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Revised February 2024

17.00 26 U.S.C. § 7212(a): "OMNIBUS CLAUSE"

17.01 STATUTORY LANGUAGE

[Note: the language of the "Omnibus Clause" is italicized.]

§ 7212. Attempts to interfere with administration of Internal Revenue Laws.

> (a) Corrupt or forcible interference. -- Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, *or in any other way corruptly* or by force or threat of force (including any threatening letter or communication) *obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title,* shall, upon conviction thereof, be fined . . ., or imprisoned not more than three years or both . . . .[1]

17.02 GENERALLY

26 U.S.C. § 7212(a) contains two clauses. ***United States v. Pansier***, 576 F.3d 726, 734 (7th Cir. 2009). The first clause, known as the "Officer Clause," prohibits threats or forcible endeavors designed to interfere with federal agents acting pursuant to Title 26. *E.g.*, ***United States v. Przybyla***, 737 F.2d 828, 829 (9th Cir. 1984) (per curiam). The second and more general clause, known as the "Omnibus Clause," prohibits acts that corruptly obstruct or impede, or endeavor to obstruct or impede, the due administration of the Internal Revenue Code. ***United States v. Bostian***, 59 F.3d 474, 477 (4th Cir. 1995); ***United States v. Koff***, 43 F.3d 417, 418 (9th Cir. 1994); ***United States v. Popkin***, 943 F.2d 1535, 1539 (11th Cir. 1991).

In ***Marinello v. United States***, 138 S. Ct. 1101 (2018), the Supreme Court considered the "breadth" of the Omnibus Clause, and – rejecting the interpretation of the Clause's scope that most courts of appeal had adopted – concluded that the Omnibus Clause proscribed only "specific interference with targeted governmental tax-related proceedings, such as a particular investigation or audit." ***Id.*** at 1104. Specifically,

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[1] Under 18 U.S.C. § 3571, the maximum fine for felony offenses under Section 7212(a) is at least $250,000 for individuals and $500,000 for corporations. Alternatively, if any person derives pecuniary gain from the offense, or if the offense results in a pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d).

Marinello held that, "to secure a conviction under the Omnibus Clause, the Government must show (among other things) that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action," and also must "show that the proceeding was pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." ***Id.*** at 1109-10. ***Marinello***'s reasoning and the requirements of proof it imposed are explored at length below.

17.03 TAX DIVISION POLICY

As a matter of Tax Division policy, an Omnibus Clause charge should, for reasons explained *infra*, Section 17.04[3], be based on acts of commission and not acts of omission.

17.04 ELEMENTS OF THE OMNIBUS CLAUSE AS CONSTRUED IN **MARINELLO**

To establish a Section 7212(a) Omnibus Clause violation, the government must prove beyond a reasonable doubt that the defendant in any way (1) corruptly (2) endeavored (3) to obstruct or impede the due administration of the Internal Revenue Code. *See, e.g.*, ***United States v. Marek***, 548 F.3d 147, 150 (1st Cir. 2008); ***United States v. Winchell***, 129 F.3d 1093, 1098 (10th Cir. 1997); ***United States v. Wilson***, 118 F.3d 228, 234 (4th Cir. 1997); ***United States v. Hanson***, 2 F.3d 942, 946-47 (9th Cir. 1993).

In ***Marinello***, the Supreme Court held that a conviction under the Omnibus Clause requires (1) proof of a targeted administrative IRS action known to the defendant, or at least reasonably foreseeable by the defendant at the time of the corrupt endeavor, and (2) proof of a "nexus" – defined as a relationship in time, causation, or logic – between the defendant's corrupt endeavor to obstruct and the pending or foreseeable administrative action. 138 S. Ct. at 1109-10.

Marinello arrived at the nexus and pending proceeding requirements through an interpretation of the phrase, "due administration of [the Internal Revenue Code]," as used in § 7212(a). 138 S. Ct. at 1104-09. The Court interpreted this language to refer only to "specific, targeted acts of administration," concluding that it did "not cover routine administrative procedures that are near universally applied to all taxpayers, such as the ordinary processing of income tax returns." ***Ibid.***

The ***Marinello*** Court offered several reasons for adopting this narrower construction of "due administration" in the Omnibus Clause. First, the Court relied upon its interpretation of "a similarly worded statute," 18 U.S.C. § 1503(a), in ***United States v. Aguilar***, 515 U.S. 593 (1995). 138 S. Ct. at 1105-06. Section 1503(a) proscribes various types of obstruction directed at court officials and participants, and, like § 7212(a), contains its own Omnibus Clause, which makes it a felony to "corruptly or by threats or force, or by any threatening letter or communication, influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct, or impede, the *due administration* of justice." (Emphasis added.) In ***Aguilar***, the Court interpreted § 1503(a)'s Omnibus Clause to impose a "nexus" requirement, under which the defendant's obstructive "act must have a relationship in time, causation, or logic with the judicial proceedings" in question. 515 U.S. at 599-600. ***Aguilar***, stating that the Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute," adopted the nexus requirement "both out of deference to the prerogatives of Congress . . . and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." ***Id.*** at 600 (cleaned up).

Marinello also found support for its construction of "due administration of [the Internal Revenue Code]" in both the statutory text of the Omnibus Clause and its immediate context in § 7212. The Court acknowledged that the word "administration" on its own "can be read literally to refer to every '[a]ct or process of administering' including every act of 'managing' or 'conduct[ing]' any 'office,' or 'performing the executive duties of' any 'institution, business, or the like.'" 138 S. Ct. at 1106 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 34 (2d ed. 1954) (alteration in original)). But the Court concluded that "the whole phrase—the due administration of the Tax Code—is best viewed, like the due administration of justice, as referring to only some of those acts or to some separable parts of an institution or business." ***Ibid.*** (citing ***Aguilar***, 515 U.S. at 600-01). The Court also found support for its construction in the fact that other provisions in Section 7212 "refer to corrupt or forceful actions taken against individual identifiable persons or property."[2] ***Id.*** at 1106-07. The Court concluded that, in this context, "the

[2] Specifically, ***Marinello*** pointed to the Officer Clause's proscription of attempts to intimidate or impede "'*any officer or employee of the United States* acting in an official capacity'" and of "'threats of bodily harm to [an] *officer or employee of the United States or to a member of his family*,'" and to Section 7212(b)'s reference to the "'forcibl[e] rescu[e]' of 'any *property* after it shall have been seized under' the Internal Revenue Code." 138 S. Ct. at 1106-07 (quoting § 7212) (emphases and alterations in original)).

Omnibus Clause logically serves as a 'catchall' in respect to the obstructive conduct the subsection sets forth, not as a 'catchall' for every violation that interferes with . . . the 'continuous, ubiquitous, and universally known' administration of the Internal Revenue Code." ***Id.*** at 1107.

Marinello also looked to the "broader statutory context of the full Internal Revenue Code" to support its reading of the Omnibus Clause. 138 S. Ct. 1107-08. Specifically, the Court noted that the Code contained "numerous misdemeanors" – including failure to pay or to keep required records in violation of § 7203, failure to furnish a statement of withholding in violation of § 7204, and willfully misrepresenting the number of exemptions to which one is entitled on a Form W-4, in violation of § 7205 – which an interpretation of the Omnibus Clause as "applying to all Code administration would potentially transform . . . into felonies, making the specific provisions redundant, or perhaps the subject matter of plea bargaining." ***Id.*** at 1107. The Court agreed that "[s]ome overlap in criminal provisions is . . . inevitable," and even noted that "Marinello's preferred reading of § 7212" overlapped with 18 U.S.C. § 1505, which criminalizes the obstruction of the "due and proper administration of the law under which any pending proceeding is being had before any agency of the United States," but ultimately found the degree of "overlap and redundancy" too great, "particularly when it would render superfluous other provisions in the same enactment." ***Ibid.*** (cleaned up).

17.04[1] Corruptly

Felony criminal tax statutes under Title 26 are specific intent statutes. The mens rea for most criminal tax statutes is "willfulness," which is defined as the voluntary and intentional violation of a known legal duty. ***Cheek v. United States***, 498 U.S. 192, 200 (1991). The mens rea for the Omnibus Clause of Section 7212(a) is not "willfulness," but "corruptly," which the courts of appeals have uniformly interpreted as requiring proof that the defendant "act[ed] with an intent to procure an unlawful benefit either for [himself] or for some other person." *See* ***United States v. Floyd***, 740 F.3d 22, 31 (1st Cir. 2014) (collecting cases).

Noting that the definition of "corruptly" can vary in meaning depending on the statute, ***Reeves*** adopted a definition of "corruptly" for Section 7212(a) different than that typically used in 18 U.S.C. § 1503(a), for which the term is often described in terms of an improper motive or evil or wicked purpose. *See* ***United States v. Haas***, 583 F.2d 216, 220

(5th Cir. 1978). In defining "corruptly" for § 7212(a) as having acted with an intent to procure an unlawful benefit, the Fifth Circuit reasoned that § 1503(a) "covers only conduct that is related to a pending judicial proceeding" and thus "presupposes a proceeding the disruption of which will almost necessarily result in an improper advantage to one side in the case," whereas "interference with the administration of the tax laws [in violation of Section 7212(a)] need not concern a proceeding in which a party stands to gain an improper advantage," so "there is no reason to presume that every annoyance or impeding of an IRS agent is done per se 'corruptly.'" ***Reeves***, 752 F.2d at 999. The distinction noted in ***Reeves*** – that § 1503(a) required a pending proceeding whereas § 7212(a) does not – no longer exists after ***Marinello***. The distinction relied upon by ***Reeves***, however, is not the sole basis for rejecting improper motive or evil purpose as the definition of "corruptly" for § 7212(a); in ***United States v. Pomponio***, 429 U.S. 10 (1976), decided two years prior to ***Reeves***, the Supreme Court held that in tax statutes, the term "willful" meant a voluntary and intentional violation of a known legal duty, and the government was not required to also prove a bad purpose or evil motive. ***Id.*** at 11-13.

In any event, ***Marinello*** did not alter Section 7212(a)'s definition of "corruptly." The Court's only discussion of "corruptly" occurred in the context of considering – and ultimately rejecting – the government's argument that the scope of the statute was sufficiently cabined by the "corruptly" element. ***Marinello,*** 138 S. Ct. at 1108. Referencing its conclusion that the "corruptly" requirement, by itself, did not sufficiently limit the statute's scope, the Court simply opined that, "practically speaking," a taxpayer who "willfully" violates the tax code would also intend to obtain an unlawful advantage. ***Ibid.***

Marinello's recognizing that "corruptly," as used in § 7212(a), and "willfully," as used in other Title 26 statutes, are similar, "practically speaking," but respecting that Congress used "corruptly," not "willfully," in Section 7212(a), is also found in earlier court of appeals opinions. The Second Circuit, for example, has rejected the contention that "willfulness" is a necessary element of Section 7212(a), concluding that when "a court properly instructs a jury concerning ['corruptly,'] it need not usurp the function of Congress by inserting the term 'willfully' in a statute where Congress saw fit to omit it." ***United States v. Kelly***, 147 F.3d 172, 176 (2d Cir. 1998). At the same time, the Second Circuit has also concluded that the "definition of the proof required for the section 7212(a) violation [is] as comprehensive and accurate as if the word 'willfully' was incorporated in

the statute." ***Id***. at 177; *see also* ***United States v. Coplan***, 703 F.3d 46, 73 (2d Cir. 2012) (citing ***Kelly***).

Prior to ***Marinello***, courts held that a broad reading of the term "corruptly" is supported by its modifying phrase "in any other way." *See* ***United States v. Mitchell***, 985 F.2d 1275, 1278-79 (4th Cir. 1993) (the language of the clause encourages a broad construction and should be read to include the full scope of conduct that such a construction commands). As long as the ***Marinello*** requirements are otherwise satisfied, earlier cases holding that an intent to obtain an unlawful benefit or advantage includes "impeding the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax records," ***Reeves***, 752 F.2d at 998, should remain good law.

In ***United States v. Dykstra***, 991 F.2d 450 (8th Cir. 1993), the defendant sent IRS officials involved in a collection action Forms 1099 that falsely indicated that the defendant had paid those IRS officials non-employee compensation. The defendant then notified the IRS that the officials failed to pay taxes on that compensation and requested a reward for supplying the information. ***Id.*** at 451. The court of appeals held that the defendant acted corruptly because he attempted to secure "an unwarranted financial gain for himself" by preventing the IRS from seizing his home to satisfy his tax outstanding liability and by attempting to obtain rewards from the IRS for reporting alleged tax violations. ***Id.*** at 453. Another court, discussing a similar scheme, reasoned that "[t]he fact that the taxpayer may claim sums which are rationally 'preposterous' does not obviate a corrupt intent." ***United States v. Winchell***, 129 F.3d 1093, 1099 (10th Cir. 1997) (citing ***United States v. Kuball***, 976 F.2d 529, 530-31 (9th Cir. 1992); ***United States v. Yago***w, 953 F.2d 423, 425-27 (8th Cir. 1992)). *See also* ***United States v. Croteau***, 819 F.3d 1293, 1308 (11th Cir. 2016) ("disagree[ing with the defendant] that in assessing whether [he] acted corruptly, our sufficiency analysis must take into account whether the numerous documents [the defendant] submitted were obviously fictitious or fraudulent").

The defendant, however, need not seek a benefit that is specifically financial in order to satisfy the element of acting "corruptly." In ***United States v. Giambalvo***, 810 F.3d 1086 (8th Cir. 2016), the defendant claimed that he did not act corruptly because he did not have any tax liability for the tax years implicated in the § 7212(a) charge against him. The Eighth Circuit, however, rejected this argument, holding that "'corruptly' is not limited to situations where the defendant wrongfully sought or gained a financial advantage under the tax laws." ***Id.*** at 1098-99.

In ***United States v. Reeves***, 782 F.2d 1323 (5th Cir. 1986) (per curiam), the Fifth Circuit concluded that attempting to divert the time and attention of an IRS agent from pursuing a tax investigation against the defendant was sufficient to establish that the defendant had acted "corruptly" for purposes of Section 7212(a). ***Id.*** at 1326. However, mere "harassment" of an agent, if it is not done to obtain an undue advantage, may not rise to the level of a section 7212(a) violation:

> [T]here is no reason to presume that every annoyance or impeding of an IRS agent is done *per se* "corruptly." A disgruntled taxpayer may annoy a revenue agent with no intent to gain any advantage or benefit other than the satisfaction of annoying the agent. Such actions by taxpayers are not to be condoned, but neither are they "corrupt" under Section 7212(a).

Reeves, 752 F.2d at 999 (emphasis omitted).

As long as there is a "nexus" between the defendant's conduct and a pending or foreseeable administrative proceeding, conduct can be "corrupt" under the provisions of the omnibus clause even if it is not directed at individual officers or employees of the Internal Revenue Service. The omnibus clause of section 7212(a) "conspicuously omits the requirement that conduct be directed at 'an officer or employee of the United States Government.'" ***Popkin***, 943 F.2d at 1539 (quoting § 7212(a)). Two of the victims of the Form 1099 scheme in ***Dykstra*** were not government agents. The Eighth Circuit held that the Section 7212(a) charge properly included the defendant's actions against those victims. *See also* ***United States v. Lovern***, 293 F.3d 695, 700 n.5 (4th Cir. 2002) (noting that Section 7212(a) omnibus clause does not require that the victim of the threat be an officer or employee of the United States).

An endeavor may be corrupt even when it involves means that are not intrinsically illegal, as long as the defendant commits them to secure an unlawful benefit for himself or for others. ***Mitchell***, 985 F.2d at 1278-79 (citing cases); ***Popkin***, 943 F.2d at 1537 (creating a corporation "expressly for the purpose of enabling [one of defendant's clients] to disguise the character of illegally earned income and repatriate it from a foreign bank" is corrupt); ***Wilson***, 118 F.3d at 234 (citing ***Bostian***, 59 F.3d at 479).

A defendant may also corruptly endeavor to obstruct or impede the due administration of the internal revenue laws by filing or threatening to file frivolous lawsuits or otherwise-legal requests for the government to provide information, although the government must "tread carefully" when it prosecutes a defendant for such corrupt endeavors to ensure it does not violate the defendant's constitutional rights. ***United States v. Miner***, 774 F.3d 336, 347-48 (6th Cir. 2014). In ***Miner***, the Sixth Circuit affirmed the defendant's § 7212(a) conviction for corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws by, *inter alia*, "threat[ening] to sue government officials" and filing "FOIA and Privacy Act requests." ***Id.*** at 347. The ***Miner*** court rejected the defendant's First Amendment challenge to his prosecution based on these actions, concluding that this argument was "defeated" by the fact that "the statute applies only to conduct committed 'corruptly' . . . ." ***Ibid.*** The court further explained that there is no constitutional right to "corruptly" engage in such conduct:

> If a defendant embarks upon a course of conduct specifically for the purpose of gaining an unlawful benefit or advantage, he is not necessarily insulated from punishment simply because the discrete acts in which he engages may be otherwise constitutionally or statutorily authorized. For example, although an individual certainly has a general right under the Petition Clause "to appeal to courts and other forums established by the government for resolution of legal disputes," ***Borough of Duryea, Pa. v. Guarnieri***, [564] U.S. [379], 131 S. Ct. 2488, 2494, 180 L.Ed.2d 408 (2011), someone who files a frivolous lawsuit may legitimately be punished for malicious prosecution or abuse of process. ***Bill Johnson's Restaurants, Inc. v. NLRB***, 461 U.S. 731, 743, 103 S. Ct. 2161, 76 L.Ed.2d 277 (1983). At that point, in fact, the defendant is no longer exercising a constitutional right: "[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition." ***Id.*** (citation omitted).

Ibid. *See also* ***Reeves***, 752 F.2d at 1001-02 (holding that "the filing of frivolous common law liens with the intention of securing improper benefits or advantages for one's self or for others constitutes a prohibited corrupt endeavor under section 7212(a)").

The Miner court did, however, caution that "a prosecution based on conduct that is closely related to citizens' rights to access the courts and to obtain information about

their government must tread carefully." 774 F.3d at 348. This is so, the court explained, because "[n]onfrivolous court filings—even those that are intended to impede the IRS's ability to collect taxes—are at the very core of the Petition Clause, meaning that even frivolous claims 'are at least adjacent to areas of protected activity.'" Ibid. (quoting Reeves, 752 F.2d at 1001). Thus, if the Miner defendant "had been non-frivolously expressing his clients' likelihood of suing IRS officials, was truly attempting to obtain information from the IRS via Privacy Act and FOIA requests, or was legitimately creating trusts to structure clients' finances in a manner that he believed was legal, then his conduct would not have been criminal." Ibid.

17.04[2] Endeavor

The second element of the omnibus clause of section 7212(a) is an "endeavor." To help define this term for purposes of Section 7212(a), courts have looked to case law interpreting similar language in the obstruction of justice statutes, 18 U.S.C. §§ 1503 and 1505. *See* ***United States v. Martin***, 747 F.2d 1404, 1409 (11th Cir. 1984). In ***Osborn v. United States***, 385 U.S. 323 (1966), the Supreme Court defined "endeavor," in a § 1503 case, as "any effort . . . to do or accomplish the evil purpose that section was intended to prevent." ***Id.*** at 333 (internal quotation omitted).

The use of "endeavor" in the Omnibus Clause makes clear that § 7212(a) is a crime of attempt. "When proving violations of § 7212(a), the government is not required to prove that the administration of the internal revenue laws was actually obstructed or impeded, but only that the defendant corruptly attempted to do so." ***Croteau***, 819 F.3d at 1308. Justice Scalia, concurring in part and dissenting in part in ***Aguilar***, noted that in ***Osborn***, the Court confirmed that Congress's use of the term "endeavor" "got rid of the technicalities which might be urged as besetting the word 'attempt,'" and even made "immaterial whether the endeavor to obstruct pending proceedings is possible of accomplishment":

> In ***Osborn v. United States***, 385 U.S. 323, 333, 87 S.Ct. 429, 435, 17 L.Ed.2d 394 (1966), we dismissed out of hand the "impossibility" defense of a defendant who had sought to convey a bribe to a prospective juror . . .. "Whatever continuing validity," we said, "the doctrine of 'impossibility' ... may continue to have in the law of criminal attempt, that body of law is inapplicable here." ***Ibid.*** (footnote omitted).

515 U.S. at 610 (internal quotation omitted).

Though ***Marinello*** did limit the scope of the Omnibus Clause via a narrow reading of "due administration," ***Marinello*** did not purport to place any categorical limitations on the types of "endeavors" that fall within the statute's scope. *See* ***Marinello***, 138 S. Ct. at 1102-10. Rather, the limits as to whether a particular "endeavor" is sufficient for a conviction in a specific case is provided by the requirement that the endeavor have a nexus to a pending or foreseeable targeted administrative action.

17.04[3] Omissions as Endeavors

In explaining its rationale for limiting the scope of the Omnibus Clause, ***Marinello*** observed that many of the Tax Code's misdemeanor provisions are based upon omissions. 138 S. Ct. at 1107-08. But the Court also stated that "[s]ome overlap in criminal provisions is . . . inevitable," ***ibid.***, and ultimately limited the Omnibus Clause not by imposing an affirmative act requirement but by requiring proof of a nexus between the defendant's conduct and a particular administrative proceeding known or foreseeable to the defendant. In response to a Tenth Circuit case decided prior to ***Marinello***, which questioned whether a failure to file a tax return could constitute a corrupt endeavor under § 7212(a), ***United States v. Wood***, 384 Fed. App'x 698, 708 (10th Cir. 2010), *overruled on other grounds by* ***Marinello***, 138 S. Ct. 1101, the Tax Division had articulated a policy of limiting the Omnibus Clause to affirmative acts. The Second Circuit's ***Marinello*** decision, however, found no error in basing an Omnibus Clause conviction on an omission, reasoning that the statute's prohibition of obstructing or impeding "in any other way" was sufficiently broad to encompass omissions. ***United States v. Marinello***, 839 F.3d 209, 224-25 (2d Cir. 2016). The Supreme Court's decision did not reach this aspect of the Second Circuit's opinion, and also did not take up the government's suggestion during oral argument that instead of limiting the Omnibus Clause's scope by imposing a pending proceeding requirement, the Court could, in the alternative, exclude omissions from the scope of the statute. Sup. Ct. Tr. pp. 59-63. With ***Marinello*** having acknowledged that some overlap between misdemeanor and felony statutes is permissible, indeed "inevitable," and having addressed its scope concerns by requiring a nexus to a pending or foreseeable proceeding, the Supreme Court did not address, and thus left as an open question, whether a Section 7212(a) conviction can be predicated upon an omission.

Against this legal backdrop, it remains the policy of the Tax Division that a § 7212(a) Omnibus Clause prosecution should not be based upon an omission, including a failure to file a tax return, without the express authorization of the Tax Division's Criminal Appeals & Tax Enforcement Policy Section.

17.04[4] Targeted Administrative IRS Action

Marinello, as explained above, rested on a narrow interpretation of "the due administration [of the internal revenue laws]," under which this phrase encompasses only a "particular administrative proceeding." 138 S. Ct. at 1104, 1109. The Court made clear that "'particular administrative proceeding' . . . do[es] not mean every act carried out by IRS employees in the course of their 'continuous, ubiquitous, and universally known' administration of the Tax Code." ***Id.*** at 1109-10. The ***Marinello*** Court declined to "exhaustively itemize" what falls outside the definition of "particular administrative proceeding," but did expressly state that the "routine, day-to-day work carried out in the ordinary course by the IRS, such as the review of tax returns" does not constitute a particular administrative proceeding. ***Id.*** at 1110; *see also* ***id.*** at 1104 (stating that "the ordinary processing of income tax returns" falls outside the statute's reach).

Marinello likewise declined to "exhaustively itemize the types of administrative conduct that fall within the scope of the statute." 138 S. Ct. at 1110. The Court did, however, expressly state that "investigation[s]" and "audit[s]" are both particular administrative proceedings within the scope of the Omnibus Clause, as is any "other targeted administrative action." ***Id.*** at 1109; *see also* ***id.*** at 1104 ("the [Omnibus C]lause as a whole refers to specific interference with targeted governmental tax-related proceedings"). Between the two extremes of a full audit or investigation on the one hand, and the day-to-day processing of tax returns on the other hand, are many IRS procedures, proceedings, and actions. The dividing line indicated by post-***Marinello*** appellate decisions is whether the administrative action was "targeted" as opposed to one that applies to most taxpayers.

Marinello's specific reference to investigations and audits has led some defendants to argue that collection proceedings fall outside the scope of the "due administration [of the Internal Revenue Code]." These challenges have been uniformly rejected. *See, e.g.*, ***United States v. Reed***, 75 F.4th 396, 403–04 (4th Cir. 2023); ***United States v. Snyder***, 71

F.4th 555, 571–73 (7th Cir. 2023); ***United States v. Prelogar***, 996 F.3d 526, 533 (8th Cir. 2021); ***United States v. Graham***, 981 F.3d 1254, 1259-60 (11th Cir. 2020).

In ***Graham***, the Eleventh Circuit held that ***Marinello*** was satisfied where the IRS had "regular and persistent contact" with the defendant over several years in an attempt to collect unpaid taxes. ***Graham***, 981 F.3d at 1259. While the collections activity in ***Graham*** was extensive, the Eleventh Circuit did not say that a particular volume of activity was necessary. Rather, the court observed that this extensive activity meant it was "not a borderline case." ***Id.*** The court also declined to interpret ***Marinello's*** "proceeding" requirement so narrowly as to apply only to "a quasi-judicial proceeding." ***Ibid.*** Instead, the court reasoned ***Marinello's*** concern "was to *exclude* relatively innocuous conduct from prosecution under the Omnibus Clause." *Id.* (emphasis in original).

In ***Prelogar***, the Eighth Circuit, following ***Graham***, concluded that IRS collection activity satisfied ***Marinello's*** administrative proceeding requirement. In ***Prelogar***, as in ***Graham***, the IRS for several years had issued liens and levies against Prelogar's property in an attempt to collect unpaid taxes. ***Prelogar***, 996 F.3d at 533-34.

In ***Reed***, the Fourth Circuit found that the targeted administrative proceeding requirement was met when an IRS collections agent issued a notice of levy to the defendant's employer and then visited the employer to serve a final demand to garnish the defendant's wages. ***Reed***, 75 F.4th at 403. The court rejected the argument that ***Marinello*** was not satisfied because garnishing wages was part of the collections agent's '"day-to-day duties,'" concluding that "what constitutes routine work for an officer in a specialized division that handles difficult cases and repeat tax avoiders does not define what is routine for the whole agency." ***Id.*** at 404. Similarly, the court noted that while the IRS sent hundreds of thousands of notices of levies each year, and garnished wages on a daily basis, that paled in comparison to the more than 150 million tax returns the IRS received annually. *See* ***ibid.*** (citing statistics for 2020 and 2021).

Likewise, the Seventh Circuit has found ***Marinello*** satisfied where "the IRS had taken 'specific, targeted' steps to collect by levying [the defendant's] personal and business bank accounts." ***United States v. Snyder***, 71 F.4th 555, 571-72 (7th Cir. 2023), *cert. granted* on unrelated grounds, 2023 WL 8605740.

In a case not just involving collections activity, the Fourth Circuit also found ***Marinello*** satisfied where the IRS "conducted a years-long investigation in an attempt to ascertain the exact amount" that the defendant owed after she filed false tax returns. ***United States v. Jackson***, 796 F. App'x 186, 187 (4th Cir. 2020). And in ***United States v. Westbrooks***, 728 Fed. App'x 379 (5th Cir. 2018) (per curiam), the Fifth Circuit concluded that ***Marinello***'s requirement for a "particular administrative proceeding" was satisfied where the defendant "provided false testimony at a show cause hearing in federal court . . . that . . . was held to assess her compliance with an IRS subpoena for tax records." ***Id.*** at 380.

On this topic, precedent from the Sixth Circuit – which required proof of knowledge of a pending IRS proceeding before ***Marinello*** was decided – is also instructive. In ***United States v. Miner***, 774 F.3d 336 (6th Cir. 2014), the Sixth Circuit found that this requirement was satisfied because, *inter alia*, the defendant was aware of pending IRS collection activities against the defendant's clients, including notices of deficiency, notices of tax past due, and federal tax liens. ***Id.*** at 340-41, 346. In so holding, the ***Miner*** court explained that "[t]he IRS, of course, does not issue notices of deficiency or obtain tax liens against individuals as a routine matter; it takes these steps only after determining that a particular taxpayer must be pursued for additional funds." ***Id.*** at 346. Likewise, in ***United States v. Faller***, 675 Fed. App'x 557 (6th Cir. 2017), the Sixth Circuit upheld a conviction for "attempting to obstruct the IRS in the collection of taxes," finding it sufficient that the defendant knew of "steps taken by the IRS to collect [his] unpaid income taxes" when he opened nominee bank accounts, filed additional false tax returns, and filed a false income-and-assets form. ***Id.*** at 561.

17.04[5] Pending or Reasonably Foreseeable

The Supreme Court held in ***Marinello*** that the administrative proceeding the defendant intended to obstruct or impede must be "pending at the time the defendant engaged in the obstructive conduct or, at the least, was then reasonably foreseeable by the defendant." 138 S. Ct. at 1110 (citing ***Arthur Andersen LLP v. United States***, 544 U.S. 696, 703, 707-08 (2005)). ***Marinello*** offered only scant elaboration of this requirement, observing only that "[i]t is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually," but, instead, "[t]o use a maritime analogy, the proceeding must at least be in the offing." ***Ibid.***

In ***United States v. Takesian***, 945 F.3d 553 (1st Cir. 2019), the First Circuit applied ***Marinello***'s reasonable foreseeability standard, and held that Takesian, the president of a corporation, could reasonably foresee a criminal investigation into his own tax affairs because he was aware that a federal grand jury carrying out a related health care fraud investigation had subpoenaed records showing that he diverted around $1 million in corporate funds to his personal use. ***Id.*** at 563-67. With knowledge of this subpoena, Takesian filed late corporate returns that falsely reported that loans had been made to a corporate officer, and filed amended personal returns that omitted the diverted funds from his reported income. ***Ibid.*** As the court of appeals explained, the related investigation "would foreseeably cast a very bright spotlight on the $1 million payout" of corporate funds for Takesian's personal use, because it involved a subpoena for all of T & C's "corporate records and books relative to its financial transactions." ***Id.*** at 566 (cleaned up). Thus, "with the IRS primed to check the flow of money to and from [the corporation]," the court concluded that Takesian "concocted the fake loan theory to put one over the revenuers." ***Ibid.*** *See also* ***United States v. Jackson***, 796 Fed. App'x 186, 188 (4th Cir. 2020) (per curiam) (concluding in the alternative that defendant's attempt to extinguish her tax liability with fraudulent checks had a nexus to a reasonably foreseeable proceeding given prior IRS collection activity).

In determining what satisfies ***Marinello***'s "reasonably foreseeable" requirement, the standard the Supreme Court set forth in ***Arthur Andersen*** for violations of 18 U.S.C. § 1512(b)(2)(A) may provide some guidance. Section 1512(b)(2)(A) criminalizes "knowingly" and "corruptly persuad[ing]" another person "with intent to . . . cause" that person to tamper with documents that would be used in an official proceeding. ***Arthur Andersen*** applied ***Aguilar***'s nexus requirement to this statute, and – like ***Marinello*** which followed it – required a nexus between the defendant's conduct and an official proceeding which is at least "foreseen." 544 U.S. at 707-08. And some courts of appeal have extended this requirement to 18 U.S.C. § 1512(c)(2), which penalizes anyone who "corruptly . . . obstructs, influences, or impedes any official proceeding." *See* ***United States v. Young***, 916 F.3d 368, 386 (4th Cir. 2019) (collecting cases); ***United States v. Pugh***, 945 F.3d 9, 22-23 (2d Cir. 2019) (official proceeding was reasonably foreseeable under § 1512(c)(2) to defendant who traveled to Turkey with intent to join ISIS in Syria, and destroyed electronic files when he was denied entry to Turkey, in light of U.S. law enforcement's announcement of an investigation of those seeking to provide support to ISIS). Prosecutors should therefore be guided by their Circuit Court's application of the ***Arthur Andersen***

standard in considering whether a particular IRS administrative action was "reasonably foreseeable by the defendant."

17.04[6] "Nexus" Between Conduct and a Particular Administrative Proceeding

Marinello, as discussed above, borrowed the nexus requirement from the Supreme Court's interpretation of 18 U.S.C. § 1503 in ***United States v. Aguilar***, 515 U.S. 593 (1995). To satisfy this requirement, "the Government must show . . . that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding, such as an investigation, an audit, or other targeted administrative action." 138 S. Ct. at 1109. Proof of a nexus "requires a 'relationship in time, causation, or logic with the [administrative] proceeding.'" ***Ibid.*** (quoting ***Aguilar***, 515 U.S. at 599) (alteration in original).

In ***United States v. Beckham***, 917 F.3d 1059 (8th Cir. 2019), the Eighth Circuit concluded that the ***Marinello*** nexus requirement was satisfied by the defendant's efforts to influence an IRS audit. The defendant, while subject to an IRS audit, gave the examining agent a falsified day-planner that purported to substantiate the defendant's false claims that he materially participated in a business, and thus was entitled to claim nonpassive losses attributable to the business. ***Id.*** at 1062-63. This action, the ***Beckham*** court concluded, satisfied the nexus requirement because "the IRS indisputably obtained the day planner as a functional part of the audit during the audit." ***Id.*** at 1064-65. ***Beckham*** thus concluded that the failure of the district court to instruct the jury on ***Marinello***'s nexus requirement was harmless beyond a reasonable doubt. ***Ibid.***

Since ***Marinello*** borrowed its formulation of the nexus requirement directly from ***Aguilar***, its discussion of the nexus requirement, and the case law further interpreting it, may provide relevant guidance. ***Aguilar*** itself stated that another equivalent formulation of the nexus requirement is that "the [defendant's] endeavor must have the 'natural and probable effect' of interfering with the due administration of justice." 515 U.S. at 599 (quoting ***United States v. Wood***, 6 F.3d 692, 695 (10th Cir. 1993)). Given this, "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." ***Ibid.***

In ***Aguilar***, the Court found that the required nexus to a grand jury proceeding was lacking where the defendant merely "utter[ed] false statements to an investigating agent . . . who might or might not testify before a grand jury." 515 U.S. at 600. There was no

proof that "the agents acted as an arm of the grand jury, or indeed that the grand jury had even summoned the testimony of these particular agents." ***Ibid.*** As such, the Court concluded that the defendant's conduct "falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself." ***Id.*** at 601.

In applying the ***Aguilar*** nexus requirement, at least two circuits have expressly recognized that "the 'discretionary actions of a third person' . . . can form part of the nexus to an official proceeding." ***United States v. Sutherland***, 921 F.3d 421, 428 (4th Cir. 2019). In ***United States v. Reich***, 479 F.3d 179 (2d Cir. 2007) (Sotomayor, J.), the Second Circuit concluded that the evidence was sufficient to find a nexus between the defendant's conduct and an official proceeding even though it relied in part upon the actions of third parties. The defendant, who was party to a federal lawsuit, faxed a forged order to opposing counsel; opposing counsel, believing the order to be genuine, subsequently withdrew a mandamus petition pending before the Second Circuit because he believed the forged order rendered the petition moot. ***Id.*** at 181-83. Recognizing that "the necessary nexus can exist when the discretionary actions of a third person are required to obstruct the judicial proceeding," the ***Reich*** court concluded that because the "forged Order appeared to render moot [the opposing party's] application to the Second Circuit for a writ of mandamus," the "evidence is clearly sufficient to establish a 'relationship in time, causation, or logic' between [the defendant's] transmission of the forged Order and effects on the judicial proceeding, as *Aguilar* requires." ***Id.*** at 185-86 (quoting ***Aguilar***, 515 U.S. at 599).

Similarly, in ***Sutherland***, the Fourth Circuit concluded that the jury could rely on the discretionary acts of the employees of a United States Attorney's Office to establish the nexus between the defendant's obstructive conduct and a grand jury proceeding. 921 F.3d at 428. The ***Sutherland*** defendant attempted to hide income he earned from insurance businesses by disguising this income as loan proceeds. ***Id.*** at 423-24. A grand jury began investigating the defendant's scheme, and served him with subpoenas seeking his companies' financial records. ***Id.*** at 424. Three months later, the defendant's attorney sent a letter to the U.S. Attorney's Office that "purported to explain away a large number of transactions relating to the subpoenaed materials," and attached to the letter the bogus loan agreements that purported to substantiate the defendant's treatment of his business income as loan proceeds. ***Ibid.*** The ***Sutherland*** court concluded that the evidence was sufficient to establish a nexus between the sending of the letter to the U.S. Attorney's Office and the grand jury proceeding because "[a] prosecutor tasked with presenting to the grand jury is

more akin to a witness who has been subpoenaed than one who has not. As with a subpoenaed witness, there is a strong likelihood that the U.S. Attorney's office would serve as a channel or conduit to the grand jury for the false evidence or testimony presented to it." ***Id.*** at 428.

Marinello did not specifically address how to prove a nexus where the tax-related proceeding involves multiple tax years or periods. Nor did not it require proof of a nexus between a corrupt endeavor and the IRS's administrative proceedings with regards to a specific tax year or period. Instead, it required proof only of a "'nexus' between the defendant's conduct and a particular administrative proceeding," and identified "investigation[s]" and "audit[s]" *simplicter*, not audits or investigations of particular tax periods, as examples of such proceedings. 138 S. Ct. at 1109. In the analogous situation of obstructing a grand jury, the government is not required to prove the defendant specifically intended to be obstructive as to the subject of the grand jury's inquiry, only that the defendant intended to obstruct the grand jury generally. *See e.g.*, ***United States v. Quattrone***, 441 F.3d 153, 171 (2d Cir. 2006) (defendant need not read grand jury subpoena or know its precise contents to obstruct the grand jury; enough that defendant knows the subpoena seeks some document and the defendant acts to put it beyond the grand jury's reach); ***United States v. Brenson***, 104 F.3d 1267, 1278-80 (11th Cir. 1997) (rejecting defendant's claim that he was entitled to a jury instruction that specifically stated that the jury must find that he endeavored to obstruct the grand jury proceeding identified in the indictment, rather than merely stating that he endeavored to obstruct the due administration of justice); ***United States v. Ahrensfield***, 2010 WL 11619114, at *10 (D.N.M. 2010) (don't have to foresee which particular proceeding will arise in the future for conduct to have nexus to a foreseeable future proceeding).

17.04[7] Pleading Violations of the Omnibus Clause under Marinello

Marinello involved not the sufficiency of an indictment but, instead, the sufficiency of the evidence following a conviction, and grounded its nexus-to-a-pending-or-foreseeable proceeding requirement in an interpretation of what "due administration" of the Internal Revenue Code meant. It thus is the Tax Division's position that the nexus requirement is one of proof and does not constitute a newly created core element that must be expressly and separately pled in the indictment in order to state an offense. That said, indictments should, in order to avoid litigation over the sufficiency of an Omnibus Clause indictment, expressly allege the nexus-to-a-pending-or-foreseeable-proceeding

requirement. A model indictment form incorporating these requirements can be found in the Indictment and Information Forms appended to this Manual.

In construing the phrase "due administration" as requiring a nexus to a pending or foreseeable proceeding, ***Marinello*** relied upon ***Aguilar***, which itself construed "due administration" to require a nexus to a pending or foreseeable proceeding. 138 S. Ct. at 1106. In the decades since ***Aguilar*** was decided, no court has held that the decision imposed a requirement to plead the nexus requirement, but numerous courts have held that it did not. *See, e.g.*, ***United States v. Collis***, 128 F.3d 313, 317 & n.3 (6th Cir. 1997) (concluding that Collis' argument that the indictment failed to establish the "nexus" required by ***Aguilar*** "is more appropriately viewed as a challenge to the sufficiency of the evidence at trial"); ***United States v. Meza***, No. 15-cr-3175, 2017 WL 1371102, at *4 (S.D. Cal. 2017) (rejecting the argument that ***Aguilar***'s nexus requirement must be alleged in an indictment as one that "conflates pleading with proof"); ***United States v. Pirk***, 267 F.Supp.3d 392, 398 (W.D.N.Y. 2017) ("Nexus is an issue of proof, rather than an issue of the sufficiency of the indictment." (citing cases)); ***United States v. Triumph Capital Group, Inc.***, 260 F.Supp.2d 470, 475 (D. Conn. 2003) (denying motion to dismiss count under omnibus provision of § 1503, where defendants argued that the indictment failed to allege that they knew their obstructive actions would likely affect a grand jury investigation); *see also* ***United States v. Ring***, 628 F.Supp.2d 195, 223-24 (D. D.C. 2009) (holding that the nexus requirement of § 1512 is a jury question and need not be alleged in the indictment). C*f.* ***United States v. Quattrone***, 441 F.3d 153, 170 (2d Cir. 2006) ("The nexus limitation is best understood as an articulation of the proof of wrongful intent that will satisfy the mens rea requirement of 'corruptly' obstructing or endeavoring to obstruct."). As ***Collis*** observed, the "nexus" required by ***Aguilar*** is "implicit" in the statutory element of 18 U.S.C. § 1503(a) that "the defendant acted corruptly with the intent of influencing, obstructing, or impeding the proceeding in the due administration of justice." 128 F.3d at 318; *cf.* ***United States v. Resendiz-Ponce***, 549 U.S. 102, 107 (2007) (agreeing with the government that the indictment "implicitly alleged" that the defendant committed an "overt act" "simply by alleging that he 'attempted to enter the United States'").

This approach was applied to § 7212(a) by the Eighth Circuit in ***Prelogar***, which rejected the argument that the nexus-to-a-pending-or-foreseeable-proceeding requirement must be pled in the indictment. *See* 996 F.3d at 532. The ***Prelogar*** court held "that ***Marinello*** clarifies what must be proven to sustain a conviction under § 7212(a) but does

not require that nexus and knowledge be charged in the indictment." ***Ibid.*** In so holding, ***Prelogar*** relied upon the cases, discussed above, that held there was no need to plead a nexus after ***Aguilar*** when charging a violation of 18 U.S.C. § 1503(a). ***Id.*** at 531-32 (citing ***Collis***, 128 F.3d at 317-18, and ***United States v. Sussman***, 709 F.3d 155, 177 (3d Cir. 2013)). ***Prelogar*** also reasoned that "[t]his interpretation is consistent with other Supreme Court decisions that have clarified statutory elements in conjunction the government's proof obligations," including ***Rehaif v. United States***, 139 S. Ct. 2191 (2019), which held that an indictment charging the defendant as a felon in possession under 18 U.S.C. § 922(g)(5)(A) that tracked the statutory language was sufficient notwithstanding its failure to plead that the defendant knew he was a felon. ***Prelogar***, 996 F.3d at 532 (citing ***Rehaif***, 139 S. Ct. at 2200).

Notwithstanding this authority, post-***Marinello*** indictments should at least allege facts showing that the nexus-to-a-pending-or-foreseeable-proceeding requirement is satisfied in order to avoid this issue. In ***United States v. Rankin***, 929 F.3d 399 (6th Cir. 2019), the Sixth Circuit – which, as noted, had a pending proceeding requirement even before ***Marinello*** – rejected a defendant's argument that an indictment charging him with a violation of the Omnibus Clause failed to allege a nexus between his conduct and a pending administrative proceeding of which he was aware. ***Rankin*** declined to address whether an indictment must expressly plead a nexus to a pending proceeding in order to state an offense, concluding that the subject indictment did sufficiently allege a nexus and knowledge of a pending proceeding because – notwithstanding its lack of express language mirroring these requirements – the indictment alleged that the defendant "willfully misl[ed] agents of the IRS by making false and misleading statements to those agents and by concealing information sought by those agents who he well knew were attempting to ascertain income, expenses and taxes for defendant and his various business entities and interests." ***Id.*** at 405-06. This language, ***Rankin*** concluded, sufficiently "allege[d] a nexus between Rankin's misleading conduct and the agents' attempts 'to ascertain [his] income, expenses and taxes,'" which was a "particular investigation" that fell within the scope of the Omnibus Clause under ***Marinello***. ***Id.*** at 406 (citing ***Marinello***, 138 S. Ct. at 1110). This allegation was also held to be sufficient to allege a pending proceeding of which the defendant had knowledge, because "it specifically note[d] that [the defendant] 'well knew' that the agents were attempting to ascertain information about him when he misled them and concealed information from them." ***Ibid.***

Note: The model indictment form appended to this Manual reflects the Tax Division's recommendation that the indictment *expressly* allege a nexus to a pending or foreseeable proceeding.

17.04[8] Jury Instructions after Marinello

Marinello's requirement of a nexus-to-a-pending-or-reasonably-foreseeable proceeding, of course, must be found by a jury, and thus must be reflected in the instructions given the jury. A model jury instruction incorporating ***Marinello***'s requirements of proof can be found in the model jury instructions appended to this Manual.

17.04[8][a] Specific Unanimity of Corrupt Endeavors

Another topic not expressly addressed in ***Marinello*** is whether the general requirement that jurors return a unanimous verdict requires that jurors be instructed that they must unanimously agree on a particular corrupt act when an indictment charging a violation of § 7212(a) alleges more than one such act. ***Marinello*** noted that the district court had instructed the jury that "it must find unanimously that [Marinello corruptly] engaged in at least one of the eight" corrupt acts alleged in the indictment, and that "the jurors need not agree on which one," 138 S. Ct. at 1105, but did not otherwise address the issue.

It is generally well-settled that the requirement that a verdict be "unanimous" requires jurors to unanimously agree that each element of an offense has been proven, but does not require unanimity with regards to the particular means by which an offense is committed. In ***Schad v. Arizona***, 501 U.S. 624 (1991), a four-Justice plurality stated "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." ***Id***. at 631. Instead, the plurality explained, "[i]n these cases, as in litigation generally, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" ***Id***. at 631-32 (citation omitted). Justice Scalia agreed with the plurality in a concurring opinion, stating that "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." ***Id***. at 649. And in ***Richardson v. United States***, 526 U.S. 813 (1999), the Supreme Court confirmed that "a federal jury need not always decide

unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." ***Id***. at 817.

In ***United States v. Sorensen***, 801 F.3d 1217 (10th Cir. 2015), the Tenth Circuit applied Richardson to a charge under the Omnibus Clause of § 7212(a), and held that an instruction requiring the jury to unanimously agree on a specific corrupt endeavor alleged in the indictment was unnecessary. In ***Sorensen***, the district court, sua sponte, instructed the jury as follows:

> [T]he indictment alleges that the defendant endeavored to obstruct or impede the due administration of the Internal Revenue laws through a variety of different means. The government does not have to prove all of these different means for you to return a guilty verdict. But in order to return a guilty verdict, all twelve of you must agree upon one or more listed means, which you find constituted a corrupt endeavor to obstruct or impede the due administration of the Internal Revenue laws.

Id. at 1235. Sorensen challenged this instruction on appeal, and the Tenth Circuit agreed that "the district court erred in giving the instruction." ***Id***. at 1237. But the Tenth Circuit held that the error favored the defense. The court explained that, unlike ***Richardson***, which required unanimity about the "predicate felonies required to prove a continuing criminal enterprise," the district court mistakenly "took the novel course of requiring the jury's unanimity on at least one means listed in the indictment." ***Ibid***. (emphasis added). ***Sorensen***, however, found no grounds for relief on account of this error, because "the instruction effectively increased the government's burden in proving its case." ***Ibid***. *Accord* ***United States v. Adams***, 150 F. Supp. 3d 32, 37-38 (D.D.C. 2015) (following ***Sorensen***); ***cf. United States v. Kozeny***, 667 F.3d 122, 131-32 (2d Cir. 2011) (jury need not unanimously agree on which overt act was taken in furtherance of a conspiracy); ***United States v. Griggs***, 569 F.3d 341, 343 (7th Cir. 2009) (same).

17.04[9] Unit of Prosecution

Marinello assumed, though it did not expressly state, that the Omnibus Clause and the Officer Clause of Section 7212(a) state two separate offenses. ***Marinello*** observed that Section 7212(a) "has two substantive clauses," the Officer and Omnibus Clauses, 138 S. Ct. at 1104-05, and proceeded, as discussed above, to address what the government must prove to establish a violation of the Omnibus Clause, id. at 1106-10. Pre-***Marinello*** cases have expressly held that the Officer and Omnibus Clauses state two

different offenses. *See* ***United States v. Pansier***, 576 F.3d 726, 734 (7th Cir. 2009) (Section 7212(a) "contains two distinct clauses, which each describe a separate offense"); ***United States v. Lovern***, 293 F.3d 695, 700 n.5 (4th Cir. 2002). Accordingly, courts have assumed that a single § 7212(a) count that alleges corrupt acts that violate both the Officer and Omnibus Clauses would be duplicitous, but have generally rejected defendants' claims that the specific count under review, in fact, charged both offenses. *See* ***Pansier***, 576 F.3d at 734-35 (holding that indictment charged only a violation of the Omnibus Clause, notwithstanding reference in indictment to "retaliation against public officials," because "[t]he language of [the indictment] tracks the statutory language of the omnibus clause of 26 U.S.C. § 7212(a) and states that [defendant's] actions . . . were intended to obstruct the due administration of the code"); ***United States v. Kozak***, 2014 WL 1281916, at *4 (D. Neb. Feb. 7, 2014) (following ***Pansier***).

Cases decided before ***Marinello*** have held that indictments charging multiple corrupt acts in a single count under the Omnibus Clause are not duplicitous so long as those acts "constitute a continuing course of conduct." ***United States v. Armstrong***, 974 F. Supp. 528, 539 (E.D. Va. 1997) (citing ***United States v. Berardi***, 675 F.2d 894, 898 (7th Cir. 1982) (indictment alleging multiple acts of obstruction of justice in violation of 18 U.S.C. § 1503 not duplicitous)); *accord* ***United States v. Daugerdas***, 837 F.3d. 212, 225-26 (2d Cir. 2016) (Omnibus Clause count not duplicitous where it charged multiple corrupt acts relating to a tax shelter that defendant both set up for his clients and for himself); ***United States v. Murphy***, 824 F.3d 1197, 1206 (9th Cir. 2016) (no duplicity because "the nine discrete acts of interference alleged in the indictment merely stated multiple ways of committing the same offense" (cleaned up)); ***United States v. Kamalu***, 298 Fed. App'x 251, 254-55 (4th Cir. 2008) (no prejudicial duplicity in Omnibus Clause count where the indictment "expressly charged [the defendant] with 'engaging in a continuing scheme'"); ***United States v. Willner***, 2007 WL 2963711, at *6-7 (S.D.N.Y. Oct. 11, 2007) (Omnibus Clause count not duplicitous where it "expressly charges a single, continuous, 'endeavor,'" and this allegation was plausible because all the alleged corrupt acts related to the defendant's efforts to improperly exploit a single net operating loss); ***United States v. Toliver***, 972 F. Supp. 1030, 1040 (W.D. Va. 1997) ("multiple acts alleged [in Section 7212(a) count] amount to a single continuous offense" because "[e]ach act was focused on achieving the same objective").

In rejecting claims that multiple-act Omnibus Clause counts are duplicitous, these courts have drawn analogies to two other types of tax charges where multiple criminal

acts can be alleged in a single count if those acts constitute a single continuing scheme: conspiracies to defraud the United States or to commit a particular offense, in violation of 18 U.S.C. § 371, and evasion of tax payments, in violation of 26 U.S.C. § 7201. For instance, in ***Armstrong***, the court, in rejecting a duplicity challenge, observed that "Section 7212(a) is analogous to the general conspiracy statute, 18 U.S.C. § 371, in that both statutes cover a broad range of unlawful conduct. Just as a conspiracy may involve violations of numerous and different laws, a violation of § 7212(a) may also involve violations of several different laws." 974 F. Supp. at 540; *see also* ***Daugerdas***, 837 F.3d at 226 (observing that "it is well established that the allegation in a single count of a conspiracy to commit several crimes is not duplicitous" (cleaned up)). And in ***Kamalu***, the Fourth Circuit rejected a duplicity challenge to a Section 7212(a) count by relying upon ***United States v. Shorter***, 809 F.2d 54 (D.C. Cir. 1987), which held that an indictment charging evasion of tax payment for multiple tax years was not duplicitous because "'two or more acts, each of which would constitute an offense standing alone and which therefore could be charged as separate counts of an indictment, may instead be charged in a single count if those acts could be characterized as part of a single, continuing scheme.'" ***Kamalu***, 298 Fed. App'x at 254 (quoting ***Shorter***, 809 F.2d at 56); Armstrong, 974 F. Supp. at 539-40 (citing ***Shorter***); ***Toliver***, 972 F. Supp. at 1039 (same).[3]

Pre-***Marinello*** cases also have largely rejected claims that indictments charging the Omnibus Clause are multiplicitous because there are other charges in the indictment that are based on some of the same facts as an alleged corrupt act. Courts have held that an indictment is not multiplicitous even though it charges both willfully filing of a false tax return, in violation of 26 U.S.C. § 7206(1), and charges the filing of that same return as a corrupt act in violation of the Omnibus Clause. For instance, ***in United States v. Swanson***, 1997 WL 225446 (4th Cir. 1997), the court applied the familiar test for impermissible multiple punishments established in ***Blockburger v. United States***, 284 U.S. 299 (1932), under which "'the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not,'" and concluded it was "obvious[]" from a statement of their respective elements that Sections 7206(1) and 7212(a) "each . . . require[] proof of facts that the other does not." ***Swanson***, 1997 WL 225446, at *3-4 (quoting ***Blockburger***, 284 U.S. at 304); *see also* ***United States v. Dain***, 258 Fed. App'x 90, 93 (9th Cir. 2007) (no

[3] For further discussion of the unit of prosecution for tax evasion charges, *see supra*, Chapter 8.07[2].

multiplicity because "a false filing violation under § 7206(1) requires a signed writing under penalties of perjury, whereas an obstruction charge under § 7212(a) does not"); ***United States v. Biller***, 2006 WL 2221695, at *4-5 (N.D. W. Va. Aug. 2, 2006) (following ***Swanson***); ***Armstrong***, 974 F. Supp. at 540; *but see* ***United States v. Mathis***, 1997 WL 683648, at *7-8 (S.D. Ohio June 2, 1997) (dismissing Section 7212(a) count as impermissibly multiplicitous of false return counts where the court had stricken as surplusage all the allegations in the 7212(a) count save those relating to the filing of false returns, and reasoning that Congress "did not intend for a violation of Section 7206(1), alone, to be the basis for a Section 7212(a) violation"). Courts have also rejected similar multiplicity claims involving other offenses. *See* ***United States v. Saoud***, 595 Fed. App'x 182, 191 n.6 (4th Cir. 2014) (Section 7212(a) count not multiplicitous of false statement counts under 18 U.S.C. § 1001); ***United States v. McCray***, 1990 WL 138571, at *4-5 (9th Cir. 1990) (same with respect to mailing a threatening communication in violation of 18 U.S.C. § 876); ***United States v. Williams***, 644 F.2d 696, 699 n.14 (8th Cir. 1981) (same with respect to willful filing of a false withholding statement in violation of 26 U.S.C. § 7205).

Marinello did not specifically discuss how its requirement of proof of a nexus to a pending or reasonably foreseeable targeted tax-related proceeding might affect multiplicity and duplicity claims. With regards to multiplicity, however, ***Marinello*** did make clear that its interpretation of the Omnibus Clause was motivated by a concern that, absent these additional requirements of proof, the Omnibus Clause would "transform many, if not all, of [the] misdemeanor provisions [in Title 26] into felonies, making the specific provisions redundant . . . ." 138 S. Ct. at 1107. Consequently, ***Marinello***'s additional requirements of proof of a nexus to a pending or reasonably foreseeable targeted tax-related proceeding can be properly cited to oppose a claim that an Omnibus Clause count is impermissibly multiplicitious of a Title 26 misdemeanor count in the same indictment.

With regards to claims of duplicity, ***Marinello*** said nothing that would disturb the general principle that an indictment may charge in one count that a defendant committed an offense by "one or more specified means." Fed. R. Crim. P. 7(c)(1) (emphasis added); *see also* ***Schad***, 501 U.S. at 631; ***United States v. Miller***, 471 U.S. 130, 136-40 (1985). Nor did ***Marinello***, on its face, disavow earlier cases holding that such a count is not impermissibly duplicitous provided that the acts alleged constitute a single continuous scheme or course of conduct. Consequently, cases holding that the government may

allege multiple acts, each of which would sustain a conviction, in a single count under the Omnibus Clause without necessarily rendering an indictment duplicitous, appear to still be good law following ***Marinello***. *See* **Murphy**, 824 F.3d at 1206; ***Sorennsen***, 801 F.3d at 1237. Prosecutors should bear in mind, however, that ***Marinello***'s requirements of proof of a nexus to a pending or reasonably foreseeable targeted tax-related proceeding are factors that should be taken into consideration in assessing whether a series of acts constitutes a single scheme or course of conduct.

17.05 VENUE

Prior to ***Marinello***, the Ninth Circuit held that venue for a Section 7212(a) prosecution lies in the district in which the defendant committed the corrupt act or acts constituting an endeavor to impede the administration of the Internal Revenue Code, but not in the district where the IRS was carrying out tax-related proceedings targeting the defendant. ***United States v. Marsh***, 144 F.3d 1229 (9th Cir. 1998). Specifically, the Ninth Circuit held that venue for a charge that the defendant violated the Omnibus Clause by filing bogus liens against IRS agents who were criminally investigating the defendant did not lie in the districts where the agents were located, the Northern and Eastern Districts of California, because the defendant filed the liens in Nevada and Washington. ***Id.*** at 1242. This was so, the ***Marsh*** court reasoned, because "the crime of endeavoring to impede the IRS is complete when the endeavor is made. The government did not have to show that its agents abandoned their investigation or even that the agents were anxious about the effect of the liens on their credit. No effect need be proved." ***Ibid.***; *see also* ***United States v. Sorensen***, 2014 WL 585330, at *2 (D. Colo. February 14, 2014) (accepting ***Marsh*** venue rule, but distinguishing ***Marsh*** on the facts because the indictment alleged corrupt endeavors that occurred in part in the District of Colorado); ***United States v. Westbrooks***, 858 F.3d 317, 326-27 (5th Cir. 2017) (venue lied in the Southern District of Texas, even though defendant's business that carried out scheme to defraud was based in North Carolina, because "part of a continuing pattern of obstructive conduct occurred [in the Southern District of Texas]"), *overruled on other grounds by* ***Westbrooks v. United States***, 138 S. Ct. 1323 (2018)

The courts have not yet addressed whether ***Marinello***'s holding that the government must prove a nexus to a targeted tax-related proceeding provides a basis for venue in a district where such a proceeding is pending, in addition to any district where a corrupt endeavor took place. But cases discussing venue for violations of 18 U.S.C. §§ 1503 and

1512 prior to the 1988 enactment of 18 U.S.C. § 1512(i),[4] which provides for venue in the district of both the proceeding and the act, may be helpful. Prior to the enactment of § 1512(i), several circuits had held that "a prosecution under section 1503 may be brought in the district where the judicial proceeding that the accused sought to obstruct is pending, even if the obstructing acts took place in a different district." ***United States v. Frederick***, 835 F.2d 1211, 1213-14 (7th Cir. 1987) (collecting cases so interpreting § 1503, and so holding with respect to § 1512 on the theory that the assault on a grand jury witness that formed the basis of the charge was "not just as an assault upon an individual victim but as an assault upon the grand jury sitting in the [district of prosecution] and upon the judicial process"); *but see* ***United States v. Swann***, 441 F.2d 1053, 1054-55 (D.C. Cir. 1971) (venue is proper only in district in which obstructive act occurred because "[t]he offense was begun, carried out, and completed" in the district where the defendant assaulted a grand jury witness, and "could not be altered by anything that might happen thereafter" in the different district where the grand jury was sitting). Prosecutors who wish to base venue upon where an IRS administrative action is pending should carefully consider both the law of their circuit and the practicable aspects of proving in what judicial district (or districts) a particular IRS proceeding is "pending."

For a further discussion of venue rules, please see Section 6.00, *supra*.

17.06 STATUTE OF LIMITATIONS

The general rule under 26 U.S.C. § 6531 is that tax offenses are subject to a three-year statute of limitations period. However, Section 6531(6) provides a six-year statute of limitations for "the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States)." In ***United States v. Workinger***, 90 F.3d 1409 (9th Cir. 1996), the defense argued that Section 6531(6) does not apply to the Omnibus Clause, because the parenthetical language limits the scope of the six-year limitations exception to offenses involving intimidation of officers and employees of the United States. 90 F.3d at 1412-13. The Ninth Circuit, after analyzing the language and structure of the statute, rejected this argument and held that "the parenthetical language in § 6531(6) is descriptive, not limiting." ***Workinger***, 90 F.3d at 1414. *Accord* ***United States v. Adams***, 955 F.3d 238, 251 (2d Cir. 2020); ***United States v. Giambalvo***, 810 F.3d 1086, 1092-93 (8th Cir. 2016);

[4] *See* Pub. L. No. 100-690, § 7029(a), 102 Stat. 4397, 4398 (1988).

United States v. Kelly, 147 F.3d 172, 177 (2d Cir. 1998); ***United States v. Wilson***, 118 F.3d 228, 236 (4th Cir. 1997).

Accordingly, the statute of limitations for an omnibus clause offense will run six years from the last act that constitutes a corrupt endeavor to impede and impair the due administration of the tax code. 26 U.S.C. § 6531(6); ***Adams***, 955 F.3d at 251 ("Violations of 26 U.S.C. § 7212(a) are subject to a six-year limitations period that does not start to run until the last act in furtherance of the scheme"); ***United States v. Murphy***, 824 F.3d 1197, 1206 (9th Cir. 2016) (rejecting the defendant's "argument that earlier acts of interference should immunize [him] from liability for a crime occurring within the limitations period"); ***Wilson***, 118 F.3d at 236. For a full discussion of the statute of limitation in criminal tax offenses, see Section 7.00, *supra*.

17.07 SENTENCING GUIDELINES

The Sentencing Guidelines, following a November 1993 amendment, direct a sentencing court to apply either the Tax Evasion guideline (Section 2T1.1) or the Obstruction of Justice guideline (Section 2J1.2) to offenses under the Omnibus Clause. USSG App. A, App. C, Amend. 496.[5] The court is to use the guideline provision "most appropriate for the offense conduct charged in the count of which the defendant was convicted." USSG App A, intro. comment.

Use of the Tax Evasion guideline may be more appropriate where the defendant's obstructive conduct was part of an effort to evade taxes or where measurable tax loss was intended by the obstruction, as both the Sixth and Tenth Circuits have concluded.

In ***United States v. Neilson***, 721 F.3d 1185 (10th Cir. 2013), the Tenth Circuit held that the 2T1.1 guideline was most appropriate on the facts of the case. The ***Neilson*** court began its analysis by "consider[ing] what type of conduct is covered by each of the possible guidelines." 721 F.3d at 1188. The court enumerated the particular offenses covered by the

[5] Some cases decided before the November 1993 amendment applied the 2J1.2 obstruction guideline, reasoning that the 2J1.2 guideline was more applicable than other guidelines besides 2T1.1. *See*, *e.g.*, ***United States v. Koff***, 43 F.3d 417, 419 (9th Cir. 1994) (comparing 2J1.2 to the now-repealed 2T1.5 guideline); ***United States v. Van Krieken***, 39 F.3d 227, 231 (9th Cir. 1994) (same); ***United States v. Dykstra***, 991 F.2d 450, 453-54 (8th Cir. 1993) (comparing 2J1.2 and USSG § 2A2.4). These cases, however, have no enduring precedential value because they did not undertake the comparison mandated by the November 1993 amendment.

2T1.1 and 2J1.2 guidelines, characterizing the 2T1.1 offenses as "target[ing] both tax evasion and various other illegal and fraudulent actions involving taxation," and the 2J1.2 offenses as "cover[ing] a broad range of conduct that generally involves interfering with the administration of the justice system." ***Ibid.*** The court then "[c]ompar[ed] the [defendant's] stipulated conduct to the conduct covered under each guideline," and concluded that "Section 2T1.1 was the most appropriate guideline" because defendant's "conduct overall had more to do with taxation." ***Ibid.*** As the court explained, "[t]he actions [defendant] stipulated to—using third parties to transfer property to trusts, reporting different financial information to the IRS than he reported to lenders, mailing frivolous letters seeking to 'redeem' the value of his birth certificate, declaring that he was not subject to the laws of the United States, harassing IRS employees, and seeking to satisfy his tax debts through 'Bills of Exchange' rather than payment—are more akin to the other types of tax offenses covered under Section 2T1.1 than to the other types of obstruction of justice covered under Section 2J1.2." ***Id.*** at 1188-89. The court, moreover, concluded that it was of no moment that the defendant's "admitted conduct does not squarely meet every element of the tax evasion statute"; it sufficed that his conduct was "akin to tax evasion and the other taxation offenses punishable under Section 2T1.1." ***Id.*** at 1189.

In ***United States v. Ballard***, 850 F.3d 292 (6th Cir. 2017), the Sixth Circuit likewise held that the 2T1.1 guideline was the most appropriate guideline on the facts of the case. The ***Ballard*** defendant argued that his violation of the Omnibus Clause was most akin to the offenses covered by the 2J1.2 obstruction guideline because "all that was actually charged was [a] . . . lie to IRS investigators, and he had always intended, he claimed, to pay his taxes once he had the money." ***Id.*** at 294. The court, however, disagreed, concluding that the defendant's offense was "just the sort of 'Willful Failure to . . . Supply Information[ ] or Pay Tax' that § 2T1.1 is built for." ***Id.*** at 295 (quoting USSG § 2T1.1 (alteration in original)). This was so, the ***Ballard*** court explained, because the defendant lied in order "[t]o throw off the investigation of his outstanding debt for taxes." ***Ibid.*** (internal quotations omitted). Thus, the defendant's "offense conduct could have been charged under other statutes punishable under § 2T1.1," including tax evasion. ***Ibid.***

Marinello did not address sentencing issues under the Omnibus Clause, although its requirement that the defendant's obstructive conduct have a nexus to a "targeted governmental tax-related proceeding[]," 138 S. Ct. at 1104, may make it more common for violations of the Omnibus Clause to be sentenced under the 2T1.1 guideline. However, the

general obstruction of justice guideline (Section 2J1.2) may still be the most appropriate sentencing guideline to be applied to some Section 7212(a) violations, particularly where no tax loss was intended by the defendant's conduct. *Cf.* ***United States v. Giambalvo***, 810 F.3d 1086, 1099 (8th Cir. 2016) (no need to seek financial benefit to act "corruptly" under § 7212(a)).

In ***United States v. Nagle***, 2021 WL 3825190 (11th Cir. Aug. 27, 2021), the Eleventh Circuit, in a post-***Marinello*** appeal, affirmed the district court's decision to use the § 2T1.1 rather than the § 2J1.2 guideline to calculate the sentencing range for a § 7212(a) offense. ***Nagle*** reasoned that § 2T1.1 was the most appropriate guideline because the "[t]he offense conduct charged in Nagle's indictment recounts Nagle's numerous and varied attempts to avoid paying his taxes by, among other things, failing to file returns or pay taxes and submitting false or fraudulent documents and statements." ***Id.*** at *2. This, ***Nagle*** reasoned, made the offense similar to the offenses sentenced under § 2T1.1, such as "tax evasion; the willful failure to file returns, supply information, or pay taxes; and filing fraudulent or false returns, statements, or other documents." ***Ibid.*** In contrast, ***Nagle*** explained that Section 2J1.2 "is 'frequently part of an effort to avoid punishment for an offense that the defendant has committed or to assist another person to escape punishment for an offense.'" ***Ibid.*** (quoting USSG § 2J1.2, comment. (backg'd.)).

For a more complete discussion of sentencing issues in criminal tax cases see Chapter 43.00, *infra*.