JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT

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On 6 April 2016, the Judicial Council approved the Eleventh Circuit Pattern Jury Instructions, Criminal Cases (2016 revision). Since that date, the Council has approved revisions on 9 December 2016, 7 September 2017, and 29 November 2017, which are listed at the bottom of this memorandum.

On 24 January 2019, the Council also approved the following revised and new instructions:

OFFENSE INSTRUCTIONS

Revised

50.1	Mail Fraud, 18 U.S.C. § 1341
50.2	Mail Fraud: Depriving Another of Intangible Right of Honest Services, 18 U.S.C. §§ 1341, 1346 (revises revision of 9 December 2016)
50.3	Mail Fraud: Depriving Another of Intangible Right of Honest Services, 18 U.S.C. §§ 1341, 1346, Private Employee
50.4	Mail Fraud: Depriving Another of Intangible Right of Honest Services, 18 U.S.C. §§ 1341, 1346, Independent Contractor or Other Private Sector Contractual Relationship Besides Employer/Employee
51	Wire Fraud, 18 U.S.C. § 1343
52	Bank Fraud, 18 U.S.C. § 1344
53.1	Health Care Fraud, 18 U.S.C. § 1347 (renumbered from O53)

98	Controlled Substances: Possession with Intent to Distribute, 21 U.S.C. § 841(a)(1)
106.1	Possession of Unregistered Firearm, 26 U.S.C. § 5861(d)

New

53.2	Obstruction of Criminal Investigations of Health Care Offenses, 18 U.S.C. § 1518

All other instructions in the 2016 Pattern Jury Instructions for Criminal Cases and previous revisions remain in effect, including the following revisions:

- On 9 December 2016, the Judicial Council approved, and announced in a memorandum on 22 December 2016, revisions to offense instructions 5.1, 5.2, 24.2 ann., 50.2, 70.2, 40.3, 49, and 82, special instruction 19, as well as new offense instructions 117.1 and 117.2.

- On 7 September 2017, the Council approved, and announced in a memorandum on 20 September 2017, a new offense instruction 92.3.

- On 29 November 2017, several non-substantive changes were incorporated into the instructions.

The 6 April 2016 resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2016 pattern jury instructions. Those limitations and conditions also apply to all of the instructions above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at http://pji.ca11.uscourts.gov has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:

James P. Gerstenlauer
Secretary to the Judicial Council

O50.1
Mail Fraud
18 U.S.C. § 1341

It's a Federal crime to [use the United States mail] [transmit something by private or commercial interstate carrier] in carrying out a scheme to defraud someone.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;

(2) the false or fraudulent pretenses, representations, or promises were about a material fact;

(3) the Defendant intended to defraud someone; and

(4) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier] something meant to help carry out the scheme to defraud.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers items from one state to another. It doesn't matter whether the message or item actually moves from one state to another as long as the message or item is delivered to the carrier.]

A "scheme to defraud" means any plan or course of action intended to deceive or cheat someone out of money or property using false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government does not have to prove all the details about the precise nature and purpose of the scheme or that the material [mailed] [deposited with an interstate carrier] was itself false or fraudulent. It also does not have to prove that

the use of [the mail] [the interstate carrier] was intended as the specific or exclusive means carrying out the fraud, or that the Defendant did the actual [mailing] [depositing]. It doesn't even have to prove that anyone was actually defrauded.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [the carrier] will usually follow in the ordinary course of business or where that use can reasonably be foreseen.

Each separate use of [the mail] [an interstate carrier] as part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

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,… 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 [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years' imprisonment and $1 million fine).

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

> 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.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1341 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the Defendant is guilty of using the mail in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

The 1994 amendment to Section 1341 now also applies it to the use of "any private or commercial interstate carrier." Where such private carriers are involved, the statute requires the government to prove only that the carrier engages in interstate deliveries and not that state lines were crossed. *See United States v. Marek*, 238 F.3d 310, 318 (5th Cir.) *cert. denied* 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001).

Mail fraud requires a showing of "(1) knowing participation in a scheme to defraud and (2) a mailing in furtherance of the scheme." *United States v. Photogrammetric Data Svcs., Inc.*, 259 F.3d 229, 253 (4th Cir. 2001). The mailing, however, need only "be incident to an essential part of the scheme or a step in the plot," and does not have to be an essential element of the scheme to be part of the execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud, and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-29 (11th Cir. 1999), *cert. denied*, 530 U.S. 1261, 120 S. Ct. 2727, 147 L. Ed. 2d 982 (2000).

In mail fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of Title 18, United States Code, Section 1341. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000).

In the Eleventh Circuit, there has been considerable activity with respect to whether the measure of the alleged fraudulent conduct should be an objective "intended to deceive a reasonable person" standard, or whether conduct intended to deceive "someone," including the ignorant and gullible, is sufficient.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009), the Eleventh Circuit, in an en banc decision, held that:

> Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent.

556 F.3d 1157, 1165 (11th Cir. 2009).

O50.2
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Public Official/Public Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the public of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the public of the right to the Defendant's honest services; and

(3) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to the public by participating in a bribery or kickback scheme.

Public officials and public employees have a duty to the public to provide honest services. If an [official] [employee] does something or makes a decision that serves the [official's] [employee's] personal interests by taking or soliciting a bribe or kickback, the official or employee defrauds the public of honest services, even if the public agency does not suffer any monetary loss.

Bribery and kickbacks involve the exchange of a thing or things of value for an official act by a public official. Bribery and kickbacks also include solicitations of things of value in exchange for an official act, even if the thing of value is not accepted or the official act is not performed. That is, bribery and kickbacks include the public [official's] [employee's] solicitation or agreement to accept something of value, whether tangible or intangible, in exchange for an official act, whether or not the payor actually provides the thing of value, and whether or not the public official or employee ultimately performs the requested official act or intends to do so.

To qualify as an official act, the public official must have [made a decision or taken an action] [agreed to make a decision or take an action] on a question, matter, cause, suit, proceeding, or controversy. Further, the question, matter, cause, suit, proceeding, or controversy must involve the formal exercise of governmental power. It must be similar in nature to a lawsuit before a court, a determination

before an agency, or a hearing before a committee. It must also be something specific which requires particular attention by a public official.

The public official's [decision or action] [agreement to make a decision or take an action] on that question, matter, cause, suit, proceeding, or controversy may include using [his/her] official position to exert pressure on another official to perform an official act, or to advise another official, knowing or intending that such advice will form the basis for an official act by another official. But setting up a meeting, talking to another official, or organizing an event (or agreeing to do so) – without more – is not an official act.

[It is not necessary that the public official *actually* make a decision or take an action. It is enough that [he/she] agrees to do so. The agreement need not be explicit, and the public official need not specify the means [he/she] will use to perform [his/her] end of the bargain. Nor must the public official in fact intend to perform the official act, so long as [he/she] agrees to do so.]

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss of honest services. Proving intent to deceive alone, without the intent to cause loss of honest services, is not sufficient to prove intent to defraud. [A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another

state. It doesn't matter whether a matter, communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

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 . . . 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 [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine.

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.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United State v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause loss of honest services. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by

United States v. Takhalov, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

In *Skilling v. United States*, 561 U.S. 358, (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks. The definition of "official act" is taken from *McDonnell v. United States*, 136 S. Ct. 2355 (2016), and should be used when the predicate bribery or kickback is based on the federal bribery statute, 18 U.S.C. § 201. However, there is authority that honest services fraud prosecutions can be based on state law bribery offenses. *See United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012); *United States v. Sanchez*, 502 F. App'x 375, 381 (5th Cir. 2012). In that event, *McDonnell*'s definition of official act may not be applicable. However, courts should be aware that the Supreme Court in *McDonnell* rejected the argument that the honest services statute is unconstitutionally vague because the application of the bribery statute's official act requirement cured any vagueness concerns. Thus, an instruction that does not precisely define the type of conduct that can give rise to the offense could be problematic.

In a public sector honest services fraud case involving a bribe, the Eleventh Circuit appears to have held that materiality is not an element of the offense. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). The Committee believes this to be the correct approach; if a public official or employee accepts a bribe or kickback, the breach of fiduciary duty is inherently material. Accordingly, the pattern charge does not include a materiality element. Nevertheless, the Supreme Court has held that materiality is an essential element of the crimes of mail fraud, wire fraud and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25 (1999). Because honest services fraud is a species of mail and wire fraud, this has led some circuits to hold that materiality is an element of honest services fraud. If a materiality element is included, the Committee suggests the following: the scheme to defraud had a natural tendency to influence, or was capable of influencing, a decision or action by the Defendant's employer.

O50.3
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Private Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the Defendant's employer of the right to honest services of the Defendant through bribery or kickbacks;

(2) the Defendant did so with an intent to defraud the Defendant's employer of the right to the Defendant's honest services;

(3) the Defendant foresaw or reasonably should have foreseen that the Defendant's employer might suffer economic harm as a result of the scheme; and

(4) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to an employer by participating in a bribery or kickback scheme.

An employee who works for a private employer has a legal duty to provide honest services to the employer.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the employer might suffer economic harm as a result of the breach.

A bribe or a kickback is any money or compensation of any kind which is provided, directly or indirectly, to an employee for the purpose of improperly obtaining or rewarding favorable treatment from the employee in connection with [his] [her] employment.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss of honest services. Proving intent to deceive alone, without the intent to cause loss of honest services, is not sufficient to prove intent to defraud.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to or through another state. It doesn't matter whether a matter, communication or

item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

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 . . . 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 [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine.

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.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United States v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause loss of honest services. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

The definition of "bribe or kickback" is taken, with some modification, from 41 U.S.C. §8701(2)'s definition of "kickback" in the context of Federal Government contracts. The Committee believes the modified definition is sufficient to cover both bribes and kickbacks in the private sector. The Eleventh Circuit cited to that statutory definition in *United States v. Aunspaugh*, --- F.3d ---, 2015 WL 4098254 (11th. Cir. 2015), in which the court held the prior definition of "kickback" in the pattern instruction was too broad in light of the Supreme Court's decision in *Skilling*. The court declined to decide whether a quid pro quo is required or whether a reward would be sufficient, so courts may want to eliminate the "or rewarding" language from the definition. *See id*. at *4.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. It seems clear that an employment relationship creates a sufficient fiduciary duty to support a conviction for honest services fraud by a private employee. *See Skilling*, 561 U.S. at 408 n.41 (identifying an employer-employee relationship as a clear example of a fiduciary relationship under pre-*McNally* case law); *United States v. Kalaycioglu*, 210 F. App'x 825, 832-33 (11th Cir. 2006); *United States v. Williams*, 441 F.3d 716, 723 (9th Cir. 2006) (noting that employer-employee relationship is sufficient for private sector honest service fraud); *deVegter*, 198 F.3d at 1327 (listing "purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions . . . . defrauding their employers or unions by accepting kickbacks or selling confidential information" as a distinct category of honest services fraud pre-*McNally* (internal quotation marks and citation omitted)).

However, the Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)).

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud.

deVegter's requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368- 69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore, the Committee has not included a redundant materiality element in the pattern charge.

O50.4
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346
Independent Contractor or Other Private Sector Contractual Relationship
Besides Employer/Employee

It's a Federal crime to use [the United States mail] [a private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant owed a duty of honest services to the victim;

(2) the Defendant knowingly devised or participated in a scheme to fraudulently deprive the victim of the right to honest services of the Defendant through bribery or kickbacks;

(3) the Defendant did so with an intent to defraud the victim of the right to the Defendant's honest services;

(4) the Defendant foresaw or reasonably should have foreseen that the victim might suffer economic harm as a result of the scheme; and

(5) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier or transmitting or causing to be transmitted] some matter, communication or item to carry out the scheme to defraud.

A "scheme" means any plan or course of action intended to deceive or cheat someone.

To "deprive someone else of the right of honest services" is to violate a duty to provide honest services to another person by participating in a bribery or kickback scheme.

The Defendant owes a duty of honest services to the victim if, by the nature of their relationship, the Defendant is vested with a position of dominance, authority, trust, and de facto control. The relationship imposes this duty if trust is reposed on one side and there is resulting superiority and influence on the other.

The Government must prove that the Defendant intended to breach that duty by receipt of a bribe or kickback, and foresaw, or should have foreseen, that the victim might suffer economic harm as a result of the breach.

A bribe or a kickback is any money or compensation of any kind which is provided, directly or indirectly, to a contractor for the purpose of improperly obtaining or rewarding favorable treatment from the contractor in connection with the contract.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss of honest services. Proving intent to deceive alone, without the intent to cause loss of honest services, is not sufficient to prove intent to defraud.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers matters, communications or items from one state to

or through another state. It doesn't matter whether a matter, communication or item actually moves from one state to or through another as long as the matter, communication or item is delivered to the carrier.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government doesn't have to prove the matter, communication or item [mailed] [deposited with or transmitted by an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] [transmitted] the matter, communication or item. And the Government doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

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 . . . 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 [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine.

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.

This instruction is prepared for mail fraud involving the "right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United States v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause loss of honest services. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a

deceit." (internal quotation marks and citation omitted)).

In *Skilling v. United States*, 561 U.S. 358 (2010), the Supreme Court interpreted 18 U.S.C. § 1346 to criminalize only schemes to defraud that are based on bribes and kickbacks.

The definition of "bribe or kickback" is taken, with some modification, from 41 U.S.C. §8701(2)'s definition of "kickback" in the context of Federal Government contracts. The Committee believes the modified definition is sufficient to cover both bribes and kickbacks in the private sector. The Eleventh Circuit cited to that statutory definition in *United States v. Aunspaugh*, --- F.3d ---, 2015 WL 4098254 (11th. Cir. 2015), in which the court held the prior definition of "kickback" in the pattern instruction was too broad in light of the Supreme Court's decision in *Skilling*. The court declined to decide whether a quid pro quo is required or whether a reward would be sufficient, so courts may want to eliminate the "or rewarding" language from the definition. *See id*. at *4.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. The Eleventh Circuit has held that a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In *deVegter*, a private sector case involving an independent contractor rather than an employee, the Eleventh Circuit held the breach of loyalty must inherently harm the purpose of the parties' relationship: "'The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'" *deVegter*, 198 F.3d at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)). The definition of the type of relationship necessary to give rise to a duty of honest services comes from *deVegter*'s definition of fiduciary duty, which is drawn from *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) and *United States v. Brennan*, 183 F.3d 139, 150-51 (2d Cir. 1999). *See deVegter*, 198 F.3d at 1331 & n.8.

As discussed in the annotations accompanying public sector honest services fraud, the Eleventh Circuit appears to have held that materiality is not an element of public sector honest services fraud. *United States v. Langford*, 647 F.3d 1309, 1321 n.7 (11th Cir. 2011). Materiality likely remains an element of private sector honest services fraud. *deVegter*'s requirement that the Government prove the private employee foresaw or reasonably should have foreseen that his employer might suffer economic harm as a result serves the same purpose as a materiality element. Other circuits discussing materiality versus foreseeable economic harm, including the Sixth Circuit case cited by the Eleventh Circuit in *de Vegter*, choose one approach or the other and make it clear they serve the same function. *See, e.g.*, *United States v. Milovanovic*, 678 F.3d 713, 726-

27 (9th Cir. 2013) (en banc) (materiality); *United States v. Rybicki*, 354 F.3d 124, 145-46 (2d Cir. 2003) (en banc) (materiality); *United States v. Vinyard*, 266 F.3d 320, 327-28 (4th Cir. 2001) (reasonably foreseeable harm); *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997) (reasonably foreseeable harm); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996) (materiality). Therefore, the Committee has not included a redundant materiality element in the pattern charge.

O51
Wire Fraud
18 U.S.C. § 1343

It's a Federal crime to use interstate wire, radio, or television communications to carry out a scheme to defraud someone else.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises;

(2) the false pretenses, representations, or promises were about a material fact;

(3) the Defendant acted with the intent to defraud; and

(4) the Defendant transmitted or caused to be transmitted by [wire] [radio] [television] some communication in interstate commerce to help carry out the scheme to defraud.

A "scheme to defraud" means any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference to the truth, and makes with the intent to defraud. A statement or representation may be "false" or "fraudulent" when it is a half-truth, or effectively conceals a material fact, and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the material transmitted by interstate [wire] [radio] [television] was itself false or fraudulent; or that using the [wire] [radio] [television] was intended as the specific or exclusive means of carrying out the alleged fraud; or that the Defendant personally made the transmission over the [wire] [radio] [television]. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "use" interstate [wire] [radio] [television] communications is to act so that something would normally be sent through wire, radio, or television communications in the normal course of business.

Each separate use of the interstate [wire] [radio] [television] communications as part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

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 guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years' imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years' imprisonment and $1 million fine.)

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

> 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.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1343 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and

victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

> If you find beyond a reasonable doubt that the defendant is guilty of using interstate [wire] [radio] [television] communications facilities in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing] [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

Wire fraud requires showing (1) that the Defendant knowingly devised or participated in a scheme to defraud; (2) that the Defendant did so willfully and with an intent to defraud; and (3) that the Defendant used interstate wires for the purpose of executing the scheme. *Langford v. Rite Aid of Ala., Inc.*, 231 F.3d 1308, 1312 (11th Cir. 2000). Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit's decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-20 (11th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

In wire fraud cases involving property rights, "the Government must establish that the defendant intended to defraud a victim of money or property of some value." *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not "property" for the purposes of this statute. *Cleveland v. United States*,

531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000) (addressing "property" for purposes of mail fraud statute).

The mail fraud and wire fraud statutes are "given a similar construction and are subject to the same substantive analysis." *Belt v. United States*, 868 F.3d 1208, 1211 (11th Cir. 1989).

See also United States v. Svete, 556 F.3d 1157, (11th Cir. 2009) and discussion *supra* Offense Instruction 50.1.

O52
Bank Fraud
18 U.S.C. § 1344

It's a Federal crime to carry out or attempt to carry out a scheme to defraud a financial institution, or to get money or property owned or controlled by a financial institution by using false pretenses, representations, or promises.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly carried out or attempted to carry out a scheme [to defraud a financial institution] [to get money, assets, or other property from a financial institution] by using false or fraudulent pretenses, representations, or promises about a material fact;

(2) the false or fraudulent pretenses, representations, or promises were material;

(3) the Defendant intended to defraud [the financial institution] [someone]; and

(4) the financial institution was federally [insured] [chartered].

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud. A statement or representation may

be "false" or "fraudulent" when it's a half truth or effectively conceals a material fact and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1344 provides:

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.

See 18 U.S.C. § 20 for an enumeration of the financial institutions covered by § 1344.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. *See* Pattern Instruction 50.1.

Proof that the financial institution is federally chartered or insured is an essential element of the crime, as well as necessary to establish federal jurisdiction. *United States v. Scott*, 159 F.3d 916, 921 (5th Cir. 1998). Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1, 25 (1999).

There are two separate offenses possible under Section 1344: (1) defrauding a financial institution; or (2) obtaining money or funds from the financial institution by means of material false or fraudulent pretenses, representations, or promises. *United States v. Dennis*, 237 F.3d 1295, 1303 (11th Cir. 2001) (discussing elements of bank fraud under section 1344); *United States v. Mueller*, 74 F.3d 1152, 1159 (11th Cir. 1996). In the case of defrauding a financial institution, the Government must establish "that the defendant (1) intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the victim of the scheme or artifice was an insured financial institution." *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir. 1997). Under the alternative theory, the Government must prove "(1) that a scheme existed in order to obtain money, funds, or credit in the custody of the federally insured institution; (2) that the defendant participated in the scheme by means of false pretenses, representations or promises, which were material; and (3) that the defendant acted knowingly." *Id*. As the Supreme Court explained in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), to prove a violation under Section 1344(s), the Government need not prove that the defendant intended to defraud a bank.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal

quotation marks and citation omitted)).

While materiality is an element of the bank fraud offense under *Neder, see also United States v. Williams*, 390 F.3d 1319, 1324 (11th Cir. 2004) (same), the Supreme Court has held (pre-*Neder*) that materiality is *not* an element of the offense in a prosecution under 18 U.S.C. § 1014, a similar statute which prohibits making a false statement to a federally insured bank or designated financial institution. *United States v. Wells*, 519 U.S. 482 (1997).

O53
Health Care Fraud
18 U.S.C. § 1347

It's a Federal crime to knowingly and willfully execute, or attempt to execute, a scheme or artifice to defraud a health-care benefit program, or to get any of the money or property owned by, or under the custody or control of, a health-care benefit program by means of false or fraudulent pretenses, representations, or promises.

The Defendant can be found guilty of this offense only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly executed, or attempted to execute, a scheme or artifice to defraud a health-care benefit program, [or to obtain money or property owned by, or under the custody or control of, a health-care benefit program] by using false or fraudulent pretenses, representations, or promises;

(2) the health care benefit program affected interstate commerce;

(3) the false or fraudulent pretenses, representations, or promises related to a material fact;

(4) the Defendant acted willfully and intended to defraud; and

(5) the Defendant did so in connection with the delivery of or payment for health-care benefits, items, or services.

"Health-care benefit program" means 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 that is providing a medical

benefit, item, or service for which payment may be made under the plan or contract.

A health care program affects interstate commerce if the health care program had any impact on the movement of any money, goods, services, or persons from one state to another [or between another country and the United States]. The Government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree. The Government need not prove that [the] [a] Defendant engaged in interstate commerce or that the acts of [the] [a] Defendant affected interstate commerce.

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud. A statement or representation may be "false" or "fraudulent" when it's a half truth or effectively conceals a material fact and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the

decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to do something with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1347 provides:

> 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 guilty of an offense against the United States].

Maximum Penalty: Ten (10) years' imprisonment and applicable fine. (If the violation results in serious bodily injury or death, twenty (20) years' or life imprisonment, respectively, and applicable fine.)

The Eleventh Circuit has stated that: "To prove health-care fraud under 18 U.S.C. §1347, the government must prove 'knowing and willful execution of or attempt to execute a scheme to defraud a health-care benefit program in connection with delivery of or payment for health-care." *United States v. Marti*, 294 F. App'x 439, 444 (11th Cir. 2008) (quoting *United States v. Mitchell*, 165 F. App'x 821, 824 (11th Cir. 2006). Thus, this instruction includes "willfully" to track the statute and circuit case law. The Committee believes the general definition of "willfully" in Basic Instruction 9.1A would usually apply to this crime.

The instruction makes clear that deception alone does not constitute a scheme to defraud; a defendant must intend to cause injury or loss. *See United States v. Takhalov*, 827 F.3d 1307, 1315 (11th Cir. 2016), altered in part on denial of rehearing by *United States v. Takhalov*, 838 F.3d 1168 (11th Cir. 2016) ("A jury cannot convict a defendant of wire fraud, then, based on misrepresentations amounting only to a deceit." (internal quotation marks and citation omitted)).

Affecting commerce is included as an element of this offense under the rationale of *United States v. Reddy*, 534 F. App'x 866, 877 (11th Cir. 2013). Other circuits have interpreted "affecting commerce" under § 24 as requiring an interstate commerce effect. *United States v. Klein*, 543 F.3d 206, 211 (5th Cir. 2008); *United States v. Lucien*, 2003 WL 22336124 (2d Cir. Oct. 14, 2003); *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002). The cases draw this inference from the Hobbs Act context, which also uses the words "affect commerce." The Eleventh Circuit has reached the same result where "affecting commerce" is used in other contexts. *See United States v. Guerra*, 164 F.3d 1358 (11th Cir. 1999) (Hobbs Act).

The Eleventh Circuit has explained that the language "affecting commerce" when used in a statute has a specialized meaning. *United States v. Ballinger*, 395 F.3d 1218, 1231-32 (11th Cir. 2005). "The words 'affecting commerce,' as the Supreme Court has repeatedly explained, are 'words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Id.* at 1232. For example, while the Hobbs Act by its terms prohibits any act that "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . ," "[t]he government needs only to establish a minimal effect on interstate commerce to support a violation." *United States v. Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000) (citing 18 U.S.C. § 1951(a); *Stirone v. United States*, 361 U.S. 212, 215 (1960)).

Materiality is included as an element of this offense under the rationale of *Neder v. United States*, 527 U.S. 1, 25 (1999).

O53.2
Health Care Fraud
18 U.S.C. § 1518(a)
Obstruction of Criminal Investigations of Health Care Offenses

It is a Federal crime to obstruct a criminal investigation of an offense involving health care. The Defendant can be found guilty of this offense only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant willfully [prevented] [obstructed] [misled] [or] [delayed] [or willfully attempted to] [prevent] [obstruct] [mislead] [or] [delay] the communication of [information] [or] [records] to a criminal investigator; and

(2) the [information] [or] [records] related to a violation of a Federal health care offense.

"Criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses. Special Agents of the [Federal Bureau of Investigation] [Health and Human Services Office of Inspector General] [Food & Drug Administration Office of Criminal Investigation] [Internal Revenue Service Criminal Investigation] [other federal agency] are "criminal investigators" as used in this section.

"Federal health care offense" means a violation of, or a criminal conspiracy to violate:

[18 U.S.C. § 287, prohibiting false, fictitious, or fraudulent claims, if the violation relates to a health care benefit program]

[18 U.S.C. § 371, prohibiting a conspiracy to commit an offense or defraud the United States, if the conspiracy relates to a health care benefit program]

[18 U.S.C. § 664, prohibiting theft or embezzlement from an employee benefit plan, if the violation relates to a health care benefit program]

[18 U.S.C. § 666, prohibiting theft or bribery concerning programs receiving Federal funds, if the violation relates to a health care benefit program]

[18 U.S.C. § 669, prohibiting theft or embezzlement in connection with health care]

[18 U.S.C. § 1001, prohibiting false statements or entries in any matter within the jurisdiction of the federal government, if the violation relates to a health care benefit program]

[18 U.S.C. § 1027, prohibiting false statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974 ("ERISA"), if the violation relates to a health care benefit program]

[18 U.S.C. § 1035, prohibiting false statements related to health care matters, if the violation relates to a health care benefit program]

[18 U.S.C. § 1341, prohibiting mail fraud, if the violation relates to a health care benefit program]

[18 U.S.C. § 1343, prohibiting wire fraud, if the violation relates to a health care benefit program]

[18 U.S.C. § 1347, prohibiting health care fraud]

[18 U.S.C. § 1349, prohibiting attempt or conspiracy to commit fraud, if the violation or conspiracy relates to a health care benefit program]

[18 U.S.C. § 1518, prohibiting obstruction of criminal investigations of health care offenses]

[18 U.S.C. § 1954, prohibiting offering, accepting, or soliciting money or things of value to influence an employee benefit plan, if the violation relates to a health care benefit program]

[21 U.S.C. § 331, prohibiting misbranded or adulterated foods, drugs, devices, tobacco products, or cosmetics, if the violation relates to a health care benefit program]

[29 U.S.C. § 1111, prohibiting convicted persons from holding certain positions for employee benefit plans, if the violation relates to a health care benefit program]

[29 U.S.C. 1131, prohibiting violations of ERISA, if the violation relates to a health care benefit program]

[29 U.S.C. § 1141, prohibiting coercive interference with ERISA participants or beneficiaries, if the violation relates to a health care benefit program]

[42 U.S.C. § 1320a-7b, prohibiting false statements and representations, illegal remunerations, and illegal patient admittance and retention practices involving federal health care programs].

"Health care benefit program" means 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 that is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1518(a) provides: "Whoever willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator shall be [guilty of an offense]."

Maximum Penalty: Five (5) years' imprisonment and applicable fine.

"Criminal investigator" is defined at 18 U.S.C. § 1518(b), which states: "As used in this section the term 'criminal investigator' means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations for prosecutions for violations of health care offenses."

"Federal health care offense" is defined in 18 U.S.C. § 24(a), which states:

> As used in this title, the term "Federal health care offense" means a violation of, or a criminal conspiracy to violate-
>
> (1) section 669, 1035, 1347, or 1518 of this title or section 1128B of the Social Security Act (42 U.S.C. 1320a-7b); or
>
> (2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, 1349, or 1954 of this title section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 331), or section 501 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1131), or section 411, 518, or 511 of the Employee Retirement Income Security Act of 1974, if the violation or conspiracy relates to a health care benefit program.

For ease of reference, the statutes referenced in Section 24(a) have been placed in numerical order and sections 411 and 511 of the Employee Retirement Income Security Act of 1974 are referred to by their

U.S. Code Sections, that is, 29 U.S.C. §§ 1111 and 1141, respectively. Note that Section 24(a)'s reference to section 518 of the Employee Retirement Income Security Act of 1974 is a typographical error. Section 518 (29 U.S.C. § 1148) is not a criminal offense; it relates to regulatory deadlines during times of war.

18 U.S.C. § 24(b) further defines "health care benefit program."

> As used in this title, the term "health care benefit program" means 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.

O98
Controlled Substances –
Possession with Intent to Distribute
21 U.S.C. § 841(a)(1)

It's a Federal crime for anyone to possess a controlled substance with intent to distribute it.

[substance] is a "controlled substance."

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly possessed [substance];

(2) the Defendant intended to distribute the [substance]; and

(3) the weight of the [substance] Defendant possessed was more than [threshold].

The Defendant "knowingly" possessed the controlled substance if (1) the Defendant knew [he][she] possessed a substance listed on the federal schedules of controlled substances, even if the Defendant did not know the identity of the substance, or (2) the Defendant knew the identity of the substance [he][she] possessed, even if the Defendant did not know the substance was listed on the federal schedules of controlled substances.

To "intend to distribute" is to plan to deliver possession of a controlled substance to someone else, even if nothing of value is exchanged.

[The Defendant[s] [is] [are] charged with [distributing] [possessing and intending to distribute] at least [threshold] of [substance]. But you may find [the] [any] Defendant guilty of the crime even if the amount of the controlled substance[s] for which [he] [she] should be held responsible is less than [threshold]. So if you find [the] [any] Defendant guilty, you must also unanimously agree on the weight of [substance] the Defendant possessed and specify the amount on the verdict form.]

ANNOTATIONS AND COMMENTS

21 U.S.C. § 841(a) provides:

> … it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with the intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

In *McFadden v. United States*, 135 S. Ct. 2298 (2015), the U.S. Supreme Court pronounced that there are two ways to satisfy the knowledge requirement under § 841(a)(1). "Th[e] knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was." *Id.* at 2304. "The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed," even if the defendant did not know that the drug is "listed on the schedules" as a controlled substance. *Id.* (citation omitted).

The Committee has omitted the word "willfully" which was previously used in this instruction. "Willfully" is not used in the statute, and the essence of the offense is a knowing possession of a controlled substance with an intent to distribute it.

The Committee recognizes and cautions that sentence enhancing factors subject to the principle of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), including weights of controlled substances under 21 U.S.C. § 841(b), are not necessarily "elements" creating separate offenses for purposes of analysis in a variety of contexts.

See United States v. Sanchez, 269 F.3d 1250, 1278 n.51 (11th Cir. 2001), *abrogated in part, United States v. Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005); *see also United States v. Underwood*, 446 F.3d 1340, 1344-45 (11th Cir. 2006). Even so, the lesser included offense model is an appropriate and convenient procedural mechanism for purposes of submitting sentence enhancers to a jury when required by the principle of *Apprendi*. This would be especially true in simpler cases involving single Defendants. See Special Instruction 10 and the verdict form provided in the Annotations And Comments following that instruction. If the lesser included offense approach is followed, using Special Instruction 10 and its verdict form, then the bracketed language in this instruction explaining the significance of weights and the use of a special verdict form specifying weights, should be deleted.

Alternatively, in more complicated cases, if the bracketed language in this instruction concerning weights is made a part of the overall instructions, followed by use of the special verdict form below, then the Third element of the instructions defining the offense should be deleted. The following is a form of special verdict that may be used in such cases.

Special Verdict

1. We, the Jury, find the Defendant [name of Defendant] _____ as charged in Count [One] of the indictment.

[Note: If you find the Defendant not guilty as charged in Count [One], you need not consider paragraph 2 below.]

2. We, the Jury, having found the Defendant guilty of the offense charged in Count [One], further find with respect to that Count that [he] [she] [distributed] [possessed with intent to distribute] [conspired to possess with intent to distribute] the following controlled substance[s] in the amount[s] shown (place an X in the appropriate box[es]):

[(a) Marijuana - -

(i) Weighing 1000 kilograms or more ☐

(ii) Weighing 100 kilograms or more ☐

(iii) Weighing less than 100 kilograms ☐]

[(b) Cocaine - -

(i) Weighing 5 kilograms or more ☐

(ii) Weighing 500 grams or more ☐

(iii) Weighing less than 500 grams ☐]

[(c) Cocaine base ("crack" cocaine) - -

(i) Weighing 50 grams or more ☐

(ii) Weighing 5 grams or more ☐

(iii) Weighing less than 5 grams ☐]

SO SAY WE ALL.

Date: _____ _____

Foreperson

Multiple sets of the two paragraphs in this Special Verdict form will be necessary in the event of multiple counts of drug offenses against the same Defendant.

O106.1
Possession of Unregistered Firearm
26 U.S.C. § 5861(d)

It's a Federal crime for anyone to possess certain kinds of firearms that are not properly registered to [him] [her] in the National Firearms Registration and Transfer Record.

A "firearm" includes [describe firearm alleged in the indictment, e.g., a shotgun having a barrel less than 18 inches in length.]

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly possessed a firearm; [and]

(2) the firearm was not registered to the Defendant in the National Firearms Registration and Transfer Record[.] [; and]

[(3) the Defendant knew of the specific characteristics or features of the firearm that made it subject to registration under the National Firearms Registration and Transfer Record.]

The Government does not have to prove that the Defendant knew the item described in the indictment was a firearm that must be legally registered. The Government only has to prove beyond a reasonable doubt that the Defendant knew about the specific characteristics or features of the firearm that made it subject to registration, namely [describe essential feature].

ANNOTATIONS AND COMMENTS

No annotation is associated with this instruction.