Chapter 10.00

FRAUD OFFENSES

Introduction to Fraud Instructions
(current through December 31, 2007)

The pattern instructions cover three fraud offenses with elements instructions:

Instruction 10.01 Mail Fraud (18 U.S.C. § 1341);
Instruction 10.02 Wire Fraud (18 U.S.C. § 1343); and
Instruction 10.03 Bank Fraud (18 U.S.C. § 1344).

In addition, Instruction 10.04 Fraud – Good Faith Defense is included to use in conjunction with the fraud instructions.

The elements of mail, wire and bank fraud are similar except for the jurisdictional elements. The Committee drafted separate instructions for the three offenses as the most efficient way to reflect the different jurisdictional bases. Beyond the jurisdictional bases, the mail, wire and bank fraud offenses are read in tandem and case law on the three 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. McAuliffe, 490 F.3d 526, 532 n.3 (6th Cir. 2007) ("The bank, mail and wire fraud statutes all employ identical 'scheme to defraud' language and thus are to be interpreted *in pari materia*.") (citations omitted); 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); Neder v. United States, 527 U.S. 1, 20-21 (1999) (bank fraud statute was modeled on and is similar to the mail and wire fraud statutes).

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.

Chapter 10.00

FRAUD OFFENSES

Table of Instructions

10.01 MAIL FRAUD (18 U.S.C. § 1341)

(1) The defendant is charged with the crime of 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].]

(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

Brackets indicate options for the court.

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.

Committee Commentary Instruction 10.01
(current through December 31, 2007)

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 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 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 other circuits' pattern instructions, including the Seventh Circuit instruction on the elements of mail fraud ("defendant ... [devised] [or] [participated in] the scheme"); Eleventh Circuit Instruction 50.1 ("defendant ... devised or participated in a scheme...") and First Circuit Instruction 4.12 ("defendant's ... participation in this scheme...."). The Seventh Circuit instruction is presumably based on United States v. Wilson, 506 F.2d 1252, 1258 (7th Cir. 1974), where the court affirmed an instruction stating that "the Government must prove beyond a reasonable doubt that defendants or any one or more of them participated in a scheme to defraud."

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). *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 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.

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); Berendt 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); and United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979). 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.

Outside the Sixth Circuit, there is a split of authority on this issue. In United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996), the court adopts an objective standard while noting a circuit split on the question. The court stated, "The 'person of ordinary prudence' standard is an *objective standard* not directly tied to the experiences of a specific person or persons." *Id. Accord,* United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997)("The objective reference to 'persons of ordinary prudence or comprehension' assists in determining whether the accused's conduct was 'calculated to deceive.'") In describing the circuit split, the Eleventh Circuit in *Brown* cites two cases that hold that fraud can even be found where only the "most gullible" person would be deceived. *Brown,* 79 F.3d at 1557, *citing* U.S. v. Brien, 617 F.2d 299, 311 (1st Cir. 1980); U.S. v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). The Eleventh Circuit further discusses the appropriate standard, without deciding the question, in United States v. Yeager, 331 F.3d 1216, 1221-24 (11th Cir. 2003). A law review article summarizes the debate among the circuits and offers insights and solutions, *see* Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 Colum. L. Rev. 795 (1999).

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.

10.02 WIRE FRAUD (18 U.S.C. § 1343)

(1) The defendant is charged with the crime of 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].]

(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

Brackets indicate options for the court.

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

In paragraph (2)(D), the bracketed sentence should be given if the court decides to use the objective standard for the definition of materiality; this issue is discussed in detail *infra* in the Committee Commentary.

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.

Committee Commentary Instruction 10.02
(current through December 31, 2007)

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). "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 base.

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)(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); 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). *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.

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); Berendt 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); and United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979). 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.

Outside the Sixth Circuit, there is a split of authority on this issue. In United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996), the court adopts an objective standard while noting a circuit split on the question. The court stated, "The 'person of ordinary prudence' standard is an *objective standard* not directly tied to the experiences of a specific person or persons." *Id. Accord,* United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997)("The objective reference to 'persons of ordinary prudence or comprehension' assists in determining whether the accused's conduct was 'calculated to deceive.'") In describing the circuit split, the Eleventh Circuit in *Brown* cites two cases that hold that fraud can even be found where only the "most gullible" person would be deceived. *Brown,* 79 F.3d at 1557, *citing* U.S. v. Brien, 617 F.2d 299, 311 (1st Cir. 1980); U.S. v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). The Eleventh Circuit further discusses the appropriate standard, without deciding the question, in United States v. Yeager, 331 F.3d 1216, 1221-24 (11th Cir. 2003). A law review article summarizes the debate among the circuits and offers insights and solutions, *see* Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 Colum. L. Rev. 795 (1999).

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.

In paragraph (1)(A) the reference to participation is based on the Seventh Circuit instruction on the elements of mail fraud, which includes the phrase "[or] [participated in] the scheme" and on Eleventh Circuit Instruction 50.1, which includes the phrase "devised or participated in a scheme." The Seventh Circuit instruction is presumably based on United States v. Wilson, 506 F.2d 1252, 1258 (7th Cir. 1974), where the court affirmed an instruction stating that "the Government must prove beyond a reasonable doubt that defendants or any one or more of them participated in a scheme to defraud."

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

10.03 BANK FRAUD (18 U.S.C. § 1344)

(1) The defendant is charged with the crime of 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 a financial institution][to obtain money or other property owned by or in the control of a 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 defraud; and

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

(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].

(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 alleged scheme actually succeeded in defrauding anyone] [that someone relied on the misrepresentation or false statement] [that the

defendant benefitted personally from the scheme to defraud the financial institution] [that the financial institution suffered a loss].]

(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

Brackets indicate options for the court.

In paragraph (1)(A), some of the types of property listed in § (2) of the bank fraud statute, *i.e.*, "funds, credits, assets, securities," were omitted because they are adequately covered by the simpler phrase "money or other property."

In paragraph (1)(B), use language in the first bracket for prosecutions based solely on § 1344(1); use language in the second bracket for prosecutions based solely on § 1344(2); use language in both brackets if the prosecution is based on both sections.

Paragraph (1)(D) fits most cases but a particular definition of financial institution may be selected from the list in 18 U.S.C. § 20 to fit the facts of each case.

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

In paragraph (2)(D), the bracketed sentence should be given if the court decides to use the objective standard for the definition of materiality; this issue is discussed in detail *infra* in the Committee Commentary.

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.

Committee Commentary Instruction 10.03
(current through December 31, 2007)

The elements of bank fraud are defined in Neder v. United States, 527 U.S.1 (1999); United States v. Everett, 270 F.3d 986, 989 (6th Cir. 2001); and United States v. Hoglund, 178

F.3d 410, 412-13 (6th Cir. 1999). The specific language in paragraphs (1)(A), (1)(C), and (1)(D) is drawn from *Everett*, 270 F.3d at 989. The language in paragraph (1)(B) describing materiality is based on *Neder*, 527 U.S. at 16.

In paragraph (1)(A), some of the types of property listed in § (2) of the bank fraud statute, *i.e.*, "funds, credits, assets, securities," were omitted because they are adequately covered by the simpler phrase "money or other property."

In paragraph (1)(D), the term "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 court has held that it is an element of bank fraud that the financial institution be federally insured. *See, e.g.*, United States v. Reaume, 338 F.3d 577, 580 (6th Cir. 2003); *Everett*, 270 F.3d at 989; *Hoglund*, 178 F.3d at 413.

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., 177 F.3d 472, 479 (6th Cir. 1999). 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.'" United States v. Daniel, *supra* 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 4.14 Bank 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). *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*, 527 U.S. 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).

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 based on United States v. Everett, *supra* at 991; and First Circuit Instruction 4.12; Fifth Circuit Instruction 2.61; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant.

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. As noted in the Introduction to the fraud instructions, the mail, wire and bank fraud offenses are read in tandem and case law on the three 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. McAuliffe, 490 F.3d 526, 532 n.3 (6th Cir. 2007) ("The bank, mail and wire fraud statutes all employ identical 'scheme to defraud' language and thus are to be interpreted *in pari materia*.") (citations omitted); 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).

To define the mens rea for bank 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 Reaume*, 338 F.3d at 580 (bank fraud requires "intent to defraud"); *Everett*, 270 F.3d at 989 (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 describes one approach to proving knowledge.

In *Neder*, 527 U.S. 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.' " *Id.* 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* 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)(D) of the instruction is appropriate. The Sixth Circuit has stated in the context of mail or wire fraud 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)(mail fraud); Berendt v. Kemper Corp., 973 F.2d 1291, 1294 (6th Cir. 1992)(mail or wire fraud); Blount Fin. Servs., Inc. v. Walter E. Heller and Co., 819 F.2d 151, 153 (6th Cir. 1987)(mail fraud); and United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979)(mail fraud). In *Frost, supra*, the court affirmed an instruction with an objective standard in the context of mail fraud, 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.

Outside the Sixth Circuit, there is a split of authority on this issue in the context of mail and wire fraud. In United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996), the court adopts an objective standard while noting a circuit split on the question. The court stated, "The 'person of ordinary prudence' standard is an *objective standard* not directly tied to the experiences of a specific person or persons." *Id.* *Accord,* United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997)("The objective reference to 'persons of ordinary prudence or comprehension' assists in determining whether the accused's conduct was 'calculated to deceive.'") In describing the circuit split, the Eleventh Circuit in *Brown* cites two cases that hold that fraud can even be found where only the "most gullible" person would be deceived. *Brown,* 79 F.3d at 1557, *citing* U.S. v. Brien, 617 F.2d 299, 311 (1st Cir. 1980); U.S. v. Maxwell, 920 F.2d 1028, 1036 (D.C. Cir. 1990). The Eleventh Circuit further discusses the appropriate standard, without deciding the question, in United States v. Yeager, 331 F.3d 1216, 1221-24 (11th Cir. 2003). A law review article summarizes the debate among the circuits and offers insights and solutions, *see* Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 Colum. L. Rev. 795 (1999).

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

The defendant need not benefit personally from the scheme to defraud the financial institution. United States v. Knipp, 963 F.2d 839, 846 (6th Cir. 1992).

The government need not prove that the financial institution suffered a loss. *Everett*, 270 F.3d at 991. The government need not prove that the defendant exposed the financial institution to a risk of loss. United States v. Hoglund, *supra* at 413. Going one step further, the court has held that to constitute bank fraud,

> [T]he defendant need not have put the bank at risk of loss in the usual sense or intended to do so. It is sufficient if the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control.
> ....
> Thus, even if the [defendant] did not intend to defraud the bank, causing a bank to transfer funds pursuant to a fraudulent scheme reduces the funds the bank has available for its loans and other activities and almost inevitably causes it some loss.

Everett, 270 F.3d at 991 (emphasis in original). *See also Reaume*, 338 F.3d at 581-82.

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 December 31, 2007)

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).