

Chapter 10.00

FRAUD OFFENSES

Introduction to Fraud Instructions

(current through December 1, 2009)

The pattern instructions cover three fraud offenses with elements instructions:

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

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

The elements of mail, wire and bank fraud are similar except for the jurisdictional elements. The Committee drafted separate instructions for the three offenses as the most efficient way to reflect the different jurisdictional bases. Beyond the jurisdictional bases, the mail, wire and bank fraud offenses are read in tandem and case law on the three is largely interchangeable. *See* *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) (“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.”); *United States v. McAuliffe*, 490 F.3d 526, 532 n.3 (6th Cir. 2007) (“The bank, mail and wire fraud statutes all employ identical ‘scheme to defraud’ language and thus are to be interpreted *in pari materia*.”) (citations omitted); *United States v. Daniel*, 329 F.3d 480, 486 n.1 (6th Cir. 2003); *Hofstetter v. Fletcher*, 905 F.2d 897, 902 (6th Cir. 1988) (“This court has held that the wire fraud statutory language should be interpreted with the same breadth as the analogous language in the mail fraud statute.”) (citations omitted); *Neder v. United States*, 527 U.S. 1, 20-21 (1999) (bank fraud statute was modeled on and is similar to the mail and wire fraud statutes).

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

10.01 MAIL FRAUD (18 U.S.C. § 1341)

(1) The defendant is charged with the crime of mail fraud. For you to find the defendant guilty of mail fraud, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

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

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

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

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

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

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

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

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

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

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

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

(3) [It is not necessary that the government prove [all of the details alleged concerning the precise nature and purpose of the scheme] [that the material transmitted by mail was itself

false or fraudulent] [that the alleged scheme actually succeeded in defrauding anyone] [that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud] [that someone relied on the misrepresentation or false statement].]

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

Use Note

Brackets indicate options for the court.

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

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

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

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

See also Instruction 2.09 Deliberate Ignorance.

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

Committee Commentary Instruction 10.01

(current through December 1, 2009)

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

To define the elements of mail fraud, the Committee relied primarily on *Neder v. United States*, 527 U.S.1 (1999); *United States v. Gold Unlimited, Inc.*, 177 F.3d 472 (6th Cir. 1999) and *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997).

The specific language used in paragraph (1) of the instruction is drawn from two cases. Paragraphs (1)(A), (1)(C) and (1)(D) are based on *United States v. Gold Unlimited, Inc.*, *supra* at 478-79. Paragraph (1)(B), which covers materiality, is based on *Neder v. United States*, *supra*.

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

or for obtaining money or property,” it was arguable that the two phrases should be construed independently. However, the Court then rejected this construction, explaining that the second phrase merely modifies the first. *McNally*, 483 U.S. at 358-59. In *Cleveland*, the Court reiterated this interpretation of the statute:

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

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

In paragraph (1)(A) the reference to participation is based on other circuits’ pattern instructions, including the Seventh Circuit instruction on the elements of mail fraud (“defendant ... [devised] [or] [participated in] the scheme”); Eleventh Circuit Instruction 50.1 (“defendant ... devised or participated in a scheme....”) and First Circuit Instruction 4.12 (“defendant’s ... participation in this scheme....”). The Seventh Circuit instruction is presumably based on *United States v. Wilson*, 506 F.2d 1252, 1258 (7th Cir. 1974), where the court affirmed an instruction stating that “the Government must prove beyond a reasonable doubt that defendants or any one or more of them participated in a scheme to defraud.”

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

The definition of “false or fraudulent pretenses, representations or promises” in paragraph (2)(B) is based on the definition of “false or fraudulent pretenses” in First Circuit Instruction 4.12 Mail Fraud. In the instruction, the Committee omitted a reference to the intent to defraud because that element is covered in paragraph (2)(E). The Sixth Circuit has approved similar definitions, *see* *United States v. Stull*, 743 F.2d 439, 446 (6th Cir. 1984) and *United States v. O’Boyle*, 680 F.2d 34, 36 (6th Cir. 1982). *See also* Instruction 2.09 Deliberate Ignorance.

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

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

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

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

Paragraph (3) lists some but not all items the government is not required to prove. Many pattern instructions include such a provision. This language is patterned after First Circuit Instruction 4.12; Fifth Circuit Instruction 2.59; Eighth Circuit Instruction 6.18.1341; and Eleventh Circuit Instruction 50.1. These provisions should be used only if relevant.

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

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

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

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

As to whether the fraud must be capable of deceiving persons based on a subjective (“however gullible”) standard or an objective (“person of ordinary prudence”) standard, in most cases the objective standard provided in paragraph (2)(D) of the instruction is appropriate. The Sixth Circuit has stated that the standard to be used is an objective one. *See, e.g., United States*

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

Outside the Sixth Circuit, there is a split of authority on this issue. In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009) (en banc), the district court gave the Eleventh Circuit pattern instruction on mail fraud, which incorporated a subjective standard and thus did not require that the fraudulent scheme be calculated to deceive a reasonably prudent person. The en banc court affirmed the use of this instruction, rejecting prior circuit precedent after a detailed review of authority in other circuits and the Supreme Court. The court concluded that “[m]ail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence.” *Id.* at 1169. In discussing the Sixth Circuit decisions in *Norman* (using a subjective standard) and *Jamieson* (stating an objective standard, but not citing or distinguishing *Norman*), the Eleventh Circuit found *Norman* more persuasive because in *Jamieson*, the “‘ordinary prudence’ language was invoked to . . . affirm [a] conviction” *Svete* at 1168-69. The subjective standard enunciated by the Sixth Circuit in *Norman* is consistent with other older Sixth Circuit precedent. *See* *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Tucker v. United States*, 224 F. 833, 837 (6th Cir. 1915); *O’Hara v. United States*, 129 F. 551, 555 (6th Cir. 1904).

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

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

counterproductive and return to haunt the perpetrator of the fraud.” *Id.* at 715.

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

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

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