Fraud Offenses - Mail, Wire, Bank and Health Care *(18 U.S.C. §§ 1341, 1343, 1344, 1347)*

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6.18.1341 Mail Fraud - Elements of the Offense (18 U.S.C. § 1341)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with mail fraud, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **knowingly devised a scheme to defraud or to obtain money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises** *(or willfully participated in such a scheme with knowledge of its fraudulent nature)***;**

Second: That *(name)* **acted with the intent to defraud; and**

Third: That in advancing, furthering, or carrying out the scheme, *(name)* **used the mails** *(a private or commercial interstate carrier)***, or caused the mails** *(a private or commercial interstate carrier)* **to be used.**

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, Modern Federal Jury Instructions - Criminal Volumes 44-3 (Matthew Bender 2003) [hereinafter, Sand et al., supra].

18 U.S.C. § 1341 provides:

> 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 affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

The court should also give the following instructions: 6.18.1341-1 (Mail, Wire, or Bank Fraud - "Scheme to Defraud or to Obtain Money or Property" Defined), 6.18.1341-4 (Mail or Wire Fraud – "Intent to Defraud" Defined), and 6.18.1341-5 (Mail Fraud – "Use of the Mails" Defined). The court should give the following instructions when appropriate: 6.18.1341-2 (Mail, Wire, or Bank Fraud- Unanimity Required), 6.18.1341-3 (Mail or Wire Fraud - Protected Interests: Honest Services), and 6.18.1341-6 (Mail Fraud - Each Use of the Mails a Separate Offense). In addition, if the indictment charges violation through use of a private or commercial interstate carrier, the language of the instruction should be modified by replacing the word "mail" with the term "private or commercial interstate carrier" throughout. If the indictment charges that the violation affected a financial institution, the court should add language instructing the jury of the additional element and may also wish to instruct on ordinary mail fraud as a lesser included offense. *See* Instruction 3.11 (Lesser Included Offenses).

> 18 U.S.C. § 1346 provides:
>
> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the instruction should be modified accordingly. If the prosecution neither alleges nor proves deprivation of intangible rights, it is error to instruct on fraud through the deprivation of intangible rights. *See United States v. Leahy*, 445 F.3d 634, 655 (3d Cir. 2006) (recognizing error but holding it harmless).

In *Pereira v. United States*, 347 U.S. 1, 8 (1954), the Supreme Court stated that "[t]he elements of the offense of mail fraud . . . are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme." However, the Third Circuit has adopted a three-element statement of the offense, clarifying the intent requirement:

> The essential elements of an offense under 18 U.S.C. § 1341 are (1) the existence of a scheme to defraud; (2) the participation by the defendant in the particular scheme charged with the specific intent to defraud; and (3) the use of the United States mails in furtherance of the fraudulent scheme.

United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994); *see also United States v. Riley*, 621F.3d 312 (3d Cir. 2010) (stating elements); *United States v. Pharis*, 298 F.3d 228, 234 (3d Cir. 2002); *United States v. Copple*, 24 F.3d 535, 544 (3d Cir. 1994). In *United States v. Pearlstein*, 576 F.2d 531, 537 (3d Cir. 1978), the court explained that the prosecution must establish either that the defendant devised the fraudulent scheme or that the defendant "wilfully participated in it with knowledge of its fraudulent nature."

18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1341:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
> (2) in the case of an offense under any of those sections that--
> (A) victimized ten or more persons over the age of 55; or
> (B) targeted persons over the age of 55,
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give a lesser included offense instruction. *See* Instruction 3.11 (Lesser Included Offenses).

18 U.S.C.A. § 1349, which makes it a crime to attempt or conspire to commit any of the federal fraud offenses, provides

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute does not require proof of an overt act. *See United States v. Obaygbona*, 556 F. App'x. 161, 2014 WL 764764 (3d Cir. 2014).

(Revised 2014)

6.18.1341-1 Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined

The first element that the government must prove beyond a reasonable doubt is that *(name)* **knowingly devised** (or willfully participated in) **a scheme to defraud** *(the victim)* **of money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises.**

A "scheme" is merely a plan for accomplishing an object.

"Fraud" is a general term which embraces all the various means by which one person can gain an advantage over another by false representations, suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property *(or the intangible right of honest services)* **by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.**

In this case, the indictment alleges that the scheme to defraud was carried out by making false *(or fraudulent)* **statements** *(representations) (claims) (documents)***. The representations which the government charges were made as part of the scheme to defraud are set forth in the indictment** *(which I have already read to you)***. The government is not required to prove every**

misrepresentation charged in the indictment. It is sufficient if the government proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme to defraud. However, you cannot convict the defendant unless all of you agree as to at least one of the material misrepresentations.

A statement, representation, claim or document is false if it is untrue when made and if the person making the statement, representation, claim or document or causing it to be made knew it was untrue at the time it was made.

A representation or statement is fraudulent if it was falsely made with the intention to deceive.

In addition, deceitful statements of half-truths or the concealment of material facts or the expression of an opinion not honestly entertained may constitute false or fraudulent statements. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance.

The deception need not be premised upon spoken or written words alone. If there is deception, the manner in which it is accomplished is immaterial.

[The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty

to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.]

The false or fraudulent representation *(or failure to disclose)* **must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision** *(describe relevant decision; e.g., with respect to a proposed investment)***.**

This means that if you find that a particular statement of fact was false, you must determine whether that statement was one that a reasonable person *(or investor)* **might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions of material facts.**

In order to establish a scheme to defraud, the government must also prove that the alleged scheme contemplated depriving another of money or property *(or of the intangible right of honest services)***.**

However, the government is not required to prove that *(name) (himself)(herself)* **originated the scheme to defraud. Furthermore, it is not necessary that the government prove that** *(name)* **actually realized any gain from the scheme or that** *(the)(any)* **intended victim actually suffered any loss.** *(In this case, it so happens that the government does contend that the proof*

establishes that persons were defrauded and that (name) profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.)

If you find that the government has proved beyond a reasonable doubt that the *(overall)* **scheme to defraud charged in the indictment did exist and that the defendant knowingly devised or participated in the** *(overall)* **scheme charged in the indictment, you should then consider the second element.**

Comment

Sand et al., supra, 44-4.

This instruction seeks to provide a comprehensive definition of the first element of the offense: the existence of a scheme to defraud or to obtain money, property, or the intangible right to obtain honest services. The instruction contains optional language that may be used if the prosecution rests at least in part on the defendant's failure to disclose information.

Scheme to defraud. As the Third Circuit has noted, the term 'scheme to defraud' is not capable of precise definition, *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987), and "[a]ssessing whether a communication is fraudulent, truthful, or otherwise is a highly contextual inquiry." *United States v. Ferriero*, 866 F.3d 107, 120 (3d Cir. 2017).[1]

A scheme to defraud "need not be fraudulent on its face." However, it must involve "fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978) (citation omitted). A fraud conviction may be based on affirmative misrepresentations, deceitful statements of half-truths, the misleading failure to disclose information, or the concealment of material facts. *United States v. Ferriero*, 866 F.3d 107 (3d Cir. 2017).

The instruction incorporates an objective standard for assessing the misrepresentations or

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1 In *United States v. Leahy*, 445 F.3d 634, 649 (3d Cir. 2006), a bank fraud case, the court included the following language in the instruction over the defendants' objection:

> The fraudulent nature of a scheme is not defined according to any technical standards. *Rather, the measure of a fraud in any fraud case is whether the scheme shows a departure from moral uprightness, fundamental honesty, fair play and candid dealings in a general light of the community.*

On appeal, the defendants argued that the trial court committed error by including the italicized language. The Third Circuit affirmed the convictions but expressed disapproval of the italicized language. *Leahy*, 445 F.3d at 350-51. This language, found in some older cases, has not been included in the model instruction.

omissions, requiring that they be "reasonably calculated to deceive persons of average prudence." Some circuits permit the jury to convict even if the misrepresentations would not deceive an ordinary reasonable person. *See, e.g., United States v. Svete*, 556 F.3d 1157, 1163 (11th Cir. 2009) ("Congress has never used any language that would limit the coverage of the mail fraud statute to schemes that would deceive only prudent persons"). Although the Third Circuit does not appear to have addressed this issue directly, the court stated an objective standard in *Pearlstein* and, since then, has repeatedly treated the standard in *Pearlstein* as governing in fraud prosecutions. *See, e.g., Ferriero*, 866 F.3d at 120; *United States* v. Ciavarella, 716 F.3d 705, 728 (3d Cir. 2013); *United States* v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995); *United States*. v. Frankel, 721 F.2d 917, 919 (3d Cir. 1983).

In *United States v. Hucks*, 557 F.App'x. 183, 187 (3d Cir. 2014) (non-precedential), the court explained:

> The "person of ordinary prudence" language that courts have imputed to the mail fraud statute, is intended, in part, to police the border between fraud and harmless sales puffing. It is not a license for criminals to prey on people of "below-average judgment or intelligence"— those most in need of the law's protection. (citations omitted)

To establish guilt, the prosecution need not prove that the deception was successful. *Neder v. United States*, 527 U.S. 1, 25 (1999); *United States v. Moleski*, 641 F. App'x. 172 (3d Cir. 2016). Further, the prosecution need not prove that the defendant benefitted personally from the scheme to defraud. *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010).

Materiality. The misrepresentations must relate to material facts. In *Neder v. United States*, 527 U.S. 1, 25 (1999), the Supreme Court held that materiality is an essential element of the crime of mail fraud, wire fraud, and bank fraud to be decided by the jury. The Court explained:

> [A] particular misrepresentation 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 (citation omitted). *See also United States v. Riley*, 621 F.3d 312 (3d Cir. 2010) (discussing materiality requirement); *United States v. Fallon*, 470 F.3d 542, 546 (3d Cir. 2006) (discussing nature of materiality inquiry and holding it was error to exclude defendant's evidence of industry custom and practice, which was relevant to the question of whether the false statements were material); *United States v. Ding*, 756 F. App'x. 126 (3d Cir. 2018) (non-precedential) (noting that there was clear evidence of materiality); *United States v. Lucas*, 709 F. App'x. 119, 2017 WL 4118346 (3d Cir. 2017) (non-precedential) (recognizing that materiality is an objective concept).

In *United States v. Newmark*, 374 F. App'x. 279 (3d Cir. 2010) (non-precedential), the court rejected the government's argument that the jury instructions covering the material fact requirement also adequately covered the concept of "ordinary prudence." The court explained:

> The materiality instruction concerns whether a reasonable person would consider a fact important, whereas the "ordinary prudence" instruction concerns whether a reasonable person would be deceived by a scheme.

Newmark, 374 F. App'x. at 283.

Negligence of the victim. The court may properly instruct the jury that the negligence of the victims is not a defense to fraud. *See United States v. Hoffecker*, 530 F.3d 137, 177 (3d Cir. 2008); *United States v. Arena*, 629 F. App'x. 453 (3d Cir. 2015); *United States v. Newmark*, 374 F. App'x. 279 (3d Cir. 2010) (non-precedential). In *Newmark*, the trial court failed to instruct the jury that a "scheme to defraud" is a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension." However, the trial court instructed the jury that "[i]t is immaterial that the alleged victims may have acted gullibly, carelessly, naively or negligently, which led to their being defrauded." The defense did not object to the instructions at trial, and the Third Circuit held that the trial court had not committed plain error. However, the court noted:

> [B]ecause of the apparent tension between an instruction that a victim's gullibility or negligence is no defense and an instruction that a scheme must be calculated to deceive a person of ordinary prudence and comprehension, there is some force to [the defendant]'s argument that the error [of omitting instruction on "ordinary prudence"] was compounded by the district court's inclusion of the former instruction.

Newmark, 374 F. App'x. at 283.

Money or Property. The aim of the scheme to defraud must be to deprive the victim of "money or property." *See United States v. Kelly*, 140 S. Ct. 1565 (2020). The property may be either tangible or intangible. The statute also reaches schemes to deprive another of the "intangible right of honest services." 18 U.S.C. § 1346. If the prosecution proceeds on the theory that the defendant defrauded the victim of honest services, the court should give Instruction 6.18.1341-3 (Mail or Wire Fraud - Protected Interests: Honest Services).

The definition of property has proved somewhat elusive. In *Cleveland v. United States*, 531 U.S. 12, 15 (2000), the defendant had obtained a video poker license by making false statements on his license application. The Court reversed his conviction, holding that unissued state and municipal licenses in general are not "property" within § 1341. The Court stated:

> It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim.

Cleveland, 531 U.S. at 15.

However, in *Pasquantino v. United States*, 544 U.S. 349 (2005), the Court held that a scheme to smuggle liquor from the United States into Canada to avoid Canadian taxes constituted a scheme to defraud in violation of the wire fraud statute. Canada's right to the uncollected taxes constituted property within the meaning of the statute: "This right is an

entitlement to collect money from petitioners, the possession of which is 'something of value' to the Government of Canada." *Pasquantino,* 544 U.S. at 354-55.

In *United States v. Kelly*, 140 S. Ct. 1565 (2020), the Court considered convictions of employees of the Port Authority of New York and New Jersey. The convictions were based on an alleged scheme to impose gridlock on the Borough of Fort Lee, New Jersey, in order to punish the Mayor of Fort Lee for failing to endorse the Governor of New Jersey as he sought reelection. To accomplish that end, the defendants had used their authority as Port Authority employees to reduce from three to one the lanes onto the George Washington Bridge available to drivers from Fort Lee during the morning commute on four days in September 2013. The result was total gridlock in Fort Lee on those mornings. The government charged the defendants under 18 U.S.C. §§ 666(a)(1)(A) and 1343. The defendants were convicted at trial and appealed. The Third Circuit affirmed the convictions in *United States v. Baroni,* 909 F.3d 550 (3d Cir. 2018), but in *Kelly*, the Supreme Court reversed. *Kelly*, 140 S. Ct. at 1574.

In *Kelly*, the Court emphasized that both § 666 and § 1343 reach only fraudulent schemes aimed at obtaining money or property. The Court rejected the government argument that the evidence demonstrated that the defendants had schemed to obtain the Port Authority's property and held that the scheme did not have property as its object.

First, citing *Cleveland v. United States*, 531 U.S. 12 (2000), the Court held that the use of the defendants' positions at the Port Authority to realign the lanes of traffic was "a quintessential exercise of regulatory power" and therefore was not a scheme to take the Port Authority's property. *Kelly*, 140 S. Ct. at 1572.

Second, the Court rejected the government argument that the defendants' misappropriation of the paid time of Port Authority employees was sufficient to support the convictions. The Court acknowledged that "a scheme to usurp a public employee's paid time is one to take the government's property." *Kelly*, 140 S. Ct. at 1573. However, the Court held that taking the time of Port Authority employees was not an object of the defendants' scheme but was merely incidental to it. *Kelly*, 140 S. Ct. at 1574.

In *United States v. Hird*, 913 F.3d 332 (3d Cir. 2019), decided after *Baroni* but before the Supreme Court's decision in *Kelly*, the Third Circuit addressed the question of what constitutes property. The court held that the defendants could be convicted of mail or wire fraud based on a scheme to fix tickets in Philadelphia Traffic Court that deprived the city and state of money "which would have been properly due as" traffic fines and costs. The court relied on *Pasquantino* and distinguished *Cleveland*. The court rejected the argument that the government entities did not lose property because the tickets were fixed before there was a finding of guilt. The court explained:

> Even if some of the cases in the extra-judicial system would have been judged not guilty in a real adjudication it is (as the District Court correctly noted) the intent of the scheme, not the successful execution of it, that is the basis for criminal liability.

Hird, 913 F.3d at 343. The court further stated:

> We conclude that a scheme to obviate judgments imposing fines, effectively preventing the government from holding and collecting on such judgments imposes an economic injury that is the equivalent of unlawfully taking money from fines paid out of the Government's accounts.

Hird, 913 F.3d at 344-45. It is not clear that this holding is consistent with *Kelly*. *See also Henry v. United States*, 29 F.3d 112 (3d Cir. 1994) (fraud conviction could not rest on scheme to defraud that disadvantaged some banks in the process of bidding to receive deposits of certain public funds; the victim banks never had property interest in the funds but were merely deprived of the opportunity to seek the deposits).

Overall Scheme. The last paragraph of the instruction refocuses the jury on the question of the defendant's involvement in the scheme charged in the indictment as well as the existence of that scheme. If the evidence in the case on trial may lead the jury to convict a defendant for involvement in some lesser scheme rather than the scheme charged in the indictment, the court may insert the adjective "overall" to emphasize that the conviction cannot rest on involvement in some scheme other than the overall scheme charged. Alternatively, depending on the particular facts, the court should make clear that the jury must find that the defendant joined the particular scheme charged in the indictment and not some other fraudulent scheme.

In *United States v. Dobson*, 419 F.3d 231, 237 (3d Cir. 2005), the court explained:

> [T]he relevant inquiry is not whether the defendant acted knowingly in making any misstatement, but whether she did so with respect to the overarching fraudulent scheme — that is, the particular "illicit enterprise" charged in the indictment.

In *Dobson*, the court held that the instructions to the jury were deficient because they

> nowhere advised the jury that it could convict only on finding that [the defendant] in fact knew of [the broader] fraudulent scheme [alleged in the indictment]. * * * [T]he language of the charge easily, but erroneously, encompassed the possibility that [the defendant's] own misrepresentations, without knowledge of [the charged scheme's] broader illicit purpose, could constitute her creation of, or participation "in a scheme to defraud, or to obtain money or property by materially false or fraudulent[ ] pretenses, misrepresentations, or promises . . . ."

Dobson, 419 F.3d at 238.

In *United States v. Kemp*, 500 F.3d 257 (3d Cir. 2007), the Third Circuit rejected a challenge based on *Dobson*. The court held that the trial court's instructions adequately protected the defendant against the risk that the defendant would be convicted for aiding and abetting a different scheme from that charged. The case involved an allegation of honest services fraud. Only one defendant — Kemp — was a public official; the other defendants could be convicted of honest services fraud only if the government established that they aided and abetted Kemp. The District Court properly instructed the jury:

> Before a defendant may be held responsible for aiding and abetting others in the commission of a crime, it is necessary that the government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself or herself in some way with the crime charged and participated in it with the intent to commit the crime.
>
> In order to be found guilty of aiding and abetting the commission of a crime, the government must prove beyond a reasonable doubt that the defendant:
>
> > First, knew that the crime charged was to be committed or was being committed.
> >
> > Second, knowingly did some act for the purpose of aiding the commission of that crime.
> >
> > And third, acted with the intention of causing the crime charged to be committed.

The Third Circuit held that the instructions adequately protected the defendant because they "contained the direct link between [the defendant's] actions and the specific scheme that was charged in the indictment-the scheme to deprive the public of Kemp's honest services." *Kemp*, 500 F.3d at 300.

Withdrawal from the scheme. In some cases, the defendant may claim to have withdrawn from the scheme to defraud. In *United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982), the Third Circuit discussed the correct way to address such a claim:

> The controlling precepts are familiar and require only a brief restatement. Mere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal. The defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals. When a defendant has produced sufficient evidence to make a prima facie case of withdrawal, however, the government cannot rest on its proof that he participated at one time in the illegal scheme; it must rebut the prima facie showing either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal. (Citations omitted.)

In *United States v. Detelich*, 351 F. App'x. 616, 620 (3d Cir. 2009) (non-precedential), the Third Circuit rejected the defendant's argument that the jury instruction on the question of withdrawal improperly shifted the burden:

> The District Court instructed the jury that they must find that Detelich "completely withdrew from the scheme. A partial or temporary withdrawal is not sufficient." The Court continued, "If you find that the defendant produced evidence that he withdrew from this scheme before November 3, 2000, the government cannot rest on its proof that he participated at one time in the illegal scheme. In that circumstance, the government has the burden to prove beyond reasonable doubt that the defendant was

participating in the scheme on or after November 3, 2000."

See also Instruction 6.18.371J (Withdrawal Before the Commission of an Overt Act as a Defense to Conspiracy).

(Revised 2/2021)

6.18.1341-2 Mail, Wire, or Bank Fraud - Unanimity Required

Count *(No.)* **of the indictment, charging** *(name)* **with** *(mail) (wire) (bank)* **fraud, alleges a number of separate** *(schemes or plans to defraud) (schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations, or promises)***.**

The government is not required to prove *(all of the schemes or plans to defraud) (all of the schemes or plans to obtain money or property by means of false or fraudulent pretenses, representations or promises) (all of the false or fraudulent pretenses, representations, or promises)* **that are alleged.**

However, each of you must agree with each of the other jurors that the same *(scheme or plan to defraud) (scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises)* **alleged in Count** *(No.)* **was, in fact, employed by** *(name)***. The jury need not unanimously agree on each scheme or plan, but, in order to convict, must unanimously agree upon at least one such scheme or plan as a scheme or plan that was knowingly used by the defendant.**

Unless each of you agrees that the government has proven the same *(scheme or plan to defraud) (scheme or plan to obtain money or property by means of false or fraudulent pretenses, representations, or promises)* **beyond a reasonable doubt, you must find the defendant not guilty of the** *(mail) (wire) (bank)* **fraud charged in Count** *(No.)* **of the indictment.**

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 47.17 [hereinafter O'Malley et al., supra].

A criminal defendant has a constitutional right to a unanimous verdict. *See United States v. Edmonds*, 80 F.3d 810, 814 (3d Cir. 1996). In some cases, that right requires the court to instruct the jury regarding the need for unanimity on specific questions. *Edmonds*, 80 F.3d at 814; *United States v. Russell*, 134 F.3d 171, 177 (3d Cir. 1998); *United States v. Ryan*, 828 F.2d 1010, 1020 (3d Cir. 1987) (cautioning courts to give "augmented unanimity instruction" if requested). *See also Richardson v. United States*, 526 U.S. 813 (1999) (discussing need for unanimity instruction on aspects of continuing criminal enterprise prosecution).

In *United States v. Pedroni*, 45 F. App'x. 103, 107-08 (3d Cir. 2002), a non-precedential decision, the Third Circuit rejected the defendant's argument that the trial court had not adequately instructed the jury concerning the unanimity requirement. The court noted that the trial court had told the jury that it "must be unanimous as to which one of the objects of the conspiracy the defendant agreed to pursue" and that the "verdict must be unanimous." The court concluded that these instructions were adequate. *See also United States v. Allen*, 2012 WL 2821896 (3d Cir. 2012) (non-precedential) (holding that trial court's failure to give unanimity instruction sua sponte was not plain error).

(Revised 10/2012)

6.18.1341-3 Mail or Wire Fraud – Protected Interests: Honest Services

A public official or employee owes a duty of honest, faithful and disinterested service to the public and to the government that *(he)(she)* serves. The public relies on officials of the government to act for the public interest, not for their own enrichment. A public official who accepts a bribe or a kickback; i.e., something of value in exchange for or as a reward for favorable treatment breaches the duty of honest, faithful, and disinterested service. While outwardly appearing to be exercising independent judgment in *(his)(her)* official work, the public official instead has been paid privately for *(his)(her)* public conduct. Thus, the public is not receiving the public official's honest and faithful service to which it is entitled.

If you find beyond a reasonable doubt that *(name of defendant)* has violated the duty to provide honest services as defined here, then you may find the first element of the particular mail *(wire)* fraud count satisfied.

Comment

If the prosecution rests on a theory of honest-services fraud by a public official or employee, the court should give this instruction in addition to Instruction 18.1341-2 (Mail, Wire or Bank Fraud - Unanimity Required). If the prosecution is for private-sector honest-services fraud by an employee, it should be modified accordingly.

In 1988, Congress enacted the honest services amendment, which provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The Third Circuit has recognized that public officials and employees may be prosecuted for depriving the citizens they serve of their right to honest services. *United States v. Antico*, 275 F.3d 245, 262 (3d Cir. 2001); *see also United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011) (recognizing honest services fraud based on bribery theory); *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010) (discussing history of honest services fraud prosecutions). A fraud prosecution may also rest on a theory of honest-services fraud by a private sector employee or agent. *See Skilling v. United States*, 561 U.S. 358 (2010); *United States v. McGeehan*, 584 F.3d 560 (3d Cir. 2009). If so, the instruction

should be modified accordingly.

In *Skilling*, the Supreme Court confronted a constitutional challenge to Section 1346 and construed it narrowly rather than invalidating it as unconstitutionally vague. 561 U.S. at 403-04. The Court concluded that Congress intended the statute to reinstate honest services law as it existed prior to the Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), which held that mail and wire fraud statutes did not extend to deprivations of intangible rights. As a result, the Court held that Section 1346 criminalizes only schemes in which the private employee or public official accepts bribes or kickbacks. 561 U.S. at 407-08. The Court specifically declined to extend Section 1346 to "undisclosed self-dealing," holding that only Congress could do so. 561 U.S. at 409-10. The Court concluded that, given the government's failure to allege or establish that the defendant had solicited or accepted side payments, the defendant had not committed honest-services fraud. 561 U.S. at 413. *See also United States v. Andrews*, 681 F.3d 509, 518-21 (3d Cir. 2012) (holding that instruction referencing "honest services" was error, but harmless); *United States v. Wright*, 665 F.3d 560, 570-72 (3d Cir. 2012) (holding that instruction on conflict-of-interest theory as well as bribery theory required reversal of convictions); *Black v. United States*, 561 U.S. 465 (2010) (vacating conviction based on "failure to disclose" honest-services fraud); *United States v. Riley*, 621 F.3d 312 (3d Cir. 2010) (discussing application of *Skilling*).

The prosecution must establish that the defendant owed the public or an employer a duty of honest services. *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003). In addition, honest-services fraud requires proof of a quid pro quo, either implicit or explicit, whether it is based on a bribery theory or a kickback theory. *See United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011) (finding sufficient evidence of quid pro quo).

For the definition of bribery and kickback, the Court in *Skilling* turned to other federal statutes. 561 U.S. at 412-13. The Court cited 41 U.S.C. § 52(2), which provides:

> The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

The Court suggested that other federal statutes would also provide the definition of bribery. 561 U.S. at 412-13. *See, e.g.*, Instructions 6.18.201B1 (Bribery of a Public Official); 6.18.666A1B (Solicitation of a Bribe); and 6.18.666A2 (Bribery of an Agent of a Program Receiving Federal Funds). In *McDonnell v. United States*, 136 S.Ct. 2355 (2016), the honest services prosecution rested on allegations of bribery, and the parties agreed that bribery would be defined by reference to 18 U.S.C. § 201. Reversing the conviction, the Supreme Court clarified the meaning of "official act" and held that the trial court committed reversible error when it failed properly to instruct the jury on the meaning of the term, allowing the government to proceed with an overly-broad definition. For further discussion, see Instruction 6.18.201B1-2 and comment. *See also United States v. Fattah*, 902 F.3d 197 (3d Cir. 2018) (affirming conviction for conspiracy to

commit honest services fraud).

The improper benefit may consist of money, property, services, or any other act which advances the official's personal or business interests, including a loan. *See United States v. Kemp*, 500 F.3d 257, 285 (3d Cir. 2007). Moreover, a fraud under this section may be based on a stream of benefits to the public official or employee, and the government does not need to establish that any specific benefit was given in exchange for a specific official act. *See United States v. Ciavarella*, 716 F.3d 705, 729-30 (3d Cir. 2013) (judges' false financial disclosure filings supported conviction on honest services mail fraud carried out through scheme of bribery and kickbacks even though evidence did not establish specific bribe or kickback for the filing). Payments may be made with the intent to retain the official's services on an "as needed" basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf. *See Kemp*, 500 F.3d at 282. In *Kemp*, discussing honest services fraud based on a bribery theory, the Third Circuit approved the trial court's instructions on "stream of benefits:"

> [T]he instructions proffered by the District Court repeatedly emphasized the critical quid pro quo, explaining that "[t]o establish such bribery the government must prove beyond a reasonable doubt that there was a quid pro quo, ... that the benefit was offered in exchange for the official act." The Court continued, "where there is a stream of benefits given by a person to favor a public official , . . . it need not be shown that any specific benefit was given in exchange for a specific official act. If you find beyond a reasonable doubt that a person gave an official a stream of benefits in implicit exchange for one or more official acts, you may conclude that a bribery has occurred." Finally, the Court explained, "[t]o find the giver of a benefit guilty, you must find that the giver had a specific intent to give ... something of value in exchange for an official act, that is, that the accused had the specific intent to engage in such a quid pro quo exchange." This instruction correctly described the law of bribery, and left no danger that the jury would convict upon merely finding that Holck and Umbrell provided benefits to Kemp [the public official] in a general attempt to curry favor or build goodwill.
>
> Moreover, we agree with the government that the District Court's instruction to the jury that it could convict upon finding a "stream of benefits" was legally correct. The key to whether a gift constitutes a bribe is whether the parties intended for the benefit to be made in exchange for some official action; the government need not prove that each gift was provided with the intent to prompt a specific official act. Rather, "[t]he quid pro quo requirement is satisfied so long as the evidence shows a 'course of conduct of favors and gifts flowing to a public official in exchange for a pattern of official actions favorable to the donor.'" Thus, "payments may be made with the intent to retain the official's services on an 'as needed' basis, so that whenever the opportunity presents itself the official will take specific action on the payor's behalf." While the form and number of gifts may vary, the gifts still constitute a bribe as long as the essential intent-a specific intent to give or receive something of value in exchange for an official act-exists. This theory was accurately and entirely presented to the jury in the jury instructions . . . .

See Kemp, 500 F.3d at 281-82 (citations omitted). *See also United States v. Bryant*, 655 F.3d

232, 245 (3d Cir. 2011) (holding that "stream of benefits" theory for honest services fraud prosecution was not undermined by United States Supreme Court decision in *Skilling*).

The prosecution need not prove that the official performed no legitimate services in exchange for the benefit received provided there is evidence from which the jury could conclude that the benefit operated primarily as a quid pro quo for favorable treatment by the official. *United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011). In *Bryant*, the Third Circuit held that the trial court properly instructed the jury:

> You may find that any salary and other financial benefits accepted by Wayne Bryant was a bribe even if you also find it was paid, in part, for legitimate work if it was also paid, in part, in return for Wayne Bryant's official action.

Bryant, 655 F.3d at 246.

In *United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011), the Third Circuit rejected the defendants' arguments that the honest services fraud instructions were flawed. The trial court had instructed the jury as follows:

> Counts 1 through 6 charge the defendants with committing honest services fraud by means of a quid pro quo bribery scheme. Bribery requires a quid pro quo, that is, a specific intent to give or receive something of value in exchange for one or more official acts.
>
> In order to find that a defendant engaged in quid pro quo bribery, you must find that the government proved each of the following beyond a reasonable doubt with respect to that defendant:
>
> First: that R. Michael Gallagher gave, offered or promised something of value, particularly a stream of payments in the form of a salary and other financial benefits to Wayne Bryant;
>
> Second: that Wayne Bryant was, at that time, a public official;
>
> Third: that with respect to R. Michael Gallagher, he intended to give the stream of payments in the form of salary and other financial benefits in exchange for one or more official acts.
>
> That with respect to Wayne Bryant, he intended to perform one or more official acts in exchange for his salary and other financial benefits from [SOM.]
>
> A quid pro quo agreement may be implicit as well as explicit. The improper benefit may consist of money and other financial benefits whether given on a one time basis or as a stream of payments to the public official. In other words, when payments are accepted by a public official from a payor with the intent to obtain that official's actions

> on an “as needed” basis, so that when the opportunity presents itself that public official takes specific official action on the payor's behalf in return for those payments, that constitutes a breach of the public official's duty of honest service.
>
> You may find that the payor and/or the recipient has engaged in bribery even though the recipient could have lawfully engaged in the official conduct in question.

The trial court in *Bryant* further instructed the jury:

> [N]ot every payment made to a public official constitutes a bribe. A payment made in a general attempt to build goodwill or curry favor with a public official, without more, does not constitute a bribe.... What distinguishes a bribe from other payments that would not constitute violations is that a bribe is offered or accepted with the intent to influence, or to be influenced, in an official act.

Bryant, 655 F.3d at 244-45. The Third Circuit held that these instructions adequately conveyed the requirement that the prosecution prove that the payor had specific intent to influence the actions of the official. *Bryant*, 655 F.3d at 244-45.

The Third Circuit has noted that a defendant other than the public official or employee may be guilty of aiding and abetting honest-services fraud by a public official or an employee. *See United States v. Carbo*, 572 F.3d 112, 116 (3d Cir. 2009) (also discussing the requisite specific intent for aiding and abetting); *United States v. Kemp*, 500 F.3d 257, 292-93 (3d Cir. 2007).

(Revised 2016)

6.18.1341-4 Mail or Wire Fraud – "Intent to Defraud" Defined

The second element that the government must prove beyond a reasonable doubt is that *(name)* **acted with the specific intent to defraud.**

To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.

In considering whether *(name)* **acted with an intent to defraud, you may consider, among other things, whether** *(name)* **acted with a desire or purpose to bring about some gain or benefit to** *(himself)(herself)* **or someone else or with a desire or purpose to cause some loss to someone.**

Comment

O'Malley et al., supra, § 47.14.

The government must prove specific intent to defraud. *United States v. Hannigan*, 27 F.3d 890, 892 (3d Cir. 1994). Specific intent may be inferred from "a material misstatement of fact made with reckless disregard for the truth." *Hannigan*, 27 F.3d at 892 n.1. *See also United States v. Bryant*, 655 F.3d 232 (3d Cir. 2011) (finding sufficient evidence of intent given defendant's efforts to conceal scheme); *United States v. Ding*, 756 F.App'x. 126 (3d Cir. 2018) (non-precedential) (concluding evidence was sufficient to establish intent to defraud even though work was completed and defendant reaped little monetary benefit); *United States v. Catarro*, 746 F. Appx 110 (3d Cir. 2018) (non-precedential) (rejecting argument that evidence was insufficient to establish defendant's intent to defraud). In some cases, the court may also consider instructing on willful blindness. *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999). *See* Instruction 5.06 (Willful Blindness).

Defendants have sometimes argued that evidence of intent to repay or actual repayment should be admissible and that the instructions should address the issue. The Third Circuit has not settled the question of whether evidence of intent to repay is relevant. However, in *United States v. Lucas*, 709 F. App'x. 119, 2017 WL 4118346 (3d Cir. 2017) (non-precedential), the court held that the trial court did not commit plain error when it instructed the jury the "intent to defraud may be found even if [the defendant] hoped, intended, or expected that [the victim] would eventually be satisfied or repaid." The court noted that several circuits have rejected the argument that intent to repay is relevant to the intent to defraud. The court distinguished *United*

States v. Jimenez, 513 F.3d 62 (3d Cir. 2008), a bank fraud case alleging check kiting, where the court held that "actual repayment 'coupled with other evidence that likewise negates an intent to defraud' may be relevant to the specific intent of a defendant charged in a check-kiting scheme." *Jimenez*, 513 F.3d at 75.

A good faith defense instruction is generally not necessary in mail and wire fraud cases and has therefore not been included. In *Gross v. United States*, 961 F.2d 1097 (3d Cir. 1992), the Third Circuit stated:

> We are persuaded by the majority view, and agree that a jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully. Therefore, in this case, we conclude that failure to give the instruction on the good faith defense did not constitute an abuse of discretion. By giving a detailed instruction on the elements of the crime with which Gross was charged, the court ensured that a jury finding of good faith would lead to an acquittal. Consistent with our well-established practice of evaluating the jury charge as a whole, we find that the district court's charge was within the bounds of its discretion.
>
> While it is not reversible error for the district court to refuse to give the good faith instruction in this case, we commend the district judges in the exercise in the discretion of its use as a supplement to the 'knowing and wilful' charge in future cases.

Gross, 961 F.2d at 1103 (citation omitted). In *United States v. Leahy*, 445 F.3d 634, 651 (3d Cir. 2006), a bank fraud case, the Third Circuit also rejected the defendant's argument that the trial court's refusal to instruct on good faith constituted error. The court stated:

> In *United States v. Gross*, 961 F.2d 1097 (3d Cir.1992), we held, adopting what has become the majority position among the circuits, that a district court does not abuse its discretion in denying a good faith instruction where the instructions given already contain a specific statement of the government's burden to prove the elements of a "knowledge" crime. *Id.* at 1102-03. In this matter, the District Court's instructions, taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant. If the jury found that the Defendants had acted in good faith, it necessarily could not have found that the Defendants had acted with the requisite scienter. Accordingly, any good faith instruction would have been unnecessary and duplicative.

See also United States v. Jimenez, 513 F.3d 62 (3d Cir. 2008) (holding that instructions adequately covered the defendants' defense to the charge of bank fraud, which included a claim of good faith); *United States v. James*, 712 F. App'x. 154, 2017 WL 4271117 (3d Cir. 2017) (non-precedential) (holding good faith instruction not required where instructions adequately covered *mens rea* requirement); *United States v. Cocchiola*, 358 F. App'x. 376, 380-81 (3d Cir. 2009) (non-precedential) (holding trial court properly denied good faith instruction where other instructions adequately covered requisite intent); *United States v. Diamond*, 322 F. App'x. 255 (3d Cir. 2009) (non-precedential) (holding trial court properly denied good faith instruction

where other instructions adequately covered requisite intent).

See Comment to Instruction 5.07 (Good Faith Defense).

(Revised 2/2021)

6.18.1341-5 Mail Fraud – "Use of the Mails" Defined

The third element that the government must prove beyond a reasonable doubt is that in advancing, furthering, or carrying out the scheme, *(name)* **used the mails** *(a private or commercial interstate carrier)***, or caused the mails** *(a private or commercial interstate carrier)* **to be used.**

The government is not required to prove that *(name) (himself)(herself)* **actually mailed anything or that** *(name)* **even intended that the mails would be used to further, or to advance, or to carry out the scheme.**

However, the government must prove beyond a reasonable doubt, that the mails *(a private or commercial interstate carrier)* **were, in fact, used in some manner to further, or to advance, or to carry out the scheme to defraud. The government must also prove either that** *(name)* **used the mails, or that** *(name)* **knew the use of the mails** *(private or commercial interstate carrier)* **would follow in the ordinary course of business or events, or that** (name) **should reasonably have anticipated that the mails would be used.**

It is not necessary that the item mailed *(sent by carrier)* **was itself false or fraudulent or contained any false or fraudulent statement, representation, or promise, or contained any request for money or thing of value.**

However, the government must prove beyond a reasonable doubt that the use of the mails *(private or commercial interstate carrier)* **in some way furthered, or advanced, or carried out the scheme.**

Comment

O'Malley et al., supra, § 47.04.

In *Pereira v. United States*, 347 U.S. 1 (1954), the Court explained that the scheme need not "contemplate the use of the mails as an essential element:"

> Where 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, then he 'causes' the mails to be used.

Pereira, 347 U.S. at 8-9. *See also United States v. Bentz*, 21 F.3d 37, 40-42 (3d Cir. 1994) (dismissing wire fraud indictment where defendant did not know that use of wires would follow in the ordinary course of business and where such use was not objectively reasonably foreseeable). However, the mailing must be for the purpose of executing or attempting to execute the scheme to defraud. *United States v. Maze*, 414 U.S. 395, 400 (1974). The Third Circuit has held that "the mailings must be sufficiently closely related to the scheme to bring the conduct within the ambit of the mail fraud statute, and the 'scheme's completion [must] depend [ ] in some way on the charged mailings.' " *United States v. Coyle*, 63 F.3d 1239, 1244-45 (3d Cir. 1995) (citations omitted)

The mailing may be routine or innocent and need not contain false information. *Schmuck v. United States*, 489 U.S. 705, 715 (1989). The mailings may even, in hindsight, be counterproductive. *Schmuck*, 489 U.S. at 715. *See also United States v. Diamond*, 322 F. App'x. 255 (3d Cir. 2009) (non-precedential) (citing Model Instruction and comment).

In *Coyle*, 63 F.3d at 1244-45 (citations omitted), the Third Circuit explained:

> Even mailings made after the fruits of the scheme have been received may come within the statute when they are "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place."

In an appropriate case, the court may give the following instruction regarding a "lulling letter:"

> A mailing intended to lull the victims into a false sense of security, or to conceal the fraud or postpone its detection, or to make detection less likely, constitutes a mailing for the purpose of executing the scheme to defraud.

See United States v. Lane, 474 U.S. 438, 451-53 (1986); *United States v. Sampson*, 371 U.S. 75, 80-81 (1962); *United States v. Lebovitz*, 669 F.2d 894, 896 (3d Cir. 1982).

(Revised 12/2009)

6.18.1341-6 Mail Fraud - Each Use of the Mails a Separate Offense

Each use of the mails to advance, or to further, or to carry out the scheme or plan may be a separate violation of the mail fraud statute.

Comment

O'Malley et al., supra, § 47.15.

Each separate mailing constitutes a separate violation of the mail fraud statute. *See United States v. McClelland*, 868 F.2d 704, 706 (5th Cir. 1989); *United States v. Tiche*, 424 F. Supp. 996, 1003 (W.D. Pa.), *aff'd.*, 564 F.2d 90 (3d Cir. 1977).

6.18.1343 Wire Fraud - Elements of the Offense (18 U.S.C. § 1343)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with wire fraud, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **knowingly devised a scheme to defraud or to obtain money or property** *(or the intangible right of honest services)* **by materially false or fraudulent pretenses, representations or promises** *(or willfully participated in such a scheme with knowledge of its fraudulent nature)***;**

Second: That *(name)* **acted with the intent to defraud; and**

Third: That in advancing, furthering, or carrying out the scheme, *(name)* **transmitted any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.**

Comment

O'Malley et al., supra, § 47.07.

18 U.S.C. § 1343 provides:

> 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 affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more

than 30 years, or both.

The court should also give Instruction 6.18.1343-1 (Wire Fraud - "Transmits by means of wire, radio, or television communication in interstate commerce" - Defined). The cases construing the mail fraud statute apply equally to wire fraud. *See United States v. Giovengo*, 637 F.2d 941 (3d Cir. 1980). As a result, the court may also give the following instructions as appropriate: 6.18.1341-1 (Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined), 6.18.1341-2 (Mail, Wire, or Bank Fraud - Unanimity Required), 6.18.1341-3 (Mail or Wire Fraud - Protected Interests: Honest Services), and 6.18.1341-4 (Mail or Wire Fraud – "Intent to Defraud" Defined). In appropriate cases, the court should also give Instruction 6.18.1343-2 (Wire Fraud - Each Transmission by Wire Communication a Separate Offense).

The wire fraud statute applies to communications in foreign commerce as well as interstate communications. *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015). If the charges allege communications in foreign commerce, the court should modify the language of the instruction accordingly. In *Georgiou*, the trial court explained to the jury "that interstate or foreign commerce is 'to send from one state to another, or to or from the United States....'" The Third Circuit held that this instruction was proper. *Id.* at 138.

In *United States v. Fattah*, 858 F.3d 801 (3d Cir. 2017), the indictment alleged that the defendant committed wire fraud by "requesting excess funds for DVHS's budgets and pocketing the surplus." The court rejected the defendant's argument that the indictment alleged only a breach of contract and held that it sufficiently charged wire fraud. *Fattah*, 858 F.3d at 815.

18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1343:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
> (2) in the case of an offense under any of those sections that--
> (A) victimized ten or more persons over the age of 55; or
> (B) targeted persons over the age of 55,
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give Instruction 3.11 (Lesser Included Offenses).

18 U.S.C.A. § 1349, which makes it a crime to attempt or conspire to commit any of the federal fraud offenses, provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be

> subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute does not require proof of an overt act. *See United States v. Obaygbona*, 556 F.App'x. 161, 2014 WL 764764 (3d Cir. 2014). If the defendant is charged with attempt, the court should adapt this instruction and should also give Instruction 7.01 (Attempt). Likewise, if the defendant is charged with conspiracy to violate this statute, the appropriate instructions on conspiracy should be given, modified to reflect the fact that § 1349 does not require proof of an overt act. See Instruction 6.18.371A et seq.

(Revised 2018)

6.18.1343-1 Wire Fraud - "Transmits by means of wire, radio, or television communication in interstate commerce"- Defined

The third element that the government must prove beyond a reasonable doubt is that in advancing, furthering, or carrying out the scheme, *(name)* **transmitted a writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of a writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.**

The phrase "transmits by means of wire, radio, or television communication in interstate commerce" means to send from one state to another by means of telephone or telegraph lines or by means of radio or television. The phrase includes a telephone conversation by a person in one state with a person in another state, or electronic signals sent from one state to another, such as by fax or financial wire. *[The use of the Internet to send a message, such as an e-mail, or to communicate with a web site may constitute a wire transmission in interstate commerce.]*

The government is not required to prove that *(name)* **actually used a wire communication in interstate commerce or that** *(name)* **even intended that anything be transmitted in interstate commerce by means of a wire, radio, or television communication to further, or to advance, or to carry out the** *(scheme or plan to defraud) (scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises)***.**

However, the government must prove beyond a reasonable doubt that a

transmission by a wire, radio, or television communication facility in interstate commerce was, in fact, used in some manner to further, or to advance, or to carry out the scheme to defraud. The government must also prove either that *(name)* **used wire, radio, or television communication in interstate commerce, or that** *(name)* **knew the use of the wire, radio, or television communication in interstate commerce would follow in the ordinary course of business or events, or that** *(name)* **should reasonably have anticipated that wire, radio, or television communication in interstate commerce would be used.**

It is not necessary that the information transmitted by means of wire, radio, or television communication in interstate commerce itself was false or fraudulent or contained any false or fraudulent pretense, representation, or promise, or contained any request for money or thing of value.

However, the government must prove beyond a reasonable doubt that the use of the wire, radio, or television communication in interstate commerce furthered, or advanced, or carried out, in some way, the scheme.

Comment

O'Malley et al., *supra*, § 47.08.

Transmission by means of wire, radio, or television communication in interstate commerce is not narrowly construed. *See United States v. King*, 590 F.2d 253 (8th Cir. 1978), *cert. denied*, 440 U.S. 973 (1979) (rejecting defendant's challenge to wire fraud conviction where conviction rested in part on microwave communications in order to further a fraud).

In *Pereira v. United States*, 347 U.S. 1 (1954), a mail fraud case, the Court explained that the scheme need not "contemplate the use of the mails as an essential element:"

> Where 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, then he ‘causes' the mails to be used.

Pereira, 347 U.S. at 8-9. *See also United States v. Keller*, 2010 WL 3733872 (3d Cir. 2010) (non-precedential) (noting that use of the wires need not be an essential element of the scheme); *United States v. Bentz*, 21 F.3d 37, 40-42 (3d Cir. 1994) (dismissing wire fraud indictment where defendant did not know that use of wires would follow in the ordinary course of business and where such use was not objectively reasonably foreseeable). If the government proves that the wire communication occurred and was reasonably foreseeable, it is not necessary that the government prove it was foreseeable that the wire communication would be interstate. *See United States v. Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988). In *Keller*, the Third Circuit held that the trial court had properly refused to give the defendant’s requested instruction that the scheme to defraud must have “depended in some way” on the use of the wires. The court noted that the trial court gave Model Criminal Jury Instruction 6.18.1343-1 for wire fraud. *Keller*, 2010 WL 3733872 at *3.

In *United States v. Andrews*, 681 F.3d 509, 528-29 (3d Cir. 2012), the indictment alleged that the information was transmitted by email, but the evidence showed that it was, instead, faxed. The Third Circuit recognized the variance but held that it was not fatal.

If the government relies on use of the Internet, the court should add the optional language addressing Internet use. Although the Third Circuit has not directly addressed this issue, use of the Internet to send a message or communicate with a web site may constitute the requisite transmission in interstate commerce. *Cf. United States v. MacEwan*, 445 F.3d 237, 244 (3d Cir. 2006).

The wire fraud statute applies to communications in foreign commerce as well as interstate communications. *United States v. Georgiou*, 777 F.3d 125 (3d Cir. 2015). If the charges allege communications in foreign commerce, the court should modify the language of the instruction accordingly. In *Georgiou*, the trial court explained to the jury “that interstate or foreign commerce is ‘to send from one state to another, or to or from the United States....’” The Third Circuit held that this instruction was proper. *Georgiou*, 777 F.3d at 138.

(Revised 2016)

18.1343-2 Wire Fraud - Each Transmission by Wire Communication a Separate Offense

Each transmission by wire communication in interstate commerce to advance, or to further, or to carry out the scheme or plan may be a separate violation of the wire fraud statute.

Comment

O'Malley et al., *supra*, § 47.15.

Each use of the wires constitutes a separate violation of the wire fraud statute. *See United States v. James*, 955 F.3d 336 (3d Cir. 2020).

(Revised 2/2021)

6.18.1344 Bank Fraud - Elements of the Offense (18 U.S.C. § 1344)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with bank fraud, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following two (*three*) elements beyond a reasonable doubt:

First: That *(name) [(knowingly executed a scheme or artifice to defraud (name of financial institution))(knowingly executed a scheme to obtain the money, funds or other property owned by or under the control of (name of financial institution))]* **by means of material false or fraudulent pretenses, representations or promises as detailed in Count** *(No.)* **of the indictment;**

[Second *(to be given only if the defendant is charged under §1344(1))*: That *(name)* **did so with the intent to defraud** *(name of financial institution)***;] and**

Second [*Third*]: That *(name of financial institution)* **was** *[(then insured by the Federal Deposit Insurance Corporation) (chartered by the United States)]***.**

[*If the defendant is charged under §1344(2):* It is not necessary that the government prove that *(name)* knew or intended that the money, funds, or property was owned by or under the control of the financial institution.]

Comment

18 U.S.C. § 1344 provides that:

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.

If the indictment charges a violation of §1344(1), the court should instruct on all three elements and should also give Instruction 6.18.1344-1 (Bank Fraud – "Intent to Defraud" Defined). If, instead, the indictment charges a violation of §1344(2), the court should instruct on only two elements, omitting the instruction on intent to defraud a financial institution. The court should also give Instructions 6.18.1341-1 (Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined).

The Third Circuit looks to the interpretation of the mail fraud statute, 18 U.S.C. § 1341, to construe the bank fraud statute. *United States v. Thomas*, 315 F.3d 190, 198 (3d Cir. 2002), abrogated in part, *Loughrin v. United States*, 573 U.S. 351 (2014) (abrogating holding regarding requisite intent, discussed below). In appropriate cases, the court should instruct concerning the requirement of unanimity. *Thomas*, 315 F.3d at 198. *See* Instruction 6.18.1341-2 (Mail, Wire, or Bank Fraud - Unanimity Required).

In *Loughrin*, the Court clarified the elements of the bank fraud statute, establishing that subsections 1344(1) and (2) are to be read disjunctively and have different requirements for conviction. When the defendant is charged under §1344(1), the court should instruct the jury that the government must prove the three elements set out in the instruction beyond a reasonable doubt. To establish guilt under §1344(1), the government must prove 1) that the defendant knowingly engaged in a scheme to defraud that targeted property owned or under the control of a financial institution, 2) that the financial institution was federally insured, and 3) that the defendant specifically intended to defraud the financial institution. *Loughrin*, 573 U.S. at 355-56. The scheme must be one to deceive the bank and deprive it of something of value. *Shaw v. United States*, 137 S. Ct. 462 (2016).

In *Shaw*, the Court held that, under §1344(1), a scheme to defraud a depositor with the bank by fraudulently obtaining funds from the depositor's account was also a scheme to defraud the bank where the defendant "knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds." *Shaw*, 137 S. Ct. at 466. *See also United States v. Capps*, 977 F.3d 250 (3d Cir. 2020).

In contrast, the Court held in *Loughrin* that §1344(2) does not require proof of specific intent to defraud the financial institution. As a result, when the defendant is charged under this section, the court need only instruct the jury that the government must establish that the defendant knowingly engaged in a scheme to defraud intended "to obtain any of the moneys ... or other property owned by, or under the custody or control of, a financial institution" that was federally insured. *Loughrin*, 573 U.S. at 356-57. In addition, the court should instruct the jury

that the defendant pursued that result "by means of false or fraudulent pretenses, representations, or promises," which is covered in Instruction 6.18.1341-1, defining "scheme to defraud." *Loughrin*, 573 U.S. at 356. The Court further held in *Loughrin* that under §1344(2) the government is not required to establish that the defendant specifically intended to defraud a financial institution. The Court emphasized that this section of the statute addresses bank property in the hands of others and is clearly written to apply when the defendant deceives an entity other than the bank into giving up bank property. *Loughrin*, 573 U.S. at 357. This aspect of *Loughrin* specifically abrogated the Third Circuit's holding in *United States v. Thomas*, 315 F.3d 190, 198 (3d Cir. 2002), which required the government to establish specific intent to defraud the bank and held that the intent to defraud the bank's customer would not support a conviction of bank fraud under §1344(2).

In response to the defendant's complaint that this reading of §1344(2) is too expansive, the Court in *Loughrin* explained in dictum, "§ 1344(2)'s "by means of" language . . . demands that the defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money." *Loughrin*, 573 U.S at 365. The fraud must have "some real connection to a federally insured bank, and thus implicate the pertinent federal interest." *Loughrin*, 573 U.S at 366.

It is not necessary that the defendant actually cause harm to the bank to be guilty of bank fraud. *See Shaw*, 137 S. Ct. at 467; *Loughrin*, 573 U.S at 364-65; *United States v. Khorozian*, 333 F.3d 498, 505 n.6 (3d Cir. 2003).

In *United States v. Fattah*, 858 F.3d 801 (3d Cir. 2017), the indictment alleged that the defendant made misrepresentations in his application for a line of credit, telling the bank that he would use the money for business expenses while he actually intended to use it for personal expenses. The court rejected the defendant's argument that the indictment alleged only a breach of contract and held that it sufficiently charged bank fraud. *Fattah*, 858 F.3d at 815.

In *United States v. Fattah*, 914 F.3d 112 (3d Cir. 2019), the defendants argued that they were entitled to be acquitted of bank fraud because the entity involved — Credit Union Mortgage Association (CUMA) – did not qualify as either a financial institution or a mortgage lending business. The Third Circuit rejected the argument. The court noted the jury was instructed that "CUMA could qualify as a financial institution either because it is federally insured or because it is a 'mortgage lending business.'" *Fattah*, 914 F.3d at 183.

Because the evidence at trial established that CUMA was not federally insured, the government relied on the argument that it was a mortgage lending business. The Third Circuit concluded:

> [I]t is of no moment that CUMA did not finance the mortgage at issue in Fattah's case. CUMA is a "mortgage lending business," and that alone suffices to support the convictions under §§ 1014 and 1344.

Fattah, 914 F.3d at 185.

18 U.S.C. § 2326 provides enhanced penalties for certain violations of § 1344:

> A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing--
>
> (1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and
>
> (2) in the case of an offense under any of those sections that--
>
> (A) victimized ten or more persons over the age of 55; or
>
> (B) targeted persons over the age of 55,
>
> shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

If the indictment alleges any of these circumstances, the instruction should be modified to add the aggravating factor as an element essential for conviction. The court may then also wish to give Instruction 3.11 (Lesser Included Offenses).

18 U.S.C.A. § 1349, which makes it a crime to attempt or conspire to commit any of the federal fraud offenses, provides:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute does not require proof of an overt act. *See United States v. Obaygbona*, 556 F. App'x. 161, 2014 WL 764764 (3d Cir. 2014). If the defendant is charged with attempt, the court should adapt this instruction and should also give Instruction 7.01 (Attempt). Likewise, if the defendant is charged with conspiracy to violate this statute, the appropriate instructions on conspiracy should be given, modified to reflect the fact that § 1349 does not require proof of an overt act. See Instruction 6.18.371A et seq.

(Revised 2/2021)

6.18.1344-1 Bank Fraud – "Intent to Defraud" Defined for Prosecutions Under Section 1344(1)

The second element that the government must prove beyond a reasonable doubt is that *(name)* **acted with the intent to defraud** *(name of financial institution)***.**

To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.

In considering whether *(name)* **acted with an intent to defraud, you may consider, among other things, whether** *(name)* **acted with a desire or purpose to bring about some gain or benefit to** *(himself)(herself)* **or someone else at the expense of** *(name of financial institution)* **or with a desire or purpose to cause some loss to** *(name of financial institution)***.** *[The intent to fraudulently obtain funds held by the bank for a depositor is an intent to defraud the bank.]*

Comment

O'Malley et al., supra, § 47.14.

If the defendant is charged under §1344(1), the government must prove specific intent to defraud the bank. *Loughrin v. United States*, 573 U.S. 351 (2014). The government need not establish that it was the defendant's *purpose* to take property from the bank. *Shaw v. United States*, 137 S. Ct. 462 (2016).

In *United States v. Leahy*, 445 F.3d 634 (3d Cir. 2006), the Third Circuit noted that the following instruction appropriately conveyed the intent requirement:

> The second element of bank fraud, which the government must prove beyond a reasonable doubt, is that the defendants participated in the scheme to defraud with the intent to defraud. To act with an intent to defraud means to act knowingly and with the purpose to deceive or to cheat. An intent to defraud is ordinarily accompanied by a desire or a purpose to bring about gain or benefit to oneself or some other person, or by a desire or a purpose to cause some loss to some person. The intent element of bank fraud is an intent to deceive the bank in order to obtain from it money or other property.

Leahy, 445 F.3d at 644.

Specific intent may be inferred from "a material misstatement of fact made with reckless disregard for the truth." *United States v. Hannigan*, 27 F.3d 890, 892 n.1 (3d Cir. 1994). In some cases, the court may also consider instructing on willful blindness. *United States v. Stewart*, 185 F.3d 112 (3d Cir. 1999). *See* Instruction 5.06 (Willful Blindness).

If the government proves such intent, it is irrelevant that the defendant also intended to harm another person or entity or was motivated by a desire to harm another person or entity. In *Shaw*, 137 S. Ct.at 467, the Court held that the intent to fraudulently obtain funds of a depositor with the bank is sufficient to establish liability for bank fraud under §1344(1).

A good faith defense instruction is generally unnecessary in bank fraud cases and therefore has not been included. In *Gross v. United States*, 961 F.2d 1097 (3d Cir. 1992), the Third Circuit stated:

> We are persuaded by the majority view, and agree that a jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully. Therefore, in this case, we conclude that failure to give the instruction on the good faith defense did not constitute an abuse of discretion. By giving a detailed instruction on the elements of the crime with which Gross was charged, the court ensured that a jury finding of good faith would lead to an acquittal. Consistent with our well-established practice of evaluating the jury charge as a whole, we find that the district court's charge was within the bounds of its discretion.
>
> While it is not reversible error for the district court to refuse to give the good faith instruction in this case, we commend the district judges in the exercise in the discretion of its use as a supplement to the 'knowing and wilful' charge in future cases.

Gross, 961 F.2d at 1103 (citation omitted). In *Leahy*, 445 F.3d at 651, the Third Circuit also rejected the defendant's argument that the trial court's refusal to instruct on good faith constituted error. The court stated:

> In *United States v. Gross*, 961 F.2d 1097 (3d Cir.1992), we held, adopting what has become the majority position among the circuits, that a district court does not abuse its discretion in denying a good faith instruction where the instructions given already contain a specific statement of the government's burden to prove the elements of a "knowledge" crime. *Id.* at 1102-03. In this matter, the District Court's instructions, taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant. If the jury found that the Defendants had acted in good faith, it necessarily could not have found that the Defendants had acted with the requisite scienter. Accordingly, any good faith instruction would have been unnecessary and duplicative.

In *United States v. Jimenez*, 513 F.3d 62 (3d Cir. 2008), the Third Circuit held that the district court's instructions had adequately covered the defendants' defense to the charge of bank fraud, which included a claim of good faith. The court described the contents of the jury instructions as

follows:

> The district court explicitly told the jury that good faith was a complete defense to bank fraud because good faith negated the element of intent to defraud required for a bank fraud conviction, and that the Government bore the burden of proving beyond a reasonable doubt that the defendants acted with the requisite intent to defraud, negating a good faith defense. The court further instructed the jury that "even if a bank officer or employee may have known the true nature of the questioned transaction, that is not a defense to bank fraud. Rather, the question is whether the financial institution itself, not its officers or agents, was defrauded." . . . . Taken together with the instruction that "[i]n determining whether or not the prosecution has proven that a defendant acted with the specific intent required by the mail and bank fraud counts, the jury must consider all of the evidence received in the case bearing on a defendant's state of mind", the instructions allowed the jury to consider the bank officials' knowledge and acquiescence in determining whether the defendants intended to defraud [the bank], while properly instructing the jury that the defendants' intent to defraud must target the bank, not the individual bank officers.
>
> The court also properly instructed the jury that repayment of the overdrafted balances could be considered in determining whether the defendants acted with an intent to defraud or whether they acted in good faith, focusing on the intent of the defendants at the time of the actions alleged to be fraudulent. The court's instruction that "[a]ctual repayment to the bank may negate an intent to defraud the bank only if coupled with other evidence that likewise negates an intent to defraud" correctly states the law and appropriately focuses the jurors' attention on the defendants' intent at the time of the charged conduct.
>
> Likewise, the court properly instructed the jury that fees and interest charged by the bank on the overdrafts do not negate a defendant's intent to defraud, which is the focus of a bank fraud charge. This instruction, coupled with the instructions on knowledge and intent to defraud, allowed the defendants to argue that they believed their actions were authorized from the fact that they paid the overdraft fees and therefore lacked the requisite intent to defraud. The fact that the jury did not buy into their argument does not make the instructions erroneous.

United States v. Jimenez, 513 F.3d at 74-75 (citations omitted). *See* Comment to Instruction 5.07 (Good Faith Defense).

(Revised 2017)

6.18.1347 Health Care Fraud - Elements of the Offense (18 U.S.C. § 1347)

Count *(No.)* **of the indictment charges the defendant** *(name)* **with health care fraud, which is a violation of federal law.**

In order to find the defendant guilty of this offense, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That *(name)* **knowingly devised or participated in a scheme to** *(defraud (victim entity or person)) (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 (victim entity or person))* **in connection with the delivery of or payment for health care benefits, items, or services;**

Second: That *(name)* **acted with the intent to defraud; and**

Third: That *(victim entity or person)* **was**

[a (public)(private) plan or contract, affecting commerce, under which medical benefits, items, or services were provided to any individual.]

[an (individual)(entity) who was providing a medical benefit, item, or service for which payment may be made under a (public)(private) plan or contract, affecting commerce, under which medical benefits, items, or services were provided to any individual.]

Comment

18 U.S.C. § 1347 provides:

(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.
>
> 18 U.S.C. § 24(b) defines "health care benefit program" to mean:
>
> any public or private plan or contract, affecting 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.

In addition to instructing the jury on the elements of the offense, the court should also give Instruction 6.18.1341-1 (Mail, Wire, or Bank Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined), Instruction 6.18.1347-1 ("Intent to Defraud" - Defined), and Instruction 6.18.1347-2 (Health Care Fraud - Affecting Interstate Commerce). If the indictment charges multiple schemes or plans to defraud, the court should give Instruction 6.18.1341-2 (Mail, Wire, or Bank Fraud - Unanimity Required).

Section 1347(b) was added in 2010, clarifying the intent requirement. In *United States v. Shvets*, 631 F. App'x. 91 (3d Cir. 2015) (non-precedential), the Third Circuit concluded in dictum that the amendment merely codified prior law on the question.

In *United States v. Hickman*, 331 F.3d 439, 445-46 (5th Cir. 2003), the Fifth Circuit considered the requirements of the statute.

> . . . § 1347 punishes one who "knowingly and willfully executes, or attempts to execute, a scheme or artifice . . . to defraud any health care benefit program . . . or . . . to obtain, by means of false or fraudulent pretenses . . . any of the money or property . . . of . . . any health care benefit program . . . ." Although there is a paucity of case law interpreting this provision, its language and structure are almost identical to the bank fraud statute, 18 U.S.C. § 1344. In *United States v. Lemons*, 941 F.2d 309 (5th Cir.1991), we interpreted § 1344 to punish "each execution of the scheme." Id. at 318. We contrasted this with the mail and wire fraud statutes, which punish "each act in furtherance, or execution, of the scheme." Id. . . . . We hold, by analogy, that the health care fraud statute, § 1347, punishes executions or attempted executions of schemes to defraud, and not simply acts in furtherance of the scheme. Of course, although the crime of health care fraud is complete upon the execution of a scheme, any scheme can be executed a number of

> times, and each execution may be charged as a separate count.
> * * *
> Ultimately, the decision of whether a particular transaction is an “execution” of the scheme or merely a component of the scheme will depend on several factors including the ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, and the number of parties involved. This test highlights the fact that the definition of an execution is inextricably intertwined with the way the fraudulent scheme is defined. (Citations omitted.)

The court concluded that each claim constituted a separate execution of the defendant's scheme. *Hickman*, 331 F.3d at 447. *See also United States v. Bell*, 2010 WL 1854113 (W.D. Pa. 2010) (discussing scienter requirement).

In *United States v. Jones*, 471 F.3d 478 (3d Cir.2006), the Third Circuit differentiated between health care fraud and theft. The defendant, a worker at a Methadone clinic, was convicted of health care fraud under 18 U.S.C. § 1347(2). The defendant, who was responsible for depositing the clinic’s daily earnings in a bank account, repeatedly embezzled the clinic’s money to her own funds. The Court of Appeals reversed on the grounds that the theft of the money occurred after the health care benefit was conferred; the theft was unrelated to the conferral of any health care benefit:

> The plain language of the statute clearly prohibits health care fraud by knowingly or willfully using "false or fraudulent pretenses, representations, or promises" to obtain the money or property of a health care benefit program in connection with the delivery of, or payment for, health care benefits, items, or services. *See* 18 U.S.C. § 1347(2). . . . [F]raud is differentiated from theft. Under the common law and the Model Penal Code, theft is synonymous to larceny--the taking of another's property by trespass with intent to deprive permanently the owner of the property. Fraud, which did not exist at common law, "means to cheat or wrongfully deprive another of his property by deception or artifice," and "implies deceit, deception, artifice, trickery."
>
> Here, the Government did not establish health care fraud. Rather, the Government established only that: (1) from February 2000 to March 2004, the amount deposited into Progressive's bank account was $451,000 less than the amount received from clients; (2) the discrepancies between the amount received and the amount deposited occurred on the majority of the days on which Jones worked alone and did not occur when Jones was absent from work; (3) Jones was one of the employees that made bank deposits; and (4) Jones had made cash deposits to her bank account and cash expenditures exceeding her wages. The Government has not established, nor did it seek to establish, any type of misrepresentation by Jones in connection with the delivery of, or payment for, health care benefits, items, or services.

Id. at 481 (internal citation and footnote omitted).

The court went on to explain:

> There was simply no type of misrepresentation made in connection with the delivery of, or payment for, health care benefits, items or services. There is no allegation that Jones said or did anything that affected the delivery of, or payment for, health care benefits, items, or services. The services were already properly paid for when Jones failed to deposit all of the money collected, and instead kept it.

Id. at 482.

In *United States v. Lucien*, 347 F.3d 45, 52 (2d Cir. 2003), the Second Circuit held that a state no-fault automobile insurance program qualified as "health care benefit program" and upheld the health care fraud convictions of defendants who posed as injured passengers in staged automobile collisions in a scheme to obtain payments from insurers, which included payments to the defendants' medical providers. In *United States v. Manamela*, 612 F.App'x. 151 (3d Cir. 2015) (non-precedential), the Third Circuit discussed the statutory definition and concluded that a program that provided in-home social services for children qualified as a health care benefit program where one consequence of the defendant's fraud was that children did not get necessary medical care. The court further held that the defendant's fraudulent actions were "in connection with the delivery of or payment for health care benefits, items, or services." as required by § 1347. *Id.*

18 U.S.C.A. § 1349, which makes it a crime to attempt or conspire to commit any of the federal fraud offenses, provides

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The statute does not require proof of an overt act. *See United States v. Obaygbona*, 556 F.App'x. 161, 2014 WL 764764 (3d Cir. 2014).

(Revised 2016)

6.18.1347-1 Health Care Fraud – "Intent to Defraud" Defined

The second element that the government must prove beyond a reasonable doubt is that *(name)* **acted with the intent to defraud** *(victim entity or person)***.**

To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.

In considering whether *(name)* **acted with an intent to defraud, you may consider, among other things, whether** *(name)* **acted with a desire or purpose to bring about some gain or benefit to** *(himself)(herself)* **or someone else at the expense of** *(victim entity or person)* **or with a desire or purpose to cause some loss to** *(victim entity or person)*.

Comment

O'Malley et al., supra, § 47.14.

See Instructions 5.02 (Knowingly) and 5.03 (Intentionally).

6.18.1347-2 Health Care Fraud - Affecting Interstate Commerce

The government must prove beyond a reasonable doubt that the *(public)(private)* **plan or contract affected or could have affected interstate commerce. Affecting interstate commerce means any action, which in any way, interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal.**

Comment

Sand et al., supra, 50-7 and 50-15.

In *United States v. Hickman*, 331 F.3d 439, 443 (5th Cir. 2003), the Fifth Circuit recognized that "affecting commerce" is probably an essential element of the offense but held that the trial court's failure to instruct on this element was not plain error where the victims of the fraud were Medicare and Medicaid.