JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

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10 September 2015

On 30 January 2015, the Judicial Council approved revised and new instructions for the 2010 Eleventh Circuit Pattern Jury Instructions, Criminal Cases. On 10 June 2015, the Judicial Council approved a second set of changes. On 4 September 2015, the Judicial Council approved a third set of changes that follow:

Special Instructions

4.1 Similar Acts Evidence

4.2 Similar Acts Evidence – Identity

Cautionary Instructions

T1.1 Similar Acts Evidence

T1.2 Similar Acts Evidence – Identity

Offense Instructions

24.1 Theft Concerning Programs Receiving Federal Funds

24.2 Bribery Concerning a Program Receiving Federal Funds

Previous 24.2 Bribery Concerning a (Governmental) Program Receiving Federal Funds – *Deleted*

50.2 Mail Fraud: Depriving Another of an Intangible Right of Honest Services Public Official/Public Employee

50.3 Mail Fraud: Depriving Another of an Intangible Right of Honest Services Private Employee

50.4 Mail Fraud: Depriving Another of an Intangible Right of Honest Services Independent Contractor or Other Private Sector Contractual Relationship Besides Employer/Employee

All other instructions in the 2010 Pattern Jury Instructions for Criminal Cases; the revisions to instructions 4, 21, 34.1, 35.2, 35.3, 35.4, 35.9, 35.10, 41.2, 50.2, 50.3, 50.4, 53, 74.5, and 92.2 approved by the Judicial Council on 30 January 2015 and announced in a memorandum on 30 March 2015; and the revisions to instructions 1.1, 1.2, 35.5, 35.6, 35.7, 35.8, 40.3, 52, 93.2, and T5 approved on 10 June 2015 and announced in a memorandum on 28 July 2015 remain in effect. The June 2010 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2010 pattern jury instructions. Those limitations and conditions also apply to the instructions listed above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at http://pji.ca11.uscourts.gov has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

Special Instruction 4.1
Similar Acts Evidence
(Rule 404(b), Fed. R. Evid.)

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. You must not consider any of this evidence to decide whether the Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].

ANNOTATIONS AND COMMENTS

> Rule 404. [Fed. R. Evid.] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
>
> * * * * *
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses

> pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911 n.15.

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the *Beechum* test. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc), *cert. denied*, 506 U.S. 942 (1992).

Special Instruction 4.2
Similar Acts Evidence - Identity
(Rule 404(b), Fed. R. Evid.)

During the trial, you heard evidence of acts allegedly done by the Defendant on other occasions that may be similar to acts with which the Defendant is currently charged. If you find the Defendant committed the allegedly similar acts, you may use this evidence to help you decide whether the similarity between those acts and the one[s] charged in this case suggests the same person committed all of them.

The Defendant is currently on trial only for the crime[s] charged in the indictment. You may not convict a person simply because you believe that person may have committed an act in the past that is not charged in the indictment.

ANNOTATIONS AND COMMENTS

> Rule 404. [Fed. R. Evid.] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
>
> * * * * *
>
> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911 n.15. Regarding evidence used to prove identity, *Beechum* notes:

> The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a modus operandi. *United States v. Goodwin*, 492 F.2d 1141, 1154 (5th Cir. 1974). Thus, (a) much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind. *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977).

Id.; see also United States v. Phaknikone, 605 F.3d 1099, 1108 (11th Cir. 2010).

Both the Supreme Court and the Eleventh Circuit have expressly endorsed the *Beechum* test. *Huddleston v. United States*, 485 U.S. 681 (1988); *United States v. Miller*, 959 F.2d 1535 (11th Cir. 1992) (en banc), *cert. denied*, 506 U.S. 942 (1992).

T1.1
Cautionary Instruction
Similar Acts Evidence
(Rule 404(b), Fed. R. Evid.)

You have just heard evidence of acts allegedly done by the Defendant that may be similar to those charged in the indictment, but were committed on other occasions. You must not consider this evidence to decide if the Defendant engaged in the activity alleged in the indictment. But you may consider this evidence to decide whether:

- the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment;
- the Defendant had a motive or the opportunity to commit the acts charged in the indictment;
- the Defendant acted according to a plan or in preparation to commit a crime; or
- the Defendant committed the acts charged in the indictment by accident or mistake.

ANNOTATIONS AND COMMENTS

> Rule 404. [FRE] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
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> * * * * * *
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> (b) Other crimes, wrongs, or acts. - - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide

> reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911-12 n.15.

T1.2
Cautionary Instruction
Similar Acts Evidence – Identity
(Rule 404(b), Fed. R. Evid.)

You have just heard evidence of acts allegedly done by the Defendant that may be similar to those charged in the indictment, but were committed on other occasions. If you find the Defendant committed the allegedly similar acts, you may use this evidence to help you decide whether the similarity between those acts and the one[s] charged in this case suggests the same person committed all of them.

The Defendant is currently on trial only for the crime[s] charged in the indictment. You may not convict a person simply because you believe that person may have committed an act in the past that is not charged in the indictment.

ANNOTATIONS AND COMMENTS

> Rule 404. [FRE] Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
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> (b) Other crimes, wrongs, or acts. - - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979), discusses at length the tests to be applied in admitting or excluding evidence under Rule 404(b); and, more specifically, the different standards that apply depending upon the purpose of the evidence, i.e., to show intent versus identity, for example. *See id*. at 911-12 n.15.

O24.1
Theft Concerning Programs Receiving Federal Funds
18 U.S.C. § 666(a)(1)(A)

It's a Federal crime for anyone who is an agent of a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] that receives more than $10,000 in federal assistance in any one year period, to [embezzle] [steal] [obtain by fraud] [knowingly convert without authority] [intentionally misapply] property that is valued at $5,000 or more, and is [owned by] [under the care, custody, or control of] such [organization] [government] [agency].

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant was an agent of [name of entity claimed by the government to be the affected entity];

(2) [same name of entity as above] was a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] that received in any one-year period, benefits in excess of $10,000 under a Federal program involving [a grant] [a contract] [a subsidy] [a loan] [a guarantee] [insurance] [other form of Federal assistance];

(3) the Defendant [embezzled] [stole] [obtained by fraud] [knowingly converted to the use of any person other than the rightful owner without authority] [intentionally misapplied] property that was [owned by] [under the care, custody, or control of] [same name entity as above]; and

(4) the property had a value of $5,000 or more.

An "agent" is a person authorized to act on behalf of another person, organization, or a government and, in the case of an organization or government, includes a servant or employee, partner, officer, or director.

[A "government agency" is a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program.]

["Local" means of or pertaining to a political subdivision within a State.]

["State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

"In any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

[To "embezzle" means to wrongfully or intentionally take someone else's money or property after lawfully taking possession or control of it.]

[To "steal" or "convert" means to wrongfully or intentionally take the money or property belonging to someone else with the intent to deprive the owner

of its use or benefit permanently or temporarily.]

[To "obtain by fraud" means to act knowingly and with intent to deceive or cheat, usually for the purpose of causing financial loss to someone else or bringing about a financial gain to oneself or another.]

[To "intentionally misapply" money or property means to intentionally convert such money or property for one's own use and benefit, or for the use and benefit of another, knowing that one had no right to do so.]

The word "value" means the face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

It is not necessary to prove that the Defendant's conduct directly affected the funds received by the [organization] [government] [agency] under the Federal program.

In determining whether the Defendant is guilty of this offense, do not consider bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

ANNOTATIONS AND COMMENTS

18 U.S.C. §666(a)(1)(A) and (b) provides:

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

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

> (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that - -
>
> (i) is valued at $5,000 or more, and
>
> (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency [shall be guilty of an offense against the United States]

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

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

Agent.

"To qualify as an agent of an entity, an individual need only be authorized to act on behalf of that entity." *United States v. Keen*, 676 F.3d 981, 990 (11th Cir. 2012). There is no "additional qualifying requirement that the person be authorized to act *specifically with respect to the entity's funds*." *Id.; see also United States v. Fernandez*, 722 F.3d 1, 11 (1st Cir. 2013); *United States v. Vitillo*, 490 F.3d 314, 323 (3d Cir. 2007); *United States v. Hudson*, 491 F.3d 590, 595 (6th Cir. 2007); *United States v. Spano*, 401 F.3d 837, 839-41 (7th Cir. 2005).

Benefits.

The term "benefits" is not limited to monies received in the form of payments or disbursements. *See United States v. Townsend*, 630 F.3d 1003, 1010–12 (11th Cir. 2011) (holding that accepting bribes in exchange for either tangible or intangible benefits is a violation of §666).

Benefits and Federal Assistance.

"The scope of §666, however, is not limitless; the statute clearly indicates that only those contractual relationships constituting some form of 'Federal assistance' fall

within the scope of the statute. Thus, organizations engaged in purely commercial transactions with the federal government are not subject to §666." *United States v. Copeland*, 143 F.3d 1439, 1441 (11th Cir. 1998) (citations omitted). As explained by the Supreme Court:

> Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance. To determine whether an organization participating in a federal assistance program receives "benefits," an examination must be undertaken of the program's structure, operation, and purpose. The inquiry should examine the conditions under which the organization receives the federal payments. The answer could depend, as it does here, on whether the recipient's own operations are one of the reasons for maintaining the program.

Fischer v. United States, 529 U.S. 667, 681 (2000) (holding that a health care provider participating in the Medicare program received "benefits" within the meaning of the statute); *see Copeland*, 143 F.3d at 1441 (finding that "[n]othing in the record indicates that Lockheed receives any form of federal assistance or is in anyway engaged in something other than purely commercial transactions with the government.").

Conflict of Interest as Relevant to Proof of a Violation.

The Eleventh Circuit addressed the meaning of "intentionally misapplied" in *United States v. Jimenez*, 705 F.3d 1305 (11th Cir. 2013):

> To be clear, we do not mean to say that violating a conflict of interest policy can never form the basis of a §666 conviction. We hold instead that evidence of an undisclosed conflict of interest is insufficient, standing alone, to sustain a conviction for "intentionally misapplying" funds within the meaning of §666.

Id. at 1310-11.

Intangible Property.

The Eleventh Circuit has expressly held that §666(a)(1)(B) covers bribery in connection with transactions involving either tangible or intangible property. *See U.S. v. Townsend*, 630 F.3d 1003, 1010–12 (11th Cir. 2011) (holding that accepting bribes in exchange for freedom from jail and greater freedom while on pretrial release falls within the plain meaning of the statute). Although the Sixth Circuit has held that 18 U.S.C. §666(a)(1)(A) also covers both tangible and intangible stolen property, *United States v. Sanderson*, 966 F.2d 184, 188–89 (6th Cir. 1992), the Eleventh Circuit has not yet determined whether theft of intangible property falls within the scope of §666(a)(1)(A). To decide whether a transaction involving intangibles has a value of $5,000 or more, courts should look to traditional valuation methods. *See Townsend*, 630 F.3d at 1011–12 (finding that the market approach is a valid method for determining the value of an intangible obtained through bribery, and setting the monetary value at "what a willing bribe-giver gives and what a willing bribe-taker takes in exchange for the intangible").

One-Year Period.

The definition in the instruction is derived from 18 U.S.C. § 666(d)(5). A violation of §666 can occur if the agency receives the requisite federal benefits in any one-year period within a year before or after the alleged offense takes place. 18 U.S.C. §666(d)(5). However, if the government proposes an instruction directing the jury to consider a more limited time period to determine whether the agency received the requisite federal benefits, it is bound to make a showing to satisfy the elements of the offense as instructed. *See United States v. Murillo*, 443 F. App'x 472, 474 (11th Cir. 2011) (per curiam).

Bona Fide Wages.

The last paragraph in the instruction concerning wages is taken from 18 U.S.C. §666(c). Whether wages are bona fide and earned in the usual course of business is a question of fact for the jury to decide. *See United States v. Schmitz*, 634 F.3d 1247, 1264 n.13 (11th Cir. 2011) ("a salary is not bona fide or earned in the usual course of business under §666(c) if the employee is not entitled to the money." (quoting *United States v. Williams*, 507 F.3d 905, 908 (5th Cir. 2007))).

State, Local or Indian Tribal Government.

The definitions in the instruction are derived from 18 U.S.C. §§666(d)(2) through 666(d)(4). 18 U.S.C. §666 criminalizes behavior affecting funds owned by or

under the care, custody or control of State, local or Indian tribal governments, or an agency, thereof, not the Federal government or any agency thereof. *See* S. Rep. No. 225 at 369–71, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510–3511 (18 U.S.C. §666 was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or state and local governments pursuant to a Federal program").

Steal or Embezzle.

The definitions of "steal" and "embezzle," as used in this instruction, are consistent with the definitions of those terms in Offense Instruction 21 regarding Theft of Government Money or Property under 18 U.S.C. §641.

O24.2
Bribery Concerning a
Program Receiving Federal Funds
18 U.S.C. § 666(a)(1)(B)

It's a Federal crime for anyone who is an agent of a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] receiving significant benefits under a Federal assistance program, to corruptly [solicit or demand] [accept] [agree to accept] anything of value from any person when the agent intends to be influenced or rewarded in connection with certain transactions of the [organization] [government] [agency].

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant was an agent of [name of entity claimed by the government to be the affected entity];

(2) [same name of entity as above] was a[n] [organization] [State government] [local government] [Indian tribal government] [any agency thereof] that received in any one-year period benefits in excess of $10,000 under a Federal program involving [a grant] [a contract] [a subsidy] [a loan] [a guarantee] [insurance] [other form of Federal assistance];

(3) during that period the Defendant [solicited or demanded] accepted] [agreed to accept] a thing valued at approximately $ _____ from someone other than [entity's name];

(4) in return for the [acceptance] [agreement], the Defendant intended to be influenced or rewarded for a transaction or series of transactions of [entity's name] involving something worth $5,000 or more; and

(5) the Defendant acted corruptly.

To act "corruptly" means to act voluntarily, deliberately, and dishonestly to either accomplish an unlawful end or result or to use an unlawful method or means to accomplish an otherwise lawful end or result.

An "agent" is a person authorized to act on behalf of another person, organization, or a government and, in the case of an organization or government, includes a servant or employee, partner, officer, or director.

[A "government agency" is a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, bureau, and a corporation or other legal entity established and subject to control by a government or governments for the execution of a governmental or intergovernmental program.]

["Local" means of or pertaining to a political subdivision within a State.]

["State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.]

"In any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

It is not necessary to prove that the Defendant's conduct directly affected the funds received by the [organization] [government] [agency] under the Federal program.

ANNOTATIONS AND COMMENTS

18 U.S.C. §666(a)(1)(B) and (b) provides:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists - -
>
> > (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof - -
> >
> > > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more [shall be guilty of an offense against the United States].
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

Maximum Penalty: Ten (10) years imprisonment and applicable fine.

In *United States v. Fischer*, 168 F.3d 1273 (11th Cir. 1999), *aff'd., Fischer v. United States*, 529 U.S. 667 (2000), the Court held that Medicare disbursements are "benefits" within the meaning of the statute, and that the Government is not required to prove a direct link between the federal assistance and the fraudulent conduct in issue.

O24.2
Bribery Concerning a (Governmental) Program Receiving Federal Funds
18 U.S.C. § 666(a)(1)(B)

Delete section

O50.2
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Public Official/Public Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the public of the right to the Defendant's honest services; and

(3) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to the public by participating in a bribery or kickback scheme.

Public officials and public employees have a duty to the public to provide honest services. If an [official] [employee] does something or makes a decision that serves the [official's] [employee's] personal interests by taking or soliciting a bribe or kickback, the official or employee defrauds the public of honest services, even if the public agency does not suffer any monetary loss.

Bribery and kickbacks involve the exchange of a thing or things of value for official action by a public official. Bribery and kickbacks also include solicitations of things of value in exchange for official action, even if the thing of value is not accepted or the official action is not performed. That is, bribery and kickbacks include the public [official's] [employee's] solicitation or agreement to accept something of value, whether tangible or intangible, in exchange for official action, whether or not the payor actually provides the thing of value, and whether or not the public official or employee ultimately performs the requested official action or intends to do so.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else. [A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter,

communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post-office or authorized depository for mail matter, any matter or thing

> whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. §1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United State v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

In *Skilling v. United States*, 561 U.S. 358, (2010), the Supreme Court interpreted 18 U.S.C. §1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

In a public sector honest services fraud case involving a bribe, the Eleventh Circuit appears to have held that materiality is not an element of the offense. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). The Committee believes this to be the correct approach; if a public official or employee accepts a bribe or kickback, the breach of fiduciary duty is inherently material. Accordingly, the pattern charge does not include a materiality element. Nevertheless, the Supreme Court has held that materiality is an essential element of the crimes of mail fraud, wire fraud and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25 (1999). Because honest services fraud is a species of mail and wire fraud, this has led some circuits to hold that materiality is an element of honest services fraud. If a materiality element is included, the Committee suggests the following: the scheme to defraud had a natural tendency to influence, or was capable of influencing, a decision or action by the Defendant's employer.

O50.3
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Private Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the Defendant's employer of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the Defendant's employer of the right to the Defendant's honest services;

(3) the Defendant foresaw or reasonably should have foreseen that the Defendant's employer might suffer economic harm as a result of the scheme; and

(4) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty

to provide honest services to an employer by participating in a bribery or kickback scheme.

An employee who works for a private employer has a legal duty to provide honest services to the employer.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the employer might suffer economic harm as a result of the breach.

A bribe or a kickback is any money or compensation of any kind which is provided, directly or indirectly, to an employee for the purpose of improperly obtaining or rewarding favorable treatment from the employee in connection with [his] [her] employment.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter, communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post-office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. §1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. §1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United States v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court interpreted 18 U.S.C. §1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

The definition of "bribe or kickback" is taken, with some modification, from 41 U.S.C. §8701(2)'s definition of "kickback" in the context of Federal Government contracts. The Committee believes the modified definition is sufficient to cover both bribes and kickbacks in the private sector. The Eleventh Circuit cited to that statutory definition in *United States v. Aunspaugh*, --- F.3d ---, 2015 WL 4098254 (11th. Cir. 2015), in which the court held the prior definition of "kickback" in the pattern instruction was too broad in light of the Supreme Court's decision in *Skilling*. The court declined to decide whether a quid pro quo is required or whether a reward would be sufficient, so courts may want to eliminate the "or rewarding" language from the definition. *See id*. at *4.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. It seems clear that an employment relationship creates a sufficient fiduciary duty to support a conviction for honest services fraud by a private employee. *See Skilling*, 561 U.S. at 408 n.41 (identifying an employer-employee relationship as a clear example of a fiduciary relationship under pre-*McNally* case law); *United States v. Kalaycioglu*, 210 F. App'x 825, 832-33 (11th Cir. 2006); *United States v. Williams*, 441 F.3d 716, 723 (9th Cir. 2006) (noting that employer-employee relationship is sufficient for private sector honest service fraud); *deVegter*, 198 F.3d at 1327 (listing "purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions . . . . defrauding their employers or unions by accepting kickbacks or selling confidential information" as a distinct category of honest services fraud pre-*McNally* (internal quotation marks and citation omitted)).

However, the Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)).

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321

n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud. *deVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. See, e.g., *United States v. Milovanovic*, 678 F.3d 713, 726- 27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore the Committee has not included a redundant materiality element in the pattern charge.

O50.4
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Independent Contractor or Other Private Sector Contractual Relationship
Besides Employer/Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant owed a duty of honest services to the victim;

(2) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the victim of the right to honest services of the Defendant through bribery or kickbacks;

(3) the Defendant did so with an intent to defraud the victim of the right to the Defendant's honest services;

(4) the Defendant foresaw or reasonably should have foreseen that the victim might suffer economic harm as a result of the scheme; and

(5) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to another person by participating in a bribery or kickback scheme.

The Defendant owes a duty of honest services to the victim if, by the nature of their relationship, the Defendant is vested with a position of dominance, authority, trust, and de facto control. The relationship imposes this duty if trust is reposed on one side and there is resulting superiority and influence on the other.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the victim might suffer economic harm as a result of the breach.

A bribe or a kickback is any money or compensation of any kind which is provided, directly or indirectly, to a contractor for the purpose of improperly obtaining or rewarding favorable treatment from the contractor in connection with the contract.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter, communication or

item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post-office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service

> [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. §1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United States v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

The definition of "bribe or kickback" is taken, with some modification, from 41 U.S.C. §8701(2)'s definition of "kickback" in the context of Federal Government contracts. The Committee believes the modified definition is sufficient to cover both bribes and kickbacks in the private sector. The Eleventh Circuit cited to that statutory definition in *United States v. Aunspaugh*, --- F.3d ---, 2015 WL 4098254 (11th. Cir. 2015), in which the court held the prior definition of "kickback" in the pattern instruction was too broad in light of the Supreme Court's decision in *Skilling*. The court declined to decide whether a quid pro quo is required or whether a reward would be sufficient, so courts may want to eliminate the "or rewarding" language from the definition. *See id*. at *4.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. The Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegte*r, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)). The definition of the type of relationship necessary to give rise to a duty of honest services comes from *deVegter*'s definition of fiduciary duty, which is drawn from *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) and *United States v. Brennan*, 183 F.3d 139, 150-51 (2d Cir. 1999). *See deVegter*, 198 F.3d at 1331 & n.8.

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud. d*eVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en

banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore the Committee has not included a redundant materiality element in the pattern charge.