

## **Chapter 10.00**

### **FRAUD OFFENSES**

#### **Introduction to Fraud Instructions**

(current through January 1, 2019)

The pattern instructions cover fraud offenses with five elements instructions:

Instruction 10.01 Mail Fraud (18 U.S.C. § 1341);

Instruction 10.02 Wire Fraud (18 U.S.C. § 1343);

Instruction 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1));

Instruction 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)); and

Instruction 10.05 Health Care Fraud (18 U.S.C. § 1347).

In addition, Instruction 10.04 covers the good faith defense.

The elements of mail and wire fraud are similar except for the jurisdictional elements. The Committee drafted separate instructions for the two offenses as the most efficient way to reflect the different jurisdictional bases. Beyond the jurisdictional bases, the mail and wire fraud offenses are read in tandem and case law on the two is largely interchangeable. See *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) (“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.”); *United States v. Daniel*, 329 F.3d 480, 486 n.1 (6th Cir. 2003); *Hofstetter v. Fletcher*, 905 F.2d 897, 902 (6th Cir. 1988) (“This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.”) (citations omitted).

The crime of bank fraud is distinguishable from mail and wire fraud. The two numbered clauses in the bank fraud statute have “separate meanings.” *Loughrin v. United States*, 134 S. Ct. 2384, 2391 (2014). Instructions 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)) reflect these different clauses.

These instructions do not cover fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

## 10.01 MAIL FRAUD (18 U.S.C. § 1341)

(1) Count \_\_\_ of the indictment charges the defendant with mail fraud. For you to find the defendant guilty of mail fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to obtain money or property, that is \_\_\_\_\_  
[describe scheme from indictment];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used the mail] [caused another to use the mail] in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A “scheme to defraud” includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term “false or fraudulent pretenses, representations or promises” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is “knowingly” done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is “material” if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with “intent to defraud” means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(F) To “cause” the mail to be used is to do an act with knowledge that the use of the mail will follow in the ordinary course of business or where such use can reasonably be foreseen.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the material transmitted by mail was itself false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud] [that someone relied on the misrepresentation or false statement] [that the defendant obtained money or property for his own benefit].]

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

### **Use Note**

If the prosecution is based on a violation of § 1341 that relates to a major disaster or affects a financial institution, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If the prosecution is based on a violation of § 1341 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

Throughout the instruction, the word “mail” should be replaced by the term “private or commercial interstate carrier” if the facts warrant.

Paragraph (1)(D) should be amended to include the receipt of mail if the facts warrant.

In paragraph (2)(D), the word “person” should be replaced with entity or corporation or agency as the facts warrant.

The provisions of paragraph (3) should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

Brackets indicate options for the court. Brackets with italics are notes to the court.

## Committee Commentary Instruction 10.01

(current through January 1, 2019)

The mail fraud statute provides:

18 U.S.C. § 1341 Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.

This instruction does not cover mail fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

To define the elements of mail fraud, the Committee relied primarily on *Neder v. United States*, 527 U.S.1 (1999); *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999) and *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). The mail fraud and wire fraud statutes are the same except for the jurisdictional element. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) (“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.”); *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013) (*citing* *United States v. Bibby*, 752 F.2d 1116, 1126 (6th Cir. 1985)); *Hofstetter v. Fletcher*, 905 F.2d 897, 902 (6th Cir. 1988) (“This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.”)

The specific language used in paragraph (1) of the instruction is drawn from two cases. Paragraphs (1)(A), (1)(C) and (1)(D) are based on *United States v. Gold Unlimited, Inc.*, *supra* at

478-79. Paragraph (1)(B), which covers materiality, is based on *Neder v. United States*, *supra*.

In paragraph (1)(A), the statement that the scheme must be a scheme “to obtain money or property” is based on *Cleveland v. United States*, 531 U.S. 12 (2000) and *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to “a scheme to defraud, or for obtaining money or property,” it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

We reaffirm our reading of § 1341 in *McNally*. . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities. . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

*Cleveland*, 531 U.S. at 25-26.

In paragraph (1)(A) the reference to participation is based on *United States v. Kennedy*, 714 F.3d 951, 957 (6th Cir. 2013).

The definition of “scheme to defraud” in paragraph (2)(A) is based on *United States v. Daniel*, 329 F.3d 480, 485-86 (6th Cir. 2003), *citing* *United States v. Gold Unlimited, Inc.*, *supra* at 479. In the instruction, the words “by deception” were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, “The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a ‘reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.’” *Daniel*, 329 F.3d at 486 (brackets and some internal quotation marks omitted), *quoting* *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of “false or fraudulent pretenses, representations or promises” in paragraph (2)(B) is based on the definition of “false or fraudulent pretenses” in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* *United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984) and *United States v. O’Boyle*, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *Kennedy*, 714 F.3d at 958 (“The government met the mail- and wire-fraud statutes’ intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.”) (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of “knowingly” in paragraph (2)(C) is drawn from the jury instructions given in *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of “material” in paragraph (2)(D) is based on *Neder v. United States*, *supra* at 16, *quoting* *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

The “intent to defraud” definition in paragraph (2)(E) is a restatement of the language in *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997). The court quoted this definition with approval in *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003) (*quoting* *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998)).

The definition of “cause” in paragraph (2)(F) is based on *Frost*, 125 F.3d at 354, *citing* *United States v. Oldfield*, 859 F.2d 392, 400 (6th Cir. 1988).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after First Circuit Instruction 4.12; Fifth Circuit Instruction 2.59; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant. The final bracketed provision, that the government need not prove that the defendant obtained money or property for his own benefit, is based on *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013).

To define the mens rea for mail fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc.*, 177 F.3d at 478-79, 485, 488. *See also* *United States v. Reaume*, 338 F.3d 577, 580 (6th Cir. 2003) (bank fraud requires “intent to defraud”); *United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001) (same). In other cases, the court has referred to the mens rea as the “specific” intent to defraud, *see, e.g., Daniel*, 329 F.3d at 487; *Frost*, 125 F.3d at 354 (“A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud . . . .”); *United States v. Smith*, 39 F.3d 119, 121-22 (6th Cir. 1994). The instruction omits the word “specific.” *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08 Inferring Required Mental State states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance explains one approach to proving knowledge.

In *Neder v. United States*, *supra* at 25, the Court held that materiality is an element of a “scheme or artifice to defraud” under mail, wire and bank fraud. Although this element is not found in a “natural reading” of the statute, the court relied on the rule of construction “ ‘[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.’ ” 527 U.S. at 21. At common law, the word “fraud” required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate “materiality.”

The definition of materiality is as follows: “In general, a false statement is material if it has ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.’” *Id.* at 16, *quoting Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective (“however gullible”) standard or an objective (“person of ordinary prudence”) standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.*, *United States v. Jamieson*, 427 F.3d 394, 415-16 (6th Cir. 2005); *Berent v. Kemper Corp.*, 973 F.2d 1291, 1294 (6th Cir. 1992); *Blount Fin. Servs., Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979); and *United States v. Bohn*, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see Norman v. United States*, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: “the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice.”). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, “There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension.”). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that “[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence.” *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the “‘ordinary prudence’ language was invoked to . . . affirm [a] conviction . . . .” *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Tucker v. United States*, 224 F. 833, 837 (6th Cir. 1915); *O'Hara v. United States*, 129 F. 551, 555 (6th Cir. 1904).

Jurisdiction for a mail fraud conviction requires the defendant to deposit, receive, or cause to be deposited any matter or thing to be sent or delivered by the United States Postal Service or any private or commercial interstate carrier for the purpose of executing a scheme to defraud. 18 U.S.C. § 1341.

As to the required connection between the scheme to defraud or obtain property and the use of the mails, the Supreme Court has stated: “The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . .” *Schmuck v. United States*, 489 U.S. 705, 710 (1989). The Court explained: “To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be ‘incident to an essential part

of the scheme,' or 'a step in [the] plot.'" *Schmuck*, 489 U.S. at 710 (internal citations and quotation marks omitted). The Court then stated: "The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." *Id.* at 715.

A mail fraud conviction can be based on mailings that were legally required. As the court explains, "Further, 'the mailings may be innocent or even legally necessary.'" *Frost*, 125 F.3d at 354, *quoting* *United States v. Oldfield*, 859 F.2d 392, 400 (6th Cir. 1988), *in turn quoting* *United States v. Decastris*, 798 F.2d 261, 263 (7th Cir. 1986).

It is not necessary that the defendant actually mail the material. *See* 18 U.S.C. § 1341 (mail fraud committed where defendant causes the mails to be used). The Supreme Court has explained that one causes a mailing when "one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." *Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *accord*, *Frost*, 125 F.3d at 354 (mailing need only be reasonably foreseeable).

A pyramid scheme is a scheme to defraud. *See United States v. Gold Unlimited, Inc.*, *supra* at 484-85.

If the prosecution is based on a violation of § 1341 that relates to a major disaster or affects a financial institution, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the major disaster or effect on a financial institution must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B). *See also* 18 U.S.C. § 2326 (maximum penalty increased for violation in connection with telemarketing).

It is also a crime to conspire to violate § 1341. Conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft a separate instruction for conspiracy to commit mail fraud because an instruction may be compiled by combining the mail fraud instruction with the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. *See United States v. Rogers*, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit mail fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (§ 371) Basic Elements should be used as is, but if the conspiracy is charged based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.



## 10.02 WIRE FRAUD (18 U.S.C. § 1343)

(1) Count \_\_\_ of the indictment charges the defendant with wire fraud. For you to find the defendant guilty of wire fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly participated in] [devised] [intended to devise] a scheme to defraud in order to obtain money or property, that is \_\_\_\_\_ [*describe scheme from indictment*];

(B) Second, that the scheme included a material misrepresentation or concealment of a material fact;

(C) Third, that the defendant had the intent to defraud; and

(D) Fourth, that the defendant [used wire, radio or television communications] [caused another to use wire, radio or television communications] in interstate [foreign] commerce in furtherance of the scheme.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A “scheme to defraud” includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

(B) The term “false or fraudulent pretenses, representations or promises” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(C) An act is “knowingly” done if done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment is “material” if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(E) To act with “intent to defraud” means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(F) To “cause” wire, radio or television communications to be used is to do an act with knowledge that the use of the communications will follow in the ordinary course of business or where such use can reasonably be foreseen.

(G) The term “interstate [foreign] commerce” includes wire, radio or television communications which crossed a state line.

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] or [that the material transmitted by wire, radio or television communications was itself false or fraudulent] or [that the alleged scheme actually succeeded in defrauding anyone] or [that the use of the wire, radio or television communications] was intended as the specific or exclusive means of accomplishing the alleged fraud] or [that someone relied on the misrepresentation or false statement] or [that the defendant obtained money or property for his own benefit].]

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

#### **Use Note**

If the prosecution is based on a violation of § 1343 that relates to a major disaster or affects a financial institution, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If the prosecution is based on a violation of § 1343 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

In paragraph (2)(D), the word “person” should be replaced with entity or corporation or agency as the facts warrant.

The provisions of paragraph (3) should be used only if relevant to the case.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

Brackets indicate options for the court. Brackets with italics are notes to the court.

The wire fraud statute provides:

18 U.S.C. § 1343 Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.

This instruction does not cover wire fraud based on a deprivation of the intangible right to honest services as provided in 18 U.S.C. § 1346.

The wire fraud statute was modeled after the mail fraud statute, and therefore the same analysis should be used for both. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013) (*citing* *United States v. Bibby*, 752 F.2d 1116, 1126 (6th Cir. 1985)). “The wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.” *Hofstetter v. Fletcher*, 905 F.2d 897, 902 (6th Cir. 1988). The only difference in the two offenses is the jurisdictional element.

To define the elements of wire fraud, the Committee relied primarily on *Neder v. United States*, 527 U.S.1 (1999); *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999) and *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). In the context of wire fraud, the Sixth Circuit identified the elements in *United States v. Smith*, 39 F.3d 119, 122 (6th Cir. 1994) and *United States v. Ames Sintering Company*, 927 F.2d 232, 234 (6th Cir. 1990).

The specific language of the instruction is drawn from three sources. Paragraphs (1)(A) and (1)(C) are based on *United States v. Gold Unlimited, Inc.*, *supra* at 478. Paragraph (1)(B), which describes materiality, is based on the language from *Neder v. United States*, *supra*. Paragraph (1)(D) is based on *United States v. Smith*, *supra* at 122.

In paragraph (1)(A), the statement that the “scheme to defraud” must be a “scheme to defraud in order to obtain money or property” is based on *Cleveland v. United States*, 531 U.S. 12 (2000) and *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, the Court noted that based on the disjunctive phrasing of the mail fraud statute, which refers to “a scheme to defraud, or for obtaining money or property,” it was arguable that the two phrases should be construed

independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

We reaffirm our reading of § 1341 in *McNally*. . . . Were the Government correct that the second phrase of § 1341 defines a separate offense, the statute would appear to arm federal prosecutors with power to police false statements in an enormous range of submissions to state and local authorities . . . . [W]e decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear.

*Cleveland*, 531 U.S. at 25-26.

In paragraph (1)(A) the reference to participation is based on *United States v. Kennedy*, 714 F.3d 951, 957 (6th Cir. 2013).

In paragraph (1)(D), the phrase “wire, radio or television communications” is drawn from the statute. Some Sixth Circuit cases use the term “electronic communications,” *see, e.g.*, *United States v. Daniel*, 329 F.3d 480, 489 (6th Cir. 2003); *VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000), *overruled on other grounds*, *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S.Ct. 2131 (2008); *United States v. Smith*, *supra* at 122.

The definition of “scheme to defraud” in paragraph (2)(A) is based on *United States v. Daniel*, *supra* at 485-86, *citing* *Gold Unlimited, Inc.*, 177 F.3d at 479. In the instruction, the words “by deception” were omitted because that requirement is adequately covered in paragraph (2)(E) defining intent to defraud. In *Daniel*, the court further states, “The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a ‘reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.’” *Daniel*, 329 F.3d at 486 (6th Cir. 2003) (brackets and some internal quotation marks omitted), *quoting* *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979).

The definition of “false or fraudulent pretenses, representations or promises” in paragraph (2)(B) is based on the definition of “false or fraudulent pretenses” in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* *United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984) and *United States v. O’Boyle*, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *Kennedy*, 714 F.3d at 958 (“The government met the mail- and wire-fraud statutes’ intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.”) (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of “knowingly” in paragraph (2)(C) is drawn from the jury instructions given in *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984).

The definition of “material” in paragraph (2)(D) is based on *Neder v. United States*, *supra* at 16, *quoting* *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

The “intent to defraud” definition in paragraph (2)(E) is a restatement of the language in *Frost*, 125 F.3d at 371. The court quoted this definition with approval in *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* *United States v. Daniel*, *supra* at 487, *quoting* *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998).

The “cause” language in paragraph (2)(F) is drawn from *United States v. Frost*, 125 F.3d 346, 354 (6th Cir. 1997), *citing* *United States v. Oldfield*, 859 F.2d 392, 400 (6th Cir. 1988).

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after the language used in First Circuit Instruction 4.12; Fifth Circuit Instruction 2.61; Eighth Circuit Instruction 6.18; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant. The final bracketed provision, that the government need not prove that the defendant obtained money or property for his own benefit, is based on *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013).

To define the mens rea for wire fraud, some authority requires that the defendant knowingly devised or intended to devise a scheme to defraud, and that the defendant acted with the intent to defraud. The court endorses these terms several times in *Gold Unlimited, Inc.*, 177 F.3d at 478-79, 485, 488. *See also* *United States v. Reaume*, 338 F.3d 577, 580 (6th Cir. 2003) (bank fraud requires “intent to defraud”); *United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001) (same). In other cases, the court has referred to the mens rea as the “specific” intent to defraud, *see, e.g.*, *United States v. Daniel*, *supra* at 487 (6th Cir. 2003); *United States v. Frost*, *supra* at 354 (“A defendant does not commit mail fraud unless he possesses the specific intent to deceive or defraud...”); *United States v. Smith*, *supra* at 121-22. The instruction omits the word “specific.” *See also* Committee Commentary to Instruction 2.07 Specific Intent.

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In *Neder v. United States*, *supra*, the Court held that materiality is an element of a “scheme or artifice to defraud” under mail, wire and bank fraud. Although this element is not found in a “natural reading” of the statute, the court relied on the rule of construction “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” 527 U.S. at 21. At common law, the word “fraud” required proof of materiality. Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate “materiality.”

The definition of materiality is as follows: “In general, a false statement is material if it

has ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.’” *Id.* at 16, *quoting Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective (“however gullible”) standard or an objective (“person of ordinary prudence”) standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.*, *United States v. Jamieson*, 427 F.3d 394, 415-16 (6th Cir. 2005); *Berent v. Kemper Corp.*, 973 F.2d 1291, 1294 (6th Cir. 1992); *Blount Fin. Servs., Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979); and *United States v. Bohn*, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* *Norman v. United States*, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: “the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice.”). In *Frost, supra*, the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *Frost*, 125 F.3d at 371 (affirming instruction which provided, “There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension.”). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that “[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence.” *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the “‘ordinary prudence’ language was invoked to . . . affirm [a] conviction . . .” *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Tucker v. United States*, 224 F. 833, 837 (6th Cir. 1915); *O’Hara v. United States*, 129 F. 551, 555 (6th Cir. 1904).

As to the required connection between the scheme to defraud and the use of the wires, in the context of mail fraud the Supreme Court has stated: “The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . .” *Schmuck v. United States*, 489 U.S. 705, 710 (1989). The Court explained: “To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be ‘incident to an essential part of the scheme,’ or ‘a step in [the] plot.’” *Id.* at 710-11 (internal citations and quotation marks omitted). The Court then stated: “The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud.” *Id.* at 715.

A pyramid scheme is a scheme to defraud. *See Gold Unlimited, Inc.*, 177 F.3d at 484-85.

If the prosecution is based on a violation of § 1343 that relates to a major disaster or affects a financial institution, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the major disaster or effect on a financial institution must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B). *See also* 18 U.S.C. § 2326 (maximum penalty increased for violation in connection with telemarketing).

It is also a crime to conspire to violate § 1343. Conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft a separate instruction for conspiracy to commit wire fraud because an instruction may be compiled by combining the wire fraud instruction with the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. *See United States v. Rogers*, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit wire fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (§ 371) Basic Elements should be used as is, but if the conspiracy is charged under § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

### 10.03A BANK FRAUD – Scheme to Defraud a Bank (18 U.S.C. § 1344(1))

(1) Count \_\_\_ of the indictment charges the defendant with bank fraud. For you to find the defendant guilty of bank fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly executed] [attempted to execute] a scheme to defraud, that is, a scheme to deceive [cheat] a bank [financial institution] and to deprive it of something of value.

(B) Second, that the scheme [related to a material fact] [included a material misrepresentation or concealment of a material fact].

(C) Third, that the defendant had the intent to deceive [cheat] the bank [financial institution] and to deprive it of something of value.

(D) Fourth, that the bank [financial institution] was federally insured.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A “scheme” means any deliberate plan of action or course of conduct.

(B) [The term “misrepresentation or concealment” means any false statements or assertions that concern a material fact of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.]

(C) An act is done “knowingly” if it is done voluntarily, and not because of mistake or some other innocent reason.

(D) A misrepresentation or concealment of fact is “material” if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

[(3) It is not necessary that the government prove [*insert from options below as appropriate*]].

(A) [that the bank [financial institution] suffered financial harm].

(B) [that the defendant intended to cause the bank financial harm].

(C) [that the alleged scheme actually succeeded].

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then



you must find the defendant not guilty of this charge.

### Use Note

The two numbered clauses in the bank fraud statute, § 1344(1) and 1344(2), have “separate meanings.” *Loughrin v. United States*, 134 S. Ct. 2384, 2391 (2014). The bank fraud instructions reflect the two clauses in separate instructions: Inst. 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)).

If the prosecution is based on a violation of § 1344 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

As to the terms “bank” or financial institution,” the instruction uses the term “bank” as the default and then offers the term “financial institution” in brackets as an option. The statute defining the offense uses the term “bank” in the title of the offense but then uses the term “financial institution” in the text. See 18 U.S.C. § 1344. The term “financial institution” is broader than the term “bank.” See 18 U.S.C. § 20. The Committee recommends that the court use the term raised by the facts of the case.

Paragraph (1)(D) (that the bank [financial institution] was federally insured) fits most cases but the statute defining “financial institution,” 18 U.S.C. § 20, includes other definitions for financial institution beyond institutions that are federally insured. If the definition of “financial institution” is an issue in the case, the court should consult the list of definitions for “financial institution” in 18 U.S.C. § 20.

The definition of “misrepresentation or concealment” in paragraph (2)(B) should be given only when the bracketed option including those terms in paragraph (1)(B) is used.

The provisions of paragraph (3) stating items the government need not prove are bracketed and should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

Brackets indicate options for the court; bracketed italics are notes to the court.

**Committee Commentary Instruction 10.03A**  
(current through January 1, 2019)

This instruction covers Bank Fraud Scheme to Defraud a Bank under 18 U.S.C. § 1344(1).

Section 1344 provides:

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.

The two numbered clauses in the bank fraud statute have separate meanings. See *Loughrin v. United States*, 134 S. Ct. 2384 (2014) at 2390 (describing the statute as having “two entirely distinct statutory phrases”) and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have “separate meanings.”) The bank fraud instructions reflect these two clauses in separate instructions: Inst. 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)). In the wake of *Loughrin*, the Sixth Circuit has not ruled on whether these two clauses state different offenses or just different means of committing a single offense. In the absence of authority from the Sixth Circuit on whether these two clauses are multiple crimes or multiple means, the court should consider whether to give a specific unanimity instruction or use a special verdict form.

In paragraph (1), the elements are based on the statute and case law. In paragraph (1)(A), the first phrase tracks the statutory language with one exception. The statute refers to a “scheme or artifice,” but the instruction uses the term “scheme” and omits “artifice” based on a plain-English approach and for consistency with the other fraud instructions. The last part of paragraph (1)(A) is based on *Shaw v. United States*, 137 S. Ct. 462 (2016) (holding that a knowing execution of a scheme to defraud a bank was established under § 1344(1) when the defendant made false statements to the bank leading it to release money from another customer’s deposit account). In *Shaw*, the Court stated, “The parties agree, as do we, that the scheme must be one to deceive the bank *and* deprive it of something of value.” (emphasis in original). *Id.* at 469. The term “cheat” is offered as a synonym for “deceive” based on its repeated use in *Shaw*. See also *United States v. Reaume*, 338 F.3d 577, 580 (bank fraud requires “intent to defraud”) and *United States v. Hogleund*, 178 F.3d 410, 412-13 (6th Cir. 1999) (bank fraud under § 1344(1) requires intent to defraud).

In paragraph (1)(B), the language describing the materiality element is based on *Neder v. United States*, 527 U.S.1, 20-23 (1999) and *Field v. Mans*, 516 U.S. 59 (1995).

In paragraph (1)(C), the element that the defendant had the intent to deceive [cheat] the bank and to deprive it of something of value, is based on *Shaw v. United States*, 137 S. Ct. 462, 469 (2016), quoted above. *See also* *Loughrin v. United States*, 134 S. Ct. 2384, 2389-90 (2014) (“[T]he *first* clause of § 1344, as all agree, includes the requirement that a defendant intend to ‘defraud a financial institution’; indeed, that is § 1344(1)’s whole sum and substance.”).

In paragraph (1)(D), the element that the bank was federally insured is based on the statutory definition of financial institution as one which is insured by, *inter alia*, the F.D.I.C. or the National Credit Union Share Insurance Fund, *see* 18 U.S.C. § 20(1) and (2). The Sixth Circuit has held that it is an element of bank fraud that the financial institution is federally insured. *See, e.g.*, *United States v. Reaume*, 338 F.3d 577, 580 (6th Cir. 2003); *United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001); *United States v. Hoglund*, 178 F.3d 410, 413 (6th Cir. 1999).

The definition of “scheme” in paragraph (2)(A) is based on *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997) (construing scheme to defraud under mail fraud statute).

In paragraph (2)(B), the definition of “misrepresentation or concealment” is based on *United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984) and *United States v. O’Boyle*, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013) (construing mail and wire fraud) (“The government met the mail- and wire-fraud statutes’ intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.”) (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of “knowingly” in paragraph (2)(C) (“An act is done knowingly if it is done voluntarily, and not because of mistake or some other innocent reason.”) is drawn from the jury instructions given in *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984) with one modification. The full definition of knowingly in *McGuire* stated, “An act is ‘knowingly’ done if done voluntarily *and intentionally*, and not because of mistake or some other innocent reason.” (emphasis added). This instruction on bank fraud deletes the italicized words referring to intent based on the *Shaw* Court’s discussion distinguishing knowingly and purposefully and concluding that the correct mens rea is knowingly. *See Shaw*, 137 S. Ct. at 468 (“[T]he statute itself makes criminal the the ‘*knowin[g]* execut[ion of] a scheme ... to defraud.”). Another possible definition of knowingly is, “An act is done knowingly if it is done with awareness, understanding or consciousness.” *See Arthur Andersen v. United States*, 125 S.Ct. 2129, 2135-36 (2005) (“‘[K]nowledge’ and ‘knowingly’ are normally associated with awareness, understanding, or consciousness.”) (citations omitted) (construing term “knowingly” in 18 U.S.C. § 1512).

The definition of “material” in paragraph (2)(D) is based on *Neder*, 527 U.S. at 16, quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

Paragraph (3) lists some but not all items the government is not required to prove. These provisions identifying items the government need not prove are bracketed and should be used only if relevant.

In paragraph (3)(A), the statement that the government need not prove that the bank suffered financial harm is based on *Shaw*, 137 S. Ct. at 467 (“We have found no case from this Court interpreting the bank fraud statute as requiring that the victim bank ultimately suffer financial harm . . . .”); *see also* *United States v. Hoglund*, 178 F.3d 410, 412 (6th Cir. 1999) (approving an instruction stating “it is not necessary for the government to prove anyone lost money.”).

In paragraph (3)(B), the statement that the government need not prove that the defendant intended to cause the bank financial harm is based on *Shaw*, 137 S. Ct. at 469 (“[T]he Government need not prove that the defendant intended that the bank ultimately suffer monetary loss.”)

In paragraph (3)(C), the statement that the government need not prove that the alleged scheme actually succeeded is based on *Loughrin v. United States*, 134 S. Ct. at 2395 n. 9 *citing Neder*, 527 U.S. at 25 (stating that gravamen of § 1344 is the scheme and damage is not required); *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (stating that scheme to defraud under wire fraud statute was complete when scheme was executed; success of scheme was not required); and *United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006) (“Of course, the mail fraud statute does not require an actual loss of property because success of the scheme is not an element of the offense.”).

In cases decided before *Shaw*, the Sixth Circuit held that the government need not prove that defendant’s conduct exposed the bank to a risk of loss as long as the defendant intended to expose the bank to a risk of loss, and that the government need not prove that the defendant benefitted personally from the scheme to defraud the bank. *See United States v. Hoglund*, 178 F.3d 410, 413 (6th Cir. 1999) and *United States v. Knipp*, 963 F.2d 839, 846 (6th Cir. 1992), *citing United States v. Goldblatt*, 813 F.2d 619, 624 (3rd Cir. 1987). These cases should be consulted until the Sixth Circuit has the opportunity to reaffirm, modify, or repudiate its precedent in light of *Shaw*.

Generally, the bank fraud statute was modeled on and is similar to the mail and wire fraud statutes. *Neder*, 527 U.S. at 20-21 (1999). However, in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Court distinguished the bank fraud statute from the mail fraud statute. The mail fraud statute sets forth just one offense. *Loughrin* at 2391, *citing McNally v. United States*, 483 U.S. 350, 358-59 (1987). In contrast, the bank fraud statute includes two clauses with separate meanings: scheming to defraud a bank under § 1344(1), and scheming to obtain bank property by means of false or fraudulent representations under § 1344(2). *See Loughrin* at 2390 (describing the statute as having “two entirely distinct statutory phrases”) and 2391 (describing § 1344’s two clauses as having separate numbers and punctuation indicating that they have “separate meanings.”)

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In *Neder*, 527 U.S. at 4, the Court held that materiality is an element of the bank fraud offense. Although this element is not found in a “natural reading” of the statute, the Court relied on the rule of construction that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” *Id.* at 21 (citations omitted). At common law, the words “fraud” and “defraud” required proof of materiality. *Id.* at 22-23. Likewise, the terms “false pretenses” and “false representations” are common-law terms of art with meanings that imply elements that the common law defined them to include. *Neder*, 527 U.S. at 23 n.6, *quoting* *Field v. Mans*, 516 U.S. 59, 69 (1995). Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate the common-law element of “materiality” into the crime of bank fraud.

The definition of materiality is as follows: “In general, a false statement is material if it has ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.’” *Id.* at 16, *quoting* *United States v. Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective (“however gullible”) standard or an objective (“person of ordinary prudence”) standard, in most cases the objective standard provided in paragraph (2)(C) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.*, *United States v. Jamieson*, 427 F.3d 394, 415-16 (6th Cir. 2005); *Berent v. Kemper Corp.*, 973 F.2d 1291, 1294 (6th Cir. 1992); *Blount Fin. Servs., Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979); and *United States v. Bohn*, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* *Norman v. United States*, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: “the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice.”). In *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997), the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *See id.* (affirming instruction which provided, “There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension.”). However, none of these cases involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that “[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence.” *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive

because in *Jamieson*, the “‘ordinary prudence’ language was invoked to . . . affirm [a] conviction . . . .” *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Tucker v. United States*, 224 F. 833, 837 (6th Cir. 1915); *O'Hara v. United States*, 129 F. 551, 555 (6th Cir. 1904).

Check kiting constitutes a “scheme to defraud” under the bank fraud statute. *United States v. Stone*, 954 F.2d 1187, 1190 (6th Cir. 1992).

It is also a crime to attempt or conspire to violate § 1344. *See* 18 U.S.C. § 1344 (attempt); §§ 371 and 1349 (conspiracy). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled by using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. *See United States v. Rogers*, 769 F.3d 372, 377 (6th Cir. 2014) (listing elements of conspiracy under § 1349 without including overt act). Thus if the conspiracy to commit fraud charge is based on § 371, Instruction 3.01A Conspiracy to Commit an Offense Basic Elements should be used as is, but if the charge is based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

**10.03B BANK FRAUD – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2))**

(1) Count \_\_\_ of the indictment charges the defendant with bank fraud. For you to find the defendant guilty of bank fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant [knowingly executed] [attempted to execute] a scheme to obtain any of the money, funds, or property [owned by] [under the control of] a bank [financial institution] by means of false or fraudulent pretenses, representations or promises.

(B) Second, that the scheme [related to a material fact] [included a material misrepresentation or concealment of a material fact].

(C) [Third, that the defendant had the intent to deceive or cheat someone for the purpose of either causing a financial loss to another or bringing about a financial gain to himself [to another person].]

(D) Fourth, that the bank [financial institution] was federally insured.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term “false or fraudulent pretenses, representations or promises” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

(B) An act is done “knowingly” if it is done voluntarily, and not because of mistake or some other innocent reason.

(C) A misrepresentation or concealment of fact is “material” if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

[(3) It is not necessary that the government prove [*insert from options below as appropriate*]].

(A) [that the bank [financial institution] suffered a financial loss.]

(B) [that defendant intended to defraud a bank [financial institution].]

(C) [that the defendant’s scheme created a risk of financial loss to the bank [financial institution].]

(D) [that the false or fraudulent pretenses, representations, or promises were made to a bank [financial institution].]

(E) [that the alleged scheme actually succeeded.]

(F) [that someone relied upon the misrepresentation.]

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of the elements, then you must find the defendant not guilty of this charge.

### Use Note

In paragraph (1)(C), the element that the defendant had the intent to deceive or cheat for the purpose of causing a financial loss or a financial gain is bracketed to indicate some conflicting authority. The authority is detailed below in the Commentary.

The two numbered clauses in the bank fraud statute, § 1344(1) and 1344(2), have separate meanings. *Loughrin v. United States*, 134 S. Ct. 2384, 2391 (2014). The bank fraud instructions reflect the two clauses in separate instructions: Inst. 10.03A Bank Fraud – Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud – Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)).

If the prosecution is based on a violation of § 1344 in connection with telemarketing, the maximum penalty is increased under 18 U.S.C. § 2326. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the telemarketing must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).

As to the terms “bank” or financial institution,” the instruction generally uses the term “bank” as the default and then offers the term “financial institution” in brackets as an option. The statute defining the offense uses the term “bank” in the title of the offense but then uses the term “financial institution” in the two numbered clauses of its text. See 18 U.S.C. § 1344. The term “financial institution” is broader than the term “bank.” See 18 U.S.C. § 20. The Committee recommends that the court use the term raised by the facts of the case.

In paragraph (1)(A), some of the types of property listed in § 1344(2), i.e., “credits, assets, securities,” were omitted because they are adequately covered by the simpler phrase “money, funds, or property.” If a case raises issues about this definition, substitute the more detailed statutory language.



Paragraph (1)(D) (that the bank [financial institution] was federally insured) fits most cases but the statute defining “financial institution,” 18 U.S.C. § 20, includes other definitions for financial institution beyond institutions that are federally insured. If the definition of “financial institution” is an issue in the case, the court should consult the list of definitions for “financial institution” in 18 U.S.C. § 20.

The provisions of paragraph (3) stating items the government need not prove are bracketed and should be used only if relevant.

See also Instruction 2.09 Deliberate Ignorance.

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

Brackets indicate options for the court; bracketed italics are notes to the court.

### **Committee Commentary Instruction 10.03B**

(current through January 1, 2019)

This instruction covers Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations under 18 U.S.C. § 1344(2).

Section 1344 provides:

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both.

The two numbered clauses in the bank fraud statute have separate meanings. See *Loughrin v. United States*, 134 S. Ct. 2384 (2014) at 2390 (describing the statute as having “two entirely distinct statutory phrases”) and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have “separate meanings.”) The bank fraud instructions reflect these two clauses in separate instructions: Inst. 10.03A Bank Fraud Scheme to Defraud a Bank (18 U.S.C. § 1344(1)) and Inst. 10.03B Bank Fraud Scheme to Obtain Bank Property by Means of False or Fraudulent Representations (18 U.S.C. § 1344(2)). In the wake of *Loughrin*, the Sixth Circuit has not ruled on whether these two clauses state different offenses or different means of committing a single offense. In the absence of authority from the Sixth Circuit on whether these two clauses are multiple crimes or multiple means, the court should

consider whether to give a specific unanimity instruction or use a special verdict form.

In paragraph (1), the elements are based on the statute and case law. Paragraph (1)(A) tracks the statutory language with two exceptions. First, the statute refers to a “scheme or artifice,” but the instruction uses the term “scheme” and omits “artifice” based on a plain-English approach and for consistency with the other fraud instructions. Second, some of the types of property listed in § 1344(2) of the statute, *i.e.*, “credits, assets, securities,” were omitted because they are adequately covered by the simpler phrase “money, funds, or property.” If a case raises issues about this definition, the court should consider using the more detailed statutory language.

The statutory phrase “by means of” in paragraph (1)(A) was defined by the Court in *Loughrin v. United States*, *supra*. In *Loughrin*, the defendant stole checks and forged them in order to buy merchandise at Target. He then immediately returned the merchandise for cash. He argued that there was no evidence he intended to defraud a bank, only evidence that he intended to defraud Target. The Supreme Court held that the government need not prove the defendant intended to defraud a bank, and that § 1344(2)’s “by means of” language is satisfied when “the defendant’s false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control.” *Loughrin*, 134 S. Ct. at 2393.

In paragraph (1)(B), the language describing the materiality element is based on *Neder v. United States*, 527 U.S.1, 20-23 (1999) and *Field v. Mans*, 516 U.S. 59 (1995).

In paragraph (1)(C), the element that the defendant had the intent to deceive or cheat for the purpose of causing a financial loss or a financial gain is based on *Loughrin v. United States*, 134 S. Ct. 2384 (2014) and *United States v. Kerley*, 784 F.3d 327, 343 (6th Cir. 2015). This element is bracketed to indicate some conflicting authority on what kind of intent is an element under § 1344(2). In *Loughrin*, the Court states repeatedly that § 1344(2) requires no “intent to defraud a bank.” *See, e.g.*, 134 S. Ct. at 2387 (stating “The question presented is whether the Government must prove that a defendant charged with violating that provision intended to defraud a bank.”); *see also id.* at 2388 and 2389. While *Loughrin* makes clear that the defendant need not intend to defraud a bank, whether the defendant must nonetheless intend to defraud someone is uncertain. The *Loughrin* Court also states:

We begin with common ground. All parties agree, as do we and the Courts of Appeals, that § 1344(2) requires that a defendant “knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice” with at least two elements. First, the clause requires that the defendant intend “to obtain any of the moneys ... or other property owned by, or under the custody or control of, a financial institution.” (We refer to that element, more briefly, as intent “to obtain bank property.”)

*Loughrin*, 134 S. Ct. at 2388-2389 (citations omitted). This passage supports the conclusion that while the defendant must intend to obtain money or property under the control of a bank, he need not intend to defraud anyone. In *United States v. Kerley*, 784 F.3d 327, 343 (6th Cir. 2015), decided in the wake of *Loughrin*, the Sixth Circuit states:

The elements of bank fraud under 18 U.S.C. § 1344 are: “(1) the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) the defendant had an intent to defraud, and (3) the financial institution was insured by the FDIC.” *United States v. Dowlen*, 514 Fed. Appx. 559, 563 (6th Cir.2013) (citing *United States v. Everett*, 270 F.3d 986, 989 (6th Cir.2001)). “Intent to defraud means to act with intent to deceive or cheat for the purpose of causing a financial loss to another or bringing about a financial gain to oneself.” *United States v. Olds*, 309 Fed. Appx. 967, 972 (6th Cir.2009).

This passage supports the conclusion that intent to defraud remains an element in the wake of *Loughrin*.

Other circuits’ pattern instructions reflect the confusion in interpreting *Loughrin*. For example, in the Fifth Circuit, pattern instruction 2.58B Bank Fraud 18 U.S.C. § 1344(2) does not include intent to defraud as an element and explains in commentary, “The *Loughrin* Court made clear that, for offenses charged under § 1344(2), the Government need prove neither intent to defraud nor that the defendant placed the financial institution at risk. See *id.*, 134 S. Ct. at 2387, 2395 n.9. Accordingly, these elements have not been included in this instruction.” (However, the Fifth Circuit instruction does include an “intent to deceive” as part of the definition of scheme or artifice.) Meanwhile, in the Ninth Circuit, the pattern instruction retains intent to defraud as element. See Ninth Circuit Instruction 8.127 Bank Fraud Scheme to Defraud by False Promises (18 U.S.C. § 1344(2)). In view of the conflicting authority in the Sixth Circuit, the Committee decided to bracket the element and alert the court and parties to the question.

In paragraph (1)(D), the element that the bank was federally insured is based on the statutory definition of financial institution as one which is insured by, *inter alia*, the F.D.I.C. or the National Credit Union Share Insurance Fund, *see* 18 U.S.C. § 20(1) and (2). The Sixth Circuit has held that it is an element of bank fraud that the financial institution is federally insured. *See, e.g.*, *United States v. Reaume*, 338 F.3d 577, 580 (6th Cir. 2003); *United States v. Everett*, 270 F.3d 986, 989 (6th Cir. 2001); *United States v. Hoglund*, 178 F.3d 410, 413 (6th Cir. 1999).

In paragraph (2)(A), the definition of “false or fraudulent pretenses, representations, or promises” is based on the Sixth Circuit’s approval of similar definitions, *see United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984) and *United States v. O’Boyle*, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *United States v. Kennedy*, 714 F.3d 951, 958 (6th Cir. 2013) (construing mail and wire fraud) (“The government met the mail- and wire-fraud statutes’ intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.”) (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

The definition of “knowingly” in paragraph (2)(B) (“An act is done knowingly if it is done voluntarily, and not because of mistake or some other innocent reason.”) is drawn from the jury instructions given in *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984) with one modification. The full definition of knowingly in *McGuire* stated, “An act is ‘knowingly’

done if done voluntarily *and intentionally*, and not because of mistake or some other innocent reason.” (emphasis added). This instruction on bank fraud deletes the italicized words referring to intent based on the Court’s discussion of bank fraud under § 1344(1) in *Shaw v. United States*, 137 S. Ct. 462 (2016). In *Shaw*, the Court distinguished the terms knowingly and purposefully and concluded that the correct mens rea under § 1344(1) was knowingly. See *Shaw*, 137 S. Ct. at 468 (“[T]he statute itself makes criminal the the ‘*knowin[g]* execut[ion of] a scheme ... to defraud.”). Another possible definition of knowingly is, “An act is done knowingly if it is done with awareness, understanding or consciousness.” See *Arthur Andersen v. United States*, 125 S.Ct. 2129, 2135-36 (2005) (“‘[K]nowledge’ and ‘knowingly’ are normally associated with awareness, understanding, or consciousness.”) (citations omitted) (construing term “knowingly” in 18 U.S.C. § 1512).

The definition of “material” in paragraph (2)(C) is based on *Neder*, 527 U.S. at 16, quoting *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

Paragraph (3) lists some but not all items the government is not required to prove. These provisions are bracketed and should be used only if relevant. They are based on *Loughrin v. United States*, 134 S. Ct. 2384 (2014).

The statements in paragraphs (3)(A) and (3)(C), that the government need not prove that the bank suffered a financial loss and need not prove that the defendant’s scheme created a risk of financial loss to the bank, are based on *Loughrin*, 134 S. Ct. at 2395 n. 9 (explaining that language of § 1344(2) is broad and “appears calculated to avoid entangling courts in technical issues of banking law” about who suffers the loss) (citation omitted).

In paragraph (3)(B), the statement that the government need not prove that the defendant intended to defraud a bank is based on *Loughrin*, 134 S. Ct. at 2387 and at 2388 n. 2, citing *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001).

In paragraph (3)(D), the statement that the government need not prove that the false or fraudulent pretenses, representations, or promises were made to a bank, is based on *Loughrin*, 134 S. Ct. at 2393 & n. 6.

In paragraph (3)(E), the statement that the government need not prove that the alleged scheme actually succeeded is based on *Loughrin*, 134 S. Ct. at 2393-94 quoting *Neder*, 527 U.S. at 25 (“And we have long made clear that such failure is irrelevant in a bank fraud case, because § 1344 punishes not ‘completed frauds’ but instead fraudulent ‘scheme[s].’”).

In paragraph (3)(F), the statement that the government need not prove that someone relied upon the misrepresentation is based on *Loughrin*, 134 S. Ct. at 2395 n. 9 (referring to “our prior holding that . . . the [bank fraud] offense . . . does not require ‘damage’ or ‘reliance’”) (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)).

Generally, the bank fraud statute was modeled on and is similar to the mail and wire fraud statutes. *Neder*, 527 U.S. at 20-21 (1999). However, in *Loughrin v. United States*, 134 S. Ct.

2384 (2014), the Court distinguished the bank fraud statute from the mail fraud statute. The mail fraud statute sets forth just one offense. *Loughrin* at 2391, *citing* *McNally v. United States*, 483 U.S. 350, 358-59 (1987). In contrast, the bank fraud statute includes two clauses with separate meanings: scheming to defraud a bank under § 1344(1), and scheming to obtain bank property by means of false or fraudulent representations under § 1344(2). *See Loughrin*, 134 S. Ct. at 2390 (describing the statute as having “two entirely distinct statutory phrases”) and 2391 (describing § 1344's two clauses as having separate numbers and punctuation indicating that they have “separate meanings.”)

Intent and knowledge need not be proved directly. Pattern Instruction 2.08, Inferring Required Mental State, states this principle and should be given in appropriate cases. In addition, Pattern Instruction 2.09 Deliberate Ignorance describes one approach to proving knowledge.

In *Neder*, 527 U.S. at 4, the Court held that materiality is an element of the bank fraud offense. Although this element is not found in a “natural reading” of the statute, the Court relied on the rule of construction that “[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.” *Id.* at 21 (citations omitted). At common law, the words “fraud” and “defraud” required proof of materiality. *Id.* at 22-23. Likewise, the terms “false pretenses” and “false representations” are common-law terms of art with meanings that imply elements that the common law defined them to include. *Neder*, 527 U.S. at 23 n.6, *quoting* *Field v. Mans*, 516 U.S. 59, 69 (1995). Because Congress did not indicate otherwise, the Court presumed that Congress intended to incorporate the common-law element of “materiality” into the crime of bank fraud.

The definition of materiality is as follows: “In general, a false statement is material if it has ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed.’” *Neder*, 527 U.S. at 16, *quoting* *United States v. Gaudin*, 515 U.S. at 509.

As to whether the fraud must be capable of deceiving persons based on a subjective (“however gullible”) standard or an objective (“person of ordinary prudence”) standard, in most cases the objective standard provided in paragraph (2)(C) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g.,* *United States v. Jamieson*, 427 F.3d 394, 415-16 (6th Cir. 2005); *Berent v. Kemper Corp.*, 973 F.2d 1291, 1294 (6th Cir. 1992); *Blount Fin. Servs., Inc. v. Walter E. Heller and Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979); and *United States v. Bohn*, 2008 WL 2332226 at 9, 2008 U.S. App. LEXIS 12474 at 26 (6th Cir. 2008) (unpublished). *But see* *Norman v. United States*, 100 F.2d 905, 907 (6th Cir. 1939) (using a subjective standard, explaining that: “the lack of guile on the part of those generally solicited may itself point with persuasion to the fraudulent character of the artifice.”). In *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997), the court affirmed an instruction with an objective standard, but the issue of objective-vs.-subjective standard was not raised. *See id.* (affirming instruction which provided, “There must be proof of either a misrepresentation, false statement, or omission calculated to deceive a person of ordinary prudence and comprehension.”). However, none of these cases

involved vulnerable victims who were targeted by the defendant specifically because of their vulnerability. If this situation arises, the parties should address whether the appropriate standard is objective or subjective based on the facts of the case.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc), the court adopted a subjective standard, concluding that “[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence.” *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the “‘ordinary prudence’ language was invoked to . . . affirm [a] conviction . . . .” *Svete* at 1168-69. The subjective standard articulated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Tucker v. United States*, 224 F. 833, 837 (6th Cir. 1915); *O'Hara v. United States*, 129 F. 551, 555 (6th Cir. 1904).

It is also a crime to attempt or conspire to violate § 1344. *See* 18 U.S.C. § 1344 (attempt); §§ 371 and 1349 (conspiracy). If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled by using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. *See United States v. Rogers*, 769 F.3d 372, 377 (6th Cir. 2014) (listing elements of conspiracy under § 1349 without including overt act). Thus if the conspiracy to commit fraud charge is based on § 371, Instruction 3.01A Conspiracy to Commit an Offense Basic Elements should be used as is, but if the charge is based on § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

## 10.04 FRAUD – GOOD FAITH DEFENSE

(1) The good faith of the defendant is a complete defense to the charge of \_\_\_\_\_ contained in [Count \_\_\_\_ of] the indictment because good faith on the part of the defendant is, simply, inconsistent with an intent to defraud.

(2) A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an honest error in management does not rise to the level of criminal conduct.

(3) A defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.

(4) While the term “good faith” has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of malice or ill will, and an intention to avoid taking unfair advantage of another.

(5) The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the government’s burden to prove to you, beyond a reasonable doubt, that the defendant acted with an intent to defraud.

(6) If the evidence in this case leaves you with a reasonable doubt as to whether the defendant acted with an intent to defraud or in good faith, you must acquit the defendant.

### Use Note

Brackets indicate options for the court.

### Committee Commentary Instruction 10.04

(current through January 1, 2019)

This instruction is based on Kevin F. O’Malley et al., *Federal Jury Practice and Instructions* (5th ed. 2000), § 19.06 *The Good Faith Defense Explained*.

Several Sixth Circuit cases endorse instructions including good faith provisions. *See* *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997) (endorsing an instruction that stated, *inter alia*, “good faith on the part of a defendant is inconsistent with an intent to defraud.”); *United States v. McGuire*, 744 F.2d 1197, 1200-02 (6th Cir. 1984); *United States v. Stull*, 743 F.2d 439, 445-46 (6th Cir. 1984).

In *Stull*, 743 F.2d at 446, the court approved a good faith instruction that stated, *inter alia*, “Good faith does not include the defendant’s belief or faith that the venture will eventually meet his or her expectations.” This provision can be added to the instruction if relevant in the case.

The good faith instruction should be given if there is any evidence at all to support the charge. *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984), *quoting* *United States v. Curry*, 681 F.2d 406, 416 (5th Cir. 1982).



## 10.05 HEALTH CARE FRAUD (18 U.S.C. § 1347)

(1) Count \_\_\_ of the indictment charges the defendant with health care fraud. For you to find the defendant guilty of health care fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant knowingly and willfully [executed] [attempted to execute] a scheme [*insert at least one of two options below*]

--[to defraud any health care benefit program]

--[to obtain, by means of false or fraudulent pretenses, representations, or promises any of the money or property [owned by] [in the control of] a health care benefit program]

in connection with the [delivery of] [payment for] health care benefits, items, or services.

(B) Second, that the scheme [related to a material fact] [included a material misrepresentation or concealment of a material fact].

(C) Third, that the defendant had the intent to defraud.

(2) Now I will give you more detailed instructions on some of these terms.

(A) A “health care benefit program” is any [public or private] [plan or contract], affecting interstate [foreign] commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [between another country and the United States]. The government need only prove that the health care program itself either engaged in interstate [foreign] commerce or that its activity affected interstate [foreign] commerce to any degree.

[(B) A “scheme to defraud” includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.]

[(C) The term “false or fraudulent pretenses, representations, or promises” means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.]

(D) An act is done “knowingly and willfully” if it is done voluntarily and intentionally, and not because of mistake or some other innocent reason.

(E) A misrepresentation [concealment] is “material” if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

(F) To act with “intent to defraud” means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself [to another person].

(3) [The government need not prove [that the defendant had actual knowledge of the statute or specific intent to commit a violation of the statute] [that the health care benefit program suffered any financial loss] [that the defendant engaged in interstate [foreign] commerce or that the acts of the defendant affected interstate commerce]].

(4) If you are convinced that the government has proved all of the elements, say so by returning a guilty verdict on the charge. If you have a reasonable doubt about any of the elements, then you must find the defendant not guilty of this charge.

#### **Use Note**

If the prosecution is based on a violation of § 1347 that results in serious bodily injury or death, the maximum penalty is increased; the court should modify the instruction and consider using special verdict forms like those included with Instructions 14.07(A) and (B).

If there is any evidence at all of good faith, the court should refer to Instruction 10.04 Fraud Good Faith Defense.

In paragraph (2)(A) defining health care benefit program, the instruction presumes that the commerce involved is interstate commerce, and the bracketed term “foreign” should be substituted if warranted by the facts.

The bracketed provisions in paragraph (3) should be used only if relevant.

Brackets indicate options for the court. Bracketed italics are notes to the court.

#### **Committee Commentary** (current through January 1, 2019)

This instruction covers health care fraud under 18 U.S.C. § 1347. That statute provides:

§ 1347. Health care fraud

(a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice--

(1) to defraud any health care benefit program; or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program,

in connection with the delivery of or payment for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both. If the violation results in serious bodily injury (as defined in section 1365 of this title), such person shall be fined under this title or imprisoned not more than 20 years, or both; and if the violation results in death, such person shall be fined under this title, or imprisoned for any term of years or for life, or both.

(b) With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

In paragraph (1), the elements are based on a combination of the statute and case law. The two options in paragraph (1)(A) track the statutory language of § 1347(a)(1) and (a)(2) with one exception: The statute refers to a “scheme or artifice,” while the instruction uses the term “scheme” and omits “artifice” based on a plain-English approach and for consistency with the other fraud instructions.

Paragraph (1)(A) includes a mens rea of “knowingly and willfully.” This phrase is drawn verbatim from the statute. Case law in the Sixth Circuit generally uses the term “knowingly” and omits the term “willfully,” *see* *United States v. Semrau*, 693 F.3d 510, 524 (6th Cir. 2012); *United States v. Jones*, 641 F.3d 706, 710 (6th Cir. 2011); *United States v. Martinez*, 588 F.3d 301, 314 (6th Cir. 2009); *United States v. Hunt*, 521 F.3d 636, 645 (6th Cir. 2008); and *United States v. Raithatha*, 385 F.3d 1013, 1021 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1136 (2005). Other circuits’ pattern instructions are evenly split on whether “knowingly” alone is sufficient or “willfully” should be used as well. *Compare* Seventh Circuit and Eleventh Circuit (“willfully” is used) *with* Third Circuit and Eighth Circuit (“willfully” is not used). The instruction tracks the statutory language.

In paragraph (1)(B), the materiality element is based on *Neder v. United States*, 527 U.S. 1 (1999). The term “materiality” does not appear in the health care fraud statute. The statute was adopted in 1996. Three years later, in 1999, the Court construed three other fraud statutes that similarly did not include the term “materiality,” and the Court held that materiality was an element of the crime of fraud. The Court’s theory was that Congress meant to adopt the well established common law meaning of the term fraud, which included materiality. Based on that rationale, materiality is an element of health care fraud as well.

In paragraph (1)(C), the intent to defraud element is based on *United States v. Semrau*, 693 F.3d 510, 524 (6th Cir. 2012); *United States v. Jones*, 641 F.3d 706, 710 (6th Cir. 2011); *United States v. Martinez*, 588 F.3d 301, 314 (6th Cir. 2009); *United States v. Hunt*, 521 F.3d 636, 645 (6th Cir. 2008); and *United States v. Raithatha*, 385 F.3d 1013, 1021 (6th Cir. 2004), *vacated on other grounds*, 543 U.S. 1136 (2005).

In paragraph (2)(A), the definition of health care benefit program is based on 18 U.S.C. § 24(b). That statute defines “health care benefit program” as one that “affect[s] commerce.” The instruction adds the terms “interstate [foreign]” based on *United States v. Klein*, 543 F.3d 206, 211 n.2 (5th Cir. 2008). The phrasing of paragraph (2)(A) is drawn from Seventh Circuit Pattern Instruction 18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/INTERSTATE COMMERCE DEFINITION.

In bracketed paragraph (2)(B), the definition of “scheme to defraud” is based on *United States v. Daniel*, 329 F.3d 480, 485-86 (6th Cir. 2003), *citing* *United States v. Gold Unlimited, Inc.*, *supra* at 479. In the instruction, the words “by deception” were omitted because that requirement is adequately covered in paragraph (2)(F) defining intent to defraud. In *Daniel*, the court further states, “The scheme to defraud element required under 18 U.S.C. § 1341 is not defined according to a technical standard. The standard is a ‘reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.’” *Daniel*, 329 F.3d at 486 (brackets and some internal quotation marks omitted), *quoting* *United States v. Van Dyke*, 605 F.2d 220, 225 (6th Cir. 1979).

In bracketed paragraph (2)(C), the definition of “false or fraudulent pretenses, representations or promises” is based on the definition of “false or fraudulent pretenses” in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(F). The Sixth Circuit has approved similar definitions, *see* *United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984) and *United States v. O’Boyle*, 680 F.2d 34, 36 (6th Cir. 1982). The reference to reckless indifference to the truth is further supported by *Kennedy*, 714 F.3d at 958 (“The government met the mail- and wire-fraud statutes’ intent requirements through proof that K. Kennedy was reckless in his disregard for the truth of the statements that he made to victims to obtain their money.”) (citations omitted). *See also* Instruction 2.09 Deliberate Ignorance.

In paragraph (2)(D), for the definition of “knowingly and willfully,” neither the Supreme Court nor the Sixth Circuit has discussed that phrase in the context of health care fraud. In the absence of specific authority, the Committee relied on the definition of “knowingly” approved for the crime of fraud under § 1005 in *United States v. McGuire*, 744 F.2d 1197, 1201 (6th Cir. 1984). It is clear that the term willfully in the health care fraud statute does not require knowledge of this law. *See* § 1347(b) (“[w]ith respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.”). The instruction adopts the same definition of “knowingly and willfully” as the instructions in Chapter 14 False Statements to the United States Government. The statute for those instructions, § 1001, uses the same phrase, “knowingly and willfully.”

In paragraph (2)(E), the definition of “material” is based on *Neder v. United States*, 527 U.S. 1, 16 (1999), *quoting* *United States v. Gaudin*, 515 U.S. 506, 509 (1995).

In paragraph (2)(F) the definition of “intent to defraud” is a restatement of the language in *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997). The court quoted this definition with approval in *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007). For other phrasing of the definition, *see* *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003) (*quoting* *United States v. DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998)).

Bracketed paragraph (3) lists some but not all items the government is not required to prove. These provisions should be used only if relevant. The first bracketed item, that the government need not prove the defendant’s actual knowledge or specific intent, is based on § 1347(b). The second bracketed item, that the government need not prove that the health care benefit program suffered any loss, is based on *United States v. Davis*, 490 F.3d 541, 547 (6th Cir. 2007). The third bracketed item (that for the jurisdictional element, the government need not prove that the defendant engaged in interstate commerce or that the defendant’s acts affected interstate commerce) is based on Seventh Circuit Pattern Instruction 18 U.S.C. § 1347 HEALTH CARE BENEFIT PROGRAM/INTERSTATE COMMERCE DEFINITION.

The Use Note counseling the court on when to give Instruction 10.04 Fraud – Good Faith Defense in health care fraud prosecutions is based on *United States v. Semrau*, 693 F.3d 510, 528 (6th Cir. 2012).

It is also a crime to attempt or conspire to violate § 1347. Attempt can be charged under 18 U.S.C. § 1344; conspiracy can be charged under either 18 U.S.C. §§ 371 or 1349. The Committee did not draft separate instructions for these crimes. If the charge is based on attempt, an instruction may be compiled by combining this instruction with the instructions in Chapter 5 Attempts. If the charge is based on conspiracy, an instruction may be compiled by using the instructions in Chapter 3 Conspiracy with one caveat. Conspiracies under § 371 require an overt act whereas conspiracies under § 1349 do not require an overt act. *United States v. Rogers*, 769 F.3d 372, 379-82 (6th Cir. 2014). Thus if the conspiracy to commit health care fraud is charged under § 371, Instruction 3.01A Conspiracy to Commit an Offense (18 U.S.C. § 371) – Basic Elements should be used as is, but if the conspiracy is charged under § 1349, Instruction 3.01A should be modified to omit paragraph (2)(C) on overt acts. All other references to overt acts should be deleted as well.

If the prosecution is based on a violation of § 1347 that results in serious bodily injury or death, the maximum penalty is increased. Because the jury must unanimously agree on any fact (other than a prior conviction) that increases the maximum penalty, the serious bodily injury or death must be proved to the jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In this situation, the Committee recommends that the court give an instruction like Instruction 14.07(A) or (B) and use a special verdict form like those following Instructions 14.07(A) and (B).