

**Instruction Number \_\_\_\_ AGENT**

Under the Indiana Securities Act (IC 23-2-1), "agent" means an individual, other than a broker-dealer, who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. A partner, officer, or director of a broker-dealer or issuer or a person occupying a similar status or performing similar functions is an agent only if the person effects or attempts to effect a purchase or sale of securities in Indiana.

IC 23-2-1-1(b) Agent

**Instruction Number \_\_\_\_\_ AGENT REGISTRATION**

Unregistered Broker-Dealer or Agent as charged in COUNT [I, II, etc.] is defined by law as follows:

IC 23-2-1-8. Registration requirements

(a) It is unlawful for a person to transact business in Indiana as a broker-dealer or agent unless the person is registered under this chapter.

(b) It is unlawful for a broker-dealer or issuer to employ an agent unless the agent is registered under this chapter. The registration of an agent is not effective during a period when the agent is not associated with a particular broker-dealer registered under this chapter or a particular issuer.

(c) It is unlawful for a person to transact business in Indiana as an investment adviser or an investment adviser representative unless:

(1) the person is registered under this chapter;

To convict the defendant of the offense of Unlawfully Transacting Business as an Agent, a Class C Felony, the State must have proved beyond a reasonable doubt, each of the following elements:

The defendant:

(1) Transacted business in the State of Indiana;

(2) As an agent; and,

(3) If doing so, the defendant was not registered as required in IC 23-2-1-8 - IC 23-2-1-11.

Whether Defendant was aware of the Indiana securities laws is not your concern. This is a situation where criminal intent is presumed from the acts of the Defendant.

If the State fails to prove any of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Unlawfully Transacting Business as an Agent, a Class C Felony, charged in Count \_\_\_\_.

Clarkson v. State, 486 N.E.2d 501, (1985 Ind. App.).

**Instruction Number \_\_\_\_\_ Aiding, Inducing or Causing an Offense**

a person who, (knowingly) (intentionally)

[aids another person in committing]

[or]

[induces another person to commit]

[or]

[causes another person to commit] (*name offense aided, induced, or caused*) is guilty of (*name offense*) even though [he] [she] does not personally participate in each act constituting the (*name offense*).

(A person may be convicted of -->[*name offense*] by -->[aiding] -->[inducing] -->[causing] another to commit -->[*name offense*] even if the other person:

[has not been prosecuted for the (*name offense*)]

[or]

[has not been convicted of the (*name offense*)]

[or]

[has been acquitted of the (*name offense*).]

(In order to commit -->[*name offense*] by -->[aiding] -->[inducing] -->[causing] another to commit -->[*name offense*], a person must have knowledge that [he] [she] is -->[aiding] -->[inducing] -->[causing] the commission of the -->[*name offense*]. To be guilty, [he] [she] does not have to personally participate in the crime nor does [he] [she] have to be present when the crime is committed. Merely being present at the scene of the crime is not sufficient to prove that [he] [she] -->[aided] -->[induced] -->[caused] the crime. Failure to oppose the commission of the crime is also insufficient to prove -->[aiding] -->[inducing] -->[causing] another to commit the crime. But presence at the scene of the crime [and] [or] failure to oppose the crime's commission are factors which may be considered in determining whether there was -->[aiding] -->[inducing] -->[causing] another to commit the crime.)

Before you may convict the Defendant, the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant

2. -->[knowingly] -->[intentionally]

3. -->[aided]

[or]

-->[induced]

[or]

-->[caused]

4. -->[*name other person*] to commit the offense of

-->[*name offense*], defined as -->[*define elements of offense*]

5. by [*describe the alleged conduct by Defendant*

*which aided, induced, or caused the offense*].

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the Defendant not guilty of -->[*name offense*], a Class -->[*specify grade of felony*] felony, charged in Count \_\_.

### **Comments**

The second paragraph should be used only when evidence is presented that the one aided, induced, or caused has not been prosecuted or convicted or has been acquitted.

The third paragraph contains evidence sufficiency information which has not been found reversible by Indiana appellate courts when included in instructions. The judge must use his or her discretion as to which portions of this paragraph, if any, are warranted due to the evidence (e.g., when evidence is that Defendant was never at the scene) and arguments (e.g., when State points out Defendant failed to oppose criminal conduct of accomplice).

This instruction may be used when the defendant is charged as a principal as well as when he or she is charged as an accessory.

There need not be a separate charge of aiding, inducing, or causing: "[O]ne may be charged as a principal yet convicted as an accomplice. ... The instruction on accessory liability does not represent an additional charge or a new theory of the case." *McQueen v. State*, 711 N.E.2d 503, 506 (Ind. 1999). "[T]he Indiana statute governing accomplice liability does not establish it as a separate crime, but merely as a separate basis of liability for the crime charged." *Hampton v. State*, 719 N.E.2d 803, 807 (Ind. 1999). "Where the facts in the case raise a reasonable inference that the crime was carried out with an accomplice, it is appropriate for the judge to give such an instruction." 711 N.E.2d 503.

**Instruction Number \_\_\_\_\_ ATTEMPT**

IC 35-41-5-1(a), [*Statute for object crime*].

The crime of [*name object crime*] is defined by statute as [*insert definition of object crime*]. A person attempts to commit a [*name object crime*] when, acting with the culpability required for commission of the [*name object crime*], [he] [she] engages in conduct that constitutes a substantial step toward commission of the [*name object crime*]. The crime of attempted [*name object crime*] is a Class [*insert grade*] [*felony*] [*misdemeanor*].

Before you may convict the Defendant of attempted [*name object crime*], the State must have proved each of the following elements beyond a reasonable doubt:

1. The Defendant
2. acting with the culpability required to commit the crime of [*name object crime*], which is defined as:

[*insert elements of object crime: i.e., knowingly or intentionally*

*element*

*element*

*element*]

3. did [*set out conduct alleged in charge as substantial step*]
4. which was conduct constituting a substantial step toward the commission of the crime of [*name object crime*].

If the State failed to prove each of these elements beyond a reasonable doubt, you must find the Defendant not guilty of the crime of attempted [*insert crime attempted*], a Class [*insert class of crime*] [*felony*] [*misdemeanor*], charged in Count

\_\_\_\_\_.

**Instruction Number \_\_\_\_ BONUS**

Under the Indiana Securities Act (IC 23-2-1), a security given or delivered with, or as a bonus on account of, a purchase of securities or any other thing, is considered to constitute part of the subject of the purchase and to have been offered and sold for value.

IC 23-2-1-1(i)(5)

**Instruction Number \_\_\_\_ BROKER-DEALER**

Under the Indiana Securities Act (IC 23-2-1), "broker-dealer" means a person engaged in a role that is other than insignificant in the business of effecting offers, sales, or purchases of securities for the account of others or for the person's own account.

IC 23-2-1-1(b) Broker-dealer

**Instruction Number \_\_\_\_ BROKER-DEALER EXCLUSION**

Under the Indiana Securities Act (IC 23-2-1), "broker-dealer" does not include:

- (1) an agent;
- (2) an issuer with respect to the offer or sale of the issuer's own securities;
- (3) a bank, savings institution, or trust company; or
- (4) a person who has no place of business in Indiana if the person effects transactions in Indiana exclusively with:
  - (i) the issuers of the securities involved in the transactions;
  - (ii) other broker-dealers; or
  - (iii) banks, savings institutions, trust companies, insurance companies, investment companies (as defined in the Investment Company Act of 1940, as in effect on December 31, 1990), pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, whether or not the offeror or any of the offerees is then present in Indiana.

**INSTRUCTION NUMBER \_\_\_\_ COMMON SCHEME**

Evidence of other offenses or acts allegedly similar to that charged is relevant and admissible to show a common scheme or plan or to show particular criminal intent and knowledge on the part of the accused, but not to prove the offense charged. You are not to consider it except for the purpose of showing guilty knowledge and intent.

Van Deveer v. State, 256 Ind. 509, 269 N.E.2d 865 (1971); Kahn v. State, 493 N.E.2d 790, (1986 Ind. App.).

**INSTRUCTION NUMBER \_\_\_\_ DEFENDANT HAS BURDEN TO PROVE EXEMPTION**

The burden of proof to show exemption or exclusion from registration is upon defendant.

IC 23-2-1-16(j); Hippensteel v. Karol, 159 Ind. App. 146, 304 N.E.2d 796 (1973); Kahn v. State, 666 N.E.2d 1236 (Ind. App. 1996).

**Instruction Number \_\_\_\_ FRAUD**

The terms "fraud", "fraudulent", "deceit", and "defraud", as defined by the Indiana Securities Act (IC 23-2-1), mean a misrepresentation of a material fact, a promise or representation or prediction not made honestly or in good faith, or the failure to disclose a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. This definition does not limit or diminish the full meaning of those terms as applied by or defined in courts of law or equity. These terms are not limited to common law deceit.

IC 23-2-1-1(d)

**Instruction Number \_\_\_\_ FRAUD IN THE SALE OF SECURITY**

Fraud in the Sale of a Security as charged in COUNT [I, II, etc.] is defined by law as follows:

IC 23-2-1-12. Prohibited practices with respect to sales and purchases

It is unlawful for any person in connection with the offer, sale or purchase of any

security, either directly or indirectly,

- (1) To employ any device, scheme or artifice to defraud, or
- (2) To make any untrue statements of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of circumstances under which they are made, not misleading, or
- (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

To convict the defendant of the offense of Fraud in the Sale of a Security, a Class C felony, the State must have proved beyond a reasonable doubt each of the following elements:

The defendant did:

- (1) In connection with the offer, sale or purchase of any security, directly or indirectly:
  - (a) employ a device, scheme or artifice to defraud; or,
  - (b) make untrue statement or statements of material fact or omitted to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made, not misleading; or,
  - (c) engage in any act, practice or course of business which operated or would operate as a fraud or deceit upon the alleged victims."

Whether Defendant was aware of the Indiana securities laws is not your concern. This is a situation where criminal intent is presumed from the acts of the Defendant.

If the State fails to prove any of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Fraud in the Sale of a Security, a Class C Felony, charged in Count \_\_\_\_.

Clarkson v. State, 486 N.E.2d 501 (1985 Ind. App.).

**INSTRUCTION NUMBER \_\_\_\_ GOOD FAITH AND ADVICE OF COUNSEL**

Good faith or advice of counsel are not a defense to a securities law offense.

Kahn v. State, 493 N.E.2d 790, (1986 Ind. App.).

## **Instruction Number \_\_\_\_ INVESTMENT CONTRACT**

An "investment contract" arises whenever a person (1) invests money (2) in a common enterprise (3) premised upon a reasonable expectation of profits (4) to be derived from the entrepreneurial or managerial efforts of others.

Securities and Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293, 66 S. CT. 1100, 90 L. Ed. 1244 (1946), American Fletcher Mtg. Co. v. United States Steel Credit Corp., 635 F.2d 1247 (7th Cir. 1980), cert. denied, 451 U.S. 911, 101 S. Ct. 1982, 68 L. Ed. 2d 300 (1981). See also Manns v. Skolnik, 666 N.E.2d 1236 (Ind. App. 1996), trans. denied, (stating that the *Howey* test is the test used in Indiana to determine whether a transaction is an investment contract).

IC 23-2-1-1(c)

## **Instruction Number \_\_\_\_ MATERIAL FACT**

A fact is material if a reasonable investor under the circumstances would attach importance to it in determining whether or not to invest or in determining the price at which to invest.

Arnold v. Dirrem, 398 N.E.2d 426, (1979 Ind. App.).

## **Instruction Number \_\_\_\_ NOTE**

There is a presumption that a "note" is a security unless falls within or bears a "strong resemblance" to one of seven enumerated instruments deemed not to be securities.

- (1) a note delivered in consumer financing,
- (2) a note secured by a mortgage on a home,
- (3) a short-term note secured by a lien on a small business or some of its assets,
- (4) a note evidencing a "character" loan to a bank customer,
- (5) a short-term note secured by an assignment of accounts receivable,
- (6) a note which simply formalizes an open-account debt incurred in the ordinary course of business, or
- (7) a note evidencing loans by commercial banks for current operations.

In determining whether the note is a security, you are to use the following four (4) factors in determining whether the instrument bears a "strong resemblance" to any of these seven (7) categories: (1) the motivations that would prompt a reasonable seller and buyer to enter into the transaction, (2) the "plan of distribution" of the instrument, (3) the reasonable expectations of the investing public, and (4) the existence of another regulatory scheme significantly reducing the risk of the instrument.

Based on the application of the four (4) factors, if you determine that the instrument does not strongly resemble any of the notes on the non-securities list, you shall declare it to be a security.

Reves v. Ernst & Young, 494 U.S. 56, 67, 108 L. Ed. 2d 47, 110 S. Ct. 945, reh. denied, 494 U.S. 1092 (1990).

Manns v. Skolnik, 666 N.E.2d 1236 (Ind. App. 1996).

### **Instruction Number \_\_\_\_\_ OFFER OR OFFER TO SELL**

The term "offer" or "offer to sell", as defined by the Indiana Securities Act (IC 23-2-1), means an attempt or offer to dispose of, or solicitation of an offer to purchase, a security, or interest in a security for value.

IC 23-2-1-1(i)(2)

### **Instruction Number \_\_\_\_\_ OFFER OR SALE OF UNREGISTERED SECURITIES**

Unlawful Offer and/or Sale of Unregistered Securities as charged in COUNT [I, II, etc.] is defined by law as follows:

IC 23-2-1-3. Registration requirement

It is unlawful for any person to offer or sell any security in Indiana unless:

- (1) it is registered under this chapter;
- (2) the security or transaction is exempted under section 2 [IC 23-2-1-2] of this chapter; or
- (3) it is a federal covered security.

To convict the defendant of the offense of Unlawful Offer and/or Sale of Unregistered Securities, a Class C Felony, the State must have proved beyond a reasonable doubt, each of the following elements:

The defendant:

- (1) Offered or sold;
- (2) A security; and,
- (3) Such security was not registered under the law (IC 23-2-1-1 - IC 23-2-1-24), and, such security or transaction was not exempted by the law.

Whether Defendant was aware of the Indiana securities laws is not your concern. This is a situation where criminal intent is presumed from the acts of the Defendant.

If the State fails to prove any of these elements beyond a reasonable doubt, you must find the Defendant not guilty of Unlawful Sale of Unregistered Securities, a Class C Felony, charged in Count \_\_\_\_.

Clarkson v. State, 486 N.E.2d 501 (1985 Ind. App.).

**Instruction Number \_\_\_\_ OMITTED MATERIAL FACT**

An omitted fact is material if there is a substantial likelihood that a reasonable investor under the circumstances would consider it important in deciding whether to invest.

Manns v. Skolnik, 666 N.E.2d 1236 (1986 Ind. App. 1986), Kahn v. State, 493 N.E.2d 790, (1986 Ind. App.).

**Instruction Number \_\_\_\_\_ PATTERN OF RACKETEERING ACTIVITY**

The term “pattern of racketeering activity” means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents; however, the incidents are a pattern of racketeering activity only if at least one (1) of the incidents occurred after August 31, 1980, and if the last of the incidents occurred within five (5) years after a prior incident of racketeering activity.

IC 35-45-6-1

2-14 *IN Pattern Jury Instructions* Criminal Instruction No. 14.147

**Instruction Number \_\_\_\_ PERSON**

In the Indiana Securities Act (IC 23-2-1), the term “person” means an individual, a corporation, a limited liability company, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

IC 23-2-1-1(h)

**Instruction Number \_\_\_\_\_ PURCHASE**

The term "purchase", as defined by the Indiana Security Act (IC 23-2-1), means an acquisition, direct or indirect, of a security or an interest in a security for value.

IC 23-2-1-1(i)(4)

**Instruction Number \_\_\_\_\_ RACKETEERING ACTIVITY**

The term "racketeering activity" means to commit, to attempt to commit, or to conspire to commit a violation, or aiding and abetting in a violation of a provision of IC 23-2-1 (Indiana Securities Act), or of a rule or order issued under IC 23-2-1.

IC 35-45-6-1(1)

2-14 *IN Pattern Jury Instructions* Criminal Instruction No. 14.173

**INSTRUCTION NUMBER \_\_\_\_\_ REGISTRATION KNOWLEDGE - MOTIVE OR INTENT**

Proof of evil motive or intent to violate the law, or knowledge that the law was being violated, is not required. Furthermore, as to the alleged sale of securities by an unregistered agent, it is not necessary that the State prove that the defendant knew that the security or agent should have been registered, that the security or agent was not registered, or that the sale of an unregistered security or sale by unregistered agent is forbidden by law. Criminal intent is not an element of a securities offense.

Transacting business, offering or selling, and committing one of the acts constituting fraud, are acts by their inherent nature cannot be done unknowingly. Accordingly, if you find the defendant committed these acts, you must find they were committed knowingly. Whether the defendant was aware of the Indiana securities laws is of no moment. This is a situation where criminal intent is presumed from the acts of the defendant.

Kahn v. State, 493 N.E.2d 790, (1986 Ind. App.).

Clarkson v. State, 486 N.E.2d 501 (1985 Ind. App.).

**Instruction Number \_\_\_\_\_ RIGHT TO PURCHASE**

Under the Indiana Securities Act (IC 23-2-1), a sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as a sale or offer of a security that gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

IC 23-2-1-1(i)(7)

**Instruction Number \_\_\_\_ SALE OR SELL**

The term "sale" or "sell" as defined by the Indiana Securities Act means a contract of sale of, contract to sell, or disposition of, a security, or interest in a security for value.

IC 23-2-1-1(i)(1)

**Instruction Number \_\_\_\_ SECURITY**

The term "security" as defined by the Indiana Securities Act (IC 23-2-1), means a note, stock, treasury stock, bond, debenture, evidence of indebtedness, an interest in a limited liability company or limited liability partnership and any class or series of an interest in a limited liability company or limited liability partnership (including any fractional or other interest in an interest in a limited liability company or limited liability partnership), certificate of interest or participation in a profit-sharing agreement, commodity futures contract, option, put, call, privilege, or other right to purchase or sell a commodity futures contract, margin accounts for the purchase of commodities or commodity futures contracts, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, viatical settlement contract, any fractional or pooled interest in a viatical settlement contract, voting-trust certificate, certificate of deposit for a security, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under the title or lease, an automatic extension or rollover of an existing security, or, in general, an interest or instrument commonly known as a "security", or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant, option, or right to subscribe to or purchase, any of the foregoing.

IC 23-2-1-1(k)

**INSTRUCTION NUMBER \_\_\_\_ STATUTE OF LIMITATIONS**

It is a defense to the crime charged that the case did not begin within the time allowed by law.

A person may not be found guilty of violating the criminal provisions of the Indiana Securities Act (IC 23-2-1), unless the case began within five years after the commission of the crime.

A case begins on the earlier of the following events: the date the charge was filed, the date a valid arrest warrant for the crime was issued, or the date the Defendant was lawfully arrested without a warrant.

The time period for beginning a criminal case does not include any period of time:

the Defendant was not usually and publicly residing in Indiana

or

the Defendant concealed himself so that he could not be officially notified of the case against him

or

the Defendant concealed evidence of the offense and evidence of the offense was unknown to the prosecuting attorney and could not have been discovered by the prosecutor by exercise of due diligence.

The burden is on the State to prove beyond a reasonable doubt that the case did begin within the time allowed by law.

*2-12 IN Pattern Jury Instructions Criminal Instruction No 12.37*

**Instruction Number \_\_\_\_ STOCK GIFT**

Under the Indiana Securities Act (IC 23-2-1), a purported gift of assessable stock is considered to involve an offer and sale.

IC 23-2-1-1(i)(6)

**Instruction Number \_\_\_\_ TRANSACTION AND TRANSACTIONS**

The terms "transaction" and "transactions" as defined by the Indiana Securities Act (IC 23-2-1) include the meanings of "sale", "sell", "offer", "offer to sell", and "purchase".

IC 23-2-1-1(i)(3)