoning of *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005) (requiring proof that defendant knew the substance he possessed was a controlled substance analogue as defined by statute), may suggest by analogy that the government must prove that the defendant knew the substance was a listed chemical within the meaning of 21 U.S.C. 802(33)C(35). If so, the last paragraph is inaccurate.

21 U.S.C. § 841(C)(2) POSSESSION/DISTRIBUTION OF LISTED CHEMICAL FOR USE IN MANUFACTURE – ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] possession of [identify chemical alleged in charge] for use in the manufacture of a prohibited drug. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant knowingly [possessed; distributed] [identify chemical alleged in charge].

2. The defendant knew or had reasonable cause to believe the [identify the chemical] would be used to manufacture a prohibited drug;

3. [Identify the chemical] is a listed chemical. The government is not required to prove that the defendant knew [identify the chemical] was a listed chemical.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee notes that there is currently a circuit split as to the proper interpretation of the *mens rea* requirement under section 841(c)(2). As noted in *United States v. Khattab*, 536 F.3d 765, 769 (7th Cir. 2008), the Seventh Circuit has not yet addressed the issue. *Compare United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005) (holding that government must prove actual knowledge or "something close to it") with *United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005), *United States v. Kauer*, 382 F.3d 1155, 1157-58 (9th Cir. 2004), and *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). What is clear is that the defendant must be more than negligent or even reckless with respect to the risk that a listed chemical will be used to manufacture a controlled substance. *United States v. Green*, 779 F.2d 1313, 1318-19 (7th Cir. 1985).

The Committee notes that the Tenth Circuit's decision in *Truong* also stands for the proposition that the defendant must know, or have reasonable cause to believe, that the listed chemical will be used to manufacture a specific controlled substance.

21 U.S.C. § 846 ATTEMPTED DISTRIBUTION OF CONTROLLED SUBSTANCE – ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] attempted distribution of [identify controlled substance]. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant intended to distribute a controlled substance to another person.

2. The defendant believed that the substance was some kind of a controlled substance. [The government is not required to prove that the substance was actually a controlled substance.]

3. The defendant knowingly took a substantial step toward distributing [a substance that he believed to be] a controlled substance, intending to distribute it. A substantial step is an act beyond mere planning or preparation to commit the crime, but less than the last act necessary to commit the crime.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Fiedeke, 384 F.3d 407, 411-12 (7th Cir. 2004) (attempted distribution is a specific intent crime); *United States v. Cea*, 914 F.2d 881 (7th Cir. 1990). The definition of "attempt" is taken from Instruction 4.09.

The sale of a non-controlled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt to distribute. *See United States v. Dominguez*, 992 F.2d 678, 682 (7th Cir. 1992). In a case that does not involve an actual controlled substance – such as a case in which government agents supply "sham" narcotics for use in a transaction – it may be appropriate to use the bracketed language in the second and third elements.

21 U.S.C. § 846 ATTEMPTED POSSESSION WITH INTENT TO DISTRIBUTE – ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] attempted possession of [identify controlled substance] with intent to distribute. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant intended to possess a controlled substance and intended to distribute it to another person.

2. The defendant believed that the substance was some kind of a controlled substance. [The government is not required to prove that the defendant knew the substance was actually a controlled substance.]

3. The defendant knowingly took a substantial step toward possessing [a substance he believed to be] a controlled substance, intending to possess it. A substantial step is an act beyond mere planning or preparation to commit the crime, but less than the last act necessary to commit the crime.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Fiedeke, 384 F.3d 407, 411-12 (7th Cir. 2004) (attempt under section 846 is a specific intent crime); *United States v. Cea*, 914 F.2d 881 (7th Cir. 1990). The definition of "attempt" is taken from Instruction 4.09.

The sale of a non-controlled substance that the defendant subjectively believes to be a controlled substance can constitute an attempt to distribute. *See United States v. Dominguez*, 992 F.2d 678, 682 (7th Cir. 1992). In a case that does not involve an actual controlled substance – such as a case in which government agents supply "sham" narcotics for use in a transaction – it may be appropriate to use the bracketed language in the second and third elements.

21 U.S.C. § 841(A)(1) DEFINITION OF POSSESSION

Committee Comment

Instruction 4.13 should be used in narcotics cases in which a definition of possession is required.

21 U.S.C. § 841(A)(1) DEFINITION OF CONTROLLED SUBSTANCE

[Identify the controlled substance] is a controlled substance.

Committee Comment

See 21 U.S.C. §§ 802(6) & 812.

DRUG QUANTITY/SPECIAL VERDICT INSTRUCTIONS

If you find the defendant guilty of the offense charged in [Count _____ of] the indictment, you must then determine the amount of [controlled substance] the government has proven was involved in the offense.

You will see on the verdict form a question concerning the amount of narcotics involved in the offense charged in [Count __ of] the indictment. You should consider this question only if you have found that the government has proven the defendant guilty of the offense charged in [Count _____ of] the indictment.

If you find that the government has proven beyond a reasonable doubt that the offense involved [insert quantity; e.g., 5 kilograms or more of cocaine], then you should answer the [first] question "Yes." [If you answer "Yes," then you need not answer the remaining question[s] regarding drug quantity for that count.]

If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert quantity; e.g., 5 kilograms or more of cocaine], then you should answer the [first] question "No."

[If you answer the first question "No," then you must answer the next question. That question asks you to determine whether the government has proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of cocaine], then you should answer the second question "Yes."

If you find that the government has not proven beyond a reasonable doubt that the offense involved [insert lesser quantity; e.g., 500 grams or more of cocaine], then you should answer the second question "No."

Committee Comment

Based on the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this instruction should be given whenever the drug quantity may affect the statutory maximum sentence. The jury need only find the threshold quantity that triggers the increased statutory maximum penalty; it need not find the exact quantity involved. *See United States v. Kelly*, 519 F.3d 355, 363 (7th Cir. 2005); *United States v. Washington*, 558 F.3d 716, 719-20 (7th Cir. 2009).

In drafting this instruction, the Committee took account of *United States v. Washington*, 558 F.3d 716 (7th Cir. 2009), in which the court

considered a case in which the jury was given a quantity verdict form with three choices – less than 5 grams of crack; 5 grams or more but less than 50 grams; and 50 grams or more – and left the form blank because it was unable to reach a unanimous verdict on the quantity. The court noted that it was possible that the jury's failure to agree on a quantity was attributable in part to how the verdict form was worded, and it stated that "[i]t would be preferable . . . to give the jury an open-ended form, saying something like 'we find unanimously that the defendant distributed at least __ grams of crack and __ grams of powder cocaine." *Id.* at 718 n.1. Having considered this suggestion, the Committee is of the view that an "open-ended" quantity verdict form might actually be counterproductive, as a jury might find it more difficult to agree on a particular quantity than upon a range, which is what the proposed instruction directs. Though the court in Washington proposed an "at least [x]" form of verdict, the instructions necessary to explain that the trial judge is, in effect, asking the jury to make a finding about the highest (or lowest) amount on which the jury can reach unanimous agreement would be quite complicated and would risk tilting the balance in favor of one side or the other.

21 U.S.C. § 843(B) USE OF COMMUNICATION FACILITY IN AID OF NARCOTICS OFFENSE – ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] [using; causing the use of] a [telephone; other communication facility] to facilitate a narcotics crime. In order for you to find the defendant guilty of this charge, the government must prove both of the following propositions beyond a reasonable doubt:

1. The defendant used a [telephone; other type of communication facility] to facilitate or cause the commission of, [insert predicate offense, e.g., possession with intent to distribute].

2. The defendant did so knowingly.

If you find from your consideration of all the evidence that the government has proved both of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty

Committee Comment

See United States v. Campbell, 534 F.3d 599, 605 (7th Cir. 2008).

21 U.S.C. § 843(B) USE OF COMMUNICATION FACILITY IN AID OF NARCOTICS OFFENSE - DEFINITION

A [call; transmission] facilitates an offense if it makes the offense easier, or if it assists in committing the offense.

Committee Comment

See United States v. Mojica, 984 F.2d 1426, 1440 (7th Cir. 1993); *United States v. Aquilla*, 976 F.2d 1044, 1049 (7th Cir. 1992).

21 U.S.C. § 952(A) & (B); 21 U.S.C. § 960(A) IMPORTATION OF CONTROLLED SUBSTANCES – ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] importation of [identify controlled substance alleged in charge]. In order for you to find the defendant guilty of this charge, the government must prove each of the [three; four] following propositions beyond a reasonable doubt:

1. The defendant brought [identify the controlled substance alleged in the charge] from a point outside the United States into [the United States; customs territory of the United States].

2. The defendant did so knowingly.

3. The defendant knew the substance [was; contained] some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify controlled substance.]

[4. The [identify the substance] was not imported or exported pursuant to regulations prescribed by the Attorney General.]

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty

Committee Comment

The proposed instruction incorporates the definition of importation into the elements instruction rather than using that term and then defining it separately. Because the definition is simple, this provides for clearer instruction. The term import is defined in 21 U.S.C. § 951(a)(1) and has been interpreted to require the government to prove that the substance emanated from a point outside the United States and was then brought into the United States or a United States customs territory. *See, e.g., United States v. Seni*, 662 F.2d 277, 286-87 (4th Cir. 1981); *United States v. Watkins*, 662 F.2d 1090, 1098 (4th Cir. 1981).

The prior pattern instructions for 21 U.S.C. § 952(a) erroneously omitted the requirement that the defendant act knowingly. The likely reason for this was that the prior instruction was based solely upon

section 952(a). That statute makes it unlawful to import a controlled substance, but it does not create the crime of importation. The section creating the crime is 21 U.S.C. § 960(a), which states that anyone who "knowingly or intentionally" violates section 952 commits a crime. Section 960, and thus the crime of importation, requires that the defendant act knowingly or intentionally. *See, e.g., United States v. Osideko*, 201 Fed. Appx. 366 (7th Cir. 2006).

21 U.S.C. § 951(A)(2) CUSTOMS TERRITORY OF THE UNITED STATES - DEFINITION

The customs territory of the United States includes only the United States, the District of Columbia, and Puerto Rico.

Committee Comment

Section 951(a)(2) defines this term by reference to general headnote 2 to the Tariff Schedules of the United States. As of 1984, this headnote defined "customs territory" as set out in this instruction.

21 U.S.C. § 952(A) DEFINITION OF CONTROLLED SUBSTANCE

[Identify the substance] is a [controlled substance; narcotic drug; non-narcotic drug].

Committee Comment

If the defendant challenges the government's proof that the substance in question falls within the statutory definition of the substance charged, a more detailed instruction may be required. That instruction should make clear that the government must prove beyond a reasonable doubt that the substance in question was in fact the substance charged as defined in the appropriate Schedule of 21 U.S.C. § 812. The instructions may also need to include a definition of the substance as articulated in section 802(16) (definition of "narcotic" drug) and section 812. For examples of such instructions, *see United States v. Luschen*, 614 F.2d 1164, 1169 n.2 (8th Cir. 1980); *United States v. Umentum*, 547 F.2d 987, 992 n.3 (7th Cir. 1976); *United States v. Orzechowski*, 547 F.2d 978, 982-83 n.3, 983 n.4 (7th Cir. 1976).

21 U.S.C. § 856(A)(1) MAINTAINING DRUG-INVOLVED PREMISES - ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] maintaining a drug-involved premises. In order for you to find the defendant guilty of this charge, the government must prove both of the following things beyond a reasonable doubt:

1. The defendant knowingly [opened; leased; rented; used; maintained] a place;

2. The defendant did so for the purpose of [manufacturing; distributing; using] a controlled substance. The government must prove that at least one purpose of the defendant was to manufacture, distribute, or use a controlled substance. The government is not required to prove that was the defendant's sole purpose.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty

Committee Comment

See generally United States v. Acosta, 534 F.3d 574, 591 (7th Cir. 2008). *See United States v. Church*, 970 F.2d 401, 405-06 (7th Cir. 1992), for a discussion regarding whether drug use/distribution must be the sole purpose for which the defendant maintains the premises at issue.

21 U.S.C. § 856(A)(1) MAINTAINING DRUG-INVOLVED PREMISES – LIMITING INSTRUCTION

The mere fact that the defendant lived in a [house; premises] used for [manufacturing; distributing; using] a controlled substance is insufficient to prove that he maintained the house for the purpose of [manufacturing; distributing; using] a controlled substance.

A defendant's mere personal use of a controlled substance in a [house; premises] is insufficient to prove that he maintained the house for the purpose of [manufacturing; distributing; using] a controlled substance.

Committee Comment

See United States v. Acosta, 534 F.3d 574, 591 (7th Cir. 2008), as to the provision on merely living in a drug house. The second sentence of this instruction is not supported by any existing case law. However, because personal possession, ordinarily a misdemeanor or a lesser felony, often occurs in a defendant's own home, allowing a conviction under the "drug house" statute for personal use in one's own home would produce an absurd result.

21 U.S.C. § 856(A)(2) MAINTAINING DRUG-INVOLVED PREMISES - ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] maintaining a drug-involved premises. In order for you to find the defendant guilty of this charge, the government must prove the following [four] things beyond a reasonable doubt:

1. The defendant [managed; controlled] a place;

2. The defendant was an [owner; lessee; agent; employee; occupant; mortgagee] of that place;

3. The defendant knowingly [rented; leased the place; profited from the place; made the place available for use, with or without compensation].

4. The defendant did so for the purpose of unlawfully [manufacturing; storing; distributing; using] a controlled substance. The government must prove that at least one purpose of the defendant was to manufacture, distribute, store, or use a controlled substance. The government is not required to prove that was the defendant's sole purpose.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty

Committee Comment

The limitation that *United States v. Acosta*, 534 F.3d 574, 591 (7th Cir. 2008) suggests for offenses under section 856(a)(1) (*see* Comment to previous instruction) does not apply to section 856(a)(2), which necessarily implies invited activities of others if it has any application beyond the scope of section 856(a)(1).

21 U.S.C. § 859 DISTRIBUTION OF CONTROLLED SUBSTANCE TO PERSON UNDER 21 - ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] distributing [identify controlled substance in charge] to a person under 21 years of age. In order for you to find the defendant guilty of this charge, the government must prove the following [five] things beyond a reasonable doubt:

1. The defendant distributed [identify controlled substance].

2. The defendant did so knowingly.

3. The defendant knew that the substance was a controlled substance. The government is not required to prove that the defendant knew the substance was [identify controlled substance in charge].

4. The defendant was at least 18 years of age.

5. The person to whom the defendant distributed the controlled substance was under 21 years of age. The government is not required to prove that the defendant knew that the person to whom he distributed the substance was under 21 years of age.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

COMMITTEE COMMENT

This instruction should be used in conjunction with the instruction under 21 U.S.C. § 841 defining "distribution" and the general instruction defining "knowingly."

With regard to the fifth element, the Eleventh Circuit has held that the government need not prove that the defendant knew the person to whom he distributed a controlled substance was under 21 years of age. *United States v. Pruitt*, 763 F.2d 1256, 1261-62 (11th Cir. 1985). The Seventh Circuit has not decided the question, but it cited that particular holding in Pruitt approvingly in a different context. *See United States v. Schnell*, 982 F.2d 216, 221 (7th Cir. 1992).

21 U.S.C. § 844 SIMPLE POSSESSION - ELEMENTS

[The indictment charges defendant[s] with; Count __ of the indictment charges the defendant with] possession of a controlled substance. In order for you to find the defendant guilty of this charge, the government must prove both of the following things beyond a reasonable doubt:

1. The defendant knowingly possessed [identify controlled substance].

2. The defendant knew the substance was some kind of a controlled substance. The government is not required to prove that the defendant knew the substance was [identify controlled substance in charge].

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty

Committee Comment

In some cases, a conviction for possession may require a quantity threshold. In such a case, an element incorporating that requirement should be added to the instruction.

31 U.S.C. § 5324(A)(3) STRUCTURING FINANCIAL TRANSACTIONS – ELEMENTS

[The indictment charges defendant[s] with; Count of the indictment charges the defendant with] structuring a currency transaction. In order for you to find the defendant guilty of this charge, the government must prove each of the following [three] propositions beyond a reasonable doubt:

1. [Defendant's name] had knowledge that [financial institutions; insert name(s) of financial institution(s) involved] are required to report currency transactions in amounts greater than $10,000.

2. [Defendant's name] [structured; attempted to structure] a currency transaction for the purpose of evading this reporting requirement.

3. The transaction involved one or more domestic financial institution.

I will define some of these terms in a moment.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

COMMITTEE COMMENT

See 31 U.S.C. § 5324(a)(3); 31 C.F.R. § 103.11(gg); *United States v. Van Allen*, 524 F.3d 814, 819-20 (7th Cir. 2008); *United States v. Cassano*, 372 F.3d 868, 878 (7th Cir. 2004), *vacated on other grounds* 543 U.S. 1109 (2005). This instruction uses the most common example of structuring, specifically the offense described in section 5324(a)(3). If the defendant is charged under a different subsection of the statute, the instruction should be modified accordingly.

A previous version of the criminal prohibition against structuring required proof of willfulness. In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Supreme Court held that this required proof that the defendant acted with knowledge that his conduct was unlawful. *Id.* at 137. Congress responded by eliminating the statutory requirement of

willfulness. *See United States v. Griffin*, 84 F.3d 912, 925 (7th Cir. 1996) (citing Pub. L. No. 103-325, 411, 108 Stat. 2160, 2253 (1994)). Section 5324(a) still requires, however, proof that the defendant acted "for the purpose of evading the [currency transaction] reporting requirements." 31 U.S.C. § 5324(a). The Seventh Circuit has determined that to convict, the government must prove that the defendant had knowledge of the reporting requirements and acted to avoid them. *See Van Allen*, 524 F.3d at 820; *Cassano*, 372 F.3d at 878.

The instruction does not use the phrase "had knowledge of the reporting requirements" because it is somewhat opaque regarding the extent of knowledge required. The instruction is adapted from language approved in *United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 2005). Though the Seventh Circuit's decisions in *Van Allen* and *Cassano* use the term "avoid," the instruction uses the statutory term "evade" because it is believed to be more descriptive of what is required. "Evade" is a commonly understood term that is used elsewhere in these instructions. *See* Instruction for 26 U.S.C. § 7201.

31 U.S.C. § 5324(A)(3) STRUCTURING FINANCIAL TRANSACTIONS – DEFINITIONS

A financial institution must file a currency transaction report with the Internal Revenue Service every time a customer engages in a currency transaction of more than $10,000.00.

[Commercial banks; banks that are insured by the Federal Deposit Insurance Corporation; credit union; insert other] are financial institutions.

A currency transaction is the physical transfer of currency from one [person [or] entity] to another [person [or] entity].

A person structures a currency transaction when he[, by himself or on behalf of others,] conducts one or more currency transactions at one [or more] financial institution[s] [or different branches of the same financial institution], on one [or more] day[s], with the purpose of evading currency transaction reporting requirements. Structuring may include breaking down a single sum of currency over $10,000 into smaller sums, or conducting a series of cash transactions all at or below $10,000, with the purpose of evading currency transaction reporting requirements.

You may find [defendant's name] guilty of unlawfully structuring a transaction regardless of whether the financial institution filed a true and accurate currency transaction report.

Committee Comment:

See 31 U.S.C. 5312 & 31 C.F.R. § 103.11(n) ("financial institution"); 31 U.S.C. § 103. 11(ii) ("transaction in currency"); 31 U.S.C. § 103.11 (gg) ("structuring"); 31 U.S.C. § 103.22(b)(i) (obligation to file currency transaction report). This instruction uses the most common example of currency structuring. If it does not fit the particular case, a more applicable example should be devised.

7 U.S.C. § 2024(B) UNAUTHORIZED ACQUISITION OF FOOD STAMPS – ELEMENTS

(NO CURRENT INSTRUCTION)

[The indictment charges defendant[s] with; Count __ of the indictment is a charge of] unauthorized acquisition of [food stamps; LINK card benefits; insert terminology used in particular State]. In order for you to find the defendant guilty of this charge, the government must prove both of the following propositions beyond a reasonable doubt:

1. The defendant acquired more than $100 worth of [food stamps; LINK card benefits; insert other appropriate terminology] in a way that was contrary to law.

2. The defendant knew that his acquisition of the [food stamps; LINK card benefits; other terminology] was contrary to law.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty

Committee Comments

See 7 U.S.C. § 2024(b). The statute covers offenses other than unauthorized acquisition, but that is its most common application. The statutory requirement of "knowledge" requires proof that the defendant knew he was acquiring the benefits in a way that was unauthorized by statute or regulation. *United States v. Liparota*, 471 U.S. 419, 433 (1985).

7 U.S.C. § 2024(B) DEFINITION OF "CONTRARY TO LAW"

The law allows [food stamps; LINK card benefits; insert other appropriate terminology] to be exchanged only for eligible food, and not for cash.

Committee Comments

See 7 C.F.R. § 278.2(a). The applicable regulations identify a number of ways in which a person might acquire food stamp benefits in a manner that is "contrary to law." Exchange of the benefits for cash is the most common application of the criminal statute.

26 U.S.C. § 7201 ATTEMPT TO EVADE OR DEFEAT TAX – ELEMENTS

[The indictment charges defendant[s] with; Count _____ of the indictment charges the defendant with] attempting to evade or defeat his [individual income] tax. In order for you to find the defendant guilty of this charge, the government must prove each of the [four] following propositions beyond a reasonable doubt:

1. On the date for filing a federal [income] tax return, federal [income] tax was due and owing by the defendant. [If the defendant owed tax for a particular year, then the tax was due and owing as of [April 15; other date pursuant to extension] of the following year.]

2. The defendant knew he had a legal duty to pay the tax.

3. The defendant did some affirmative act to evade [payment of; assessment of; computation of] the tax. Any conduct that is likely to have a misleading or concealing effect can constitute an affirmative act. A lawful act can serve as an affirmative act if it is done with the intent to evade income tax. [The mere failure to file a tax return is not an affirmative act.]

4. In doing so, the defendant acted [willfully, that is,] with the intent to violate his legal duty to pay the tax.

The government is not required to prove the precise amount of additional tax alleged in the indictment or the precise amount of [additional] tax owed.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment:

See Sansone v. United States, 380 U.S. 343, 351 (1965); *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. King*, 126 F.3d 987, 989-990 (7th Cir. 1997). This section includes both attempts to avoid payment of taxes and attempts to avoid assessment of taxes. *United States v. Voorhies*, 658 F.2d 710, 713 (9th Cir. 1981).

Willfully is defined in the instruction as acting with the intent to violate a legal duty to pay a tax. *Cheek v. United States*, 498 U.S. 192 (1991). *See United States v. Murphy*, 469 F.3d 1130, 1137 (7th Cir. 2006) ("proof of a specific intent to do something which the law forbids; more than a showing of careless disregard for the truth is required"); *United States v. Patridge*, 507 F.3d 1092, 1093-94 (7th Cir. 2007).

"Any conduct that is likely to have a misleading or concealing effect can constitute an affirmative act." A lawful act can serve as an affirmative act if it is done with the intent to evade income tax. *United States v. Valenti*, 121 F.3d 327, 333 (7th Cir. 1997) (citing *United States v. Jungers*, 903 F.2d 468, 474 (7th Cir. 1960)). The mere failure to file a tax return is not an affirmative act. *United States v. Valenti*, 121 F.3d 327, 333 (7th Cir. 1997). A "substantial" deficiency is not required, contrary to a prior Committee Comment. *United States v. Daniels*, 387 F.3d 636 (7th Cir. 2004).

26 U.S.C. § 7201 UNANIMITY AS TO ACTS OF EVASION

Committee Comment

The Committee recommends the use of a unanimity instruction modeled on Instruction 4.04, requiring the jury to agree unanimously on at least one of the specific acts of evasion charged in the indictment.

26 U.S.C. § 7201 NO NEED FOR TAX ASSESSMENT

If the defendant has incurred a tax liability, then it exists from the date the return is due. The government need not prove that there was an administrative assessment of tax or that the defendant received a tax assessment.

Committee Comment

This instruction should be given only if the contrary position is argued by the defendant.

26 U.S.C. § 7203 FAILURE TO FILE – ELEMENTS

[The indictment charges defendant[s] with; Count ____ of the indictment charges the defendant with] willful failure to file an [individual; partnership; corporate; trust] income [other type] tax return. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant was required by law to file an [individual, partnership, corporate, trust, or other] income [or other] tax return for [insert calendar or fiscal year in question]. [I will explain in a moment when [a person; insert other form of entity] is required by law to file a tax return.]

2. The defendant failed to file the return as required by law.

3. The defendant [acted willfully, that is, he] knew that he was required by law to file an income tax return and intentionally failed to do so.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Willfulness is defined within the instruction, as in the instruction for 26 U.S.C. § 7201.

26 U.S.C. § 7203 WHEN PERSON IS OBLIGATED TO FILE RETURN

[Use only the paragraph(s) that apply.]

A [single individual, married individual filing separately, etc.] [under] [over] 65 years old was required to make and file an individual income tax return if that individual had a gross income of $_____ or more. "Gross income" means all income from any source, including [wages and compensation for services, tips, compensation in the form of personal expenses paid for by defendant's corporation, income from fraud, embezzlement, etc.]

A married individual was required to file a federal income tax return if he/she had a separate gross income in excess of $_____ and a total gross income, when combined with that of his/her spouse, in excess of $_____ where [either] [both] [is] [are] [over] [under] 65 years old.

Any person who received more than $_____ net income from business (Schedule C), was required to make and file an individual income tax return.

If the defendant had the required gross income in [insert year], then he was required to file a tax return on or before [insert date return was due].

For the years _____ a corporation [partnership, trust] was required to make and file a corporate [partnership, trust] income tax return, whether or not that corporation had income.

Committee Comment:

This instruction should be adapted for the particular years at issue, as filing requirements may change from year to year.

"The definition of gross income under the Internal Revenue Code sweeps broadly." *United States v. Burke*, 504 U.S. 229, 233 (1992); *United States v. Benson*, 67 F.3d 641 (7th Cir. 1995) (citing *Burke*).

26 U.S.C. § 7203 TAX RETURN MUST CONTAIN SUFFICIENT INFORMATION

Submitting a tax form that does not contain sufficient financial information to enable the Internal Revenue Service to determine the individual's tax liability does not qualify as the filing of a tax return under the law. It is up to you to determine whether the tax form the defendant filed contained enough information to enable the Internal Revenue Service to determine the defendant's tax liability.

Committee Comment:

United States v. Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982).

26 U.S.C. § 7206(1) FRAUD AND FALSE STATEMENTS – ELEMENTS

[The indictment charges defendant[s] with; Count _____of the indictment charges the defendant with] filing a false tax return. In order for you to find the defendant guilty of this charge, the government must prove each of the [five] following propositions beyond a reasonable doubt:

1. The defendant [prepared an [income] tax return; caused someone to prepare an [income] tax return].

2. The income tax return was false [or incomplete] as to a material matter, as charged in the Count.

3. The defendant signed the income tax return, which contained a written declaration that it was made under penalties of perjury.

4. The defendant [acted willfully, that is, he] knew that he had a legal duty to file a truthful [and complete] tax return, but when he signed the return, he did not believe that it was truthful [or complete] as to a material matter.

5. The defendant [filed; caused someone to file] the [income] tax return with the Internal Revenue Service.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

A charge of filing a false tax return does not, unlike a charge of evasion, require proof of a tax deficiency. *United States v. Peters*, 153 F.3d 445, 461 (7th Cir. 1998).

Willfulness is defined within the instruction, as in the instruction for 26 U.S.C. § 7201. *See United States v. Pree*, 408 F.3d 855, 867 (7th Cir. 2005)(willfulness as element).

26 U.S.C. § 7206 MATERIALITY

A false matter is material if the matter was capable of influencing the Internal Revenue Service.

Committee Comment:

See United States v. Pree, 405 F.3d 855, 873 (7th Cir. 2005) ("[a] false statement is material when it has the potential for hindering the IRS's efforts to monitor and verify the tax liability of the taxpayer.") (citations omitted); *United States v. Peters*, 153 F.3d 445 (7th Cir. 1998)(defining materiality).

26 U.S.C. § 7206(2) AIDING AND ABETTING IN SUBMITTING FALSE AND FRAUDULENT RETURN – ELEMENTS

[The indictment charges defendant[s] with; Count ____ of the indictment charges the defendant with] aiding and abetting in the [preparation; presentation] of a false tax return. In order for you to find the defendant guilty of this charge, the government must prove each of the [three] following propositions beyond a reasonable doubt:

1. The defendant [aided; assisted in; procured; counseled; advised] the [preparation; presentation] of an [income] tax return that was false as to a material matter. There must be some affirmative participation which at least encourages the perpetrator. The return must be filed with the Internal Revenue Service. [The government is not required to prove that the defendant [prepared [or] signed] the tax return.]

2. The defendant knew that the income tax return was false, that is, that the income tax return was untrue when it was made.

3. The defendant acted willfully, that is, with the intent to violate the law.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment:

United States v. Dunn, 961 F.2d 648, 651 (7th Cir. 1992) (issue of willfulness); *United States v. Hooks*, 848 F.2d 785, 791-92 (7th Cir. 1988) (application of 26 U.S.C. § 7206(2) "has a broad sweep, making all forms of willful assistance in preparing a false return an offense"). *United States v. Palivos*, 486 F.3d 250, 258-259 (7th Cir. 2007) (return must be filed with the Internal Revenue Service). *United States v. Hooks*, 848 F.2d 785, 789 (7th Cir. 1988) ("there must exist some affirmative participation which at least encourages the perpetrator").

26 U.S.C. § 7206(2) KNOWLEDGE OF TAXPAYER IRRELEVANT

The government is not required to prove that the taxpayer [who filed the false tax return; for whom the false tax return was filed] knew the return was false.

Committee Comment:

United States v. Motley, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Hooks*, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return and therefore violated Section 7206(2), regardless of whether tax preparer knew of falsity or fraud).

26 U.S.C. § 7212 CORRUPTLY ENDEAVORING TO OBSTRUCT OR IMPEDE DUE ADMINISTRATION OF INTERNAL REVENUE LAWS-ELEMENTS

[The indictment charges defendant[s] with; Count ____ of the indictment charges the defendant with] corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws. In order for you to find the defendant guilty of this charge, the government must prove each of the [four] following things beyond a reasonable doubt:

1. The defendant [made an effort; acted] with the purpose to obstruct or impede the due administration of the internal revenue laws, which includes the Internal Revenue Service's lawful functions to [ascertain income; compute, assess and collect income taxes; audit tax returns and records; and investigate possible criminal violations of the internal revenue laws].

2. The defendant's [effort; act] had a reasonable tendency to obstruct or impede the due administration of the internal revenue laws. The effort need not be successful.

3. The defendant acted knowingly.

4. The defendant acted [corruptly, that is,] with the purpose to obtain an unlawful benefit for himself or someone else.

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Valenti, 121 F.3d 327 (7th Cir.1997).

26 U.S.C. § 7212 GOOD FAITH

If the defendant believes in good faith that he is acting within the law or that his actions comply with the law, he cannot be said to have acted [corruptly, or] with the purpose to obtain an unlawful benefit for himself or someone else. This is so even if the defendant's belief was not objectively reasonable. However, you may consider the reasonableness of the defendant's belief together with all the other evidence to determine whether the defendant held the belief in good faith.

Committee Comment:

See Cheek v. United States, 498 U.S. 192, 202, 204-206 (1991); *United States v. Becker*, 965 F.2d 383, 388 (7th Cir. 1992).

26 U.S.C. §§ 7201, 7203, 7206 FUNDS OR PROPERTY FROM UNLAWFUL SOURCES

In determining the defendant's taxable income, income received from unlawful activities is treated in the same manner as income from lawful activities.

Committee Comment:

26 U.S.C. § 61. *See James v. United States*, 366 U.S. 213 (1961); *Rutkin v. United States*, 343 U.S. 130 (1952).

26 U.S.C. H7201, 7203, 7206 KNOWLEDGE OF CONTENTS OF RETURN

You may infer that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to infer this.

If you find that the government has proven beyond a reasonable doubt that the defendant signed [a; the] tax return, then you may infer that the defendant knew of the contents of the return. You are not required, however, to infer this.

Committee Comment

26 U.S.C. § 6064.

18 U.S.C. § 286 CONSPIRACY TO DEFRAUD THE GOVERNMENT WITH RESPECT TO CLAIMS – ELEMENTS

To sustain the charge of conspiracy to defraud the government with respect to claims, the government must prove the following propositions:

1. There was a conspiracy to obtain [payment; allowance; aid in obtaining payment; aid in obtaining allowance] of a [false; fictitious; fraudulent] claim against [the United States; a department or agency of the United States] as charged in Count __.

2. The defendant knowingly became a member of the conspiracy with an intent to advance the conspiracy.

3. The defendant knew that the claim was [false; fictitious; fraudulent].

4. The defendant acted with the intent to defraud.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

There is a split of authority regarding whether section 286 requires proof of an overt act. *Compare United States v. Gupta*, 463 F.3d 1182, 1194 (11th Cir. 2006) (overt act required); with *United States v. Saybolt*, 577 F.3d 195, 202 (3d Cir. 2009) (overt act not required); *United States v. Dedman*, 527 F.3d 577, 594 n.7 (6th Cir. 2008) (overt act not required). In *Salinas v. United States*, 522 U.S. 52, 63 (1997), the Supreme Court held that there is no overt act requirement under the RICO conspiracy statute because "[t]here is no requirement of some overt act or specific act in the statute before us, unlike the general conspiracy provision"). The Committee has not included an overt act requirement in the pattern instruction.

There is authority requiring proof of materiality under section 286. *See United States v. Saybolt*, 577 F.3d 195, 202-04 (3d Cir. 2009) (distinguishing section 286 from section 287 in this regard). This derives from the fact that the statute requires a conspiracy "to defraud," which in turn implicitly requires materiality. *See Neder v. United States*, 527

U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality"). The Seventh Circuit has not yet addressed this issue. If the court determines that materiality is an element of the offense, the instruction should be modified accordingly.

If a court gives this instruction, it should also give an instruction defining "intent to defraud," which can be borrowed from the instructions for mail and wire fraud, 18 U.S.C. §§ 1341 & 1343.

18 U.S.C. § 287 FALSE, FICTITIOUS, OR FRAUDULENT CLAIMS – ELEMENTS

To sustain the charge of making a false claim, the government must prove the following propositions:

1. The defendant [made, presented] a claim against [the United States, a department or agency of the United States];

2. The claim was [false, fictitious, fraudulent];

3. The defendant knew the claim was [false, fictitious, fraudulent];

4. [The defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is required to prove that the defendant knew the claim was false. *United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996).

The weight of appellate authority is that proof of materiality is not required under section 287, at least when the claim is alleged to be "false" or "fictitious" rather than "fraudulent." *See, e.g., United States v. Saybolt*, 577 F.3d 195, 199-201 (3d Cir. 2009); *United States v. Logan*, 250 F.3d 350, 358 (6th Cir. 2001); *United States v. Upton*, 91 F.3d 677, 684-85 (5th Cir. 1996). If the claim is alleged to be "fraudulent," then materiality is required. *Saybolt*, 577 F.3d at 199-01 (citing *Neder v. United States*, 527 U.S. 1, 22 (1999) ("the common law could not have conceived of 'fraud' without proof of materiality"). The Seventh Circuit has not yet addressed this issue.

The fourth element (intent to defraud) is bracketed because it is unsettled in this Circuit whether proof of intent to defraud is required under section 287. In *United States v. Nazon*, 940 F.2d 255 (7th Cir. 1991), the jury was instructed that it must find that the defendant submitted his claim with an intent to defraud. On appeal, the defendant objected to the district court's failure to define the phrase intent to defraud for the jury. Although the Seventh Circuit held that the failure to define intent to defraud was not plain error, it assumed that the jury

was required to find intent to defraud. *Id.* at 260. In *United States v. Haddon*, 927 F.2d 942 (7th Cir. 1991), the court said that a jury instruction that required the government to prove intent to defraud on a section 287 charge "accurately presented the jury with the fundamental questions bearing upon the defendant's guilt or innocence" and concluded that "the requisite intent to defraud was present. " *Id.* at 951.

In *Catton*, the court considered whether a trial judge had erred in failing to instruct a jury that the government had to prove willfulness to convict under section 287. The court equated willfulness with intent to defraud. *Catton*, 89 F.3d at 392. It noted that *Nazon* and *Haddon* assumed that intent to defraud is required. *Id.* The court concluded, however, that "It is implicit in the filing of a knowingly false claim that the claimant intends to defraud the government, and hence unnecessary to charge willfulness separately." *Id.* In an unpublished decision, *United States v. Strong*, 114 F.3d 1192, 1997 WL 269359, at *2 (7th Cir. May 20, 1997) (unpublished), the court concluded that intent to defraud is not required under section 287 and read its decision in Catton as so concluding.

A separate unresolved question exists as to whether the government must prove that the defendant knew the false claim would be presented to the United States or whether that point is a jurisdictional fact which need not be presented to the jury. The case law is silent. The issue turns on whether the requirement is more like the requirement in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (charge of knowingly transporting visual depictions of minors engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252 requires proof that defendant knew depiction was of a minor) or more like *United States v. Feola*, 420 U.S. 671 (1975) (charge of conspiracy to assault a federal officer in violation of 18 U.S.C. § 111 does not require proof that defendant knew person was federal officer).

18 U.S.C. § 1001 CONCEALING A MATERIAL FACT – ELEMENTS

To sustain the charge of concealing a material fact, the government must prove the following propositions:

1. The defendant [concealed; covered up] a fact by trick, scheme or device.

2. The fact was material.

3. The defendant acted knowingly and willfully.

4. The defendant [concealed; covered up] the material fact in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See comment to instruction for 18 U.S.C. § 1001, Making a False Statement or Representation.

18 U.S.C. § 1001 MAKING A FALSE STATEMENT OR REPRESENTATION – ELEMENTS

To sustain the charge of making a [false; fictitious; fraudulent] [statement; representation], the government must prove the following propositions:

1. The defendant made a [statement; representation]

2. The statement was [false; fictitious; fraudulent].

3. The [statement; representation] was material.

4. The defendant acted knowingly and willfully.

5. The defendant made the [statement; representation] in a matter within the jurisdiction of the [executive][legislative][judicial] branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

United States v. Moore, 446 F.3d 671, 676 (7th Cir. 2006), says that the court has "identified five elements of a charge under section 1001, and lists them in the manner set forth in the revised pattern instruction. *See also, e.g., United States v. Ranum*, 96 F.3d 1020, 1028 (7th Cir. 1996); *United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983). The prior pattern instruction collapsed elements 1 and 2 into a single element. This instruction separates the making of the statement and its falsity into two separate elements.

Section 1001 does not require proof that the defendant knew the false statement involved a matter within the jurisdiction of a federal agency. *United States v. Yermian*, 468 U.S. 63, 69 (1984). Nor does it require proof of an intent to deceive the government. *Id.* ("Any natural reading of § 1001 . . . establishes that the terms 'knowingly and willfully' modify only the making of 'false, fictitious or fraudulent statements' . . . . The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be 'knowingly made in a matter within federal agency jurisdiction," or "with the intent to

deceive the Federal Government.'"). *See also, e.g., United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010) ("the 'knowingly and willfully' requirement in 18 U.S.C. § 1001 relates only to the defendant's knowledge and intent that the statements he made to a government entity were false or were made with the conscious purpose of evading the truth.").

18 U.S.C. § 1001 MAKING OR USING A FALSE WRITING OR DOCUMENT – ELEMENTS

To sustain the charge of [making; using] a false [writing; document] knowing it to contain any [false; fictitious; fraudulent] [statement; entry], the government must prove the following propositions:

1. The defendant [made; used] a false [writing; document];

2. The defendant knew the [writing; document] contained a [false; fictitious; fraudulent] [statement; entry];

3. The [false; fictitious; fraudulent] [statement; entry] was material;

4. The defendant [made; used] the [document; writing] knowingly and willfully; and

5. The defendant [made; used] the [writing; document] in a matter within the jurisdiction of the [executive] [legislative] [judicial] branch of the government of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See comment to instruction for 18 U.S.C. § 1001, Making a False Statement or Representation.

18 U.S.C. § 1001 DEFINITION OF SCHEME AND DEVICE

A scheme or device includes any plan or course of action intended to deceive others.

18 U.S.C. § 1001 DEFINITION OF FALSE, FICTITIOUS

A statement is [false; fictitious] if it was untrue when made.

18 U.S.C. § 1001 DEFINITION OF FRAUDULENT

A statement or representation is fraudulent if it is made [or caused to be made] with intent to deceive.

18 U.S.C. § 1001 DEFINITION OF MATERIALITY

A statement is material if it is capable of influencing the actions of the [body or agency]. [The government is not required to prove that the statement actually influenced the actions of the [body or agency].]

Committee Comment

See United States v. Gaudin, 515 U.S. 506, 509 (1995) (To be material for purposes of section 1001, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed. "); *United States v. Turner*, 551 F.3d 657, 663 (7th Cir. 2008).

18 U.S.C. § 1001 WILLFULLY – DEFINITION

A person acts willfully if he acts voluntarily and intentionally, and with the intent to do something the law forbids.

Committee Comment

This instruction defines the requirement of "willful" conduct as used in the fourth element of the section 1001 instructions. That same element also requires "knowing" conduct. Given the standard definition of "knowing" conduct as set forth elsewhere in the pattern instructions, there is some overlap between these two concepts as they are used in section 1001. The Seventh Circuit, however, has specifically approved the definition of "willful" conduct under section 1001 as set forth in this instruction. *See United States v. Ranum*, 96 F.3d 1020, 1028-29 (7th Cir. 1996).

The willfulness element does not require government to prove that the underlying conduct about which the defendant made representations was unlawful. *See United States v. Lupton*, 620 F.3d 790, 806 (7th Cir. 2010).

18 U.S.C. § 1001 DEPARTMENT OR AGENCY

The [name of department, agency, or office] is a part of the [executive; legislative; judicial] branch of the government of the United States. [Statements; Representations; Facts] concerning [specify] are within the jurisdiction of that branch.

Committee Comment

The statement need not be made directly to a United States agency. If made to a local entity administering a totally or partially federally funded program then such a statement may also be within the jurisdiction of a federal agency. *See United States v. Petullo*, 709 F.2d 1178, 1180 (7th Cir. 1983); *see also United States v. Ross*, 77 F.3d 1525, 1544 (7th Cir. 1996) ("This court has repeatedly found the submission of a fraudulent statement to a private (or non federal government) entity to be within the jurisdiction of a federal agency where the agency has given funding to the entity and fraudulent statements cause the entity to utilize the funds improperly.")

It is of no consequence whether the government suffered monetary loss or was actually deceived by the acts charged.

18 U.S.C. § 1005, PARA. 4 FRAUDULENTLY BENEFITTING FROM A LOAN BY A FEDERALLY INSURED INSTITUTION

To sustain the charge of fraudulently benefitting from a loan made by a financial institution as charged in Count ___ of the indictment, the government must prove the following propositions:

1. The defendant received or otherwise benefitted, directly or indirectly, from a loan made by a financial institution.

2. The defendant acted with the intent to defraud the financial institution.

3. The deposits of the [name the financial institution] were then insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

For the definition of intent to defraud, use the pattern instruction applicable to 18 U.S.C. §§ 1341 and 1343.

18 U.S.C. § 1006 INSIDER FRAUD ON A FEDERALLY INSURED FINANCIAL INSTITUTION

To sustain the charge of defrauding a federally insured financial institution as charged in Count ___ of the indictment, the government must prove the following propositions:

1. The defendant was an [officer, agent or employee of or connected in some capacity with] [name of qualifying institution as listed in the statute].

2. The defendant [choose whichever applies].

(A) made a false entry in a book, report or statement of [name of institution].

(B) without authorization, drew an [order; bill of exchange], [made an acceptance], [issued, put forth or assigned a note, debenture, bond, draft, bill of exchange, mortgage, judgment, or decree].

(C) [participated in; shared in; received], directly or indirectly, [money; profit; property; benefits] through a [transaction; loan; commission; contract; or insert other act of the institution].

3. The defendant acted with the intent to defraud the [name of defrauded institution, corporation, association, or individual].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

For the definition of intent to defraud, see pattern instruction applicable to 18 U.S.C. §§ 1341 and 1343.

18 U.S.C. § 1007 FALSE STATEMENTS TO INFLUENCE THE FDIC

To sustain the charge of making [or inviting reliance on] a false statement [document or other thing] to influence the Federal Deposit Insurance Corporation, the government must prove the following propositions:

1. The defendant knowingly [made; invited reliance on] a [false; forged; counterfeit] [statement; document; thing] as alleged in Count ___ of the indictment;

2. The defendant acted for the purpose of influencing in some way an action of the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 1014 FALSE STATEMENT TO FINANCIAL INSTITUTION – ELEMENTS

To sustain the charge of making a false statement to a [bank] [financial institution], the government must prove the following propositions:

1. The defendant made a false statement to a [bank] [financial institution], [orally; in writing].

2. At the time the defendant made the statement, he knew it was false.

3. The defendant made the statement with the intent to influence the action of the [bank] [financial institution] concerning a[n] [describe type of action: application, loan, etc.]; and

4. The accounts of the [bank] [financial institution] were insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

There are several types of institutions listed in the statute for which this instruction should be modified, but the vast majority of section 1014 cases are based on statements to banks.

See United States v. Lane, 323 F.3d 568, 583 (7th Cir. 2003) (elements of offense under 18 U.S.C. § 1014 include "knowledge of falsity, and the intent to influence action by the financial institution concerning a loan or one of the other transactions listed in the statute"). Proof of materiality is not required under section 1014. *United States v. Wells*, 519 U.S. 482 (1997); *Lane*, 323 F.3d at 583.

18 U.S.C. § 1623 FALSE DECLARATIONS BEFORE GRAND JURY OR COURT – ELEMENTS

To sustain the charge of false declaration before a grand jury or in a court, the government must prove the following propositions:

1. The defendant, while under oath, testified falsely before a [United States grand jury, Court of the United States] as charged in the indictment.

2. The defendant's testimony concerned a material matter.

3. The defendant knew the testimony was false. [[Mistake][,] [confusion][,] [or] [faulty memory]] does not constitute knowledge that the testimony was false.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Seventh Circuit has defined perjury under section 1623 as requiring "the willful intent to provide false testimony." *United States v. Dumeisi*, 424 F.3d 566, 582 (7th Cir. 2005); *see also, United States v. Fawley*, 137 F.3d 458, 463 (7th Cir. 1998). The definition of "willful" in this context appears to be the equivalent of "knowing" conduct. The language in the proposed instruction that distinguishes knowing conduct from confusion, mistake, or faulty memory comes from the same sentence of *Dumeisi* that requires "willful intent." It is included to draw the distinction the court drew in that case. The general instruction defining "knowing" conduct may be used in conjunction with this instruction.

If recantation is raised by the defendant, see the instruction on § 1623 Recantation. As noted in the comment to that instruction, there is no Seventh Circuit authority on which side bears the burden of persuasion if recantation is raised. If the burden is placed on the government, a fourth element should be added to this instruction, e.g., "4. The defendant did not recant the false [testimony; declaration]." If the burden is placed on the defendant, the form of instruction for affirmative defenses should be used. *See* Instruction 4.03. In that event,

the court must make a determination regarding the nature of the defense burden, e.g., preponderance of the evidence.

If the charge alleges multiple false statements, the jury must agree unanimously on the statement that constitutes perjury. *See United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009). In such a case, the court should give the unanimity instruction contained in Instruction 4.04.

18 U.S.C. § 1623 MATERIALITY – DEFINITION

Testimony concerns a material matter if it is capable of impeding, interfering with or influencing the [court] [jury] [grand jury]. [The government is not required to prove that the testimony actually impeded, interfered with, or influenced the [court] [jury] [grand jury]].

Committee Comment

See, e.g., United States v. Burke, 425 F.3d 400, 414 (7th Cir. 2005); *United States v. Waldemer*, 50 F.3d 1379, 1382 (7th Cir. 1995). Materiality is an element of the offense and is an issue for the jury, not the court. *See, e.g., United States v. Gellene*, 182 F.3d 578, 590 (7th Cir. 1999).

18 U.S.C. § 1623 RECORDS OR DOCUMENTS

Making or using a record or document knowing it to be false or to contain a false declaration constitutes making or using a false declaration.

18 U.S.C. § 1623 SEQUENCE OF QUESTIONS

In determining whether an answer to a question is false, you should consider the sequence of questions in which the question and answer occurred as an aid to understanding the defendant's intent when giving the answer.

Committee Comment

See United States v. Bonacorsa, 528 F.2d 1218, 1221 (2d Cir. 1976).

18 U.S.C. § 1623 INCONSISTENT STATEMENTS

If you find that the defendant under oath has knowingly made two or more declarations which are so inconsistent that one of them is necessarily false, you need not find which of the two declarations is false. If you find that the defendant believed each declaration to be true when made, then you must find the defendant not guilty.

Committee Comment

See 18 U.S.C. § 1623(c); *United States v. Bacani*, 236 F.3d 857, 859 (7th Cir. 2001); *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997).

18 U.S.C. § 1623 RECANTATION

A person recants false testimony; a false declaration] when, in the same continuous proceeding, he admits to the [grand jury; court] that his earlier declarations were false. The defendant must admit the falsity: (1) before the proceeding has been substantially affected by the false [testimony; declaration]; and (2) before it has become apparent to the defendant that the false [testimony; declaration] has been or will be exposed to the [grand jury; court].

Committee Comment

1. General authority. *See* 18 U.S.C. § 1623(d); *United States v. DeLeon*, 603 F.3d 397, 404-05 (7th Cir. 2010).

2. Conjunctive vs. disjunctive. Section 1623(d) states that

> [w]here, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

Although the statute uses the word "or," the weight of appellate authority is that both of its conditions must be fulfilled before a defendant's admission of falsity bars prosecution. *See, e.g., United States v. Moore*, 613 F.2d 1029, 1039-45 (D.C. Cir. 1979); *United States v. Scrimgeour*, 636 F.2d 1019, 1024 (5th Cir. 1981); *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990). There is, however, contrary appellate authority. *See United States v. Smith*, 35 F.3d 344, 345-47 (8th Cir. 1994). The Seventh Circuit has not addressed the point. The pattern instruction adopts the majority rule.

3. Burden of proof. There is a split of appellate authority regarding which side bears the burden of proof when the defendant claims recantation. *Compare United States v. Tobias*, 863 F.2d 685, 688 (9th Cir. 1988) (defendant must raise defense of recantation, but if raised, the government must disprove recantation beyond a reasonable doubt) with *United States v. Moore*, 613 F.2d 1029, 1044 (D.C. Cir. 1979) (defendant bears burden of proof on recantation). The pattern instruction does not take a position on this point. There is also authority suggesting that the viability of the defense may be an issue that the court can address prior to trial. *See United States v. Denison*, 663 F.2d 611, 618 (5th Cir. 1981).

4. "Has become manifest." *United States v. Denison*, 663 F.2d 611, 615-16 (5th Cir. 1981), construed the "has become manifest" clause as referring to whether it was manifest to the witness at the time of recantation that the grand jury or trial court knew or would come to learn of the declaration's falsity. *United States v. Moore*, , 613 F.2d at 1043, implicitly accepts the *Denison* view. In the Seventh Circuit, both Judge Swygert and Judge Pell, in separate statements following a per curiam en banc opinion in *United States v. Clavey*, 578 F.2d 1219 (7th Cir. 1978), adopted the view that the term "manifest" concerns whether the likelihood of exposure had become apparent to the witness, not to the court or grand jury to which the false testimony had been given. The use of the term "apparent" in the instruction as the equivalent of the statutory term "manifest" is taken from *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990).

5. "Substantially affected." The only circuit-level decision that addresses the phrase "substantially affected" does so by reviewing the standards for materiality in perjury prosecutions. That court concluded that false testimony that did not have a substantial effect for purposes of Section 1623(d) may still be material in the Section 1623(d) sense. *See Moore*, 613 F.2d at 1038. The court in *United States v. Krogh*, 366 F.Supp. 1255 (D.D.C. 1973), concluded as a matter of law that the grand jury had been substantially affected when it "acted" on issues that encompassed the given matter of the testimony which had been falsely given. The court in *United States v. Tucker*, 495 F. Supp. 607 (E.D.N.Y. 1980), citing *Krogh's* approach, found that a grand jury had been substantially affected when it was unable to indict a suspect due to the defendant's false declaration.

18 U.S.C. §3 ACCESSORY AFTER THE FACT

The defendant is charged with being an accessory after the fact to [identify the underlying federal offense]. In order for you to find the defendant guilty of this charge, the government must prove each of the [four] following things beyond a reasonable doubt:

1. [Name of offender] had committed the crime of [identify underlying federal crime] as defined in the next instruction;

2. The defendant knew that [name of offender] had committed the crime of [identify underlying crime];

3. The defendant assisted [name of offender] in some way;

4. The defendant did so with the intent to [obstruct [or] prevent] [name of offender] from being [arrested; prosecuted; [or] punished].

If you find from your consideration of all the evidence that the government has proved each of these propositions beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any of these propositions beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Irwin, 149 F.3d 565, 571 (7th Cir. 1998); *United States v. Osborn*, 120 F.3d 59, 63 (7th Cir. 1997).

18 U.S.C. § 152(1) CONCEALMENT OF PROPERTY – ELEMENTS

To sustain the charge of concealment of property belonging to the estate of a debtor in a bankruptcy proceeding, the government must prove the following propositions:

1. There was a bankruptcy proceeding ;

2. [Identify property or assets] belonged to the bankrupt estate;

3. The defendant knowingly concealed [identify property or assets] from [creditors; custodian; trustee; marshal; United States Trustee; other person charged with control or custody of such property]; and,

4. The defendant acted [fraudulently, that is,] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

With regard to the fourth element, the statute uses the term "fraudulently," but the instruction substitutes the definition ("with intent to deceive") because it is simpler than using the statutory term and then defining it. *See United States v. Gellene*, 182 F.3d 578, 586 (7th Cir. 1999) (concerning the term "fraudulently" as used in section 152(3)); *United States v. Lerch*, 996 F.2d 158, 161 (7th Cir. 1993) (same); *see also, United States v. Sabbeth*, 262 F.3d 207, 217 (2d Cir. 2001).

The defendant need not be the debtor in bankruptcy to be convicted under section 152. *See United States v. Ross*, 77 F.3d 1525, 1548 (7th Cir. 1996).

18 U.S.C. § 152(1) DEFINITION OF CONCEALMENT

A person "conceals" [property; an asset] if he hides, secretes, fraudulently transfers, or destroys the [property; asset], or if he takes action to prevent discovery of the [property; asset], or if he withholds information or knowledge required by law to be made known. Since the offense of concealment is a continuing one, the acts of concealing may have begun before as well as after the bankruptcy proceeding began.

The government is not required to prove that the concealment was successful.

[The government is also not required to prove that a demand was made to the defendant for the [property; assets; insert other].]

[NOTE: Choose appropriate terms contained in brackets.]

Committee Comment

Concealment includes withholding information and taking action to prevent discovery of an asset, not simply hiding it. *See, e.g., United States v. Turner*, 725 F.2d 1154, 1157 (8th Cir. 1984); *Burchinal v. United States*, 342 F.2d 982, 985 (10th Cir. 1965);

Concealment need not be successful. *See United States v. Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984).

18 U.S.C. § 152(2) & (3) FALSE OATH, FALSE DECLARATION UNDER PENALTY OF PERJURY – ELEMENTS

To sustain the charge of making [a false oath; a false account; a false declaration under penalty of perjury] in a bankruptcy proceeding, the government must prove the following propositions:

1. There was a bankruptcy proceeding.

2. The defendant made [an oath; account; declaration; certification; verification; statement under penalty of perjury] in relation to the bankruptcy proceeding;

3. The [oath; account; declaration; certification; verification; statement under penalty of perjury] related to some material matter;

4. The [oath; account; declaration; certification; verification; statement under penalty of perjury] was false; and,

5. The defendant made the [oath; account; declaration; certification; verification; statement under penalty of perjury] knowingly and with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

A material omission of information the debtor has a duty to disclose may qualify as a false declaration under section 152. *See United States v. Ellis*, 50 F.3d 419, 423-25 (7th Cir. 1995). In a case involving omissions, the pattern instruction should be modified appropriately.

18 U.S.C. § 152(2 & 3) FALSE DECLARATION UNDER PENALTY OF PERJURY – DEFINITION OF MATERIALITY

A material matter is one that is capable of influencing the court, the trustee, or any creditor.

[The government is not required to prove that the statement actually influenced the court, the trustee, or a creditor.]

[The government is also not required to prove that creditors were harmed by the false statement.]

18 U.S.C. § 152(4) PRESENTING OR USING A FALSE CLAIM – ELEMENTS

To sustain the charge of [presenting; using] a false claim in a bankruptcy proceeding, the government must prove the following propositions:

1. There was a bankruptcy proceeding.

2. The defendant [personally; by agent; by proxy; by attorney as agent, proxy or attorney] [presented; used] a claim for proof against the estate of a debtor;

3. The claim was false;

4. The defendant knew the claim was false.

5. The defendant presented the claim [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152(6) BRIBERY – ELEMENTS

To sustain the charge of [bribery; attempted bribery] in a bankruptcy proceeding, the government must prove the following propositions:

1. There was a bankruptcy proceeding.

2. The defendant knowingly [gave; offered; received; attempted to obtain] [money; property; remuneration; compensation; reward; advantage, or promise thereof] for [acting; failing to act] in such bankruptcy proceeding; and

3. Third, the defendant acted [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that either of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152(7) CONCEALMENT OR TRANSFER OF ASSETS IN CONTEMPLATION OF BANKRUPTCY OR WITH INTENT TO DEFEAT THE PROVISIONS OF THE BANKRUPTCY LAW – ELEMENTS

To sustain the charge of [concealment; transfer] of property belonging to the estate of a debtor [in contemplation of bankruptcy; with intent to defeat the provisions of the bankruptcy law], the government must prove the following propositions:

1. [There was a bankruptcy proceeding]; [[Defendant; name of business; name of corporation] contemplated a bankruptcy proceeding];

2. [In contemplation of the bankruptcy proceeding; with intent to defeat the provisions of the bankruptcy law], the defendant transferred or concealed [identify the property], which belonged or would belong to the bankrupt estate; and,

3. The defendant knowingly [concealed; transferred] the property;

4. The defendant acted [fraudulently, that is,] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

With regard to the fourth element, the statute uses the term "fraudulently," but the instruction substitutes the definition ("with intent to deceive") because it is simpler than using the statutory term and then defining it. *See United States v. Gellene*, 182 F.3d 578, 586 (7th Cir. 1999) (concerning the term "fraudulently" as used in section 152(3)); *United States v. Lerch*, 996 F.2d 158, 161 (7th Cir. 1993) (same); *see also, United States v. Sabbeth*, 262 F.3d 207, 217 (2d Cir. 2001).

The defendant need not be the debtor in bankruptcy to be convicted under section 152. *See United States v. Ross*, 77 F.3d 1525, 1548 (7th Cir. 1996).

18 U.S.C. § 152(7) DEFINITION OF "IN CONTEMPLATION OF BANKRUPTCY PROCEEDING"

A person acts "in contemplation of bankruptcy proceeding" if he acts in expectation of, or planning for, the future probability of a bankruptcy proceeding.

18 U.S.C. § 152(7) DEFINITION OF "TRANSFER"

"Transfer of property includes every manner of disposing of or parting with property or an interest in property, whether directly or indirect, and whether absolutely or conditionally.

18 U.S.C. § 152(8) DESTRUCTION OF RECORDS; FALSE ENTRIES – ELEMENTS

To sustain the charge of [concealment of records; destruction of records; making a false entry in a document] relating to the property or the affairs of a debtor [in contemplation of bankruptcy; after filing a case in bankruptcy], the government must prove the following propositions:

1. A bankruptcy proceeding [was contemplated; existed].

2. The defendant knowingly [concealed; destroyed; mutilated; falsified; made a false entry in] document(s);

3. The document(s) affected or related to the property or affairs of the debtor;

4. The defendant acted [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 152(9) WITHHOLDING RECORDS – ELEMENTS

To sustain the charge of withholding records after filing a case in bankruptcy, the government must prove the following propositions:

1. There was a bankruptcy proceeding.

2. The defendant knowingly withheld [recorded information; books; documents; records; [papers] from [the custodian; the trustee; the marshal; an officer of the court; a United States Trustee] entitled to its possession.

3. The [recorded information; books; documents; records; papers] related to the property or financial affairs of the debtor;

4. The defendant acted [fraudulently, that is] with the intent to deceive [any creditor; the trustee; the bankruptcy judge].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 241 ELEMENTS

To sustain the charge of conspiracy against civil rights, the government must prove the following propositions:

1. The conspiracy to [injure,] [oppress,] [threaten,] [or] [intimidate] one or more persons as charged in Count __ existed.

2. The defendant knowingly became a member of the conspiracy with an intent to further the conspiracy.

3. The defendant intended to deprive [name(s) of alleged victim(s)] of the free exercise or enjoyment of [his; their] right to [describe the right], which is secured by the [[Constitution] [and] [laws]] of the United States. The government is not required to prove that the defendant knew this right was secured by the [[Constitution] [and] [laws]] of the United States.

4. One or more of the intended victims was present in a [State; Territory; District] of the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Guest, 383 U.S. 745, 760 (1966) (specific intent to interfere with federal right is required); *Screws v. United States*, 325 U.S. 91, 103, 106-07 (1945) (same, but defendant need not be "thinking in constitutional terms"); *United States v. Bradley*, 196 F.3d 762, 769-70 (7th Cir. 1999) (approving an instruction including the language, "The defendant need not have known that these rights were secured by the Constitution or the laws of the United States."). A conspiracy under section 241 does not require proof of an overt act. *See United States v. Colvin*, 353 F.3d 569, 576 (7th Cir. 2003) (en banc).

See also the instructions for 18 U.S.C. § 242 and accompanying commentary.

Depending on the particular right at issue, the court may be required to instruct the jury that at least one conspirator acted "under color of law." *See Guest*, 383 U.S. at 755-56 (state action required for

violation of Equal Protection Clause but not for right to travel); Fifth Cir. Pattern Instr. 2.17.

In a case in which the indictment charges that a victim died as the result of the conspiracy, the government must prove that fact beyond a reasonable doubt, because it increases the maximum penalty for the charge. *See* 18 U.S.C. § 241 (increasing maximum term to life imprisonment if death results); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). If death is charged, the instruction regarding "Death" and an accompanying special interrogatory should be used.

Section 241 likewise provides for enhanced penalties if "the acts committed in violation of this section . . . include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, the instruction regarding "Death" should be adapted accordingly.

18 U.S.C. § 241 DEFINITION OF CONSTITUTIONAL RIGHTS

The right[s] to [insert description of constitutional or statutory right at issue, e.g., the right to be free from the use of unreasonable force by a law enforcement officer] [is; are] right[s] secured by the [Constitution; laws] of the United States.

Committee Comment

Further definition of the right in question may be required. If, for example, the right in question is the right to be free from the use of unreasonable force, an instruction defining reasonable/unreasonable force may be required. The Seventh Circuit Civil Instructions include descriptions of many of the constitutional rights most commonly at issue in prosecutions under section 241. *See, e.g.*, 7th Cir. Civil Instr. 7.06 (defining reasonable force). *See generally United States v. Brown*, 250 F.3d 580, 586-87 (7th Cir. 2001) (approving, in a prosecution under 18 U.S.C. § 242, an instruction regarding unreasonable force that was derived from civil cases).

18 U.S.C. § 241 DEATH

If you find the defendant guilty as charged in [Count x of] the indictment, you must then determine whether the government has proven that [name of victim] died as a result of the conspiracy charged [in Count [x]].

The government must prove that [name of victim] died as a result of the defendants' conspiracy. The government satisfies this requirement by proving that the conduct of one or more of the defendants contributed to or hastened [name of victim]'s death, even if that conduct by itself would not have caused his death. The government is not required to prove that the defendant[s] intended for (name) to die.

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count x of] the indictment.

If you find that the government has proven beyond a reasonable doubt that [name of victim] died as a result of the conspiracy charged in [Count x of] the indictment, then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that [name of victim] died as a result of the conspiracy charged in [Count x of] the indictment, then you should answer that question "No."

Committee Comment

See United States v. Harris, 701 F.2d 1095, 1101 (4th Cir. 1983); *United States v. Hayes*, 589 F.2d 811, 820-21 (5th Cir. 1979); *United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976).

This instruction should be used in cases in which the indictment charges that a victim died as the result of the conspiracy. If the victim dies as the result of the conspiracy, the maximum penalty is increased. For this reason, the government is required to prove the death beyond a reasonable doubt. *See* 18 U.S.C. § 241 (increasing maximum term to life imprisonment if death results); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because, however, a person who engages in a conspiracy to violate civil rights violates the law even if no death results, the appropriate way to instruct in a case in which the victim's death is at issue is by way of a separate instruction concerning that issue, combined with a special interrogatory on the verdict form, as is done in cases in which narcotics quantity is at issue.

Section 241 likewise provides for enhanced penalties if "the acts committed in violation of this section . . . include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, this instruction should be adapted accordingly.

18 U.S.C. § 242 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW – ELEMENTS

To sustain the charge of deprivation of rights under color of law, the government must prove the following propositions:

1. The defendant was acting under color of law.

2. The defendant deprived [name of person] of [his/her] right to (name of right), which is secured or protected by the [[Constitution] [and] [laws]] of the United States.

3. The defendant intended to deprive the victim of this right. The government is not required to prove that the defendant knew this right was secured by the [[Constitution] [and] [laws]] of the United States.

4. [Name of person)] was present in [name of State, Territory, or District of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Prior to 1994, section 242 applied only to deprivations of the rights of "inhabitants of" a state, territory, or district of the United States. In *United States v. Maravilla*, 907 F.2d 216 (1st Cir. 1990), the court overturned the convictions of two customs agents for killing an alien who was briefly present in the United States. The rationale was that such a person did not qualify as an "inhabitant" for purposes of 18 U.S.C. 242. In 1994, the statute was amended to make it apply to deprivations of the rights of "persons in" a state, territory, or district of the United States, rather than just "inhabitants of" such places.

In a case in which the indictment charges that the victim died as a result of the defendant's conduct, the separate "Death" instruction provided for cases under 18 U.S.C. § 241 should be used and adapted to the case, along with a special interrogatory as discussed in the commentary to that instruction.

Section 242 also provides for an enhanced maximum penalty if the defendant's acts caused bodily injury to the victim. If that is charged,

the separate instruction regarding bodily injury should be used, along with a special interrogatory on the verdict form.

18 U.S.C. § 242 RIGHTS

The right[s] to [insert description of constitutional or statutory right at issue, e.g., the right to be free from the use of unreasonable force by a law enforcement officer] [is; are] [a] right[s] secured by the [constitution; laws] of the United States.

18 U.S.C. § 242 DEFINITION OF COLOR OF LAW

A person acts under color of law when he the defendant acts in his official capacity or purports or claims to act in his official capacity. Action under color of law includes the abuse or misuse of the power possessed by the defendant by virtue of his [office; official position].

[A defendant who is not [an officer; a government employee/official] acts under color of law when he knowingly participates in joint activity with a [state; local] [officer; official].

Committee Comment (proposed)

See, e.g., United States v. Hoffman, 498 F.2d 879, 881 (7th Cir. 1974); *United States v. Price*, 383 U.S. 787 794 & n.7 (1966) ("Color of law" under section 242 has same definition as under 42 U.S.C. § 1983; "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute."); *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (Under section 1983, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law.").

18 U.S.C. § 242 DEATH

Committee Comment

If the indictment charges that the victim died as a result of unlawful conduct, the "Death" instruction for 18 U.S.C. § 241 should be adapted, and a special interrogatory should be used, as described in the commentary to that instruction.

18 U.S.C. § 242 BODILY INJURY

If you find the defendant guilty as charged in [Count x of] the indictment, you must then determine whether the government has proven that [name of victim] suffered a bodily injury as a result of the defendant's acts charged [in Count [x]].

The term "bodily injury" includes any of the following: a cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of [a/the] function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary.

You will see on the verdict form a question concerning this issue. You should consider that question only if you have found that the government has proven the defendant guilty as charged in [Count x of] the indictment.

If you find that the government has proven beyond a reasonable doubt that [name of victim] suffered bodily injury as a result of the defendant's acts as charged in [Count x of] the indictment, then you should answer that question "Yes."

If you find that the government has not proven beyond a reasonable doubt that [name of victim] suffered bodily injury as a result of the defendant's acts as charged in [Count x of] the indictment, then you should answer that question "No."

Committee Comment

Section 242 provides for an enhanced statutory maximum if, among other things, "bodily injury results from the acts committed" in violation of the statute. For this reason, the government is required to prove the death beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). Because, however, a person who deprives another of civil rights violates the law even if no bodily injury results, the appropriate way to instruct in a case in which bodily injury is charged is by way of a separate instruction concerning that issue, combined with a special interrogatory on the verdict form, as is done in cases in which narcotics quantity is at issue.

Section 242 does not define the term "bodily injury." The definition provided in the instruction is taken from several other statutes in Title 18 that use that term. *See* 18 U.S.C. §§ 831(f)(5); 1365(h)(4); 1515(a)(5); and 1864(d)(2). *See United States v. Bailey*, 405 F.3d 102, 111 (1st Cir. 2005); *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992). *See generally United States v. DeSantis*, 565 F.3d 354, 362 (7th Cir. 2009) (citing *Bailey* and *Myers* with approval).

Section 242 likewise provides for enhanced penalties "if the acts committed in violation of this section . . . include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill." If the indictment includes such allegations, this instruction should be adapted accordingly.

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS – WHETHER OR NOT UNITED STATES SHALL OR MAY BE DEPRIVED OF ANY LAWFUL DUTIES – ELEMENTS

To sustain the charge of entering goods into commerce by means of a false statement, the government must prove the following propositions:

1. [here specify merchandise named in indictment] was imported;

2. The defendant [entered; introduced; attempted to enter; attempted to introduce] [here specify merchandise named in indictment] into the commerce of the United States;

3. The defendant did so by means of a [fraudulent, false] [invoice; declaration; affidavit; letter; paper; practice] [written or verbal false statement], which he knew was [false; fraudulent]; and,

OR

3. The defendant made a false statement in a declaration without reasonable cause to believe that the statement was true; and,

OR

3. The defendant caused the making of a false statement in a declaration without reasonable cause to believe the truth of the statement; and,

[4. The [invoice; declaration; affidavit; letter; paper; statement; practice] was material to the entry of the merchandise.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 542 provides:

> Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of

> any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; . . .
>
> Shall be fined for each offense under this title or imprisoned not more than two years, or both.

18 U.S.C. § 542. The quoted paragraph of the statute describes three types of false statements. The first does not contain any express intent requirement – it simply proscribes "fraudulent" or "false" statements – but it has been interpreted as requiring a knowing falsehood. *See United States v. Ven-Fuel, Inc.*, 602 F.2d 747, 753 (5th Cir. 1979). The second and third expressly contain what amounts to a knowledge/reckless disregard intent requirement.

The fourth element (materiality) is bracketed because the Seventh Circuit has not decided whether materiality is an element under 18 U.S.C. § 542. It appears that every other circuit that has considered the issue has ruled that section 542 requires proof of materiality. *See, e.g., United States v. Avelino*, 967 F.2d 815, 817 (2d Cir. 1992); *United States v. Holmquist*, 36 F.3d 154, 158 (1st Cir. 1990); *United States v. Corcuera-Valor*, 910 F.2d 198, 199 (5th Cir. 1990); *United States v. Bagnall*, 907 F.2d 432, 435 (3d Cir. 1990); *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982). These decisions, however, predate the Supreme Court's decision in *United States v. Wells*, 519 U.S. 482 (1997), to the effect that 18 U.S.C. § 1014, which like section 542 proscribes false statements, does not require proof of materiality. The Committee takes no position on whether the statute requires materiality.

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS – DEFINITION OF FRAUDULENT

A [statement; document; practice] is fraudulent if it is [made; conducted; caused to be made; caused to be conducted] with the intent to deceive.

18 U.S.C. § 542 DEFINITION OF MATERIAL

A statement is material to the entry of merchandise if it is capable of influencing the actions of [identify agency] in a way that affects or facilitates the entry of the merchandise into the United States.

Committee Comment

For a discussion about whether proof of materiality is required under section 542, see the commentary to the elements instruction for this statute.

This instruction is derived from materiality instructions that appear elsewhere in the pattern instructions, *see, e.g.*, 18 U.S.C. § 1001, but is worded in a way that focuses on the particular materiality requirement contained in section 542. *See United States v. Bagnall*, 907 F.2d 432, 436 (3d Cir. 1990) (citing cases); *see also, United States v. Holmquist*, 36 F.3d 154, 158-60 (1st Cir. 1994).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS – DEFINITION OF ENTRY

The process of entering or introducing merchandise into the commerce of the United States does not begin until after the merchandise has arrived in the United States and the importer or owner of the merchandise has begun the acts necessary for him to gain lawful possession of the merchandise. The process is not completed until the payment of all customs duties.

Committee Comment

See United States v. Steinfels, 753 F.2d 373, 377-78 (5th Cir. 1985). *See generally United States v. Mescall*, 215 U.S. 26, 32 (1909); *Heike v. United States*, 192 F. 83, 99-100 (2d Cir. 1911).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS – DEFINITION OF IMPORTED MERCHANDISE

Committee Comment

Because the meaning of the term imported varies in different contexts, the court must formulate a definition for the term on a case by case basis. *See, e.g., Schiavone-Chase Corp. v. United States*, 553 F.2d 658, 663-64 (Ct. Cl. 1977); *Kee Co. v. United States*, 13 C.C.P.A. 106, 109 (1925).

18 U.S.C. § 542 ENTRY OF GOODS BY MEANS OF FALSE STATEMENTS - UNITED STATES HAS BEEN OR MAY HAVE BEEN DEPRIVED OF ANY LAWFUL DUTIES – ELEMENTS

Committee Comment

The Committee has not drafted an instruction for the second paragraph of § 542 because the few reported cases concerning that paragraph leave its scope unclear. *See generally United States v. Yip*, 930 F.2d 142, 148-50 (2d Cir. 1991).

18 U.S.C. § 751 ESCAPE – ELEMENTS

To sustain the charge of [attempted] escape, the government must prove the following propositions:

1. The defendant was in the custody of [name or describe custodial official, institution or agency] pursuant to [describe authority for custody, e.g. judgment of conviction, arrest, court order].

2. The defendant knowingly [left] [attempted to leave] [intentionally failed to return to] that custody without authorization to do so.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Bailey, 444 U.S. 394, 408 (1980); *United States v. Casteneda-Galvan*, 205 Fed. Appx. 437, 440 (7th Cir. 2006) (unpublished) (citing former pattern instruction); *United States v. Richardson*, 687 F.2d 952, 961 (7th Cir. 1982).

Some additional definition of "custody" should be offered in cases where it is minimal or constructive, as opposed to those obvious cases involving arrest, jail or prison.

18 U.S.C. § 471 FALSELY MAKING, FORGING, COUNTERFEITING, OR ALTERING A SECURITY OR OBLIGATION – ELEMENTS

To sustain the charge of [falsely making; forging; counterfeiting; altering] a (specific security or obligation involved), the government must prove the following:

1. Th defendant [falsely made; forged; counterfeited; altered] a (insert specific security or obligation of the United States involved); and

2. The defendant did so with the intent to defraud.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Whether a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. *See* 18 U.S.C. § 8; *United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980). Thus, the jury need not make a finding that the security or obligation at issue is that of the United States. The Committee recommends that the court instruct the jury as to the specific security or obligation involved, for example, U.S. currency.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 472 UTTERING COUNTERFEIT OBLIGATIONS OR SECURITIES – ELEMENTS

To sustain the charge of [passing; uttering; publishing; selling; bringing into the United States; possessing; concealing] a [falsely made; forged; counterfeited; altered] (insert specific security or obligation of the United States involved), the government must prove the following:

1. The defendant [passed; uttered; published; sold; brought into the United States; possessed; concealed] a [falsely made; forged; counterfeited; altered] (insert specific security or obligation of the United States involved);

2. The defendant knew at the time that the (specific security or obligation involved) was [falsely made; forged; counterfeited; altered]; and

3. The defendant did so with the intent to defraud.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 472 includes attempting to pass, utter, publish, or sell counterfeit obligations. When attempt is charged, general instruction XX on page ___, which defines attempt, should be given.

Whether a specific security or obligation is an obligation or security of the United States is a question of law and is to be decided by the trial court. *See* 18 U.S.C. § 8; *United States v. Anzalone*, 626 F.2d 239 (2d Cir. 1980). Thus, the jury need not make a finding that the security or obligation at issue is that of the United States. The Committee recommends that the court instruct the jury as to the specific security or obligation involved, for example, U.S. currency.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 473 DEALING IN COUNTERFEIT OBLIGATIONS OR SECURITIES – ELEMENTS

To sustain the charge of [buying; selling; exchanging; transferring; receiving; delivering] a [false; forged; counterfeited; altered] (insert specific security or obligation), the government must prove the following:

1. The defendant [bought; sold; exchanged; transferred; received; delivered] a [false; forged; counterfeited; altered] (insert specific security or obligation of the United States involved);

2. The defendant knew at the time that the (specific security or obligation) was [false; forged; counterfeit; altered]; and

3. The defendant did so with the intent that the (specific security or obligation) be [passed; published; used] as true and genuine.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 495 FALSELY MAKING, FORGING, COUNTERFEITING, OR ALTERING A DOCUMENT – ELEMENTS

To sustain the charge of [making; forging; counterfeiting; altering] a document, the government must prove the following:

1. The defendant [falsely made; forged; counterfeited; altered] the (document described in the indictment);

2. The defendant did so for the purpose of [obtaining money; enabling (name) to obtain money] from the United States; and

3. The defendant knew the claim was [false; fraudulent].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the first paragraph of 18 U.S.C. § 495.

It is recommended that the description of the document contained in the indictment be included where indicated at the end of the first element.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 495 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. *See*, for example, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th

Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates) where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 495.

18 U.S.C. § 495 UTTERING OR PUBLISHING A FALSE DOCUMENT – ELEMENTS

To sustain the charge of [uttering; publishing] a false document, the government must prove the following:

1. The defendant offered a document;

2. When the defendant did so, he falsely represented in some way or manner that the document was genuine;

3. When the defendant did so, the document was [false; forged; counterfeited; altered] in that (specific allegation);

4. When the defendant did so, he knew that the document was [false; forged; counterfeited; altered]; and

5. The defendant did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the second paragraph of 18 U.S.C. § 495.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 495 PRESENTING A FALSE DOCUMENT – ELEMENTS

To sustain the charge of presenting a false document, the government must prove the following:

1. The defendant [transmitted; presented] the (document) to (name), who was an officer of the United States, or at any office of the United States;

2. The document was [transmitted; presented] in support of or in relation to any account or claim;

3. When the defendant [transmitted; presented] the (document), it was [false; forged; counterfeited; altered] in that (specific allegation);

4. When the defendant [transmitted; presented] the (document), the defendant knew it was [false; forged; counterfeited; altered]; and

5. When the defendant [transmitted; presented] the (document), he did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the third paragraph of 18 U.S.C. § 495.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 500 FALSELY MAKING, FORGING, COUNTERFEITING, ENGRAVING, OR PRINTING A MONEY ORDER – ELEMENTS

To sustain the charge of [falsely making; forging; counterfeiting; engraving; printing] a money order, the government must prove the following:

1. The defendant [falsely made; forged; counterfeited; engraved; printed] a document;

2. The document was an imitation of or purported to be a [blank money order; money order issued by or under the direction of the United States Postal Service]; and

3. The defendant made the document with the intent to defraud.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the first paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 500 FORGING OR COUNTERFEITING A SIGNATURE OR INITIALS OF ANY PERSON AUTHORIZED TO ISSUE A MONEY ORDER, POSTAL NOTE, OR BLANK – ELEMENTS

To sustain the charge of [forging; counterfeiting] the signature or initials of any person authorized to issue money orders upon or to any [money order; postal note; [blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country], which was payable in the United States, the government must prove the following:

1. The defendant [forged; counterfeited] the [signature; initials] of (name);

2. (Name) was authorized to issue money orders; [and]

3. The defendant [forged; counterfeited] the [signature; initials] on a [money order; postal note] blank provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States; [and]

[4. The defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the first part of the second paragraph of 18 U.S.C. § 500, regarding forgery and counterfeiting of the signature or initials of any person authorized to issue money orders.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language

of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 500 in light of the Supreme Court's decision in Bates. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. *See*, *for example*, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates), where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 500.

If intent to defraud is an element, the court should add the bracketed language. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 500 FORGING OR COUNTERFEITING A SIGNATURE OR ENDORSEMENT ON A MONEY ORDER, POSTAL NOTE, OR BLANK – ELEMENTS

To sustain the charge of [forging; counterfeiting] any material [signature; endorsement] on a [money order; postal note; [blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country], which was payable in the United States, the government must prove the following:

1. The defendant [forged; counterfeited] any material [signature; endorsement]; [and]

2. The defendant did so on a [money order; postal note; blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States; [and]

[3. The defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the second part of the second paragraph of 18 U.S.C. § 500, regarding forgery and counterfeiting of any material signature or endorsement on a money order, postal note, or blank provided or issued by or under the direction of the U.S. Postal Service or post office department or corporation of any foreign country.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 500 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. *See, for example*, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in *Bates*), where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 500.

If intent to defraud is an element, the court should add the bracketed language. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

For a definition of "material" see page ___.

18 U.S.C. § 500 FORGING OR COUNTERFEITING A SIGNATURE ON A RECEIPT OR CERTIFICATE OF IDENTIFICATION – ELEMENTS

To sustain the charge of [forging; counterfeiting] a signature to any receipt or certificate of identification of a [money order; postal note], the government must prove the following:

1. The defendant [forged; counterfeited] a material signature; [and]

2. The signature was on a receipt or certificate of identification of a [money order; postal note; [blank] provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States; [and]

[3. The defendant acted with the intent to defraud.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the third part of the second paragraph of 18 U.S.C. § 500, regarding forgery and counterfeiting of any material signature to any receipt or certificate of identification of a money order, postal note, or blank provided or issued by or under the direction of the U.S. Postal Service or post office department or corporation of any foreign country.

In *United States v. Bates*, 522 U.S. 23 (1997), the Supreme Court declined to read a requirement of proof of an intent to defraud into 20 U.S.C. § 1097(a), which statute prohibits the knowing and willful misapplication of student loan funds. In refusing to read the intent element into the statute, the Court did not lay down a blanket rule. Instead, it considered a number of factors, including the plain language of the statute, the fact that other subsections of the same statute included the intent to defraud language, and the history of the statute.

The Seventh Circuit has not yet determined whether an intent to defraud requirement should be read into § 500 in light of the Supreme Court's decision in *Bates*. The key to the analysis will be whether there is an historical basis for requiring an intent to defraud. This analysis is particularly suited to the adversary process. *See, for example*, the Seventh Circuit's decision in *United States v. Bates*, 852 F.2d 212 (7th Cir. 1988), where the court held, in a case unrelated to the more recent Supreme Court case of the same name, that an intent to defraud requirement should be read into 18 U.S.C. § 656, prohibiting the willful misapplication of bank funds and its decision in *United States v. Ranum*, 96 F.3d 1020 (7th Cir. 1996) (predating the Supreme Court's decision in Bates), where the court held that an intent to defraud requirement should not be read into 18 U.S.C. § 1097(a), prohibiting the making of false statements to obtain student loan funds.

Because this question is an interpretive question of first impression, the Committee believes it is more appropriate to leave to the courts the initial determination of whether intent to defraud is an element in § 500.

If intent to defraud is an element, the court should add the bracketed language. For a definition for "intent to defraud" is found following the mail and wire fraud, 18 U.S.C. §§ 1341 & 1343, elements instructions, see page ___.

For a definition of "material" see page ___.

18 U.S.C. § 500 FALSELY ALTERING A MONEY ORDER OR POSTAL NOTE – ELEMENTS

To sustain the charge of falsely altering a [money order; postal note], the government must prove the following:

1. The defendant falsely altered a [money order; postal note] blank provided or issued by or under the direction of the [United States Postal Service; post office department or corporation of any foreign country] which was payable in the United States; and

2. The alteration was material.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the third paragraph of 18 U.S.C. § 500.

For a definition of "material" see page ___.

18 U.S.C. § 500 PASSING, UTTERING, OR PUBLISHING FORGED OR ALTERED MONEY ORDERS OR POSTAL NOTES – ELEMENTS

To sustain the charge of [passing; uttering; publishing] [attempting to pass; utter; publish] a forged or altered [money order; postal note], the government must prove the following:

1. The defendant [passed; uttered; published] [attempted to pass; utter; publish] a [money order; postal note];

2. He falsely represented in some way or manner that the [money order; postal note] was genuine;

3. The [money order; postal note] was forged or materially altered;

4. He knew that any material [initials; signature; stamp impression; endorsement] thereon was [false; forged; counterfeited]; or a material alteration on the [money order; postal note] was falsely made]; and

5. The defendant did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the fourth paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

For definitions of "material" and "material alteration" see pages ___.

18 U.S.C. § 500 FRAUDULENTLY ISSUING A MONEY ORDER OR POSTAL NOTE – ELEMENTS

To sustain the charge of fraudulently issuing a [money order; postal note], the government must prove the following:

1. The defendant issued a [money order; postal note] without having previously received or paid the full amount of money payable on the [order; note];

2. He did so for the purpose of [obtaining or receiving money; enabling another person to obtain or receive money] from the United States or its agents or employees; and

3. That he did so with the intent to defraud the United States.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the fifth paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 500 THEFT OF A MONEY ORDER – ELEMENTS

To sustain the charge of theft of a money order, the government must prove the following:

1. The defendant [embezzled; stole; converted to his own use or the use of another; converted or disposed of without authority] a blank money order form provided under the authority of the United States Postal Service; and

2. He did so with the intent to deprive the owner of the use or benefit of the document.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the sixth paragraph of 18 U.S.C. § 500.

18 U.S.C. § 500 RECEIPT OR POSSESSION OF A STOLEN MONEY ORDER – ELEMENTS

To sustain the charge of [receipt; possession] of a stolen money order, the government must prove the following:

1. The defendant [received; possessed] a blank money order form provided under the authority of the United States Postal Service;

2. The defendant did so with the intent to convert it to [his own use or gain; the use or gain of another] and

3. The defendant knew the document had been [embezzled; stolen; converted].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the seventh paragraph of 18 U.S.C. § 500.

18 U.S.C. § 500 FALSE PRESENTMENT OF A MONEY ORDER OR POSTAL NOTE – ELEMENTS

To sustain the charge of false presentment of a [money order; postal note], the government must prove the following:

1. The defendant [transmitted; presented; caused to be transmitted or presented] a [money order; postal note];

2. The defendant knew that the [money order; postal note] contained any forged or counterfeited [signature; initials; stamped impression]; or, [contained any material alteration which was unlawfully made; was unlawfully issued without previous payment of the amount required to have been paid upon issue; was stamped without lawful authority]; and

3. The defendant [transmitted; presented] the document with the intent to defraud the United States, the Postal Service, or any person.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the eighth paragraph of 18 U.S.C. § 500.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

For a definition of "material alteration" see page ___.

18 U.S.C. § 500 THEFT OR RECEIPT OF A MONEY ORDER MACHINE OR INSTRUMENT – ELEMENTS

To sustain the charge of theft or receipt of a money order [machine; instrument], the government must prove the following:

1. The defendant [stole; received; possessed; disposed of; attempted to dispose of] (here name item); [and]

2. The (here name item) was a postal money order [machine; stamp; tool; instrument] specifically designed to be used in preparing or filling out the blanks on postal money order forms; [and]

[3. The defendant [received; possessed; disposed of; attempted to dispose of] (here name item) with the intent to defraud or without being lawfully authorized by the United States Postal Service.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the ninth paragraph of 18 U.S.C. § 500. When the defendant is charged with stealing the item, this instruction should include only the first two elements.

For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 500 DEFINITION OF "MATERIAL"

A signature, endorsement, initials, or stamp impression is "material" if it has a natural tendency to influence, or is capable of influencing, the decision of the [person; decisionmaking body] to whom it was addressed.

Committee Comment

This instruction was adapted from the instruction defining material under the mail and wire fraud statutes, 18 U.S.C. § 1341 & 1343.

18 U.S.C. § 500 DEFINITION OF "MATERIAL ALTERATION"

An alteration of a [money order; postal note; initials; signature; stamp impression; endorsement] is material if it had the effect of influencing the action of the recipient or was capable of or had a natural tendency to influence.

Committee Comment

This instruction was adapted from the instruction defining materiality under the false statement statute, 18 U.S.C. § 1001.

18 U.S.C. § 511 ALTERING OR REMOVING VEHICLE IDENTIFICATION NUMBERS

Committee Comment

Because this statute is so little used, the Committee has not drafted a pattern instruction for it. For cases discussing the statute generally, *see United States v. Chorman*, 901 F.2d 102, 110 (4th Cir. 1990) ("knowingly" under statute means "knowing action"); *United States v. Podell*, 869 F.2d 328, 332 (7th Cir. 1989) (discussing appropriate unit of prosecution under statute); *United States v. Enochs*, 857 F.2d 491, 492 93 (8th Cir. 1988), *cert. denied*, 490 U.S. 1022 (1989) (discussing intent element of statute).

18 U.S.C. § 641 THEFT OF GOVERNMENT PROPERTY – ELEMENTS

To sustain the charge of [theft; embezzlement; knowing conversion] of property of the United States, the government must prove the following:

1. The [record; money; thing of value] described in the indictment belonged to the United States;

2. The [record; money; thing of value] had a value that exceeded $1,000;

3. The defendant [stole; embezzled; knowingly converted] that [record; money; thing of value] to [the defendant's own use; the use of another]; and

– or –

[3. The defendant [sold; conveyed; disposed of] that [record; money; thing of value] without authority; and]

4. The defendant did so [knowingly and willfully] with the intent to deprive the owner of the use or benefit of that [record; money; thing of value].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Use the alternate third element when appropriate.

Section 641 of Title 18 consolidated theft, embezzlement, and receipt of stolen property previously found in Sections 82, 87, 100, and 101 of Title 18. Section 641 contains a lesser included misdemeanor for violations when the value of the money or property in question does not exceed $1,000. "Value" is specifically defined in the statute.

The Committee has drafted this instruction to be used in felony cases. If the crime charged is a misdemeanor, the second element of this instruction should read: "2. The [record; money; thing of value] had some

value. Where there is a real dispute as to whether the value of the property exceeds $1,000, the Committee recommends that two separate instructions be given as opposed to use of a special interrogatory. Note that the value is established at the time of possession rather than at the time of theft. *United States v. Ditata*, 469 F.2d 1270 (7th Cir. 1972). *See also United States v. Brookins*, 52 F.3d 615, 619 (7th Cir. 1995). Furthermore, the statute provides that the value of the property is determined "in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case. . . ." Where a defendant is charged in more than one count and there is a dispute over whether the aggregate value of the property at issue exceeds $1,000, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), requires that the jury determine the aggregate value. Thus, the jury should be given an appropriate instruction.

See Morissette v. United States, 342 U.S. 246 (1952), regarding the "intent to deprive element." The government need only prove that the defendant intended to deprive the owner of the use of the money or property; the government need not prove that the defendant knew the money or property belonged to the government. *See Morissette*, 342 U.S. at 276; *United States v. Howard*, 30 F.3d 871, 875 (7th Cir. 1994).

18 U.S.C. § 641 DEFINITION OF "VALUE"

"Value" means face value, market value [wholesale or retail], or a price actually paid for the item in question, whichever is greater. [Market value is the price someone would be willing to pay for the item to someone else willing to sell it.] [To have value a thing need not be a physical object [, and may be something like (information, labor, etc.), as long as it has economic worth.]]

Committee Comment

See 18 U.S.C. § 641; *United States v. Smith*, 489 F.2d 1330 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974).

Regarding market value, *see United States v. Brookins*, 52 F.3d 615 (7th Cir. 1995). Regarding intangible property, *see United States v. Howard*, 30 F.3d 871 (7th Cir. 1994). The term "par value" is eliminated because it is covered by the remaining terms. Relevant illustration is encouraged in intangible property cases.

18 U.S.C. § 659 EMBEZZLEMENT OR THEFT OF GOODS FROM INTERSTATE SHIPMENT – ELEMENTS

To sustain the charge of [embezzling; stealing; unlawfully taking; carrying away; concealing]; or, [by fraud or deception obtaining] goods or chattels [moving as interstate commerce; which are a part of or which constitute an interstate shipment of freight], the government must prove the following:

1. The defendant [embezzled; stole; unlawfully took; carried away; or concealed; obtained by fraud or deception] the goods or chattels described in the indictment;

2. The defendant did so with the intent to convert the goods or chattels to his own use;

3. The goods or chattels were moving as, or were a part of, [an interstate; a foreign] shipment of property; and

4. The goods or chattels had a value of $1,000 or more.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 659 describes six distinct offenses; the instructions should be modified as necessary.

The statute contains a lesser included offense where the value of the goods or chattels is less than $1,000. The Committee has drafted the instruction to be used when the value is or exceeds $1,000. If the value charged is less than $1,000, then the fourth element of the instruction should read: "4. The goods or chattels had a value less than $1,000." If the value of the goods or chattels is in issue, the court should give a lesser included offense instruction. In cases in which "value" is in issue, the Committee recommends using the proposed definition of "value" found in the pattern instructions for 18 U.S.C. § 641 on page _____.

18 U.S.C. § 659 POSSESSION OF GOODS STOLEN FROM INTERSTATE SHIPMENT – ELEMENTS

To sustain the charge of possession of goods or chattels stolen from an interstate shipment, the government must prove the following:

1. The goods or chattels described in the indictment were [embezzled; stolen; unlawfully taken, carried away, or concealed] [obtained by fraud or deception];

2. The defendant possessed the goods or chattels with knowledge that they were [embezzled; stolen; unlawfully taken; carried away; concealed; obtained by fraud or deception];

3. The goods or chattels were moving as, or were a part of, [an interstate; a foreign] shipment of property; and

4. The goods or chattels had a value of $1,000 or more.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

United States v. Zarattini, 552 F.2d 753 (7th Cir.), *cert. denied*, 431 U.S. 942 (1977), indicates that intent to convert is not an element under a charge of possession.

The government must prove beyond a reasonable doubt that goods were stolen from an interstate shipment and the person possessing the goods knew they had been stolen. *United States v. Green*, 779 F.2d 1313, 1318 (7th Cir. 1985); *United States v. DeGeratto*, 727 F. Supp. 1254, 1265 (N.D. Ind. 1990).

The statute contains a lesser included offense where the value of the goods or chattels is less than $1,000. The Committee has drafted the instruction to be used when the value is or exceeds $1,000. If the value charged is less than $1,000, then the fourth element of the instruction should read: "4. The goods or chattels had a value less than $1,000." If the value of the goods or chattels is in issue, the court should give a lesser included offense instruction. In cases in which "value" is in issue, the Committee recommends using the proposed definition of "value" found in the pattern instructions for 18 U.S.C. § 641.

18 U.S.C. § 666(A)(1)(A) THEFT CONCERNING FEDERALLY FUNDED PROGRAM – ELEMENTS

To sustain the charge of [embezzlement; theft; fraud; conversion; misapplication], the government must prove the following:

1. The defendant was an agent of [an organization; a state, local, Indian tribal government or any agency of that government] [, such as (name charged entity here if status is not in dispute)];

2. The defendant [embezzled; stole; obtained by fraud; knowingly and without authority converted to the use of someone other than the rightful owner; intentionally misapplied] some [money; property];

3. The [money; property] was owned by, or was under the care, custody or control of the [organization; government or agency];

4. The [money; property] had a value of $5,000 or more; and

5. The [organization; government or agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a [grant; contract; subsidy; loan; guarantee; insurance] or other assistance. (The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.)

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the theft affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 56-61 (1997). The jury should be so instructed in the event a contrary argument is raised.

18 U.S.C. § 666(A)(1)(B) BRIBERY CONCERNING FEDERALLY FUNDED PROGRAM – ELEMENTS

To sustain the charge of bribery, the government must prove the following:

1. The defendant was an agent of [an organization] [a [state; local; Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]];

2. The defendant [solicited; demanded; accepted; agreed to accept] anything of value from another person;

3. The defendant did so corruptly with the intent to be influenced or rewarded in connection with some [business; transaction; series of transactions] of the [organization; government or agency];

4. This business [transaction; series of transactions] involved any thing of a value of $5,000 or more; and

5. The [organization; government; agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a [grant; contract; subsidy; loan; guarantee; insurance] or other assistance. (The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.)

[A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his [organizational; official] duties.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the theft affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 56-61 (1997). The jury should be so instructed in the event a contrary argument is raised.

The bracketed definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. *See, e.g., Roma Construction Co. v. aRusso*, 96 F.3d 566, 573-74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." *See United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

A defendant need only be partially motivated by the expectation of or desire for reward. *United States v. Coyne*, 4 F.3d 100 (2d Cir. 1993).

18 U.S.C. § 666 DEFINITION OF "AGENT"

An "agent" is a person who is authorized to act on behalf of an [organization; government; agency], including an employee, officer or representative.

18 U.S.C. § 842(A)(1) IMPORTING, MANUFACTURING, OR DEALING IN EXPLOSIVE MATERIALS WITHOUT A LICENSE – ELEMENTS

To sustain the charge of engaging in the business of [importing; manufacturing; dealing in] explosive materials without a license, the government must prove the following:

1. The defendant was an [importer; manufacturer; dealer] of explosive materials; and

2. The defendant did not have a license, issued by the Attorney General, permitting him to act as an [importer; manufacturer; dealer] of explosive materials.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The terms "importer," "manufacturer," and "dealer" are defined by 18 U.S.C. § 841(g), (h), (i). The term "explosive materials" is defined by 18 U.S.C. § 841(c).

18 U.S.C. § 842(A)(2) WITHHOLDING INFORMATION, MAKING A FALSE STATEMENT, OR FURNISHING FALSE IDENTIFICATION TO OBTAIN EXPLOSIVE MATERIALS – ELEMENTS

To sustain the charge of [withholding information; making a false written or oral statement; furnishing or exhibiting any false or misrepresented identification], intended or likely to deceive, for the purpose of obtaining [explosive materials; a[n] license; permit; exemption; relief from disability], the government must prove the following:

1. The defendant knowingly [withheld information; made a false written or oral statement; furnished or exhibited any false or misrepresented identification] [from; to] the Attorney General or [his delegate; a licensed importer; manufacturer; dealer in explosive materials]; and

2. In doing so, the defendant intended to or was likely to deceive for the purpose of obtaining [explosive materials; a[n] license; permit; exemption; relief from disability].

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The term "explosive materials" is defined by 18 U.S.C. § 841(c).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

18 U.S.C. § 922(A)(6) MAKING A FALSE STATEMENT OR FURNISHING FALSE IDENTIFICATION TO A LICENSED FIREARMS IMPORTER, MANUFACTURER, DEALER, OR COLLECTOR IN CONNECTION WITH THE ACQUISITION OF A FIREARM OR AMMUNITION – ELEMENTS

To sustain the charge of a [making a false statement; furnishing or exhibiting false or misrepresented identification] to a licensed firearms [dealer; importer; manufacturer; collector] in connection with the acquisition or attempted acquisition of a [firearm; ammunition], the government must prove the following:

1. The defendant [made a false statement; furnished or exhibited false or misrepresented identification] in connection with the [acquisition; attempted acquisition] of [a firearm; ammunition] from a licensed firearms [dealer; importer; manufacturer; collector];

2. The defendant did so knowingly; and

3. The [statement; identification] was intended to or likely to deceive the [dealer; importer; manufacturer; collector] with respect to any fact material to the lawfulness of the sale or other disposition of the [firearm; ammunition].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The term "knowingly" is defined in the Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___. The terms "firearm" and "ammunition" are defined by 18 U.S.C. § 921(a)(3) and (17)(A) and in Pattern Instructions XX and XX, on pages ___ and ___. The statute applies to licensed importers, manufacturers, dealers, and collectors of firearms. Those terms are defined by §§ 921(a)(9)-(11), and (13).

For a definition of "materiality" see Instruction XX regarding that term as used in the mail fraud statutes on page ___.

18 U.S.C. § 922(D) (SALE OR TRANSFER OF A FIREARM OR AMMUNITION TO A PROHIBITED PERSON – ELEMENTS)

To sustain the charge of selling or otherwise transferring [a firearm; ammunition] to a [Prohibited Person], the government must prove the following:

1. The defendant [sold; otherwise transferred] [a firearm; ammunition];

2. The individual to whom the [firearm; ammunition] was [sold; transferred] was a [Prohibited Person]; and

3. The defendant knew or had reasonable cause to believe that the individual was a [Prohibited Person].

If you find from your consideration of all of the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, however, you find that the government failed to prove any of these elements beyond a reasonable doubt, you should find the defendant not guilty.

Committee Comment

The term "'Prohibited Person' denotes any person prohibited from possessing a firearm under 18 U.S.C. §§ 922[(d) or] (g)." *United States v. Grap*, 403 F.3d 439, 446 (7th Cir. 2005); *see also United States v. Jefferson*, 334 F.3d 670, 675 (7th Cir. 2003); U.S.S.G. § 2K2.1, comment. (n.3). The term is merely used as a placeholder in this instruction, and a specified class of persons prohibited under § 922(d) should be substituted as applicable. The term "Prohibited Person" includes, but is not limited to: a person under "indictment," as defined by 18 U.S.C. § 921(a)(14); a "fugitive from justice," as defined by § 921(a)(15); an unlawful user of any controlled substance as defined by 21 U.S.C. § 802 and any person addicted to any such controlled substance; as well as any person who has been convicted in any court of a "crime punishable by imprisonment for a term exceeding one year," as defined by § 921(a)(20).

A person who has been convicted in any court of a "misdemeanor crime of domestic violence" is a "Prohibited Person" under the statute. *See* 18 U.S.C. § 922(d)(9). The term "misdemeanor crime of domestic violence" is defined by 18 U.S.C. § 921(a)(33)(A). However, to convict under § 922(g)(9), does not require proof that a domestic relationship was

an element of the underlying misdemeanor offense. *See United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

Instead of the term "transfer" the statute uses the phrase "dispose of." But "dispose of" means "to transfer a firearm so that the recipient acquires possession of the firearm." *See Jefferson*, 334 F.3d at 675. The transfer can be gratuitous, temporary, or both. *Id.* The Committee has used the term "transfer" in place of "dispose of" for ease of understanding by the jury.

The terms "firearm" and "ammunition" are defined by 18 U.S.C. § 921(a)(3) and (17)(A) and in Pattern Instructions XX and XX, on pages ___ and ___.

18 U.S.C. § 922(D) DEFINITION OF "REASONABLE CAUSE TO BELIEVE"

A person has "reasonable cause to believe" that [name] was a prohibited person if he knows facts that would cause a reasonable person, knowing the same things, to conclude that [name] was a prohibited person.

Committee Comment

This definition of "reasonable cause to believe" is taken from Eleventh Circuit Pattern Federal Criminal Jury Instructions No. 34.5, as considered in *United States v. Haskins*, 511 F.3d 688, 693 (7th Cir. 2007). While the district court in that case ultimately did not issue such an instruction, the instruction should serve as a strong model for defining this term.

The term "Prohibited Person" is used in this definition in the same way that it is used in the elements instruction for 18 U.S.C. § 922 (d) (i.e. as a placeholder) and the Committee Comment associated with that instruction also applies to the use of that term in this definition.

18 U.S.C. § 922(G) UNLAWFUL SHIPMENT OR TRANSPORTATION OF A FIREARM OR AMMUNITION BY A PROHIBITED PERSON – ELEMENTS

To sustain the charge of unlawful [shipment; transportation] of [a firearm; ammunition] by a [Prohibited Person], the government must prove the following:

1. The defendant knowingly [shipped; transported] [a firearm; ammunition] in interstate or foreign commerce; and

2. At the time of the charged act, the defendant was a [Prohibited Person].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The term "Prohibited Person" is used in this instruction in the same way that it is used in the elements instruction for 18 U.S.C. § 922(d) (i.e. as a placeholder) and the Committee Comment associated with that instruction also applies to the use of that term in this instruction.

The term "knowingly" is defined in the Pattern Criminal Federal Jury Instructions for the Seventh Circuit, see page ___. Section 922(d)(1) requires only that the defendant know that the firearm recipient is a felon; it does not require knowledge of what crime he previously had been convicted. *See United States v. Haskins*, 511 F.3d 688, 692 (7th Cir. 2007).

The terms "firearm" and "ammunition" are defined by 18 U.S.C. § 921(a)(3) and (17)(A) and in Pattern Instructions XX and XX, on pages ___ and ___.

18 U.S.C. § 922(G) UNLAWFUL POSSESSION OR RECEIPT OF A FIREARM OR AMMUNITION BY A PROHIBITED PERSON – ELEMENTS

To sustain the charge of unlawful [possession; receipt] of [a firearm; ammunition] by a [Prohibited Person], the government must prove the following:

1. The defendant knowingly [possessed; received] [a firearm; ammunition];

2. At the time of the charged act, the defendant was a [Prohibited Person]; and

3. [Such possession was in or affecting commerce] or [the [firearm; ammunition] had been shipped or transported in interstate or foreign commerce].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The term "Prohibited Person" is used in this instruction in the same way that it is used in the elements instruction for 18 U.S.C. § 922(d) (i.e. as a placeholder) and the Committee Comment associated with that instruction also applies to the use of that term in this instruction.

The term "knowingly" is defined in the Pattern Criminal Federal Jury Instructions for the Seventh Circuit, see page ___. Section 922(d)(1) requires only that the defendant know that the firearm recipient is a felon; it does not require knowledge of what crime he previously had been convicted. *See United States v. Haskins*, 511 F.3d 688, 692 (7th Cir. 2007).

The terms "firearm" and "ammunition" are defined by 18 U.S.C. § 921(a)(3) and (17)(A) and in Pattern Instructions XX and XX, on pages ___ and ___, and the term "possession" is defined in the Pattern Instruction X on page ___.

18 U.S.C. § 922(G) DEFINITIONS OF "IN OR AFFECTING COMMERCE" AND "IN INTERSTATE OR FOREIGN COMMERCE"

"In or affecting commerce" and "interstate or foreign commerce" include commerce between any place in a state and any place outside of that state. The terms do not include commerce between places within the same state but through any place outside of that state.

This requirement is satisfied if the firearm traveled in interstate or foreign commerce prior to the defendant's possession of it. A firearm has traveled in interstate or foreign commerce if it has traveled between one state and any other state or country, or across a state or national boundary line. [The government need not prove how the firearm traveled in interstate commerce; that the firearm's travel was related to the defendant's possession of it; or, that the defendant knew the firearm had traveled in interstate commerce.]

Committee Comment

This instruction is based in part on 18 U.S.C. § 921(a)(2) which defines "interstate or foreign commerce." The terms "in or affecting commerce" and "in interstate or foreign commerce" are synonymous. *Scarborough v. United States*, 431 U.S. 563, 577 (1977) (interpreting "in or affecting commerce" in § 922(g)'s forerunner, 18 U.S.C. § 1202(a)); *United States v. Lowe*, 860 F.2d 1370, 1374 (7th Cir. 1988) (rejecting contention that "commerce" is separate and distinct from "interstate commerce"). "Movement in interstate commerce is all the Supreme Court requires under the statute." *United States v. Jackson*, 479 F.3d 485, 492 (7th Cir. 2007) (citing *Scarborough*, 431 U.S. at 577; *United States v. Williams*, 410 F.3d 397, 400 (7th Cir. 2005)).

Several cases have discussed the meaning of "in interstate or foreign commerce" in the context of 18 U.S.C. § 922(g). *See, e.g., United States v. Rice*, 520 F.3d 811, 815-17 (7th Cir. 2008) (concluding that the defendant's possession of firearms manufactured outside of the state, in some instances years after the firearms had entered the state, satisfied § 922(g)(1)'s interstate commerce requirement); *United States v. Jackson*, 479 F.3d 485, 492 (7th Cir. 2007) (stating that § 922(g)(1)'s interstate commerce requirement was satisfied where gun was manufactured outside the United States, entered the United States in one state, and then traveled to another state), *cert. denied*, 128 S. Ct. 49 (2007); *United States v. Lewis*, 100 F.3d 49, 52 (7th Cir. 1996) ("A single journey across state lines, however remote from the defendant's possession, is enough to establish . . . a connection to interstate commerce").

18 U.S.C. § 922(G) DEFINITION OF "POSSESSION"

For the definition of possession see Instruction 4.14.

18 U.S.C. § 924(C)(1)(A) USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME – ELEMENTS

To sustain the charge of [using; carrying] a firearm during and in relation to a [crime of violence; drug trafficking crime], the government must prove the following:

1. The defendant committed the crime of [name the specific crime of violence or drug trafficking crime alleged in the indictment] as charged in Count __ of the indictment; and

2. He knowingly [used; carried] a firearm during and in relation to such crime.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The terms "drug trafficking crime" and "crime of violence" are both defined by statute, 18 U.S.C. § 924(c)(2) and (3), respectively. Whether a particular crime qualifies as such is a determination for the district court judge, therefore the Committee recommends that neither term be defined for the jury. Instead, the bracketed portion of the first element of this instruction should list the name of the "drug trafficking crime" or "crime of violence" alleged in the indictment, as determined qualified as such by the trial judge.

The term "knowingly" is defined by Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

Whether a firearm is "brandished" or "discharged" is not an element of the offense to be determined by the jury (as it affects the mandatory minimum, not the mandatory maximum sentence) and may instead be determined by a judge using the preponderance of the evidence standard. *See United States v. Watts*, 256 F.3d 630, 634-35 (7th Cir. 2001).

The term "firearm" is defined by 18 U.S.C. § 921(a)(3) and in Pattern Instruction XX, on page ___. There is no requirement that the gun be operable to be a "firearm" under 18 U.S.C. § 924(c). *See United States v. Castillo*, 406 F.3d 806, 817 (7th Cir. 2005), *vacated on other grounds, Castillo v. United States*, 128 S. Ct. 1061 (2008).

18 U.S.C. § 924(C)(1)(A) POSSESSION OF A FIREARM IN FURTHERANCE OF A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME – ELEMENTS

To sustain the charge of possession of a firearm in furtherance of a [crime of violence; drug trafficking crime], the government must prove the following:

1. The defendant committed the crime of [name specific crime of violence or drug trafficking crime alleged in the indictment] as charged in Count [__] of the indictment;

2. He knowingly possessed a firearm; and

3. His possession of the firearm was in furtherance of the [name specific crime of violence or drug trafficking crime alleged in the indictment].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Note

The terms "drug trafficking crime" and "crime of violence" are both defined by statute, 18 U.S.C. § 924(c)(2) and (3), respectively. Whether a particular crime qualifies as such is a determination for the district court judge, therefore the Committee recommends that neither term be defined for the jury. Instead, the bracketed portion of the first element of this instruction should list the name of the "drug trafficking crime" or "crime of violence" alleged in the indictment, as determined qualified as such by the trial judge.

The term "knowingly" is defined by Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

The term "firearm" is defined by18 U.S.C. § 921(a)(3) and in Pattern Instruction XX, on page ___. There is no requirement that the gun be operable to be a "firearm" under 18 U.S.C. § 924(c). *See United States v. Castillo*, 406 F.3d 806, 817 (7th Cir. 2005), *vacated on other grounds*, *Castillo v. United States*, 128 S. Ct. 1061 (2008).

The Committee recommends that courts instruct jurors on the meaning of "in furtherance of" a crime of violence or drug trafficking crime. The Seventh Circuit has recognized a non-exhaustive list of factors developed by the Fifth Circuit, for use in the determining whether a firearm was possessed "in furtherance of" another crime. The list includes: "the type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found." *Castillo*, 406 F.3d at 815 (internal citations omitted); *see also United States v. Seymour*, 519 F.3d 700, 715 (7th Cir.) (applying factors), *cert. denied*, 129 S. Ct. 527 (2008). The Seventh Circuit has advised that "given the fact intensive nature of the 'in furtherance of' inquiry, the weight, if any, these and other factors should be accorded necessarily will vary from case to case." *Castillo*, 406 F.3d at 815. Courts should craft an instruction addressing the relevant factors based on the evidence in the case on trial.

18 U.S.C. §§ 922 & 924 DEFINITION OF "FIREARM"

"Firearm" means [any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device]. [The term does not include an antique firearm.]

Committee Comment

This definition is found in 18 U.S.C. § 921(a)(3). There is no requirement that the gun be operable to be a "firearm" for purposes of 18 U.S.C. § 924(c). *See United States v. Castillo*, 406 F.3d 806, 817 (7th Cir. 2005), *vacated on other grounds, Castillo v. United States*, 128 S. Ct. 1061 (2008). The court should choose the appropriate bracketed description based on the evidence about the object in question introduced at trial.

The portion of the instruction excluding an "antique firearm" should be given only in cases in which evidence is introduced that the object in question could qualify as such pursuant to 18 U.S.C. § 921(a)(16), which is defined in the following pattern instruction.

18 U.S.C. §§ 922 & 924 DEFINITION OF "ANTIQUE FIREARM"

"Antique firearm" means --

(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or

(B) any replica of any firearm described in subparagraph (A) if such replica --

(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or (ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or

(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For purposes of this subparagraph, the term "antique firearm" shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

Committee Comment

This definition is found in 18 U.S.C. § 921(a)(16). This definition should be given only in cases in which evidence is introduced that the object in question could qualify as an "antique firearm" pursuant to statute.

18 U.S.C. § 922 DEFINITION OF "AMMUNITION"

"Ammunition" means ammunition or cartridge cases, primers, or propellant powder designed for use in any firearm.

18 U.S.C. § 924(C) DEFINITION OF "USE"

"Use" means the "active employment" of a firearm. The term is not limited to use as a weapon, and includes brandishing, displaying, bartering, striking with, firing, and attempting to fire a firearm. A defendant's reference to a firearm calculated to bring about a change in the circumstances of the offense constitutes "use" during and in relation to a crime. However, mere possession or storage of a firearm, at or near the site of the crime, drug proceeds or paraphernalia is not enough to constitute use of that firearm.

Committee Comment

See Bailey v. United States, 516 U.S. 137, 148-49 (1995). In *Smith v. United States*, 508 U.S. 223, 241 (1993), the Supreme Court held that a person who trades a gun for drugs "uses" it during and in relation to a drug trafficking offense for purposes of § 924(c)(1). But a person who trades drugs for a gun does not "use" the gun within the meaning of § 924(c)(1)(A). *Watson v. United States*, 552 U.S. 74, 83 (2007). Where the defendant displayed a firearm by placing it on the couch next to him as he was cutting cocaine, he "used" the firearm within the meaning of § 924(c). *Buggs v. United States*, 153 F.3d 439, 444 (7th Cir. 1998).

18 U.S.C. § 924(C) DEFINITION OF "CARRY"

A person "carries" a firearm when he knowingly transports it on his person [or in a vehicle or container].

[A person may "carry" a firearm even when it is not immediately accessible because it is in a case or compartment [such as a glove compartment or trunk of a car], even if locked.]

Committee Comment

Muscarello v. United States, 524 U.S. 125, 126-27, 137 (1998). The term "carry" requires a connotation of transportation that occurred during or in relation to the predicate crime. *See Stanback v. United States*, 113 F.3d 651, 657-58 (7th Cir. 1997). "Carrying" a firearm from one room to another is sufficient. *See Buggs v. United States*, 153 F.3d 439, 444 (7th Cir. 1998).

The bracketed language should be used only if supported by evidence in the case on trial.

18 U.S.C. § 924(C) DEFINITION OF "DURING"

"During" means at any point within the offense conduct charged in Count [__] of the indictment.

Committee Comment

The Seventh Circuit has stated that the terms "during" and "in relation to" have separate meanings under § 924(c)(1)(A). *United States v. Young*, 316 F.3d 649, 662 (7th Cir. 2002).

18 U.S.C. § 924(C) DEFINITION OF "IN RELATION TO"

A person [uses; carries] a firearm "in relation to" a crime if there is a connection between the use or carrying of the firearm and the crime of violence or drug trafficking crime. The firearm must have some purpose or effect with respect to the crime of violence or drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. The firearm must at least facilitate, or have the potential of facilitating, the crime of violence or drug trafficking crime.

Committee Comment

See Smith v. United States, 508 U.S. 223, 238 (1993); *United States v. Mancillas*, 183 F.3d 682, 707 (7th Cir. 1999).

The Seventh Circuit has stated that the terms "during" and "in relation to" have separate meanings under § 924(c)(1)(A). *United States v. Young*, 316 F.3d 649, 662 (7th Cir. 2002).

18 U.S.C. § 924(C) DEFINITION OF "IN FURTHERANCE OF"

A person possess a firearm "in furtherance of" of a crime if the firearm furthers, advances, moves forward, promotes or facilitates the crime of violence or drug trafficking crime. The mere presence of a firearm at the scene of a crime is insufficient to establish that the firearm was possessed "in furtherance of" a crime of violence or drug trafficking crime. There must be some connection between the firearm and the crime of violence or drug trafficking crime.

Committee Comment

See United States v. Huddleston, 593 F.3d 596, 602 (7th Cir. 2010) ("in furtherance of" prong satisfied where jury could have found that defendant possessed gun to protect himself and his stash and his profits); *United States v. Castillo*, 406 F.3d 806, 814-16 (7th Cir. 2005) (holding evidence was sufficient to establish that defendant possessed shotgun "in furtherance of" underlying drug crime where he strategically placed the shotgun near his cache of drugs to protect himself, his drugs, and his drug trafficking business), vacated on other grounds, *Castillo v. United States*, 128 S. Ct. 1061 (2008).

18 U.S.C. § 1028 § 1028(A) OFFENSES AND § 1028(B) PENALTIES COMMITTEE COMMENT

Section 1028(a) defines eight substantive fraud offenses in subsections (a)(1) through (a)(8). Section 1028(b) provides for a variety of punishments ranging from one year to thirty years depending on the manner in which § 1028(a) was violated. See 18 U.S.C. § 1028(b)(1) (15 years maximum), (b)(2) (5 years maximum), (b)(3) (20 years maximum), (b)(4) (30 years maximum), (b)(6) (one year maximum). (Section 1028(b)(5) provides for forfeiture.). Subject to the analysis in the Notes below, the default statutory maxima (that is, the maxima that apply when no other factors are proven except for the elements of the offense) are:

Subsection	Default Maximum	Citation
(a)(1)	5 years' imprisonment	§ 1028(b)(2)(A)[1]
(a)(2)	5-years' imprisonment	§ 1028(b)(2)(A)[2]
(a)(3)	5 years' imprisonment	§ 1028(b)(2)(B)
(a)(4)	1-year imprisonment	§ 1028(b)(6)[3]
(a)(5)	15-years' imprisonment	§ 1028(b)(1)(C)
(a)(6)	1-year imprisonment	§ 1028(b)(6)[3]
(a)(7)	5-years' imprisonment	§ 1028(b)(2)(B)
(a)(8)	5-years' imprisonment	§ 1028(b)(2)(A)[4]

Note 1. Section 1028(b)(2)(A) applies because the circumstances in (b)(2)(A) are necessarily proven if the § 1028(a)(1) offense elements are proven. Compare (b)(2)(A) ("any other production . . . of . . . an identification document, authentication feature, or a false identification document") with (a)(1) ("knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document").

Note 2. Section 1028(b)(2)(A) applies because the circumstances in (b)(2)(A) are necessarily proven if the § 1028(a)(2) offense elements are proven. Compare (b)(2)(A) ("any other . . . transfer . . . of . . . an identification document, authentication feature, or a false identification document") with (a)(2) ("knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority").

Note 3. Neither § 1028(a)(4) nor (a)(6)—which are possession offenses – are covered by the penalty provisions in § 1028(b)(1) and (b)(2). The reason is that, setting aside (a)(5) offenses and certain (a)(7) offenses,

an offense satisfies (b)(1) only "if the offense is" the "production or transfer" of a covered document or feature. Likewise, setting aside (a)(3) and (a)(7) offenses, an offense satisfies (b)(2) only "if the offense is" "any other production, transfer, or use" of a covered document or feature. Possession "is" not production, transfer, or use. Additionally, the legislative history of (a)(4) and (a)(6)'s original enactment described them as default misdemeanors. See H.R. Rep. 97 802, at 7 (1982), reprinted in 1982 U.S.C.C.A.N. 3519, 3525 (characterizing (a)(4) as "a misdemeanor with a maximum fine of $5000 and imprisonment of not more than one year or both"); H.R. Rep. 97 975 at 1, 4 (1982) (Conf. Rep.) (describing (a)(6) as "a misdemeanor subject to a fine of not more than $5,000, imprisonment for not more than one year, or both.") To be sure, other subsections do provide circumstances that would elevate (a)(4) and (a)(6) offenses to felonies, namely, if the subsequently-enacted penalties in § 1028(b)(3) and (b)(4) apply. But (b)(1) and (b)(2) do not apply to (a)(4) and (a)(6) offenses.

Note 4. Section 1028(b)(2)(A) applies because the circumstances in (b)(2)(A) are necessarily proven if the § 1028(a)(8) offense elements are proven, so long as it is correct to interpret "traffics" in (a)(8) as necessarily comprising "transfer" or "use" of an authentication feature in (b)(2)(A). Compare (b)(2)(A) ("any other . . . transfer, or use . . . of . . . an . . . . authentication feature") with (a)(8) ("knowingly traffics in false or actual authentication features for use in false identification documents, document making implements, or means of identification"). The statutory definition of "traffic" includes "transfer." 18 U.S.C. § 1028(d)(12)(A).

The penalty-enhancing instructions and special verdict forms for violations of § 1028(a) and a discussion thereof begin on page ___.

18 U.S.C. § 1028(A)(1) FRAUDULENT PRODUCTION OF AN IDENTIFICATION DOCUMENT, AUTHENTICATION FEATURE, OR FALSE IDENTIFICATION DOCUMENT – ELEMENTS

To sustain the charge of fraud in connection with the production of a[n] [identification document; authentication feature; false identification document], the government must prove the following:

1. The defendant knowingly produced a[n] [identification document; authentication feature; false identification document];

2. He did so without lawful authority; and

[3. The [document; feature] is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance];

- or -

[3. [The production of the [document; feature] occurred in or affected interstate or foreign commerce] or [the document was transported in the mail in the course of the production]].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The alternate third elements, which set forth the circumstances described in § 1028(c) that are required for any conviction under § 1028(a), should be used as appropriate based on the facts of the case. The first alternate should be used if the evidence supports a finding that the defendant produced an identification document or authentication feature that is or appears to be "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance." When the production of the document or feature occurred in or affected interstate or foreign commerce, or the document was transported in the mail in the course of the production, use the other alternate element.

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for

18 U.S.C. § 1028 on page ___. However, it bears emphasizing here that certain convictions under § 1028(a)(1) will by necessity contain elements that trigger a § 1028(b) penalty-enhancing provision and in such a case do not require the giving of a penalty-enhancing instruction and corresponding special verdict form, unless other factors triggering another penalty-enhancing provision exist. For example, if the offense elements of § 1028(a)(1) are proven, then the circumstances in § 1028(b)(2)(A), which trigger a five-year maximum, are necessarily proven. Compare § 1028(b)(2)(A) ("any other production . . . of . . . an identification document, authentication feature, or a false identification document"), with § 1028(a)(1) ("knowingly and without lawful authority produces an identification document, authentication feature, or a false identification document").

Similarly, if the third element of the § 1028(a)(1) offense involves a document or feature that "is or appears to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in §1028(b)(1)(A)(i) of fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved trigger another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the document or feature at issue "is or appears to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in the Pattern Criminal Federal Jury Instructions for the Seventh Circuit No. XX, see page ___. "Lawful authority" is defined in the definitions instructions for § 1028, see page ___. A definition of "interstate or foreign commerce" is found on page ____. "Interstate or foreign commerce" is defined on page ___.

The term "produce" is defined in 18 U.S.C. § 1028(d)(9). The terms "identification document," "authentication feature," "false identification document" and "personal identification card" are defined in 18 U.S.C. § 1028(d)(3), (1), (4), and (8). The definitions of these terms are found on pages ___.

18 U.S.C. 1028(A)(2) FRAUDULENT TRANSFER OF AN IDENTIFICATION DOCUMENT, AUTHENTICATION FEATURE, OR FALSE IDENTIFICATION DOCUMENT – ELEMENTS

To sustain the charge of fraud in connection with the transfer of a[n] [identification document; authentication feature; false identification document], the government must prove the following:

1. The defendant knowingly transferred a[n] [identification document; authentication feature; false identification document];

2. The defendant knew that such [identification document; authentication feature; false identification document] was stolen or produced without lawful authority; and

[3. The [document; feature] is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance];

- or -

[3. [The transfer of the [document; feature] occurred in or affected interstate or foreign commerce [including the transfer of a document by electronic means]] or [the document was transported in the mail in the course of the transfer]].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The alternate third elements, which set forth the circumstances described in § 1028(c) that are required for any conviction under § 1028(a), should be used as appropriate based on the facts of the case. The first alternate should be used if the evidence supports a finding that the defendant transferred an identification document or authentication feature that is or appears to be "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance." When the transfer of the document or feature occurred in or affected interstate or foreign commerce, or the document was transported in the mail in the course of the transfer, use the other alternate element.

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, it bears emphasizing here that certain convictions under § 1028(a)(2) will by necessity contain elements that trigger a § 1028(b) penalty-enhancing provision and in such a case do not require the giving of a penalty-enhancing instruction and corresponding special verdict form, unless other factors triggering another penalty-enhancing provision exist. For example, if the offense elements of § 1028(a)(2) are proven, then the circumstances in § 1028(b)(2)(A), which trigger a five-year maximum, are necessarily proven. Compare (b)(2)(A) ("any other . . . transfer . . . of . . . an identification document, authentication feature, or a false identification document") with (a)(2) ("knowingly transfers an identification document, authentication feature, or a false identification document knowing that such document or feature was stolen or produced without lawful authority").

Similarly, if the third element of the § 1028(a)(2) offense involves a document or feature that "is or appears to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in §1028(b)(1)(A)(i) of fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved trigger another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the document or feature at issue "is or appears to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page __. A definition of "lawful authority" is on page __. "Interstate or foreign commerce" is defined on page __.

The term “transfer” is defined in 18 U.S.C. § 1028(d)(10). The terms “identification document,” “authentication feature,” “false identification document” and “personal identification card” are defined in 18 U.S.C. § 1028(d)(3), (1), (4), and (8). The definitions of these terms are found on pages ___.

18 U.S.C. § 1028(A)(3) FRAUDULENT POSSESSION OF FIVE OR MORE IDENTIFICATION DOCUMENTS, AUTHENTICATION FEATURES, OR FALSE IDENTIFICATION DOCUMENTS – ELEMENTS

To sustain the charge of fraud in connection with the possession of five or more [identification documents; authentication features; false identification documents], the government must prove the following:

1. The defendant knowingly possessed five or more [identification documents; authentication features; false identification documents];

2. The defendant intended to use or transfer those [identification documents; authentication features; false identification documents] [in a manner that would violate one or more federal, state, or local laws]; and

[3. The [documents; features] are or appear to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. [The possession of the [documents; features] occurred in or affected interstate or foreign commerce] [the documents were transported in the mail in the course of the possession].]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In the second element, the bracketed language "in a manner that would violate one or more federal, state, or local laws" is intended to serve as a placeholder only. The Committee recommends that the court instruct the jury as to what federal, state or local law is alleged to have been violated and the manner in which that law was allegedly violated by the defendant.

The alternate third elements, which set forth the circumstances described in § 1028(c) that are required for any conviction under § 1028, should be used as appropriate based on the facts of the case. The first alternate should be used if the evidence supports a finding that the defendant possessed identification documents or authentication features

that are or appear to be "issued by or under the authority of the United States or a sponsoring entity of an event designated as a special event of national significance." When the possession of the documents or features occurred in or affected interstate or foreign commerce, or the documents or features were transported in the mail in the course of the possession, use the other alternate element.

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, note that a conviction under § 1028(a)(3) will necessarily trigger the penalty provision in § 1028(b)(2)(B), which provides for a five-year maximum for a § 1028(a)(3) offense. If this is the only penalty provision supported by the allegations and facts proved at trial, then an additional penalty-enhancing instruction and special verdict form would be unnecessary.

Similarly, if the third element of the § 1028(a)(3) offense involves documents or features that are or appear "to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in §1028(b)(1)(A)(i) of fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved trigger another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the documents or features at issue are or appear "to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ____.

For a definition of "interstate or foreign commerce" see page ___.

The term "transfer" is defined in 18 U.S.C. § 1028(d)(10). The terms "identification document," "authentication feature," and "false identification document," are defined in 18 U.S.C. § 1028(d)(3), (1), and (4). The definitions of these terms are found on pages ___.

18 U.S.C. § 1028(A)(4) POSSESSION OF AN IDENTIFICATION DOCUMENT, AUTHENTICATION FEATURE, OR FALSE IDENTIFICATION DOCUMENT WITH INTENT TO DEFRAUD THE UNITED STATES – ELEMENTS

To sustain the charge of fraud in connection with the possession of a[n] [identification document; authentication feature; false identification document], the government must prove the following:

1. The defendant knowingly possessed a[n] [identification document; authentication feature; false identification document]; and

2. He did so with the intent that it be used to defraud the United States.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, it should be noted that the penalty provisions in § 1028(b)(1) and (b)(2) do not apply to § 1028(a)(4) offenses, which are possession offenses. With a few exceptions not applicable to (a)(4) offenses, (b)(1) and (b)(2) apply only to offenses involving production, transfer, or use. The penalty provisions in § 1028(b)(3) (20 years) (applicable to offenses committed to facilitate a drug trafficking crime or in connection with a crime of violence) and § 1028(b)(4) (30 years) (applicable to offenses committed to facilitate an act of domestic terrorism or international terrorism) may apply to §1028(a)(4) offenses if the facts alleged and proved at trial warrant it.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ____.

For a general definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18

U.S.C. §§ 1341 & 1343, on page ___. It should be noted, however, that the intent required under § 1028(a)(4) is that the document or feature "be used to defraud the United States."

The terms "identification document," "authentication feature," and "false identification document" are defined in 18 U.S.C. § 1028(d)(3), (1), and (4). The definitions of these terms are found on pages ___.

18 U.S.C. § 1028(A)(5) FRAUDULENT PRODUCTION, TRANSFER, OR POSSESSION OF A DOCUMENT-MAKING IMPLEMENT OR AUTHENTICATION FEATURE – ELEMENTS

To sustain the charge of fraud in connection with the [production; transfer; possession] of a [document-making implement; authentication feature], the government must prove the following:

1. The defendant knowingly [produced; transferred; possessed] a [document-making implement; authentication feature];

2. The defendant intended that the [document-making implement; authentication feature] be used to produce [a false identification document; another document-making implement or authentication feature which will be used to create a false identification document]; and

[3. The document-making implement is designed or suited for making a[n] [identification document; authentication feature; false identification document] that is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. The authentication feature is or appears to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance].]

- or -

[3. [The [production; transfer; possession] of the [document-making implement; authentication feature] is in or affects interstate or foreign commerce] or [the document-making implement is transported in the mail in the course of the [production; transfer; possession].]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The third element sets forth the circumstances described in subsection (c) that are required for any conviction under § 1028. The first

two alternatives contain subsection (c)(1)'s circumstances that either the "document-making implement" be suited for making one of the covered documents, or the "authentication feature" appear to be issued by the United States. The third alternative contains the circumstances described in subsection (c)(3) and thus applies when the production, transfer or possession of the document-making implement was in or affected interstate or foreign commerce or the document-making implement was transported in the mail in the course of the production, transfer or possession.

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, note that a conviction under § 1028(a)(5) will necessarily trigger the penalty provision in § 1028(b)(1)(C), which provides for a fifteen-year maximum for a § 1028(a)(5) offense. If this is the only penalty provision supported by the allegations and facts proved at trial, then an additional penalty-enhancing instruction and special verdict form would be unnecessary. If the facts alleged and proved at trial trigger the greater maximum penalty in § 1028(b)(3) (20 years) or (b)(4) (30 years) (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A), connection with a crime of violence, § 1028(b)(3)(B), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4)), then the penalty-enhancing provisions of § 1028(b) should be addressed.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___. "Interstate or foreign commerce" is defined on page ___.

The term "produce" is defined in 18 U.S.C. § 1028(d)(9). The term "transfer" is defined in 18 U.S.C. § 1028(d)(10). The terms "document-making implement," "authentication feature," and "false identification document" are defined in 18 U.S.C. § 1028(d)(2), (1), and (4). The definitions for these terms are found on pages ___.

18 U.S.C. § 1028(A)(6) POSSESSION OF A STOLEN IDENTIFICATION DOCUMENT OR AUTHENTICATION FEATURE – ELEMENTS

To sustain the charge of possession of a stolen [identification document; authentication feature], the government must prove the following:

1. The defendant knowingly possessed a[n] [document; authentication feature] that is or appears to be an [identification document; authentication feature] of the [United States; a sponsoring entity of an event designated as a special event of national significance];

2. The [document; authentication feature] was [stolen; produced without lawful authority]; and

3. The defendant knew that the [document; authentication feature] was [stolen; produced without lawful authority].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, it should be noted that the penalty provisions in § 1028(b)(1) and (b)(2) do not apply to § 1028(a)(6) offenses, which are possession offenses. With a few exceptions not applicable to (a)(6) offenses, (b)(1) and (b)(2) apply only to offenses involving production, transfer, or use. The penalty provisions in § 1028(b)(3) (20 years) (applicable to offenses committed to facilitate a drug trafficking crime or in connection with a crime of violence) and § 1028(b)(4) (30 years) (applicable to offenses committed to facilitate an act of domestic terrorism or international terrorism) may apply to §1028(a)(6) offenses if the facts alleged and proved at trial warrant it.

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___. "Lawful authority" is defined in the instruction following the elements instruction for § 1028(a)(1), see page ___.

The term "produce" is defined in 18 U.S.C. § 1028(d)(9). The terms "identification document" and "authentication feature" are defined in 18 U.S.C. § 1028(d)(3) and (1). The definitions of these terms are found on pages ___.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

18 U.S.C. § 1028(A)(7) FRAUDULENT TRANSFER, POSSESSION, OR USE OF A MEANS OF IDENTIFICATION – ELEMENTS

To sustain the charge of fraud in connection with the [transfer; possession; use] of a means of identification, the government must prove the following:

1. The defendant knowingly [transferred; possessed; used] a means of identification of another person;

2. The defendant knew that the means of identification belonged to another person;

3. The defendant acted [with the intent to [commit; aid or abet]; in connection with] any activity that [violates federal law] or [is a felony under any applicable State or local law]];

4. The defendant acted without lawful authority; and

5. The [transfer; possession; use] of the means of identification occurred in or affected interstate or foreign commerce] or the means of identification was transported in the mail in the course of the [transfer; possession] [use].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In the third element, the bracketed language "violates federal law; is a felony under any applicable State or local law" is intended to serve as a placeholder only. The Committee recommends that the court instruct the jury as to the specific law which would have been violated by the alleged activity.

A single identification document or false identification document that contains one or more means of identification shall be construed to be one means of identification. 18 U.S.C. § 1028(i).

If the means of identification is of a certain type, e.g., a driver's license, and it is undisputed that the means of identification was a driver's license, then the court should substitute the specific type of a

means of identification, e.g., a driver's license, for "a means of identification" wherever used in the instruction.

In *Flores Figueroa v. United States*, 129 S. Ct. 1886 (2009), the Supreme Court held that 18 U.S.C. § 1028A(a)(1) (aggravated identity theft) required the Government to prove that the defendant knew that the means of identification at issue belonged to another person. The language of § 1028A is nearly identical to that in § 1028(a)(7)—"knowingly transfers, possesses, or uses . . . a means of identification of another person." Thus, the holding should apply to § 1028(a)(7) offenses as well.

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, note that a conviction under § 1028(a)(7) will necessarily trigger the penalty provision in § 1028(b)(2)(B), which provides for a five-year maximum for a § 1028(a)(7) offense. If this is the only penalty provision supported by the allegations and facts proved at trial, then an additional penalty-enhancing instruction and special verdict form would be unnecessary. But if the facts alleged and proved at trial trigger the greater maximum penalty in § 1028(b)(1) (15 years), (b)(3) (20 years) or (b)(4) (30 years), then the penalty-enhancing provisions of § 1028(b) should be addressed.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___. "Lawful authority" is defined on page . "Interstate or foreign commerce" is defined on page ___.

The term "transfer" is defined in 18 U.S.C. § 1028(d)(10). The term "means of identification" is defined in 18 U.S.C. § 1028(d)(7). "State" is defined in 18 U.S.C. § 1028(d)(11). The definitions of these terms are found on pages ___.

18 U.S.C. § 1028(A)(8) TRAFFICKING IN FALSE OR ACTUAL AUTHENTICATION FEATURES – ELEMENTS

To sustain the charge of trafficking in authentication features, the government must prove the following:

1. The defendant knowingly trafficked in [false] authentication features;

2. The authentication features were for use in [false identification documents; document-making implements; means of identification]; and

[3. The authentication features were or appeared to be issued by or under the authority of [the United States; a sponsoring entity of an event designated as a special event of national significance]]

- or -

[3. The trafficking in the [false] authentication features occurred in or affected [interstate; or foreign] commerce [including the transfer of a document by electronic means]].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The first element can involve trafficking in either false or actual authentication features. The word "false" should be included in this element only if the evidence at trial proved that the authentication features in question were false.

The third element has two alternatives. The appropriate one should be selected based on the facts alleged in the indictment and proved at trial.

For a discussion of the effect of § 1028(b)'s enhanced penalty provisions on the jury instructions, see the Committee Comment for 18 U.S.C. § 1028 on page ___. However, it bears emphasizing here that certain convictions under § 1028(a)(8) may necessarily contain elements that trigger a § 1028(b) penalty-enhancing provision and in such a case do not require the giving of a penalty-enhancing instruction and corresponding special verdict form, unless other factors triggering another penalty-

enhancing provision exist. For example, if the offense elements of § 1028(a)(8) are proven, then the circumstances in § 1028(b)(2)(A), which trigger a five-year maximum, are necessarily proven, as long as it is correct to interpret "traffics" in (a)(8) as necessarily comprising "transfer" or "use" of an authentication feature in (b)(2)(A). Compare (b)(2)(A) ("any other . . . transfer, or use . . . of . . . an . . . . authentication feature") with (a)(8) ("knowingly traffics in false or actual authentication features for use in false identification documents, document making implements, or means of identification"). The statutory definition of "traffic" includes "transfer." 18 U.S.C. § 1028(d)(12)(A).

Similarly, if the third element of the § 1028(a)(8) offense involves authentication features that were or appeared "to be issued by or under the authority of the United States," then upon a finding of guilt, the statutory maximum provided in §1028(b)(1)(A)(i) of fifteen years applies, and no penalty-enhancing instruction or corresponding verdict form should be given, unless the facts alleged and proved at trial trigger a greater maximum penalty under another penalty-enhancing provision (such as facilitation of a drug trafficking crime, § 1028(b)(3)(A) (20 years), connection with a crime of violence, § 1028(b)(3)(B) (20 years), or facilitation of an act of domestic terrorism or international terrorism, § 1028(b)(4) (30 years)).

However, if the elements involved in the offense charged do not necessarily involve a finding that the authentication features at issue were or appeared "to be issued by or under the authority of the United States," then the penalty-enhancing provisions of § 1028(b) should be addressed if the facts alleged in the indictment and proved at trial support those enhancements.

"Drug trafficking crime" is defined in 18 U.S.C. § 929(a)(2), "crime of violence" in *id.* § 924(c)(3), "act of domestic terrorism" in *id.* § 2331(5), and "act of international terrorism" in *id.* § 2331(1).

The term "knowingly" is defined in Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___. "Interstate or foreign commerce" is defined on page ___.

The term "traffic" is defined in 18 U.S.C. § 1028(d)(12); "transfer" is defined in § 1028(d)(10); and "authentication feature" "false authentication feature," "false identification documents," "document-making implement," and "means of identification" are defined in § 1028(d)(1), (5), (4), (2) and (7). The definitions of these terms are found on pages ___.

18 U.S.C. § 1028 PENALTY-ENHANCING INSTRUCTIONS AND SPECIAL VERDICT FORMS

Committee Comment

The Supreme Court has held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, an enhanced penalty under § 1028(b), then the principles of Apprendi require that the jury be instructed on the penalty-enhancing factor(s). In that event, the Committee suggests that the jury also be provided with a special verdict form.

The default maximum penalty for § 1028(a) convictions ranges from one to fifteen years of imprisonment. *See* 18 U.S.C. § 1028(b). If the jury finds beyond a reasonable doubt that the government has proven certain factors specified in § 1028(b), then the applicable statutory maximum is increased. But the elements of the substantive offenses described in § 1028(a) remain the same -- only the statutory maximum is dependent on the factors specified in § 1028(b). If the penalty-enhancing factors were incorporated into the offense-elements instruction, then the jury could mistakenly find a defendant not guilty of the offense, when instead the defendant should be found guilty of the offense but subject only to the default statutory maximum. Thus, rather than incorporate those penalty-enhancing factors into the offense-elements instruction, the court should provide the jury with an additional penalty-enhancing instruction as necessary. But two significant caveats apply.

Section 1028(c). First, § 1028(c)(1), has a potential impact on the propriety of giving such an instruction. Section 1028(c) identifies several federal-interest grounds; proof of one of them is an element of a § 1028(a) offense. For example, one way to satisfy (c)(1) is to prove that the identification document, authentication feature, or false identification document "is or appears to be issued by or under the authority of the United States." If the indictment alleges this ground as an element of the offense and the jury is so instructed, then a finding of guilt would trigger the 15-year statutory maximum in § 1028(b)(1)(A)(i). In that situation, no penalty-enhancing instruction or corresponding special verdict form should be given to the jury. That is, if the indictment in such a case alleges no fact to trigger the greater maximum in § 1028(b)(3) (20 years) or (b)(4) (30 years), specifically, that the offense was committed to facilitate a drug trafficking crime, in connection with a crime of violence, or to facilitate an act of domestic terrorism or international terrorism, then a penalty-enhancing

instruction and corresponding special verdict form are also unnecessary. But if the indictment alleges and the evidence supports a fact that triggers (b)(3) or (b)(4), then an additional penalty-enhancing instruction and corresponding special verdict form should be given.

Section 1028(b)(3)(C). The second caveat is that one of the § 1028(b) enhancements does not require a special verdict form. Specifically, (b)(3)(C) provides for a 20-year statutory maximum if the offense is committed "after a prior conviction under this section becomes final." An enhancement for a prior conviction is an exception to the rule of *Apprendi*. *Oregon v. Ice*, 129 S. Ct. at 714 (2009) (describing *Apprendi* line of cases as holding "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense"); *Cunningham v. California*, 549 U.S. 270, 274-75 (2007) (*Apprendi* applies only to those facts "other than a prior conviction"). Accordingly, the jury should not be asked to determine the existence of the prior conviction. Indeed, the defendant could be unduly prejudiced by evidence of the prior conviction if there is no independent basis to admit that evidence.

The penalty-enhancing instructions and special verdict forms for § 1028(a) offenses begin on the following page.

18 U.S.C. § 1028 PENALTY-ENHANCING PROVISIONS UNDER § 1028(B)

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [___] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that the offense in Count [___]

(insert appropriate alternative(s))

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be an identification document or authentication feature issued by or under the authority of the United States.] [(b)(1)(A)(i)]

- or -

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be a birth certificate, or a driver's license or personal identification card.] [(b)(1)(A)(ii)]

- or -

[involved the production or transfer of more than five identification documents, authentication features, or false identification documents.] [(b)(1)(B)]

- or -

[involved the transfer, possession, or use of 1 or more means of identification and, as a result of the offense, [the defendant] obtained anything of value aggregating $1,000 or more during any 1 year period.] [(b)(1)(D) for 1028(a)(7) offenses only]

- or -

[involved any production, transfer, or use of a means of identification, an identification document, authentication feature, or a false identification document.] [(b)(2)(A)]

- or -

[was committed to facilitate a drug trafficking crime.] [(b)(3)(A)]

- or -

[was committed in connection with a crime of violence.] [(b)(3)(B)]

- or -

[was committed to facilitate an [act of domestic terrorism; act of international terrorism].] [(b)(4)]

Committee Comment

The jury's determination on these characteristics of the offense influences the defendant's maximum sentence. If supported by allegations in the indictment and proof at trial, this instruction may be given for any of the offenses listed under § 1028(a). The Committee recommends that if this instruction is given, then the jury also be given a special verdict form, see the following.

The bracketed citations to the subsections of §1028(b) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate instruction. The citations are not intended to be included in the instructions given to the jury.

It should again be noted that § 1028(c)(1) may impact the propriety of giving a penalty-enhancing instruction and special verdict form. Section 1028(c) identifies several federal-interest grounds; proof of one of them is an element of a § 1028(a) offense. For example, one way to satisfy (c)(1) is to prove that the identification document, authentication feature, or false identification document "is or appears to be issued by or under the authority of the United States." If the indictment alleges this ground as an element of the offense and the jury is so instructed, then a finding of guilt would trigger the statutory maximum in § 1028(b)(1)(A)(i). In that situation, no penalty-enhancing instruction or corresponding special verdict form should be given to the jury. If the indictment alleges no fact to trigger the greater maximum in § 1028(b)(3) or (b)(4), specifically, that the offense was committed to facilitate a drug trafficking crime, in connection with a crime of violence, or to facilitate an act of domestic terrorism or international terrorism, then a penalty-enhancing instruction and corresponding special verdict form are also unnecessary. But if the indictment alleges and the evidence supports a fact that triggers (b)(3) or (b)(4) other than the fact of a prior conviction under § 1028, then an additional penalty-enhancing instruction and corresponding special verdict form should be given.

See the Committee Comment to Penalty-Enhancing Instructions and Special Verdict Forms preceding this instruction on page ___.

18 U.S.C. § 1028 SPECIAL VERDICT FORM

If you find the defendant(s) guilty of [specify the offense charged in the indictment] in Count [___], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that the offense described in Count [___]:

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be an identification document or authentication feature issued by or under the authority of the United States.] [(b)(1)(A)(i)]

- or -

[involved the production or transfer of an identification document, authentication feature, or false identification document that is or appears to be a birth certificate, or a driver's license or personal identification card.] [(b)(1)(A)(ii)]

- or -

[involved the production or transfer of more than five identification documents, authentication features, or false identification documents.] [(b)(1)(B)]

- or -

[involved the transfer, possession, or use of 1 or more means of identification and, as a result of the offense, [the defendant] obtained anything of value aggregating $1,000 or more during any 1 year period.] [(b)(1)(D) for § 1028(a)(7) offenses only]

- or -

[involved any production, transfer, or use of a means of identification, an identification document, authentication feature, or a false identification document.] [(b)(2)(A)]

- or -

[was committed to facilitate a drug trafficking crime.] [(b)(3)(A)]

- or -

[was committed in connection with a crime of violence.] [(b)(3)(B)]

- or -

[was committed to facilitate an [act of domestic terrorism; act of international terrorism].] [(b)(4)]

Yes _____ No _____

Committee Comment

The bracketed citations to the subsections of §1028(b) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate special verdict form. The citations are not intended to be included in the verdict form given to the jury.

Care should be exercised in determining whether a special verdict form is necessary. Certain convictions under § 1028(a), which by necessity contain elements that trigger the penalty-enhancing provisions of § 1028(b), do not require the giving of any penalty-enhancing instruction or corresponding verdict form, unless the indictment alleges, and the evidence supports, finding facts that would trigger a greater maximum penalty under other subsections of § 1028(b). See the Committee Comment to Penalty-Enhancing Instructions and Special Verdict Forms preceding this form on page ___.

18 U.S.C. § 1028 DEFINITIONS

Committee Comment

These definitions are designed to accompany the pattern instructions for the offenses listed in §§ 1028(a) and 1028A(a). The source of most of these definitions is § 1028(d), which defines several terms unique to §§ 1028(a) and 1028A(a).

In providing these definitions, the Committee does not intend to imply that the court should always instruct the jury on all of the definitions. The court should provide the jury with the definitions only for the terms that are necessary for the particular case on trial. In addition, the court should excise from each definition terms that are inapplicable to the facts of the particular case.

Unless otherwise noted, these pattern definitions simply reproduce the definitions provided by § 1028(d) with only minor stylistic changes. Incorporating the complete statutory definitions in this manner is consistent with the relatively few pattern instructions for § 1028(a) published by other circuits.

18 U.S.C. § 1028(D)(1) DEFINITION OF "AUTHENTICATION FEATURE"

"Authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters that is used by the issuing authority on an identification document, document making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified. The issuing authority may use the authentication feature either by itself or in combination with another feature to make this determination.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(1)-(6) and (8) and the definitions of "false authentication feature" and "issuing authority" which follow.

18 U.S.C. § 1028(D)(2) DEFINITION OF "DOCUMENT-MAKING IMPLEMENT"

"Document making implement" means any implement, impression, template, computer file, computer disc, electronic device, or computer hardware or software, that is specifically configured or primarily used for making an identification document, a false identification document, or another document making implement.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(5) and (8) and the definitions of "authentication feature," "false authentication feature," and "transfer" on pages ___, ___, and ___.

For definitions of the terms "hardware" and "software" see the definitions regarding those terms as used under § 1029 on pages___ and ___.

18 U.S.C. § 1028(D)(3) DEFINITION OF "IDENTIFICATION DOCUMENT"

"Identification document" means a document made or issued by or under the authority of the United States Government, a State, political subdivision of a State, a sponsoring entity of an event designated as a special event of national significance, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(1)-(4), (6), and the definitions of "authentication feature," "document-making implement," "false authentication feature," "issuing authority," "personal identification card" and "transfer" on pages __, __, __, __, __, and __.

18 U.S.C. § 1028(D)(4) DEFINITION OF "FALSE IDENTIFICATION DOCUMENT"

"False identification document" means a document that

(1) is of a type that is intended or commonly accepted to identify individuals,

(2) is not issued by or under the authority of a governmental entity; was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit; and appears to be issued by or under the authority of [the United States Government] [a State] [a political subdivision of a State] [a sponsoring entity of an event designated by the President as a special event of national significance] [a foreign government] [a political subdivision of a foreign government] [or an international governmental or quasi governmental organization].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1028(a)(1)-(5) and (8) and § 1028A(a)(2) and the definitions of "document-making implement" and "transfer" on pages __ and __.

Ideally, the facts charged in the indictment or the evidence presented at trial will be particular enough to allow the court to determine which alternative definition of "false identification document" applies. If not, the court may have to give both alternative definitions.

18 U.S.C. § 1028(D)(5) DEFINITION OF "FALSE AUTHENTICATION FEATURE"

"False authentication feature" means an authentication feature that

[is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit.]

- or -

[is genuine, but, without the authorization of the issuing authority, has been distributed or is intended for distribution for use other than by the issuing authority in a lawfully made [identification document] [document making implement] [means of identification].]

- or -

[appears to be genuine, but is not.]

Committee Comment

This pattern separates the three definitions of "false authentication feature" provided by 18 U.S.C. § 1028(d)(5)(A)-(C) into three alternative jury instructions. The second alternative significantly condenses the language of § 1028(d)(5)(B), which contains several terms that seem unnecessary to convey the key requirement that the distribution be for a purpose other than making a valid identification document.

Applicable to offenses under 18 U.S.C. § 1028(a)(8).

18 U.S.C. § 1028(D)(6) DEFINITION OF "ISSUING AUTHORITY"

"Issuing authority" means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features. An issuing authority includes the United States Government, a State, a political subdivision of a State, a sponsoring entity of an event designated by the President as a special event of national significance, a foreign government, a political subdivision of a foreign government, or an international government or quasi governmental organization.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028 and the definitions of "authentication feature" and "false authentication feature" on pages __ and __.

18 U.S.C. § 1028(D)(7) DEFINITION OF "MEANS OF IDENTIFICATION"

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual. A means of identification includes any

[name; social security number; date of birth; official State or government issued driver's license or identification number; alien registration number; government passport number; employer or taxpayer identification number.]

[unique biometric data, such as fingerprint, voice print, retina or iris image; or other unique physical representation.]

[unique electronic [identification number; address; routing code].]

[electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account; a specific communication transmitted from a telecommunications instrument.]

[[card; plate; code; account number; electronic serial number; mobile identification number; personal identification number; or other telecommunications service, equipment, or instrument identifier; or other means of account access] that can be [used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value; used to initiate a transfer of funds (other than a transfer originated solely by paper instrument).]

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(7)-(8) and § 1028A(a)(1)-(2) and the definitions of "authentication feature," "issuing authority" and "false authentication feature" on pages __, __, and __.

The statutory definition of "means of identification" provides an uncommonly long list of examples, all of which are reproduced here as alternative sets of examples. In crafting a jury instruction from this pattern definition, the court should incorporate only those examples that are most relevant to the facts of the particular case on trial.

The final set of examples of a "means of identification" provided by § 1028(d)(7)(D) contains a cross-reference to § 1029(e)'s definitions of "telecommunication identifying information" and "access device." Accordingly, the final two sets of examples in this pattern definition reproduce the definitions of those terms provided by § 1029(e)(1), (11).

Finally, for § 1028A purposes, a person's name, by itself, might not constitute a "means of identification of another." The Fourth Circuit has held that such a means of identification must contain other, valid information, in addition to a person's name, which identifies a specific individual. *United States v. Mitchell*, 518 F.3d 230, 235 (4th Cir. 2008). In *Mitchell*, the defendant was charged under § 1028A because he used a Georgia driver's license to commit bank fraud. The license bore the name "Marcus Jackson" (not the defendant's name). There were two Marcus Jacksons with driver's licenses in Georgia but neither had the same license number as the one on the defendant's license. Moreover, the defendant's license did not accurately state the birthday or address of either of the real Marcus Jacksons. The court reversed the defendant's § 1028A conviction because nothing established that the means of identification at issue was in fact the "means of identification of another person." The ID was fake. To sustain a conviction under § 1028A, according to the Fourth Circuit, the means of identification must contain some "valid unique identifier" to establish that the identification did in fact belong to someone else. *Id.* at 235-36.

18 U.S.C. § 1028(D)(8) DEFINITION OF "PERSONAL IDENTIFICATION CARD"

"Personal identification card" means an identification document issued by a State or local government solely for the purpose of identification.

Committee Comment

Applicable to production or transfer offenses subject to a 15-year maximum under 18 U.S.C. § 1028(b)(1)(A)(ii).

18 U.S.C. § 1028(D)(9) DEFINITION OF "PRODUCE"

"Produce" includes alter, authenticate, and assemble.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(1) and (5).

18 U.S.C. § 1028(D)(10) DEFINITION OF "TRANSFER"

"Transfer" includes selecting an identification document, false identification document, or document making implement and placing or directing the placement of such identification document, false identification document, or document making implement on an online location where it is available to others.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(2)-(3), (5), and (7) and § 1028A(a)(1)-(2) and the definition of "traffic" on page ___.

The court should give this pattern definition of "transfer" only when appropriate based on the facts of the particular case. Although the statutory definition provided by § 1028(d)(10) makes clear that the transfers prohibited by § 1028 may include an online posting, a conviction under § 1028 does not require such an electronic transfer. If the defendant is charged with physically carrying counterfeit identification documents, this pattern definition would be unnecessary and potentially confusing to the jury.

18 U.S.C. § 1028(D)(11) DEFINITION OF "STATE"

"State" includes any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession, or territory of the United States.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(7) and the definitions of "identification document," "false identification document," "issuing authority," "means of identification," and "personal identification card" on pages __, __, __, __, and __.

18 U.S.C. § 1028(D)(12) DEFINITION OF "TRAFFIC"

"Traffic" means to transport, transfer, or otherwise dispose of, to another, for anything of value, or to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.

Committee Comment

Applicable to offenses under 18 U.S.C. § 1028(a)(8).

18 U.S.C. § 1028 DEFINITION OF "LAWFUL AUTHORITY"

"Lawful authority" means authorization recognized by statute or regulation. Thus, "without lawful authority" means without authorization recognized by statute or regulation.

To prove the "without lawful authority" element, the government need not prove that the identification document(s), authentication feature(s), false identification documents(s), or means of identification were stolen. However, proof that such documents, features or means of identification were stolen would satisfy the "without lawful authority" element. "Without lawful authority" includes situations in which a defendant comes into lawful possession of identifying information and had the lawful authority to use that information for a lawful purpose, but used the information for an unlawful purpose.

Committee Comment

See United States v. Abdelshafi, 592 F.3d 602, 608-09 (4th Cir. 2010) (holding government was not required to prove that the identifying information was stolen or misappropriated in order to prove a violation of the aggravated-identity theft statute, 18 U.S.C. § 1028A(a)(1)); *United States v. Hurtado*, 508 F.3d 603, 607-08 (11th Cir. 2007) (per curiam) (holding that 18 U.S.C. § 1028A(a)(1) does not require the government to prove that the defendant stole the identification of another person). The "without lawful authority" language used in § 1028A(a) is also used in § 1028(a)(1), (2), (6) and (7), and the Committee believes the same meaning should be applied under the latter statute.

18 U.S.C. § 1028 DEFINITION OF "INTERSTATE OR FOREIGN COMMERCE"

"Interstate or foreign commerce" involves business, trade, travel, transportation or communication between any place in a state and any place outside that state, [or any two places within a state but through any place outside that state]. A defendant's conduct affects commerce if the natural consequences of the defendant's actions had some effect on commerce, however minimal.

Committee Comment

This definition is derived from the arson statute, 18 U.S.C. § 844(I) and the Hobbs Act, 18 U.S.C. § 1951, instructions, which use the similar phrase "affects commerce."

18 U.S.C. § 1028A AGGRAVATED IDENTITY THEFT – ELEMENTS

(Combined General & Terrorism Offense Instructions)

To sustain the charge of aggravated identity theft, the government must prove the following:

[1. The defendant committed the felony offense of [title of offense] as charged in Count [__]];

- or -

[1. The defendant committed [the terrorism offense of [title of offense] as charged in Count [__]];

2. During and in relation to that offense, the defendant knowingly [transferred; possessed; used] a [means of identification; false identification document]; [and]

3. The defendant did so without lawful authority[.] [; and]

[4. The means of identification belonged to another person; and

5. The defendant knew that the means of identification belonged to another person.]

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from you consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction may be used alternatively for both general and terrorism-related aggravated-identity-theft offenses. 18 U.S.C. § 1028A(a)(1)–(2). Use the alternate first element for the terrorism offense under § 1028A(a)(2). The term "false identification document" in the second element should also be used only in connection with the terrorism offense. The fourth and fifth elements are applicable only if the offense charged is § 1028A(a)(1), involving a means of identification rather than a false identification document.

In *Flores Figueroa v. United States*, 129 S. Ct. 1886 (2009), the Supreme Court held that 18 U.S.C. § 1028A(a)(1) required the government

to prove that the defendant knew that the means of identification at issue belonged to another person.

In *United States v. LaFaive*, 618 F.3d 613, 615-18 (7th Cir. 2010), the Seventh Circuit decided that the phrase "another person" in subsection (a)(1) of § 1028A includes both living and deceased persons. The court stated that its conclusion was supported by the plain language of § 1028A(a)(1), the structure of § 1028A, and decisions of other courts.

For a definition of "lawful authority" see the instruction defining that term as used under § 1028, see page ___.

18 U.S.C. § 1028A DEFINITION OF "IN RELATION TO"

A person [transfers; possesses; uses] a [means of identification; false identification document] "in relation to" a crime if it had a purpose, role or effect with respect to the [felony; terrorism] offense. It also means that the [transfer; possession; use] of the [means of identification]; [false identification document] had a connection to or relationship with the [felony; terrorism] offense.

Committee Comment

Section 1028A does not provide a specific meaning for "in relation to." This definition borrows from the meaning of that phrase as used in the firearms context, see Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX on page ___; 18 U.S.C. § 924(c)(1); see also Pattern Crim. Jury Instr. 5th Cir. 2.48 (2001); Mod. Crim. Jury Instr. 3rd Cir. 6.18.924B (2009); Pattern Crim. J. Instr. 11th Cir. OI 35.2 (2003). The definition should be defined and tailored to the particular facts of the case on trial and the government's theory of how the defendant's transfer, possession, or use was related to the felony or terrorism offense.

18 U.S.C. § 1029(A)(1) PRODUCTION, USE OR TRAFFICKING IN COUNTERFEIT ACCESS DEVICES – ELEMENTS

To sustain the charge of fraud in connection with the [production; use; trafficking] of [a] counterfeit access device[s], the government must prove the following:

1. The defendant knowingly [produced; used; trafficked in] one [or more] counterfeit access device[s];

2. The defendant did so with the intent to defraud; and

3. The defendant's conduct affected [interstate; [foreign]] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Produce" is defined by 18 U.S.C. § 1029(e)(4). "Counterfeit access device" is defined by § 1029(e)(2). The definitions of these terms are found on pages ___.

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee also recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 1029(A)(2) TRAFFICKING OR USE OF UNAUTHORIZED ACCESS DEVICES – ELEMENTS

To sustain the charge of fraud in connection with the [use of; attempt to use] [an] access device[s], the government must prove the following:

1. The defendant knowingly [used; trafficked in] one or more specified unauthorized access devices;

2. By such conduct the defendant obtained any [money; good(s); service(s)]; [any other thing of value] with a total value of at least $1,000 during any one year period;

3. The defendant did so with the intent to defraud; and

4. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Unauthorized access device" is defined on page ___ of these instructions. The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 1029(A)(3) POSSESSION OF MULTIPLE UNAUTHORIZED OR COUNTERFEIT ACCESS DEVICES – ELEMENTS

To sustain the charge of possession of multiple access devices with intent to defraud, the government must prove the following:

1. The defendant knowingly possessed fifteen or more access devices;

2. Those devices were [counterfeit; unauthorized];

3. The defendant possessed those devices with the intent to defraud; and

4. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is a dispute over whether the device at issue qualifies as an "access device." For a definition of "access device" see the instruction on page ___. For a definition of "counterfeit access device" see page ___ . For a definition of "unauthorized access device" see page ___.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 1029(A)(4) PRODUCTION, TRAFFICKING AND POSSESSION OF DEVICE-MAKING EQUIPMENT – ELEMENTS

To sustain the charge of fraud involving access device making equipment, the government must prove the following:

1. The defendant knowingly [produced; trafficked in; had control or custody of; possessed] device making equipment;

2. The defendant did so with the intent to defraud; and

3. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Device-making equipment" is defined in 18 U.S.C. § 1029(e)(6). "Produce" is defined in § 1029(e)(4). The definitions of these terms are found on pages ___.

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device." For a definition of "access device" see the instruction on page ___.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud. For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

"Traffic" and "trafficking" are defined in a subsequent instruction, see page ___.

18 U.S.C. § 1029(A)(5) FRAUDULENT TRANSACTIONS WITH ANOTHER'S ACCESS DEVICE – ELEMENTS

To sustain the charge of fraud in connection with access devices issued to others, the government must prove the following:

1. The defendant knowingly [engaged in; caused; conducted] [a] transaction[s] with [one; or more] access device[s] that had been issued to another person[s];

2. The defendant did so to obtain [money; good(s); service(s); or any other thing of value] with a total value of at least $1,000 during any one-year period;

3. The defendant did so with the intent to defraud; and

4. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device." For a definition of "access device" see the instruction on page ___.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

The Committee notes that the statute employs the phrase "effects transactions" but recommends that district courts use "engaged in," "caused" or "conducted" transactions because those terms are more likely to be understood by juries.

18 U.S.C. § 1029(A)(6) SOLICITATION TO SELL ACCESS DEVICE OR INFORMATION REGARDING AN ACCESS DEVICE – ELEMENTS

To sustain the charge of fraud in connection with the unauthorized solicitation of information relating to access devices, the government must prove the following:

1. The defendant knowingly solicited a person for the purpose of [offering an access device; selling information regarding an access device; selling information regarding an application to obtain an access device];

2. The defendant did so without authorization of the issuer of the access device;

3. The defendant did so with the intent to defraud; and

4. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device." For a definition of "access device" see the instruction on page ___.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 1029(A)(7) USE, PRODUCTION, TRAFFICKING OR POSSESSION OF MODIFIED TELECOMMUNICATION INSTRUMENT – ELEMENTS

To sustain the charge of fraud in connection with [insert type of telecommunications instrument], the government must prove the following:

1. The defendant knowingly [used; produced; trafficked in; had control or custody of; possessed] a [insert type of telecommunications instrument] that has been modified or altered to obtain unauthorized use of telecommunications services;

2. The defendant did so with the intent to defraud; and

3. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Produce" is defined in 18 U.S.C. § 1029(e)(4). The definition of this term is found on page ___.

The Committee recommends that district courts name the particular telecommunications instrument at issue (such as "cellular telephone") rather than using the generic term "telecommunications instrument" in its instructions unless there is an issue as to whether the device qualifies as an "telecommunications instrument." If there is such a dispute, then the jury should be instructed on the meaning of a "telecommunications instrument," see the instruction on page ___ for a definition.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page __. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page __.

"Traffic" and "trafficking" are defined in a subsequent instruction, see page ___.

18 U.S.C. § 1029(A)(8) USE, PRODUCTION, TRAFFICKING OR POSSESSION OF A SCANNING RECEIVER – ELEMENTS

To sustain the charge of fraud involving scanning receivers, the government must prove the following:

1. The defendant knowingly [used; produced; trafficked in; had control or custody of; possessed] [a]; [one or more] scanning receiver[s];

2. The defendant acted with the intent to defraud; and

3. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Produce" is defined in 18 U.S.C. § 1029(e)(4). "Scanning receiver" is defined in 18 U.S.C. § 1029(e)(8). For the definition of these terms see pages ___.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

"Traffic" is defined in 18 U.S.C. § 1029(e)(5). For an instruction defining "traffic" and "trafficking" see page ___.

18 U.S.C. § 1029(A)(9) USE, PRODUCTION, TRAFFICKING OR POSSESSION OF HARDWARE OR SOFTWARE CONFIGURED TO OBTAIN TELECOMMUNICATION SERVICES – ELEMENTS

To sustain the charge of fraud involving hardware or software used to obtain unauthorized telecommunications services, the government must prove the following:

1. The defendant knowingly [used; produced; trafficked in; had control or custody of; possessed] [hardware; software] that has been configured to [insert; modify] telecommunication identifying information [associated with; contained in] a telecommunications instrument so that the instrument may be used to obtain telecommunications services without authorization;

2. The defendant knew the software or hardware had been so configured; and

3. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

If no issue exists as to whether the device is a "telecommunications instrument" (such as a cellular telephone), the Committee recommends that the phrase "telecommunications instrument" be replaced with the name of the device. If an issue does exist as to whether the device is a telecommunications instrument then, of course, the term should be used and defined for the jury. For an instruction defining "telecommunications instrument" see page ___.

"Produce" is defined in 18 U.S.C. § 1029(e)(4). "Telecommunication identifying information" is defined in § 1029(e)(11). "Telecommunications service" is defined in § 1029(e)(9). The definitions of these terms are found on pages __.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___.

For an instruction defining "traffic" and "trafficking" see page ___.

18 U.S.C. § 1029(A)(10) FRAUDULENT PRESENTATION OF EVIDENCE OF PAYMENT BY ACCESS DEVICE – ELEMENTS

To sustain the charge of fraud involving credit card payments, the government must prove the following:

1. The defendant knowingly [arranged for; caused] another person to present, for payment to a credit card system [member; agent], one or more [records; evidences] of transactions made by an access device [as described in the indictment];

2. The defendant was not authorized by the credit card system [member; agent] to [arrange; cause] such a claim for payment;

3. The defendant acted with the intent to defraud; and

4. The defendant's conduct affected [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee recommends that district courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device." If there is a dispute, "access device" is defined in 18 U.S.C. § 1029(e)(1) and an instruction is provided in the definitional instructions for § 1029, see page __.

The Committee also recommends that district courts name the bank or other institution rather than using the generic term "credit card system member." However, if there is an issue as to whether an entity is a "credit card system member," the definition for the term is found in § 1029(e)(7) and provided in the definitional instructions for § 1029, see page __.

The Committee recommends that district courts instruct juries on the definition of "interstate or foreign commerce" and "intent to defraud." For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___. For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page __.

18 U.S.C. § 1029 ACCESS DEVICE FRAUD – DEFINITIONS

Committee Comment

These pattern definitions are designed to accompany the pattern instructions for the offenses listed in § 1029. The source of most of these definitions is § 1029(e), which defines several terms unique to § 1029.

In providing these definitions, the Committee does not intend to imply that the court should always instruct the jury on all of the definitions. The court should provide the jury with the definitions only for the terms that are necessary for the particular case on trial. In addition, the court should excise from each definition terms that are inapplicable to the facts of the particular case.

Unless otherwise noted, these pattern definitions simply reproduce the definitions provided by § 1029(e) with only minor stylistic changes.

18 U.S.C. § 1029(E)(1) DEFINITION OF "ACCESS DEVICE"

"Access device" includes a credit card, debit card or a personal identification number such as that used to obtain cash at an ATM. It also means [a[n] [card; plate; code; account number; electronic serial number; mobile identification number; personal identification number] or other [telecommunications service; equipment; instrument identifier]; [or other means of account access] that can be used, alone or in conjunction with another access device, to obtain [money; goods; services; or any other thing of value], [or that can be used to initiate a transfer of funds].

Committee Comment

The Committee recommends that courts name the access device (such as "credit card" or "debit card") rather than using the generic term "access device" in its instructions unless there is an issue as to whether the device qualifies as an "access device."

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(5), (6) and (10) and the definitions of "counterfeit access device," "unauthorized access device," and "device-making equipment" on pages __, __, and __.

18 U.S.C. § 1029(E)(2) DEFINITION OF "COUNTERFEIT ACCESS DEVICE"

"Counterfeit access device" means any access device that is [counterfeit; fictitious; altered; forged]. [The term also includes an identifiable component of an access device or a counterfeit access device.]

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1) and (3) and the definition of "device-making equipment" on page __.

18 U.S.C. § 1029(E)(3) DEFINITION OF "UNAUTHORIZED ACCESS DEVICE"

"Unauthorized access device" means any access device that is [lost; stolen; expired; revoked; canceled; or obtained with intent to defraud].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(2) and (3).

18 U.S.C. § 1029(E)(4) DEFINITION OF "PRODUCE"

"Produce" includes [design; alter; authenticate; duplicate; or assemble].

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1), (4), and (7)-(9).

18 U.S.C. § 1029(E)(5) DEFINITION OF "TRAFFIC" OR "TRAFFICKING"

"Traffic" or "trafficking" means to transfer something to another, or otherwise dispose of something. It also means to obtain control of something with intent to transfer or dispose of it.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1), (2), (4), and (7)-(9).

18 U.S.C. § 1029(E)(6) DEFINITION OF "DEVICE-MAKING EQUIPMENT"

"Device making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(4).

18 U.S.C. § 1029(E)(7) DEFINITION OF "CREDIT CARD SYSTEM MEMBER"

"Credit card system member" means an entity, including a financial institution, that is a member of a credit card system, such as a bank, credit union, or credit card company. The term includes an entity that is the sole member of a credit card system, whether affiliated with or identical to the credit card issuer.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(10).

18 U.S.C. § 1029(E)(8) DEFINITION OF "SCANNING RECEIVER"

"Scanning receiver" means a device or apparatus that can be used to intercept an electronic serial number, mobile identification number, or other identifier of any telecommunications service, equipment, or instrument.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(8).

The statutory definition of "scanning receiver" includes a device that can be used to intercept wire or electronic communications in violation of chapter 119 (18 U.S.C. §§ 2510-2522). The types of devices and conduct covered by §§ 2510 to 2522 are so broad, that the Committee concluded it would be unable to capture all of the potential conduct in a pattern instruction. Thus, the Committee recommends that if the theory of prosecution addresses a scanning receiver that can be used to intercept wire or electronic communications, the district court should craft a definition of "scanning receiver" that is specific to §§ 2510 to 2522.

18 U.S.C. § 1029(E)(9) DEFINITION OF "TELECOMMUNICATIONS SERVICE"

"Telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. Telephone service, cellular telephone service, instant messaging and email messaging services are all examples of "telecommunications services."

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(7) and (9) and the definitions of "access device" and "scanning receiver" on pages __ and __.

18 U.S.C. § 1029(E)(11) DEFINITION OF "TELECOMMUNICATION IDENTIFYING INFORMATION"

"Telecommunication identifying information" means electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account, or a specific communication transmitted from a telecommunications instrument.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. 1029(a)(9).

18 U.S.C. § 1029 DEFINITION OF "TELECOMMUNICATIONS INSTRUMENT"

"Telecommunications instrument" means a device, tool or implement, especially one held in the hand, which is used to transmit information over a distance by electronic means such as by cable, telegraph, telephone, or broadcasting. [A mobile phone, often referred to as a cellular phone, is an example of a telecommunications instrument.]

Committee Comment

This definition is adapted from different sources, including The New Oxford American Dictionary, the definition of "telecommunications" in 47 U.S.C. § 153(43), and the online glossary of computer and internet terms, http://www.sharpened.net/glossary/definition.php?telecommunications.

This definition is applicable to offenses under 18 U.S.C. 1029(a)(7) and (9) and the definition of "telecommunication identifying information" on page __.

18 U.S.C. § 1029 DEFINITION OF "HARDWARE"

"Hardware" consists of the machines, wiring, and other physical components of a computer or other electronic system or media storage device. Hardware includes the [cables; connectors; power supply units; monitors; keyboards; mice; audio speakers; printers; scanners; microprocessors; disks; disk drives; optical drives; USB drives; and digital media but not data stored on the devices].

Committee Comment

This definition is adapted from different sources—The New Oxford American Dictionary, The Oxford English Dictionary, the online glossary of computer and internet terms, http://www.sharpened.net/glossary and the online dictionary of technology terms, www.techdictionary.com.

The facts of the case determine which of the items within the brackets should be included in the definition for the particular case.

This definition is applicable for offenses under 18 U.S.C. § 1029(a)(9).

18 U.S.C. § 1029 DEFINITION OF "SOFTWARE"

"Software" includes programs, applications, operating instructions, code, and other digital information or data used or processed by a microprocessor.

Committee Comment

This definition is adapted from different sources -- The New Oxford American Dictionary, The Oxford English Dictionary, the online glossary of computer and internet terms, http://www.sharpened.net/glossary and the online dictionary of technology terms, www.techdictionary.com.

This definition is applicable for offenses under 18 U.S.C. § 1029(a)(9).

18 U.S.C. § 1029 DEFINITION OF "INTERSTATE OR FOREIGN COMMERCE"

Committee Comment

"Interstate or foreign commerce" is not defined within § 1029. The Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028, see the Instruction on page ___.

This definition is applicable to offenses under 18 U.S.C. § 1029(a)(1)-(10).

18 U.S.C. §§ 1029(B)(1) AND (B)(2) ATTEMPT AND CONSPIRACY – ELEMENTS

Committee Comment

18 U.S.C. §§ 1029(b)(1) and (b)(2) proscribe attempts and conspiracies to violate any subsection of § 1029(a). Where the indictment charges an attempt or conspiracy adjust the instruction accordingly, using relevant elements from the attempt or conspiracy pattern jury instructions, Pattern Instruction XX (Attempt) or XX (Conspiracy), as appropriate, see pages ___ and ____.

Although the Committee found no case law directly addressing whether conspiracies under § 1029 require proof of an overt act, a few courts appear to have assumed that such proof is required. *See United States v. Luttrell*, 889 F.2d 806, 809-10 (9th Cir. 1989) (concluding that the government proved an overt act was committed and thus the evidence was sufficient to support the conspiracy conviction under § 1029), amended and vacated in other part, 923 F.2d 764 (9th Cir. 1991) (en banc); *United States v. Ayeki*, 289 F. Supp. 2d 183, 189 (D. Conn. 2003) (holding indictment was sufficient and noting that it listed six overt acts allegedly performed by the coconspirators).

18 U.S.C. § 1030(A)(1) OBTAINING INFORMATION FROM COMPUTER INJURIOUS TO THE UNITED STATES – ELEMENTS

To sustain the charge of obtaining government protected information from a computer, the government must prove the following:

1. The defendant knowingly [accessed a computer without authorization; exceeded his authorized access to a computer];

2. In doing so, the defendant obtained [information that had been determined by the United States Government to require protection against disclosure for reasons of national defense or foreign relations; data regarding the design, manufacture or use of atomic weapons];

3. The defendant obtained the [information; data] with reason to believe that the information could be used to injure the United States or to the advantage of any foreign nation; and

4. The defendant willfully [[communicated; delivered; transmitted] the [information; data] to any person not entitled to receive it] [retained the [information; data] and failed to deliver it to the officer or employee of the United States entitled to receive it].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted." The "causes to be communicated, delivered, or transmitted" and "attempts to communicate, deliver, transmit, or cause to be communicated, delivered, or transmitted" language should be used where relevant to the particular case on trial. When the indictment alleges an attempt, the pattern jury instruction for attempt should also be employed, see the Instruction on page ___.

"Computer" is defined by 18 U.S.C. § 1030(e)(1). "Exceeds authorized access" is defined by § 1030(e)(6). The definitions of these terms are found on pages ___.

18 U.S.C. § 1030(A)(2)(A), (B), AND (C) OBTAINING FINANCIAL INFORMATION BY UNAUTHORIZED ACCESS OF A COMPUTER – ELEMENTS

To sustain the charge of obtaining financial information by unauthorized access of a computer, the government must prove the following:

1. The defendant intentionally [accessed a computer without authorization; exceeded his or her authorized access to a computer]; and

2. By accessing the computer the defendant obtained [information contained in a financial record [of _____, a financial institution; of _____, a card issuer; contained in a file of _____, a consumer reporting agency maintained on a consumer],] or [information from any department or agency of the United States,] or [information from any protected computer].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined by 18 U.S.C. § 1030(e)(1). "Protected computer" is defined by § 1030(e)(2). "State" is defined by § 1030(e)(3). "Financial institution" is defined by § 1030(e)(4). "Financial record" is defined by § 1030(e)(5). "Exceeds authorized access" is defined by § 1030(e)(6). "Protected computer" is defined by § 1030(e)(2). The definitions of these terms are found on pages ___.

The Supreme Court has held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, the enhanced maximum penalty provided by 18 U.S.C. § 1030(c)(2)(B), that is, if the offense was committed for purpose of commercial advantage or private financial gain, was in furtherance of any criminal or tortious act, or the value of the information obtained exceeded $5,000, then the

principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s).

The instruction on the penalty-enhancing factor(s) should read:

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [___] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that

(insert appropriate alternative(s))

[the offense in Count [___] was committed for purposes of commercial advantage or private financial gain] [(c)(2)(B)(i)]

- or -

[the offense in Count [___] was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State] [(c)(2)(B)(ii)]

- or -

[the value of the information obtained exceeded $5,000] [(c)(2)(B)(iii)].

The bracketed citations to the subsections of § 1030(c) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate instruction. They are not intended to be included in the instructions given to the jury.

The Committee recommends that if this instruction is given, then the jury also be given a special verdict form as follows:

Special Verdict Form

If you find the defendant(s) guilty of [specify the offense charged in the indictment] Count [___], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that

[the offense in Count [___] was committed for purposes of commercial advantage or private financial gain] [(c)(2)(B)(i)]

- or -

[the offense in Count [___] was committed in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or of any State] [(c)(2)(B)(ii)]

- or -

[the value of the information obtained by the defendant exceeded $5,000] [(c)(2)(B)(iii)].

Yes _____ No _____

As before, the bracketed citations to § 1030(c) at the end of each of the above alternatives are included only to assist the court in crafting an appropriate special verdict form. They are not intended to be included in the verdict form given to the jury.

18 U.S.C. § 1030(A)(3) ACCESSING A NON-PUBLIC GOVERNMENT COMPUTER – ELEMENTS

To sustain the charge of accessing a non-public government computer, the government must prove the following:

1. The defendant intentionally accessed a non-public computer of a (identify department or agency of the United States);

2. [The computer was exclusively for the use of the government; the computer was used by or for the government and defendant's conduct affected the use by or for the government]; and

3. The defendant lacked authorization to access the computer of (identify the department or agency of the United States).

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined by 18 U.S.C. § 1030(e)(1) and in the instruction on page ___.

18 U.S.C. § 1030(A)(4) COMPUTER FRAUD USE BY OR FOR FINANCIAL INSTITUTION OR GOVERNMENT – ELEMENTS

To sustain the charge of fraud by using a protected computer, the government must prove the following:

1. The defendant knowingly [accessed a protected computer without authorization; exceeded authorized access to a protected computer];

2. The defendant did so with the intent to defraud;

3. By [accessing; exceeding authorized access to] the protected computer, the defendant furthered the fraud; and

4. The defendant thereby obtained anything of value.

–or–

[4. The object of the fraud and the thing obtained was the use of the computer and the value of that use exceeded $5000 in any one-year period.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined by 18 U.S.C. § 1030(e)(1). "Protected computer" is defined in § 1030(e)(2). "Exceeds authorized access" is defined in § 1030(e)(6). The definitions for these terms are on pages ___.

The Committee recommends that district courts define "intent to defraud." For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

A person does not violate this statute if the object of the fraud and the thing of value obtained consists only of the use of the computer and the value of such use is not more than $5000 in any 1-year period. If the theory of the case is that the object of the fraud was simply the use of the computer, and there is evidence to support a finding that the value of that use exceeded $5000 in any one-year period, then the alternate fourth element should be used.

18 U.S.C. § 1030(A)(5)(A) TRANSMISSION OF PROGRAM TO INTENTIONALLY CAUSE DAMAGE TO A COMPUTER – ELEMENTS

To sustain the charge of transmitting a program that damages a computer, the government must prove the following:

1. The defendant knowingly caused the transmission of a [program; information; code; command]; and

2. By doing so, the defendant intentionally caused damage to a protected computer without authorization.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined by 18 U.S.C. § 1030(e)(1). "Damage" is defined by § 1030(e)(8). "Loss" is defined by § 1030(e)(11). "Protected computer" is defined in 18 U.S.C. § 1030(e)(2). The definitions of these terms are found on pages ___.

The Supreme Court has held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, an enhanced maximum penalty provided by 18 U.S.C. § 1030(c)(4)(B), (E) or (F), the principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s). The additional jury instruction on the penalty-enhancing factor(s) should read:

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [___] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that

(insert appropriate alternative(s))

the offense [caused; or, if completed would have caused; loss to one or more persons during any one-year period aggregating at least

$5,000 in value] [the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals] [physical injury to any person; a threat to public health or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security] [damage affecting ten or more protected computers during any one-year period]] [(c)(4)(B)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] serious bodily injury] [(c)(4)(E)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] death]. [(c)(4)(F)]

The bracketed citations to the subsections of § 1030(c) are included only to assist the court in crafting an appropriate instruction. They are not intended to be included in the jury instruction.

If the government pursues a "recklessness" theory, the Committee recommends that the term be defined as follows:

A person acts recklessly if he was aware of a substantial and unjustifiable risk that [his; her] actions would cause [serious bodily injury; death] and that the defendant consciously disregarded that risk.

See Model Jury Instructions, Criminal, Third Circuit, Section 5.08 (West 2009).

The Committee recommends that if the additional instruction is given, then the jury also be given a special verdict form as follows:

Special Verdict Form

If you find the defendant(s) guilty of [specify the offense charged in the indictment] Count [___], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that

[the offense caused; in the case of an attempted offense would, if completed, have caused; loss to one or more persons during any one-year period aggregating at least $5,000 in value; the modification or impairment,

or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security] [damage affecting ten or more protected computers during any one-year period]] [(c)(4)(B)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] serious bodily injury] [(c)(4)(E)]

- or -

[the defendant [attempted to cause; knowingly or recklessly caused] death]. [(c)(4)(F)]

Yes _____ No _____

The bracketed citations are not intended to be included in the special verdict form given to the jury and are included here only to assist the court in crafting the special verdict form.

18 U.S.C. § 1030(A)(5)(B) RECKLESSLY CAUSING DAMAGE BY ACCESSING A PROTECTED COMPUTER – ELEMENTS

To sustain the charge of recklessly causing damage by accessing a protected computer, the government must prove the following:

1. The defendant intentionally accessed a protected computer without authorization; and

2. As a result of that conduct, the defendant recklessly caused damage.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee recommends that district courts define the term "recklessly," as follows:

A person acts recklessly if he was aware of a substantial and unjustifiable risk that [his] [her] conduct would cause damage and that the defendant consciously disregarded that risk.

See Model Jury Instructions, Criminal, Third Circuit § 5.08 (West 2009).

"Computer" is defined by 18 U.S.C. § 1030(e)(1). "Damage" is defined by § 1030(e)(8). "Loss" is defined by § 1030(e)(11). "Protected computer" is defined by § 1030(e)(2). The definitions of these terms are found on pages ___.

The Supreme Court has held "that it is within the jury's province to determine any fact (other than the existence of a prior conviction) that increases the maximum punishment authorized for a particular offense." *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)). Therefore, if the government seeks, and the evidence supports, the enhanced maximum penalty under 18 U.S.C. § 1030(c)(4)(A), then the principles of *Apprendi* require that the jury be instructed on the penalty-enhancing factor(s).

The additional instruction on the penalty-enhancing factor(s) should read:

If you find that the government proved beyond a reasonable doubt [specify the offense charged in the indictment] as charged in Count [___] of the indictment, then you must also determine whether the government proved beyond a reasonable doubt that [the offense caused; the attempt to commit the offense would, if completed, have caused] a [loss to one or more persons during any one-year period aggregating at least $5,000 in value; the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals; physical injury to any person; a threat to public health or safety; damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security; damage affecting ten or more protected computers during any one-year period].

The Committee recommends that if this additional instruction is given, then the jury also be given a special verdict form as follows:

Special Verdict Form

If you find the defendant(s) guilty of [specify the offense charged in the indictment] Count [___], then you must also answer the following question(s).

We, the jury, find beyond a reasonable doubt that [the offense caused] [the attempt to commit the offense would, if completed, have caused] [loss to one or more persons during any one-year period aggregating at least $5,000 in value] [the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of one or more individuals] [physical injury to any person] [a threat to public health or safety] [damage affecting a computer used by or for an entity of the United States Government in furtherance of the administration of justice, national defense, or national security] [damage affecting ten or more protected computers during any one-year period].

Yes _____ No _____

18 U.S.C. § 1030(A)(5)(C) CAUSING DAMAGE AND LOSS BY ACCESSING A PROTECTED COMPUTER – ELEMENTS

To sustain the charge of causing damage and loss by accessing a protected computer, the government must prove the following:

1. The defendant, without authorization, intentionally accessed a protected computer; and

2. As a result of that conduct, the defendant caused damage and loss.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined by 18 U.S.C. § 1030(e)(1). "Damage" is defined by § 1030(e)(8). "Loss" is defined by § 1030(e)(11). "Protected computer" is defined by § 1030(e)(2). The definitions of these terms are found on pages ___.

18 U.S.C. § 1030(A)(6) TRAFFICKING IN PASSWORDS–ELEMENTS

To sustain the charge of trafficking in passwords, the government must prove the following:

1. The defendant knowingly and without authorization trafficked in a password, or similar information through which a computer may be accessed;

2. The defendant acted with intent to defraud; and

3. The defendant's acts [affected interstate or foreign commerce; involved access to a computer used by or for the government of the United States].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined by 18 U.S.C. § 1030(e)(1). The definition of this terms is found on page ___. "Trafficking" is not defined in §1030; the Committee recommends the definition in § 1029(e)(5), see page ___ for an instruction.

The phrase "interstate or foreign commerce" is not defined in § 1030. The Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028, see Instruction XX on page ___.

For a definition of "password" see the definition that follows on page ___.

The Committee recommends instructing the jury on the meaning of "intent to defraud." For a definition of "intent to defraud" see Instruction XX regarding that term as used in the mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, on page ___.

18 U.S.C. § 1030(A)(7)(A) EXTORTION BY THREATENING TO DAMAGE A PROTECTED COMPUTER – ELEMENTS

To sustain the charge of extortion by threatening to damage a protected computer, the government must prove the following:

1. The defendant transmitted, in interstate or foreign commerce, a threat to cause damage to a protected computer; and

2. The defendant intended to obtain money or anything of value from any person.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Protected computer" is defined in § 1030(e)(2) and in an instruction on page ___. The phrase "interstate or foreign commerce" is not defined in § 1030; the Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028, see Instruction XX on page ___.

18 U.S.C. § 1030(A)(7)(B) EXTORTION BY THREATENING TO OBTAIN INFORMATION FROM A PROTECTED COMPUTER – ELEMENTS

To sustain the charge of extortion by threatening to obtain information from a protected computer, the government must prove the following:

1. The defendant transmitted, in interstate or foreign commerce, a threat [to obtain information from a protected computer without authorization; to obtain information from a protected computer in excess of authorization; to impair the confidentiality of information obtained from a protected computer without authorization; to impair the confidentiality of information obtained from a protected computer by exceeding authorized access]; and

2. By doing so, the defendant intended to obtain money or anything of value from any person.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Protected computer" is defined in § 1030(e)(2) and in an instruction on page ___. The phrase "interstate or foreign commerce" is not defined in § 1030; however, the Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028, see Instruction XX on page ___.

18 U.S.C. § 1030(A)(7)(C) EXTORTION BY DEMANDING MONEY IN RELATION TO A PROTECTED COMPUTER – ELEMENTS

To sustain the charge of extortion by demanding money in relation to a protected computer, the government must prove the following:

1. The defendant transmitted in interstate or foreign commerce any communication containing a demand or request for money or other thing of value in relation to damage to a protected computer;

2. The defendant did so with intent to extort money or anything of value from any person; and

3. Damage to a protected computer was caused to facilitate the extortion.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Damage" is defined by § 1030(e)(8) and in the instruction at page ___. "Protected computer" is defined in § 1030(e)(2) and in the instruction at page ___. The phrase "interstate or foreign commerce" is not defined in § 1030; the Committee recommends employing the pattern definition suggested for offenses in violation of 18 U.S.C. § 1028, see Instruction XX on page ___.

The statute does not define the phrase "in relation to." The Committee recommends that the phrase be defined, see the instruction on page ___.

For language defining the term "extort," see the instruction defining "extortion" in connection with the Hobbs Act, 18 U.S.C. § 1951.

18 U.S.C. § 1030(B) ATTEMPT AND CONSPIRACY – ELEMENTS

Committee Comment

18 U.S.C. § 1030(b) proscribes attempts and conspiracies to violate any subsection of § 1030(a). Where the indictment charges an attempt or conspiracy adjust the instruction accordingly, using relevant elements from the attempt pattern instruction or pattern instruction for conspiracies where an overt act is not required, see Instructions ___ and ___ on pages ___ and ___, as appropriate.

18 U.S.C. § 1030 COMPUTER FRAUD AND RELATED ACTIVITY – DEFINITIONS

Committee Comment

These pattern definitions are designed to accompany the pattern instructions for the offenses listed in § 1030. The source of most of these definitions is § 1030(e), which defines several terms unique to § 1030.

In providing these definitions, the Committee does not intend to imply that the court should always instruct the jury on all of the definitions. The court should provide the jury with the definitions only for the terms that are necessary for the particular case on trial. In addition, the court should excise from each definition terms that are inapplicable to the facts of the particular case.

Unless otherwise noted, these pattern definitions simply reproduce the definitions provided by § 1030(e) with only minor stylistic changes.

18 U.S.C. § 1030(E)(1) DEFINITION OF "COMPUTER"

"Computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions. The term includes any data storage facility or communications facility directly related to or operating in conjunction with such device. But the term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(1)-(7).

The Committee anticipates that in most cases, it will be unnecessary to instruct the jury on the meaning of the term "computer."

18 U.S.C. § 1030(E)(2) DEFINITION OF "PROTECTED COMPUTER"

"Protected computer" means a computer that is exclusively for the use of a financial institution or the United States government. The term also includes computers not exclusively for such use, used by or for a financial institution or the United States government when the defendant's conduct affects the use of the computer by or for the financial institution or the government. Finally, the term "protected computer" also includes computers which are used in or affecting interstate or foreign commerce or communication, even if the computer is located outside of the United States.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(2), (4), (5) and (7).

18 U.S.C. § 1030(E)(3) DEFINITION OF "STATE"

"State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any other commonwealth, possession or territory of the United States.

Committee Comment

This definition is applicable to 18 U.S.C. § 1030(a)(2) when the enhanced penalty under § 1030(c)(2)(B)(ii) is sought.

18 U.S.C. § 1030(E)(4) DEFINITION OF "FINANCIAL INSTITUTION"

"Financial institution" means an institution whose deposits are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration; the Federal Reserve or a member of the Federal Reserve including any Federal Reserve Bank; a member of the Federal home loan bank system and any home loan bank; any institution of the Farm Credit System; a broker dealer registered with the Securities and Exchange Commission; the Securities Investor Protection Corporation; a branch or agency of a foreign bank; and an organization operating under section 25 or section 25(a) of the Federal Reserve Act.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. 1030(a)(2) and the definitions of "protected computer," "financial record," and "person" on pages __, __, and __.

The Committee recommends that the term "financial institution" not be defined except when an issue exists as to whether an institution qualifies as a financial institution. Whenever the term "financial institution" is defined, only that part which is pertinent to the trial should be employed.

18 U.S.C. § 1030(E)(5) DEFINITION OF "FINANCIAL RECORD"

"Financial record" means information derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(2).

18 U.S.C. § 1030(E)(6) DEFINITION OF "EXCEEDS AUTHORIZED ACCESS"

"Exceeds authorized access" means to access a computer with authorization but to use such access to obtain or alter information in the computer that the person is not entitled to obtain or alter.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(1), (2) and (4).

18 U.S.C. § 1030(E)(7) DEFINITION OF "DEPARTMENT OF THE UNITED STATES"

"Department of the United States" means the legislative or judicial branch of the Government or one of the executive departments of the United States.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(2) and (3).

18 U.S.C. § 1030(E)(8) DEFINITION OF "DAMAGE"

"Damage" means any impairment to the integrity or availability of data, a program, a system, or information.

Committee Comment

This definition is applicable for offenses under 18 U.S.C. § 1030(a)(5) and (7)(A) and (C) and where an enhanced penalty is sought under § 1030(c)(4)(A).

18 U.S.C. § 1030 DEFINITION OF "GOVERNMENT ENTITY"

"Government entity" includes the Government of the United States, any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country.

Committee Comment

This definition is applicable where the enhanced penalty under 18 U.S.C. § 1030(c)(4)(A)(V) is sought and in the definition of "person" on page __.

18 U.S.C. § 1030(E)(10) DEFINITION OF "CONVICTION"

"Conviction" includes a conviction under the law of any State for a crime punishable by imprisonment for more than 1 year, an element of which is unauthorized access, or exceeding authorized access, to a computer.

Committee Comment

This definition is for use when certain enhanced penalties under 18 U.S.C. § 1030(c) are sought.

18 U.S.C. § 1030(E)(11) DEFINITION OF "LOSS"

"Loss" means any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense. The term also includes any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.

Committee Comment

This definition is applicable to offenses under 18 U.S.C. § 1030(a)(5)(C) and where the enhanced penalties under § 1030(c)(4)(A)(i)(I) are sought.

18 U.S.C. § 1030(E)(12) DEFINITION OF "PERSON"

"Person" means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal or other entity.

Committee Comment

The Committee recommends that the term "person" not be defined unless the term is being used in the case to describe an entity other than a human being.

This definition is applicable to offenses under § 1030(a)(1) and (7) and when certain enhanced penalties are sought under § 1030(c)(4)(A).

18 U.S.C. § 1030(A)(7)(C) DEFINITION OF "IN RELATION TO"

"In relation to" means that the communication had a purpose, role or effect with respect to the damage to the protected computer. It also means that the communication had a connection to or relationship with the damage to the protected computer.

Committee Comment

Section 1030(a)(C) does not define "in relation to" as used in the statute. This definition borrows from the meaning of that phrase as used in the firearms context, see Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX on page ___; 18 U.S.C. § 924(c)(1), see Pattern Crim. Jury Instr. 5th Cir. 2.48 (2001); Mod. Crim. Jury Instr. 3rd Cir. 6.18.924B (2009); Pattern Crim. J. Instr. 11th Cir. OI 35.2 (2003).

This definition is applicable to offenses under § 1030(a)(7)(C).

18 U.S.C. § 1030 DEFINITION OF "PASSWORD"

A "password" is a sequence of letters, numbers, symbols or other characters used to gain access to a computer, computer system, network, file, program, or function. A password helps ensure that only authorized users access the computer, computer system, network, file, program or function.

Committee Comment

This definition is adapted from different sources -- The New Oxford American Dictionary, The Oxford English Dictionary, the online glossary of computer and internet terms, http://www.sharpened.net/glossary and the online dictionary of technology terms, www.techdictionary.com.

This definition is applicable to offenses under 18 U.S.C. §1030(a)(6).

18 U.S.C. § 1701 OBSTRUCTION OF MAILS

Committee Comment

Because there is no present statutory or constitutional right to a jury trial under this section, the Committee has not drafted a jury instruction to cover this section.

18 U.S.C. § 2113(A) BANK ROBBERY – ELEMENTS

To sustain the charge of bank robbery, the government must prove the following:

1. The defendant [took; attempted to take] from the person or presence of another [money; property; specific thing of value] belonging to or in the care, custody, control, management or possession of (here name bank, savings and loan, or credit union named in the indictment);

2. At the time the defendant [took; attempted to take] the [money; property; specific thing of value], the deposits of the [bank; savings and loan; credit union] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

3. The defendant acted to take such [money; property; specific thing of value] by force and violence, or by intimidation.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the law of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

A conviction under the first paragraph of § 2113(a) requires proof that the defendant actually used force and violence or intimidation; an attempt to use force and violence or intimidation will not suffice. *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (concluding that "the 'attempt' language relates only to the taking and not to the intimidation"); *see also United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004).

The statute, § 2113(a) 1, includes a means of violation for whoever "obtains or attempts to obtain by extortion . . . ." If a defendant is charged with this means of violating the statute, the instruction should be adapted accordingly.

18 U.S.C. § 2113(A) DEFINITION OF "INTIMIDATION"

"Intimidation" means to say or do something that would make a reasonable person feel threatened under the circumstances.

Committee Comment

The jury need not find that the target of intimidation was actually afraid; rather, the element is satisfied if an ordinary person would reasonably feel threatened under the circumstances. *United States v. Hill*, 187 F.3d 698, 702 (7th Cir. 1999); *see also United States v. Thornton*, 539 F.3d 741, 748 (7th Cir. 2008); *United States v. Burnley*, 533 F.3d 901, 903 (7th Cir. 2008). Moreover, a defendant need not brandish a weapon or make express threats of injury. *See United States v. Clark*, 227 F.3d 771, 774 75 (7th Cir. 2000); *Hill*, 187 F.3d at 701 02.

The jury need not agree as to the means employed to place such a reasonable person in fear. *See Richardson v. United States*, 526 U.S. 813, 817 (1999). For example, some jurors may conclude that the defendant intimidated by brandishing a weapon while others conclude that intimidation was established without traditional overt gestures.

18 U.S.C. § 2113(A) ENTERING TO COMMIT BANK ROBBERY OR ANOTHER FELONY – ELEMENTS

To sustain the charge of entering to commit bank robbery or another felony, the government must prove the following:

1. The defendant [entered; attempted to enter] (here name bank, savings and loan, credit union, or building used in whole or in part as a bank, savings and loan, or credit union named in the indictment);

2. The defendant [entered; attempted to enter] the [bank; savings and loan; credit union; building] with the intent to commit a felony or larceny affecting such [bank; savings and loan; credit union; building]; and

3. At the time the defendant [entered; attempted to enter] the [bank; savings and loan; credit union; building], the deposits of the [bank; savings and loan; credit union; building] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The intended felony or larceny need not be accomplished. *See Brunjes v. United States*, 329 F.2d 339, 341 (7th Cir. 1964); *United States v. Goudy*, 792 F.2d 664, 677 (7th Cir. 1986).

Larceny is defined for purposes of § 2113(a) as the conduct proscribed in § 2113(b). *See Jerome v. United States*, 318 U.S. 101, 105-06 (1943). In cases charging the defendant with entering with intent to commit a larceny under § 2113(a), the jury should be instructed as to larceny in accordance with the following jury instruction for "Bank Theft—Elements."

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113(B) BANK THEFT – ELEMENTS

To sustain the charge of bank theft, the government must prove the following:

1. The defendant took and carried away [property; money; something of value] belonging to or in the [care; custody; control; management] of (here name bank, credit union, or savings and loan named in the indictment);

2. At the time the defendant took and carried away such [property; money; something of value], the deposits of the [bank; credit union; savings and loan] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration];

3. The defendant took and carried away such [property; money; thing of value] with the intent to steal; and,

4. Such [money; property; thing of value] exceeded $1,000 in value.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 2113(b) contains a lesser included misdemeanor where the value of the money or property does not exceed $1,000. The Committee has drafted this instruction to be used in felony cases. Where the crime charged is a misdemeanor, the fourth element of the instruction should read: "Fourth, such [money; property; thing of value] did not exceed $1,000 in value." If there is a real dispute as to whether the value of the money or property exceeded $1,000, the Committee recommends that two separate instructions be given as opposed to use of a special interrogatory.

The scope of 18 U.S.C. § 2113(b) is not limited to common law larceny. It also proscribes the crime of taking under false pretenses. *Bell v. United States*, 462 U.S. 356, 362 (1983). *See also United States v. Kucik*, 844 F.2d 493, 494 (7th Cir. 1988), *cert. denied*, 498 U.S. 1070 (1991).

The Supreme Court has held that § 2113(b) is not a lesser included offense of § 2113(a). *Carter v. United States*, 530 U.S. 255, 274 (2000).

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

18 U.S.C. § 2113(B) DEFINITION OF "STEAL"

"Steal" means to take with the intent to deprive the owner of the rights and benefits of ownership.

Committee Comment

"Steal" for the purposes of § 2113(b) means "felonious takings with intent to deprive the owner of rights and benefits of ownership." *United States v. Kucik*, 909 F.2d 206, 212 (7th Cir. 1990), *cert. denied*, 498 U.S. 1070 (1991); *United States v. Goudy*, 792 F.2d 664, 677 (7th Cir. 1986). *See also United States v. Guiffre*, 576 F.2d 126, 128 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978).

18 U.S.C. § 2113(C) POSSESSION OF STOLEN BANK MONEY OR PROPERTY – ELEMENTS

To sustain the charge of possession of stolen bank money or property, the government must prove the following:

1. The defendant [received; possessed; concealed; stored; bartered; sold; disposed of] any [property; money; thing of value] having a value in excess of $1,000;

2. The [property; money; thing of value] was taken from (here name bank, savings and loan, or credit union described in the indictment);

3. At the time the property was taken, the deposits of the [bank; savings and loan; credit union] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration]; and

4. The defendant knew that the [money; property; thing of value] was stolen when he [possessed; received; concealed; stored; bartered; sold; disposed of] it.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Section 2113(c) contains a lesser included misdemeanor offense where the value of the money or property does not exceed $1,000. The Committee has drafted this instruction to be used in felony cases. Where the crime charged is a misdemeanor, the first element of the instruction should read: "First, the defendant [received; possessed; concealed; stored; bartered; sold; disposed of; property; money; a thing of value] having a value of $1,000 or less." If there is a real dispute as to whether the value of the money or property exceeds $1,000, the Committee recommends that two separate instructions be given as opposed to use of a special interrogatory.

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The defendant need not know the exact bank robbed or that the bank was FDIC insured in order to satisfy the knowledge element. It is sufficient that the defendant knew he was possessing, concealing, or disposing of money stolen from a banking institution. *United States v. Kaplan*, 586 F.2d 980, 982 (2d Cir. 1978); *United States v. Whitney*, 425 F.2d 169, 171 (8th Cir. 1970); *United States v. Bolin*, 423 F.2d 834, 836 (9th Cir.), *cert. denied*, 398 U.S. 954 (1970); *Nelson v. United States*, 415 F.2d 483, 486 (5th Cir. 1969).

There is a conflict between the circuits as to whether punishment under Section 2113(c) is measured by the value of the property received by the defendant or by the value of the property taken by the thief. In one circuit, the degree of punishment is determined by the value of the stolen property received or possessed by the defendant. *United States v. Evans*, 446 F.2d 998, 1001 (8th Cir. 1971). The predominant view allocates punishment according to the amount stolen from the bank. *See United States v. Ross*, 286 F.3d 1307 (11th Cir.), *cert. denied*, 537 U.S. 893 (2002); *United States v. Bolin*, 423 F.2d 834, 835 (9th Cir.), *cert. denied*, 398 U.S. 954 (1970); *United States v. Wright*, 540 F.2d 1247, 1248 (4th Cir. 1976), *cert. denied*, 429 U.S. 1046 (1977); *United States v. McKenzie*, 441 F. Supp. 244, 247 (E.D. Pa. 1977), *aff'd without op.*, 557 F.2d 729 (3d Cir. 1978), *cert. denied*, 439 U.S. 855 (1978). Under this majority view, the defendant possessing under $100 of the stolen money need not have knowledge that over $100 was stolen in order to be punished as a felon under Section 2113(b). The Seventh Circuit apparently agrees with the majority view. It cited *Bolin*, *supra*, with approval, stating: "The purpose behind statutes penalizing the knowing receipt of stolen goods is not only to discourage the actual receipt, but also to discourage the initial taking that the receipt encourages." *United States v. Gardner*, 516 F.2d 334, 349 (7th Cir.), *cert. denied*, 423 U.S. 861 (1975).

18 U.S.C. § 2113(D) ARMED BANK ROBBERY – ELEMENTS

To sustain the charge of armed bank robbery, the government must prove the following:

1. The defendant took or attempted to take, from the person or presence of another [money; property; a thing of value] belonging to or in the [care; custody; control; management; possession] of (here name bank, savings and loan, or credit union named in the indictment);

2. At the time the defendant [took; attempted to take] the [money; property; thing of value], the deposits of the [bank; savings and loan; credit union] were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration];

3. The defendant took or attempted to take such [money; property; thing of value] by means of force or violence, or by means of intimidation; and

4. The defendant assaulted or put in jeopardy the life of (here name person(s) named in the indictment) by the use of a dangerous weapon or device, while committing or attempting to commit the theft or burglary.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

The phrase, "use of a dangerous weapon or device" modifies both the "assault" and the "jeopardy" portions of § 2113(d). *Simpson v. United States*, 435 U.S. 6, 11 n.6 (1978). If only the latter was modified, the "assault" would be equated with the "force or violence" aspect of § 2113(a) so as to justify the additional five year penalty of § 2113(d). When considering whether the defendant "assaulted" someone by the use

of a dangerous weapon or device, the jury should consider the reasonable fears of the victims. *United States v. Simmons*, 581 F.3d 582, 586 (7th Cir. 2009); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996).

For a definition of "intimidation" see the instruction defining that term under § 2113(a) on page.

A defendant may be sentenced to a consecutive term pursuant to § 924(c) for using a firearm in a bank robbery in addition to the extra five years authorized under § 2113(d). *United States v. Gonzales*, 520 U.S. 1, 10 11 (1997); *United States v. Loniello*, 610 F.3d 488, 495 (7th Cir. 2010); *United State v. Harris*, 832 F.2d 88 (7th Cir. 1987).

18 U.S.C. § 2113(D) DEFINITION OF "ASSAULT"

"Assault" means to intentionally attempt or threaten to inflict bodily injury upon another person with the apparent and present ability to cause such injury that creates in the victim a reasonable fear or apprehension of bodily harm. An assault may be committed without actually touching, striking, or injuring the other person.

Committee Comment

See, e.g., United States v. Vallery, 437 F.3d 626, 631 (7th Cir. 2006); *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996); *United States v. Rizzo*, 400 F.2d 400, 402-03 (7th Cir. 1969).

18 U.S.C. § 2113(D) DEFINITION OF "PUT IN JEOPARDY THE LIFE OF ANOTHER PERSON"

"Put in jeopardy the life of any person" means to knowingly do an act which exposes another person to risk of death. In considering this element, you must focus on the actual risk of death created by the use of the dangerous weapon or device. This risk might include direct risk to bank employees and indirect risk through a violent response by a customer or the police.

Committee Comment

In *United States v. Smith*, 103 F.3d 600, 605 (7th Cir. 1996), the Seventh Circuit reviewed the "put in jeopardy" language and concluded that the focus of the analysis should be on the actual risk created by the robber's use of a dangerous weapon. See also *United States v. Simmons*, 581 F.3d 582, 586 (7th Cir. 2009).

18 U.S.C. § 2113(D) DEFINITION OF "DANGEROUS WEAPON OR DEVICE"

A "dangerous weapon or device" means any object that can be used to inflict severe bodily harm or injury. The object need not actually be capable of inflicting harm or injury. Rather, an object is a dangerous weapon or device if it, or the manner in which it is used, would cause fear in the average person.

Committee Comment

See McLaughlin v. United States, 476 U.S. 16, 17-18 (1986) (holding that an unloaded handgun is a "dangerous weapon" within the meaning of § 2113(d) because "a gun is typically and characteristically dangerous;" "the display of a gun instills fear in the average citizen," consequently "it creates an immediate danger that a violent response will ensue"; and "a gun can cause harm when used as a bludgeon"); *United States v. Beckett*, 208 F.3d 140, 152 (3d Cir. 2000) (holding hoax bombs qualified as dangerous weapons under § 2113(d)); *see also United States v. Woods*, 556 F.3d 616, 623 (7th Cir. 2009) (relying on *McLaughlin* and concluding that BB guns qualify as dangerous weapons under U.S.S.G. § 2B3.1(b)(2)(E)); *United States v. Gometz*, 879 F.2d 256, 259 (7th Cir. 1989) (applying *McLaughlin's* logic to § 111 which contains language identical to § 2113).

18 U.S.C. § 2113(E) KIDNAPPING OR MURDER DURING A BANK ROBBERY – ELEMENTS

To sustain the charge of [kidnapping; murder] during a bank robbery, the government must prove the following:

1. The defendant [killed (specify person(s) named in the indictment); forced (specify person(s) named in the indictment) to accompany the defendant without the consent of (specify person(s) named in the indictment)];

2. The defendant performed such act or acts during the course of [committing any offense defined in 18 U.S.C. § 2113; avoiding or attempting to avoid apprehension for the commission of such offense; freeing himself or attempting to free himself from arrest or confinement for such offense]; and

4. At the time the defendant acted, the deposits of (here name bank, credit union, or savings and loan, named in the indictment) were insured by the [Federal Deposit Insurance Corporation; Federal Savings and Loan Insurance Corporation; National Credit Union Administration].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute includes "any bank operating under the laws of the United States" regardless of the status of insurance. There are such banks, and the instruction should be tailored to the situation, if appropriate.

To satisfy the "forced accompaniment" aspect, a defendant need not make a victim leave the bank, *see, e.g., United States v. Davis*, 48 F.3d 277, 279 (7th Cir. 1995) (evidence that defendant forced credit union employee at gunpoint to go from the parking lot into the credit union satisfied forced accompaniment requirement); *United States v. Turner*, 389 F.3d 111, 119-20 (4th Cir. 2004) (evidence that the defendant forced bank manager to accompany him into the vault was sufficient to convict under § 2133(e)), *cert. denied*, 544 U.S. 935 (2005), and the circuits are split as to what establishes "forced accompaniment."

The clear majority, including the Seventh Circuit, rejects the contention that § 2113(e) requires transportation similar to federal or common law kidnapping. *Davis*, 48 F.3d at 279 ("[N]othing in the text of the statute . . . requires that the elements of a federal kidnapping or any other crime be satisfied. The statute simply requires what it says: forced accompaniment without consent."); *United States v. Strobehn*, 421 F.3d 1017, 1020 (9th Cir. 2005), *cert. denied*, 547 U.S. 1005 (2006); *Turner*, 389 F.3d at 119-20; *United States v. Reed*, 26 F.3d 523, 527-28 (5th Cir. 1994), *cert. denied*, 513 U.S. 1157 (1995); *United States v. Bauer*, 956 F.2d 239, 241-42 (11th Cir. 1992), *cert. denied*, 506 U.S. 976 (1992). *But see United States v. Marx*, 485 F.2d 1179, 1186 (10th Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

18 U.S.C. § 2114(A) ASSAULT WITH INTENT TO ROB MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES – ELEMENTS

To sustain the charge of assault with intent to rob [mail matter; money of the United States; property of the United States], the government must prove the following:

1. The defendant assaulted the person of another having lawful [charge; control; custody] of [mail matter; money of the United States; property of the United States]; and

2. While committing the assault the defendant intended to rob or steal such property.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000), the court held that a conviction under the statute does not require proof that defendant knew that the property belonged to the United States; the property ownership provision was merely a jurisdictional requirement. *See also United States v. Roundtree*, 527 F.2d 16, 18-19 (8th Cir. 1975) (holding that a conviction under 18 U.S.C. § 2112 does not require proof that the defendant knew that the money he had stolen belonged to the United States); *United States v. Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971) (holding that an analogous provision, 18 U.S.C. § 641, which punishes theft, embezzlement, or knowing conversion of personal property belonging to the United States, does not require proof of knowledge that the property belongs to the United States to sustain a conviction).

For a definition of "assault" see the jury instruction defining that term as used in the bank robbery statute, 18 U.S.C. § 2113, on page ___.

18 U.S.C. § 2114(A) ROBBERY OR ATTEMPTED ROBBERY OF MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES – ELEMENTS

To sustain the charge of [robbery; attempted robbery] of [mail matter; money of the United States; property of the United States], the government must prove the following:

1. The defendant took [mail matter; money of the United States; property of the United States] from the person or presence of another having lawful [charge; control; custody] of such property; and

2. The defendant took such property by means of force and violence, or by means of intimidation.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee has drafted this instruction for cases where the defendant took mail matter, money or other property of the United States. The statute applies to attempts to rob as well. Where the charge is that the defendant attempted to rob, "attempted to take" should be substituted for "take" in the first and second elements.

In *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000), the court held that a conviction under the statute does not require proof that defendant knew that the property belonged to the United States; the property ownership provision was merely a jurisdictional requirement. *See also United States v. Roundtree*, 527 F.2d 16, 18-19 (8th Cir. 1975) (holding that a conviction under 18 U.S.C. § 2112 does not require proof that the defendant knew that the money he had stolen belonged to the United States); *United States v. Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971) (holding that an analogous provision, 18 U.S.C. § 641, which punishes theft, embezzlement, or knowing conversion of personal property belonging to the United States, does not require proof of knowledge that the property belongs to the United States to sustain a conviction).

The possession of mail matter or any money or other property of the United States by the person whom the defendant attempts to rob is an essential element of § 2114(a). *See United States v. Salgado*, 519 F.3d 411, 413-14 (7th Cir. 2008). *See also United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (holding a conviction for attempted bank robbery under 18 U.S.C. § 2113 requires proof of actual force and violence or intimidation).

For a definition of "intimidation," see the instruction defining that term for purposes of 18 U.S.C. § 2113(a) on page __ .

18 U.S.C. § 2114(A) WOUNDING OR PUTTING A LIFE IN JEOPARDY DURING A ROBBERY OR ATTEMPTED ROBBERY OF MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES – ELEMENTS

To sustain the charge of [wounding; putting a life in jeopardy] during a robbery; attempted robbery] of [mail matter; money of the United States; property of the United States], the government must prove the following:

1. The defendant took [mail matter; money of the United States; property of the United States] from the person or presence of (name of person having lawful [charge; control; custody] of such property);

2. The defendant took such property by means of force and violence, or by means of intimidation; and

3. The defendant [wounded (name person having [charge; control; custody] of such [mail matter; money of the United States; property of the United States]); put the life of (name of person who had [charge; control; custody] of such [mail matter; money of the United States; property of the United States])in jeopardy by use of a dangerous weapon].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The Committee has drafted this instruction for cases where the defendant took mail matter, money or other property of the United States, and in doing so, wounded a person who had charge, control or custody of the mail matter, etc. or put the life of that person in jeopardy by the use of a dangerous weapon. The statute applies to attempts to rob as well. Where the charge is that the defendant attempted to rob, "attempted to take" should be substituted for "took" in the first and second elements. Violations of this portion of § 2114(a) in an enhanced penalty, that is, imprisonment for up to 25 years.

In *United States v. Smithen*, 213 F.3d 1342, 1344 (11th Cir. 2000), the court held that a conviction under the statute does not require proof

that defendant knew that the property belonged to the United States; the property ownership provision was merely a jurisdictional requirement. *See also United States v. Roundtree*, 527 F.2d 16, 18-19 (8th Cir. 1975) (holding that a conviction under 18 U.S.C. § 2112 does not require proof that the defendant knew that the money he had stolen belonged to the United States); *United States v. Boyd*, 446 F.2d 1267, 1274 (5th Cir. 1971) (holding that an analogous provision, 18 U.S.C. § 641, which punishes theft, embezzlement, or knowing conversion of personal property belonging to the United States, does not require proof of knowledge that the property belongs to the United States to sustain a conviction).

The possession of mail matter or any money or other property of the United States by the person whom the defendant attempts to rob is an essential element of § 2114(a). *See United States v. Salgado*, 519 F.3d 411, 413-14 (7th Cir. 2008). *See also United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (holding a conviction for attempted bank robbery under 18 U.S.C. § 2113 requires proof of actual force and violence or intimidation).

For a definition of "intimidation," see the instruction defining that term for purposes of 18 U.S.C. § 2113(a) on page __ .

18 U.S.C. § 2114(B) RECEIPT, POSSESSION, CONCEALMENT, OR DISPOSAL OF STOLEN MAIL MATTER, MONEY, OR OTHER PROPERTY OF THE UNITED STATES – ELEMENTS

To sustain the charge of [receipt; possession; concealment; disposal] of stolen [mail matter; money of the United States; property of the United States], the government must prove the following:

1. The defendant [received; possessed; concealed; disposed of] any [mail matter; money of the United States; property of the United States];

2. Such property was obtained by [assault; robbery]; and

3. The defendant had knowledge that the [mail matter; money of the United States; property of the United States] had been obtained unlawfully.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2312 TRANSPORTATION OF STOLEN VEHICLE – ELEMENTS

To sustain the charge of transporting a stolen [car; truck; motorcycle; airplane; helicopter] in [interstate; foreign] commerce, the government must prove the following:

1. The (here describe vehicle charged in the indictment) was stolen;

2. The defendant transported the (here describe vehicle charged in the indictment) in [interstate; foreign] commerce; and

3. The defendant knew at the time he transported the (here describe vehicle charged in the indictment) that it was stolen.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The statute uses the terms "motor vehicle," "vessel," and "aircraft" in describing the articles to which the transportation prohibition pertains. Rather than using the statutory terms, we suggest using a generic description of the vehicle which is the subject of the prosecution.

To constitute a "motor vehicle," the vehicle must be self-propelled. 18 U.S.C. § 2311. Thus, a trailer, without the capability of self-propulsion and absent a tractor to pull it, would not fall within the proscription of the transportation prohibition. In these instances, however, the trailer could constitute a "good" for the purpose of 18 U.S.C. § 2315. On the other hand, if the trailer were connected to a tractor or other vehicle capable of self-propulsion, both vehicles would be subject to a single charge of unlawful transportation. *United States v. Kidding*, 560 F.2d 1303, 1308 (7th Cir.), *cert. denied sub nom. Brown v. United States*, 434 U.S. 872 (1977).

To fall within the meaning of the term "aircraft," the vehicle must be capable of air navigation. 18 U.S.C. § 2311.

The statute also uses the phrase “transports in interstate or foreign commerce” and the term “stolen.” For a definition of “interstate or foreign commerce” see the definition provided at page ___. For a definition of “stolen” see the following definition at page ___.

18 U.S.C. § 2312 DEFINITION OF "STOLEN"

An object is "stolen" if it was taken with the intent to deprive the owner of his rights and benefits of ownership. [The taking may be accomplished through the seizure of the (here describe vehicle) or through the use of false pretenses, trickery, or misrepresentation in obtaining possession.] [It is not necessary, however, that the taking be initially unlawful. Even if possession is first acquired lawfully, the taking falls within the meaning of "stolen" if the defendant thereafter forms the intent to deprive the owner of his ownership interests.]

Committee Comment

The meaning of the word "stolen" was, in part, resolved by the United States Supreme Court in *United States v. Turley*, 352 U.S. 407, 417 (1957). There, the Court found that the term included all takings performed with the intent to deprive the owner of the rights and benefits of ownership regardless of whether the initial taking was authorized. Thus, the statute proscribes the transportation of a vehicle in interstate or foreign commerce which initially was obtained by lawful means, such as through a rental contract, and thereafter converted entirely to the defendant's use without the permission of the owner, *United States v. Baker*, 429 F.2d 1344, 1346 (7th Cir. 1970), or which was obtained unlawfully through the use of a bogus check or stolen credit card in purportedly purchasing or renting the vehicle, *United States v. Ellis*, 428 F.2d 818, 820 (8th Cir. 1970).

The taking does not need to be done with the intent to permanently deprive the owner of the vehicle. *United States v. Bruton*, 414 F.2d 905, 908 (8th Cir. 1969). It is enough that the defendant intends to use the vehicle as long as it serves his convenience and thereafter intends to abandon it or dispose of it. *United States v. Dillinger*, 341 F.2d 696, 697-98 (4th Cir. 1965). *See also United States v. Epperson*, 451 F.2d 178, 179 (9th Cir. 1971) (intent to permanently deprive owner of ownership interest not an element of the offense); *United States v. Berlin*, 472 F.2d 13, 14 n.2 (9th Cir. 1973) (defendant must have intent to permanently or temporarily deprive the owner of the rights and benefits of ownership).

18 U.S.C. § 2313 SALE OR RECEIPT OF STOLEN VEHICLES – ELEMENTS

To sustain the charge of [selling; possessing; receiving; concealing; disposing of] a stolen [car; truck; motorcycle; airplane; helicopter] in [interstate; foreign] commerce, the government must prove the following:

1. The (here describe vehicle charged in the indictment) was stolen;

2. After the (here describe vehicle charged in the indictment) was stolen, it was moved across a [state line; United States border];

3. The defendant [sold; possessed; received; concealed; disposed of] the (here describe vehicle charged in the indictment); and

4. At the time the defendant [sold; possessed; received; concealed; disposed of] the (here describe vehicle charged in the indictment), the defendant knew that it had been stolen.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See Comment to 18 U.S.C. § 2312, *supra*.

18 U.S.C. § 2314 TRANSPORTATION OF STOLEN OR CONVERTED GOODS OR GOODS TAKEN BY FRAUD – ELEMENTS)

To sustain the charge of transportation of goods [stolen; converted; taken by fraud], the government must prove the following:

1. The defendant [caused to be; transported; transmitted; transferred] (identify goods, wares, merchandise, securities, or money charged in the indictment) in [interstate; foreign] commerce;

2. The (identify goods, wares, etc. charged in the indictment) had a value of at least $5,000;

3. The (identify goods, wares, etc. charged in the indictment) had been [stolen; converted; taken by fraud]; and

4. At the time the defendant [caused to be; transported; transmitted; transferred] (identify goods, wares, etc. charged in the indictment), he; knew they had been [stolen; converted; taken by fraud].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the first paragraph of 18 U.S.C. § 2314.

For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___.

18 U.S.C. § 2314 INTERSTATE TRAVEL TO EXECUTE OR CONCEAL FRAUD – ELEMENTS

To sustain the charge of [transporting a person; causing a person to be transported; inducing a person to travel or be transported] in interstate commerce in the execution or concealment of a scheme or artifice to defraud, the government must prove the following:

1. The defendant devised or intended to devise a scheme to [defraud; obtain money by false or fraudulent pretenses, representations, or promises] as charged in the indictment;

2. The defendant [transported a person; caused a person to be transported; induced a person to travel or be transported] in [interstate; foreign] commerce;

3. The defendant acted in the execution or concealment of the scheme or artifice to defraud that person of money or property; and

4. The money or property had a value of $5,000 or more.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the second paragraph of 18 U.S.C. § 2314.

It is suggested that the name of the person or persons transported, caused to be transported or induced to travel or be transported referred to in the indictment and proved at trial be listed in the second element. The second paragraph of § 2314 requires that the person traveling (or being transported) be the fraud victim referred to in the third element.

For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___.

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF FALSELY MADE, FORGED, ALTERED OR COUNTERFEITED SECURITIES OR TAX STAMPS – ELEMENTS

To sustain the charge of interstate transportation of [falsely made; forged; altered; counterfeited] securities or tax stamps, the government must prove the following:

1. The defendant [transported; caused to be transported], in [interstate; foreign] commerce, the [securities; tax stamps] described in the indictment;

2. The [securities; tax stamps] were [falsely made; forged; altered; counterfeited];

3. At the time the defendant [transported; caused to be transported] the [securities; tax stamps], he; knew they were [falsely made; forged; altered; counterfeited]; and

4. The defendant acted with unlawful or fraudulent intent.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the third paragraph of 18 U.S.C. § 2314.

In *McElroy v. United States*, 455 U.S. 642 (1982), the Supreme Court held that this statute does not require proof that the forgery occurred before the securities were transported across state lines. The Court's holding was based on a reading of the statutory phrase "interstate commerce" to include transportation within the state or destination if such transportation is part of a movement that began out of state. Accordingly, in some cases, an instruction incorporating the Court's holding in *McElroy* will be appropriate.

The elements of this offense do not require proof that the defendant knew the securities moved in interstate commerce. *See, e.g., United States v. Squires*, 581 F.2d 408, 410 (4th Cir. 1978). Nor does the statute require proof that the interstate transportation was for the

purpose of executing the scheme to defraud. *See, e.g., United States v. Gundersen*, 518 F.2d 960, 961 (9th Cir. 1975); *United States v. Vaccaro*, 816 F.2d 443, 455 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987).

For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___.

The statute does not define the word "unlawful" in the fourth element. Nor have appellate cases interpreted the meaning of it or a context in which it would be properly used in the instruction.

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF A TRAVELER'S CHECK BEARING A FORGED COUNTERSIGNATURE – ELEMENTS

To sustain the charge of interstate transportation of a traveler's check bearing a forged countersignature, the government must prove the following:

1. The defendant [transported; caused to be transported], in [interstate; foreign] commerce, the traveler's check described in the indictment;

2. The traveler's check bore a forged countersignature;

3. At the time the defendant [transported; caused to be transported], the traveler's check, [he; she] knew it bore a forged countersignature; and

4. The defendant acted with unlawful or fraudulent intent.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the fourth paragraph of 18 U.S.C. § 2314.

For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___.

In the fourth element, the Committee has been unable to ascertain the meaning of the statutory term "unlawful" or a context in which it would be properly used in the instruction.

18 U.S.C. § 2314 INTERSTATE TRANSPORTATION OF TOOLS USED IN MAKING, FORGING, ALTERING, OR COUNTERFEITING ANY SECURITY OR TAX STAMPS – ELEMENTS

To sustain the charge of transportation of any [tool; implement; thing used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security, the government must prove the following:

1. The defendant [transported; caused to be transported] the [tool; implement; item described in the indictment] in [interstate; foreign] commerce;

2. At the time the defendant transported the [tool; implement; item described in the indictment], it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps, or any part thereof;

3. At the time the defendant transported the [tool; implement; item described in the indictment], the defendant knew that it could be [used; fitted for use] in [falsely making; forging; altering; counterfeiting] any security or tax stamps or any part thereof; and

4. The defendant acted with unlawful or fraudulent intent.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the fifth paragraph of 18 U.S.C. § 2314.

For a definition of "interstate or foreign commerce" see Instruction XX regarding that term as used in 18 U.S.C. § 1028 on page ___.

18 U.S.C. § 2315 RECEIPT OF STOLEN PROPERTY – ELEMENTS

To sustain the charge of [receiving; possessing; concealing; storing; bartering; selling; disposing of] stolen property, the government must prove the following:

1. The defendant [received; possessed; concealed; stored; bartered; sold; disposed of] the property described in the indictment;

2. The property had been [stolen; unlawfully converted; unlawfully taken] and the defendant knew the property had been [stolen; unlawfully converted; unlawfully taken];

3. After the property was [stolen; unlawfully converted; unlawfully taken] it was moved across the boundary line of [a state; the United States]; and

4. The property had a value of $5,000 or more.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the first part of the first paragraph of 18 U.S.C. § 2315.

The third element, that the property "moved across the boundary line of the United States or a State" is found only in the first paragraph of 18 U.S.C. § 2315.

18 U.S.C. § 2315 RECEIPT OF COUNTERFEIT SECURITIES OR TAX STAMPS – ELEMENTS

To sustain the charge of [receiving; possessing; concealing; storing; bartering; selling; disposing of; pledging as security for a loan; accepting as security for a loan], in [interstate; foreign] commerce, any [falsely made; forged; altered; counterfeited; securities; tax stamps], the government must prove the following:

1. The defendant [received; possessed; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan; securities; tax stamps];

2. The [securities; tax stamps] had been [falsely made; forged; altered; counterfeited];

3. At the time the [securities; tax stamps] were [received; possessed; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan], he knew the [securities; tax stamps] had been [falsely made; forged; altered; counterfeited]; and

4. At the time the [securities; tax stamps] were [received; concealed; stored; bartered; sold; disposed of; pledged as security for a loan; accepted as security for a loan], they were moving in, were a part of, or constituted [interstate; foreign] commerce.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction is for use when the defendant has been charged with the offense set out in the second paragraph of 18 U.S.C. § 2315.

For a definition of "interstate or foreign commerce" see the following instruction.

18 U.S.C. § 2315 DEFINITION OF "INTERSTATE AND FOREIGN COMMERCE"

The term [interstate; foreign] commerce means the movement across [state; territorial] lines, including any movement before or after the crossing of [state; territorial] lines which constitutes a part of the [interstate; foreign] travel. [Property that was [received; concealed; stored; bartered; sold; disposed of] a period of time after it crossed state lines still may constitute interstate commerce if the [receipt; concealment; storage; barter; sale; disposition] is a continuation of the movement that began out of state.]

26 U.S.C. § 5845 DEFINITIONS OF FIREARM-RELATED TERMS

Committee Comment

The terms "firearm," "machinegun," "rifle," shotgun," "any other weapon," "destructive device," "antique firearm," "unserviceable firearm," "make," "transfer," "dealer," "importer," and "manufacturer" are defined in 26 U.S.C. § 5845. The definitions of those terms for the jury should, if necessary, be taken from the statute.

26 U.S.C. § 5861(A) FAILURE TO PAY TAX OR REGISTER – ELEMENTS

To sustain the charge of engaging as a [manufacturer of; importer of; dealer in] firearms [without having paid the special tax; without having registered] as required by law, the government must prove the following:

1. The defendant was engaged in business as a [manufacturer of; importer of; dealer in] firearms; and

2. The defendant did so [without having first paid the special tax; without having registered] as required by law.

If you find from your consideration of all the evidence that the government proved both of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove either of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

26 U.S.C. § 5861(D) RECEIVING OR POSSESSING AN UNREGISTERED FIREARM – ELEMENTS

To sustain the charge of [receiving; possessing] a firearm which is not registered in the National Firearms Registration and Transfer Record, the government must prove the following:

1. The defendant knowingly [possessed; received] a firearm [as described in the indictment] that had (a) characteristic(s) which required it to be registered in the National Firearms Registration and Transfer Record, specifically, that it (list characteristic(s));

2. The defendant knew that the firearm had that/those characteristic(s); and

3. The firearm was not registered in the National Firearms Registration and Transfer Record.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The term "knowingly" is defined by Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

In the first element, the court should provide a list of all the characteristics in the appropriate statutory definition of the particular firearm or firearms which are the subject of the prosecution. These definitions are found at 26 U.S.C. § 5845. *See Staples v. United States*, 511 U.S. 600, 619 (1994) (§ 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the National Firearms Act); *United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996).

For purposes of the statute, the term "firearm" is defined by 26 U.S.C. § 5845(a).

26 U.S.C. § 5861(H) RECEIPT OR POSSESSION OF A FIREARM WITH AN OBLITERATED, REMOVED, CHANGED, OR ALTERED SERIAL NUMBER – ELEMENTS

To sustain the charge of unlawful [receipt; possession] of a firearm with a[n] [obliterated; removed; changed; altered] serial number, the government must prove the following:

1. The defendant knowingly [received; possessed] a firearm [as described in the indictment];

2. The firearm had a[n] [obliterated; removed; changed; altered] serial number; and

3. The defendant knew that the serial number had been [obliterated; removed; changed; altered].

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The third element of this instruction indicates that the government must prove that the defendant knew the serial number is obliterated, removed, changed, or altered. In *Staples v. United States*, 511 U.S. 600 (1994), the Court held that 26 U.S.C. § 5861(d) requires the government to prove that the defendant knew of the characteristics that brought his weapon within the statutory definition of a firearm. *Id.* at 602, 604, 609, 619. Specifically, the Court decided that the government had to prove that the defendant knew the weapon he possessed had automatic firing capability, which made it a "machinegun" within the meaning of the firearms statute. *Id.* at 602. The rifle at issue was manufactured as a semi automatic weapon (which is not a "firearm" within the scope of the National Firearms Act), but was modified to have automatic firing capability. *Id.* at 603. Although the Committee has found no authority deciding whether knowledge of the obliteration, removal, change or alteration is an element of a § 5861(h) offense, *Staples* may be read as requiring such knowledge. Thus, the Committee has included such knowledge as an element of the offense. The Eleventh Circuit pattern instruction also includes such a requirement, see Pattern Crim. Jury Instr. 11th Cir. 92.2 Possession of Firearm Having Altered Or Obliterated Serial Number—26 USC § 5861(h).

The term “knowingly” is defined by Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

For purposes of the statute, the term “firearm” is defined by 26 U.S.C. § 5845(a).

26 U.S.C. § 5861(J) TRANSPORTING, DELIVERING OR RECEIVING AN UNREGISTERED FIREARM – ELEMENTS

To sustain the charge of [transporting; delivering; receiving] an unregistered firearm, the government must prove the following:

1. The defendant knowingly [transported; delivered; received] a firearm [as described in the indictment] in interstate commerce that had (a) characteristic(s) which required it to be registered in the National Firearms Registration and Transfer Record, specifically, that it (list characteristic(s));

2. The firearm was unregistered; and

3. The defendant knew that the firearm had that/those characteristic(s) that caused it to be required to be registered.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these elements has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The term "knowingly" is defined by the Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX, see page ___.

In the first element, the court must provide a list of all the characteristics in the appropriate statutory definition of the particular firearm or firearms which are the subject of the prosecution. These definitions are found at 26 U.S.C. § 5845. *See Staples v. United States*, 511 U.S. 600, 619 (1994) (26 U.S.C. § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the National Firearms Act); *see also United States v. Meadows*, 91 F.3d 851 (7th Cir. 1996). While *Staples* involved a violation of § 5861(d), because § 5861(j) also requires proof that a firearm was unregistered, the Court's holding that the defendant have knowledge of the characteristics of the weapon that required it to be registered would appear to apply with equal force to a violation of this subsection.

While the term "interstate commerce" is not defined under § 5861(j), the definition set forth in 18 U.S.C. § 921(a)(2) may be instructive. For purposes of the statute, the term "firearm" is defined by 26 U.S.C. § 5845(a).

42 U.S.C. § 408(A)(3) MAKING OR CAUSING TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT FOR USE IN DETERMINING A FEDERAL BENEFIT – ELEMENTS

To sustain the charge of [making; causing to be made] a false statement or representation for use in determining federal benefits, the government must prove the following:

1. The defendant [made; caused to be made] the false statement or representation [as charged in the indictment];

2. The statement or representation was for use in determining the right to a federal benefit; and

3. The statement or representation was of a material fact.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

A fact is material for purposes of § 408(a)(3) if it has "a natural tendency to influence or was capable of influencing the government agency or official." *United States v. Phythian*, 529 F.3d 807, 813 (8th Cir. 2008) (quotation omitted). *See also United States v. Moore*, 446 F.3d 671, 681 (7th Cir. 2006) (defining "material statement" under 18 U.S.C. § 1001).

The statute does not appear to contain any mens rea requirement. The Eighth and Eleventh Circuits (and the Western District of Virginia, in the Fourth Circuit) have read a requirement into the statute that the defendant make the false statement with the "intent to deceive." *United States v. Henderson*, 416 F.3d 686, 692 (8th Cir. 2005); *United States v. Youngblood*, 263 Fed. Appx. 829, 831 (11th Cir. 2008) (unpublished); *United States v. Miller*, 621 F. Supp.2d 323, 333 (W.D. Va. 2009).

42 U.S.C. § 408(A)(7)(A) USE OF A FALSELY OBTAINED SOCIAL SECURITY NUMBER ELEMENTS

To sustain the charge of using a falsely obtained social security number, the government must prove the following:

1. The defendant willfully used for any purpose a social security account number assigned by the Commissioner of Social Security;

2. The social security account number was obtained based on false information provided to the Commissioner of Social Security by any person;

3. The defendant knew the social security account number he was using had been obtained based on false information; and

4. The defendant used the social security account number with the intent to deceive.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The inclusion of the term "willfully" in a jury instruction is generally frowned upon as a confusing term unless the statute at issue uses the word, see Pattern Criminal Federal Jury Instructions for the Seventh Circuit 4.09. Here, willfully is listed in the statute (along with knowingly and with intent to deceive) as part of the mens rea for the crime of using a falsely obtained social security number. All three terms overlap, but the proposed instruction attempts to separate each term so that a jury can give meaningful consideration to each as a conceptually distinct state of mind, thus giving effect to each word Congress used in the statute.

Pattern Criminal Federal Jury Instructions for the Seventh Circuit XX (defining the term "knowingly"), see page ___, should be given for this offense as well to define the term "knew" in the third element of the instruction.

Few cases in the Seventh Circuit or others have addressed the intent requirement of this statute, and those that have did not address

the way the three mens rea terms interact in the statute. *See United States v. Pryor*, 32 F.3d 1192, 1194 (7th Cir. 1994) (applying willfully, knowingly, and with intent to deceive only to the "use" of the fraudulent social security account number); *see also United States v. Rastegar*, 472 F.3d 1032, 1037 (8th Cir. 2007) (focusing on the intent to deceive prong of the analysis).

42 U.S.C. § 408(A)(7)(B) USE OF A FALSE SOCIAL SECURITY NUMBER – ELEMENTS

To sustain the charge of the use of a false social security number, the government must prove the following:

1. The defendant represented for any purpose a particular social security account number to be his [or another person's];

2. The representation was false; and

3. The defendant acted with intent to deceive.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Most of the cases that have reached the appellate level have involved a challenge to the "purpose" for which the social security number was used. Courts have unanimously held that the language "any other purpose" in the statute means exactly what it says. *See United States v. Johnson-Wilder*, 29 F.3d 1100, 1103 (7th Cir. 1994); *see also United States v. Herrera-Martinez*, 525 F.3d 60, 65-66 (1st Cir. 2008); *United States v. Barel*, 939 F.2d 26, 34 (3d Cir. 1991); *United States v. Holland*, 880 F.2d 1091, 1095 (9th Cir. 1989). The false representation need not be for the purpose of pecuniary gain. *Johnson-Wilder*, 29 F.3d at 1103.

While mere possession of a social security number cannot sustain a conviction under this section, *see United States v. Porter*, 409 F.3d 910, 916 (8th Cir. 2005), the Eighth Circuit found that at least in some cases possession of an official document with a false social security number is sufficient evidence for a jury to determine that the possessor misrepresented a number to be his. *United States v. Teitloff*, 55 F.3d 391, 394 (8th Cir. 1995).

The consent of the person to whom the social security number is actually assigned is not a defense to the crime of false use. *United States v. Soape*, 169 F.3d 257, 269 (5th Cir. 1999).

42 U.S.C. § 408(A)(7)(A) AND (B) DEFINITION OF "INTENT TO DECEIVE"

"Intent to deceive" means to act for the purpose of misleading someone. It is not necessary for the government to prove, however, that anyone was in fact misled or deceived.

Committee Comment

See United States v. Sirbel, 427 F.3d 1155, 1159-60 (8th Cir. 2005).

42 U.S.C. § 408(A)(7)(C) SOCIAL SECURITY CARD VIOLATIONS ELEMENTS

To sustain the charge of a violation of this statute regarding social security cards, the government must prove the following:

1. The defendant altered a social security card; and

2. The defendant did so knowingly.

If you find from your consideration of all the evidence that the government proved each of these elements beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that the government failed to prove any of these elements beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

There are four other ways by which a person may violate this statute. If one of the alternatives is relevant to the case on trial, one of the following should be substituted for the first element as appropriate:

[1. The defendant bought a card that [is; purports to be] a social security card; and]

- or -

[1. The defendant sold a card that [is; purports to be] a social security card; and]

- or -

[1. The defendant counterfeited a social security card; and]

- or -

[1. The defendant possessed a [counterfeit] social security card with intent to sell or alter it].

The First Circuit has held that social security cards that lack a name and number are not sufficiently complete to be "counterfeited" for purposes of this offense. *United States v. Gomes*, 969 F.2d 1290, 1294 (1st Cir. 1992).

42 U.S.C. § 408(A)(7)(C) DEFINITION OF "COUNTERFEIT"

"Counterfeit[ed]" means that the social security card bears [or was made to bear] such a likeness or resemblance to something genuine that it is calculated to deceive an honest, sensible, and unsuspecting person of ordinary observation and using care when dealing with an individual who is presumed to be honest and upright.

Committee Comment

See United States v. Brunson, 657 F.2d 10, 114 (7th Cir. 1981); *see also United States v. Gomes*, 969 F.2d 1290, 1293-94 (1st Cir. 1992).

18 U.S.C. § 2243(A) SEXUAL ABUSE OF MINOR – ELEMENTS

To sustain the charge of sexual abuse of a minor, the government must prove the following propositions:

First, that the defendant knowingly engaged in a sexual act with [name of victim];

Second, [name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

Third, [name of victim] was at least four years younger than the defendant.

Fourth, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2243(A), 2423(B) AND 2241(C) CROSSING STATE LINE WITH INTENT TO ENGAGE IN SEXUAL ACT WITH MINOR – ELEMENTS

To sustain the charge of interstate travel to sexually abuse a minor, the government must prove the following propositions:

First, that the defendant crossed a state line with intent to engage in a sexual act with [name of victim];

Second, [name of victim] had reached the age of twelve years but had not yet reached the age of sixteen years; and

Third, [name of victim] was at least four years younger than the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

It is not necessary for the government to prove that a criminal sexual act was the sole purpose for a defendant traveling from one state to another. A person may have more than one dominant purpose for traveling across a state line. *Compare United States v. Vang*, 128 F.3d 1065, 1070-72 (7th Cir. 1997) (interpreting 18 U.S.C. § 2423(b), the sex act must be a dominant purpose for travel) with *United States v. McGuire*, 627 F.3d 622 (7th Cir. 2010) (one purpose, among others, for travel must be to engage in the criminal sex act.)

18 U.S.C. § 2243(C)(1) DEFENSE OF REASONABLE BELIEF OF MINOR'S AGE

It is a defense to the charge of sexual abuse of a minor that the defendant reasonably believed that [name of victim] had attained the age of 16 years. The defendant has the burden of proving that it is more probably true than not true that he reasonably believed that [name of victim] had attained the age of 16 years.

If you find that the defendant reasonably believed that [name of victim] had attained the age of 16 years, you must find the defendant not guilty.

18 U.S.C. § 2243(B) SEXUAL ABUSE OF PERSON IN OFFICIAL DETENTION – ELEMENTS

To sustain the charge of sexual abuse of a ward, the government must prove the following propositions:

First, the defendant knowingly engaged in a sexual act with [name of victim];

Second, at the time, [name of victim] was in official detention at the [name of institution];

Third, at the time, [name of victim] was under the custodial, supervisory or disciplinary authority of the defendant.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2243(B) DEFINITION OF "OFFICIAL DETENTION"

As used in these instructions, the term "official detention" means detention [custody] by [under the direction of] a Federal officer or employee, following [arrest] [surrender in lieu of arrest] [a charge or conviction of an offense].

Committee Comment

The Committee has selected the most frequently charged types of "official detention." The statute contains a more exhaustive list which should be consulted in particular cases.

18 U.S.C. § 2244(A), 2242 ABUSIVE SEXUAL CONTACT – ELEMENTS

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, that the defendant knowingly [engaged in] [caused] sexual contact with [name of victim];

Second, that the defendant did so by [force] [threatening [name of victim]] [placing [name of victim] in fear]; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2244(A)(2) ABUSIVE SEXUAL CONTACT – INCAPACITATED VICTIM – ELEMENTS

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, that the defendant knowingly [engaged in] [caused] sexual contact with [name of victim];

Second, [name of victim] was [incapable of recognizing the nature of the conduct] [physically incapable of declining participation in that sexual contact] [physically incapable of communicating unwillingness to engage in that sexual act]; and

Third, that the defendant's actions took place [within the special maritime jurisdiction of the United States] [within the territorial jurisdiction of the United States] [in a Federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2244(B) ABUSIVE SEXUAL CONTACT WITHOUT PERMISSION – ELEMENTS

To sustain the charge of abusive sexual contact, the government must prove the following propositions:

First, the defendant knowingly had sexual contact with [name of victim] at [name of institution], and

Second, the sexual contact was without [name of victim]'s permission.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. § 2246(2) DEFINITION OF "SEXUAL ACT"

As used in these instructions, the term "sexual act" means

- [penetration, however slight, of the {vulva} {anus} by the penis]

- [contact between the mouth and the {penis} {vulva} {anus}]

- [penetration, however slight, of the {anal} {genital} opening of another by {a hand} {a finger} {any object} with an intent to abuse, humiliate, harass, or degrade, arouse or gratify the sexual desire of any person]

- [the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, or degrade, or arouse or gratify the sexual desire of any person].

18 U.S.C. § 2246(3) DEFINITION OF "SEXUAL CONTACT"

As used in these instructions, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, or degrade, or to arouse or gratify the sexual desire of any person.

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE – ELEMENTS

To sustain the charge in Count ___ that a [the] defendant engaged in a continuing criminal enterprise, the government must prove each of the following propositions beyond a reasonable doubt:

First, that the defendant committed a continuing series of at least three or more of the narcotics offenses alleged in Count ___;

Second, the defendant committed the offenses acting in concert with five or more other persons;

Third, the defendant acted as an organizer, supervisor or manager of those five or more other persons; and

Fourth, the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty on Count ___.

If, on the other hand, you find from your consideration of all of the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty on Count ___.

Committee Comment

See United States v. Gibbs, 61 F.3d 536, 537 (7th Cir. 1995); *United States v. Herrera-Rivera*, 25 F.3d 491, 498 (7th Cir. 1994); *Richardson v. United States*, 526 U.S. 813 (1999) (in a continuing criminal enterprise case, the jury must unanimously agree not only that the defendant committed a "continuing series of violations", but also about which specific violations make up that "continuing series.")

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE – CONTINUING SERIES OF OFFENSES

The narcotics offenses you may consider in determining whether the defendant committed a continuing series of at least three offenses include:

[List possible predicate offenses (including those charged in the indictment), e.g. distribution of a controlled substance, possession of a controlled substance with the intent to distribute, or use of telephones to facilitate the commission of a narcotics offense.]

In determining whether the defendant engaged in a continuing series of at least three narcotics offenses, you may consider the offenses alleged in the indictment [as well as other alleged offenses of these types.] You must find that the government has proved that the defendant committed any offense beyond a reasonable doubt in order to consider it to be part of a continuing series.

Committee Comment

See Garrett v. United States, 471 U.S. 773 (1985); *United States v. Baker*, 905 F.2d 1100, 1103 (7th Cir. 1990) (*United States v. Baker*, 905 F.2d 1100, 1103 (7th Cir. 1990) has been criticized in other circuits for holding that a drug conspiracy cannot be used as one of the series of three predicate offenses to a CCE. *E.g., United States v. Van Nguyen*,602 F.3d 886, 900 (8th Cir. 2010) (declined to follow Seventh Circuit's reasoning that defined a "series" as including only two offenses, none of which may be conspiracy. The *Nguyen* Court defined "series" as three predicate offenses); *United States v. Young*, 745 F.2d 733 (2nd Cir. 1984); *cf. United States v. Markowski*, 772 F.2d 358, 361 n.1 (7th Cir. 1985). Note that the Seventh Circuit, in accord with the majority of circuits that have considered the question, does not require unanimity on the jury's part as to which specific offenses make up the continuing series. *United States v. Canino*, 949 F.2d 928 (7th Cir. 1991); *but see United States v. Edmonds*, 80 F.3d 810 (3rd Cir. 1996) (en banc). The bracketed language should only be used if the indictment charges a continuing series of offenses consisting of specified acts, as opposed to a series of acts consisting of statutory categories of offenses such as "multiple acts of possession of controlled substances with intent to distribute and distribution of controlled substances."

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE – FIVE OR MORE PERSONS

If you find that the defendant committed a continuing series of narcotics offenses, you must also decide whether the defendant committed this series of offenses in concert with five or more persons whom he/she organized, supervised or managed. [Those persons do not have to be named in the indictment.]

In order to find that the defendant acted in concert with five or more persons, you must unanimously agree that the defendant organized, supervised or managed five or more persons in committing the series of offenses. However, you do not have to agree on the identity of five or more persons with whom the defendant acted. [You do not have to find that the five or more persons acted together at the same time, or that the defendant personally dealt with them, or that all five persons were present at the same time.] [It is not required that the defendant acted in concert with five or more persons in the commission of any single offense that is one of the series of offenses constituting the continuing criminal enterprise.] [You do not have to find that the defendant had the same relationship with each of the five or more persons.]

Committee Comment

See United States v. Gibbs, 61 F.3d 536, 538, 539 n.1 (7th Cir. 1995); *United States v. Bafia*, 949 F.2d 1465, 1470-71 (7th Cir. 1991); *United States v. Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). *Richardson v. United States*, 526 U.S. 813 (1999) (jury unanimity is probably not required as to the identity of the "five or more persons" supervised by the defendant pursuant to the statute because the "five or more persons" provision is "significantly different" from the "continuing series of violations" provision.) The bracketed instructions should be given only where the question addressed is raised.

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE – ORGANIZING, MANAGING, SUPERVISING

The terms "organizer," "supervisory position," and "any other position of management" are used in their ordinary meaning. As to each of the five or more people, the government must prove that the defendant organized or supervised or managed them in accomplishing the activities that contribute to the continuing enterprise.

The defendant need not have had personal contact with each of the five or more persons whom he organized, supervised or managed. [The defendant may still be considered an organizer, supervisor or manager even if he delegated the authority to personally hire those whom he is alleged to have organized, supervised or managed.]

Committee Comment

See United States v. Gibbs, 61 F.3d 536, 538 (7th Cir. 1995); *United States v. Mannino*, 635 F.2d 110, 116-17 (2nd Cir. 1980); *United States v. Ray*, 731 F.2d 1361, 1367 (9th Cir. 1984); *United States v. Dickey*, 736 F.2d 571, 587 (10th Cir. 1984); *United States v. Rhodes*, 779 F.2d 1019, 1026 (4th Cir. 1985).

21 U.S.C. § 848 CONTINUING CRIMINAL ENTERPRISE – SUBSTANTIAL INCOME OR RESOURCES

The term "substantial" means of real worth and importance, or of considerable value. The term "resources" includes money, drugs or other items of material value.

The element of "substantial income or resources" can be proved circumstantially. For example, evidence of substantial gross receipts, substantial gross income or expenditures, receipt or possession of a large amount of narcotics, a large cash flow, a substantial amount of money changing hands, or anticipated profits from future sales may be considered by you in determining whether defendant obtained "substantial income and resources" from the continuing criminal enterprise. [Substantial income or resources is not limited to substantial "net" income or profit.]

Committee Comment

See United States v. Herrera-Rivera, 25 F.3d 491, 499 (7th Cir. 1994); *United States v. Dickey*, 736 F.2d 571, 588 (10th Cir. 1984) (substantial gross receipts, gross income, or gross expenditures); *United States v. Graziano*, 710 F.2d 691, 698 (11th Cir. 1983) (receipt of narcotics constitutes income), *cert. denied*, 466 U.S. 937 (1984); *United States v. Chagra*, 669 F.2d 241, 257-58 (5th Cir.) ("accounts receivable" from drug transaction constitutes income; circumstantial evidence permissible; lavish personal expenditures with no legitimate source of income), *cert. denied*, 459 U.S. 846 (1982); *United States v. Thomas*, 632 F.2d 837, 847 (10th Cir.) (large cash flow), *cert. denied*, 449 U.S. 960 (1980); *United States v. Bolts*, 558 F.2d 316, 321 (5th Cir. 1977) (substantial amounts of money changing hands), *cert. denied*, 434 U.S. 930, 439 U.S. 898 (1978); *United States v. Jeffers*, 532 F.2d 1101, 1116-17 (7th Cir. 1976) (gross receipts), *rev'd in part on other grounds*, 432 U.S. 137 (1977).

18 U.S.C. § 401 CRIMINAL CONTEMPT

Committee Comment

Because of the paucity of jury trials brought under the statute, no pattern instruction is proposed. The Committee has not drafted an instruction for § 401 because so few jury trials occur under it. This is because judges may decide in advance of trial whether, upon conviction, they will impose a sentence of six months or less. Where the sentence to be imposed is less than six months, a jury trial is not required. *See generally Frank v. United States*, 395 U.S. 147, 148-150 (1969) ("Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as 'serious' or 'petty.' 18 U.S.C. §§ 401, 402. Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense. [Footnotes omitted])"; *Bloom v. Illinois*, 391 U.S. 194, 198 (1968) ("criminal contempt is a petty offense unless the punishment makes it a serious one"); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966); *United States v. Seale*, 461 F.2d 345, 352 (7th Cir. 1972) ("If the penalty actually imposed [for criminal contempt] exceeds six months' imprisonment, the maximum sentence for a 'petty offense' under 18 U.S.C. § 1, the contempt is serious, and a jury trial must be afforded")(citing *Frank* at 151, *Cheff* at 379-80).

For information about the elements required for conviction under 18 U.S.C. § 401(1), *see United States v. Seale*, 461 F.2d 345 (7th Cir. 1972); for 18 U.S.C. § 401(3), *see In re Betts*, 927 F.2d 983, 986 (7th Cir. 1991), *rev'd on other grounds*, *Betts v. United States*, 10 F.3d 1278 (7th Cir. 1993). For general information regarding 18 U.S.C. 401(2), *see Cammer v. United States*, 350 U.S. 399, 405-06 (1956).

18 U.S.C. § 402 CRIMINAL CONTEMPT

Committee Comment

Because of the paucity of jury trials brought under the statute, no pattern instruction is proposed. Although a jury trial is mandated for § 402 offenses (when the act or omission giving rise to the contempt charge also is itself a criminal offense) under 18 U.S.C. § 3691, the exceptions enumerated in § 3691 have the practical effect of sharply limiting the number of jury trials under § 402. The Committee therefore believes that an instruction for § 402 is unnecessary.

For judicial interpretation of 18 U.S.C. §§ 402 and 3691, *see United States v. Pyle*, 518 F. Supp. 139, 145-56 (E.D. Pa. 1981), *aff'd*, 722 F.2d 736 (3d Cir. 1983); *United States v. Wright*, 516 F. Supp. 1113 (E.D. Pa. 1981).

18 U.S.C. § 1952 INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES – ELEMENTS

To sustain the charge of interstate or foreign [travel; transportation] in aid of racketeering enterprises, the government must prove the following propositions:

First, the defendant traveled or caused another to travel in interstate or foreign commerce, or used or caused to be used a facility in interstate or foreign commerce, including the mail;

Second, the defendant did so with the intent to [distribute the proceeds of an unlawful activity; commit a crime of violence to further unlawful activity; promote, manage, establish, carry on an unlawful activity; facilitate the promotion, management, establishment or carrying on of an unlawful activity]; and,

Third, thereafter the defendant did [distribute or attempt to distribute the proceeds of an unlawful activity; commit or attempt to commit a crime of violence to further unlawful activity; promote, manage, establish, carry on an unlawful activity; attempt to promote, manage, establish, carry on an unlawful activity; facilitate the promotion, management, establishment, or carrying on of an unlawful activity; attempt to facilitate the promotion, management, or carrying on of an unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Facility is a broad term that can have many meanings. The most common 'facilities' are telephone systems, highways, banking systems, and the postal service. *United States v. Peskin*, 527 F.2d 71 (1975) (interstate transmission, deposit and clearance of checks of land development company considered use of interstate facilities); *United States v. Campione*, 942 F.2d 429 (7th Cir. 1991) (credit card charges authorized through interstate telephone calls considered 'interstate facility'); *United States v. Miller*, 379 F.2d 483 (7th Cir. 1967) (tickertape displaying baseball scores was transmitted from Illinois to Indiana on Western Union tickertape so that customers could check winning tickets in illegal baseball pool; this was sufficient use of interstate facility to satisfy the statute).

18 U.S.C. § 1952 INTERSTATE COMMERCE – DEFINITION

The term "interstate commerce" means travel between one state and another state or use of an interstate facility, including the mail.

The [interstate travel; use of an interstate facility] must relate significantly to the illegal activity charged in the indictment; that is, the relationship must be more than minimal or incidental. The [interstate travel; use of an interstate facility], however, need not be essential to the success of such illegal activity.

The defendant need not have contemplated or knowingly caused the [interstate travel; use of an interstate facility].

Committee Comment

To support a conviction under § 1952, interstate travel need not be indispensable to illegal activity, it is necessary only that such use facilitates illegal activity. *United States v. McNeal*, 77 F.3d 938, 944 (7th Cir. 1996). The defendants need not cross state lines personally to be liable under § 1952. *United States v. Shields*, 793 F.Supp. 768, 774-75 (N.D.Ill. 1991) (defendants guilty where FBI agents had to travel and engage in interstate commerce to attempt bribe of defendant judge), *aff'd*, 999 F.2d 1090 (7th Cir. 1993). For additional cases discussing § 1952, *see United States v. Altobella*, 442 F.2d 310,315 (7th Cir. 1971); *see United States v. Raineri*, 670 F.2d 702, 717 (7th Cir. 1982); and *United States v. McCormick*, 442 F.2d 316, 318 (7th Cir. 1971). For cases discussing § 2314, *see United States v. Beil*, 577 F.2d 1313, 1316, 1319-20 (5th Cir. 1978); *United States v. Kelly*, 569 F.2d 928, 934-35 (5th Cir.), *cert. denied*, 439 U.S. 829 (1978). The requirements of a significant relationship between the interstate commerce and the illegal activity apparently may not apply to statutes other than the Travel Act.

18 U.S.C. § 1952 DEFINITION OF UNLAWFUL ACTIVITY – BUSINESS ENTERPRISE

"Unlawful activity" means any business enterprise involving [gambling; liquor on which the federal excise tax has not been paid; narcotics or controlled substance; prostitution], in violation of the laws of the state in which they are committed or of the United States.

or

"Unlawful activity" means [extortion; bribery; arson], in violation of the laws of the state in which it is committed or of the United States.

Committee Comment

The first paragraph refers to a business enterprise involving the offenses listed, while the second paragraph refers to offenses that are not referred to in the statute as part of a business enterprise.

18 U.S.C. § 1952 DEFINITION OF UNLAWFUL BUSINESS ACTIVITY – CONTROLLED SUBSTANCES

I instruct you that (specify) is a controlled substance.

Committee Comment

The controlled substances within the purview of 18 U.S.C. § 1952 are those drugs, other substances or immediate precursors included in Schedule I, II, III, IV, or V, of 21 U.S.C. § 812(b). See 18 U.S.C. § 1952(b)(1) (1986).

18 U.S.C. § 1962(C) SUBSTANTIVE RACKETEERING – ELEMENTS

To prove the [a] defendant guilty of racketeering, as charged in Count ___, the government must prove the following propositions:

First, that [insert name] was an enterprise;

Second, that the defendant was associated with [or employed by] the enterprise;

Third, that the defendant knowingly conducted or participated in the conduct of the affairs of [insert name] through a pattern of racketeering activity as described in Count ___; and

Fourth, that the activities of [insert name] affected interstate commerce.

[Fifth, that the commission of at least one of the racketeering acts described in Count ___ occurred on or after {five years prior to the return of the indictment}.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the [a] defendant, you should find the [that] defendant guilty of Count ___.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the [a] defendant, then you should find the [that] defendant not guilty of Count ___.

18 U.S.C. § 1962(C) PATTERN REQUIREMENT – SUBSTANTIVE RACKETEERING

In order to find a "pattern of racketeering activity" for purposes of Count ___, you must find beyond a reasonable doubt that the defendant committed [or caused another person to commit] at least two racketeering acts described in Count ___, and that those acts were in some way related to each other and that there was continuity between them[, and that they were separate acts].

Although a pattern of racketeering activity must consist of two or more acts, deciding that two such acts were committed, by itself, may not be enough for you to find that a pattern exists.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way, [or have other similar distinguishing characteristics] [or are part of the affairs of the same enterprise].

There is continuity between acts if, for example, they are ongoing over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

The government need not prove that all the acts described in Count ___ were committed, but you must unanimously agree as to which two or more racketeering acts the defendant committed [or caused to be committed] in order to find the defendant guilty of that count.

18 U.S.C. § 1962(D) RACKETEERING CONSPIRACY – ELEMENTS

To prove the [a] defendant guilty of conspiracy to commit racketeering, as charged in Count ___, the government must prove the following propositions:

First, that the defendant knowingly conspired to conduct or participate in the conduct of the affairs of [insert name], an enterprise, through a pattern of racketeering activity as described in Count ___; and

Second, that [insert name] [was][would be] an enterprise,

Third, that the activities of [insert name] would affect interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt as to the [a] defendant, then you should find the [that] defendant guilty of Count ___.

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt as to the [a] defendant, then you should find the [that] defendant not guilty of Count ___.

Committee Comment

The "Conspiracy" elements instruction, without the overt act requirement, should be given in conjunction with this instruction. There are other conspiracy charges under 1962(a), (b) and (c). This pattern instruction covers the most commonly charged offense. 1962(d).

18 U.S.C. § 1962(D) PATTERN REQUIREMENT – RACKETEERING CONSPIRACY

In order to find a "pattern of racketeering activity" for purposes of Count ___, you must find beyond a reasonable doubt that the defendant agreed that some member[s] of the conspiracy would commit at least two acts of racketeering as described in Count ___, [and that they were separate acts]. You must also find that those acts were in some way related to each other and that there was continuity between them.

Acts are related to each other if they are not isolated events, that is, if they have similar purposes, or results, or participants, or victims, or are committed a similar way, [or have other similar distinguishing characteristics] [or are part of the affairs of the same enterprise].

There is continuity between acts if, for example, they are ongoing over a substantial period of time, or had the potential to continue over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs.

For purposes of Count ___, the government does not have to prove that any racketeering acts were actually committed at all, or that the defendant agreed to personally commit any such acts, or that the defendant agreed that two or more specific acts would be committed.

Committee Comment

See Salinas v. United States, 118 S.Ct. 469 (1997); *United States v. Glecier*, 923 F.2d 496 (7th Cir. 1991), *cert. denied*, 502 U.S. 810 (1991); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237 (1989); *United States v. Neapolitan*, 791 F.2d 489 (7th Cir. 1986) (*modified by Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000) (when analyzing a conspiracy to violate RICO pursuant to § 1962(d), to "participate in the affairs of an enterprise," "[o]ne must knowingly agree to perform services of a kind which facilitate the activities of those who are operating the enterprise in an illegal manner.")); *see United States v. Delatorre*, 581 F.Supp.2d 968, 992 (N.D. Ill. 2008).

18 U.S.C. § 1961(4) ENTERPRISE – LEGAL ENTITY

The term "enterprise" includes a[n] [type of entity].

Committee Comment

Where there is no dispute as to whether the "enterprise" charged in the indictment falls within the statutory definition, that enterprise should be inserted in the bracketed portion of this instruction. Where there is a dispute, all potential forms of enterprise listed in the statute should be included.

18 U.S.C. § 1961(4) ENTERPRISE – ASSOCIATION IN FACT

The term "enterprise" can include a group of people [or legal entities] associated together for a common purpose of engaging in a course of conduct. This group may be associated together for purposes that are both legal and illegal.

In considering whether a group is an "enterprise," you should consider whether it has an ongoing organization or structure, either formal or informal, and whether the various members of the group functioned as a continuing unit. [A group may continue to be an "enterprise" even if it changes membership by gaining or losing members over time.]

The government must prove that the group described in the indictment was the "enterprise" charged, but need not prove each and every allegation in the indictment about the enterprise or the manner in which the enterprise operated. The government must prove the association had some form or structure beyond the minimum necessary to conduct the charged pattern of racketeering.

Committee Comment

In appropriate cases, the court should include language indicating that an "association in fact" may include legal entities. *See United States v. Masters*, 924 F.2d 1362 (7th Cir. 1991).

18 U.S.C. § 1962(C&D) CONDUCT – DEFINITION

A person conducts or participates in the conduct of the affairs of an enterprise if that person uses his/her position in, or association with, the enterprise to perform acts which are involved in some way in the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so.

In order to have conducted or participated in the conduct of the affairs of an enterprise, a person need not have participated in all the activity alleged in [the RICO counts]. The degree of participation required to violate subsection (c) and to conspire to violate subsection (c)(a subsection (d) offense) differs. To conspire to violate subsection (c), one must agree to "knowingly facilitate the activities of the operators or managers to whom subsection (c) applies." *Brouwer v. Raffensperger, Hughes & Co.*, 199 F.3d 961, 967 (7th Cir. 2000). To "conduct" or "participate" in the substantive offense, subsection (c), one must have "some part in directing the affairs of the enterprise," thereby participating in its operation or management.

18 U.S.C. § 1962(C&D) ASSOCIATE – DEFINITION

To be associated with an enterprise, a person must be involved with the enterprise in a way that is related to its affairs [or common purpose] [, although the person [need not have a stake in the goals of the enterprise [and] [may even act in a way that subverts those goals]]. A person may be associated with an enterprise without being so throughout its existence.

18 U.S.C. § 1962(C) SUBPARTS OF RACKETEERING ACTS

Each of the racketeering acts described in [the substantive RICO count] is numbered and [some] consist[s] of multiple offenses set out in separate, lettered sub-paragraphs [(a), (b), (c), (d), etc]. To prove that a defendant committed a particular "racketeering act" that is made up of multiple offenses, it is sufficient if the government proves beyond a reasonable doubt that the defendant committed at least one of the offenses identified in the sub-paragraphs of that racketeering act. However, you must unanimously agree upon which of the different offenses alleged within a racketeering act the defendant committed.

Committee Comment

This instruction is provided for use in cases in which the indictment breaks up specified racketeering acts into alternative subparts.

18 U.S.C. § 1962 INTERSTATE COMMERCE – DEFINITION

Interstate commerce includes the movement of money, goods, services or persons from one state to another [or between another country and the United States]. This would include the purchase or sale of goods or supplies from outside [the state[s] in which the enterprise was located], the use of interstate mail or wire facilities, or the causing of any of those things. If you find that beyond a reasonable doubt either (a) that [the enterprise] made, purchased, sold or moved goods or services that had their origin or destination outside [the state[s] in which the enterprise was located], or (b) that the actions of [the enterprise] affected in any degree the movement of money, goods or services across state lines, then interstate commerce was engaged in or affected.

The government need only prove that [the enterprise] as a whole engaged in interstate commerce or that its activity affected interstate commerce to any degree, although proof that racketeering acts did affect interstate commerce meets that requirement. The government need not prove that the [a] defendant engaged in interstate commerce, or that the acts of the [a] defendant affected interstate commerce.

18 U.S.C. SECTION 1461 MAILING OBSCENE MATERIAL – ELEMENTS

To sustain the charge of mailing obscene material, the government must prove the following:

First, the defendant knowingly [used] [caused the mails to be used] for the delivery of certain materials, as charged;

Second, the defendant knew the content, character, and nature of the materials; and

Third, the materials were obscene.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment:

To fulfill the "knowingly" requirement of 18 U.S.C. 1461, the Supreme Court held that the prosecution need only show that the defendant had knowledge of the content, character and nature of the materials. *Hamling v. United States*, 418 U.S. 87, 123 (1974); *see also United States v. Knox*, 32 F.3d 733, 753-54 (3d Cir. 1994)(general nature and character required under section 2252).

Because the statute's references to indecent, filthy and vile raise constitutional issues, the proposed pattern instruction does not include them.

18 U.S.C. SECTION 1462 IMPORTING OR TRANSPORTING OBSCENE MATERIAL – ELEMENTS

To sustain the charge of importing or transporting obscene material, the government must prove the following:

First, the defendant knowingly used [any express company][other common carrier][interactive computer service] to transport [the material charged in the indictment] in interstate or foreign commerce;

Second, the defendant knew the character or nature of [the material charged in the indictment] at the time of such use; and

Third, [the material charged in the indictment] was obscene.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined at Seventh Circuit Instruction No._____

"Interstate/Foreign Commerce" is defined at Seventh Circuit Instruction No._____

"Obscenity" is defined at _____.

18 U.S.C. §2256(6) AND 18 U.S.C. §1030(E) COMPUTER – DEFINED

"Computer" as used in this instruction means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.

Committee Comment

This instruction should only be given in cases where there is an issue regarding whether a particular device is a computer.

18 U.S.C. § 1470 - OBSCENITY – DEFINITION

No evidence of what constitutes obscene material has been or needs to be presented. It is up to you to determine whether the material is obscene using the standard in this instruction.

Material is obscene when it meets all three of the following requirements:

1. The average person, applying contemporary adult community standards, would find that the material, taken as a whole, appeals to the prurient interest. Material appeals to "prurient interest" when it is directed to an unhealthy or abnormally lustful or erotic interest, or to a lascivious or degrading interest, or to a shameful or morbid interest, in [sex] [or] [nudity] [or] [excretion].

2. The average person, applying contemporary adult community standards, would find that the material depicts or describes sexual conduct in a patently offensive way.

3. A reasonable person would find that the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Before you can find material to be obscene, you must find that it meets all three of these requirements.

You are to apply these requirements from the standpoint of an average adult in the community, namely, the counties in the _____ District of _____ in which you reside.

You are not to apply these standards from the standpoint of the sender, the recipient, or the intended recipient of the material.

You must also avoid applying subjective personal and privately held views regarding what is obscene. Rather, the standard is that of an average adult applying the collective view of the community as a whole.

Committee Comment

The three-part test for determining whether material is obscene is taken from *Miller v. California*, 413 U.S. 15, 24 (1973) and *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). *See also Smith v. United States*, 431 U.S. 291, 302 (1977) ("community standards . . . provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness"). The definition of "prurient interest" comes from a number of decisions, including *Brockett v. Spokane Arcades, Inc.*, 472

U.S. 491, 504-07 (1985); *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957); *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966)

The definition of the relevant "community" is taken from *Hamling v. United States*, 418 U.S. 87, 104-05 (1974) ("A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination . . . ."). *Accord*, *Smith*, 431 U.S. at 302.

The admonition to apply the standard of an average person and not particular persons (e.g. the sender and recipient, or the juror himself or herself) comes from several Supreme Court decisions. *See, e.g., Miller*, 413 U.S. at 33 ("the primary concern in requiring a jury to apply the standard of the average person, applying contemporary community standards is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one") (internal quotation marks omitted). *See also Pinkus v. United States*, 436 U.S. 293, 300-01 (1978) ("Cautionary instructions to avoid substantive personal and private views in determining community standards can do no more than tell the individual juror that in evaluating the hypothetical 'average' person he is to determine the collective view of the community, as best as it can be done."); *Hamling*, 418 U.S. at 107 (material is not to be judged "on the basis of each juror's personal opinion").

18 U.S.C. SECTION 1462 BRINGING OBSCENE MATERIAL INTO THE UNITED STATES – ELEMENTS

To sustain the charge of bringing obscene material into the United States, the government must prove the following:

First, the defendant knowingly brought [the material charged in the indictment] into the United States;

Second, the defendant knew the character or nature of [the material charged in the indictment] at the time it was brought into the United States; and

Third, [the material charged in the indictment] was obscene.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

18 U.S.C. SECTION 1462 TAKING OR RECEIVING OBSCENE MATERIAL – ELEMENTS

To sustain the charge of taking or receiving obscene material, the government must prove the following:

First, the defendant knowingly took or received [the material charged in the indictment] from [any express company][other common carrier][interactive computer service];

Second, the defendant knew the character or nature of [the material charged in the indictment] at the time it was [taken][received]; and

Third, [the material charged in the indictment] was obscene.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined at Seventh Circuit Instruction No.____

18 U.S.C. SECTION 1465 PRODUCTION WITH INTENT TO TRANSPORT/DISTRIBUTE/TRANSMIT OBSCENE MATERIAL FOR SALE OR DISTRIBUTION – ELEMENTS

To sustain the charge of production of obscene material with the intent to [transport][distribute][transmit] obscene material for the purpose of [sale][distribution], the government must prove the following:

First, the defendant knowingly used [any express company][other common carrier][interactive computer service] to [transport][distribute] [transmit][the material charged in the indictment] in interstate or foreign commerce;

Second, the defendant knowingly produced the materials with the intent to [transport][distribute] [transmit] them;

Third, the defendant knew of the content, character and nature of [the material charged in the indictment] at the time of production; and

Fourth, [the material charged in the indictment] was obscene.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Computer" is defined at Seventh Circuit Instruction No._____

"Interstate/Foreign Commerce" is defined at Seventh Circuit Instruction No._____

INTERSTATE/FOREIGN COMMERCE – DEFINED

"Interstate commerce" means commerce between different states, territories, and possessions of the United States, including the District of Columbia.

"Foreign commerce" as used above, means commerce between any state, territory or possession of the United States and a foreign country.

"Commerce" includes, among other things, travel, trade, transportation and communication.

Images transmitted or received over the Internet have moved in interstate or foreign commerce. It is for you to determine, however, if [the material containing] the visual depiction [had been transmitted or received over the Internet][was produced using materials that had been transmitted or received over the Internet].

Committee Comment

The definitions of "interstate commerce" and "foreign commerce" are found at 18 U.S.C. §10, and are modified here to consolidate and harmonize various definitions of those terms. *See, e.g.*, Seventh Circuit Criminal Jury Instructions at pp. 234, 299, 301, 308, 313, 324, 356.

Several circuits have now held that use of the internet satisfies the interstate commerce nexus. *See United States v. Lewis*, 554 F.3d 208, 215 (1st Cir. 2009); *United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006); *United States v. Runyon*, 290 F.3d 223, 239 (5th Cir. 2002).

18 U.S.C. SECTION 1465 TRANSPORTATION OF OBSCENE MATERIAL FOR SALE OR DISTRIBUTION -– ELEMENTS

To sustain the charge of transportation of obscene material for the purpose of [sale][distribution], the government must prove the following:

First, the defendant knowingly [transported in][traveled in][used any facility or means of] interstate or foreign commerce;

Second, the defendant did so for the purpose of [sale][distribution] of [the material charged in the indictment];

Third, the defendant knew of the content, character and nature of [the material charged in the indictment] at the time of [transportation] [travel]; and

Fourth, [the material charged in the indictment] was obscene.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

It is possible for a defendant to travel in interstate commerce for the purpose of selling or distributing obscene material, without possessing the obscene material at the time of travel. It is also arguably possible for a defendant to use a facility or means of interstate or foreign commerce for the purpose of selling or distributing obscene material, without sending the obscene material through the means of interstate commerce. The Committee takes no position on whether the statute is intended to apply to these situations.

In certain cases, a rebuttable presumption may apply to the defendant's intent to sell or distribute. *See* 18 U.S.C. §1465, ¶ 2.

18 U.S.C. SECTION 1466 ENGAGING IN BUSINESS OF PRODUCING/SELLING OBSCENE MATTER – ELEMENTS

To sustain the charge of engaging in the business of [[producing] obscene material with intent to [distribute][sell]] [[selling][transferring] obscene material], the government must prove the following:

First, the defendant is engaged in the business of [producing] [selling][transferring] [the material charged in the indictment];

Second, the defendant knowingly [[sold][transferred][the material charged in the indictment]] or [produced [the material charged in the indictment] with intent to [distribute][sell];

Third, [the material charged in the indictment] is obscene; and

Fourth, [the material charged in the indictment] has been [shipped] [transported] in [interstate][foreign] commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In certain cases, a rebuttable presumption may apply. See 18 U.S.C. §1466(b).

"Engaged in the business" is defined at Seventh Circuit Instruction No._____

"Producing" is defined at Seventh Circuit Instruction No._____

18 U.S.C. §1466(B) ENGAGED IN THE BUSINESS – DEFINED

A person who produces, sells or transfers or offers to sell or transfer obscene matter is "engaged in the business" of doing so, if he devotes time, attention or labor to such activities, as a regular course of trade or business, with the objective of earning a profit. It is not necessary that the person make a profit or that the production, selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income.

18 U.S.C. § 2256(3) PRODUCING – DEFINED

The term "producing" includes producing, directing, manufacturing, issuing, publishing, or advertising.

18 U.S.C. SECTION 1466 ENGAGING IN BUSINESS OF SELLING/TRANSFERRING OBSCENE MATTER – ELEMENTS)

To sustain the charge of engaging in the business of [selling] [transferring] obscene material, the government must prove the following:

First, the defendant is engaged in the business of [selling] [transferring] [the material charged in the indictment]

Second, the defendant knowingly [sold][transferred][the material charged in the indictment];

Third, [the material charged in the indictment] is obscene; and

Fourth, the [the material charged in the indictment] has been [shipped] [transported] in interstate or foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In certain cases, a rebuttable presumption may apply. See 18 U.S.C. §1466(b).

"Engaged in the business" is defined at Seventh Circuit Instruction No._____

"Interstate/Foreign Commerce" is defined at Seventh Circuit Instruction No._____

18 U.S.C. SECTION 1466 ENGAGING IN BUSINESS OF RECEIVING/POSSESSING OBSCENE MATTER – ELEMENTS

To sustain the charge of engaging in the business of [receiving][possessing] obscene material with intent to distribute, the government must prove the following:

First, the defendant is engaged in the business of [receiving] [possessing] [the material charged in the indictment];

Second, the defendant knowingly [received][possessed] [the material charged in the indictment] with intent to distribute;

Third, [the material charged in the indictment] is obscene; and

Fourth, [the material charged in the indictment] has been [shipped][transported] in interstate or foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

In certain cases, a rebuttable presumption may apply. See 18 U.S.C. §1466(b).

"Engaged in the business" is defined at Seventh Circuit Instruction No._____

"Interstate/Foreign commerce" is defined at Seventh Circuit Instruction No._____

18 U.S.C. SECTION 1466A(A)(1) PRODUCING/DISTRIBUTING/RECEIVING/POSSESSING WITH INTENT TO DISTRIBUTE OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN – ELEMENTS

To sustain the charge of [producing][distributing][receiving] [possessing with intent to distribute], a visual depiction, the government must prove the following:

First, the defendant knowingly [produced][distributed][received] [possessed with intent to distribute], a visual depiction;

Second, the visual depiction is of a minor engaging in sexually explicit conduct;

Third, the visual depiction is obscene; and

Fourth, [a communication involved in or made in furtherance of this offense was communicated or transported by [mail][in interstate or foreign commerce, including by computer]]

[a communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail] [in interstate or foreign commerce, including by computer]]

[any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[any visual depiction involved in the offense was produced using materials that were [mailed][shipped or transported in interstate or foreign commerce, including by computer]

[the offense was committed in the special maritime or territorial jurisdiction of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

"Computer" is defined at Seventh Circuit Instruction No._____

"Minor" is defined at Seventh Circuit Instruction No._____

18 U.S.C. § 1466A(F)(1) VISUAL DEPICTION – DEFINED

"Visual depiction" includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means.

Committee Comment

Only the applicable terms within this definition should be used.

18 U.S.C. §2256(1) MINOR - DEFINED

"Minor" means any person under the age of eighteen (18) years.

18 U.S.C. §2256(2)(A) SEXUALLY EXPLICIT CONDUCT – DEFINED

"Sexually explicit conduct" includes actual or simulated –

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadistic or masochistic abuse; or

(5) lascivious exhibition of the genitals or pubic area of any person.

Committee Comment

Only the applicable terms within this definition should be used.

In some cases charging violations of 18 U.S.C. §2252A involving allegations of the use of computer-generated images that are, or are indistinguishable from, that of a minor engaging in sexually explicit conduct, this definition should be modified as set forth in 18 U.S.C. §2256(2)(B).

18 U.S.C. SECTION 1466A(A)(2) PRODUCING/DISTRIBUTING/RECEIVING/POSSESSING WITH INTENT TO DISTRIBUTE OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN – ELEMENTS

To sustain the charge of [producing][distributing][receiving] [possessing with intent to distribute], a visual depiction, the government must prove the following:

First, the defendant knowingly [produced][distributed][received] [possessed with intent to distribute], a visual depiction;

Second, the visual depiction is of an image [that is][appears to be] a minor engaging in [graphic bestiality][sadistic abuse][masochistic abuse][sexual intercourse];

Third, the visual depiction lacks serious literary, artistic, political or scientific value; and

Fourth, [a communication involved in or made in furtherance of this offense was communicated or transported by [mail][in interstate or foreign commerce, including by computer]]

[a communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail][in interstate or foreign commerce, including by computer]]

[any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[any visual depiction involved in the offense was produced using materials that were [mailed][shipped or transported in interstate or foreign commerce, including by computer]

[the offense was committed in the special maritime or territorial jurisdiction of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Graphic" is defined at Seventh Circuit Instruction No._____

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Producing" is defined at Seventh Circuit Instruction No._____

"Computer" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

18 U.S.C. 1466A(F)(3) GRAPHIC – DEFINED

A depiction of sexually explicit conduct is "graphic" if a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.

18 U.S.C. SECTION 1466A(B)(1) POSSESSION OF OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN - ELEMENTS

To sustain the charge of possession of an obscene visual depiction, the government must prove the following:

First, the defendant knowingly possessed a visual depiction;

Second, the visual depiction is of a minor engaging in sexually explicit conduct;

Third, the visual depiction is obscene; and

Fourth, [a communication involved in or made in furtherance of this offense was communicated or transported by [mail][in interstate or foreign commerce, including by computer]]

[a communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail][in interstate or foreign commerce, including by computer]]

[any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[any visual depiction involved in the offense was produced using materials that were [mailed][shipped or transported in interstate or foreign commerce, including by computer]

[the offense was committed in the special maritime or territorial jurisdiction of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Minor" is defined at Seventh Circuit Instruction No._____

"Computer" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

18 U.S.C. SECTION 1466A(B)(2) POSSESSION OF OBSCENE VISUAL REPRESENTATIONS OF SEXUAL ABUSE OF CHILDREN – ELEMENTS)

To sustain the charge of possession of an obscene visual depiction, the government must prove the following:

First, the defendant knowingly possessed a visual depiction;

Second, the visual depiction is of an image [that is][appears to be] a minor engaging in [graphic bestiality][sadistic abuse][masochistic abuse][sexual intercourse];

Third, the visual depiction lacks serious literary, artistic, political or scientific value; and

Fourth, [a communication involved in or made in furtherance of this offense was communicated or transported by [mail][in interstate or foreign commerce, including by computer]]

[a communication involved in or made in furtherance of the offense contemplated the transmission or transportation of a visual depiction by the [mail][in interstate or foreign commerce, including by computer]]

[any person traveled or was transported in interstate or foreign commerce in the course of or in furtherance of the commission of this offense]

[any visual depiction involved in the offense was produced using materials that were [mailed][shipped or transported in interstate or foreign commerce, including by computer]

[the offense was committed in the special maritime or territorial jurisdiction of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Visual depiction" is defined at Seventh Circuit Instruction No._____.

"Graphic" is defined at Seventh Circuit Instruction No._____.

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____.

"Computer" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 1470 TRANSFER OF OBSCENE MATERIAL TO A MINOR – ELEMENTS

To sustain the charge of transfer of obscene material to an individual who has not attained the age of sixteen years, the government must prove the following:

First, the defendant knowingly transferred [the material charged in the indictment];

Second, the defendant transferred [the material charged in the indictment] to an individual less than sixteen years-old;

Third, the defendant knew the other individual was less than sixteen years-old;

Fourth, the defendant knew at the time of the transfer the content, character and nature of the material;

Fifth, [the material charged in the indictment] is obscene; and

Sixth, the defendant knowingly used the [mail][any means or facility of interstate commerce] to transfer [the material charged in the indictment].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 1591 SEX TRAFFICKING OF A MINOR – ELEMENTS

To sustain the charge of sex trafficking of a minor, the government must prove the following:

First, the defendant knowingly [recruited][enticed][harbored][transported][provided][obtained][maintained] [the person identified in the indictment];

Second, the defendant [knew][recklessly disregarded the fact]:

(a) [force][threats of force][fraud][coercion] would be used to cause [the person identified in the indictment] to engage in a commercial sex act; or

(b) [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; and

Third, the offense was in or affecting interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. §1591(e)(3).

A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that [force][threats of force][fraud][coercion] would be used to cause, or the minor status of the person identified in the indictment being caused to engage in a commercial sex act. See *United States v. Pina-Suarez*, 280 F. Appx. 813, 817-18 (11th Cir. 2008); *United States v. Wilson*, 2010 WL 2991561 (S.D.Fl. 2010).

"Commercial sex act" is defined at Seventh Circuit Instruction No.____.

"Coercion" is defined at Seventh Circuit Instruction No.____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. §1591(E)(2) COERCION – DEFINED

"Coercion" means:

(1) threats of serious harm to or physical restraint against any person;

(2) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(3) the abuse or threatened abuse of law or the legal process.

Committee Comment

This instruction should be accompanied by the definition of "serious harm" and/or "abuse or threatened abuse of law or legal process" found at Seventh Circuit Instruction No. ____.

18 U.S.C. §1591(E)(4) SERIOUS HARM – DEFINED

"Serious harm" means any harm, whether physical or non-physical, including psychological, financial, or reputational harm, that is sufficiently serious, under the circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

18 U.S.C. §1591(E)(1) ABUSE OR THREATENED ABUSE OF LAW OR LEGAL PROCESS – DEFINED

"Abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to take or refrain from taking some action.

18 U.S.C. 1591(E)(3) COMMERCIAL SEX ACT – DEFINED

"Commercial sex act" means any sex act for which anything of value is given to or received by any person.

18 U.S.C. SECTION 1591 BENEFITTING FROM SEX TRAFFICKING OF A MINOR – ELEMENTS

To sustain the charge of benefitting from the sex trafficking of a minor, the government must prove the following:

First, the defendant knowingly benefitted, financially or by receiving a thing of value, from participation in a venture which has engaged in an act of [recruiting][enticing][harboring][transporting][providing][obtaining][maintaining] [the person identified in the indictment];

Second, the defendant [knew][recklessly disregarded the fact]:

(a) force, fraud, or coercion would be used to cause [the person identified in the indictment] to engage in a commercial sex act; or

(b) [the person identified in the indictment] was under eighteen years of age and would be caused to engage in a commercial sex act; and

Third, the offense was in or affecting interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "commercial sex act" are listed in 18 U.S.C. §1591(e)(3).

"Commercial sex act" is defined at Seventh Circuit Instruction No._____

A person "recklessly disregards" a fact within the meaning of this offense when he is aware of, but consciously or carelessly ignores facts and circumstances that would reveal the fact that [force][threats of force][fraud][coercion] would be used to cause, or the minor status of the person identified in the indictment being caused to engage in a commercial sex act. *See United States v. Pina-Suarez*, 280 F. Appx. 813, 817-18 (11th Cir. 2008); *United States v. Wilson*, 2010 WL 2991561 (S.D.Fl. 2010).

"Coercion" is defined at Seventh Circuit Instruction No._____

"Venture" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

18 U.S.C. 1591(E)(5) VENTURE – DEFINED

"Venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. SECTION 2241(A) AGGRAVATED SEXUAL ABUSE – ELEMENTS

To sustain the charge of aggravated sexual abuse, the government must prove the following:

First, the defendant knowingly caused [the person named in the indictment] to engage in a sexual act:

(a) by using force against [the person named in the indictment]; or

(b) by [threatening][placing [the person named in the indictment] in fear that some person would be subject to death, serious bodily injury or kidnapping]; and

Second, the offense was committed at [location stated in indictment, e.g., federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(B)(1) AGGRAVATED SEXUAL ABUSE – RENDERING VICTIM UNCONSCIOUS – ELEMENTS

To sustain the charge of aggravated sexual abuse, the government must prove the following:

First, the defendant knowingly rendered [the person identified in the indictment] unconscious;

Second, the defendant then engaged in a sexual act with [the person identified in the indictment]; and

Third, the offense was committed at [location stated in indictment, e.g., federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. § 2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(B)(2) AGGRAVATED SEXUAL ABUSE-ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE – ELEMENTS

To sustain the charge of aggravated sexual abuse, the government must prove the following:

First, the defendant knowingly administered a drug, intoxicant or other similar substance to [the person named in the indictment] by [force][threat of force][without the knowledge or permission of [the person named in the indictment]];

Second, as a result, [the person named in the indictment]'s ability to evaluate or control [his][her] own conduct was substantially impaired;

Third, the defendant then engaged in a sexual act with [the person named in the indictment]; and

Fourth, the offense was committed at [location stated in indictment, e.g., federal prison].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

If the charged offense is an attempt, the Court should modify the elements instruction accordingly, and provide the general instructions regarding the definition of attempt.

See Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(C) AGGRAVATED SEXUAL ABUSE OF CHILD – ELEMENTS

To sustain the charge of aggravated sexual abuse of a child, the government must prove the following:

First, the defendant traveled across a state line with intent to engage in a sexual act with [the person named in the indictment]; and

Second, at the time, [the person identified in the indictment] was less than twelve years old. The government need not prove that the defendant knew that the person was less than twelve years old.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(C) AGGRAVATED SEXUAL ABUSE OF CHILD ON FEDERAL PROPERTY – ELEMENTS

To sustain the charge of aggravated sexual abuse of a child on federal property, the government must prove the following:

First, the defendant knowingly engaged in a sexual act with [the person identified in the indictment];

Second, the sexual act was committed at [location stated in indictment, e.g., special maritime and territorial jurisdiction]; and

Third, at the time of the sexual act, [the person identified in the indictment] had not yet reached the age of twelve years. The government need not prove that the defendant knew that the person was less than twelve years old.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(C) AGGRAVATED SEXUAL ABUSE OF A MINOR TWELVE TO SIXTEEN – ELEMENTS

To sustain the charge of aggravated sexual abuse, the government must prove the following:

First, the defendant knowingly caused [the person named in the indictment] to engage in a sexual act:

(a) by using force against [the person named in the indictment]; or

(b) by [threatening][placing [the person named in the indictment] in fear that some person would be subject to death, serious bodily injury or kidnapping];

Second, the offense was committed [location stated in indictment, e.g., in the special maritime or territorial jurisdiction of the United States];

Third, [the person identified in the indictment] was at least twelve years old but less than sixteen years old; and

Fourth, the defendant was at least four years older than [the person identified in the indictment].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(C) AGGRAVATED SEXUAL ABUSE-RENDERING VICTIM UNCONSCIOUS, MINOR TWELVE TO SIXTEEN – ELEMENTS

To sustain the charge of aggravated sexual abuse, the government must prove the following:

First, the defendant knowingly rendered [the person identified in the indictment] unconscious;

Second, the defendant then engaged in a sexual act with [the person identified in the indictment];

Third, the offense was committed at [location stated in indictment, e.g., in the special maritime or territorial jurisdiction of the United States];

Fourth, [the person identified in the indictment] was at least twelve years old but less than sixteen years old; and

Fifth, the defendant was at least four years older than [the person identified in the indictment].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2241(C) AGGRAVATED SEXUAL ABUSE-ADMINISTRATION OF DRUG, INTOXICANT OR OTHER SUBSTANCE, MINOR TWELVE TO SIXTEEN – ELEMENTS

To sustain the charge of aggravated sexual abuse, the government must prove the following:

First, the defendant knowingly administered a drug, intoxicant or other similar substance to [the person named in the indictment] by [force][threat of force][without the knowledge or permission of [the person named in the indictment]];

Second, as a result, [the person named in the indictment]'s ability to evaluate or control conduct was substantially impaired;

Third, the defendant then engaged in a sexual act with [the person named in the indictment];

Fourth, the offense was committed at [location stated in indictment, e.g., in the special maritime or territorial jurisdiction of the United States];

Fifth, [the person identified in the indictment] was at least twelve years old but less than sixteen years old; and

Sixth, the defendant was at least four years older than [the person identified in the indictment].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexual act" are listed in 18 U.S.C. §2246(2).

"Sexual act" is defined at Seventh Circuit Instruction No. _____

18 U.S.C. SECTION 2250(A) FAILURE TO REGISTER/UPDATE AS SEX OFFENDER – ELEMENTS

To sustain the charge of failing to register or update registration as a sex offender, the government must prove the following:

First, the defendant was required to register under the Sex Offender Registration and Notification Act;

Second, the defendant knowingly failed to [register][update his registration] as required by the Sex Offender Registration and Notification Act; and

Third, the defendant traveled in interstate or foreign commerce after failing to [register][update his registration].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

18 U.S.C. §2250(b) provides an affirmative defense where uncontrollable circumstances prevented the individual from complying, the individual did not contribute to the creation of those circumstances, and the individual complied as soon as the circumstances ceased to exist.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

The interstate or foreign commerce travel element is satisfied by proof that the defendant has traveled from one state to another state or to a foreign country after having been convicted of a qualifying "sex offense." *See* 42 U.S.C. §16911(5). The interstate or foreign travel may not precede the registration requirement. *See Carr v. United States*, 130 S.Ct. 2229 (2010).

The court should instruct regarding requirements of the Sex Offender Registration and Notification Act. *See* 42 U.S.C. §16901, *et seq.*

18 U.S.C. SECTION 2251(A) SEXUAL EXPLOITATION OF CHILD – ELEMENTS

To sustain the charge of sexual exploitation of a child, the government must prove the following:

First, at the time, [the person identified in the indictment] was under the age of eighteen years;

Second, the defendant, for the purpose of producing a visual depiction of such conduct:

(a) [employed][used][persuaded][coerced][the person identified in the indictment] to take part in sexually explicit conduct; or

(b) had [the person identified in the indictment] assist any other person to engage in sexually explicit conduct; or

(c) transported [the person identified in the indictment][across state lines][in foreign commerce][in any Territory or Possession of the United States] with the intent that [the person identified in the indictment] engage in sexually explicit conduct; and

Third:

(a) The defendant knew or had reason to know that such visual depiction would be mailed or transported across state lines or in foreign commerce; or

(b) The visual depiction was [produced][transmitted] using materials that had been mailed, shipped, transported across state lines or in foreign commerce; or

(c) The visual depiction was mailed or actually transported across state lines or in foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has

been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Comment:

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a), (b) and (c) in each of the second and third elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B).

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Producing" is defined at Seventh Circuit Instruction No._____

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

Knowledge of the age of the minor victim is not an element of the offense. *United States v. United States District Court*, 858 F.2d 534 (9th Cir. 1988). *See also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 76 n.5 (1994) ("[P]roducers may be convicted under 2251(a) without proof they had knowledge of age...") (dicta). *But see* Seventh Circuit Instruction No. ____ on defense of reasonable belief of age). This issue is the subject of a pending appeal in this Circuit. *See United States v. Fletcher*, No. 08-3195.

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. 2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

18 U.S.C. SECTION 2251(B) SEXUAL EXPLOITATION OF CHILD – PERMITTING OR ASSISTING BY PARENT OR GUARDIAN – ELEMENTS

To sustain the charge of sexual exploitation of a child, the government must prove the following:

First, at the time, [the person identified in the indictment] was under the age of eighteen years;

Second, the defendant was a [parent][legal guardian][person having custody or control] of [the person identified in the indictment];

Third, for the purpose of producing a visual depiction of such conduct, the defendant knowingly permitted [the person identified in the indictment] to:

(a) engage in sexually explicit conduct; or

(b) assist any other person to engage in sexually explicit conduct; and

Fourth:

(a) the defendant knew or had reason to know that the visual depiction would be mailed or transported across state lines or in foreign commerce; or

(b) The visual depiction was [produced][transmitted] using materials that had been mailed, shipped, transported across state lines or in foreign commerce; or

(c) The visual depiction was actually mailed or transported across state lines or in foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has

been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a), (b) and (c) in each of the third and fourth elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B).

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

"Custody or control" is defined at Seventh Circuit Instruction No._____

18 U.S.C. §2256(7) CUSTODY OR CONTROL – DEFINED

"Custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained.

18 U.S.C. 2251(C) SEXUAL EXPLOITATION OF CHILD – CONDUCT OUTSIDE OF THE UNITED STATES

To sustain the charge of sexual exploitation of a child, the government must prove the following:

First, at the time, [the person identified in the indictment] was under the age of eighteen years;

Second, the defendant knowingly [[employed][used][persuaded][induced][enticed][coerced] [the person identified in the indictment] to engage in][had [the person identified in the indictment] assist any other person to engage in] sexually explicit conduct outside of the United States;

Third, the defendant did so for the purpose of producing a visual depiction of such conduct; and

Fourth,

(a) the defendant intended the visual depiction to be transported to the United States; or

(b) the defendant transported the visual depiction to the United States.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Coercion" is defined at Seventh Circuit Instruction No._____

18 U.S.C. SECTION 2251(D) PUBLISHING OF CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of publishing of child pornography, the government must prove the following:

First, the defendant knowingly [made][printed][published][caused to be [made] [printed][published]] a notice or advertisement;

Second, the notice or advertisement [sought][offered] to [receive][exchange][buy]

[produce][display][distribute][reproduce] a visual depiction;

Third,

(a) the production of the visual depiction involved the use of [the person identified in the indictment] engaging in sexually explicit conduct, and the visual depiction is of the sexually explicit conduct; or

(b) the defendant participated in any act of sexually explicit conduct by or with [the person identified in the indictment] for the purpose of producing a visual depiction of the conduct;

Fourth, the defendant knew that [the person identified in the indictment] was under the age of eighteen years; and

Fifth,

(a) the defendant knew or had reason to know that the notice or advertisement would be transported using any means or facility of interstate or foreign commerce, including by computer or by mail; or

(b) the notice or advertisement was transported using any means or facility of interstate or foreign commerce, including by computer or by mail.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

It is not intended that this entire instruction would be given to the jury. The options set forth as subparts (a) and (b) in each of the third and fifth elements are alternative means of setting forth the elements of the offense.

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B).

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Visual depiction" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

"Child pornography" is defined at Seventh Circuit Instruction No._____

18 U.S.C. §2256(8) CHILD PORNOGRAPHY - DEFINED

"Child pornography" means a visual depiction of sexually explicit conduct, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, if:

1) The production of the visual depiction involves the use of a minor engaged in sexually explicit conduct;

2) The visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

3) Such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. SECTION 2251A SELLING OF CHILDREN – ELEMENTS

To sustain the charge of selling [a child][children], the government must prove the following:

First, the defendant is the [parent][legal guardian][a person having custody or control of [the person identified in the indictment]] and

(a) sold [the person identified in the indictment]; or

(b) transferred custody or control of [the person identified in the indictment]; or

(c) offered to sell [the person identified in the indictment]; or

(d) offered to transfer custody of [the person identified in the indictment];

Second,

(a) the defendant knew that [the person identified in the indictment] would be portrayed in a visual depiction [engaging in][assisting another person to engage in] sexually explicit conduct; or

(b) the defendant [sold][transferred][offered to sell][offered to transfer custody]

(i) intending to promote having [the person identified in the indictment] engage in sexually explicit conduct; and

(ii) the defendant did so for the purpose of producing a visual depiction of that conduct;

Third, in the course of such conduct [[the person identified in the indictment] or the defendant traveled in interstate commerce][the offer to sell or transfer custody or control of the minor was communicated or transported in interstate commerce or by mail]; and

Fourth, [the person identified in the indictment] at the time of the [sale][transfer][offer to sell][offer to transfer custody] was under the age of eighteen years.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B).

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____

"Producing" is defined at Seventh Circuit Instruction No._____

"Custody or control" is defined at Seventh Circuit Instruction No._____

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____

"Visual depiction" is defined at Seventh Circuit Instruction No._____

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. §2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

18 U.S.C. SECTION 2251A(B) PURCHASING OR OBTAINING CHILDREN

To sustain the charge of purchasing or obtaining [a child][children], the government must prove the following:

First, the defendant:

(a) purchased [the person identified in the indictment]; or

(b) obtained custody or control of [the person identified in the indictment]; or

(c) offered to purchase [the person identified in the indictment]; or

(d) offered to obtain custody or control of [the person identified in the indictment];

Second,

(a) the defendant knew that [the person identified in the indictment] would be portrayed in a visual depiction [engaging in][assisting another person to engage in] sexually explicit conduct; or

(b) the defendant [purchased][obtained custody or control] [offered to purchase][offered to obtain custody or control][the person identified in the indictment]

(i) intending to promote having [the person identified in the indictment] engage in sexually explicit conduct; and

(ii) the defendant did so for the purpose of producing a visual depiction of that conduct;

Third, in the course of such conduct [[the person identified in the indictment][the defendant] traveled in interstate commerce][the offer to sell or transfer custody or control of the minor was communicated or transported in interstate commerce or by mail]; and

Fourth, [the person identified in the indictment] at the time of the [purchase][obtaining of custody or control][offer to purchase][offer to obtain custody or control] was under the age of eighteen years.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

Acts that fall within the meaning of "sexually explicit conduct" are listed in 18 U.S.C. §2256(2)(B).

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____.

"Producing" is defined at Seventh Circuit Instruction No._____.

"Visual depiction" is defined at Seventh Circuit Instruction No._____.

"Custody or control" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

A defendant who simply possesses, transports, reproduces, or distributes child pornography does not sexually exploit a minor in violation of 18 U.S.C. §2251, even though the materials possessed, transported, reproduced, or distributed "involve" such sexual exploitation by the producer. *See United States v. Kemmish*, 120 F.3d 937, 942 (9th Cir. 1997).

18 U.S.C. SECTION 2252A(A)(1) MAILING, TRANSPORTING OR SHIPPING MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of [mailing][transporting][shipping] of material containing child pornography, the government must prove the following:

First, the defendant knowingly [mailed] [transported in interstate commerce][shipped in interstate commerce] [the material identified in the indictment]; and

Second, [the material identified in the indictment] is child pornography.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

18 U.S.C. §2252A encompasses the primary theories of prosecution under 18 U.S.C. §2252. Accordingly, the committee has not prepared pattern instructions for Section 2252.

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2252A(A)(2)(A) RECEIPT OR DISTRIBUTION OF CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of [receipt][distribution] of child pornography, the government must prove the following:

First, the defendant knowingly [received] [distributed] [the material identified in the indictment];

Second, [the material identified in the indictment] is child pornography; and

Third, [the material identified in the indictment] was [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2252A(A)(2)(B) RECEIPT OR DISTRIBUTION OF MATERIAL CONTAINING CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of [receipt][distribution] of material containing child pornography, the government must prove the following:

First, the defendant knowingly [received] [distributed] [the material identified in the indictment];

Second, [the material identified in the indictment] contained child pornography; and

Third, [the material identified in the indictment] was [mailed] [shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2252A(A)(3)(A) REPRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION – ELEMENTS

To sustain the charge of reproduction of child pornography for distribution, the government must prove the following:

First, the defendant knowingly reproduced [the material identified in the indictment];

Second, [the material identified in the indictment] is child pornography; and

Third, the defendant intended to distribute [the material identified in the indictment] by [mailing it] [shipping it in or affecting interstate or foreign commerce] [transporting it in or affecting interstate or foreign commerce].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTIONS 2252A(A)(4)(A) & (B) SALE OR POSSESSION WITH INTENT TO SELL CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of [sale of][possession with intent to sell] child pornography, the government must prove the following:

First, the defendant knowingly [sold][possessed with intent to sell] [the material identified in the indictment];

Second, [the material identified in the indictment] is child pornography; and

Third,

(a) the [sale][possession with intent to sell] occurred [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government][in Indian country]; or

(b) [the material identified in the indictment] has been [mailed][shipped in interstate or foreign commerce] [transported in interstate or foreign commerce][produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTIONS 2252A(A)(5)(A) & (B) POSSESSION OF OR ACCESS WITH INTENT TO VIEW CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of [possession of][accessing with intent to view] child pornography, the government must prove the following:

First, the defendant knowingly [possessed][accessed with intent to view] [the material identified in the indictment];

Second, [the material identified in the indictment] is child pornography; and

Third,

(a) the defendant [possessed][accessed with intent to view] [the material identified in the indictment] [in the special maritime and territorial jurisdiction of the United States] [on land or in a building owned by, leased to or under the control of the United States government][in Indian country]; or

(b) [the material identified in the indictment] has been [mailed][shipped in interstate or foreign commerce] [transported in interstate or foreign commerce][produced using materials that have been mailed, shipped or transported in a manner affecting interstate or foreign commerce].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2252A(A)(6) PROVIDING CHILD PORNOGRAPHY TO A MINOR – ELEMENTS

To sustain the charge of [distributing][offering][sending][providing] child pornography to a minor, the government must prove the following:

First, the defendant knowingly [distributed][offered][sent][provided] [the material identified in the indictment] to [the person identified in the indictment];

Second, [the material identified in the indictment] is child pornography;

Third, [the person identified in the indictment] had not attained the age of eighteen years; and

Fourth, [the material identified in the indictment] has been:

(a) [mailed][shipped in interstate or foreign commerce] [transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce]; or

(b) produced using materials that have been [mailed] [shipped in interstate or foreign commerce][transported in interstate or foreign commerce] [shipped or transported in a manner affecting interstate or foreign commerce]; or

(c) which [distribution][offer][sending][provision] was accomplished [using the mails][by any means or facility of interstate or foreign commerce].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2252A(A)(7) PRODUCTION WITH INTENT TO DISTRIBUTE AND DISTRIBUTION OF ADAPTED CHILD PORNOGRAPHY – ELEMENTS

To sustain the charge of [production with the intent to distribute] [distribution] of adapted child pornography, the government must prove the following:

First, the defendant knowingly [produced with the intent to distribute][distributed] [the material identified in the indictment];

Second, [the material identified in the indictment] is child pornography [consisting of][including] an adapted or modified depiction of an identifiable minor; and

Third, [the material identified in the indictment] has been [produced][distributed] by any means [in] [affecting] interstate or foreign commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Child Pornography" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

"Identifiable minor" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. §2256(9) IDENTIFIABLE MINOR – DEFINED

"Identifiable minor" means a person who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, and

(1) who was a minor at the time the visual depiction was created, adapted, or modified; or

(2) whose image as a minor was used in creating, adapting, or modifying the visual depiction.

The Government is not required to prove the actual identity of the identifiable minor.

AFFIRMATIVE DEFENSE

18 U.S.C. SECTION 2252A(C) – TO CHARGES UNDER 18 U.S.C. SECTION 2252A(A)(1), (A)(2), (A)(3)(A), (A)(4) OR (A)(5)

The government must prove beyond a reasonable doubt that [the material identified in the indictment] was produced using an actual minor or minors.

Committee Comment:

"Child pornography" is defined broadly in 18 U.S.C. §2256(8) to include visual depictions that are indistinguishable from that of a minor engaging in sexually explicit conduct and visual depictions adapted or modified to appear to be that of an identifiable minor engaging in sexually explicit conduct. Therefore, it is an affirmative defense that the visual depictions were produced using actual adults.

"Minor" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. §2256(11) INDISTINGUISHABLE – DEFINED

"Indistinguishable" used with respect to a depiction, means virtually indistinguishable such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

AFFIRMATIVE DEFENSE TO CHARGES UNDER 18 U.S.C. SECTION 2252A(A)(5) – 18 U.S.C. SECTION 2252A(D)

If the defendant proves that it is more likely than not that

(a) he possessed fewer than three images of child pornography;

(b) he promptly and in good faith [took reasonable steps to destroy each image][reported the matter to a law enforcement agency and afforded the agency access to the image(s)];

(c) he did not retain any image; and

(d) he did not allow any person other than law enforcement to access or copy any image,

then you should find him not guilty of possessing child pornography.

Committee Comment:

The defendant has the burden of proof with respect to this affirmative defense because it does not negate an element of the offense; instead it requires proof of additional facts that mitigate the circumstances of the offense. *United States v. Davenport*, 519 F.3d 940, 945 (9th Cir. 2008).

The language in this instruction should be added to the elements instruction for 18 U.S.C. §2252A(a)(5) in appropriate cases.

"Child pornography" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2260(A) PRODUCTION OF SEXUALLY EXPLICIT DEPICTIONS OF A MINOR – IMPORTATION

To sustain the charge of producing sexually explicit depictions of a minor for importation into the United States, the government must prove each of the following:

First, at the time, [the person identified in the indictment] was under the age of eighteen years;

Second, the defendant, outside the United States, for the purpose of [producing a visual depiction of such conduct][transmitting a live visual depiction of such conduct]:

(a) [employed][used][persuaded][induced][enticed][coerced][the person identified in the indictment] to take part in sexually explicit conduct; or

(b) caused [the person identified in the indictment] to assist another person to engage in sexually explicit conduct; or

(c) transported [the person identified in the indictment] with the intent that [the person identified in the indictment] engage in sexually explicit conduct; and

Third, the defendant intended that such visual depiction be [imported] [transmitted] into the [United States][waters within a distance of twelve miles of the coast of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____.

"Producing" is defined at Seventh Circuit Instruction No._____.

"Visual depiction" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2260(B) USE OF A VISUAL DEPICTION – IMPORTATION

To sustain the charge of [receiving][transporting][shipping] [distributing][selling] [possession with intent to [transport] [ship] [sell] [distribute]] visual depictions of a minor engaged in sexually explicit conduct for importation into the United States, the government must prove each of the following:

First, at the time, [the person identified in the indictment] was under the age of eighteen years;

Second, the defendant, while outside the United States, knowingly [received] [transported] [shipped][distributed][sold][possessed with intent to [transport] [ship][sell][distribute]] a visual depiction of [the person identified in the indictment];

Third, the production of the visual depiction involved [the person identified in the indictment] engaging in sexually explicit conduct; and

Fourth, the defendant intended that the visual depiction be [imported] into the [United States][waters within a distance of twelve miles of the coast of the United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexually explicit conduct" is defined at Seventh Circuit Instruction No._____.

"Producing" is defined at Seventh Circuit Instruction No._____.

"Visual depiction" is defined at Seventh Circuit Instruction No._____.

"Minor" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2421 TRANSPORTATION FOR PROSTITUTION/SEXUAL ACTIVITY – ELEMENTS

To sustain the charge of transportation for [prostitution][sexual activity], the government must prove the following:

First, the defendant knowingly [transported][attempted to transport] [the person identified in the indictment] in interstate commerce; and

Second, at the time of [transportation][the attempted transportation], the defendant intended that [the person identified in the indictment] would engage in [prostitution][sexual activity for which [the defendant][any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment]].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. §2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. §2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. §2423(f)), and "sexual act" (see 18 U.S.C. §2246(2)), such as misdemeanor offenses involving flashing or masturbation.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See Seventh Circuit Instruction No. _____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2422(A) ENTICEMENT – ELEMENTS

To sustain the charge of enticement, the government must prove the following:

First, the defendant knowingly [persuaded][induced][enticed][coerced][the person identified in the indictment] to travel in interstate commerce to engage in [prostitution][sexual activity]; and

Second, [the defendant][any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment] for the sexual activity.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. §2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. §2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. §2423(f)), and "sexual act" (see 18 U.S.C. §2246(2)), such as misdemeanor offenses involving flashing or masturbation.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See Seventh Circuit Instruction No. _____.

"Coercion" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. §2422(B) ENTICEMENT OF A MINOR – ELEMENTS

To sustain the charge of enticement of a minor, the government must prove the following:

First, the defendant knowingly used a facility or means of interstate commerce to [persuade][induce][entice][coerce] [the person identified in the indictment] to engage in [prostitution][sexual activity];

Second, [the person identified in the indictment] was less than 18 years of age;

Third, the defendant believed [the person identified in the indictment was less than 18 years of age; and

Fourth, [the defendant][any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment] for the sexual activity.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

United States v. Berg, No. 09-2498 (7th Cir. 2011), held that the intent required under Section 2422(b) is the intent to persuade, induce or entice someone believed to be a minor to engage in sexual activity. It is not required for the government to prove that the defendant intended to engage in sexual activity with the minor.

The term "sexual activity" is not defined in the state. However, in *United States v. Taylor*, No. 10-2715 (7th Cir. 2011), the Court held that the rule on lenity requires sexual activity to be interpreted as synonymous with "sexual act" insofar as it requires physical contact between two people. Acts that are sexual in nature, but that do not involve that physical contact between two people (*e.g.*, flashing, masturbation) are not covered by the statute.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See Seventh Circuit Instruction No. _____.

"Minor" is defined at Seventh Circuit Instruction No. _____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2422(A) ATTEMPTED ENTICEMENT – ELEMENTS

To sustain the charge of attempted enticement, the government must prove the following:

First, the defendant knowingly attempted to [persuade][induce][entice][coerce][the person identified in the indictment] to travel in interstate commerce to engage in [prostitution][sexual activity];

Second, [the defendant][any other person identified in the indictment] could have been charged with a criminal offense of [____] for the sexual activity;

Third, the defendant took a substantial step toward committing the crime of enticement, with all of you agreeing as to what constituted the substantial step.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. §2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. §2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. §2423(f)), and "sexual act" (see 18 U.S.C. §2246(2)), such as misdemeanor offenses involving flashing or masturbation.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See Seventh Circuit Instruction No. _____.

This instruction should be accompanied by the definition of "substantial step" which is found at Seventh Circuit Instruction No. _____.

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. §2427.

"Coercion" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. §2422(B) ATTEMPTED ENTICEMENT OF A MINOR – ELEMENTS

To sustain the charge of attempted enticement of a minor, the government must prove the following:

First, the defendant knowingly used a facility or means of interstate commerce in an attempt to [persuade][induce][entice][coerce] [the person identified in the indictment] to engage in [prostitution][sexual activity];

Second, the defendant believed that [the person identified in the indictment] was less than 18 years of age;

Third, [the defendant][any other person identified in the indictment] could have been charged with a criminal offense of [_____] for the sexual activity; and

Fourth, the defendant took a substantial step toward committing the crime of enticement, with all of you agreeing as to what constituted the substantial step.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government need only prove that the defendant believed the person being enticed was a minor. *See United States v. Cote*, 504 F.3d 682 (7th Cir. 2007).

"Sexual activity" is not fully defined by the statute. *See* 18 U.S.C. §2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. §2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. §2423(f)), and "sexual act" (see 18 U.S.C. §2246(2)), such as misdemeanor offenses involving flashing or masturbation.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See Seventh Circuit Instruction No. _____.

This instruction should be accompanied by the definition of "substantial step" which is found at Seventh Circuit Instruction No. _____.

"Coercion" is defined at Seventh Circuit Instruction No._____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No. _____.

18 U.S.C. SECTION 2423(A) TRANSPORTATION – ELEMENTS

To sustain the charge of transportation, the government must prove the following:

First, the defendant knowingly transported [the person identified in the indictment] in [interstate][foreign] commerce;

Second, [the person identified in the indictment] was less than eighteen years of age at the time; and

Third, the defendant intended that [the person identified in the indictment] engage in [prostitution][sexual activity for which [the defendant][any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment]].

The government does not have to prove that the defendant believed or knew [the person identified in the indictment] was less than 18 years of age.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government need not prove the defendant knew or believed of the minor status of the person transported. *United States v. Cox*, 577 F.3d 833 (7th Cir. 2009).

"Sexual activity" is not fully defined by the statute. *See* 18 U.S.C. §2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. §2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. §2423(f)), and "sexual act" (see 18 U.S.C. §2246(2)), such as misdemeanor offenses involving flashing or masturbation.

In appropriate cases, "prostitution" may need to be defined. "Prostitution" means knowingly engaging in or offering to engage in a sexual act in exchange for money or other valuable consideration.

If the charged offense is an attempt, the court should also give the instruction defining attempt. See Seventh Circuit Instruction No. _____.

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. §2427.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No. _____.

18 U.S.C. SECTION 2423(B) INTERSTATE TRAVEL WITH INTENT TO ENGAGE IN A SEXUAL ACT WITH A MINOR – ELEMENTS

To sustain the charge of traveling in interstate commerce to engage in illicit sexual conduct with a minor, the government must prove the following:

First, the defendant traveled in [interstate commerce][foreign commerce];

Second, the defendant's purpose in traveling in [interstate commerce][foreign commerce] was to engage in [a commercial sex act][a sexual act] with a minor.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Minor" is defined at Seventh Circuit Instruction No. _____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No. _____.

18 U.S.C. 2423(F) ILLICIT SEXUAL CONDUCT – DEFINED

"Illicit sexual conduct" means:

(1) a sexual act with a person under eighteen years of age; or

(2) any commercial sex act with a person under eighteen years of age.

Committee Comment

"Sexual act" is defined at Seventh Circuit Instruction No. _____.

"Commercial sex act" is defined at Seventh Circuit Instruction No. _____.

18 U.S.C. SECTION 2423(C) FOREIGN TRAVEL WITH INTENT TO ENGAGE IN A SEXUAL ACT WITH A MINOR – ELEMENTS

To sustain the charge of traveling in foreign commerce to engage in illicit sexual conduct with a minor, the government must prove the following:

First, the defendant is a [United States citizen][alien admitted for permanent residence];

Second, the defendant traveled in foreign commerce; and

Third, the defendant engaged in illicit sexual conduct with a minor.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Illicit Sexual Conduct" is defined at Seventh Circuit Instruction No. _____.

"Minor" is defined at Seventh Circuit Instruction No. _____.

"Interstate/foreign commerce" is defined at Seventh Circuit Instruction No. _____.

18 U.S.C. 2423(G) AFFIRMATIVE DEFENSE

If the defendant establishes that it is more likely than not that he reasonably believed that [the person identified in the indictment] with whom the defendant engaged in a commercial sex act was at least eighteen years of age then you should find the defendant not guilty.

Committee Comment

This instruction should only be given in cases charging violations of 18 U.S.C. §2423(b) and (c) in which the illicit sexual conduct involves a commercial sex act.

"Commercial sex act" is defined at Seventh Circuit Instruction No._____.

18 U.S.C. SECTION 2425 USE OF INTERSTATE FACILITIES TO TRANSMIT INFORMATION ABOUT A MINOR – ELEMENTS

To sustain the charge of use of interstate facilities to transmit information about a minor, the government must prove the following:

First, the defendant knowingly initiated the transmission of the [name][address] [telephone number][social security number][electronic mail address] of [the person identified in the indictment] [by [mail][a facility or means of interstate or foreign commerce]][within the special maritime or territorial jurisdiction of the United States];

Second, the defendant knew that [the person identified in the indictment] was less than sixteen years of age at the time; and

Third, the defendant intended to [entice][encourage][offer][solicit] [the person identified in the indictment] to engage in any sexual activity for which [the defendant][any other person identified in the indictment] could have been charged with a criminal offense [as charged in the indictment]].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

"Sexual activity" is not fully defined by the statute. *See* 18 U.S.C. §2427. There is no current authority addressing whether "sexual activity" includes conduct other than conduct included within "sexually explicit conduct" (see 18 U.S.C. §2256(2)(A)), "illicit sexual conduct" (see 18 U.S.C. §2423(f)), and "sexual act" (see 18 U.S.C. §2246(2)), such as misdemeanor offenses involving flashing or masturbation.

"Minor" is defined at Seventh Circuit Instruction No._____.

"Sexual activity" is not fully defined by the statute. See 18 U.S.C. §2427.

18 U.S.C. § 1956(a)(1)(A)(i) MONEY LAUNDERING – PROMOTING UNLAWFUL ACTIVITY

To sustain the charge[s] of money laundering as charged in Count[s] ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction was proceeds of [name of specified unlawful activity];

Third, the defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

Fourth, the defendant engaged in the financial transaction with the intent to [further the unlawful activity][or][promote the continued success of] the [name of specified unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in the pattern instruction for the Definition of "Transaction."

See United States v. Santos, 553 U.S. 507, 128 S. Ct. 2020, 2027 (2008) (plurality) ("promote the carrying on" means "[t]o contribute to the . . . prosperity of something, or to further something") (internal quotations omitted); *United States v. Krasinski*, 545 F.3d 546, 551 (7th Cir. 2008) (transporting money to buy drugs "promoted the carrying on" of the drug conspiracy, even though the drug sales were part and parcel of the conspiracy, because the transportation "contributed to the drug conspiracy's prosperity and furthered it along") (citing *United States v. Malone*, 484 F.3d 916, 921 (7th Cir. 2007) (delivery of cash for drugs satisfied the promotion element because it promoted "the continued

prosperity of the underlying offense") (quoting *United States v. Febus*, 218 F.3d 784, 790 (7th Cir. 2000)).

18 U.S.C. § 1956(a)(1)(A)(ii) MONEY LAUNDERING – TAX VIOLATIONS

To sustain the charge[s] of money laundering as charged in Count[s] ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction was proceeds of [name of specified unlawful activity];

Third, the defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

Fourth, the defendant engaged in the financial transaction with the intent to engage in [tax evasion; willfully making or subscribing false statements on a tax, return, document or statement made under penalty of perjury].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

The financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in the pattern instruction for the Definition of "Transaction."

Modify as necessary if the fourth element constitutes a violation of Title 26, U.S.C., §§ 7206(2), 7206(3), 7206(4), or 7206(5).

18 U.S.C. § 1956(a)(1)(B)(i) MONEY LAUNDERING – CONCEALING OR DISGUISING

To sustain the charge[s] of money laundering as charged in Count[s] ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction was proceeds of [name of specified unlawful activity];

Third, the defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

Fourth, the defendant knew that the transaction was designed in whole or in part to [conceal] [or] [disguise] [the nature, the location, the source, the ownership, or the control] of the proceeds of [name of specified unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

The financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in the pattern instruction for the Definition of "Transaction."

In light of *Cuellar v. United States*, 553 U.S. 540, 128 S. Ct. 1994, 2003 (2008), which interpreted a similar conceal/disguise provision in 18 U.S.C. § 1956(a)(2)(B)(i), the word "designed" in § 1956(a)(1)(b)(i) likely also means that the purpose or intent of the transaction must be to conceal or disguise one of the listed attributes. *See id.* at 2003-04. *Cuellar* is discussed further in the instruction for § 1956(a)(2)(B)(i).

18 U.S.C. § 1956(a)(1)(B)(ii) MONEY LAUNDERING – AVOIDING REPORTING

To sustain the charge[s] of money laundering as charged in Count[s] ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly conducted or attempted to conduct a financial transaction;

Second, the property involved in the financial transaction was proceeds of [name of specified unlawful activity];

Third, the defendant knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity; and

Fourth, the defendant knew that the transaction was designed in whole or in part to avoid [a transaction reporting requirement under state or federal law] [the filing of a Currency Transaction Report Form 4789].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

In appropriate cases the court may define the underlying transaction reporting requirement.

The financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)). An instruction to this effect is provided in the pattern instruction for the Definition of "Transaction."

18 U.S.C. § 1956(a)(2)(A) MONEY LAUNDERING – INTERNATIONAL PROMOTION

To sustain the charge[s] of money laundering as charged in Count[s] ___ of the indictment, the government must prove the following propositions:

First, the defendant knowingly [transported, transmitted, or transferred] or [attempted to transport, transmit, or transfer] a monetary instrument or funds;

Second, the [transportation, transmittal, or transfer] or [attempted transportation, transmittal, or transfer] was [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States]; and

Third, the defendant did so with the intent to [further the] [or] [promote the continued success of] [name of specified unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

Because Title 18, United States Code, Section 1956(a)(2)(A) contains no reference to "proceeds," *United States v. Santos,* 553 U.S. 507, 128 S. Ct. 2020 (2008) (plurality opinion) (defining "proceeds" in § 1956(a)(1)), is inapplicable in this context. *United States v. Krasinski,* 545 F. 3d 546,551 (7th Cir. 2008) ("The absence of a 'proceeds' requirement in section 1956(a)(2)(A) reflects that Congress decided to prohibit any funds transfer out of the country that promotes the carrying on of certain unlawful activity.")

18 U.S.C. § 1956(a)(2)(B)(i) MONEY LAUNDERING – INTERNATIONAL CONCEALING OR DISGUISING

To sustain the charge[s] of money laundering as charged in Count[s] __ of the indictment, the government must prove the following propositions:

First, the defendant knowingly transported, transmitted, or transferred or attempted to transport, transmit or transfer a [monetary instrument] or [funds];

Second, the transportation, transmittal, or transfer [or attempted transportation, transmittal, or transfer] was [from a place in the United States to or through a place outside the United States] [to a place in the United States from or through a place outside the United States];

Third, the defendant did so knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represented the proceeds of some form of unlawful activity; and

Fourth, the defendant knew that the transportation, transmission, or transfer was designed, in whole or in part, to [conceal] or [disguise] the nature, the location, the source, the ownership, or the control of the proceeds of [name of specified unlawful activity].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

Cuellar v. United States, 553 U.S.550, 128 S. Ct. 1994, 2003 (2008), held that the transportation contemplated in 18 U.S.C. § 1956(a)(2)(B)(i) must itself be intended to avoid the detection of the funds. It is not sufficient that the funds be hidden or concealed during the transportation. *Id.* at 2003. As the Supreme Court explained in *Cuellar,* the word "designed" in this statute refers not to the manner in which the funds are concealed, but to the purpose or intent accompanying the transportation. *Id.* at 2003-04.

18 U.S.C. § 1956 DEFINITION OF "PROCEEDS"

(For offenses alleged to have occurred before May 20, 2009)

The term "proceeds" is defined as the net proceeds, or profits, remaining after deducting all of the direct ordinary and necessary expenses, if any, incurred in acquiring the proceeds.

(For offenses alleged to have occurred on or after May 20, 2009)

The term "proceeds" is defined as any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

Committee Comment

For offenses alleged to have occurred before May 20, 2009, the term "proceeds" as it is used in Title 18, U.S.C., Section 1956 means profits, not gross receipts. *United States v. Santos*, 553 U.S.507, 128 S. Ct. 2020, 2031 (2008) (plurality opinion). Justice Stevens's concurring opinion was not as broad as the plurality opinion; however, independent of the *Santos* opinion, the law of this Circuit is consistent with the plurality opinion. *United States v. Scialabba,* 282 F. 3d 475, 478 (7th Cir. 2002) (in an illegal gambling prosecution: "We now hold that the word 'proceeds' in § 1956(a)(1)denotes net rather than gross income of an unlawful venture."); *United States v. Malone,* 484 F.3d 916 (7th Cir. 2007) (cash receipts from narcotics business used to purchase more narcotics are not considered "proceeds"). *Scialabba* and *Malone* explained that "the act of paying a criminal operation's expenses out of gross income is not punishable as a transaction in proceeds under §1956(a)(A)(i)." *Malone*, 484 F.3d at 921 (citing *Scialabba*). If *Scialabba* remains the governing law – that is, if *Scialabba* survived *Santos* – then all "ordinary and necessary expenses," including capital expenditures, do not constitute proceeds. *United States v. Hodge*, 558 F.3d 630, 633-34 (7th Cir. 2009); *United States v. Lee*, 558 F.3d 638, 644 (7th Cir. 2009). The Seventh Circuit has not definitively decided whether certain capital expenditures, such as advertising expenses, that would not duplicate the underlying crime fall within Justice Stevens's – and thus perhaps a majority of the Supreme Court's – view of net proceeds. *Hodge*, 558 F.3d at 634 (refraining from deciding the question because the government conceded the issue in that appeal and the jury verdict did not distinguish between advertising and other expenses).

For offenses alleged to have occurred after May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, overruled *Santos* by inserting an explicit definition of proceeds: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9).

18 U.S.C. § 1956 KNOWLEDGE

The government must prove that the defendant knew that the property involved in the financial transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law. The government is not required to prove that the defendant knew that the property involved in the transaction represented the proceeds of [fill in specified unlawful activity].

Committee Comment

This definition is set forth in 18 U.S.C. § 1956(c)(1).

18 U.S.C. § 1956 DEFINITION OF "TRANSACTION"

The term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected.

[The alleged financial transaction need not involve "all" illegal proceeds, only "some" illegal proceeds.]

Committee Comment

This definition is set forth in 18 U.S.C. § 1956(c)(3), and should be modified to conform to the alleged facts in the particular case. Usually the transaction at issue does not include all the examples set forth above. The court should include only those applicable to the facts of the case.

In a case where the financial transaction might include both legitimate funds and illegal proceeds, the bracketed language instructs the jury that the transaction need not involve "all" illegal proceeds, only "some" illegal proceeds. *See United States v. Jackson*, 983 F.2d 757, 765 (7th Cir. 1993) (interpreting the term "involves the proceeds" in § 1956(a)(1)).

18 U.S.C. § 1956 DEFINITIONS

The term "financial transaction" means [a purchase, sale, transfer, delivery, or other disposition involving one or more monetary instruments, which in any way or degree affects interstate [or foreign] commerce]] or [a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or use of a safe deposit box involving the use of a financial institution which is engaged in or the activities of which affect interstate [or foreign] commerce.]

The term "monetary instruments" includes coin or currency of the United States, personal checks, bank checks, and money orders.

The term "financial institution" includes, for example, commercial banks, trust companies, businesses engaged in vehicle sales including automobile sales, and businesses and persons engaged in real estate closings and settlements.

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state, or between two points within a state through a place outside the state. "Foreign commerce" means trade, transactions, transportation, or communication between a point in one country and a place outside that country, or between two points within a country through a place outside that country.

When [a financial institution][a business][an individual] in [name the state] is engaged in commerce outside of that state, or when [a financial institution][a business][an individual] in [name of state] purchases goods or services which come from outside that state, then the activities of that [financial institution] [business][individual] affect interstate commerce.

The government must prove that it was foreseeable that defendant's acts would be to affect interstate or foreign commerce. The government need not prove that the defendant knew or intended that his actions would affect interstate or foreign commerce.

Committee Comment

The definition of "financial transaction" is set forth in 18 U.S.C. § 1956(c)(4).

This instruction includes the transactions most commonly prosecuted under this statute. Other types of transactions – for example a transaction involving the transfer of title to real estate or an automobile – may be included where appropriate.

18 U.S.C. § 1956 DEFINITION OF "CONCEAL OR DISGUISE"

The term "conceal or disguise" means to hide the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

Committee Comment

See United States v. Esterman, 324 F.3d 565, 570 (7th Cir. 2003) (quoting *United States v. Jackson*, 935 F.3d 832, 843 (7th Cir. 1991)), *overruled on other grounds*, *Cuellar v. United States*, 553 U.S. 550, 128 S. Ct. 1994, 1999 n.1 (2008) (overruling *Esterman* to the extent that it held that creating the appearance of legitimate wealth was the only means to prove concealment or disguise).

18 U.S.C. § 1957 UNLAWFUL MONETARY TRANSACTIONS IN CRIMINALLY DERIVED PROPERTY

To sustain the charge of money laundering as charged in Count ___ of the indictment, the government must prove the following propositions:

First, the defendant engaged or attempted to engage in a monetary transaction;

Second, that defendant knew the transaction involved criminally derived property;

Third, the property had a value greater than $10,000;

Fourth, the property was derived from [name of specified unlawful activity]; and

Fifth, the transaction occurred in the [United States].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

The statute also allows for prosecution where the offense occurs within the special maritime and territorial jurisdiction of the United States, and where the offense occurs outside the United States but by qualifying persons as defined in 31 U.S.C. § 3077.

Section 1957(c) clearly states that the government need not prove that the defendant knew the offense from which the criminally derived property was derived was specified unlawful activity.

18 U.S.C. § 1957 DEFINITION OF "MONETARY TRANSACTION" AND "INTERSTATE COMMERCE"

The term "monetary transaction" means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce, of funds or a monetary instrument, by, through, or to a financial institution.

[The alleged monetary transaction need not involve "all" criminally derived property, only over $10,000 in criminally derived property.]

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state.

The term "financial institution" includes [commercial banks, trust companies, businesses engaged in vehicle sales including automobile sales, and businesses and persons engaged in real estate closings or settlements.]

Committee Comment

Financial institutions are defined in 31 U.S.C. § 5312 (a)(2), and specific cases may require giving the statutory language to the jury.

Although the monetary transaction must involve criminally derived property valued at over $10,000, there is no requirement that all of the money involved in the transaction was criminally derived. *United States v. Haddad*, 462 F.3d 783, 791-92 (7th Cir. 2006) (although transactions of $16,000 and $15,000 were drawn from bank account where legitimate and illegitimate funds were commingled, evidence was sufficient because the "vast majority" of funds in the account were illegitimate and money is fungible). In a case where the transaction might include both legitimate funds and criminally derived property, the bracketed language instructs the jury that the transaction need not involve "all" criminally derived property, only over $10,000.

The transaction that created the criminally-derived property must be distinct from the charged money laundering transaction, because § 1957 criminalizes transactions in criminally-derived property, not the transactions that create the property – the latter transactions comprise the underlying specified activity itself. *United States v. Seward*, 272 F. 3d 831, 836 (7th Cir. 2001 (citing *United States v. Mankarious*, 151 F. 3d 694, 705 (7th Cir. 1998)). In the context of ongoing criminal activity, however, such as a fraud scheme," there is no requirement that the entire fraudulent scheme be complete before the defendant starts laundering the proceeds from the early portions of the scheme." *Seward,* 272 F 3d at 837. In appropriate cases further clarification may be appropriate to address this merger issue.

18 U.S.C. §§ 1341 & 1343 MAIL/WIRE/ CARRIER FRAUD – ELEMENTS

Count[s] ___ of the indictment charge[s] the defendant _____ with [mail][wire][carrier] fraud.

To sustain the charge of [mail][wire][carrier] fraud, the government must prove the following propositions:

First, that the defendant knowingly [devised] [or] [participated in] a scheme [to defraud], as described in Count[s] ___;

Second, that the defendant did so with the intent to defraud;

Third, the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and

Fourth, that for the purpose of carrying out the scheme or attempting to do so, the defendant [used [or caused the use of]] [the United States Mails] [a private or commercial interstate carrier] [caused interstate wire communications to take place] in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

Section 1341 (and § 1343) begins, "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ." The 1999 pattern instruction sets forth the elements as if there are two separate types of prohibited schemes, using bracketed language to signify the different types: a scheme "[to defraud] [or] [to obtain money or property by means of false pretenses, representations, or promises]." In other words, the current pattern instruction treats § 1341 as prohibiting (a) schemes to defraud and (b) schemes to obtain money or property by false representations.

To conform the instruction to controlling case law and to improve the instruction's comprehensibility, the Committee proposes that the instruction refer only to a singular "scheme to defraud," with another instruction further defining "scheme to defraud." In *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000), the Supreme Court rejected the argument that § 1341 prohibits two separate types of schemes. The Supreme Court acknowledged that, "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." *Id.* at 26. But the Court rejected that interpretation, and reaffirmed a prior decision that had construed the second phrase – the "for obtaining money or property" phrase – as "simply modif[ying] the first" to make clear that the statute covered false representations as to future events, not just already-existing facts. *Id.* (citing *McNally v. United States*, 483 U.S. 350, 359 (1987)). Accordingly, the pattern instruction should refer only to a "scheme to defraud," with a further instruction defining that term, and should not refer to a separate scheme to obtain money or property.

Another substantive change involves the addition of the materiality element. *See Neder v. United States*, 527 U.S. 1 (1999). Cases recommend inclusion of the materiality element in jury instructions. *See United States v. Fernandez*, 282 F.3d 500, 509 n. 6 (7th Cir. 2002); *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 2000).

Because the honest services statute is a definition of "scheme to defraud," *United States v. Boscarino*, 437 F.3d 634, 636 (7th Cir. 2006), it has not been separately identified as a type of mail/wire/carrier fraud in the elements instruction.

18 U.S.C. §§ 1341, 1343 & 1346 TYPES OF MAIL/ WIRE/CARRIER FRAUD

The indictment charges the defendant[s] with committing [mail] [wire] [carrier] fraud in two different ways: First, the defendant[s] [is] [are] charged with [mail] [wire] [carrier] fraud by participating in a scheme to obtain money or property. Second, the defendant[s] [is] [are] charged with [mail] [wire] [carrier] fraud by participating in a scheme to defraud [list victim of the intangible right to honest services].

Committee Comment

This instruction applies when the indictment charges more than one type of mail/wire/carrier fraud, 18 U.S.C. §§ 1341, 1343 & 1346.

When an indictment charges both money/property and honest services fraud, the court may consider giving a special verdict form requiring the jury to make findings on each theory. The Committee takes no position on whether such a verdict form should be given. In *Black v. United States*, 130 S. Ct. 2963 (2010), the Supreme Court discussed special verdict forms in mail/wire fraud cases charging both money/property and honest services fraud. The Supreme Court held that the defendants did not forfeit their right to challenge the jury instructions simply because they objected to the government's request for a special verdict form requiring the jury to make separate findings on money/property and honest services fraud.

18 U.S.C. §§ 1341 & 1343 DEFINITION OF SCHEME TO DEFRAUD

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

[A scheme to defraud is a scheme that is intended to deceive or cheat another and [to obtain money or property or cause the [potential] loss of money or property to another by means of materially false or fraudulent pretenses, representations or promises] [or] [to deprive another of the intangible right to honest services through [bribery] or [kickbacks].]]

Committee Comment

The "scheme to defraud" and "intent to defraud" elements are distinct, and subject to definition in separate instructions. *See United States v. Doherty*, 969 F.3d 425, 429 (7th Cir. 1992).

As the Supreme Court held in *Skilling v. United States*, 130 S.Ct. 2896, 2931 (2010) the honest services statue only covers bribery and kickback schemes. Honest services is further defined in these instructions.

In cases in which the indictment alleges multiple schemes, the jury should be instructed that it must be unanimous on at least one of the schemes. *See United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) ("Jury Instruction 13 informed the jury that the government need not prove every scheme that it had alleged, but that it must prove one of them beyond a reasonable doubt."); *see also United States v. Sababu*, 891 F.3d 1308, 1326 (7th Cir. 1989) (1989). A unanimity instruction can be found at Instruction 4.04.

A jury need not be given a specific unanimity instruction regarding the means by which an offense is committed. *See Richardson v. United States*, 526 U.S. 813, 817 (1999) (citing *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality)); *see also United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009) (jury is not required to unanimously agree on overt act in a conspiracy prosecution). In the absence of definitive precedent on the subject, the Committee takes no position on whether a specific unanimity instruction as to money/property and honest services fraud should be given when the indictment charges both money/property and honest services fraud. If money/property and honest services fraud are viewed as establishing separate scheme objects, a specific unanimity instruction may be appropriate. On the other hand, if money/property and honest services fraud are viewed as different means by which to commit the "scheme to defraud" essential element, cf. *United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006) (honest services is a definition of scheme to defraud), or as something akin to an overt act, the general

unanimity instruction applicable to essential elements may be sufficient. *See United States v. Blumeyer*, 114 F.3d 758, 769 (8th Cir. 1997) (dicta) ("we have serious doubts whether the jury was required to agree on the precise manner in which the scheme violated the law"); *United States v. Zeidman*, 540 F.2d 314, 317-18 (7th Cir. 1976) ("[T]he indictment cannot be attacked because it would permit a conviction by less than a unanimous jury. The trial judge clearly instructed the jury that they must not return a guilty verdict unless they all agreed that the defendants had devised a scheme to defraud at least the creditor or the debtor.").

18 U.S.C. §§ 1341 & 1343 PROOF OF SCHEME

In considering whether the government has proven a scheme to defraud, the government must prove that one or more of the [false or fraudulent pretenses, representations or promise] [bribes or kickbacks] charged in the portion of the indictment describing the scheme be proved beyond a reasonable doubt. The government, however, is not required to prove all of them.

Committee Comment

Where unanimity as to a specific act is required, refer to Instruction 4.04.

18 U.S.C. §§ 1341 & 1343 DEFINITION OF MATERIAL

A false or fraudulent pretense, representation, [or] promise[,] [omission, or concealment] is "material" if is capable of influencing, the decision of the [person[s]] [or] [list victim] to whom it was addressed.

[It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim, as long as it is capable of doing so.]

[A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] or the concealment of material information.]

Committee Comment

Neder v. United States, 527 U.S. 1 (1999), held that materiality is an essential element of mail/wire fraud. Cases recommend inclusion of the materiality element in jury instructions. *See United States v. Fernandez*, 282 F.3d 500, 509 n.6 (7th Cir. 2002); *United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 2000).

The mail/wire fraud statutes do not include the words "omission" or "concealment," but cases interpreting the statutes hold that omissions or concealment of material information may constitute money/property fraud, without proof of a duty to disclose the information pursuant to a specific statute or regulation. *See United States v. Powell*, 576 F.2d 482, 490, 492 (7th Cir. 2009) ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment'") (quoting *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005)); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.3d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697-98 (7th Cir. 1985); *see also United States v. Colton*, 231 F.3d 890, 891-901 (4th Cir. 2000).

18 U.S.C. §§ 1341 & 1343 DEFINITION OF INTENT TO DEFRAUD

A person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat [the victim] in order to cause [a gain of money or property to the defendant or another] [or] [the [potential] loss of money or property to another] [or] [to deprive another of the intangible right to honest services through bribery or kickbacks].

Committee Comment

In *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005), the court stated, "A participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants." In *United States v. Sorich*, 523 F.3d 702, 709-10 (7th Cir. 2008), the court held that fraud could exist when the benefit accrues to third parties who are not co-schemers.

18 U.S.C. §§ 1341, 1343 & 1346 DEFINITION OF HONEST SERVICES

A scheme to defraud another of the intangible right to honest services consists of a scheme to violate a fiduciary duty by bribery or kickbacks.

[A public official owes a fiduciary duty to the public.]

[An employee owes a fiduciary duty to [his] [her] employer.]

[An officer of a corporation owes a fiduciary duty to the corporation's shareholders].

[An union official owes a fiduciary duty to the union.]

[The defendant need not owe the fiduciary duty personally, so long as [he][she] devises or participates in a bribery or kickback scheme intended to deprive the [public][employer][union] of its right to a fiduciary's honest services.]

Committee Comment

As the Supreme Court held in *Skilling v. United States*, 130 S.Ct. 2896 (2010), the honest services statute covers only bribery and kickback schemes. See the bribery and kickback instructions for further definition.

Skilling noted certain examples of fiduciary relationships covered by §1346. *See* 130 S. Ct. at 2931 n.42. The list of fiduciary duties in this instruction is not exhaustive and courts may need to use other fiduciary duties than those identified above. *See e.g., United States v. Hausmann*, 345 F.3d 952, 955-56 (7th Cir. 2003).

In most cases, public official status will not be in dispute. If public official status is a disputed issue, the Court may consider giving an instruction tailored for the case.

The final bracketed instruction may be given in cases in which one or more of the trial defendants is not the individual who personally owed the fiduciary duty. *See, e.g., United States v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984) ("[t]here can be no doubt that a non-fiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail fraud statute"), overruled on other grounds, *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985) (*en banc*); *United States v. Lovett*, 811 F.2d 979, 984 (7th Cir. 1987) (lawyer guilty of mail fraud for bribing mayor, and thereby depriving the citizens of their right to the mayor's honest services). The public official/fiduciary, in fact, need not

even be a party to the scheme. *See United States v. Potter*, 463 F.3d 9, 17 (1st Cir. 2006) (businessmen guilty of honest services fraud for scheming to bribe state speaker of the house; no requirement that public official agree to the scheme; "that [official] might prove unwilling or unable to perform, or that the scheme never achieved its intended end, would not preclude conviction").

18 U.S.C. §§ 1341, 1343 & 1346 RECEIVING A BRIBE OR KICKBACK

[A [public official] [employee] [corporate officer] [union official] [defendant] commits bribery when he [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act.].

[A kickback occurs when a [public official] [employee] [corporate officer] [union official] [defendant] [demands, solicits, seeks, or asks for, or agrees to accept or receive, or accepts or receives], directly or indirectly, something of value from another person in exchange for a promise for, or performance of, an [official act], and the act itself provides the source of the funds to be "kicked back."]

"Something of value" includes money or property [and prospective employment].

Committee Comment

The official act will vary in each case and the court may need to vary the instruction based on it. The bracketed list of fiduciaries is not necessarily an exhaustive list.

A kickback is a form of bribery where the official action, typically the granting of a government contract or license, is the source of the funds to be paid to the fiduciary. As *Skilling* explains, that is what happened in *McNally* itself. *See* 130 S. Ct. at 2932 ("a public official, in exchange for routing . . . insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest"); *see also, e.g., United States v. Blanton*, 719 F.2d 815, 816-818 (6th Cir. 1983) (governor arranged for friends to receive state liquor licenses in exchange for a share of the profits).

Skilling cites 18 U.S.C. § 201 as an example of a bribery statute that gives content to 1346's bribery scope, and § 201 refers to bribes comprising "anything of value." Accordingly, "anything of value" may include various forms of money and property, *United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir. 1983) ("anything of value" under § 201 includes shares in corporation), and may also include prospective employment, *United States v. Gorman*, 807 F.2d 1299, 1302, 1305 (6th Cir. 1986) ("anything of value" under § 201 includes a side job for federal employee as reward for official action).

The definition of "something of value" provides common examples but is not intended to be an exhaustive list.

When the alleged bribe is in the form of a campaign contribution, an additional instruction may be required. In *McCormick v. United States*, 500 U.S. 257, 273 (1991), the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In *Evans v. United States*, 504 U.S. 255 (1992), another Hobbs Act case involving campaign contributions, the Court elaborated on the *quid pro quo* requirement from *McCormick*, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268. The Court in *Evans* held that the following jury instruction satisfied *McCormick*:

> [I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258, 268 (second brackets in original). Furthermore, in *United States v. Allen*, 10 F.3d 405, (7th Cir. 1993), the court discussed the district court's giving of a *McCormick* instruction in a case in which RICO predicate acts included bribery in violation of Indiana law.

The instruction defining "color of official right" for § 1951 purposes also addresses the role of campaign contributions. *See* **[cite] [page 296 of 1999 book]**.

18 U.S.C. §§ 1341, 1343 & 1346 OFFERING A BRIBE OR KICKBACK

[A defendant offers a bribe when he, directly or indirectly, [promises, gives, offers] a [public official] [employee] [corporate officer] [union official] anything of value in exchange for a promise for, or performance of, an [official act.] [Describe act at issue.]

[A defendant offers a kickback when he, directly or indirectly, [promises, gives, offers] a [public official] [employee] [corporate officer] [union official] something of value in exchange for a promise for, or performance of, an [official act], and the act itself provides the source of the funds to be "kicked back." [Describe act at issue.]

"Something of value" includes money or property [and prospective employment].

Committee Comment

See Committee Comment for Receiving a Bribe or Kickback.

18 U.S.C. §§ 1341, 1343 & 1346 INTENT TO INFLUENCE

It is not necessary that the [public official] [defendant] had the power to or did perform the act for which he was promised or which he agreed to receive something of value; it is sufficient if the matter was before him in his official capacity. [Nor is it necessary that the [public official] [defendant] in fact intended to perform the specific official act. It is sufficient if the [public official] [defendant] knew that the thing of value was offered with the intent to exchange the thing of value for the performance of the official act.]

18 U.S.C. §§ 1341 & 1343 SUCCESS NOT REQUIRED

The [mail] [interstate carrier] [wire] fraud statute can be violated whether or not there is any loss or damage to the victim of the crime] [or] [gain to the defendant].

[The government need not prove that the scheme to defraud actually succeeded.]

Committee Comment

See United States v. Lupton (7th Cir. 2010) (the "wire fraud statutes criminalize the fraudulent acts undertaken to secure illicit gains, not their ultimate successes").

18 U.S.C. § 1343 WIRE COMMUNICATION

[Telephone calls,] [mobile or cellular telephone calls,] [facsimiles,] [e-mails,] [instant messages,] [wire transfer of funds,] [text messages] [and] [electronic filing of documents] constitute[s] transmission by means of wire communication.

Committee Comment

This instruction lists various types of transmissions covered by the wire fraud statute. The list may not be exhaustive given the evolution of technology.

18 U.S.C. §§ 1341 AND 1343 USE OF MAILS/INTERSTATE CARRIER/INTERSTATE COMMUNICATION FACILITY

The government must prove that [the United States mails] [[a] private or commercial interstate carrier[s]] [interstate communication facilities] [was] [were] used to carry out the scheme, or [was] [were] incidental to an essential part of the scheme.

In order to [use [or cause the use of]] [the United States mails] [a private or commercial interstate carrier]] [cause interstate wire communications to take place], the [a] defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which that use could reasonably have been foreseen. [However, the government does not have to prove that [the/a] defendant knew that [the wire communication was of an interstate nature][the carrier was an interstate carrier].]

[The defendant need not actually or personally use [the mail] [an interstate carrier] [interstate communication facilities].]

[Although an item [mailed] [sent by interstate carrier] [communicated interstate] need not itself contain a fraudulent representation or promise or a request for money, it must carry out or attempt to carry out the scheme.]

[In connection with whether a [mailing] [or] [wire transmission] was made, you may consider evidence of the habit or the routine practice of [a person] [or] [an organization].]

[Each separate use of [the mail] [an interstate carrier] [interstate communication facilities] in furtherance of the scheme to defraud constitutes a separate offense.]

Committee Comment

A defendant does not actually have to use the mail or wire or a carrier to violate § 1341; he only needs to cause mailing to be done as a part of the scheme. The two essential elements are a scheme to defraud and that mailing or wiring or use of a carrier occurred as a part of that scheme. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). The use of mail need not be intended but must be reasonably foreseeable and follow in the course of business of furthering the scheme. *United States v. Ashman*, 979 F.2d 469, 481-84 (7th Cir. 1992); *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir.1986); *United States v. Briscoe*, 65 F.3d 576,583 (7th Cir. 1995); *United States v. Hickok*, 77 F.3d 992, 1004 (7th

Cir.), *cert. denied*, 116 S.Ct. 1071 (1996). *See also United States v. Kenofskey*, 243 U.S. 440 (1917); *United States v. Calvert*, 523 F.2d 895 (8th Cir.1975), *cert. denied,* 424 U.S. 911 (1976); and *Hart v. United States*, 112 F.2d 128 (5th Cir.), *cert. denied*, 311 U.S. 684 (1940).

In *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) it was held that wire fraud parallels mail fraud. Consequently, the government is not required to prove the scheme was successful, but only that use of a wire communication was reasonably foreseeable, and actual wiring occurred in furtherance of the scheme. *See also United States v. Kenofskey*, 243 U.S. 440 (1917); *United States v. Clavert*, 523 F.2d 895 (8th Cir.1975), *cert. denied*, 424 U.S. 911 (1976); and *Hart v. United States*, 112 F.2d 128 (5th Cir.), *cert. denied*, 311 U.S. 684 (1940).

The Committee has combined separate mail and wire instructions, and has added interstate carrier language. It has also added the "incidental to" line in response to *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989). The Committee has also amended the knowledge requirement to conform with *Pereira v. United States*, 347 U.S. 1 (1954) and, in the case of interstate wire/interstate carrier communications, with *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996).

Language from Rule 406 of the Federal Rules of Evidence has been added.

Finally, it has merged the last line, in brackets, for use in multiple count cases.

18 U.S.C. § 669(A) HEALTH CARE THEFT/EMBEZZLEMENT – ELEMENTS

To sustain the charge of [theft][embezzlement] from a health care benefit program as charged in Count[s]____ of the indictment, the government must prove the following propositions:

First, that the defendant [embezzled][stole][otherwise without authority converted to the use of any person other than the rightful owner][intentionally misapplied] any [moneys]funds][securities] [premiums] [credits][property][assets] of a health care benefit program;

Second, that the defendant did so knowingly and willfully; and

Third, that the [moneys] [funds] [securities] [premiums] [credits] [property] [assets] had a value of more than $100.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should refer to the pattern instruction defining "health care benefit program." The statute uses both "knowingly" and "willfully" to define the mens rea element. There is no case that has definitively decided the meaning of "knowingly and willfully" in the context of this statute. *See United States v. Wheeler*, 540 F.3d 683 (7th Cir. 2008). *Wheeler* considered this issue under a plain error standard and concluded that "there is a plausible argument that the use of 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully under § 669, the *Wheeler* court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the *Wheeler* court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly." The Committee advises that if the district court deems the two terms to have the same meaning, then the court should define "knowingly and willfully" in one instruction using the pattern instruction

for "knowingly." If the court deems the two terms to have separate meanings, then the court should define both terms in separate instructions.

This instruction contemplates a felony charge under the statute. If the value of the money or property is $100 or less, the offense constitutes a misdemeanor under 18 U.S.C. § 669(a).

18 U.S.C. § 669(A) HEALTH CARE BENEFIT PROGRAM/ INTERSTATE COMMERCE – DEFINITION

A health care benefit program is a [public or private] [plan or contract], affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States].

The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree. The government need not prove that [the] [a] defendant engaged in interstate commerce or that the acts of [the] [a] defendant affected interstate commerce.

Committee Comment

A health care benefit program is defined in 18 U.S.C. § 24 for purposes of the federal health care offenses, including § 669. The first sentence of this instruction is the definition of health care benefit program in 18 U.S.C. § 24. The remainder of the instruction addresses "affecting commerce" which is an element of proof in cases where 18 U.S.C. § 24 is at issue. Courts have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002).

18 U.S.C. § 1347 HEALTH CARE FRAUD – ELEMENTS

To sustain the charge of health care fraud, the government must prove the following propositions:

First, that there was a scheme [to defraud any health care benefit program] [or] [to obtain the money or property owned by, or under the custody and control of, any health care benefit program by means of material false statements, pretenses, representations, promises] in connection with the delivery of or payment for health care benefit items, or services, as charged in Count[s] ____ of the indictment;

Second, that the defendant [attempted to] execute[d] the scheme; and

Third, that the defendant did so knowingly and willfully.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should refer to the pattern instruction defining "scheme" under 18 U.S.C. §§ 1341 and 1343. The court should define both "knowingly" and "willfully" for the jury. See *United States v. Wheeler*, 540 F.3d 683 (7th Cir. 2008) ("there is a plausible argument that the use of 'knowingly and willfully' in § 669 [health care theft] may require that a defendant know his conduct was in some way unlawful").

18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/ INTERSTATE COMMERCE – DEFINITION

A health care benefit program is any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. Commerce was affected if the health care program[s] had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States].

The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree. The government need not prove that [the] [a] defendant engaged in interstate commerce or that the acts of [the] [a] defendant affected interstate commerce.

Committee Comment

A health care benefit program is defined in 18 U.S.C. § 24 for purposes of the federal health care offenses, including § 1347. The first sentence of this instruction is the definition of health care benefit program in 18 U.S.C. § 24. The remainder of the instruction addresses "affecting commerce" which is an element of proof in cases where 18 U.S.C. § 24 is at issue. Courts have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Lucien*, 2003 WL 22336124 (2d Cir. Oct. 14, 2003); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002). The court may also find it appropriate to adapt for health care offenses the RICO pattern instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce.

21 U.S.C. § 853 DRUG FORFEITURE – ELEMENTS

The Forfeiture Allegation[s] in the Indictment allege that the following property is subject to forfeiture under Title 21, United States Code, Section 853:

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the property constituted or was derived from the proceeds obtained, directly or indirectly, as a result the defendant's[s'] participation in the drug offense[s] charged in Count[s] ___; and/or

Second, that the property was used or intended to be used, in any manner or part, to commit, or to facilitate the commission of, [that] [those] drug offense[s]; and

Third, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

21 U.S.C. § 853(B) DEFINITION OF PROPERTY

Property that is subject to forfeiture includes [real property, including things growing on, affixed to, and found in land]; and [tangible and intangible personal property, including rights, privileges, interests, claims and securities.]

21 U.S.C. § 853(D) REBUTTABLE PRESUMPTION

If you find that the government has proven by a preponderance of the evidence:

First, that the property at issue was acquired by a person convicted of _____ during the time period of this offense or within a reasonable time after such period; and

Second, that there was no likely source for the property at issue other than the violation of _____, then there is a rebuttable presumption that any property of a person convicted of ___ is subject to forfeiture.

Committee Comment

This instruction leaves a place for the Court to fill in the violation under Title 21, Subchapter I or Subchapter II. It is based on the language of 18 U.S.C. § 853(d).

INTRODUCTION FORFEITURE INSTRUCTION

Members of the Jury, you have one more task to perform before you are discharged.

In this case, a portion of the Indictment not previously discussed seeks to forfeit [certain] money or property. The law provides that when a defendant is convicted of _____, he may be required to forfeit to the United States certain property. I will explain the specific property that may be subject to forfeiture in a moment. But first, I will give you some general instructions that apply to your consideration of the forfeiture allegations. [Each of you will be given a copy of these instructions for your deliberations.]

"Forfeiture" means to give up ownership or interest in property, as a penalty for committing [a] violation[s] of certain federal laws.

The instructions previously given to you concerning your consideration of the evidence, the credibility of the witnesses, [separate consideration of each defendant], your duty to deliberate together, and the necessity of a unanimous verdict apply during your forfeiture deliberations. The burden of proof, however, is different, as I will describe more fully below.

In your forfeiture deliberations, you may consider any evidence admitted before [or after your previous] deliberations, including witness testimony, exhibits, and stipulations [and anything I took judicial notice of]. I remind you that the lawyers' statements to you are not evidence.

You should not reconsider whether [a] defendant[s] [is] [are] guilty or not guilty. Your previous verdict[s] [is] [are] final and conclusive.

Committee Comment

Federal Rule of Criminal Procedure 32.2(b)(4) provides that upon a party's request, "a jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant. Because forfeiture is an element of sentencing, *United States v. Libretti*, 516 U.S. 29, 38-39 (1995), the forfeiture proceedings take place only if the jury has found the defendant guilty of an offense that gives rise to forfeiture.

Federal Rule of Civil Procedure 32.2(a), modified as of December 1, 2009, provides that the government does not have to identify in the indictment the property subject to forfeiture or specify the amount of any forfeiture money judgment that it seeks. The government need only provide notice in the indictment or information that it intends to seek the

forfeiture of property. Accordingly, the draft instructions have included language in brackets for those cases where the notice in the indictment identifies specific property.

FORFEITURE ALLEGATIONS INSTRUCTION

The Indictment contains [____] Forfeiture Allegations. The Forfeiture Allegation[s] [is] [are] not evidence and [do] [does] not create any inference that the property is subject to forfeiture. The Defendant has denied that the property is subject to forfeiture.

Committee Comment

Because forfeiture is an element of sentencing, *United States v. Libretti*, 516 U.S. 29, 38-39 (1995), and the jury has already found the defendant guilty, the Committee concluded that the presumption of innocence instruction is not appropriate. The Committee has included as part of this instruction that the defendant denies that the property is subject to forfeiture.

FORFEITURE BURDEN OF PROOF INSTRUCTION

In this phase of the trial, the government has the burden of proving that the property it seeks to forfeit is subject to forfeiture. The government must establish its forfeiture allegation[s] are more probably true than not true.

The burden of proof stays with the government throughout this phase of the trial. The defendant[s] [does] [do] not have the burden of proof, and [is] [are] not required to produce any evidence.

Committee Comment

Because forfeiture is an element of sentencing, *United States v. Libretti*, 516 U.S. 29, 38-39 (1995), "the government need only establish its right to forfeiture by a preponderance of the evidence." *United States v. Patel*, 131 F.3d 1195, 1200 (7th Cir. 1997). *See also United States v. Melendez*, 401 F.3d 851, 856 (7th Cir. 2005); *United States v. Swanson*, 394 F.3d 520, 526 (7th Cir. 2005); *United States v. Messino*, 382 F.3d 704, 713-14 (7th Cir. 2004); *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002); *United States v. Messino*, 122 F.3d 427, 428 (7th Cir. 1997); *United States v. Ben-Hur*, 20 F.3d 313, 317 (7th Cir. 1994); *United States v. Simone*, 931 F.2d 1186, 1199 (7th Cir. 1991). The Seventh Circuit has held that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "does not disturb the rule that forfeiture is constitutional when supported by the preponderance of the evidence." *Vera*, 278 F.3d at 672; *see also Messino*, 382 F.3d at 713–14.

Prior to *Libretti*, the government in *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987), conceded that a reasonable doubt standard applied to a RICO forfeiture. Another pre-*Libretti* case, *United States v. Pelullo*, 14 F.3d 881, 901-06 (3rd Cir. 1994), held that a reasonable doubt standard applied to RICO forfeitures. Later cases have disagreed with *Pelullo*. *See United States v. Corrado*, 227 F.3d 543, 550-51 (6th Cir. 2000); *United States v. DeFries*, 129 F.3d 1293, 1312 (D.C. Cir. 1997) (*per curiam*). *See also United States v. Houlihan*, 92 F.3d 1271, 1299 n. 33 (1st Cir. 1996) (government "may have conceded too much" in agreeing to a reasonable doubt standard in a RICO forfeiture case).

SEPARATE CONSIDERATION – FORFEITURE ALLEGATIONS

You must give separate consideration to each [property, interest, forfeiture allegation], and return a separate finding as to each. Your finding as to one [piece of property, interest, forfeiture allegation] should not control your decision as to any other.

SEPARATE CONSIDERATION – MULTIPLE DEFENDANTS

The Forfeiture Allegation[s] allege[s] that the same property is subject to forfeiture as to more than one defendant. You should give each defendant separate consideration as to [the] [each] Forfeiture Allegation.

18 U.S.C. § 982(A)(1) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property:

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] property was involved in the offense[s] as charged in Count[s] ___ or is property traceable to real or personal property involved in [that] [those] offense[s]; and

Second, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(1) applies where the real or personal property was involved in one or more of these offenses: 1) 18 U.S.C. § 1956, laundering of monetary instruments; 2) 18 U.S.C. § 1957, engaging in monetary transactions in property derived from specified unlawful activity; or 3) 18 U.S.C. § 1960, unlicensed money transmitting businesses. Section 982(a)(1) does not require a specific connection between the property and the defendant. The only required connection is between the property and the offense.

18 U.S.C. § 982(A)(2) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(2):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the property constitutes or was derived from proceeds the defendant[s] obtained directly or indirectly as a result of the offense[s] charged in Count[s] ___ ;

Second, that the offense charged in Count[s] ___ affected a financial institution; and

Third, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(2) applies where the property constitutes or was derived from proceeds the defendant obtained directly or indirectly as a result of the violation of, or conspiracy to violate one of the following statutes, as long as it affects a financial institution: 1) 18 U.S.C. § 215, receipt of commissions or gifts for procuring loans, theft; 2) 18 U.S.C. § 656, embezzlement, or misapplication by a bank officer or employee; 3) 18 U.S.C. § 657, embezzlement, or misapplication by a lending, credit or insurance institution officer or employee; 4) 18 U.S.C. § 1005, false entries by a bank officer or employee; 5) 18 U.S.C. § 1006, false entries by officers or employees of federal credit institutions; 6) 18 U.S.C. § 1007, false statements to influence the Federal Deposit Insurance

Corporation; 7) 18 U.S.C. § 1014, false statement on loan or credit application; 8) 18 U.S.C. § 1341, mail fraud; 9) 18 U.S.C. § 1343, wire fraud; 10) 18 U.S.C. § 1344, bank fraud.

Section 982(a)(2) also applies where the property at issue constitutes or was derived from proceeds the defendant obtained directly or indirectly as a result of the violation of, or conspiracy to violate one of the following statutes: 1) 18 U.S.C. § 471, false obligation of security; 2) 18 U.S.C. § 472, uttering counterfeit obligations or securities; 3) 18 U.S.C. § 473, dealing in counterfeit obligations or securities; 4) 18 U.S.C. § 474, plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities; 5) 18 U.S.C. § 476, taking impressions of tools used for obligations or securities; 6) 18 U.S.C. § 477, possessing or selling impressions of tools used for obligations or securities; 7) 18 U.S.C. § 478, false foreign obligations or securities; 8) 18 U.S.C. § 479, uttering counterfeit foreign obligations or securities; 9) 18 U.S.C. § 480, possessing counterfeit foreign obligations or securities; 10) 18 U.S.C. § 481, plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities; 11) 18 U.S.C. § 485, false coins or bars; 12) 18 U.S.C. § 486, uttering coins of gold, silver or other metal; 13) 18 U.S.C. § 487, making or possessing counterfeit dies for coins; 14) 18 U.S.C. § 501, counterfeit postage stamps, postage meter stamps, and postal cards; 15) 18 U.S.C. § 502, counterfeit postage and revenue stamps of foreign government; 16) 18 U.S.C. § 510, forging endorsements on Treasury checks or bonds or securities of the United States; 17) 18 U.S.C. § 542 entry of goods by means of false statements; 18) 18 U.S.C. § 545, smuggling goods into the United States; 19) 18 U.S.C. § 842, unlawful acts relating to explosive materials; 20) 18 U.S.C. § 844, unlawful importation, manufacture, distribution and storage of explosive materials; 21) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents, authentication features, and information; 22) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; and 23) 18 U.S.C. § 1030, fraud and related activity in connection with computers. Unlike the offenses listed above, a violation of one of these statutes does not require that the offense affected a financial institution for purposes of Section 982(a)(2).

Section 982 does not define proceeds. Section 981, the civil forfeiture statute, provides two different definitions of proceeds, depending on the circumstances involved. In the context of the money laundering statute, a plurality of the Supreme Court noted that because of the ambiguity of the meaning of proceeds "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008).

18 U.S.C. § 982(A)(3) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(3):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of the offense[s] charged in Count[s] ___ ;

Second, that the offense[s] in Counts ___ involved the sale of assets acquired or held by [((the Resolution Trust Corporation) (the Federal Deposit Insurance Corporation) as a conservator or receiver for a financial institution) (any other conservator for a financial institution appointed by (the Office of the Comptroller of the Currency or the Office of Thrift Supervision) (the National Credit Union Administration) as conservator or liquidating agent for a financial institution))]; and

Third, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(3) applies where the real or personal property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of a violation of one of these statutes: 1) 18 U.S.C. § 666(a)(1), Federal program fraud; 2) 18 U.S.C. § 1001, false statements; 3) 18 U.S.C. § 1031, major fraud against the United States; 4) 18 U.S.C. § 1032, concealment of assets from conservator, receiver, or liquidating

agent of insured financial institution; 5) 18 U.S.C. § 1341, mail fraud; or 6) 18 U.S.C. § 1343, wire fraud. The offense under one of these statutes must involve the sale of assets acquired or held by the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, as conservator or receiver for a financial institution, any other conservator for a financial institution appointed by the Office of the Comptroller of the Currency or the Office of Thrift Supervision, or the National Credit Union Administration as conservator or liquidating agent for a financial institution.

18 U.S.C. § 982(A)(4) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(4):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] [tangible or intangible] property represents or is traceable to the gross receipts obtained, directly or indirectly, as a result of the offense[s] charged in Count ___;

Second, that the offense[s] in Count ___ [was] [were] committed for the purpose of executing or attempting to execute any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent statements, pretenses, representations, or promises; and

Third, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(4) applies where the real or personal tangible or intangible property are gross receipts obtained, directly or indirectly, as a result of a violation of one of these statutes: 1) 18 U.S.C. § 666(a)(1), Federal program fraud; 2) 18 U.S.C. § 1001, false statements; 3) 18 U.S.C. § 1031, major fraud against the United States; 4) 18 U.S.C. § 1032, concealment of assets from conservator, receiver, or liquidating agent of insured financial institution; 5) 18 U.S.C. § 1341 mail fraud; or 6) 18 U.S.C. § 1343, wire fraud.

18 U.S.C. § 982(A)(5) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(5):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] property represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of the offense of which the defendant [you are considering] was convicted in Count[s] ___; and

Second, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(5) applies where the real or personal property represents or is traceable to the gross proceeds obtained, directly or indirectly, as a result of a violation of, or a conspiracy to violate 1) 18 U.S.C. § 511, altering or removing motor vehicle identification numbers; 2) 18 U.S.C. § 553, importing or exporting stolen motor vehicles; 3) 18 U.S.C. § 2119, armed robbery of automobiles; 4) 18 U.S.C. § 2312, transporting stolen motor vehicles in interstate commerce; or 5) 18 U.S.C. § 2313, possessing or selling a stolen motor vehicle that has moved in interstate commerce.

18 U.S.C. § 982(A)(6) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(6):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the conveyance was used in commission of the offense of which the defendant [you are considering] was convicted in Count[s] ___; or

Second, that the [real] or [personal] property constitutes or is derived from or is traceable to the proceeds obtained directly or indirectly from the commission of the offense of which the defendant [you are considering] was convicted in Count[s] __; or

Third, that the [real] or [personal] property was used to facilitate or was intended to be used to facilitate the commission of the offense of which the defendant [you are considering] was convicted in Count[s] __; and

Fourth, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(6) applies where the defendant has been convicted of a violation of or conspiracy to violate one of these statutes: Section 274(a), 274A(a)(1), or 274A(a)(2) of the Immigration and Nationality Act; or Section 555, constructing border tunnel or passage; Section 1425,

unlawful procurement of citizenship or naturalization; Section 1426, false/fraudulent reproduction of naturalization or citizenship papers; Section 1427, unlawful sale of naturalization or citizenship papers; Section 1541, issuance of passport without authority; Section 1542, false statement in application and use of passport; Section 1543, forgery or false use of passport; Section 1544, misuse of passport; Section 1546, fraud and misuse of visas, permits, and other documents; or Section 1028, fraud and related activity in connection with identification documents, if committed in connection with passport or visa issuance or use.

18 U.S.C. § 982(A)(7) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(7):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] property that constitutes or was derived, directly or indirectly, from the gross proceeds traceable to the commission of the federal health care offense of which the defendant [you are considering] was convicted in Count[s] __; and

Second, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

18 U.S.C. § 982(A)(8) FORFEITURE INSTRUCTION

The Forfeiture Allegation[s] in the Indictment allege[s] that the following property is subject to forfeiture under Title 18, United States Code, Section 982(a)(8):

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] property was used or intended to be used to commit, to facilitate or to promote the offense of which the defendant [you are considering] was convicted in Count[s] ___, and that the offense involved telemarketing; or

Second, that the [real] or [personal] property constituted, was derived from or traceable to the gross proceeds that the defendant [you are considering] obtained directly or indirectly as a result of the offense of which the defendant [you are considering] was convicted in Count[s] ___, and that the offense involved telemarketing; and

Third, that there is a nexus between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 982(a)(8) applies where the real or personal property was used or intended to be used to commit, to facilitate or to promote the violation of Section 1028, fraud and related activity in connection with identification documents; Section 1029, fraud and related activity in connection with access devices; 1341, mail fraud; 1342, fictitious name or address; 1343, wire fraud; or 1344, bank fraud, and that the conviction involved telemarketing.

NEXUS INSTRUCTION

In order to establish a "nexus" between the property alleged to be forfeitable and the offense giving rise to the forfeiture allegation, the government must establish a connection between the property and the offense. The connection must be more than incidental, but the connection need not be substantial.

Committee Comment

Federal Rule of Criminal Procedure 32.2 requires that "the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed.R.Crim.P. 32.2(4). For the most part, the nexus requirement of the Rule will be met under the statutory requirement of what property is subject to forfeiture. The Committee recognizes that there may be overlap between the statutory requirement and the nexus requirement of the Rule, but the Committee has concluded that we need this separate instruction to meet both the statutory and Rule requirements.

DEFINITION OF TELEMARKETING

In order to find that the offense involved telemarketing, you must find that the offense involved a plan, program, promotion, or campaign that was conducted to induce 1) purchases of goods or services, 2) participation in a contest or sweepstakes, or 3) a charitable contribution, donation, or gift of value or any other thing of value. Either the person conducting the plan, program, promotion or campaign or a prospective purchaser, participant, or contributor must have initial at least one interstate telephone call during the offense.

Telemarketing does not include the solicitation of sales through the mailing of a catalog that contains a written description or illustration of the goods or services offered for sales, includes the business address of the seller, includes multiple pages of written material or illustrations, and has been issued not less frequently than once a year, as long as the person making the solicitation does not solicit customers by telephone. The person making the solicitation can only receive calls initiated by customers in response to the catalog and during those calls take orders without further solicitation.

Committee Comment

The definition of "telemarketing" comes from 18 U.S.C. § 2325.

DEFINITION OF FEDERAL HEALTH CARE OFFENSE

A defendant is convicted of a health care fraud offense if he is convicted of violating or conspiring to violate: 1) theft or embezzlement in connection with health care (18 U.S.C. § 669); 2) false statements relating to health care matters (18 U.S.C. § 1035); 3) health care fraud (18 U.S.C. § 1347); or 4) obstruction of a criminal investigation of a health care offense (18 U.S.C. § 1518). A defendant is also convicted of a health care fraud offense if he is convicted of violating or conspiring to violate: 1) submitting false, fictitious or fraudulent claims (18 U.S.C. § 287); 2) conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371); 3) theft or embezzlement from employee benefit plan (18 U.S.C. § 664); 4) theft or bribery concerning programs receiving Federal funds (18 U.S.C. § 666); 5) false statements (18 U.S.C. § 1001); 6) false statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974 (18 U.S.C. § 1027); 7) mail fraud (18 U.S.C. § 1341); 8) wire fraud (18 U.S.C. § 1343); or 9) offer, acceptance, or solicitation to influence operations of an employee benefit plan (18 U.S.C. § 1954), if the offense relates to a health care benefit program.

A health care benefit program is any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. Commerce was affected if the health care program[s] had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States].

Committee Comment

This definition comes from 18 USC § 24 – "definitions relating to Federal health care offense." Courts have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Lucien*, 2003 WL 22336124 (2d Cir. Oct. 14, 2003); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002).

DEFINITION OF CONVEYANCE

A conveyance includes a vessel, vehicle or aircraft used in the commission of the offense.

Committee Comment

The definition of "conveyance" comes from 18 U.S.C. § 982(a)(6).

PROPERTY SUBJECT TO FORFEITURE

The government is not required to prove that the money obtained by the Defendant is still in the Defendant's possession. Rather, the government is only required to prove the elements that I have described to you. You are further instructed that what happens to any property that is declared subject to forfeiture is exclusively a matter for the court to decide. You should not consider what might happen to the property in determining whether the property is subject to forfeiture. [In this connection, you should disregard any claims that other persons may have to the property because those interests will be taken into account by the court at a later time.]

Committee Comment

United States v. Ginsburg, 773 F.3d 798 (7th Cir. 1985) (en banc) holds that the government does not have to prove that the property is in existence at the time of conviction.

18 U.S.C. § 981(A)(1)(A) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property:

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the property was involved in a transaction or attempted transaction as charged in Count[s] ___ [or is property traceable to such property]; and

Second, that there is a nexus between the property and the offense[s] charged in Count[s] _____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Although 18 U.S.C. § 981(a)(1)(A) is a civil forfeiture provision, 28 U.S.C. § 2461(c) authorizes its use in a criminal case. *United States v. Venturella*, 585 F.3d 1013, 1016 (7th Cir. 2009); *United States v. Silvious*, 512 F.3d 364, 369 (7th Cir.2008). Section 981(a)(1)(A) applies where the real or personal property was involved in a transaction or attempted transaction in violation of one or more of these offenses: 1) 18 U.S.C. § 1956, laundering of monetary instruments; 2) 18 U.S.C. § 1957, engaging in monetary transactions in property derived from specified unlawful activity; or 3) 18 U.S.C. § 1960, unlicensed money transmitting businesses.

Nexus is defined in a separate instruction. Federal Rule of Criminal Procedure 32.2 requires that "the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed.R.Crim.P. 32.2(4). For the most part, the nexus requirement of the Rule will be met under

the statutory requirement of what property is subject to forfeiture. The Committee recognizes that there may be overlap between the statutory requirement and the nexus requirement of the Rule, but the Committee has concluded that we need this separate instruction to meet both the statutory and Rule requirements.

18 U.S.C. § 981(A)(1)(C) FORFEITURE

The government seeks to forfeit the following property:

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the property constituted or was derived from proceeds traceable to the offense charged in Count ___, [or a conspiracy to commit that offense]; and

Second, that there is a nexus between the property alleged to be forfeitable and the offense charged in Count[s] _____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Although 18 U.S.C. § 981(a)(1)(A) is a civil forfeiture provision, 28 U.S.C. § 2461(c) authorizes its use in a criminal case. *United States v. Venturella*, 585 F.3d 1013, 1016 (7th Cir. 2009); *United States v. Silvious*, 512 F.3d 364, 369 (7th Cir.2008). Section 981(a)(1)(C) applies where the property constitutes or was derived from proceeds traceable to a violation of, or conspiracy to violate one of the following statutes: 1) 18 U.S.C. § 215, receipt of commissions or gifts for procuring loans, theft; 2) 18 U.S.C. § 471, false obligation of security; 3) 18 U.S.C. § 472, uttering counterfeit obligations or securities; 4) 18 U.S.C. § 473, dealing in counterfeit obligations or securities; 5) 18 U.S.C. § 474, plates, stones, or analog, digital, or electronic images for counterfeiting obligations or securities; 6) 18 U.S.C. § 476, taking impressions of tools used for obligations or securities; 7) 18 U.S.C. § 477, possessing or selling impressions of tools used for obligations or securities; 8) 18 U.S.C. § 478, false foreign obligations or securities; 9) 18 U.S.C. § 479, uttering counterfeit foreign obligations or securities; 10) 18 U.S.C. § 480,

possessing counterfeit foreign obligations or securities; 11) 18 U.S.C. § 481, plates, stones, or analog, digital, or electronic images for counterfeiting foreign obligations or securities; 12) 18 U.S.C. § 485, false coins or bars; 13) 18 U.S.C. § 486, uttering coins of gold, silver or other metal; 14) 18 U.S.C. § 487, making or possessing counterfeit dies for coins; 15) 18 U.S.C. § 488, making or possessing counterfeit dies for foreign coins; 16) 18 U.S.C. § 501, counterfeit postage stamps, postage meter stamps, and postal cards; 17) 18 U.S.C. § 502, counterfeit postage and revenue stamps of foreign government; 18) 18 U.S.C. § 510, forging endorsements on Treasury checks or bonds or securities of the United States; 19) 18 U.S.C. § 542 entry of goods by means of false statements; 20) 18 U.S.C. § 545, smuggling goods into the United States; 21) 18 U.S.C. § 656, embezzlement, or misapplication by a bank officer or employee; 22) 18 U.S.C. § 657, embezzlement, or misapplication by a lending, credit or insurance institution officer or employee; 23) 18 U.S.C. § 842, unlawful acts relating to explosive materials; 24) 18 U.S.C. § 844, unlawful importation, manufacture, distribution and storage of explosive materials; 25) 18 U.S.C. § 1005, false entries by a bank officer or employee; 26) 18 U.S.C. § 1006, false entries by officers or employees of federal credit institutions; 27) 18 U.S.C. § 1007, false statements to influence the Federal Deposit Insurance Corporation; 28) 18 U.S.C. § 1014, false statement on loan or credit application; 29) 18 U.S.C. § 1028, fraud and related activity in connection with identification documents, authentication features, and information; 30) 18 U.S.C. § 1029, fraud and related activity in connection with access devices; 31) 18 U.S.C. § 1030, fraud and related activity in connection with computers; 32) 18 U.S.C. § 1034, civil penalties for a violation of 18 U.S.C. § 1033; 33) 18 U.S.C. § 1344, bank fraud; or 34) "specified unlawful activity" as defined in 18 U.S.C. 1956(c)(7).

The criminal forfeiture statute, 18 U.S.C. § 982, provides for forfeiture in a mail/wire/interstate carrier fraud case only when the fraud scheme is directed at a financial institution. Section 981(a)(1)(C) does not contain a similar limitation. "[P]roceeds of basic mail fraud" may be forfeitable under § 981(a)(1)(C) as a result of the bridging statute, § 2461(c).

Venturella, 585 F.3d at 1016. Although the mail/wire/interstate carrier fraud statutes are not expressly listed in § 981(a)(1)(C), forfeiture proceedings in such cases are authorized because "specified unlawful activity" defined in 18 U.S.C. § 1956(c)(7) includes offenses listed in 18 U.S.C. § 1961(1), which, in turn, identifies the general mail/wire/interstate carrier fraud statutes, 18 U.S.C. § 1341 & 1343. *See United States v. Black*, 526 F.Supp.2d 870, 876 (N.D. Ill. 2007), *aff'd* on other grounds, *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), *cert. granted, Black v. United States*, 129 S.Ct. 2379 (2009).

18 U.S.C. § 981(A)(1)(G) FORFEITURE INSTRUCTION

The government seeks to forfeit the following assets:

LIST ASSET

To establish that the assets are subject to forfeiture, the government must prove the following propositions:

First, that the [foreign or domestic] assets belonged to any individual, entity, or organization engaged in planning or perpetrating the offense charged in Count[s] ____; or

Second, that the [foreign or domestic] assets were acquired or maintained by any person with the intent and for the purpose of supporting, planning, conducting, or concealing the offense charged in Count[s] ___; or

Third, that the [foreign or domestic] assets were derived from, involved in, or sued or intended to be used to commit the offense charged in Count[s] ____; or

Fourth, that the [foreign or domestic] assets belonged to any individual, entity, or organization engaged in planning or perpetrating any act of international terrorism or against any foreign Government, [and if the property the government seeks to forfeit is located outside the United States, you must find that an act in furtherance of the planning or perpetration occurred within the United States' jurisdiction]; and

Fifth, that there is a nexus between the assets alleged to be forfeitable and the offense[s] charged in Count[s] _____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 981(a)(1)(G) provides for forfeiture of "assets" rather than "property." Subsections (i) through (iii) provide for the forfeiture of assets in connection with a Federal crime of terrorism against the United States, its citizens or residents, or their property. A Federal crime of terrorism is defined in 18 U.S.C. § 2332b(g)(5). Section 981(a)(1)(G)(iv) applies to acts of international terrorism, defined in 18 U.S.C. § 2331.

18 U.S.C. § 981(A)(1)(H) FORFEITURE INSTRUCTION

The government seeks to forfeit the following property:

LIST PROPERTY

To establish that this property is subject to forfeiture, the government must prove the following propositions:

First, that the [real] or [personal] property was involved in a violation or attempted violation, or constituted or was derived from proceeds traceable to a violation of the offense[s] as charged in Count[s] ___; and

Second, that there is a nexus between the property alleged to be forfeitable and the offense[s] charged in Count[s] _____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the property you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that property and that defendant].

Committee Comment

Section 981(a)(1)(H) applies where the real or personal property at issue was involved in a violation or attempted violation, or constituted to was derived from proceeds traceable to a violation of 18 U.S.C. § 2339C, financing terrorism activities.

18 U.S.C. § 981(A)(2) DEFINITION OF "PROCEEDS"

["Proceeds" means property of any kind obtained directly or indirectly, as a result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense.]

["Proceeds" means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. The defendant has the burden of proof with respect to the issue of direct costs. Direct costs does not include any part of the overhead expenses of the entity providing the goods or services, or any part of the income taxes paid by the entity.]

"Proceeds" subject to forfeiture does not include any loan repayments or debt payments that did not result in any financial loss to the victim.]

Committee Comment

These are the statutory definitions of the word "proceeds" for use in forfeiture proceedings under 18 U.S.C. § 981(a)(1). *See* 18 U.S.C. § 981(a)(2); *see also United States v. Venturella*, 585 F.3d 1013 (7th Cir. 2009). The definition in the first paragraph applies in cases involving illegal goods, illegal services, unlawful activities, and telemarketing and health care fraud schemes. The definition in the second paragraph applies in cases involving lawful goods or lawful services that are sold or provided in an illegal manner. The definition in the third paragraph applies in cases involving fraud in the process of obtaining a loan or extension of credit.

In the context of the money laundering statute, a plurality of the Supreme Court noted that because of the ambiguity of the meaning of proceeds "the 'profits' definition of 'proceeds' is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted." *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008).

In *United States v. Tedder*, 403 F.3d 836, 842 (7th Cir. 2005), the Seventh Circuit held that Federal Rule of Criminal Procedure 32.2 only provides a defendant with a jury trial in a forfeiture proceeding on the limited issue of "the nexus between the funds and the crime; Rule 32.2 does not entitle the accused to a jury's decision on the amount of the forfeiture."

TRACEABLE TO – DEFINITION

The term "traceable to" means that the acquisition of the property is attributable to the offense[s] charged in Count[s] ___, as opposed to [a] source[s] other than [this] [these] offenses. If the offense[s] enabled the acquisition of property, you may find the property is "traceable to" the offense.

Committee Comment

The definition in the first paragraph comes from *United States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998). Issues regarding whether property is "traceable to" an offense may arise when the funds targeted for forfeiture are in a bank account, or when property is purchased, in whole or part, with funds derived from an offense. *United States v. United States Currency Deposited in Account No. 1115000763247*, 176 F.3d 941, 946 (7th Cir. 1999), noted that "only funds used in or traceable to the illegal activity are subject to forfeiture, and not any commingled legitimate funds used in facilitating the scheme."

Account No. 1115000763247 held that the district court did not err in ordering forfeiture when the criminal offense produced funds that exceeded the amount on deposit in a bank account at the time of the seizure. *United States v. $448,342.85*, 969 F.2d 474, 477 (7th Cir. 1992), found it unnecessary to apply tracing rules when the criminal proceeds exceeded the sums on deposit in a bank account at the time of the seizure. (Both cases involved civil forfeiture proceedings and were decided before the Civil Asset Reform Act of 2000, Pub.L. 106-185, which reallocated the burden of proof in civil forfeiture matters to the government.)

United States v. Banco Cafetero Panama, 797 F.2d 1154, 1158-61 (2nd Cir. 1986), addressed various accounting approaches to "tracing."

United States v. Voigt, 89 F.3d 1050, 1084-87 (3rd Cir. 1996), addressed the meaning of "traceable to" in a case in which the personal property targeted for forfeiture (jewelry) was purchased with bank account funds containing legitimate and illegitimate funds. In *Account No. 1115000763247*, the Seventh Circuit found *Voigt* factual distinguishable.

18 U.S.C. § 1963(A)(1) FORFEITURE ELEMENTS

As a result of the [defendant's] [defendants'] conviction for [racketeering] [racketeering conspiracy], the government seeks forfeiture of the following interest[s]:

LIST INTEREST[S]

To establish that an interest is subject to forfeiture, the government must prove the following propositions:

First, that the defendant acquired or maintained an interest in violation of the law as charged in Count[s] ____; and

Second, that there is a nexus between that interest and the offense charged in Count[s] ____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the interest[s] you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to the interest[s] and [the] [that] defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the interest[s] you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to the interest[s] and [the] [that] defendant].

Committee Comment

Under Rule 32.2(a) of the Federal Rules of Criminal Procedure, effective December 1, 2009, "The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment the government seeks." If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(5)(B).

The Committee recognizes that there may be some overlap between the RICO statutory requirement for forfeiture and the nexus requirement of Rule 32.2(b)(5)(B). The Committee has included both requirements in this instruction. See [**CITE IN THIS PUBLICATION**] for an instruction defining the word "nexus."

18 U.S.C. § 1963(A)(1) DEFINITIONS

The word "interest" includes every property interest [including [profits,] [proceeds,] [income,] [or] [an employment position]].

A defendant acquires or maintains an "interest" only to the extent racketeering activities were the cause of the defendant's acquisition or maintenance of the interest. If the defendant would not have acquired or maintained his interest but for the racketeering activity, the interest is subject to forfeiture. If, on the other hand, the defendant acquired or maintained the interest regardless of any racketeering activities, then the interest under consideration is not subject to forfeiture.

Committee Comment

United States v. Russello, 464 U.S. 16, 22 (1983); *United States v. Horak*, 833 F.3d 1235, 1243 (7th Cir. 1987); *United States v. Ginsburg*, 773 F.3d 798 (7th Cir. 1985) (en banc).

18 U.S.C. § 1963(A)(2) FORFEITURE ELEMENTS

As a result of the [defendant's] [defendants'] conviction for [racketeering] [racketeering conspiracy], the government seeks forfeiture of the following [interest,] [security,] [claim,] [or] [property or contractual right]:

LIST PROPERTY

To establish that an [interest,] [security,] [claim,] [or] [property or contractual right] is subject to forfeiture, the government must prove the following propositions:

First, that the defendant has [an interest in,] [a security of,] [a claim against,] [or] [a property or contractual right of any kind affording a source of influence over] the enterprise that defendant established, operated, controlled, conducted or participated in the conduct of, in violation of the law as charged in Count[s] ____; and

Second, that there is a nexus between the [interest,] [security,] [claim,] [or] [property or contractual right] and the offense charged in Count[s] ____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the [interest,] [security,] [claim,] [or] [property or contractual right] you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to that [interest,] [security,] [claim,] [or] [property or contractual right] and [the] [that] defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the [interest] [security] [claim] [or] [property or contractual right] you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to that [interest,] [security,] [claim,] [or] [property or contractual right] and [the] [that] defendant].

Committee Comment

Under Rule 32.2(a) of the Federal Rules of Criminal Procedure, effective December 1, 2009, "The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment the government seeks." If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property

subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(5)(B).

The Committee recognizes that there may be some overlap between the RICO statutory requirement for forfeiture and the nexus requirement of Rule 32.2(b)(5)(B). The Committee has included both requirements in this instruction. See [**CITE IN THIS PUBLICATION**] for an instruction defining the word "nexus."

When forfeiture is sought under 18 U.S.C. § 1963(a)(2), the jury should only be asked whether the interest is subject to forfeiture and should not be asked to determine what percentage of any interest subject to forfeiture. *United States v. Segal*, 495 F.3d 826, 838 (7th Cir. 2007).

18 U.S.C. § 1963(A)(3) FORFEITURE ELEMENTS

As a result of the defendant's conviction for [racketeering] [racketeering conspiracy], the government seeks forfeiture of the following proceeds:

LIST PROCEEDS/PROPERTY

To establish that proceeds are subject to forfeiture, the government must prove the following propositions:

First, that the defendant, directly or indirectly, obtained property that constitutes, or was derived from, proceeds of [racketeering activity] [or] [unlawful debt collection] in violation of the law as charged in Count[s] ____; and

Second, that there is a nexus between the proceeds and the offense charged in Count[s] ____.

If you find from your consideration of all the evidence that each of these propositions has been proved by a preponderance of the evidence [as to the proceeds you are considering and as to the defendant you are considering], then you should check the "Yes" line on the Special Forfeiture Verdict Form [as to those proceeds and [the] [that] defendant].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved by a preponderance of the evidence [as to the proceeds you are considering and as to the defendant you are considering], then you should check the "No" line on the Special Forfeiture Verdict Form [as to those proceeds and [the] [that] defendant].

Committee Comment

Under Rule 32.2(a) of the Federal Rules of Criminal Procedure, effective December 1, 2009, "The indictment or information need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment the government seeks." If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(5)(B).

The Committee recognizes that there may be some overlap between the RICO statutory requirement for forfeiture and the nexus requirement of Rule 32.2(b)(5)(B). The Committee has included both requirements in this instruction. See [**CITE IN THIS PUBLICATION**] for an instruction defining the word "nexus."

18 U.S.C. § 1963(A)(3) DEFINITION OF PROCEEDS

The term "proceeds" means the net proceeds, or profits, remaining after deducting all of the direct ordinary and necessary expenses, if any, incurred in acquiring the proceeds.

"Proceeds" from a racketeering offense includes any property later purchased with proceeds.

[Value added independently by the defendant is not subject to forfeiture. Therefore, if you find that proceeds obtained by the defendant were obtained through lawful income, then the value of those proceeds is not subject to forfeiture.]

Committee Comment

The Seventh Circuit has held that the word "proceeds" in the RICO forfeiture statute means net proceeds, as opposed to gross receipts. *United States v. Genova*, 333 F.3d 750, 761 (7th Cir. 2003); *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir. 1991).

The definition of "net proceeds" is the same as recommended for certain money laundering offenses committed before May 20, 2009. See [**CITE IN THIS PUBLICATION**].

United States v. Santos, -- U.S. --, 128 S. Ct. 2020, 2031 (2008) (plurality), found that the word "proceeds," as used in the criminal money laundering statute, 18 U.S.C. § 1956, means profits, not gross receipts. For money laundering offenses alleged to have occurred after May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, overruled Santos by inserting an explicit definition of proceeds: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9). FERA, however, did not define "proceeds" for purposes of the RICO forfeiture statute.

18 U.S.C. § 1963(B) DEFINITION OF PROPERTY

The word "property" includes [real property,] [including things growing on, affixed to, and found in land] [and tangible and intangible personal property], [including [rights,] [privileges,] [interests,] [claims,] [and securities].

FORFEITURE VERDICT FORM

[A] Special Forfeiture Verdict Form[s] [has] [have] been prepared for you. [Judge reads verdict form.] Once you have unanimously agreed on the matters in the Special Forfeiture Verdict Form[s], please sign [it] [them] and return [it] [them] to me through the Court Security Officer.

Committee Comment

If a party makes a timely request for a jury determination on the issue of forfeiture, "the government must submit a Special Verdict Form listing each property subject to forfeiture and asking the jury to determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed. R. Crim. P. 32.2(b)(5)(B).

United States v. Tedder, 403 F.3d 836, 841 (7th Cir. 2005), suggests that a jury in a forfeiture proceeding need not make findings as to the amount subject to forfeiture:

Although Fed.R.Crim.P. 32.2 offers the defendant a jury trial, this provision (unlike the sixth amendment) is limited to the nexus between the funds and the crime; Rule 32.2 does not entitle the accused to a jury's decision on the amount of the forfeiture. Even if it did, the rule would not foreclose what amounts to summary judgment or remittitur; as those procedures are compatible with the seventh amendment's jury-trial right in civil cases.

18 U.S.C. § 1347 HEALTH CARE FRAUD – ELEMENTS

To sustain the charge of health care fraud, the government must prove the following propositions:

First, that there was a scheme [to defraud any health care benefit program] [or] [to obtain the money or property owned by, or under the custody and control of, any health care benefit program by means of material false statements, pretenses, representations, promises] in connection with the delivery of or payment for health care benefit items, or services, as charged in Count[s] ____ of the indictment, and

Second, that the defendant knowingly and willfully [attempted to] execute[d] the scheme.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the] [that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should refer to the pattern instruction defining "scheme" under 18 U.S.C. §§ 1341 and 1343 and the pattern instruction defining "health care benefit program." The statute uses both "knowingly" and "willfully" to define the mens rea element. There is no case that has definitively decided the meaning of "knowingly and willfully" in the context of this statute. In *United States v. Wheeler*, 540 F.3d 683 (7th Cir. 2008), the court considered this issue under a plain error standard in the context of another health care offense, § 669, and concluded that "there is a plausible argument that the use of 'knowingly and willfully' in § 669 may require that a defendant know his conduct was in some way unlawful." In discussing the meaning of willfully, the *Wheeler* court noted that § 669 does not involve the complex statutory scheme at issue in tax or structuring crimes which require a defendant to violate a known legal duty. However, the *Wheeler* court reasoned that there is also some support for the argument that "willfully" means more than acting intentionally when it is used conjunctively with "knowingly." The Committee advises that if the district court deems the two terms to have the same meaning, then the court should define "knowingly and willfully" in one instruction using the pattern instruction for "knowingly." If the court deems the two terms to have separate meanings, then the court should define both terms in separate instructions.

18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/ INTERSTATE COMMERCE – DEFINITION

A health care benefit program is any [public or private][plan or contract], affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States].

The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree. The government need not prove that [the] [a] defendant engaged in interstate commerce or that the acts of [the] [a] defendant affected interstate commerce.

Committee Comment

A health care benefit program is defined in 18 U.S.C. § 24 for purposes of the federal health care offenses, including § 1347. The first sentence of this instruction is the definition of health care benefit program in 18 U.S.C. § 24. The remainder of the instruction addresses "affecting commerce" which is an element of proof in cases where 18 U.S.C. § 24 is at issue. Courts have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002). The court may also find it appropriate to adapt for health care offenses the RICO pattern instruction describing enterprises that engage in interstate commerce or whose activities affect interstate commerce.

18 U.S.C. § 1512(B)(1) WITNESS TAMPERING – INFLUENCING OR PREVENTING TESTIMONY – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [use[d] intimidation; threaten[ed] anther person] or corruptly persuade[d] another person]] or [engaged in misleading conduct toward another person]or [attempted to do so];

Second, the defendant acted knowingly; and

Third, the defendant acted with the intent to influence, delay or prevent the testimony of any person in an official proceeding.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should define "official proceeding" for the jury. The court should also instruct the jury regarding the definitions of "corruptly" and "misleading" when these terms are used in the instruction. See pattern instructions and Committee Comments, infra. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(B)(2)(A) WITNESS TAMPERING – WITHHOLDING EVIDENCE -ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [[attempted to] [use[d] intimidation, threaten[ed] or corruptly persuade[d] another person]] or [engaged in misleading conduct toward another person];

Second, the defendant acted knowingly; and

Third, the defendant acted with the intent to cause or induce any person to withhold [testimony, a record, a document or an other object] from an official proceeding; and

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should define "official proceeding" for the jury. The court should also instruct the jury regarding the definitions of "corruptly" and "misleading" when these terms are used in the instruction. See pattern instructions and Committee Comments, infra. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(B)(2)(B) WITNESS TAMPERING – ALTERING OR DESTROYING EVIDENCE – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [[attempted to] [use[d] intimidation, threaten[ed] or corruptly persuade[d] another person]] or [engaged in misleading conduct toward another person];

Second, the defendant acted knowingly; and

Third, the defendant acted with the intent to cause or induce any person to [[alter], [destroy][mutilate], or [conceal]] an object with the intent to impair the object's integrity or availability for use in an official proceeding.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should define "official proceeding" for the jury. The court should also instruct the jury regarding the definitions of "corruptly" and "misleading" when these terms are used in the instruction. See pattern instructions and Committee Comments, infra. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(B)(2)(C) WITNESS TAMPERING – EVADING LEGAL PROCESS – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [[attempted to] [use[d] intimidation, threaten[ed] or corruptly persuade[d] another person]] or [engaged in misleading conduct toward another person];

Second, the defendant acted knowingly; and

Third, the defendant acted with the intent to cause or induce any person to evade legal process summoning that person [to appear as a witness] or [to produce a [record], [document] or other object]], in an official proceeding.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should define "official proceeding" for the jury. The court should also instruct the jury regarding the definitions of "corruptly" and "misleading" when these terms are used in the instruction. See pattern instructions and Committee Comments, infra. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(B)(2)(D) WITNESS TAMPERING – ABSENCE FROM LEGAL PROCEEDING – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [[attempted to] [use[d] intimidation, threaten[ed] or corruptly persuade[d] another person]] or [engaged in misleading conduct toward another person];

Second, the defendant acted knowingly; and

Third, the defendant acted with the intent to cause or induce any person to be absent from an official proceeding to which such person has been summoned by legal process.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should define "official proceeding" for the jury. The court should also instruct the jury regarding the definitions of "corruptly" and "misleading" when these terms are used in the instruction. See pattern instructions and Committee Comments, infra. The court may substitute the name of the individual for "another person" and "any person" in the instruction.

18 U.S.C. § 1512(B)(3) WITNESS TAMPERING – HINDER, DELAY OR PREVENT COMMUNICATION RELATING TO COMMISSION OF OFFENSE – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [[attempted to] [use[d] intimidation, threaten[ed] or corruptly persuade[d] another person]] or [engaged in misleading conduct toward another person];

Second, the defendant acted knowingly;

Third, the defendant acted with the intent to hinder, delay or prevent the communication of information to [a law enforcement officer of the United States or judge of the United States]; and

Fourth, such information related to the commission or possible commission of a [[federal offense] or [violation of conditions of probation], [supervised release], or [release pending judicial proceedings]].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

The court should also instruct the jury regarding the definitions of "corruptly" and "misleading" when these terms are used in the instruction. See pattern instructions and Committee Comments, infra.

18 U.S.C. § 1512(C)(1) DESTROY, ALTER OR CONCEAL DOCUMENT OR OBJECT – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [attempted to][alter[ed], destroy[ed], mutilate[d] or conceal[ed]] a [record, document or other object];

Second, the defendant acted knowingly;

Third, the defendant acted corruptly; and

Fourth, the defendant acted with the intent to impair the object's integrity or availability for use in an official proceeding; and

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

United States v. Matthews, 505 F.3d 698 (7th Cir. 2007). The court should define "official proceeding" for the jury. The court should also instruct the jury regarding the definition of "corruptly." See pattern instructions and Committee Comments, infra.

Note from Subcommittee

Section 1512(b) requires that the defendant act "knowingly" with regard to each offense listed in § 1512(b). The § 1512(c) offenses require that defendant act "corruptly." Thus, we have not included "knowingly" as an element for the two § 1512(c) offenses. We felt that the addition of "knowingly" would unnecessarily invite the Ostrich instruction and appellate litigation. We note, however, that § 1503 requires the defendant act "corruptly" and does not include "knowingly" in the statute. Nonetheless, the previous 7th Circuit Instruction Committee included both "corruptly" and "knowingly" in the pattern instruction for § 1503. In *United States v. Matthews*, although in a different context,

the Court of Appeals analogized § 1503 and § 1512 conduct. 505 F.3d 698, 706 (7th Cir. 2007)("because both sections prohibit similar types of conduct, it was proper for the district court to refer to § 1503 in arriving at a definition for 'corruptly' under § 1512").

18 U.S.C. § 1512(C)(2) OTHERWISE OBSTRUCT OFFICIAL PROCEEDING – ELEMENTS

To sustain the charge of obstruction of justice as charged in Count[s] ____ of the indictment, the government must prove the following propositions:

First, the defendant [attempted to][obstruct[ed], influence[d], or impede[d]] any official proceeding, and

Second, the defendant acted corruptly.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, [as to [a particular defendant] [and] [a particular count]] then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

United States v. Matthews, 505 F.3d 698 (7th Cir. 2007). The court should instruct the jury as to the official proceeding in question. The court should also instruct the jury regarding the definition of "corruptly." See pattern instructions and Committee Comments, infra.

18 U.S.C. §§ 1512 AND 1515(A)(1) DEFINITION OF OFFICIAL PROCEEDING

The term "official proceeding" as used in Count[s] ___ means (name official proceeding).

An official proceeding need not be pending or about to be instituted at the time of the offense. However, the government must prove beyond a reasonable doubt that the defendant[s] foresaw the particular official proceeding.

[There are (number) official proceedings identified in Count[s] ____. The government need not prove beyond a reasonable doubt that the defendant intended to obstruct all of these proceedings. Instead, the government must prove beyond a reasonable doubt that the defendant intended to obstruct at least one of these official proceedings. You must unanimously agree as to which official proceeding the defendant intended to obstruct.]

Committee Comment

The term "official proceeding" means a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, a Federal grand jury, Congress, a Federal Government agency which is authorized by law, or any proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce. 18 U.S.C. § 1515(a).

Although there is no requirement that the official proceeding is pending or about to be instituted at the time of the offense, 18 U.S.C. § 1512(f)(1), the official proceeding must be foreseeable to the defendant. *Arthur Andersen v. United States*, 544 U.S. 696, 707-08 (2005) ("It is . . . one thing to say that a proceeding 'need not be pending or about to be instituted at the time of the offense' and quite another to say a proceeding need not even be foreseen. A 'knowingly . . . corrupt persuader' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material."); *United States v. Matthews*, 505 F.3d 698, 708-09 (7th Cir. 2007) (finding that the nexus requirement had been met when district court instructed jury that defendant acted with

intent to impair objects availability for use "in an official proceeding," specifically identified the proceeding as the federal grand jury for the Southern District of Illinois and also instructed the jury that "for the purposes of these instructions an official proceeding need not be pending or about be instituted at the time of the offense."); *United States v. Kaplan*, 490 F.3d 110, 125-27 (2nd Cir. 2007) ("[A] 'knowingly corrupt persuader' must believe that his actions are likely to affect a particular, existing or foreseeable official proceeding" and "it would surely have been more prudent, even where the evidence only points to one federal proceeding, for the district judge to identify the 'particular' federal proceeding that the defendant intended to obstruct.").

The bracketed language in the third paragraph should be used where the defendant is charged in the indictment with obstructing more than one official proceeding.

Not every section of § 1512(b) requires a nexus to a federal proceeding. For example, § 1512(b)(3) does not connect the federal interest to a federal proceeding, instead the federal interest derives from the transmission of certain information to a federal officer or judge. *United States v. Ronda*, 455 F.3d 1273 (11th Cir. 2006); *United States v. Veal*, 153 F.3d 1233 (11th Cir. 1998).

18 U.S.C. §§ 1512 DEFINITION OF CORRUPTLY

A person acts "corruptly" if he or she acts with the purpose of wrongfully impeding the due administration of justice.

Committee Comment

United States v. Matthews, 505 F.3d 698 (7th Cir. 2007). This instruction defines "corruptly" under § 1512(c) as it is defined in 18 U.S.C. § 1503 which prohibits similar conduct.

18 U.S.C. §§ 1512 AND 1515(A)(3) DEFINITION OF MISLEADING CONDUCT

The term "misleading conduct" means [knowingly making a false statement]; [intentionally omitting [material] information from a statement and thereby causing a portion of such a statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement]; [with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered or otherwise lacking in authenticity]; [with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect]; or [knowingly using a trick, scheme, or device with intent to mislead] .

Committee Comment

Section 1515 does not specify that omitted information needs to be "material." However, the district court may wish to include a materiality requirement, as materiality is included with regard to the other clauses in the definition of misleading conduct.

18 U.S.C. § 1512(E) AFFIRMATIVE DEFENSE

If the defendant proves that it is more likely than not that the defendant's conduct consisted solely of lawful conduct and the defendant's sole intention was to encourage, induce or cause the other person to testify truthfully, then you must find the defendant not guilty as charged in Count[s] _____.

Committee Comment

18 U.S.C. § 1512(e) provides this affirmative defense applicable to all prosecutions for offenses under § 1512. The burden is on the defendant to prove the affirmative defense by a preponderance of the evidence.

18 U.S.C. §§ 1512 AND 1515(A)(4) DEFINITION OF LAW ENFORCEMENT OFFICER

The term "law enforcement officer" means [[an officer or employee of the Federal Government], or [a person authorized to act for or on behalf of the Federal Government] or [a person serving the Federal Government as an adviser or consultant]] who is [[authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense] or [serving as a probation or pretrial services officer under federal law]].

18 U.S.C. § 892 EXTORTIONATE EXTENSION OF CREDIT – ELEMENTS

To sustain the charge of making an extortionate extension of credit, the government must prove the following propositions:

First, the defendant knowingly made an extension of credit to a person, including the making [or extending] of a loan or other thing of value for which repayment is expected[, or the deferring of repayment of a debt][, whether valid or invalid][, whether disputed or acknowledged]; and

Second, the defendant and the debtor understood, at the time the extension of credit was made, that delay in making repayment or failure to make repayment could result in the use of violence [or other criminal means] to cause harm to the [person] [reputation] [property] of anyone.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

See United States v. Scotti, 47 F.3d 1237, 1245 (2d Cir. 1995); *United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975).

The statute contains a list of possible factors to consider in determining whether an extension of credit was extortionate (e.g. legal enforceability, interest rate); the court should point out any that may be applicable in individual cases.

18 U.S.C. § 892 DEFINITION OF "DEBTOR"

A debtor [is a person to whom an extension of credit was made][, or a person who guarantees repayment or otherwise agrees or attempts to cover any loss to the defendant because of a failure to repay the extension of credit].

18 U.S.C. § 892 DEFINITION OF UNDERSTANDING

The government is not required to prove that, when the extension of credit was made, the defendant and debtor mutually agreed that delay in making repayment or failure to make repayment could result in the use of violence [or other criminal means] to cause harm to the [person] [reputation] [property] of anyone. The government is required to prove that both the defendant and debtor understood that a threat of violence existed.

Committee Comment

United States v. Zizzo, 120 F.3d 1338, 1353-54 (7th Cir. 1997).

18 U.S.C. § 894 EXTORTIONATE COLLECTION OF DEBT – ELEMENTS

To sustain the charge of collection of an extension of credit by extortionate means, the government must prove the following propositions:

[First, there was a[n] [attempt to collect] [collection of] an extension of credit, including [inducing] [attempting to induce] in any way the repayment by anyone of a loan or other thing of value for which repayment was expected[, or the deferring of repayment of a debt][, whether valid or invalid][, whether disputed or acknowledged];] [or]

[First, a person was punished for the nonrepayment of an extension of credit, including a loan or other thing of value for which repayment was expected,[or the deferring of repayment of a debt][, whether valid or invalid][, whether disputed or acknowledged];]

Second, the [attempt to collect] [collection] [punishment] involved the use of extortionate means, that is, the[, or [express or implied] threat of the use] of violence [or other criminal means] to cause harm to the [person] [reputation] [property] of anyone; and

Third, the defendant knowingly participated in some way in the use of such extortionate means in that [attempted] [collection] [punishment].

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

United States v. Khilchenko, 324 F.3d 917, 919-20 (7th Cir. 2003); *United States v. Toulomis*, 771 F.2d 235 (7th Cir. 1985).

18 U.S.C. § 894 DEFINITION OF THREAT

A defendant knowingly participates in use of extortionate means when he intends by his conduct to instill fear of harm in the debtor. Acts or statements are a threat if they would reasonably induce fear of harm in an ordinary person. A simple demand for money is not a threat. The government is not required to prove that the recipient of a threat actually feared its consequences.

Committee Comment

Although there is no Seventh Circuit case on point, other circuits have held that the production of actual fear in the recipient is not an element of the offense. *See, e.g., United States v. DiSalvo*, 34 F.3d 1204, 1211 (3d Cir. 1994); *United States v. Polizzi*, 801 F.2d 1543, 1547-48 (9th Cir. 1986); *United States v. Joseph*, 781 F.2d 549, 553 (6th Cir. 1986); *United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975). This is unlike cases involving charges under 18 U.S.C. § 892 in which the borrower's state of mind is an element. *United States v. Lombardozzi*, 491 F.3d 61, 68-69 (2d Cir. 2007). In a § 894 prosecution, the government must prove that the defendant intended to take actions that would reasonably induce fear in an ordinary person. *Natale*, 526 F.2d at 1168. It is the nature of the actions of the person seeking to collect the indebtedness, not the debtor's mental state, that is the focus of the jury's inquiry. *Polizzi*, 801 F.2d at 1548. When the indictment contains both §§ 892 and 894 offenses, a specific instruction on the distinction in the role of the debtor's mental state may be appropriate.

In cases in which the indictment alleges multiple schemes, the jury should be instructed that it must be unanimous on at least one of the schemes. *See United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) ("Jury Instruction 13 informed the jury that the government need not prove every scheme that it had alleged, but that it must prove one of them beyond a reasonable doubt."); *see also United States v. Sababu*, 891 F.3d 1308, 1326 (7th Cir. 1989) (1989). A jury, however, need not be given a specific unanimity instruction regarding the means by which an offense is committed. *See Richardson v. United States*, 526 U.S. 813, 817 (1999) (citing *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality)); *see also United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009) (jury is not required to unanimously agree on overt act in a conspiracy prosecution) . In the absence of definitive precedent on the subject, the Committee takes no position on whether a specific unanimity instruction as to money/property and honest services fraud should be given when the indictment charges both money/property and honest services fraud. If money/property and honest services fraud are viewed as establishing separate scheme objects, a specific unanimity instruction may be appropriate. On the other hand, if money/property and honest services fraud are viewed as different means by which to commit the "scheme to defraud" essential element, the general unanimity instruction applicable to essential elements may be sufficient. *See United States v. Blumeyer*, 114 F.3d 758, 769 (8th Cir. 1997) (dicta) ("we have serious doubts whether the jury was required to agree on the precise manner in which the scheme violated the law"); *United States v. Zeidman*, 540 F.2d 314, 317-18 (7th Cir. 1976) ("[T]he indictment cannot be attacked because it would permit a conviction by less than a unanimous jury. The trial judge clearly instructed the jury that they must not return a guilty verdict unless they all agreed that the defendants had devised a scheme to defraud at least the creditor or the debtor.").

Alternative last 2 sentences:

On the other hand, if money/property and honest services fraud are viewed as different means by which to commit the "scheme to defraud" essential element, *cf. United States v. Boscarino*, 437 F.3d 634 (7th Cir. 2006) (honest services is a definition of scheme to defraud), or as something akin to an overt act, the general unanimity instruction applicable to essential elements may be sufficient. *See United States v. Blumeyer*, 114 F.3d 758, 769 (8th Cir. 1997) (dicta) ("we have serious doubts whether the jury was required to agree on the precise manner in which the scheme violated the law"); *United States v. Zeidman*, 540 F.2d 314, 317-18 (7th Cir. 1976) ("[T]he indictment cannot be attacked because it would permit a conviction by less than a unanimous jury. The trial judge clearly instructed the jury that they must not return a guilty verdict unless they all agreed that the defendants had devised a scheme to defraud at least the creditor or the debtor.").

18 U.S.C. § 1951 EXTORTION – NON-ROBBERY – ELEMENTS

Count[s] ____ of the indictment charge(s) the defendant _____ with extortion.

To sustain the charge of extortion the government must prove the following propositions:

First, that the defendant knowingly obtained money or property from [name of victim];

Second, that the defendant did so by means of extortion [by] [threatened] [force] [violence] [fear] [under color of official right], as that term is defined in these instructions;

Third, that [name of victim] consented to part with the money or property because of the extortion;

Fourth, that the defendant believed that [name of victim] parted with the money or property because of the extortion; and

Fifth, that the conduct of the defendant affected interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

It has not been expressly decided whether the government needs to prove an overt act in a Hobbs Act conspiracy. *United States v. Corson*, 579 F.3d 804 (7th Cir. 2009). Several Seventh Circuit cases have held without discussion that proof of an overt is necessary in a Hobbs Act conspiracy charge. *Id.* at 810. *See United States v. Stodola*, 953 F.2d 266, 272 (7th Cir. 1992); *United States v. Tuchow*, 768 F.2d 855, 869 (7th Cir. 1985). However, other circuits have specified that a Hobbs Act conspiracy does not require proof of an overt act. *See, e.g., United States v. Palmer*, 203 F.3d 55, 63 (1st Cir. 2000); *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994). In *Corson* the jury instructions did not include an overt act requirement, and the Court noted that the overt act requirement had not been expressly addressed in the Seventh Circuit. *Corson*, 579 F.3d at 810. The *Corson* Court did not decide the issue as it had not been raised on appeal. *Id.*

18 U.S.C. § 1951 ATTEMPTED EXTORTION – ELEMENTS

Count[s] of the indictment charge[s] the defendant _____ with extortion.

To sustain the charge of attempted extortion the government must prove the following propositions:

First, that the defendant knowingly [obtained or] attempted to obtain money or property from _____;

Second, that the defendant did so by means of extortion [by] [threatened] [force] [violence] [fear] [under color of official right], as that term is defined in these instructions;

Third, that the defendant believed that _____ [would have] parted with the money or property because of the extortion; and

Fourth, that the conduct of the defendant affected, would have affected or had the potential to affect interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

18 U.S.C. § 1951 EXTORTION – ROBBERY – ELEMENTS

Count[s] of the indictment charge[s] the defendant _____ with extortion by robbery.

To sustain the charge of extortion by robbery the government must prove the following propositions:

First, that the defendant knowingly obtained money or property from or in the presence of [name of victim];

Second, that the defendant did so by means of robbery, as that term is defined in these instructions;

Third, that the defendant believed that [name of victim] parted with the money or property because of the robbery; and

Fourth, that the robbery affected interstate commerce.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant guilty [as to that count].

If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt [as to [a particular defendant][and][a particular count]], then you should find [the][that] defendant not guilty [as to that count].

Committee Comment

It has not been expressly decided whether the government needs to prove an overt act in a Hobbs Act conspiracy. *United States v. Corson*, 579 F.3d 804 (7th Cir. 2009). Several Seventh Circuit cases have held without discussion that proof of an overt is necessary in a Hobbs Act conspiracy charge. *Id.* at 810. *See United States v. Stodola*, 953 F.2d 266, 272 (7th Cir. 1992); *United States v. Tuchow*, 768 F.2d 855, 869 (7th Cir. 1985). However, other circuits have specified that a Hobbs Act conspiracy does not require proof of an overt act. *See, e.g., United States v. Palmer*, 203 F.3d 55, 63 (1st Cir. 2000); *United States v. Pistone*, 177 F.3d 957, 959-60 (11th Cir. 1999); *United States v. Clemente*, 22 F.3d 477, 480 (2d Cir. 1994). In *Corson* the jury instructions did not include an overt act requirement, and the Court noted that the overt act requirement had not been expressly addressed in the Seventh Circuit. *Corson*, 579 F.3d at 810. The *Corson* Court did not decide the issue as it had not been raised on appeal. *Id.*

18 U.S.C. § 1951 DEFINITION OF ROBBERY

Robbery means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence [or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining].

Committee Comment

Use material in brackets when appropriate.

18 U.S.C. § 1951 COLOR OF OFFICIAL RIGHT – DEFINITION

[Attempted] Extortion under color of official right occurs when a public official receives [or attempts to obtain] money or property to which [he][she] is not entitled, knowing [believing] that the money or property is being [would be] given to [him][her] in return for taking, withholding or influencing official action. [Although the official must receive [or attempt to obtain] the money or property, the government does not have to prove that the public official first suggested giving money or property, or that the official asked for or solicited it.] [While the official must receive [or attempt to obtain] the money or property in return for the official action, the government does not have to prove [that the official actually took or intended to take that action] [or] [that the official could have actually taken the action in return for which payment was made] [or] [that the official would not have taken the same action even without payment].]

[Acceptance by an elected official of a campaign contribution, by itself, does not constitute extortion under color of official right, even if the person making the contribution has business pending before the official. However, if a public official receives [or attempts to obtain] money or property, knowing [believing] that it is [would be] given in exchange for a specific requested exercise of [his][her] official power, [he][she] has committed extortion under color of official right, even if the money or property is [to be] given to the official in the form of a campaign contribution.]

Committee Comment

See Evans v. United States, 504 U.S. 255 (1992); *McCormick v. United States*, 500 U.S. 257 (1991); *United States v. Giles*, 246 F.3d 966 (7th Cir. 2001); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009).

An extortion conviction "under color of official right" requires the government to prove a quid pro quo. In *McCormick*, 500 U.S. at 273, the Court held that the jury should have been instructed that the receipt of campaign contributions constitutes extortion under color of official right, 18 U.S.C. § 1951, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not perform an official act." In *Evans*, 504 U.S. 255, another Hobbs Act case involving campaign contributions, the Court elaborated on the quid pro quo requirement from *McCormick*, holding that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268. The Court in *Evans* held that the following jury instruction satisfied *McCormick*:

[I]f a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Id. at 258, 268 (second brackets in original).

In *United States v. Giles*, the Court extended the quid pro quo requirement beyond campaign contributions and held that any extortion "under color of official right" conviction under the Hobbs Act requires the government to prove that a payment was made in exchange for a specific promise to perform an official act. 246 F.2d at 971-73 (approving the language of this instruction as sufficient to instruct jury on quid pro quo requirement).

The quid pro quo can be implied. *Id.* at 972 ("The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his works and actions, so long as he intends it to be so and the payor so interprets it.")

In *Abbas*, the Seventh Circuit held that "under color of official right" liability applies only to public officials who misuse their official office. 560 F.3d at 664. Thus, a defendant who impersonated an FBI agent could not commit a crime against the public trust and was not subject to this "special brand of criminal liability." *Id.*

18 U.S.C. § 1951 EXTORTION – DEFINITION

[Attempted] Extortion by [threatened] [force] [or] [violence] [or] [fear] means the wrongful use of [threatened] [force] [or] [violence] [or] [fear] to obtain [or attempt to obtain] money or property. "Wrongful" means that the defendant had no lawful right to obtain [money] [property] in that way. ["Fear" includes fear of economic loss. This includes fear of a direct loss of money, fear of harm to future business operations or a fear of some loss of ability to compete in the marketplace in the future if the victim did not pay the defendant.] The government must prove that the victim's fear was [would have been] reasonable under the circumstances. [However, the government need not prove that the defendant actually intended to cause the harm threatened.]

Committee Comment

See United States v. Mitov, 460 F.3d 901, 907-09 (7th Cir. 2006). *See also United States v. Capo*, 791 F.2d 1054, 1062 (2d Cir. 1986); *United States v. Beeler*, 587 F.2d 340, 344 (6th Cir. 1978); *United States v. Brecht*, 540 F.2d 45, 51-52 (2d Cir. 1976); *United States v. Crowley*, 504 F.2d 992, 997 (7th Cir. 1974); *United States v. DeMet*, 486 F.2d 816, 819-20 (7th Cir. 1973); *United States v. Biondo*, 483 F.2d 635, 640 (8th Cir. 1973); *United States v. Varlack*, 225 F.2d 665, 668-69 (2d Cir. 1955).

18 U.S.C. § 1951 PROPERTY – DEFINITION

"Property" includes [name that which was extorted as charged in the indictment].

Committee Comment

In cases where there is no dispute that the item at issue is property (such as in cases in which the "property" is money), the Committee suggests that the appropriate term be incorporated into the elements instruction rather than using a separate definitional instruction.

18 U.S.C. § 1951 INTERSTATE COMMERCE – DEFINITION

With respect to Count _____, the government must prove that the defendant's actions affected [had the potential to affect] interstate commerce in any way or degree. This occurs if the natural consequences of the defendant's actions were [would have been] some effect on interstate commerce, however minimal. [This would include reducing the assets of a [person who] [or] [business that] customarily purchased goods from outside the state of _____ or actually engaged in business outside the state of _____, and if those assets would have been available to the [person] [or] [business] for the purchase of such goods or the conducting of such business if not for defendant's conduct.] It is not necessary for you to find that the defendant knew or intended that his actions would affect interstate commerce [or that there have been an actual effect on interstate commerce].

[Even though money was provided by a law enforcement agency as part of an investigation, a potential effect on interstate commerce can be established by proof that the money, if it had come from _____, would have affected interstate commerce as I have described above.]

Committee Comment

Under the Hobbs Act the government need only show a de minimus actual effect on interstate commerce, or where there is no actual effect, a realistic probability of or potential for an effect on interstate commerce. *United States v. Re*, 401 F.3d 828, 835 (7th Cir. 2005)(given that the Hobbs Act criminalizes attempted as well as completed crimes, the impact on commerce need not be actual, it is enough that the conduct had the potential to impact commerce); *United States v. Moore*, 363 F.3d 631 (7th Cir. 2004) (extortion case); *United States v. Sutton*, 337 F.3d 792 (7th Cir. 2003) (robbery case); *United States v. Peterson*, 236 F.3d 848, 851-52 (7th Cir. 2001) (holding that Supreme Court decisions in *United States v. Morrison*, 529 U.S. 598 (2000) and *United States v. Lopez*, 514 U.S. 549 (1995), do not undermine prior holdings that a de minimus effect on interstate commerce is constitutionally satisfactory in a Hobbs Act prosecution). *See also United States v. Carter*, 530 F.3d 565, 572 (7th Cir. 2008) (when the government uses a depletion of assets theory to prove the interstate commerce element, there is no requirement that the business directly purchase its items through interstate commerce, it is enough that the business purchase such items through a wholesaler or other intermediary, and the money used can be the FBI's and not the money of the business itself); *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) (government's theory that the money that defendants stole traveled in interstate commerce was legally insufficient as cash itself cannot serve

as the jurisdictional hook or any robbery would be a federal crime); *United States v. Mitov*, 460 F.3d 901, 908 (7th Cir. 2006) (government could prove effect on interstate commerce through temporary depletion of assets); *United States v. McCarter*, 406 F.3d 460, 462 (7th Cir. 2005)(in a case charging attempted robbery in violation of the Hobbs Act, "the question is merely whether commerce would have been affected had the attempt succeeded"); *United States v. Marrero*, 299 F.3d 653, 655 (7th Cir. 2002) (case charging multiple robberies of drug dealers, each individual criminal act need not have a measurable impact on commerce, it is enough if a class of acts has such an impact).

Much of the language in brackets is designed for undercover cases charged as attempted extortion. Courts should feel free to customize the bracketed sentence in the first paragraph regarding the "asset depletion" theory to fit the allegations in particular cases.

18 U.S.C. § 1344 FINANCIAL INSTITUTION FRAUD – ELEMENTS

Count[s] __ of the indictment charge[s] the defendant[s] with [bank] [financial institution] fraud. To sustain the charge of [bank] [financial institution] fraud, the government must prove the following things:

First, there was a scheme [to defraud a [bank] [financial institution]] [or] [to obtain moneys, funds, credits, assets, securities, or other property owned by, or in the custody or control of, a [bank] [financial institution] by means of false or fraudulent pretenses, representations or promises] as charged in the indictment;

Second, the defendant knowingly [attempted to] carry out the scheme;

Third, the defendant acted with the intent to defraud; [and]

[Fourth, the scheme involved a materially false or fraudulent pretense, representation, or promise; and]

[Fourth] [Fifth], at the time of the charged offense the deposits of the [bank] [financial institution] were insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that each of these things has been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant guilty [as to that count].

If you find from your consideration of all the evidence that any one of these things has not been proved beyond a reasonable doubt [as to [a particular defendant] [and] [a particular count]], then you should find [the] [that] defendant not guilty [as to that count].

Committee Comment

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following *Neder* the Seventh Circuit has made clear that "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 1999). *See also United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). See the materiality instruction for mail and wire fraud to include where appropriate with bank fraud charges, including that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or the concealment of material information.

In a check-kiting scheme, the Seventh Circuit has held that the scheme need not involve a false statement or misrepresentation of fact because Section 1344(1) encompasses such a scheme. *See United States v. Doherty*, 969 F.2d 425, 427-28 (7th Cir. 1992). *See also United States v. Norton*, 108 F.3d 133, 135 (7th Cir. 1997); *United States v. LeDonne*, 21 F.3d 1418, 1427-28 (7th Cir. 1994).

18 U.S.C. § 1344 SCHEME – DEFINITION

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

[In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property from a [bank] [financial institution] by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.]

[A scheme to defraud a [bank] [financial institution] means a plan or course of action intended to deceive or cheat that [bank] [financial institution] and [to obtain money or property or to cause the [potential] loss of money or property by the [bank] [financial institution] [to deprive the [bank] [financial institution] of [description of honest services, including source text of rule or statute]. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]]

Committee Comment

This follows the instructions offered for the mail/wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

Unanimity as to facts should be explicitly required in cases where there is a danger that jurors may disagree on the facts of the case, e.g., where the facts are particularly complex, where multiple schemes are charged, where there is a variance between the charge and proof.

The first bracketed paragraph should be given in a case in which a scheme to obtain money from a bank by means of false pretenses, representations or promises is charged under § 1344(2). The second bracketed paragraph should be given in a case in which a scheme to defraud a bank is charged. Where both methods of violating the statute are charged, both paragraphs should be given. The Seventh Circuit has held that charges under § 1344(1) do not require a false statement or misrepresentation of fact. *United States v. Doherty*, 696 F.2d 425, 429 (7th Cir. 1992) ("As its ordinary meaning suggests, the term 'scheme to defraud' describes a broad range of conduct, some which involve false statements or misrepresentations of fact . . . and others which do not . . . . [O]ne need not make a false representation to execute a scheme to defraud.")

18 U.S.C. § 1344 MULTIPLE FALSE STATEMENTS CHARGED

[In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property from a [bank] [financial institution] by means of false pretenses, representations or promises, the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme. However, the government is not required to prove all of them.]

18 U.S.C. § 201 GIVING A BRIBE – ELEMENTS

To sustain the charge of giving a bribe, the government must prove the following propositions:

First, that the defendant directly or indirectly [promised, gave, offered] something of value to a public official;

Second, that the defendant acted with intent to influence an official act; and

Third, that the defendant acted corruptly.

If you find from your consideration of all the evidence that each of these propositions have been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

An "offer" under § 201 need not constitute an "offer" in the sense of what would otherwise be an binding contractual offer. *United States v. Synowiec*, 333 F.3d 786, 789 (7th Cir. 2003) ("The requirement that a defendant expresses 'an ability and desire to pay a bribe' in order to satisfy the bribery statute is a less demanding requirement that what the civil law requires for an enforceable offer.")

The third element is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995). It should be noted that *Bonito* was a case involving 18 U.S.C. § 666, not 18 U.S.C. § 201. The term "corruptly" has been defined somewhat differently in the context of other criminal statutes. *See, e.g., Roma Construction Co. v. aRusso*, 96 F.3d 566, 573-74 (1st Cir. 1996).

18 U.S.C. § 201 INTENT TO INFLUENCE

The government does not need to prove that the [public official; defendant] had the power to or did perform the act for which he [was promised; was given; received; agreed to receive] something of value. It is sufficient if the matter was one that was before him in his official capacity.

[The government also does not need to prove that the defendant in fact intended to be influenced. It is sufficient if the defendant knew that the thing of value was offered with the intent to influence official action.]

Committee Comment

United States v. Peleti, 576 F.3d 377, 382 (7th Cir. 2009) (citing and quoting *United States v. Myers*, 692 F.2d 823, 841-42 (2d Cir. 1982) (noting that "'being influenced' does not describe the [recipient's] true intent, it describes the intention he conveys to the briber in exchange for the bribe" and holding that an official commits bribery if he gives "false promises of assistance to people he believed were offering him money to influence his official actions.")

18 U.S.C. § 666(A)(1)(A) THEFT CONCERNING FEDERALLY FUNDED PROGRAM – ELEMENTS)

To sustain the charge of [embezzlement] [theft] [fraud] [conversion] [misapplication], the government must prove the following propositions:

First, that the defendant was an agent of [an organization] [a [state] [local]

[Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]];

Second, that the defendant [embezzled] [stole] [obtained by fraud] [knowingly and without authority converted to the use of someone other than the rightful owner] [intentionally misapplied] some [money] [property];

Third, that the [money] [property] was owned by, or was under the care, custody or control of the [organization] [government or agency];

Fourth, that the [money] [property] had a value of $5,000 or more; and

Fifth, that the [organization] [government or agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the theft affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55-60 (1997). The jury should be so instructed in the event a contrary argument is raised.

The statutory term "intentionally misapplies" does not cover mere mistakes. *United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007).

Instead, an intentional misapplication is confined to "theft, extortion, bribery, and similarly corrupt acts." *Id.* at 881. Authorization or ratification by an organization of an expenditure of funds is important evidence "militating against a finding of intentional misapplication," but is not a defense if "criminal intent is proven." *United States v. De La Cruz*, 469 F.3d 1064, 1068 (7th Cir. 2006).

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

18 U.S.C. § 666(A)(1)(B) ACCEPTING A BRIBE

To sustain the charge of bribery, the government must prove the following propositions:

First, that the defendant was an agent of [an organization] [a [state] [local] [Indian tribal] government, or any agency of that government] [, such as [name charged entity here if status is not in dispute]];

Second, that the defendant solicited, demanded, accepted or agreed to accept anything of value from another person;

Third, that the defendant acted corruptly with the intent to be influenced or rewarded in connection with some business, transaction or series of transactions of the [organization] [government or agency];

Fourth, that this business, transaction or series of transactions involved any thing of a value of $5,000 or more; and

Fifth, that the [organization] [government or agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence him/her in connection with his/her [organizational] [official] duties.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Salinas v. United States*, 522 U.S. 52, 55-60 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. *See, e.g., Roma Construction Co. v. aRusso*, 96 F.3d 566, 573-74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." *See United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

A defendant need only be partially motivated by the expectation of or desire for reward. *United States v. Coyne*, 4 F.3d 100 (2nd Cir. 1993).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive-branch grants: "This confuses influence with power to act unilaterally. . . . One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

18 U.S.C. § 666(A)(2) PAYING A BRIBE

To sustain the charge of [paying or offering to pay] a bribe, the government must prove the following propositions:

First, that the defendant gave, offered, or agreed to give anything of value to another person;

Second, that the defendant did so corruptly with the 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 some business, transaction, or series of transactions of the [organization] [government or agency];

Third, that this business, transaction, or series of transactions involved any thing with a value of $5,000 or more; and

Fourth, that the [organization] [government or agency], in a one year period, received benefits of more than $10,000 under any Federal program involving a grant, contract subsidy, loan, guarantee, insurance or other assistance. [The one year period must begin no more than 12 months before the defendant committed these acts and must end no more than 12 months afterward.]

[A person acts corruptly when that person acts with the intent that something of value is given or offered to reward or influence an agent of an [organization] [government] in connection with the agent's [organizational] [official] duties.]

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

The government is not required to prove that the bribe or other payment affected the federal funds received by the organization or agency. *Sabri v. United States*, 541 U.S. 600, 606 (2004); *Salinas v. United States*, 522 U.S. 52, 55-60 (1997). The jury should be so instructed in the event a contrary position is raised.

The definition of "corruptly" set forth above is derived from *United States v. Bonito*, 57 F.3d 167, 171 (2nd Cir. 1995). The term has been defined somewhat differently in the context of other criminal statutes. *See, e.g., Roma Construction Co. v. aRusso*, 96 F.3d 566, 573-74 (1st Cir. 1996). It is not necessary that this instruction contain the word "bribe" or "bribery," but it must define the term "corruptly." *See United States v. Medley*, 913 F.2d 1248 (7th Cir. 1990).

The agent need not have unilateral control over the business or transaction; influence is sufficient. *United States v. Gee*, 432 F.3d 713, 715 (7th Cir. 2005) (rejecting defense argument that legislator did not control executive-branch grants: "This confuses influence with power to act unilaterally. . . . One does not need to live in Chicago to know that a job description is not a complete measure of clout.")

The definition of the one-year federal-funds period reflects 18 U.S.C. § 666(d)(5).

18 U.S.C. § 666 "AGENT" - DEFINITION

An agent is a person who is authorized to act on behalf of an [organization] [government or agency], including an employee, officer, or representative.

Committee Comment

The common law definition of "agent" does not control the statutory definition of "agent." *United States v. Lupton*, 620 F.3d 790, 800 (7th Cir. 2010) ("The statutory definition of 'agent' is an expansive one.")

The defendant must be an agent of the organization from which he unlawfully obtained funds, and the funds must have been unlawfully obtained from the organization when it owned the funds, or had care, custody, or control over the funds. *United States v. Abu-Shawish*, 507 F.3d 550, 555-57 (7th Cir. 2007).

18 U.S.C. § 666(C) BONA FIDE COMPENSATION

Bona fide [salary, wages, fees, or other compensation paid] [expenses paid or reimbursed], in the usual course of business, does not qualify as a thing of value [solicited or demanded] [given, offered, or agreed to be given] by the defendant.

Committee Comment

Section 666(c) exempts bona fide payments from the reach of the bribery provisions: "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." 18 U.S.C. § 666(c).

Although it is clear that § 666(c) exempts bona fide payment of compensation or expenses from qualifying as a bribe, the Seventh Circuit has not yet decided whether § 666(c)'s exemption also applies to the $5,000 valuation of the business or transaction, or the $10,000 federal-funding jurisdictional amount. The Sixth Circuit has held that § 666(c) applies to both the $5,000 and $10,000 requirements. *United States v. Mills*, 140 F.3d 630, 632-33 (6th Cir. 1998). Other courts, including the Supreme Court, has assumed without analysis that § 666(c)'s exemption applies beyond the bribe itself. *E.g., Fischer v. United States*, 529 U.S. 667, 678-79 (2000). 666(c) applied (assuming that § 666(c) covers the $10,000 requirement).