

23.14 Economic Espionage (18 U.S.C. § 1831)

The defendant is charged in [Count_____ of] the indictment with economic espionage in

violation of Section 1831 of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [intended] [knew] that his actions would benefit any [foreign government] [foreign instrumentality] [foreign agent];

Second, the defendant knowingly:

[[stole] [without authorization [appropriated] [took] [carried away] [concealed]] [obtained by fraud] [obtained by artifice] [obtained by deception] a trade secret];

or

[without authorization [copied] [duplicated] [sketched] [drew] [photographed] [downloaded] [uploaded] [altered] [destroyed] [photocopied] [replicated] [transmitted] [delivered] [sent] [mailed] [communicated] [conveyed] a trade secret];

or

[[received] [bought] [possessed] a trade secret, knowing the same to have been [stolen] [appropriated without authorization] [obtained without authorization] [converted without authorization]].

Comment

Use this instruction “when there is evidence of foreign government sponsored or coordinated intelligence activity” involving “any manner of benefit.” *United States v. Liew*, 856 F.3d 585, 597 (9th Cir. 2017) (quoting *United States v. Hsu*, 155 F.3d 189, 195-96 (3d Cir. 1998)).

The term “foreign instrumentality,” as used in these instructions, means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government. 18 U.S.C. § 1839(1). A “foreign agent” is any officer, employee, proxy, servant, delegate, or representative of a foreign government. 18 U.S.C. § 1839(2).

If the indictment charges conspiracy to commit economic espionage (18 U.S.C. § 1831(a)(5)), the jury should be instructed that it is not necessary for the government to prove

that the information the alleged conspirators intended to misappropriate was, in fact, a trade secret. What is required is proof beyond a reasonable doubt that the defendant and at least one other member of the conspiracy knowingly agreed to misappropriate information that they reasonably believed was a trade secret and did so for the benefit of a foreign government or foreign instrumentality. This is because the defendant's guilt or innocence on this charge depends on what he believed the circumstances to be, not what they actually were. *See Liew*, 856 F.3d at 594, 600; *United States v. Nosal*, 844 F.3d 1024, 1044-45 (9th Cir. 2016).

Similarly, if the indictment charges attempt to commit economic espionage (18 U.S.C. § 1831(a)(4)), the jury should be instructed that the government is not required to prove that the information the defendant is alleged to have attempted to misappropriate was, in fact, a trade secret. However, the government is required to prove the defendant reasonably believed that the information the defendant intended to misappropriate was a trade secret. *Id.*

Revised June 2021