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PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT

(2012 Ed.)

(plus 2015-2019 changes)

Prepared by the Committee on Federal Criminal Jury Instructions of the Seventh Circuit

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18 U.S.C. § 1344(1) SCHEME TO DEFRAUD A FINANCIAL INSTITUTION – ELEMENTS

[The indictment charges the defendant[s] with; Count[s] __ of the indictment charge[s] the defendant[s] with] [bank] [financial institution] fraud. In order for you to find [a; the] defendant guilty of this charge, the government must prove each of the [four; five] following elements beyond a reasonable doubt:

1. There was a scheme to defraud a [bank; specified financial institution under 18 U.S.C. § 20] as charged in the indictment; and

2. The defendant knowingly [carried out; attempted to carry out] the scheme; and

3. The defendant acted with the intent to defraud the [bank; specified financial institution under 18 U.S.C. § 20]

[4. The scheme involved a materially false or fraudulent pretense, representation, or promise[; and

[[4.; 5.] At the time of the charged offense the deposits of the [bank] [financial institution] were insured by the Federal Deposit Insurance Corporation.]

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant guilty [of that charge].

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt [as to the charge you are considering], then you should find the defendant not guilty [of that charge].

Committee Comment

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court held that the Government need not prove that a defendant charged under 18 U.S.C. § 1344(2) intended to defraud the bank or financial institution that owned, or had custody or control over, the money or property that was the object of the scheme. Accordingly, the Committee has divided the previously unified instruction for § 1344 into two separate instructions.

In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court held that materiality is an element under § 1344. Following *Neder*, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 1999). See also *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002). that a materially false or

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fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information. Although the Seventh Circuit has not yet addressed the application of Neder to § 1344(1) specifically, the Ninth Circuit, in United States v. Omer, 395 F.3d 1087 (9th Cir. 2005), held that materiality is an element of a § 1344(1) violation under Neder. In light of the general admonitions in Neder and in Reynolds, this instruction has been modified to reflect this requirement. Reference may be made to the Pattern Instruction for materiality ("Definition of Material") accompanying the mail and wire fraud instructions, which incorporate the notion that a materially false or fraudulent pretense, representation, or promise may be accomplished by an omission or by the concealment of material information.

The final element concerns proof that the institution's deposits were federally insured, which was a required element in the 1999 instructions. Effective May 20, 2009, though, the definition of "financial institution" set forth at 18 U.S.C. § 20 was broadened substantially by the Fraud Enforcement and Recovery Act, Pub. L. 111-21, to include several types of financial institutions the assets of which might not be federally insured. The definition of the term "financial institution" set forth in § 20 is incorporated into § 1344, as well as into other statutes such as 18 U.S.C. § 215 (bank bribery), and is also addressed in 18 U.S.C. §§ 1341 and 1343 in connection with mail or wire fraud schemes that affect a financial institution. This instruction should be appropriately modified in the event that the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.