Proposed revisions to Seventh Circuit Criminal Jury Instructions

These proposed revised criminal civil jury instructions for the Seventh Circuit are offered for public comment by the Seventh Circuit Criminal Jury Instruction Committee. Each proposed revised instruction is marked "PROPOSED REVISION" and bears in the title a short notation indicating whether the proposed revision involves the instruction, the committee comment, or both. Each proposed revised instructions is followed by, where applicable, the current version of the instruction, marked "CURRENT INSTRUCTION."

The proposed revisions concern the following instructions:

3.11 (proposed changes to instruction and comment)
3.16 (proposed changes to comment only)
3.17 (proposed changes to comment only)
4.04 (proposed changes to comment only)
4.09 (proposed changes to comment only)
4.10 (proposed changes to comment only)
5.06 (proposed changes to comment only)
5.10 (proposed changes to instruction and comment)
5.10(a) (proposed changes to instruction and comment)
6.05 (proposed changes to instruction and comment)
18 USC 666(a) (proposed changes to instructions and comment)
18 USC 669 (proposed changes to instruction)
18 USC 1035 (proposed new instructions)
18 USC 1341 & 1343 (proposed changes to comments only)
18 USC 1344(1) (proposed new instruction)
18 USC 1344(2) (proposed changes to instruction)
18 USC 1347(1) (proposed new instruction)
18 USC 1347(2) (proposed changes to instructions and comment)
18 USC 1951 (proposed changes to comment only)
Title 21 narcotics offenses – drug quantity special verdict ((proposed changes to instruction and comment)

The committee, which includes judges, prosecutors, defense attorneys, and law professors, welcomes comment before submission of the proposed revisions to the Circuit Council for approval and promulgation. Comments should be emailed to the Committee's Reporter, Professor J. Steven Beckett of the University of Illinois College of Law, at jicomments@illinois.edu, with a subject line of "Pattern Jury Instruction Comment." Comments will be accepted through January 30, 2017.

PROPOSED REVISION

3.11 EVIDENCE OF OTHER ACTS BY DEFENDANT

[changes to both instruction and comment]

You have heard [testimony/evidence] that the defendant committed acts other than the ones charged in the indictment. Before using this evidence, you must decide whether it is more likely than not that the defendant took the actions that are not charged in the indictment. If you decide that he did, then you may consider that evidence to help you decide [describe with particularity the purpose for which other act evidence was admitted, e.g. the defendant's intent to distribute narcotics, absence of mistake in dealing with the alleged victim, etc.]. You may not consider this evidence for any other purpose. To be more specific, you may not infer that, because the defendant committed an act in the past, he is more likely to have committed the crime[s] charged in the indictment. The reason is that the defendant is not on trial for these other acts. Rather, he is on trial for [list charges alleged in the indictment]. The government has the burden to prove beyond a reasonable doubt the elements of the crime[s] charged in the indictment. This burden cannot be met with an inference that the defendant is a person whose past acts suggest bad character or a willingness or tendency to commit crimes.

Committee Comment

See Fed. R. Evid. 404(b) (admissibility of other act evidence for limited purposes); see also, e.g., *United States v. Perkins*, 548 F3d 510, 514 (7th Cir. 2008) (jury must find that the defendant committed the act in question). Other act evidence may be admitted to show, among other things, predisposition, motive, opportunity, intent, preparation, plan, knowledge, identity, presence, or absence of mistake or accident.

This instruction may also be given during the trial at the time the evidence is introduced provided that the court has first consulted with defense counsel about whether the defense wants a limiting instruction. *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (en banc). "When given, the limiting instruction should be customized to the case rather than boilerplate." *Id.* In other words, the judge should, to the extent feasible, identify the other-act evidence in question and describe with particularity the issue(s) on which it has been admitted, as more fully discussed in the remainder of this Comment. The judge should take care to describe the evidence in a neutral fashion and to avoid giving it additional weight. In addition, the judge should consult counsel about whether and when to give a limiting instruction; the Seventh Circuit has "caution[ed] against judicial freelancing in this area." *Id.* In some situations, the defense may prefer "to let the evidence come in without the added emphasis of a limiting instruction," and if so the judge should not preempt this. *Id.; see also United States v. Lawson*, 776 F.3d 519, 522 (7th Cir. 2015) ("[T]he choice whether

to give a limiting instruction rests with the defense, which may decide that the less said about the evidence the better.").

In *United States v. Miller*, 673 F.3d 688 (7th Cir. 2012), the court counseled against "leaving juries to decode for themselves how they may properly consider admissible bad acts evidence" and encouraged trial judges to include "a case-specific explanation of the permissible inference – with the requisite care not to affirmatively credit that inference." *Id.* at 702 n.1. This instruction contemplates that the trial judge will do exactly that, inserting into the bracket in the third sentence a description of the issue(s) on which the other-act evidence has been admitted. This will help focus the jury on the fact that the identified purpose for consideration of the evidence is the sole purpose for which it may consider the evidence. As counseled in *Miller*, the description of the basis for which the other-act evidence is offered should be as focused as reasonably possible under the circumstances, and where possible, courts should avoid using overly general language. *Miller* indicates that a general instruction along the lines that other-act evidence may be considered "on the questions of knowledge and intent" may be unduly vague and may invite the jury to consider the evidence for impermissible purposes. *See id.* The cautionary language at the end of the instruction is included for the same reasons and to avoid misuse of "other act" evidence. *See*, e.g. Sixth Circuit Criminal Instruction 7.13; Eighth Circuit Criminal Instructions 2.08 & 2.09.

In *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014)(en banc), the court abandoned the four part test for admissibility under Rule 404(b), originally set forth in *United States v. Zapata*, 871 F.2d 616, 620 (7th Cir. 1989). *Gomez* adopted "a more straightforward rules-based approach," which is summarized as follows:

> [T]o overcome an opponent's objection to the introduction of other-act evidence, the proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person's character or propensity to behave in a certain way. *See* Fed. R. Evid. 401, 402, 404(b). Other-act evidence need not be excluded whenever a propensity inference can be drawn. But its relevance to "another purpose" must be established through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case. If the proponent can make this initial showing, the district court must in every case assess whether the probative value of the other-act evidence is substantially outweighed by the risk of unfair prejudice and may exclude the evidence under Rule 403 if the risk is too great. The court's Rule 403 balancing should take account of the extent to which the non-propensity fact for which the evidence is offered actually is at issue in the case.

Id. at 853, 860.

Gomez also counseled against keeping the jury in the dark about the rationale for the rule against propensity inferences and suggested that jurors should be explicitly told why they must not use the other-act evidence to infer that the defendant has a certain "character" and acted "in character" in the present case. *Id.* at 861. This instruction does just that while also reminding the jury that the government bears the burden of proving every element of the specific crime charged beyond a reasonable doubt.

This instruction does not apply to evidence admitted pursuant to Fed. R. Evid. 413 or 414, under which a prior act of sexual assault or child molestation by the defendant may be considered for "its bearing on any other matter to which it is relevant." If evidence was admitted pursuant to Rules 413 or 414, this instruction should be modified to exempt that evidence from its limitations, and a separate instruction should be given to address the Rule 413 or 414 evidence.

CURRENT INSTRUCTION

3.11 EVIDENCE OF OTHER ACTS BY DEFENDANT

You have heard [testimony; evidence] that the defendant committed [crimes; acts; wrongs] other than the ones charged in the indictment. Before using this evidence, you must decide whether it is more likely than not that the defendant did the [crimes; acts; wrongs] that are not charged in the indictment. If you decide that he did, then you may consider this evidence to help you decide [describe purpose for which other act evidence was admitted, *e.g.* the defendant's intent to distribute narcotics, absence of mistake in dealing with the alleged victim, etc.]. You may not consider it for any other purpose. Keep in mind that the defendant is on trial here for [describe charge(s) in indictment], not for the other [crimes; acts; wrongs].

Committee Comment

See Fed. R. Evid. 404(b) (admissibility of other act evidence for limited purposes); see also, *e.g., United States v. Perkins*, 548 F.3d 510, 514 (7th Cir. 2008) (jury must find that the defendant committed the act in question). Other act evidence may be admitted to show, among other things, predisposition, motive, opportunity, intent, preparation, plan, knowledge, identity, presence, or absence of mistake or accident.

In *United States v. Miller*, 673 F.3d 688 (7th Cir. 2012), the court counseled against "leaving juries to decode for themselves how they may properly consider admissible bad acts evidence" and encouraged trial judges to include "a case-specific explanation of the permissible inference – with the requisite care not to affirmatively credit that inference." 673 F.3d at 702 n.1. This instruction contemplates that the trial judge will do exactly that, inserting into the bracket in the third sentence a description of the issue(s) on which the other-act evidence has been admitted. This will help focus the jury on the fact that the identified purpose for consideration of the evidence is the sole purpose for which it may consider the evidence. As counseled in *Miller*, the description of the basis for which the other-act evidence is offered should be as focused as reasonably possible under the circumstances, and where possible, courts should avoid using overly general language. *Miller* indicates that a general instruction along the lines that other-act evidence may be considered "on the questions of knowledge and in- tent" may be unduly vague and may invite the jury to consider the evidence for impermissible purposes. *See id.* The cautionary language at the end of the instruction is included for the same reasons and to avoid misuse of "other act" evidence. See, *e.g.*, Sixth Circuit Criminal Instruction 7.13; Eighth Circuit Criminal Instructions 2.08 & 2.09.

This instruction may also be given during the trial at the time the evidence is introduced. The trial judge may refer specifically to the other act evidence in question if necessary for clarity. The judge should take care, however, not to

characterize the evidence or to give it additional weight.

This instruction does not apply to evidence admitted pursuant to Fed. R. Evid. 413 or 414, under which a prior act of sexual assault or child molestation by the defendant may be considered for "its bearing on any matter to which it is relevant." If evidence was admitted pursuant to Rules 413 or 414, this instruction should be modified to exempt that evidence from its limitations, and a separate instruction should be given to address the Rule 413 or 414 evidence.

PROPOSED REVISION

3.16 SUMMARIES RECEIVED IN EVIDENCE

[changes made to comment only]

Certain [summaries; charts; etc.] were admitted in evidence. [You may use those [summaries; charts] as evidence [even though the underlying [documents; evidence] are not here].]

[The accuracy of the [summaries; charts] has been challenged. [The underlying [documents; evidence] [has; have] also been admitted so that you may determine whether the summaries are accurate.]

[It is up to you to decide how much weight to give to the summaries.]

Committee Comment

See Fed. R. Evid. 1006. For an undisputed summary, only the first two sentences should be given. For a disputed summary, the entire instruction should be given, except for the second sentence of the first paragraph.

In *United States v. White*, 737 F.3d 1121 (7th Cir. 2013), the court provides an overview of summary exhibits offered and admitted pursuant to Rule 1006, and distinguishes such exhibits from demonstrative summaries offered pursuant to Fed. R. Evid. 611(a), which are addressed in pattern instruction 3.17, *infra.* A party may introduce information by means of a summary exhibit under Rule 1006 to prove the content of voluminous documents that cannot be conveniently examined by the court. If admitted this way, then the summary itself is admissible evidence, in part because the party is not obligated to introduce the underlying documents themselves. Because a Rule 1006 summary is intended to substitute for the voluminous documents, the exhibit must accurately summarize those documents. It must not misrepresent their contents or make arguments about the inferences the jury should draw from them. *White*, 737 F.3d at 1135.

CURRENT INSTRUCTION

3.16 SUMMARIES RECEIVED IN EVIDENCE

Certain [summaries; charts; etc.] were admitted in evidence. [You may use those [summaries; charts] as evidence [even though the underlying [documents; evidence] are not here].]

[The accuracy of the [summaries; charts] has been challenged. [The underlying [documents; evidence] [has; have] also been admitted so that you may determine whether the summaries are accurate.]

[It is up to you to decide how much weight to give to the summaries.]

Committee Comment

See Fed. R. Evid. 1006. For an undisputed summary, only the first two sentences should be given. For a disputed summary, the entire instruction should be given, except for the second sentence of the first paragraph.

PROPOSED REVISION

3.17 DEMONSTRATIVE SUMMARIES CHARTS NOT RECEIVED IN EVIDENCE

[changes made to comment only]

Certain [summaries; charts; etc.] were shown to you to help explain other evidence that was admitted, [specifically, identify the demonstrative exhibit, if appropriate]. These [summaries; charts] are not themselves evidence or proof of any facts, [so you will not have these particular [summaries; charts] during your deliberations]. [If they do not correctly reflect the facts shown by the evidence, you should disregard the [summaries; charts] and determine the facts from the underlying evidence.]

Committee Comment

The last sentence should only be given if there is a dispute about whether a particular demonstrative exhibit is accurate.

The committee suggests that this instruction as given should identify the demonstrative exhibit(s) by name, and not just by number. In addition, the court may wish to give this instruction during trial when the demonstrative exhibit is used, so that the jurors are made aware that they will not have the exhibit available during deliberations.

In *United States v. White*, 737 F.3d 1121 (7th Cir. 2013), the court provides an overview of demonstrative exhibits offered as "pedagogical summaries "that may be allowed under Fed. R. Evid. 611(a), which gives the court "control over the mode . . . [of] presenting evidence." The court distinguished such exhibits from summaries admitted into evidence under Fed. R. Evid. 1006. Pedagogical summaries are meant to facilitate the presentation of evidence already in the record and thus are not themselves admissible evidence. Instead, such summaries are meant to aid the jury in its understanding of evidence that has been admitted and thus may be more slanted in presenting information than a summary admitted under Rule 1006. Allowing such an exhibit is within the district court's discretion, but when the court allows an exhibit of this sort, it should instruct the jury that the exhibit is not evidence and is meant only aid the jury in its evaluation of other evidence. *White,* 737 F.3d at 1135.

CURRENT INSTRUCTION

3.17 DEMONSTRATIVE SUMMARIES/ CHARTS NOT RECEIVED IN EVIDENCE

Certain [summaries; charts; etc.] were shown to you to help explain other evidence that was admitted, [specifically, identify the demonstrative exhibit, if appropriate]. These [summaries; charts] are not themselves evidence or proof of any facts, [so you will not have these particular [summaries; charts] during your deliberations]. [If they do not correctly reflect the facts shown by the evidence, you should disregard the [summaries; charts] and determine the facts from the underlying evidence.]

Committee Comment

The last sentence should only be given if there is a dispute about whether a particular demonstrative exhibit is accurate.

The committee suggests that this instruction as given should identify the demonstrative exhibit(s) by name, and not just by number.

PROPOSED REVISION

4.04 UNANIMITY ON SPECIFIC ACTS

[changes made to comment only]

Count[s] ___ charge the defendant with [fill in description of multiple acts, *e.g.*, making more than one false statement]. The government is not required to prove that the defendant made every one of the [fill in shorthand description, *e.g.*, false statements] alleged in [Count __; the particular Count you are considering]. However, the government is required to prove that the defendant made at least one of the [fill in shorthand description, *e.g.*, false statements] that is alleged in [Count __; the particular Count]. To find that the government has proven this, you must agree unanimously on which particular [shorthand description, e.g. false statement] the defendant made, as well as all of the other elements of the crime charged.

[For example[, on Count __], if some of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, *e.g.*, "made a false statement regarding his taxable income"], and the rest of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of a different particular act charged, *e.g.*, "made a false statement about the number of exemptions to which he was entitled"], then there would be no unanimous agreement on which [shorthand description, *e.g.*, false statement] the government has proved. On the other hand, if all of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, *e.g.*, "made a false statement regarding his taxable income"], then there would be a unanimous agreement on which [shorthand description, *e.g.*, false statement] the government proved.]

Committee Comment

This instruction may apply when the government alleges in a single count that the defendant violated the law in more than one way. The law in this regard has developed significantly in recent years. When *Richardson v. United States*, 526 U.S. 813 (1999), and *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality opinion), are read together, it appears that unanimity is required when the government alleges more than one possibility for an element of the crime (*e.g.*, a false statement charge in which the government charges that the defendant made one or more of three alleged false statements), but not when the government contends that the defendant committed an element of the crime using one or more of several possible means (*e.g.*, a armed robbery charge in which the government charges that the defendant committed a robbery using a knife, or a gun, or both). *Richardson*, 513 U.S. at 817. The element/means distinction is not always clear. Some guidance has been provided by the Seventh Circuit's post-*Richardson* cases. *See, e.g., United States v. Griggs*, 569 F.3d 341,

344 (7th Cir. 2009), which gives as examples of when a jury must be unanimous on particular acts in situations in which a single count charges multiple perjurious statements, multiple objects of a single conspiracy, and multiple predicate acts of an alleged continuing criminal enterprise. By analogy, false statement-type charges (including false tax return charges) that allege multiple false statements in a single count and RICO charges listing a series of predicate acts likely require a unanimity instruction, though there is no definitive post-*Richardson* guidance from the Seventh Circuit on charges of that sort. *See also United States v. Mannava*, 565 F.3d 412, 415–16 (7th Cir. 2009) (conviction under 18 U.S.C. § 2422(b), which makes it a crime to induce a minor to engage in sexual activity for which a person can be charged with a criminal offense, requires unanimity regarding underlying state criminal offense involved); *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) (if fraud charge alleges multiple schemes, unanimity regarding the particular scheme is required). On the other hand, a jury need not be unanimous on which overt act the defendants committed in furtherance of a charged conspiracy. *Griggs*, 569 F.3d at 343–44. In addition, the Seventh Circuit has held that specific unanimity is not required when multiple false statements are alleged as part of a scheme to defraud. *See United States v. Daniel*, 749 F.3d 608, 613-14 (7th Cir. 2014) ("the fraudulent representations or omissions committed by [defendant] . . . were merely the means he used to commit an element of the crime."). In certain cases, where the evidence (and the strength of the evidence) on false statements or omissions is different enough that the jury might well split, it might be appropriate to affirmatively instruct the jury that there need not be unanimity on the particular representation or omission.

If used, this instruction should be given in sequence to accompany the "elements" and definitional instructions for the particular count(s) to which it applies. If the instruction applies to some counts but not others, the trial judge should include language in the instruction identifying the counts to which the instruction applies. The example provided in the second paragraph is optional and, if given, should be adapted to the particular case.

CURRENT INSTRUCTION

4.04 UNANIMITY ON SPECIFIC ACTS

Count[s] charge the defendant with [fill in description of multiple acts, *e.g.*, making more than one false statement]. The government is not required to prove that the defendant made every one of the [fill in shorthand description, *e.g.*, false statements] alleged in [Count ; the particular Count you are considering]. However, the government is required to prove that the defendant made at least one of the [fill in shorthand description, *e.g.*, false statements] that is alleged in [Count ; the particular Count]. To find that the government has proven this, you must agree unanimously on which particular [shorthand description, e.g. false statement] the defendant made, as well as all of the other elements of the crime charged.

[For example[, on Count], if some of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, *e.g.*, "made a false statement regarding his taxable income"], and the rest of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of a different particular act charged, *e.g.*, "made a false statement about the number of exemptions to which he was entitled"], then there would be no unanimous agreement on which [shorthand description, *e.g.*, false statement] the government has proved. On the other hand, if all of you were to find that the government has proved beyond a reasonable doubt that the defendant [fill in description of one of the particular acts charged, *e.g.*, "made a false statement regarding his taxable income"], then there would be a unanimous agreement on which [shorthand description, *e.g.*, false statement] the government proved.]

Committee Comment

This instruction may apply when the government alleges in a single count that the defendant violated the law in more than one way. The law in this re- gard has developed significantly in recent years. When *Richardson v. United States*, 526 U.S. 813 (1999), and *Schad v. Arizona*, 501 U.S. 624, 631–32 (1991) (plurality opinion), are read together, it appears that unanimity is re- quired when the government alleges more than one possibility for an element of the crime (*e.g.*, a false statement charge in which the government charges that the defendant made one or more of three alleged false statements), but not when the government contends that the defendant committed an element of the crime using one or more of several possible means (*e.g.*, a armed robbery charge in which the government charges that the defendant committed a rob- bery using a knife, or a gun, or both). *Richardson*, 513 U.S. at 817.

The element/means distinction is not always clear. Some guidance has been provided by the Seventh Circuit's post-*Richardson* cases. See, *e.g., United States v. Griggs*, 569 F.3d 341, 344 (7th Cir. 2009), which gives as examples of

when a jury must be unanimous on particular acts in situations in which a single count charges multiple perjurious statements, multiple objects of a single conspiracy, and multiple predicate acts of an alleged continuing criminal enterprise. By analogy, false statement-type charges (including false tax return charges) that allege multiple false statements in a single count and RICO charges listing a series of predicate acts likely require a unanimity instruction, though there is no definitive post-*Richardson* guidance from the Seventh Circuit on charges of that sort. See also *United States v. Mannava*, 565 F.3d 412, 415–16 (7th Cir. 2009) (conviction under 18 U.S.C. § 2422(b), which makes it a crime to induce a minor to engage in sexual activity for which a person can be charged with a criminal offense, requires unanimity regarding underlying state criminal offense involved); *United States v. Davis*, 471 F.3d 783, 791 (7th Cir. 2006) (if fraud charge alleges multiple schemes, unanimity regarding the particular scheme is required). On the other hand, a jury need not be unanimous on which overt act the defendants committed in furtherance of a charged conspiracy. *Griggs*, 569 F.3d at 343–44.

The Committee notes that it is common for mail, wire, and bank fraud charges to include allegations regarding multiple false statements, promises, or representations. Since *Richardson*, the Seventh Circuit has not spoken on whether unanimity on the particular false statement, promise, or representation is required in such a case. Though it is likely that these constitute allegations regarding a means, and not an element, of the offense (the element being the existence of a scheme, not the particulars of how the scheme was executed), the Committee takes no definitive position on the point.

If used, this instruction should be given in sequence to accompany the "elements" and definitional instructions for the particular count(s) to which it applies. If the instruction applies to some counts but not others, the trial judge should include language in the instruction identifying the counts to which the instruction applies. The example provided in the second paragraph is optional and, if given, should be adapted to the particular case.

PROPOSED REVISION

4.09 ATTEMPT

[changes to comment only]

A person attempts to commit [identify offense, *e.g.*, bank robbery] if he (1) knowingly takes a substantial step toward committing [describe the offense], (2) with the intent to commit [describe the offense]. The substantial step must be an act that strongly corroborates that the defendant intended to carry out the [the crime; describe the offense].

Committee Comment

See generally *United States v.* Sanchez, 615 F.3d 836, 844–45 (7th Cir. 2010); *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000); *United States v. Rovetuso*, 768 F.2d 809, 822 (7th Cir. 1985). The definition of "substantial step" is included because the term is difficult to understand without explanation.

In *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court concluded that explicitly sexual Internet chatter combined with the defendant sending the purported minor a video of himself masturbating did not amount to a "substantial step" as required to convict the defendant of attempting to in- duce the minor to engage in sexual activity. The court stated that "[t]he requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air." 536 F.3d. at 650; see also *United States v. Zawada*, 552 F.3d 531 (7th Cir. 2008) (planning for meeting with mi- nor and discussion about setting up a meeting sufficient to constitute substantial step under plain error review); *United States v. Davey*, 550 F. 2d 653 (7th Cir. 2008) (affirming denial of motion to withdraw guilty plea; substantial step toward completion of substantive offense demonstrated by planning a meeting with purported minor, travel across state lines to achieve meeting, and telephone contact with purported minor upon arrival for further planning); *Doe v. City of Lafayette,* 337 F.3d 757, 783 (7th Cir. 2004) (merely thinking sexual thoughts about children does not constitute substantial step towards sexual abuse).

As the Seventh Circuit noted in *Sanchez*, the line between mere preparation and a substantial step is "inherently fact specific." *Sanchez*, 615 F.3d at 844. The Committee has not proposed a bright-line rule because none exists. The trial judge must, of course, assess whether there is evidence that, consistent with the law, would permit a finding of guilt.

Many Seventh Circuit cases say that a "substantial step" is "something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime." See, *e.g., Sanchez*, 615 F.3d at 844 (internal quotation marks omitted); *United States v. Barnes*, 230 F.3d 311,

315 (7th Cir. 2000). The Committee did not include this language in the pattern jury instruction because it did not appear to provide clear guidance to jurors. As the Seventh Circuit observed in *Sanchez*, "there is no easy way to separate preparation from a substantial step." *Sanchez*, 615 F.3d at 844.

Some pattern instructions include an "attempt" alternative. *See, e.g.,* Instruction for 18 U.S.C. § 2113(a) (bank robbery). When a court instructs on an attempt offense where the pattern instruction does not include an attempt alternative, the court should modify the pattern instruction for the offense to incorporate the element of attempt and then should give the definition of attempt in Instruction 4.09 either separately or in the body of the elements instruction. For example, for a charge of attempted possession with intent to distribute cocaine under 21 U.S.C. § 841(a)(1), the court should instruct as follows (eliminating the bold type, of course):

> The indictment charges defendant with **attempting to possess** cocaine 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 elements beyond a reasonable doubt:
>
> 1. The defendant knowingly **attempted to possess** cocaine; and
>
> 2. The defendant intended to distribute the substance to another person; and
>
> 3. 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 cocaine.
>
> If you find from your consideration of all the evidence that the government has 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 has failed to prove any one of these elements beyond a reasonable doubt, then you should find the defendant not guilty.
>
> **(separate instruction)**
>
> A person attempts to possess a controlled substance if he (1) knowingly takes a substantial step toward possessing the controlled substance, (2) with the intent to possess the controlled substance. The substantial step must be an act that strongly corroborates that the defendant intended to carry out the crime.

CURRENT INSTRUCTION

4.09 ATTEMPT

A person attempts to commit [identify offense, *e.g.*, bank robbery] if he (1) knowingly takes a substantial step toward committing [describe the offense], (2) with the intent to commit [describe the offense]. The substantial step must be an act that strongly corroborates that the defendant intended to carry out the [the crime; describe the offense].

Committee Comment

See generally *United States v.* Sanchez, 615 F.3d 836, 844–45 (7th Cir. 2010); *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000); *United States v. Rovetuso*, 768 F.2d 809, 822 (7th Cir. 1985). The definition of "substantial step" is included because the term is difficult to understand without explanation.

In *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court concluded that explicitly sexual Internet chatter combined with the defendant sending the purported minor a video of himself masturbating did not amount to a "substantial step" as required to convict the defendant of attempting to induce the minor to engage in sexual activity. The court stated that "[t]he requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air." 536 F.3d. at 650; see also *United States v. Zawada*, 552 F.3d 531 (7th Cir. 2008) (planning for meeting with minor and discussion about setting up a meeting sufficient to constitute substantial step under plain error review); *United States v. Davey*, 550 F. 2d 653 (7th Cir. 2008) (affirming denial of motion to withdraw guilty plea; substantial step toward completion of substantive offense demonstrated by planning a meeting with purported minor, travel across state lines to achieve meeting, and telephone contact with purported minor upon arrival for further planning); *Doe v. City of Lafayette,* 337 F.3d 757, 783 (7th Cir. 2004) (merely thinking sexual thoughts about children does not constitute substantial step towards sexual abuse).

As the Seventh Circuit noted in *Sanchez*, the line between mere preparation and a substantial step is "inherently fact specific." *Sanchez*, 615 F.3d at 844. The Committee has not proposed a bright-line rule because none exists. The trial judge must, of course, assess whether there is evidence that, consistent with the law, would permit a finding of guilt.

Many Seventh Circuit cases say that a "substantial step" is "something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime." See, *e.g., Sanchez*, 615 F.3d at 844 (internal quotation marks omitted); *United States v. Barnes*, 230 F.3d 311, 315 (7th Cir. 2000). The Committee did not include this language in the pattern jury

instruction because it did not appear to provide clear guidance to jurors. As the Seventh Circuit observed in *Sanchez*, "there is no easy way to separate mere preparation from a substantial step." 615 F.3d at 844.

PROPOSED REVISION

4.10 KNOWINGLY – DEFINITION

[changes to comment only]

A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. [In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.]

[You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he had a strong suspicion that [state fact as to which knowledge is in question, *e.g.*, "drugs were in the suitcase," "the financial statement was false,"] and that he deliberately avoided the truth. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth.]

Committee Comment

The Seventh Circuit has approved the definition of "knowledge" given in the first paragraph of this instruction. *United States v. Graham*, 431 F.3d 585, 590 (7th Cir. 2005).

The second paragraph, commonly referred to as an "ostrich" instruction, will not be appropriate in every case in which knowledge is an issue. "An ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted as having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity." *United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015). *See also United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007) (ostrich instruction is appropriate "where (1) the defendant claims a lack of guilty knowledge, and (2) the government has presented evidence sufficient for a jury to conclude that the defendant deliberately avoided learning the truth."). Deliberate avoidance is more than mere negligence; the defendant "must have 'deliberately avoided acquiring knowledge of the crime being committed by cutting off his curiosity through an effort of the will.'" *Carani*, 492 F.3d at 873 (quoting *United States v. Leahy*, 464 F.3d 773, 796 (7th Cir. 2006). "The purpose of the ostrich instruction is to inform the jury that a person may not escape criminal liability by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact information about the nature or extent of those dealings." *Carrillo*, 435 F.3d at 780 (internal quotation marks and citation omitted). "[E]vidence merely supporting a finding of negligence[,] that a reasonable person would have been strongly suspicious, or that a defendant should have been aware of criminal knowledge, does not support an inference that a particular defendant was deliberately ignorant."

Carrillo, 435 F.3d at 781; *United States v. Stone*, 987 F.2d 469, 472 (7th Cir. 1993) (explaining that it is improper to use an ostrich instruction "to convict [a defendant] on the basis of what [he] should have known").

Accordingly, an ostrich instruction is inappropriate when the government's evidence leaves the jury with a "binary choice" – the defendant had actual knowledge, or he lacked knowledge. See *United States v. Craig*, 178 F.3d 891, 898 (7th Cir. 1999); *United States v. Giovanetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). "If the evidence against the defendant points solely to direct knowledge of the criminal venture, it would be error to give the [ostrich] instruction." *United States v. Caliendo*, 910 F.2d 429, 435 (7th Cir. 1990) (internal quotation marks and citation omitted).

In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), a civil case involving inducement of patent infringement, the Supreme Court provided an arguably narrower definition of the sort of willful blindness that equates to knowledge. Specifically, the Court stated that the doctrine of willful blindness includes "two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 2060. The Court said that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* at 2070.

Though *Global-Tech* was a civil case, the Court supported its definition with citations to discussions of the concept in criminal cases. See *id.* at 2068–70. This suggests that the *Global-Tech* definition ought to be used in criminal cases as well. The Supreme Court has not yet expressly held that *Global-Tech* applies to criminal cases, although several Circuits (but not yet the Seventh) have said that it should. See *United States v. Brooks*, 681 F.3d 678, 702 n. 19 (5th Cir. 2012) ("Although *Global-Tech* was a civil case, the standard seems to apply equally to criminal deliberate ignorance cases."); *United States v. Ferguson*, 676 F.3d 260, 278 n. 16 (2nd Cir. 2011); *United States v. Butler*, 646 F.3d 1038, 1041 (8th Cir. 2011). The Seventh Circuit quoted approvingly from *Global-Tech* in discussing the appropriateness of an ostrich instruction in *Macias*, 786 F.3d at 1062 (7th Cir. 2015), but it has not yet expressly addressed whether the *Global-Tech* standard should be incorporated into the instruction. *See also United States v. Pierotti*, 777 F.3d 917, 920 (7th Cir. 2015) (declining "to decide whether the definition in *Global–Tech* . . . requires a fresh look at our pattern instruction to address it because the instruction's language was not challenged by the defendant"). Because the Seventh Circuit has not decided the issue, the Committee has not incorporated *Global-Tech's* discussion of this concept into this instruction. Trial judges in this Circuit should consider whether it is appropriate to do so.

CURRENT INSTRUCTION

4.10 KNOWINGLY – DEFINITION

A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. [In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.]

[You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he had a strong suspicion that [state fact as to which knowledge is in question, *e.g.*, "drugs were in the suitcase," "the financial statement was false,"] and that he deliberately avoided the truth. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth.]

Committee Comment

The Seventh Circuit has approved the definition of "knowledge" given in the first paragraph of this instruction. *United States v. Graham*, 431 F.3d 585, 590 (7th Cir. 2005).

The second paragraph, commonly referred to as an "ostrich" instruction, will not be appropriate in every case in which knowledge is an issue. Such an instruction is appropriate "where (1) the defendant claims a lack of guilty knowledge, and (2) the government has presented evidence sufficient for a jury to conclude that the defendant deliberately avoided learning the truth." *United States v. Carani*, 492 F.3d 867, 873 (7th Cir. 2007) (citing *United States v. Carrillo*, 435 F.3d 767, 780 (7th Cir. 2006). Deliberate avoidance is more than mere negligence; the defendant "must have 'deliberately avoided acquiring knowledge of the crime being committed by cutting off his curiosity through an effort of the will.'" *Carani*, 492 F.3d at 873 (quoting *United States v. Leahy*, 464 F.3d 773, 796 (7th Cir. 2006). "The purpose of the ostrich instruction is to inform the jury that a person may not escape criminal liability by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact information about the nature or extent of those dealings." *Carrillo*, 435 F.3d at 780 (internal quotation marks and citation omitted). "[E]vidence merely supporting a finding of negligence[,] that a reasonable person would have been strongly suspicious, or that a defendant should have been aware of criminal knowledge, does not support an inference that a particular defendant was deliberately ignorant." *Carrillo*, 435 F.3d at 781; *United States v. Stone*, 987 F.2d 469, 472 (7th Cir. 1993) (explaining that it is improper to use an ostrich instruction "to convict [a defendant] on the ba- sis of what [he] should have known").

Accordingly, an ostrich instruction is inappropriate when the government's

evidence leaves the jury with a "binary choice" – the defendant had actual knowledge, or he lacked knowledge. See *United States v. Craig*, 178 F.3d 891, 898 (7th Cir. 1999); *United States v. Giovanetti*, 919 F.2d 1223, 1228 (7th Cir. 1990). "If the evidence against the defendant points solely to direct knowledge of the criminal venture, it would be error to give the [ostrich] instruction." *United States v. Caliendo*, 910 F.2d 429, 435 (7th Cir. 1990) (internal quotation marks and citation omitted).

In *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), a civil case involving inducement of patent infringement, the Supreme Court provided an arguably narrower definition of the sort of willful blindness that equates to knowledge. Specifically, the Court stated that the doctrine of willful blindness includes "two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 2060. The Court said that "these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Id.* at 2070.

Though *Global-Tech* was a civil case, the Court supported its definition with citations to discussions of the concept in criminal cases. See *id.* at 2068–70. This suggests that the *Global-Tech* definition ought to be used in criminal cases as well. The Supreme Court has not yet expressly held that *Global-Tech* applies to criminal cases, although several Circuits (but not yet the Seventh) have said that it should. See *United States v. Brooks*, 681 F.3d 678, 702 n. 19 (5th Cir. 2012) ("Although *Global-Tech* was a civil case, the standard seems to apply equally to criminal deliberate ignorance cases."); *United States v. Ferguson*, 676 F.3d 260, 278 n. 16 (2nd Cir. 2011); *United States v. Butler*, 646 F.3d 1038, 1041 (8th Cir. 2011). Because the Seventh Circuit has not addressed the issue, the Committee has not incorporated *Global-Tech's* discussion of this concept into this instruction. Trial judges in this Circuit should consider whether it is appropriate to do so.

PROPOSED REVISION

5.06 AIDING AND ABETTING/ACTING THROUGH ANOTHER

[changes to comment only]

(a)

Any person who knowingly [aids; counsels; commands; induces; or procures] the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.

(b)

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.

Committee Comment

See Rosemond v. United States, 5134 S. Ct. 1240 (2014); *United States v. Irwin*, 149 F.3d 565, 571–73 (7th Cir. 1998). In prosecutions under 18 U.S.C. § 924(c), the Supreme Court held in *Rosemond* that the affirmative act requirement is satisfied if the act is one in furtherance of *either* the underlying violent crime of drug trafficking offense *or* the firearms offense. However, with respect to intent, the defendant must be shown to have intended to facilitate an *armed* commission of the underlying offense.

CURRENT INSTRUCTION

5.06 AIDING AND ABETTING/ACTING THROUGH ANOTHER

(a)

Any person who knowingly [aids; counsels; commands; induces; or procures] the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.

(b)

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.

Committee Comment

The Seventh Circuit has not yet clearly reconciled two competing lines of cases on what level of *mens rea* is required for aider and abettor liability. See, *e.g.*, Baruch Weiss, *"What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law,"* 70 Fordham L. Rev. 1341, 1401–09 (2002). One line of cases suggests that it is sufficient for the defendant to provide material assistance to the main actor regardless of whether the defendant desired that the underlying crime succeed. *United States v. Ortega*, 44 F.3d 505, 508 (7th Cir. 1995). In *United States v. Garcia*, 45 F.3d 196, 199 (7th Cir. 1995), however, the court held that an aider and abettor must desire to help the activity succeed. Many subsequent cases have adopted the higher level of *mens rea*, declaring it consistent with the material assistance standard. See, *e.g., United States v. Irwin*, 149 F.3d 565, 571–73 (7th Cir. 1998); but see *United States v. Andrews*, 442 F.3d 996, 1002 (7th Cir. 2006) (aiding and abet- ting a violation of 18 U.S.C. § 924(c) requires proof that the defendant know- ingly and intentionally assisted the principal's use of a dangerous weapon in a violent felony), citing *Ortega*, 44 F.3d at 508. The Committee suggests that, absent clearer direction from the Seventh Circuit, the more prudent course is to hold the government to the higher standard.

PROPOSED REVISION

5.10 CONSPIRACY – MEMBERSHIP IN CONSPIRACY

[changes to both instruction and comment]

To be a member of a conspiracy, [the/a] defendant does not need to join it at the beginning, and he does not need to know all of the other members or all of the means by which the illegal goal[s] of the conspiracy [was; were] to be accomplished. The government must prove beyond a reasonable doubt that the defendant [you are considering] was aware of the illegal goal[s] of the conspiracy and knowingly joined the conspiracy.

[A defendant is not a member of a conspiracy just because he knew and/or associated with people who were involved in a conspiracy, knew there was a conspiracy, and/or was present during conspiratorial discussions.]

[The conspiracy must include at least one member other than the defendant who, at the time, was not [a government agent; a law enforcement officer; an informant].]

In deciding whether [a particular] [the] defendant joined the charged conspiracy, you must base your decision only on what [that] [the] defendant did or said. To determine what [that] [the] defendant did or said, you may consider [that] [the] defendant's own words or acts. You may also use the words or acts of other persons to help you decide what the defendant did or said.

Committee Comment

(a)

Consideration of co-conspirator declarations. *See* Committee Comment to Instruction 5.09 for a discussion of the consideration of co-conspirator statements, *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), and *Bourjaily v. United States*, 483 U.S. 171, 176–81 (1987).

(b)

Authority. A defendant does not need to join a conspiracy at its beginning, know all of its members, or know all of the means by which the goal of the conspiracy was to be accomplished in order to be a member of the conspiracy. *United States v. Jame*s, 540 F.3d 702, 708 (7th Cir. 2008); *United States v. Bolivar*, 523 F.3d 699, 603–04 (7th Cir. 2008). The Seventh Circuit has made clear, however, that the defendant's mere knowledge of or association with other members of the conspiracy is insufficient to prove membership in the conspiracy. *United States v. Useni*, 516 F.3d 634, 646 (7th Cir. 2008). *See also* Pattern Instruction 5.07 and its commentary.

"The government must prove that the defendant conspired with at least one true co-conspirator. In other words, a conspiracy cannot be established between one criminally-minded individual and a government agent or informer." *United States v. Spagnola,* 632 F.3d 981, 986 (7th Cir. 2011) (internal quotation marks and citation omitted). The bracketed paragraph concerning this point should not be given, of course, if a government agent was an actual co-conspirator.

CURRENT INSTRUCTION

5.10 CONSPIRACY – MEMBERSHIP IN CONSPIRACY

To be a member of a conspiracy, [the/a] defendant does not need to join it at the beginning, and he does not need to know all of the other members or all of the means by which the illegal goal[s] of the conspiracy [was; were] to be accomplished. The government must prove beyond a reasonable doubt that the defendant [you are considering] was aware of the illegal goal[s] of the conspiracy and knowingly joined the conspiracy.

[A defendant is not a member of a conspiracy just because he knew and/or associated with people who were involved in a conspiracy, knew there was a conspiracy, and/or was present during conspiratorial discussions.]

In deciding whether [a particular] [the] defendant joined the charged conspiracy, you must base your decision only on what [that] [the] defendant did or said. To determine what [that] [the] defendant did or said, you may consider [that] [the] defendant's own words or acts. You may also use the words or acts of other persons to help you decide what the defendant did or said.

Committee Comment

(a)

Consideration of co-conspirator declarations. See Committee Comment to Instruction 5.08(c) for a discussion of the consideration of co-conspirator statements, *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), and *Bourjaily v. United States*, 483 U.S. 171, 176–81 (1987).

(b)

Authority. A defendant does not need to join a conspiracy at its beginning, know all of its members, or know all of the means by which the goal of the conspiracy was to be accomplished in order to be a member of the conspiracy. *United States v. James*, 540 F.3d 702, 708 (7th Cir. 2008); *United States v. Bolivar*, 523 F.3d 699, 603–04 (7th Cir. 2008). The Seventh Circuit has made clear, however, that the defendant's mere knowledge of or association with other members of the conspiracy is insufficient to prove membership in the conspiracy. *United States v. Useni*, 516 F.3d 634, 646 (7th Cir. 2008). *See also* Pattern Instruction 5.07 and its commentary.

PROPOSED REVISION

5.10(A) BUYER/SELLER RELATIONSHIP

[change to both instruction and comment]

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of [name of drug] do not enter into a conspiracy to [distribute [name of drug]; possess [name of drug] with intent to distribute] simply because the buyer resells the [name of drug] to others, even if the seller knows that the buyer intends to resell the [name of drug]. The government must prove that the buyer and seller had the joint criminal objective of further distributing [name of drug] to others.

Committee Comment

This instruction should be used only in cases in "where the jury could rationally find, from the evidence presented, that the defendant merely bought or sold drugs but did not engage in a conspiracy." *United States v. Cruse*, 805 F.3d 795, 814 (7th Cir. 2015) (internal quotation marks omitted).

A routine buyer-seller relationship, without more, does not equate to conspiracy. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010); *United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008). This issue may arise in drug conspiracy cases. In *Colon*, the Seventh Circuit reversed the conspiracy conviction of a purchaser of cocaine because there was no evidence that the buyer and seller had engaged in a joint criminal objective to distribute drugs. *Id.* at 569–70, citing *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (distinguishing between conspiracy and a mere buyer-seller relationship); *see also United States v. Kincannon,* 593 F.3d 893, 897 (7th Cir. 2009) (regular and repeated purchases of narcotics on standardized terms, even in distribution quantities, does not make a buyer and seller into conspirators); *United States v. Lechuga*, 994 F.2d 346, 47 (7th Cir. 1993) (*en banc*) (drug conspiracy conviction cannot be sustained by evidence of only large quantities of controlled substances being bought or sold).

In *Colon*, the Seventh Circuit was critical of the previously-adopted pattern instruction on this point, which included a list of factors to be considered. The Committee has elected to simplify the instruction so that it provides a definition, leaving to argument of counsel the weight to be given to factors shown or not shown by the evidence.

Some cases have suggested that particular combinations of factors permit an inference of conspiracy. *See, e.g., United States v. Vallar,* 635 F.3d 271 (7th Cir. 2011) (repeated purchases on credit, combined with standardized way of doing business and evidence that purchaser paid seller only after reselling the drugs); *United States v. Kincannon*, 567 F.3d 893 (7th Cir. 2009). But the cases appear

to reflect that particular factors do not always point in the same direction. See *United States v. Nunez*, 673 F.3d 661, 665 and 666 (7th Cir. 2012) (“Sales on credit and returns for refunds are normal incidents of buyer-seller relationships,” but they can in some situations be “‘plus’ factors” indicative of conspiracy); *see also Cruse*, 805 F.3d at 815 ("Occasional credit sales are not necessarily inconsistent with a buyer-seller relationship."). The Committee considered and rejected the possibility of drafting an instruction that would zero in on particular factors, out of concern that this would run afoul of *Colon* and due to the risk that the instruction might be viewed by jurors as effectively directing a verdict.

In *United States v. Brown*, 726 F.3d 993 (7th Cir. 2013), the court generally endorsed the approach taken by this pattern instruction, *see id.* at 1001, but held that the district court did not abuse its discretion in providing further guidance regarding the types of evidence that might tend to establish a conspiracy. *Id.* at 1003-04. Following the decision in *Brown*, the Committee considered making further changes to the pattern instruction but decided not to do so, largely due to the "infinite varieties" of conspiratorial agreements that may exist. *Id.* at 1001. In addition, the court in *Brown* reaffirmed its rejection of the "list of factors" approach disapproved in *Colon*. *Id.* at 999. For the reasons cited in this Comment, and due to "the immense challenge of trying to craft a jury instruction that captures [the Seventh Circuit's] case law on buyer-seller relationships," judges should proceed with caution before adopting jury instructions that identify particular factors as pointing in one direction or another.

CURRENT INSTRUCTION

5.10(A) BUYER/SELLER RELATIONSHIP

A conspiracy requires more than just a buyer-seller relationship between the defendant and another person. In addition, a buyer and seller of [name of drug] do not enter into a conspiracy to [distribute [name of drug]; possess [name of drug] with intent to distribute] simply because the buyer resells the [name of drug] to others, even if the seller knows that the buyer intends to resell the [name of drug].

To establish that a [buyer; seller] knowingly became a member of a conspiracy with a [seller; buyer] to [distribute [name of drug]; possess [name of drug] with intent to distribute], the government must prove that the buyer and seller had the joint criminal objective of distributing [name of drug] to others.

Committee Comment

This instruction should be used only in cases in which a jury reasonably could find that there was only a buyer-seller relationship rather than a conspiracy.

A routine buyer-seller relationship, without more, does not equate to conspiracy. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010); *United States v. Colon*, 549 F.3d 565, 567 (7th Cir. 2008). This issue may arise in drug conspiracy cases. In *Colon*, the Seventh Circuit reversed the conspiracy conviction of a purchaser of cocaine because there was no evidence that the buyer and seller had engaged in a joint criminal objective to distribute drugs. *Id.* at 569– 70, citing *Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (distinguishing between conspiracy and a mere buyer-seller relationship); see also *United States v. Kincannon,* 593 F.3d 893, 897 (7th Cir. 2009) (regular and repeated purchases of narcotics on standardized terms, even in distribution quantities, does not make a buyer and seller into conspirators); *United States v. Lechuga*, 994 F.2d 346, 47 (7th Cir. 1993) (*en banc*) (drug conspiracy conviction cannot be sustained by evidence of only large quantities of controlled sub- stances being bought or sold).

In *Colon*, the Seventh Circuit was critical of the previously-adopted pattern instruction on this point, which included a list of factors to be considered. The Committee has elected to simplify the instruction so that it provides a definition, leaving to argument of counsel the weight to be given to factors shown or not shown by the evidence.

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drugs); *United States v. Kincannon*, 567 F.3d 893 (7th Cir. 2009). But the cases appear to reflect that particular factors do not always point in the same direction. See *United States v. Nunez*, 673 F.3d 661, 665 and 666 (7th Cir. 2012) ("Sales on credit and returns for refunds are normal incidents of buyer-seller relationships," but they can in some situations be "'plus' factors" indicative of conspiracy). The Committee considered and rejected the possibility of drafting an instruction that would zero in on particular factors, out of concern that this would run afoul of *Colon* and due to the risk that the instruction might be viewed by jurors as effectively directing a verdict.

PROPOSED REVISION

6.04 ENTRAPMENT INSTRUCTION – ELEMENTS

[changes to instruction and comment]

The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped by [identify the actor[s]: e.g., government agent, informant, law enforcement officers]. The government must prove either:

1. [A] [government agent[s]; informant[s]; [or] law enforcement officer[s]] did not induce the defendant to commit the offense; or

2. The defendant was predisposed to commit the offense before he had contact with [government agent[s]; informant[s]; law enforcement officer[s]].

I will define what I mean by the terms "induce" and "predisposed."

Committee Comment

See United States v. Mayfield, 771 F.3d 417 (7th Cir. 2014) (en banc).

PROPOSED REVISION

6.05 ENTRAPMENT INSTRUCTION – DEFINITIONS OF TERMS

[changes to instruction and comment]

Definition of "induce":

[A] [government agent[s]; informant[s]; law enforcement officer[s]] "induce[s]" a defendant to commit a crime: (1) if [the] [agent[s]; informant[s]; [and/or] officer[s]] solicit[s] the defendant to commit the crime, and (2) does something in addition that could influence a person to commit a crime that the person would not commit if left to his own devices. This other conduct may consist of [repeated attempts at persuasion;] [fraudulent representations;] [threats;] [coercive tactics;] [harassment;] [promises of reward beyond what is inherent in the usual commission of the crime;] [pleas based on need, sympathy, or friendship;] [*insert specific other conduct at issue*; or any [other] conduct that creates a risk that a person who would not commit the crime if left to his own devices will do so in response to the efforts of the [agent[s]; informant[s]; officer[s]]].

[If the [agent[s]; informant[s]; officer[s] merely initiated contact with the defendant; merely solicited the crime; or merely furnished an opportunity to commit the crime on customary terms, then the [agent[s]; informant[s]; officer[s]] did not induce the defendant to commit the crime.]

Definition of "predisposed":

A defendant is "predisposed" to commit the charged crime if, before he was approached by [a] [government agent[s]; informant[s]; law enforcement officer[s]], he was ready and willing to commit the crime and likely would have committed it without the intervention of the [agent[s]; informant[s]; officer[s]], or he wanted to commit the crime but had not yet found the means.

Predisposition requires more than a mere desire, urge, or inclination to engage in the charged crime. Rather, it concerns the likelihood that the defendant would have committed the crime if [the] [agent[s]; informant[s]; officer[s]] had not approached him.

In deciding whether the government has proven that the defendant was predisposed to commit the crime, you may consider the defendant's character [,or] reputation [;and criminal history]; whether the government initially suggested the criminal activity; whether the defendant engaged in the criminal activity for profit; whether the defendant showed a reluctance to commit the crime that was overcome by persuasion by the [agent[s]; informant[s]; officer[s]]; and the nature of the inducement or persuasion that was used.

Committee Comment

See United States v. Mayfield, 771 F.3d 417, 434-36 (7th Cir. 2014) (en banc); *United States v. McGill*, 754 F.3d 452 (7th Cir. 2014) (reversing conviction for failure to give entrapment instruction). *See also Jacobson v. United States*, 503 U.S. 540 (1992) (predisposition must exist prior to the government's attempts to persuade the defendant to commit the crime). Regarding predisposition, the *en banc* court emphasized in *Mayfield* that the relevant inquiry is the defendant's predisposition to commit the charged crime, not just any crime. *Mayfield*, 771 F.3d at 438. In addition, "although the defendant's criminal history is relevant to the question of his predisposition, it's not *dispositive*." *Id.* (emphasis in original).

Entrapment is, generally speaking, a question for the jury, not the court. *Id.* at 439. "[T]he defendant is entitled to a jury instruction on the defense 'whenever there is sufficient evidence from which a reasonable jury could find entrapment.'" *Id.* at 440. "[T]o obtain a jury instruction and shift the burden of disproving entrapment to the government, the defendant must proffer evidence on both elements of the defense. But this initial burden of production is not great. An entrapment instruction is warranted if the defendant proffers some evidence that the government induced him to commit the crime and he was not predisposed to commit it. *Id.* (internal quotation marks and citations omitted).

Mayfield also addressed the question of whether the trial court may, before trial, preclude the defendant from asserting an entrapment defense. The court stated:

> Though this practice is permissible, it carries an increased risk that the court will be tempted to balance the defendant's evidence against the government's, invading the province of the jury. In ruling on a pretrial motion to preclude the entrapment defense, the court must accept the defendant's proffered evidence as true and not weigh the government's evidence against it. This important point is sometimes obscured, subtly raising the bar for presenting entrapment evidence at trial.
>
> . . . The two elements of the entrapment inquiry are not equally amenable to resolution before trial. Predisposition rarely will be susceptible to resolution as a matter of law. Predisposition, as we've defined it, refers to the likelihood that the defendant would have committed the crime without the government's intervention, or actively wanted to but hadn't yet found the means. This probabilistic question is quintessentially factual; it's hard to imagine how a particular person could be deemed "likely" to do something as a matter of law. The inducement inquiry, on the other hand, may be more appropriate for pretrial resolution; if the evidence shows that the government did nothing more than solicit the crime on standard terms, then the entrapment defense will be unavailable as a matter of law.

Id. at 440-41.

The instruction's list of the types of actions that may constitute inducement includes "fraudulent representations," as the Seventh Circuit ruled in *Mayfield*. The court has not yet, however, definitively defined what types of fraudulent representations may qualify as the type of inducement giving rise to entrapment, as opposed to legitimate undercover investigation tactics. For this proposition, the court cited *United States v. Burkley*, 591 F.2d 903, 913 (D.C. Cir. 1978), which in turn notes that "not all fraudulent representations constitute inducement" and provides examples of some types that the D.C. Circuit believed would not qualify. *Id.* at n.18 (internal quotation marks omitted). The court may, of course, consider whether the evidence warrants making specific reference to "fraudulent representations" or whether some other factor listed in the instruction covers the type of inducement at issue (e.g., a fake stash of drugs might be better characterized as a "promise of reward," a false suggestion of a gang reprisal might be better characterized as a "coercive tactic," etc.).

In addition, in a case in which Instruction 3.19 (Government Investigative Techniques) is given, consideration should be given to how that instruction fits together with the entrapment instructions.

Regarding predisposition, if evidence of the defendant's character or criminal history is introduced, the court should consider giving a limiting instruction confining the use of the evidence to determination of predisposition and precluding its use for other purposes.

CURRENT INSTRUCTION

6.04 ENTRAPMENT – ELEMENTS

The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped by [identify the actor[s]: *e.g.*, government agent, informant, law enforcement officers]. The government must prove either:

1. Law enforcement officers and their agents did not persuade or otherwise induce the defendant to commit the offense; or

2. The defendant was predisposed to commit the offense before he had contact with law enforcement officers or their agents. If the defendant was predisposed, then he was not entrapped, even though law enforcement officers or their agents provided a favorable opportunity to commit the offense, made committing the offense easier, or participated in acts essential to the offense.

Committee Comment

See generally *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992); *United States v. Russell*, 411 U.S. 423, 436 (1973); *Sherman v. United States*, 356 U.S. 369 (1958). To warrant an entrapment instruction, there must be evidence supporting each of the two prongs of entrapment: government inducement of the crime and lack of predisposition by the defendant to engage in the crime. If the evidence of absence of predisposition is insufficient, then the court may reject the entrapment defense without inquiry into government inducement. *United States v. Al-Shahin*, 474 F.3d 941, 948 (7th Cir. 2007).

For an entrapment defense to be proper, a defendant must show "the sort of promise that would blind the ordinary person to his legal duties." If a defendant takes advantage of a "simple, ordinary opportunity" to commit a crime, then he has not been induced. *United States v. Haddad*, 462 F.3d 783, 790 (7th Cir. 2006).

The instruction does not require "extraordinary" inducement as an element of the defense. The Seventh Circuit recently concluded that a defendant need not show "extraordinary inducement" as a threshold for obtaining an entrapment instruction defense in every case. *United States v. Pillado*, 656 F.3d 754, 765–66 (7th Cir. 2011). Rather, the court stated, "when the record reveals that a defendant was predisposed to commit the crimes charged, she is not entitled to an entrapment instruction unless she can show that the government pro- vided an opportunity to commit the crime that was out of the ordinary. But if the evidence is thin that a defendant was predisposed to commit a crime, even minor government inducements should entitle the defendant to present her defense to the jury." *Id.* at 766.

Predisposition is "the key inquiry" regarding entrapment. *Pillado*, 656 F.3d

at 764 (quoting *Matthews v. United States*, 458 U.S. 58, 63 (1988)). The instruction puts that element second not because it is less important but rather because the instruction's language indicating that a predisposed defendant is not entrapped even if he was persuaded by the government to commit the crime requires an antecedent definition of persuasion. For this reason, the Committee chose to describe the persuasion element first. In determining whether to give an entrapment instruction, however, it generally will be advis- able for the trial judge to focus first on the question of whether the evidence would permit a jury to find lack of predisposition. *Pillado*, 656 F.3d at 764 ("predisposition will often be the more efficient place to start").

A defendant who denies committing the crime still may have the jury instructed on entrapment if he makes his required preliminary showing of lack of predisposition and government inducement. *Mathews v. United States*, 485 U.S. 58, 59–60 (1988).

If the defendant makes a sufficient preliminary showing, then the burden shifts to the government to prove beyond a reasonable doubt the absence of entrapment. *Pillado*, 656 F.3d at 763; *Haddad*, 462 F.3d at 790. This requires the court to include the negation of entrapment in the elements instruction for the charged offense(s). The court should provide Instruction 6.04 as the instruction following the elements instruction.

The Committee considered whether *United States v. Dixon*, 548 U.S. 1, 15 (2006), which addresses the defense of duress, suggests that the defendant should bear the burden of proving entrapment. No support for this proposition exists in post-*Dixon* decisions concerning entrapment, so the Committee proposes no change in allocation of that burden, particularly because *Jacobson*, a relatively recent Supreme Court decision, squarely places the burden of disproving entrapment on the government. See *Jacobson*, 503 U.S. at 549; see also *Pillado,* 656 F.3d at 763 (if there is evidence sufficient to warrant an entrapment instruction, "the burden shifts to the government to prove that the defendant was not entrapped, meaning 'the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by the Government agents.'" (quoting *Jacobsen*, 503 U.S. at 549)). *United States v. Orr*, 622 F.3d 864 (7th Cir. 2010), a case under 28 U.S.C. § 2255 involving a claim of ineffective assistance of counsel for failure to assert an entrapment defense, says that the burden of proving affirmative defenses is on a defendant, but the holding actually concerns only what evidence is needed "before the defense [of entrapment] may be asserted," *id.* at 868, *i.e.*, what a defendant must show to get an entrapment instruction, rather than who bears the ultimate burden of persuasion.

CURRENT INSTRUCTION

6.05 ENTRAPMENT – FACTORS

In deciding whether the government has proved that it did not entrap the defendant, you may consider all of the circumstances, including:

1. The defendant's background[, including his prior criminal history];

2. Whether [government agents; government informants; law enforcement officers] first suggested the criminal activity;

3. Whether the defendant engaged in the criminal activity for profit;

4. Whether the defendant was reluctant to engage in criminal activity;

5. Whether law enforcement officers or their agents merely invited or solicited the defendant to commit the offense;

6. The nature and extent of any pressure or persuasion used by law enforcement officers or their agents; [and]

7. Whether law enforcement officers or their agents offered the defendant an ordinary opportunity to commit a crime or instead offered the defendant exceptional profits or persuasion. [; and]

[8. The defendant's ability to commit the crime without the assistance of law enforcement officers or their agents.]

It is up to you to determine the weight to be given to any of these factors and any others that you consider.

Committee Comment

See, e.g., *United States v. Lewis*, 641 F.3d 773, 781 (7th Cir. 2011); *United States v. Millet*, 510 F.3d 668, 675–76 (7th Cir. 2007); *United States v. Bek*, 493 F.3d 790, 800 (7th Cir. 2007); *United States v. Al-Shahin*, 474 F.3d 941, 948 (7th Cir. 2007). The last, bracketed factor is taken from *United States v. Lopeztegui*, 230 F.3d 1000 (7th Cir. 2000). In that case the court stated that "predisposition [for entrapment purposes] goes beyond the mere willingness to commit the crime, and also includes some consideration of the defendant's ability to carry it out." *Id.* at 1003 (citing *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994)).

Part (a) of former Pattern Instruction 6.06 (1999) has been eliminated because it has been incorporated into this Instruction.

Part (b) of former Pattern Instruction 6.06 (1999) has been eliminated because it appeared to be an inaccurate statement of the law. The prior instruction stated,

> In addition to being ready and willing, the defendant must have had the ability by reason of previous training, experience, occupation, or acquaintances to commit the crime even if the government had not provided the opportunity to do so. Where the defendant is not in a position to become involved in the crime without the government's help, the defendant is not predisposed.

For this proposition, the prior instruction cited *Hollingsworth*. The principle in the instruction, however, is not expressed in *Hollingsworth*. Indeed, the court in *Hollingsworth* stated that its decision should not be "understood as holding that lack of present means to commit a crime is alone enough to establish entrapment if the government supplies the means." *Id.* at 1202. The court more recently reaffirmed this statement, by quoting it, in *Lopeztegui*, 230 F.3d at 1003. Indeed, in *Lopeztegui* the court characterized the defendant's argument that "without [the government agent's] intervention, he would not have had the physical ability" to commit the crime as "a major misreading of the meaning of 'predisposition.'" *Id.*

PROPOSED REVISION

18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE

[non-substantive changes to instruction; changes to comment]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] bribery. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [five] following elements beyond a reasonable doubt:

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

2. That the defendant solicited, demanded, accepted or agreed to accept something of value from another person; and

3. 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; government agency]; and

4. That this business, transaction or series of transactions involved something of a value of $5,000 or more; and

5. That the [organization; government; government agency], in a one year period, received benefits of more than $10,000 under a 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 [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

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).

In *United States v. Blagojevich*, the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. 794 F.3d 729, 735 (7th Cir. 2015). In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.

CURRENT INSTRUCTION
18 U.S.C. § 666(a)(1)(B) ACCEPTING A BRIBE

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

1. 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]]; and

2. That the defendant solicited, demanded, accepted or agreed to accept anything of value from another person; and

3. 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; government agency]; and

4. That this business, transaction or series of transactions involved anything of a value of $5,000 or more; and

5. That the [organization; government; 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/her in connection with his [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

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).

PROPOSED REVISION

18 U.S.C. § 666(a)(2) PAYING A BRIBE

[non-substantive changes to instruction; changes to comment

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [paying or offering to pay] a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant gave, offered, or agreed to give something of value to another person; and

2. That the defendant did so corruptly with the intent to influence or reward an agent of [an organization; a [State; local; Indian tribal] government, or an agency thereof] in connection with some business, transaction, or series of transactions of the [organization; government; government agency]; and

3. That this business, transaction, or series of transactions involved something with a value of $5,000 or more; and

4. That the [organization; government; 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; government agency] in connection with the agent's [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

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).

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011).

In *United States v. Blagojevich*, the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. 794 F.3d 729, 735 (7th Cir. 2015). In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.

CURRENT INSTRUCTION

18 U.S.C. § 666(a)(2) PAYING A BRIBE

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [paying or offering to pay] a bribe. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four] following elements beyond a reasonable doubt:

1. That the defendant gave, offered, or agreed to give anything of value to another person; and

2. That the defendant did so corruptly with the intent to influence or reward an agent of [an organization; a [State; local; Indian tribal] government, or any agency thereof] in connection with some business, transaction, or series of transactions of the [organization; government; government agency]; and

3. That this business, transaction, or series of transactions involved anything with a value of $5,000 or more; and

4. That the [organization; government; 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; government agency] in connection with the agent's [organizational; official] duties.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

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).

The "business" or "transaction" of the government agency or organization may include the "intangible" business or transaction of the agency or organization, "such as the law-enforcement 'business' of a police department that receives federal funds." *United States v. Robinson*, 663 F.3d 265, 271–73 (7th Cir. 2011).

PROPOSED REVISION

18 U.S.C. § 669(a) HEALTH CARE BENEFIT PROGRAM/ INTERSTATE COMMERCE – DEFINITION

[changes to instruction]

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 degree of 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).

CURRENT INSTRUCTION

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).

PROPOSED REVISION

18 U.S.C. § 1035(a)(1)

FALSE STATEMENT RELATING TO HEALTH CARE MATTERS: FALSIFICATION AND CONCEALMENT

[new instruction; no current version]

The indictment charges the defendant[s] in Counts ____ with making a false statement in a matter involving a health care benefits program. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant [falsified; concealed; or covered up by any trick, scheme or device] a material fact in a matter involving a health care benefit program;

2. The defendant did so knowingly and willfully; and

3. The defendant did so in connection with the delivery of or payment for health care benefits, items or services.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count that you are considering], then you should find the defendant guilty [of that count].

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

Committee Comment

This instruction is modeled on the general false statements instruction under 18 U.S.C. § 1001.

PROPOSED REVISION

18 U.S.C. § 1035(a)(2)

FALSE STATEMENT RELATING TO HEALTH CARE MATTERS: FALSE STATEMENT

[new instruction; no current version]

The indictment charges the defendant[s] in Counts ____ with making a false statement in a matter involving a health care benefits program. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant made a [statement; representation] in a matter involving a health care benefit program;

2. The [statement; representation] was in connection with the [delivery of; payment for] health care benefits, items or services;

3. The [statement; representation] was material to the health care benefit program;

4. The [statement; representation] was [false; fictitious; fraudulent]; and

5. The defendant made the statement knowingly and willfully.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the count that you are considering], then you should find the defendant guilty [of that count].

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

Committee Comment

See United States v. Natale, 719 F.3d 719, 742 (7th Cir. 2013).

PROPOSED REVISION

18 U.S.C. § 1035(a)(1 & 2)

DEFINITION OF HEALTH CARE BENEFIT PROGRAM

[new instruction; no current version]

A "health care benefit program" is [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 thew health care program had any impact on the movement of any moey, 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 some 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

"Health care benefit program" is defined in 18 U.S.C. § 24(b). In this statute, "affecting commerce" means affecting interstate commerce. *See United States v. Natale*, 719 F.3d 719, 732 n.5 (7th Cir. 2013). This definition is taken from the parallel instruction under 18 U.S.C. § 669(a).

PROPOSED REVISION

18 U.S.C. § 1035(a)(1 & 2) DEFINITION OF MATERIAL

[new instruction; no current version]

A statement is "material" if it is capable of influencing the decision of the health care benefit program regarding the [delivery of [or] payment for] health care [benefits]; [items]; [or] services].

Committee Comment

See United States v. Natale, 719 F.3d 719, 737 (7th Cir. 2013).

PROPOSED REVISION

18 U.S.C. § 1035(a)(1 & 2) DEFINITION OF WILLFULLY

[new instruction; no current version]

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

Committee Comment

See United States v. Natale, 719 F.3d 719, 740-41 (7th Cir. 2013) (Section 1035 does not require specific intent to deceive).

PROPOSED REVISION

18 U.S.C. §§ 1341 & 1343 DEFINITION OF SCHEME TO DEFRAUD

[changes to comment only]

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].]]

[A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] or the concealment of material information.]

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.

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 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). For a discussion of the absence of a unanimity requirement as to a particular misrepresentation, as distinct from unanimity as to a particular scheme, see the Committee Comment for Pattern 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.").

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); *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).

Nevertheless, it is not clear that an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited in the preceding paragraph involved more than just an omission; their facts also included other misrepresentations or affirmative acts of concealment. Some cases state the proposition in a way that suggests that an omission-based fraud scheme must include an act of concealment. *Powell*, 576 F.3d at 491 ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment'" (quoting *Stephens*, 421 F.3d at 507). It is also worth noting that in *Skilling*, 130 S. Ct. at 2932–33, the Supreme Court refused to hold that an undisclosed conflict of interest by itself constituted honest services fraud. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 2933 n.44 ("How direct or significant does the conflicting financial interest have to be? To what extent

does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.").

In cases where the indictment charges that the scheme to defraud was to obtain "property," the property cannot include State licenses. In *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000), the Supreme Court explained that a State gambling license was not, for purposes of § 1341, "property" in the hands of the State. *Id.* at 23-24, 26-27. The same reasoning would apply to § 1343 (wire fraud), and was so applied in a wire (and mail) fraud case to reverse convictions premised on the obtaining of vehicle title papers issued by the State. *United States v. Borrero*, 771 F.3d 973, 976 (7th Cir. 2014) (citing *Cleveland*, 531 U.S. at 23-24, and *Toulabi v. United States*, 875 F.2d 122 (7th Cir. 1989)). If the evidence at trial raises the risk that a jury would rely on State licenses to be a form of "property," then it might be an appropriate to include an explicit instruction that defines property in a way that prevents that reliance.

CURRENT INSTRUCTION

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].]]

[A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] or the concealment of material information.]

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.

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 the Pattern 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 ser- vices 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.").

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); *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).

Nevertheless, it is not clear that an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited in the preceding paragraph involved more than just an omission; their facts also included other misrepresentations or affirmative acts of concealment. Some cases state the proposition in a way that suggests that an omission-based fraud scheme must include an act of concealment. *Powell*, 576 F.3d at 491 ("a failure to disclose information may constitute fraud if the 'omission [is] accompanied by acts of concealment'" (quoting *Stephens*, 421 F.3d at 507). It is also worth noting that in *Skilling*, 130 S. Ct. at 2932–33, the Supreme Court refused to hold that an undisclosed conflict of interest by itself constituted honest services fraud. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 2933 n.44 ("How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.").

PROPOSED REVISION

18 U.S.C. §§ 1341, 1343 & 1346
RECEIVING A BRIBE OR KICKBACK
[changes to comment only]

[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. For the definition of an "official act" see 18 U.S.C. 201(a)(3).

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 v. United States*, 130 S. Ct. 2896 (2010), explains, that is what happened in *McNally v. United States*, 483 U.S. 350, 359 (1987). See *Skilling*, 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 Instruction 18 U.S.C. § 1951 Color of Official Right – Definition.

Gratuities are not a form of bribery under § 1346 honest-services fraud. *United States v. Hawkins*, 777 F.3d 880, 882-83 (7th Cir. 2015). Honest-services bribery requires that the public official demand or accept money in *exchange* for the bribe, whereas a gratuity is merely a reward for the performance for official acts, without the bargained-for exchange. *Id.* In view of *Hawkins*, it might be appropriate in certain bribery prosecutions to give a limiting instruction explaining the difference between gratuities and bribes, especially if the defense theory relies on this distinction.

In *United States v. Blagojevich*, the Seventh Circuit limited the definition of

bribery in 18 U.S.C. § 666, § 1951, and § 1346. 794 F.3d 729, 735 (7th Cir. 2015). In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.

CURRENT INSTRUCTION

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. For the definition of an "official act" see 18 U.S.C. 201(a)(3).

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 v. United States*, 130 S. Ct. 2896 (2010), explains, that is what happened in *McNally v. United States*, 483 U.S. 350, 359 (1987). See *Skilling*, 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).

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> [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 ad- dresses the role of campaign contributions. *See* Instruction 18 U.S.C. § 1951 of Official Right – Definition.

PROPOSED REVISION

18 U.S.C. § 1344(1) SCHEME TO DEFRAUD A FINANCIAL INSTITUTION – ELEMENTS

[New; no current separate instruction for 1344(1)]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [bank] [financial institution] fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt:

1. There was a scheme to defraud a [bank; specified financial institution under 18 U.S.C. § 20] as charged in the indictment; and

2. The defendant knowingly [carried out; attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud the [bank; specified financial institution under 18 U.S.C. § 20]

4. The scheme involved a materially false or fraudulent pretense, representation, or promise [; and

5. 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 the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. Accordingly the Committee has divided the previously unified instruction for § 1344 into two separate instructions.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following *Neder*, "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). Although the Seventh Circuit has not yet addressed the application of *Neder* to § 1344(1) specifically, the Ninth Circuit, in *United States v. Omer*, 395 F.3d 1087 (9th Cir. 2005), held that materiality is an element of a § 1344(1) violation under *Neder*. In light of the general admonitions in *Neder* and in *Reynolds*, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information.

The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated into § 1344, as well as into other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

PROPOSED REVISION

18 U.S.C. § 1344(1) SCHEME TO DEFRAUD – DEFINITION

[New; no current separate instruction for 1344(1)]

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud a [bank; financial institution] is a plan or course of action that is intended to deceive or cheat that [bank; financial institution] or [to obtain money or property or to cause the [potential] loss of money or property [belonging to; in the [care] [custody] [or] [control] of] the [bank; financial institution]. [A scheme to defraud need not involve any specific false statement or misrepresentation of fact.]

Committee Comment

This instruction is based on the instruction applicable to the mail/wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. For a discussion of the use of proof of omission or concealment to show a scheme to defraud, see the Committee Comment to that instruction and to the accompanying "Definition of Material" instruction.

For a discussion of whether a unanimity instruction should be given, see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud.

The Seventh Circuit has held that § 1344(1) covers check kiting schemes, even though it believes that they may not involve specific false statements or misrepresentations of fact. *United States v. Doherty*, 969 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."); 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).

The final bracketed sentence in this instruction reflects the holdings in the check kiting cases, and should be given in a case (like one charging check kiting) where no specific false statement or misrepresentation is charged. However, the Committee recognizes that there is tension between that language, which says that a scheme need not involve a specific false statement or misrepresentation, and the language in the fourth element of the elements instruction for § 1344(1), which requires the government to prove that "[t]he scheme involved a materially false or fraudulent pretense, representation, or

promise." The Committee believes that this language in the fourth element under § 1344(1) is, despite the holdings in the check kiting cases, made necessary by the holdings in *Neder v. United States*, 527 U.S. 1 (1999), and *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999), that juries must be instructed on the requirement of materiality in bank fraud cases, as they are in mail and wire fraud cases. Moreover, consistent with the additional observation in *Neder* that the mail, wire and bank fraud statutes should be considered similarly, the Committee believes that the materiality requirement must be addressed this way in the elements instruction, as is done in the mail and wire fraud instructions. But reconciling the requirement of a "materially false or fraudulent pretense, representation, or promise" in the fourth element under § 1344(1) with the holding in the *Doherty* line of cases that no specific false statement or misrepresentation is required, and determining just what it is that must be material in a check-kiting case, is beyond the Committee's authority to resolve.

In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. As unresolved as the issue is with respect to the mail and wire fraud statutes, it is even more so with respect to bank fraud. In bank fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

PROPOSED REVISION

18 U.S.C. § 1344(2) OBTAINING BANK PROPERTY BY FALSE OR FRAUDULENT PRETENSES – ELEMENTS

[changes to former § 1344 instruction and comment]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] scheming to obtain [money] [property] belonging to a [bank] [financial institution] by false or fraudulent pretenses or misrepresentations. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt:

1. There was a scheme to obtain moneys, funds, credits, assets, securities, or other property that [was] [were] [owned by] [or] [in the [care] [custody] [or] [control] of] a [bank] [specified financial institution under 18 U.S.C. § 20] by means of false or fraudulent pretenses, representations or promises, as charged in the indictment; and

2. The defendant knowingly [carried out] [attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise [; and

5. At the time of the charged offense the deposits of the [bank] [other financial institution] were insured by the Federal Deposit Insurance Corporation]].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that

owned, or had custody or control over, the money or property that was the object of the scheme. This separate instruction for violations of § 1344(2) reflects that holding.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following *Neder*, "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).

The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated in § 1344, as well as in other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

PROPOSED REVISION

18 U.S.C. § 1344(2) SCHEME – DEFINITION

[changes to former § 1344 instruction and comment]

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

To prove a scheme to obtain moneys, funds, credits, assets, securities, or other property [belonging to] [in the [care] [custody] [or] [control] of] a [bank] [financial institution] by means of false pretenses, representations or promises, the government must prove that [a] [the] false pretense, representation or promise charged was what induced[, or would have induced,] the [bank] [financial institution] to part with the [money] [property].

[In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property [belonging to] [in the [care] [custody] [or] [control] of] 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.]

Committee Comment

The second paragraph of this instruction is based on the discussion in *Loughrin v. United States*, 134 S. Ct. 2384, 2393-94 (2014), of the requirement in 18 U.S.C. § 1344(2) that the money or property at issue in a scheme punishable under § 1344(2) be obtained "by means of" the false pretense(s), representation(s) and/or promise(s) charged. In that discussion the Court observed that the "by means of" requirement contained "a relational component," that is, that "the given result (the 'end') is achieved, at least in part, *through* the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect and incidental." *Id.* at 2393 (emphasis original). As the Court emphasized, this may require something more than mere "but-for" causation. The Court's discussion of this requirement in *Loughrin* is complex, though, as is the range of concepts of causation potentially encompassed by the word "induced." In an appropriate case the Court may wish to consider whether some word other than "induced" more accurately captures the meaning of the "by means of" requirement. The bracketed phrase "or would have induced" should be given in a case in which there is an issue with respect to whether the charged scheme actually came to fruition.

The final, bracketed paragraph should be given in cases in which, as will

usually be the case, more than one false pretense, representation or promise is charged.

In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wore fraud conviction can be based on an omission and/or concealment. As that Comment points out, it is not clear, even from cases construing those statutes, whether an omission itself, without more, can comprise a scheme to defraud. As unresolved as the issue is with respect to the mail and wire fraud statutes, it is even more so with respect to bank fraud. In bank fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

For a discussion of whether a unanimity instruction should be given, see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud.

CURRENT INSTRUCTION

18 U.S.C. § 1344 FINANCIAL INSTITUTION FRAUD – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] [bank] [financial institution] fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt:

1. 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; and

2. The defendant knowingly [attempted to] execute the scheme; and

3. The defendant acted with the intent to defraud; and

[4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and]

[[4.; 5.] 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 the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

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 Pattern Instruction for materiality 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).

The bracketed final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated in § 1344, as well as in other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution.

CURRENT INSTRUCTION

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] or [to obtain money or property or to cause the [potential] loss of money or property by the [bank] [financial institution]. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]]

Committee Comment

This instruction is based on the mail/wire fraud statutes, 18 U.S.C. §§ 1341 and 1343.

For a discussion of whether the unanimity instruction should be given see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud.

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.")

PROPOSED REVISION

18 U.S.C. § 1347(1) HEALTH CARE FRAUD – ELEMENTS

[New; no previous separate instructions for 1347(1)]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] health care fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following five elements beyond a reasonable doubt:

1. There was a scheme to defraud a health care benefit program, as charged in the indictment; and

2. The defendant knowingly and willfully [carried out; attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud the health care benefit program; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and

5. The scheme was in connection with the delivery of or payment for [health care benefits] [health care items] [health care services].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. The bank fraud statute is almost identical to the health care fraud statute. Accordingly the Committee has divided the previously unified instruction for this statute into two separate instructions to be consistent with the instructions for bank fraud. See the comments under 1347(2) for a further discussion of this issue.

Willfulness: For the mens rea element, Section 1347 uses both "knowingly" and "willfully." There is no Seventh Circuit case that has definitively decided the meaning of "knowingly and willfully" in the context of this statute, and the key question is whether "willfully" requires that the defendant know he is violating the law. In *United States v. Awad*, 551 F.3d 930, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. In 2010, after *Awad* was decided, however, Congress amended § 1347 and added that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." 18 U.S.C. 1347(b). No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether the amendment is strictly limited to "this section," meaning specifically Section 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, Section 1347 prosecutions are sometimes premised on representations that are deemed to be false due to a federal regulation, and it is an open question whether a defendant must know that he is violating the regulation.

Litigants and trial courts might find it useful to refer to *United States v. Wheeler,* 540 F.3d 683 (7th Cir. 2008), which lay out competing considerations on the meaning of "willfully." In *Wheeler*, the Seventh Circuit 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. Litigants and the trial court might wish to refer to the instructions on 18 U.S.C. § 1001, which also uses the term "knowingly and willfully."

Intent to Defraud: The third element requires the government to prove that there was a "specific intent to deceive or defraud." See *United States v. Natale*, 719 F.3d 719, 741-42 (7th Cir. 2013)("intent to defraud requires a

specific intent to deceive or mislead"), *citing*, *Awad*, 551 F.3d at 940 ("'intent to defraud' [is] defined as 'an intent to deceive or cheat'"); *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008)(in a § 1347 prosecution jury instructions defined intent to defraud to mean that "the acts charged were done knowingly and with the intent to do deceive or cheat the victims"); *United States v. White*, 492 F.3d 380, 393-94 (6th Cir. 2007)

("the government must prove the defendant's 'specific intent to deceive or defraud'"). As noted above, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." Just as the interpretation of Section 1347(b) remains open on the issue of willfulness (see the discussion above), no Seventh Circuit decision has interpreted this section for purposes of the specific-intent element.

Materiality: With regard to the fourth element, in *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined at 18 U.S.C. § 1344. Following *Neder*, "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). Although the Seventh Circuit has not yet addressed the application of *Neder* to § 1344(1) or in the context of the health care fraud statute, specifically, the Ninth Circuit, in *United States v. Omer*, 395 F.3d 1087 (9th Cir. 2005), held that materiality is an element of a § 1344(1) violation under *Neder*. In light of the general admonitions in *Neder* and in *Reynolds*, as well as the similarity of the bank fraud statute to the health care fraud statute, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information.

The jury instruction defining Health Care Benefit Program and Interstate Commerce should be given in conjunction with this instruction.

PROPOSED REVISION

18 U.S.C. § 1347(1) SCHEME – DEFINITION

[New; no previous separate instructions for 1347(1)]

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud a health care benefit program means a plan or course of action intended to deceive or cheat that health care benefit program or [to obtain money or property or to cause the [potential] loss of money or property [belonging to; [in the [care] [custody] [or] [control] of] the health care benefit program. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]

Committee Comment

This instruction is based on the instructions applicable to mail/wire/bank fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1344. For a discussion of the use of proof of omission or concealment to show a scheme to defraud, see the Committee Comment to the mail/wire fraud statutes instruction and to the accompanying "Definition of Material" instruction.

For a discussion of whether the unanimity instruction should be given see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud.

The issue of whether a specific false statement or misrepresentation of fact is necessary has not been decided in the context of health care fraud. Under the bank fraud statute, the Seventh Circuit has recognized that a check-kiting scheme can be charged under § 1344(1) even though the scheme may not involve a specific false statement or misrepresentation of fact. *United States v. Doherty*, 969 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."); 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). If such a scheme is charged, the Committee recommends that the final bracketed sentence in the first bracketed paragraph reflects these holdings, and should be given in a case where no specific false statement or misrepresentation is charged. For a more detailed discussion of this issue, see the Committee Comment to the Pattern Instruction for 18 U.S.C. § 1344(1)-Scheme to Defraud-Definition.

In the Committee Comment to the "Definition of Scheme to Defraud"

instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wire fraud conviction can be based on an omission and/or concealment. As that Comment points out, omissions plus an affirmative act of concealment can comprise a scheme to defraud in mail/wire fraud cases. But it is not clear, even from cases construing those statutes, whether an omission itself, without more, is enough. Similarly, this issue has not been resolved with respect to health care fraud. In health fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation, or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

PROPOSED REVISION

18 U.S.C. § 1347(2) OBTAINING PROPERTY FROM A HEALTH CARE BENEFIT PROGRAM BY FALSE OR FRAUDULENT PRETENSES – ELEMENTS

[changes to former § 1347 instruction and comment]

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] scheming to obtain [money] [property] belonging to a health care benefit program by false or fraudulent pretenses or misrepresentations. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the following five elements beyond a reasonable doubt:

1. There was a scheme to obtain the money or property that [was] [were] [owned by] [or] [in the [care] [custody] [or] [control] of] a health care benefit program by means of false or fraudulent pretenses, representations, or promises, as charged in the indictment; and

2. The defendant knowingly and willfully [carried out; attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud; and

4. The scheme involved a materially false or fraudulent, pretense, representation, or promise; and

5. The scheme was in connection with the delivery of or payment for [health care benefits] [health care items] [health care services].

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In *McNally v. United States*, the Supreme Court held that language in the mail fraud statute, 18 U.S.C. § 1341, "sets forth just one offense, using the mail to advance a scheme to defraud." 107 S. Ct. 2875 (1987). In contrast, in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court held that

language almost identical to § 1347 in the bank fraud statute, § 1344, gives rise to two theories of liability and that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the financial institution that owned or had custody or control over the money or property that was the object of the scheme. The *Loughrin* Court justified this different interpretation, in part, because of the construction of the statutes. The mail fraud provision contains the two phrases "strung together in a single, unbroken sentence" whereas the bank fraud law's "two clauses have separate numbers, line breaks before, between, and after them, and equivalent indentation – thus placing the clauses on equal footing and indicating that they have separate meanings." 134 S. Ct. at 2391. Although this issue has not been decided by the Supreme Court with regard to the health care fraud statute, § 1347 is constructed almost identically to § 1344. *United States v. Hickman*, 331 F.3d 439, 445-46 (5th Cir. 2003)(the language and structure of the health care fraud statute indicates that Congress patterned it after the bank fraud statute). *See United States v. Awad*, 551 F.3d 930 (9th Cir. 2008)(agreeing with *Hickman* analysis that the health care fraud statute provides two theories of liability). Thus, the committee suggests that similarly to § 1344, the health care fraud statute provides two theories of liability. However, it is important to note, the *Loughrin* Court further justified the dual theory of liability for the bank fraud statute by noting that at the time the statute was enacted the two clauses of the mail fraud statute had been construed independently by the courts. In the case of the health care fraud statute, it was enacted after *McNally* was decided, and therefore, after the Court had limited the mail fraud statute to a single theory of liability.

Willfulness: For the mens rea element, Section 1347 uses both "knowingly" and "willfully." There is no Seventh Circuit case that has definitively decided the meaning of "knowingly and willfully" in the context of this statute, and the key question is whether "willfully" requires that the defendant know he is violating the law. In *United States v. Awad*, 551 F.3d 930, 939 (9th Cir. 2008), the Ninth Circuit held that to establish a willful state of mind in a § 1347 prosecution, the government must prove that the defendant acted with knowledge that his conduct was unlawful. In 2010, after *Awad* was decided, however, Congress amended § 1347 and added that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." 18 U.S.C. 1347(b). No Seventh Circuit decision has interpreted this amendment, so it remains an open question whether the amendment is strictly limited to "this section," meaning specifically Section 1347, or whether the amendment more broadly eliminates the need to prove that the defendant knew he was violating any law. Additionally, Section 1347 prosecutions are sometimes premised on representations that are deemed to be false due to a federal regulation, and it is an open question whether a defendant must know that he is violating the regulation.

Litigants and trial courts might find it useful to refer to *United States v. Wheeler,* 540 F.3d 683 (7th Cir. 2008), which lay out competing considerations on the meaning of "willfully." In *Wheeler*, the Seventh Circuit 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. Litigants and the trial court might wish to refer to the instructions on 18 U.S.C. § 1001, which also uses the term "knowingly and willfully."

Intent to Defraud: The third element requires the government to prove that there was a "specific intent to deceive or defraud." See *United States v. Natale*, 719 F.3d 719, 741-42 (7th Cir. 2013)("intent to defraud requires a specific intent to deceive or mislead"), *citing*, *Awad*, 551 F.3d at 940 ("'intent to defraud' [is] defined as 'an intent to deceive or cheat'"); *United States v. Choiniere*, 517 F.3d 967, 972 (7th Cir. 2008)(in a § 1347 prosecution jury instructions defined intent to defraud to mean that "the acts charged were done knowingly and with the intent to do deceive or cheat the victims"); *United States v. White*, 492 F.3d 380, 393-94 (6th Cir. 2007) ("the government must prove the defendant's 'specific intent to deceive or defraud'"). As noted above, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section." Just as the interpretation of Section 1347(b) remains open on the issue of willfulness (see the discussion above), no Seventh Circuit decision has interpreted this section for purposes of the specific-intent element.

Materiality: In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element of the offense defined in 18 U.S.C. § 1344. Following *Neder*, "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). In keeping with the similarity between section 1344 and section 1347, the fourth element of this instruction includes materiality.

The jury instruction defining Health Care Benefit Program and Interstate Commerce should be given in conjunction with this instruction.

PROPOSED REVISION

18 U.S.C. § 1347(2)

SCHEME – DEFINITION

[changes to former § 1347 instruction and comment]

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

To prove a scheme to obtain money or other property [belonging to] [in the [care] [custody] [or] [control] of] a health care benefit program by means of false pretenses, representations or promises, the government must prove that [a] [the] false pretense, representation or promise charged was what induced[, or would have induced,] the health care benefit program to part with the [money] [property].

[In considering whether the government has proven a scheme to obtain moneys or other property [belonging to] [in the [care] [custody] [or] [control] of] a health care benefit program 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.]

Committee Comment

This instruction is based on the mail/wire/bank fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1344. For a discussion of whether the unanimity instruction should be given see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud.

The second paragraph of this instruction is based on the discussion in *Loughrin v. United States*, 134 S. Ct. 2384, 2393-94 (2014), of the requirement in 18 U.S.C. § 1344(2) that the money or property at issue be obtained "by means of" the false pretense(s), representation(s) and/or promise(s) charged. Although this case involved the bank fraud statute, as previously noted the language of the health care fraud statute substantially similar. In the *Loughrin* discussion, the Court observed that the "by means of" requirement contained "a relational component," that is, that "the given result (the 'end') is achieved, at least in part, *through* the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect and incidental." *Id.* at 2393 (emphasis original). As the Court emphasized, this may require something more than mere "but-for" causation. The Court's discussion of this requirement in *Loughrin* is complex, though, as is the range of concepts of causation potentially encompassed by the word

"induced." In an appropriate case the Court may wish to consider whether some word other than "induced" more accurately captures the meaning of the "by means of" requirement. The bracketed phrase "or would have induced" should be given in a case in which there is an issue with respect to whether the charged scheme actually came to fruition.

The final, bracketed paragraph should be given in cases in which, as will usually be the case, more than one false pretense, representation or promise is charged.

In the Committee Comment to the "Definition of Scheme to Defraud" instruction applicable to the mail and wire fraud instructions, the Committee discusses at some length cases that address whether, and when, a mail or wore fraud conviction can be based on an omission and/or concealment. As that Comment points out, it is not clear, even from cases construing those statutes, whether an omission itself, without more, can comprise a scheme to defraud. This issue has not been resolved with respect to health care fraud or bank fraud cases. In health care fraud cases in which the issue arises, the Court may wish to consider adding some iteration of the final bracketed sentence in the mail and wire fraud scheme instruction: "A materially false or fraudulent pretense, representation or promise may be accomplished by [an] omission[s] [and] [or] the concealment of material information."

For a discussion of whether a unanimity instruction should be given, see the Committee Comment to the Pattern Instruction for 18 U.S.C. §§ 1341 & 1343 – Definition of Scheme to Defraud.

PROPOSED REVISION

18 U.S.C. § 1347
HEALTH CARE BENEFIT PROGRAM –
INTERSTATE COMMERCE – DEFINITION
[changes to former § 1347 instruction and comment]

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 degree of 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 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) (interpreting health care benefit program under §669).

CURRENT INSTRUCTION

18 U.S.C. § 1347 HEALTH CARE FRAUD – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] of the indictment charge[s] the defendant[s] with] health care fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove both of the following elements beyond a reasonable doubt:

1. 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

2. That the defendant knowingly and willfully [attempted to] execute[d] the scheme.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

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 elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

The court should refer to the Pattern Instruction defining "scheme" under 18 U.S.C. §§ 1341 and 1343. 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 pat- tern instruction for "knowingly." If the court deems the two terms to have separate meanings, then the court should define both terms in separate instructions.

It should also be noted that, effective on March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. 111-148, Title VI, § 10606(b), added § 1347(b), which provides that "a person need not have actual knowledge of this section or specific intent to commit a violation of this section."

CURRENT INSTRUCTION

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. 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.

PROPOSED REVISION

18 U.S.C. § 1951 COLOR OF OFFICIAL RIGHT – DEFINITION

[changes to comment only]

[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 *United States v. Blagojevich*, the Seventh Circuit limited the definition of bribery in 18 U.S.C. § 666, § 1951, and § 1346. 794 F.3d 729, 735 (7th Cir. 2015). In that case, a governor offered to use his official authority to appoint a person to a Senate seat in exchange for the President's use of his official authority to appoint the governor to a Cabinet position. *Blagojevich* held that the proposed exchange did not fit within the definition of bribery because the deal was a proposed "political logroll." *Id.* at 735. In an appropriate case, if there is a risk that the jury might premise a bribery verdict on conduct that is outside the definition of bribery as interpreted by *Blagojevich*, then an instruction might be warranted to exclude that possibility.

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.*

CURRENT INSTRUCTION

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].]

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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.*

PROPOSED REVISION

TITLE 21 NARCOTICS OFFENSES -
DRUG QUANTITY/SPECIAL VERDICT INSTRUCTIONS
[changes to instruction and comment]

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

In making this determination, you are to consider any type and amount of controlled substances for which the government has proven beyond a reasonable doubt that [: (1)] the defendant [possessed with intent to distribute; distributed; conspired to possess with intent to distribute; conspired to distribute; etc.] [while the defendant was a member of the conspiracy charged in Count __][; plus (2) the defendant's co-conspirators [distributed; possessed with intent to distribute; conspired to possess with intent to distribute; conspired to possess with intent to distribute; etc.] in furtherance of and as a reasonably foreseeable consequence of that conspiracy.]

You will see on the verdict form a question concerning the amount of controlled substances 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]. If you find that 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 decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013), this instruction should be given whenever the drug quantity may affect the statutory minimum or maximum sentence. The jury need only find the threshold quantity that triggers the increased statutory minimum or 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).

The second paragraph of this instruction, which includes reference to narcotics involved in a conspiracy of which the defendant was a member, is derived from the *Pinkerton* instruction, Instruction 5.11. If the jury is asked to consider amounts involved in acts by the defendant's co-conspirators, it must be instructed that the defendant's liability "only extends to those criminal acts that (1) were reasonably foreseeable to the defendant[ ]; and (2) occurred during the time that [he was a] member[ ] of the conspiracy." *United States v. Cruse*, 805 F.3d 795, 817 (7th Cir. 2015).

In drafting this instruction, the Committee took account of *Washington*, 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." *Washington*, 558 F.3d 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 Committee believes that 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.

If evidence of narcotics transactions or dealing not involved in the charged

offense is admitted at trial under Federal Rule of Evidence 404(b) or otherwise, the court should consider a limiting instruction that those narcotics cannot be counted in the jury's quantity determination.

CURRENT INSTRUCTION

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.]

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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).

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