**IN THE UNITED STATES DISTRICT COURT**
**DISTRICT OF COLORADO**

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

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**UNITED STATES' PROPOSED DISPUTED JURY INSTRUCTIONS**

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The United States hereby submits the attached proposed jury instructions. Pursuant to the Court's rules, this submission includes two hard copies of a set with citations to authority, as well as an electronic copy on disk in Wordperfect 9.

Respectfully submitted this 1st day of March, 2007.

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**United States Proposed Instruction No. 1**
**CAUTION—CONSIDER ONLY CRIME CHARGED**

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crime charged. The defendant is not on trial for any act, conduct, or crime not charged in the indictment.

It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for the crime charged. The fact that another person *also* may be guilty is no defense to a criminal charge.

The question of the possible guilt of others should not enter your thinking as you decide whether this defendant has been proved guilty of the crime charged.[1]

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[1] 10th Circuit Pattern Instruction No. 1.19.

**United States Proposed Instruction No. 2**
**CAUTION—PUNISHMENT**

If you find the defendant guilty, it will be my duty to decide what the punishment will be. You should not discuss or consider the possible punishment in any way while deciding your verdict.[1]

[1] 10th Circuit Pattern Instruction No. 1.20.

**United States Proposed Instruction No. 3**
**KNOWINGLY—DELIBERATE IGNORANCE**

When the word "knowingly" is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. Knowledge can be inferred if the defendant was aware of a high probability of the existence of [the fact in question], unless the defendant did not actually believe [the fact in question].[1]

[1] 10th Circuit Pattern Instruction No. 1.37; *United States v. Delreal-Ordones*, 213 F.3d 1263 (10th Cir. 2000).

**United States Proposed Instruction No. 4**
**VIOLATION OF COMPANY RULES**

Evidence has been presented regarding Qwest's internal rules and policies. A violation of Qwest's internal rules does not constitute a violation of the criminal law, and compliance with these rules does not establish that the defendant did not violate the criminal law. You may, however, consider the defendant's compliance with Qwest's internal rules or his knowing and intentional violation of these rules in evaluating his intent.[1]

[1] *See United States v. Mooney,* 425 F.3d 1093, 1097 (8th Cir. 2005) (noting that the defendant had been suspended for violating the company's insider trading policy); *SEC v. Happ*, 392 F.3d 12, 29-30 (1st Cir. 2004) (noting that although an internal trading policy was not properly admitted in that case to show intent where there was no evidence suggesting that the defendant had seen or even knew about the policy in that case, it nevertheless could be relevant in establishing his fiduciary duties).

**United States Proposed Instruction No. 5**
**ALL AVAILABLE EVIDENCE NEED NOT BE PRODUCED**

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

However, in judging the credibility of the witnesses who have testified, and in considering the weight and effect of all evidence that has been produced, the jury may consider the prosecution's failure to call other witnesses or to produce other evidence shown by the evidence in the case to be in existence and available.[2]

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[2] Adapted from COURT'S INSTRUCTION NO. 2.7 (modified to delete instruction that the jury may not draw an adverse inference against the defendant for not calling other witnesses). *See also United States v. Mayes*, 917 F.2d 457 (10th Cir. 1990) (observing that "as long as evidence can be solicited other than from the mouth of the accused, it is proper to comment upon the failure of the defense to produce it") (quoting *United States v. Gomez-Olivas*, 897 F.2d 500, 503-04 (10th Cir. 1990)).

**United States Proposed Instruction No. 6**
**MOTIVE**

Intent and motive are different concepts and should never be confused.

Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain, for example, are two well-recognized motives for much of human conduct. These praiseworthy motives, however, may prompt one person to voluntary acts of good while prompting another person to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. The motive of the defendant is, therefore, immaterial except insofar as evidence of motive may aid in the determination of state of mind or the intent of the defendant.[1]

[1] COURT'S INSTRUCTION NO. 5.4; see O'Malley, Grenig, and Lee, Federal Jury Practice and Instructions, Fifth Edition, 2000, § 17.06

**United States Proposed Instruction No. 7**
**SUMMARY OF COUNTS**

I am now going to discuss insider trading securities fraud.

As I mentioned to you before, in Counts 1 through 42 of the Indictment, defendant Nacchio is charged with 42 counts of engaging in securities fraud in violation of Title 15, United States Code, Section 78j(b) and SEC Rule 10b-5 and 10b5-1. The particular type of securities fraud alleged in the Indictment is known as insider trading.

Counts 1 through 42 charge that defendant Nacchio committed forty two acts of insider trading securities fraud from January 2, 2001 to May 29, 2001. The indictment alleges that defendant Nacchio sold shares of Qwest stock on the basis of material non-public information and generated total proceeds of $100,812,582.02. These forty-two acts are alleged in the Indictment as follows:

| Count | Date | Shares | Sale Price(s) | Gross Proceeds |
|---|---|---|---|---|
| 1. | 1/2/01 | 196,723 | $ 39.8394 | $ 7,837,326.29 |
| 2. | 1/3/01 | 160,000 | $ 40.2093 | $ 6,433,488.00 |
| 3. | 1/26/01 | 7,500 | $ 43.2800 | $ 324,600.00 |
| 4. | 1/29/01 | 92,500 | $ 43.1356 | $ 3,999,043.00 |
| 5. | 1/30/01 | 70,000 | $ 43.3571 | $ 3,034,997.00 |
| 6. | 2/1/01 | 10,000 | $ 41.7500 | $ 417,500.00 |

| | | | | |
|---|---|---|---|---|
| 7. | 2/5/01 | 70,000 | $ 40.2261 | $ 2,815,827.00 |
| 8. | 2/6/01 | 30,000 | $ 41.3967 | $ 1,241,901.00 |
| 9. | 2/7/01 | 20,000 | $ 41.0000 | $ 820,000.00 |
| 10. | 2/8/01 | 90,000 | $ 40.7822 | $ 3,670,398.00 |
| 11. | 2/9/01 | 10,000 | $ 40.5000 | $ 405,000.00 |
| 12. | 2/12/01 | 70,000 | $ 40.9857 | $ 2,868,999.00 |
| 13. | 2/13/01 | 30,000 | $ 41.3433 | $ 1,240,299.00 |
| 14. | 2/13/01 | 180,000 | $ 41.6898 | $ 7,504,164.00 |
| 15. | 2/15/01 | 70,000 | $ 40.1857 | $ 2,812,999.00 |
| 16. | 2/20/01 | 11,500 | $ 37.4763 | $ 430,977.45 |
| 17. | 2/21/01 | 11,500 | $ 37.3670 | $ 429,720.50 |
| 18. | 2/22/01 | 11,500 | $ 36.4497 | $ 419,171.55 |
| 19. | 2/23/01 | 11,500 | $ 34.8355 | $ 400,608.25 |
| 20. | 2/26/01 | 11,500 | $ 38.1230 | $ 438,414.50 |
| 21. | 2/27/01 | 11,500 | $ 37.8861 | $ 435,690.15 |
| 22. | 2/28/01 | 11,500 | $ 37.2978 | $ 428,924.70 |
| 23. | 3/1/01 | 11,500 | $ 35.1291 | $ 403,984.65 |
| 24. | 4/26/01 | 350,000 | $ 38.8559 | $ 3,599,565.00 |
| 25. | 4/27/01 | 300,000 | $ 39.6716 | $ 11,901,480.00 |
| 26. | 4/30/01 | 110,000 | $ 41.1182 | $ 4,523,002.00 |
| 27. | 5/1/01 | 100,000 | $ 40.8353 | $ 4,083,530.00 |
| 28. | 5/3/01 | 50,000 | $ 39.0852 | $ 1,954,260.00 |
| 29. | 5/7/01 | 70,000 | $ 38.3086 | $ 2,681,602.00 |
| 30. | 5/8/01 | 20,000 | $ 38.7000 | $ 774,000.00 |
| 31. | 5/9/01 | 30,000 | $ 38.0000 | $ 1,140,000.00 |

| | | | | |
|---|---|---|---|---|
| 32. | 5/10/01 | 43,200 | $ 38.0000 | $ 1,641,600.00 |
| 33. | 5/11/01 | 20,000 | $ 37.2250 | $ 744,500.00 |
| 34. | 5/14/01 | 56,800 | $ 37.6367 | $ 2,137,764.56 |
| 35. | 5/15/01 | 105,000 | $ 37.7667 | $ 3,965,503.50 |
| 36. | 5/18/01 | 20,000 | $ 38.0000 | $ 760,000.00 |
| 37. | 5/21/01 | 10,000 | $ 38.1140 | $ 381,140.00 |
| 38. | 5/22/01 | 10,000 | $ 38.6027 | $ 386,027.00 |
| 39. | 5/23/01 | 10,000 | $ 38.2320 | $ 382,320.00 |
| 40. | 5/24/01 | 4,100 | $ 38.0012 | $ 155,804.92 |
| 41. | 5/25/01 | 15,900 | $ 38.0000 | $ 604,200.00 |
| 42. | 5/29/01 | 5,000 | $ 38.2500 | $ 191,250.00 |

For the substantive offense of insider trading securities fraud charged in Counts 1 through 42, you must find beyond a reasonable doubt all the elements of the offense as I have already and am about to explain them to you before you may return a verdict of guilty.

**United States Proposed Instruction No. 8**
**ELEMENTS OF SECURITIES FRAUD**

All of the instructions I previously gave you relating to the elements of a securities fraud offense are applicable in your consideration of the charges that defendant Nacchio engaged in insider trading securities fraud. I will briefly review the elements of a securities fraud violation.

In order to prove a securities fraud offense, the government must prove beyond a reasonable doubt:

First: in connection with the sale or purchase of the securities of Qwest Communications International, that the defendant (1) employed a device, scheme, or artifice to defraud, or (2) engaged in an act, practice, or course of business that operated, or would operate, as a fraud or deceit upon members of the investing public;

Second: that the defendant did so willfully, knowingly, and with the intent to defraud; and

Third: that the defendant used or caused to be used, any means or instruments of transportation or communication in interstate commerce, or the mails, or any facility of any national securities exchange, in furtherance of the fraudulent conduct.

The particular type of "fraud" or fraudulent "practice" alleged in Counts 1 through 42 is called "insider trading." I will now give you some additional instructions to aid in your consideration of the charges of insider trading securities fraud.

**United States Proposed Instruction No. 9**
**PARTICULAR SCHEME TO DEFRAUD - INSIDER TRADING**

The government alleges that defendant Nacchio, while in possession of material non-public information, traded in Qwest stock on the basis of that information, in breach of duties of trust and confidence that he owed to the investors to whom he sold shares.[2] If you find that the government has proved the existence of such a scheme or course of conduct, a scheme to defraud or fraudulent practice has been established.[3]

As I will explain more in a moment, a corporate "insider" is one who comes into possession of material, non-public information about a specific security or stock by virtue of a business relationship that involves trust and confidence. If such a person has such "inside information" by virtue of a position of trust or confidence, the law forbids him from trading in the securities in question, or causing others to trade in such securities, on the basis of such information. An insider's sale or purchase of stock for personal gain on the basis of material non-public information is a fraudulent or deceptive device under the securities laws.[4] This rule

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[2] *United States v. O'Hagan*, 521 U.S. 642, 652 (1997) (explaining that the "classical theory" of insider trading "targets a corporate insider's breach of duty to shareholders with whom the insider transacts").

[3] *Dirks v. SEC*, 463 U.S. 646, 653-54, 103 S. Ct. 3255, 3261 (1983) (explaining that insider trading in violation of Rule 10b-5 is established by "'the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure'").

[4] *United States v. O'Hagan*, 521 U.S. 642, 652 (1997) (explaining that insider trading on material nonpublic information "*qualifies as a deceptive device* under § 10(b) ... because 'a relationship of trust and confidence [exists] between the shareholders of a

has developed because of the unfairness that would result from allowing insiders with access to material, nonpublic information intended to be used only for corporate purposes to benefit from trading on the basis of such information.[5] If a corporate insider, while in possession of material non-public information, traded in his corporation's stock for personal gain on the basis of that information without disclosing that information, you may find that he engaged in a fraudulent act.[6]

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corporation and those insiders who have obtained confidential information by reason of their position within that corporation.' That relationship ... gives rise to a duty to disclose [or to abstain from trading]....") (quoting *Chiarella v. United States*, 445 U.S. 222, 227 (1980)); *see O'Hagan*, 521 U.S. at 653-54 (explaining that it is a fraudulent device to misappropriation of corporate information by selling while in possession of undisclosed a fiduciary "who pretends loyalty to the principal while secretly converting the principal's information for personal gain ... 'dupes' or defrauds the principal"); *Dirks v. SEC*, 463 U.S. 646, 659 (1983) (observing that insiders are "forbidden by the fiduciary relationship from using undisclosed corporate information to their advantage").

[5] *See Dirks v. SEC*, 463 U.S. 646, 654 (1983) (explaining that the fraud of insider trading "derives from the 'inherent unfairness involved where one takes advantage' of 'information intended to be available only for a corporate purpose and not for the personal benefit of anyone'") (quoting *In re Merrill Lynch, Pierce, Fenner & Smith Inc.*, 43 S.E.C. 933, 936 (1968)).

[6] *Chiarella v. Unites States*, 445 U.S. 222, 228-30 (1980) (explaining that where a corporate insider has a duty to disclose or abstain from trading, "silence in connection with the purchase or sale of securities may operate as a fraud actionable under § 10(b)"); *id.* at 228 n.9 (discussing the fact that silence may be a fraudulent act).

**United States Proposed Instruction No. 10**
**DEFINITION OF "INSIDER" AND FIDUCIARY DUTIES OF INSIDERS**

A person is an "insider" if the government proves that he had a special relationship of trust and confidence with the corporation that afforded him access to material non-public information intended to be available only for a corporate purpose and not for his personal benefit. Corporate officers and directors who have access to such material non-public information are considered "insiders" for purposes of the prohibition on insider trading.[1] Such insiders owe a fiduciary duty to the buyer of any stock sold by the insider, even if the buyer was not a shareholder prior to the transaction.[2]

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[1] *United States v. O'Hagan*, 521 U.S. 642, 652 (1997) (explaining that the insider trading prohibition "applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation"); *Dirks v. SEC*, 463 U.S. 646, 655 (1983) (observing that insiders "have independent fiduciary duties to both the corporation and its shareholders").

[2] *Chiarella v. United States*, 445 U.S. 222, 227 & n.8 (1980); *United States v. Chestman*, 947 F.2d 551, 565 n.2 (2d Cir. 1990) ("The insider's fiduciary duties ... run to a buyer (a shareholder-to-be) and to a seller (a pre-existing shareholder) of securities, even though the buyer technically does not have a fiduciary relationship with the insider prior to the trade.").

**United States Proposed Instruction No. 11**
**"NONPUBLIC" INFORMATION**

With respect to each of the insider trading violations that have been charged, the government must prove that the information allegedly possessed by the defendant at the time of his alleged trading was "nonpublic" at the time the defendant sold the security at issue.

Information is "nonpublic" if it has not been effectively disseminated to the investing public through such sources as press releases, public filings with the SEC, trade publications, analyst reports, newspapers, magazines, television, radio, word of mouth, or other sources.[1]

In considering whether a defendant possessed non-public information, you may consider whether the information possessed was more reliable or specific than any rumors, speculation, or other information that may have been available to the general public.[2]

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[1] *See Dirks v. SEC,* 463 U.S. 646, 653 n.12 (1983) (observing that the SEC views an insider's disclosure as proper and adequate only where it is "'effected by a public release through the appropriate public media, designed to achieve a broad dissemination to the investing public generally and without favoring any special person or group.'") (quoting *In re Faberge, Inc.*, 45 S.E.C. 249, 256 (1973)); *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997) ("Information becomes public when disclosed to achieve a broad dissemination to the investing public generally and without favoring any special person or group.") (quoting *Dirks*, 463 U.S. at 653 n.12); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 853-54 (2d Cir. 1968) (*en banc*) ("Before insiders may act upon material information, such information must have been effectively disclosed in a manner sufficient to insure its availability to the investing public."); see id. at 853-54 (holding that an insider could not rely on sporadic news reports, but "should have waited until the news could reasonably have been expected to appear over the media of widest circulation").

[2] *See Dirks v. SEC*, 463 U.S. 646, 661 n.21 (1983) (recognizing that the SEC views disclosure just to the SEC as insufficient if the information has not been disclosed to the market); *United States v. Cusimano*, 123 F.3d 83, 89 (2d Cir. 1997) (holding that information from corporate insider that is more reliable or specific than public rumors is non-public); *SEC v. Mayhew*, 121 F.3d 44, 50 (2d Cir. 1997) (holding that tip from corporate insider that is more reliable or specific than public rumors is non-public despite existence of such rumors); *United*

To prove that the information was nonpublic, the government is not required to additionally prove that Qwest was required to disclose the information at issue. A corporation has no general duty to disclose all of its nonpublic information. Rather, you must decide whether the information at issue was effectively disseminated to the investing public.[3]

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*States v. O'Hagan*, 139 F.3d 641, 648 (8th Cir. 1998) (holding that the specific information obtained by a defendant was nonpublic, despite the existence of rumors to the same effect, because "[t]he information that [the defendant] obtained went beyond that which had been publicly disseminated"); *United States v. Mylett*, 97 F.3d 663, 666-67 (2d Cir. 1996) (holding that where a defendant had specific confirmation of a rumor in a news article, the specific confirmation was nonpublic information because it was "specific and more private than general rumor"); *United States v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993) ("trading on stolen information that is not fully impounded in price is a misuse of such information whether or not others are also trading on it").

[3] *See* Transcript of March 24, 2006 hearing at 24-25, *United States v. Nacchio*, 05-cr-545-EWN (observing, in pertinent part, that "[a] corporation is not … under a general duty to disclose all non-material public information in the possession of the corporation …. The individual [insider], however, … is under a duty not to trade on the basis of the material information.... Mr. Nacchio had a duty to refrain from trading on the basis of material inside information."); *Gross v. Summa Four, Inc.*, 93 F.3d 987, 992 (1st Cir. 1996) (observing that "[b]y itself, however, Rule 10b-5, does not create an affirmative duty of disclosure. Indeed, a corporation does not commit securities fraud merely by failing to disclose all nonpublic material information in its possession."); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 850 n.12 (2d Cir. 1968) (*en banc*) ("We do not suggest that material facts must be disclosed immediately; the timing of disclosure is a matter for the business judgment of the corporate officers entrusted with the management of the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC.... We do intend to convey, however, that where a corporate purpose is thus served by withholding the news of a material fact, those persons who are thus quite properly true to their corporate trust must not during the period of nondisclosure deal personally in the corporation's securities ...."); *In re Enron Corp. Securities, Derivative & Erisa Litigation*, 258 F. Supp. 2d 576, 589 (S.D. Tex. 2003) (observing that "Rule 10b-5 does not impose on a corporation an affirmative duty to disclose all nonpublic material information that it has about the corporation" and citing cases in support).

**United States Proposed Instruction No. 12**
**"MATERIAL" INFORMATION**

The government must also prove that the nonpublic information allegedly possessed by the defendant was "material." Information is material if there is a substantial likelihood that the information would have been viewed by a reasonable investor as important in deciding whether to buy, sell, or hold securities, or at what price to buy or sell.[1]

Information may be material even if relates not to past events but on forecasts and forward-looking statements, so long as a reasonable investor would consider the information important in deciding whether to buy, sell, or hold securities, or at what price to buy or sell.[2] In evaluating whether forecasts and forward-looking information is material, you should evaluate

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[1] *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding, in the context of a challenge to a proxy statement, that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."); *SEC v. Cochran*, 214 F.3d 1261, 1268 (10th Cir. 2000) (concluding that "information implicating the fair market value would be material to a reasonable investor"); *United States v. Teicher*, 987 F.2d 112, 120-21 (2d Cir. 1993) (observing that an individual with inside information may alter his choices in various ways, and "it would be a mistake to think of such decisions as merely binary choices – to buy or to sell").

[2] *See Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S. Ct. 978, 987 (1988) (holding that the possibility of a merger could be material); *United States v. Smith*, 155 F.3d 1051, 1064-66 (9th Cir. 1998) (rejecting the contention that forward looking or "soft" information cannot be material"); *see also* Transcript of March 24, 2006 hearing in *United States v. Nacchio*, 05-cr-00545-EWN, at 16-17 (discussing *Basic Inc. v. Levinson* and stating that "[t]here is an implicit recognition in [*Basic*] that materiality can be based not only on past events, but it can be based on the probability that future events will or will not occur"); *see id.* at 17-18 (explaining that *Basic, Inc.* "stands for the proposition that future events can, depending on the probability of such events and other factors peculiar to the case, be the basis for an action under Section 10(b)"); *id.* at 18-20 (stating that "the most persuasive case after *Basic Incorporated* ... is the Ninth Circuit's decision in *United States v. Smith*").

the importance of the information to a reasonable investor, such as the probability that the future events will or will not occur and the anticipated magnitude of the events in light of the totality of company activity.[3]

The information need not be such that a reasonable investor would necessarily change his or her investment decision based on it, as long as it is substantially likely that a reasonable investor would have viewed it as significantly altering the total mix of information made available concerning the company.[4]

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[3] *Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S. Ct. 978, 987 (1988) (observing, in the context of preliminary merger negotiations and a proxy statement, that with respect to such forward-looking information, materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity").

[4] *Cf. TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (explaining that materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

**United States Proposed Instruction No. 13**
**TRADING "ON THE BASIS OF" MATERIAL NONPUBLIC INFORMATION**

The government must show that the corporate insider traded in securities of his corporation "on the basis of" material, nonpublic information. It is sufficient if the material nonpublic information was a factor, however small, in the insider's decision to buy or sell. However, the government need not prove that the defendant purchased or sold securities solely because of the material, nonpublic information.[1]

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[1] *See* 17 C.F.R. § 240.10b5-1(b) (enacted Aug. 24, 2000) ("a purchase or sale of a security of an issuer is 'on the basis of' material nonpublic information about that security or issuer if the person making the purchase or sale *was aware of* the material nonpublic information when the person made the purchase or sale," subject to certain affirmative defenses) (emphasis added); Final Rule: Selective Disclosure and Insider Trading, 2000 WL 1201556 at *21 (Aug. 24, 2000) (SEC description of this standard as "closer to the 'knowing possession' standard than the 'use' standard"); *id.* at *23 (explaining that the defense of selling according to a certain type of sales plan was "designed to cover situations in which a person can demonstrate that the material nonpublic information *was not a factor* in the trading decision") (emphasis added); *United States v. Nacchio,* 05-cr-545-EWN, Docket No. 146 at 16-17 (observing that "the SEC sought to find a middle ground between use and possession by crafting a broad general rule prohibiting trading while 'aware of' material inside information"); *United States v. Causey*, 2005 WL 3560632, *5 (S.D. Tex. Dec. 29, 2005) (in a criminal insider trading case addressing the validity of Rule 10b5-1, ruling that the material nonpublic information must be "a factor"). *See also SEC v. Lipson*, 278 F.3d 656, 661-62 (7th Cir. 2002) (holding, in a case applying the law prior to the adoption of Rule 10b5-1, that all that was needed to be shown was that the information played "*a causal role*") (emphasis added); *SEC v. Adler*, 137 F.3d 1325, 1335 (11th Cir. 1998) (explaining, in a case preceding Rule 10b5-1, that "several cases arguably provide support for the proposition that there is no violation of § 10(b) and Rule 10b-5 in the absence of *some causal connection* between the material nonpublic information and an insider's trading") Jury Charge by Hon. Richard M. Berman in *United States v. Michael A. Robles*, 00-CR-1169 at 1803 (S.D.N.Y. Sept. 30, 2002) (attached as Ex. B to United States brief submitted October 4, 2006).

**United States Proposed Instruction No. 14**
***SCIENTER***

The Government must also prove that the defendant acted wilfully, with the intent to defraud, manipulate, or defraud.

An "intent to deceive, manipulate, or defraud" is established if the defendant acted knowingly with the intention or purpose to deceive or cheat.[1]

To act "willfully" means to act voluntarily and purposefully with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or disregard the law.[2]

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[1] The Court determined the content of this definition at the October 12, 2006 conference. *See* Transcript of October 12, 2006 hearing at 4-5, *United States v. Nacchio*, 05-cr-545-EWN. The United States preserves for the record the objections it raised in its prior submissions. *See* Docket Nos. 162, 168.

[2] The Court determined the content of this definition at the October 12, 2006 conference. *See* Transcript of October 12, 2006 hearing at 4, *United States v. Nacchio*, 05-cr-545-EWN. The United States preserves for the record the objections it raised in its prior submissions. *See* Docket Nos. 162, 168; *see also* 15 U.S.C. § 78ff(a) (requiring that the violation of the rule be done "willfully"); *Bryan v. United States*, 524 U.S. 184, 191 n.12 (1998) (observing that the term "willfully" has been used in some contexts "to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right to act") (internal citations omitted).