**ADDENDUM TO FIFTH CIRCUIT**

**PATTERN JURY INSTRUCTIONS**

**CRIMINAL**

**AS OF MARCH 28, 2017**

## Introduction

During the time periods between publications of new editions of the Pattern Jury Instructions published by Thomson Reuters, the Fifth Circuit District Judges Association, PJC Criminal Committee continues to monitor case law developments to ensure that the current version remains useful. This electronic supplement modifies the following Instructions and/or Notes:

| | | |
|---|---|---|
| 1.01 | Preliminary Instructions | |
| 1.24 | Duty to Deliberate | |
| 2.09A | 18 U.S.C. § 201(b) (1) | Bribing a Public Official |
| 2.09B | 18 U.S.C. § 201(b) (2) | Receiving Bribe by a Public Official |
| 2.58A | 18 U.S.C. § 1344(1) | Bank Fraud |
| 2.95 | 21 U.S.C. § 846 | Controlled Substances – Conspiracy |

In addition, the following new Instruction has been added:

| | | |
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| 2.48C | 18 U.S.C. § 1028A(a)(l) | Aggravated Identity Theft |

As always, we welcome any suggestions for new Instructions or edits to the 2015 version or this electronic addendum.

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## 1.01

## PRELIMINARY INSTRUCTIONS

Members of the Jury:

Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

Duty of the jury:

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not. Perform these duties fairly. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

Nothing the court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

Evidence:

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other items received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now.

1. Statements, arguments, and questions by lawyers are not evidence.

2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.

4. Anything you may have seen, heard, or read outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

Rules for criminal cases:

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First: the defendant is presumed innocent until proven guilty. The indictment brought by the government against the defendant is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second: the burden of proof is on the government until the very end of the case. The defendant has no burden to prove his or her innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you from arriving at your verdict by considering that the defendant may not have testified.

Third: the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

Summary of applicable law:

In this case the defendant is charged with ————. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements of the offense that the government must prove beyond a reasonable doubt to make its case. [Summarize the elements of the offense.]

Conduct of the jury:

Now, a few words about your conduct as jurors.

During the course of the trial, do not speak with any witness, or with the defendant, or with any of the lawyers in the case. Please do not talk with them about any subject at all. You may be unaware of the identity of everyone connected with the case. Therefore, in order to avoid even the appearance of impropriety, do not engage in any conversation with anyone in or about the courtroom or courthouse. It is best that you remain in the jury room during breaks in the trial and do not linger in the hall. In addition, during the course of the trial, do not talk about the trial with anyone else—not your family, not your friends, not the people with whom you work. Also, do not discuss this case among your- selves until I have instructed you on the law and you have gone to the jury room to make your decision at the end of the trial. Otherwise, without realizing it, you may start forming opinions before the trial is over. It is important that you wait until all the evidence is received and you have heard my instructions on rules of law before you deliberate among yourselves.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the Internet, websites, or blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

I know that many of you use cell phones, the Internet, and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case through any means, including your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Snapchat or Twitter, or through any blog or website, including Facebook, Google+, MySpace, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions. A juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

Course of the trial:

I will now give you a roadmap to help you follow what will happen over the entire course of this trial. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it is admitted. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor arguments.

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if he wishes, present

witnesses whom the government may cross-examine. If the defendant decides to present evidence, the government may introduce rebuttal evidence.

After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and the court will instruct you on the law. After that, you will retire to deliberate on your verdict.

The trial will now begin.

**Note**

This instruction is largely based on the Federal Judicial Center's Benchbook for U.S. District Court Judges (6th ed. 2013). The "Duty of the Jury" paragraph has been modified to emphasize that jurors should perform their duty fairly to reflect the Supreme Court's opinion in *Pena-Rodriguez v. Colorado*, No. 15-606, 2017 WL 855760 (U.S. Mar. 6, 2017).

**1.24**

**DUTY TO DELIBERATE**

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. Do not let any bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A verdict form has been prepared for your convenience.

[Explain verdict form.]

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security office. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.

**Note**

"In the routine case, a general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction, even where in indictment alleges numerous factual bases for criminal liability." *United States v. Creech*, 408 F.3d 264, 268 (5th Cir. 2005). Regarding the use of a specific unanimity instruction, see Note to Instruction No. 1.25, Unanimity of Theory.

Concerning the admonition against disclosure of the numerical division of the jury, see *Brasfi v. United States*, 47 S. Ct. 135, 135–36 (1926) (questioning jury on its numerical split constituted reversible error) and *United States v. Chanya*, 700 F.2d 192, 193 (5th Cir. 1983) (district court's inquiry into numerical division of jury before giving "Allen" charge constituted reversible error).

For discussions about how a trial judge may handle allegations of juror misconduct during deliberations, including a juror's refusal to follow his duty to deliberate, see *Pena-Rodriguez v. Colorado*, 2017 WL 855760 (U.S. Mar. 6, 2017) (finding a Sixth Amendment racial-bias exception to the no-impeachment rule); *United States v. Ebron*, 683 F.3d 105, 126–28 (5th Cir. 2012); *United States v. Patel*, 485 F. App'x 702, 712–14 (5th Cir. 2012).

**2.09A**

**BRIBING A PUBLIC OFFICIAL**

**18 U.S.C. § 201(b)(1)**

Title 18, United States Code, Section 201(b)(1), makes it a crime for anyone to bribe a public official. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant directly or indirectly gave [offered] [promised] something of value to ———————————— (insert name of public official or person selected to be a public official), a public official [person who has been selected to be a public official]; and

*Second*: That the defendant did so corruptly with intent to influence an official act by the public official [persuade the public official to omit an act in violation of his lawful duty] [persuade the public official to do an act in violation of his lawful duty].

The term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee of or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

[The term "person selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be nominated or appointed.]

[The term "official act" means any decision or action on any matter, question, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.]

An act is "corruptly" done if it is done intentionally with an unlawful purpose.

**Note**

Similar instructions were used in *United States v. Franco*, 632 F.3d 880 (5th Cir. 2011), *United States v. Whitfield*, 590 F.3d 325, 348 (5th Cir. 2009), and *United States v. Tomblin*, 46 F.3d 1369, 1379–80 & n.16 (5th Cir. 1995). *United States v. Pankhurst*, 118 F.3d 345, 351 (5th Cir. 1997), describes the elements. "The federal bribery statute 'has been accurately characterized as a comprehensive statute applicable to all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority.'" *United States v. Baymon*, 312 F.3d 725, 728 (5th Cir. 2002) (quoting *Dixson v. United States*, 104 S. Ct. 1172 (1984)). This instruction charges a violation of § 201(b)(1)(A) or (C), but does not charge a violation of § 201(b)(1)(B). The second element should be modified in such a case.

"Public official" and "official act" are defined by 18 U.S.C. §§ 201(a)(1) and (3). See also *Franco*, 632 F.32d at 886 (finding no plain error to define "public official" to include "an employee of a private corporation who acts for or on behalf of the federal government pursuant to a contract"). The term "person who has been selected to be a public official" is defined by 18 U.S.C. § 201(a)(2). For a useful discussion of "public official," see *Baymon*, 312 F.3d at 728–29 (the fact that a supervisory cook at a federal correctional facility was a federal employee with official functions was sufficient to support a finding, under a plain error standard, that he was a "public official"), *United States v. Thomas*, 240 F.3d 445, 446–48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a "public official"), and *United States v. Wilson*, 408 F. App'x 798, 806 (5th Cir. 2010) (holding that a construction manager for waterway improvements employed by United States Army Corps of Engineers post-Katrina rebuilding is a "public official").

For a discussion of the scope of "official act," see *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) ("In sum, an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is 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 and focused that is 'pending' or 'may by law be brought' before a public official. To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so. That decision or action may include using his 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. Setting up a meeting, talking to another official, or

organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'"). See also *United States v. Parker*, 133 F. 3d 322, 325-26 (5th Cir. 1998).

For the meaning of "corruptly," see *United States v. Brunson*, 882 F.2d 151, 154 (5th Cir. 1989) (discussing the meaning of "corruptly" in the context of "receipt of commissions or gifts for procuring loans," 18 U.S.C. § 215).

**2.09B**

## RECEIVING BRIBE BY A PUBLIC OFFICIAL

**18 U.S.C. § 201(b)(2)**

Title 18, United States Code, Section 201(b)(2), makes it a crime for a public official to take [demand] [seek] [receive] [accept] [agree to receive or accept] a bribe. For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant, a public official [person selected to be a public official] directly or indirectly demanded [sought] [received] [accepted] [agreed to receive or accept] personally [for another person] [for an entity] something of value; and

*Second*: That the defendant did so corruptly in return for being influenced in his performance of an official act [persuaded to omit any act in violation of his official duty] [persuaded to do any act in violation of his official duty].

The term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee of or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

[The term "person selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be nominated or appointed.]

[The term "official act" means any decision or action on any matter, question, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.] An act is "corruptly" done if it is done intentionally with an unlawful purpose.

**Note**

This conviction charges a violation of § 201(b)(2)(A) or (C), but does not charge a violation of §201(b)(2)(B). The second element should be modified in such a case.

"Public official" and "official act" are defined by 18 U.S.C. §§ 201(a)(1) and (3). "Person selected to be a public official is defined by 18 U.S.C. § 201(a)(2). For a useful discussion of "public official," see *United States v. Baymon*, 312 F.3d 725, 728–29 (5th Cir. 2002) (the fact that a supervisory cook at a federal correctional facility was a federal employee with official functions was sufficient to support a finding, under a plain error standard, that he was a "public official"), and *United States v. Thomas*, 240 F.3d 445, 446–48 (5th Cir. 2001) (holding that a guard employed by a private company operating a detention facility under a contract with the Immigration and Naturalization Service is a "public official").

For a discussion of the scope of "official act," see *McDonnell v. United States*, 136 S. Ct. 2355, 2371–72 (2016) ("In sum, an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.' The 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is 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 and focused that is 'pending' or 'may by law be brought' before a public official. To qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so. That decision or action may include using his 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. Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit that definition of 'official act.'"). See also *United States v. Parker*, 133 F. 3d 322, 325-26 (5th Cir. 1998).

To find bribery, the jury is required to find that a public official accepted a thing of value in return for being influenced in the performance of an official act. See *United States v. Bustamante*, 45 F.3d 933, 938 (5th Cir. 1995) (finding the evidence sufficient to support the bribery conviction).

For the meaning of "corruptly," see *United States v. Brunson*, 882 F.2d 151, 154 (5th Cir. 1989) (discussing the meaning of "corruptly" in the context of "receipt of commissions or gifts for procuring loans," 18 U.S.C. § 215).

**2.48C**

**AGGRAVATED IDENTITY THEFT**

**18 U.S.C. § 1028A(a)(l)**

Title 18,United States Code, Section 1028A(a)(l), makes it a crime for anyone to knowingly transfer, possess, or use, without lawful authority, a means of identification of another person during and in relation to a felony relating to theft of government money or property.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant knowingly transferred [possessed] [used] a means of identification of another person;

*Second*: That the defendant did so without lawful authority;

*Third*: That the defendant transferred [possessed] [used] the means of identification of another person during and in relation to [describe the offense enumerated in 1028A(c)]; and

*Fourth*: That the defendant knew that the means of identification in fact belonged to another real person, living or dead.

"Means of identification" means any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any name, social security number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, or employer or taxpayer identification number.

"Without lawful authority" means that the defendant transferred, possessed, or used another's means of identification without that person's permission or having obtained that person's permission illegally.

**Note**

See Pattern Jury Instructions, Eighth Circuit, No. 6.18.1028A, 2014 Edition; Pattern Jury Instructions, Eleventh Circuit, No. 40.3, 2015 Edition.

The definition of "means of identification" is from 18 U.S.C. § 1028(d)(7)(A). In the appropriate case, the definitions included in 18 U.S.C. § 1028(d)(7)(B) thorough (D) should be considered.

The statute criminalizes as aggravated identity theft the use of another person's identity during and in relation to a large number of felony offenses listed in 18 U.S.C. § 1028A(c)(1) through (11). The third element should be modified in such a case.

The fourth element is required by *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). See also *United States v. Broussard*, 2017 WL 150495 (5th Cir. Jan. 13, 2017); *United States v. Biyiklioglu*, 652 Fed. App'x 274 (5th Cir. 2016).

**2.58A**

**BANK FRAUD 18 U.S.C. § 1344(1)**

**[18 U.S.C. § 1346]**

Title 18, United States Code, Section 1344(1) makes it a crime for anyone to knowingly execute a scheme or artifice to defraud a financial institution.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First*: That the defendant knowingly executed a scheme or artifice;

*Second*: That the scheme or artifice was to defraud a financial institution, as alleged in the indictment;

*Third*: That the defendant had the intent to defraud the financial institution;

*Fourth*: That the scheme or artifice to defraud was material [employed a false material representation] [concealed a material fact]; and

*Fifth*: That the defendant placed the financial institution at risk of civil liability or financial loss.

A "scheme or artifice" means any plan, pattern, or course of action intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived. [Such a scheme or artifice can involve a scheme to deprive a financial institution of the intangible right to honest services through soliciting or accepting bribes or kickbacks. [Define "bribery" pursuant to 18 U.S.C. §§ 201(b) or 665(a)(2) or state law; define "kickback" pursuant to 41 U.S.C. § 52(2) or state law].]

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature of the alleged scheme or artifice, or that the alleged scheme or artifice actually succeeded. What must be proved beyond a reasonable doubt is that the accused knowingly executed a scheme that was substantially similar to the scheme alleged in the indictment.

[A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation is also "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.]

A scheme [representation] [concealment] is "material" if it has a natural tendency to influence, or is capable of influencing, the institution to which it is addressed.

To act with "intent to defraud" means to do something with the specific intent to deceive or cheat someone, ordinarily for personal financial gain or to cause financial loss to someone else. However, 'a scheme to defraud' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss.

"Financial institution" means [insert appropriate definition from 18 U.S.C. § 20].

To prove that "the defendant placed the financial institution at risk of civil liability or financial loss," it is not necessary for the government to demonstrate that the financial institution actually suffered civil liability or financial loss, or that it faced a substantial likelihood of risk of loss.

**Note**

In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Supreme Court distinguished between offenses under § 1344(1) and § 1344(2). In light of *Loughrin*, the Committee separated and substantially revised the instructions for the two offenses.

The *Loughrin* Court made clear that "the whole sum and substance" of § 1344(1) is the requirement that "a defendant intend to 'defraud a financial institution.'" 134 S. Ct. at 2389–90. For offenses charged under § 1344(2), however, the Court similarly made clear that the government need prove neither intent to defraud nor that the defendant placed the financial institution at risk. See *Loughrin*, 134 S. Ct. at 2387, 2395 n.9. Accordingly, these two elements have been removed from the instruction for that offense. See Instruction No. 2.58B.

For pre-*Loughrin* cases discussing the elements of § 1344 offenses, see *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. McCauley*, 253 F.3d 815, 819–20 (5th Cir. 2001); *United States v. Dadi*, 235 F.3d 945, 950–51 (5th Cir. 2000); *United States v. Harvard*, 103 F.3d 412, 421 (5th Cir. 1997); *United States v. Blackburn*, 9 F.3d 353, 356 (5th Cir. 1993). These cases and those discussed below should be consulted until the Fifth Circuit has the opportunity to reaffirm, modify, or repudiate its precedent in light of *Loughrin*.

In *Shaw v. United States*, 137 S. Ct. 462 (2016), the Supreme Court noted that "for purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution.'" *Id*. at 466. The Court further held that "the statute, while insisting upon 'a scheme to defraud,' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Id*. at 467.

Because materiality is an element of the § 1344, the court must submit the question of materiality to the jury. See *Neder v. United States*, 119 S. Ct. 1827, 1841 (1999) ("[W]e hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."). In *Neder*, the Supreme Court stated that the scheme to defraud in § 1344 "must employ material falsehoods." *Id*. at 1839. However, the Ninth Circuit has held that, under § 1344(1) "[i]t is the materiality of the scheme or artifice that must be alleged; the materiality of a specific statement need not be pleaded." Cf. *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005); see also *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992) ("[O]ne need not make a false representation to execute a scheme to defraud."). Bracketed material is included in the instruction for use depending on whether false representations are at issue.

The definition of "materiality" in this instruction was described as the "general" definition by the Supreme Court. *Neder*, 119 S. Ct. at 1837. The definition of materiality in this instruction was also adopted in a bank fraud context in *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995) (§ 1344(2) case) (citing *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992)).

The definitions of "intent to defraud" and "scheme or artifice" are derived from *United States v. Restivo*, 8 F.3d 274, 280 (5th Cir. 1993) (citing *United States v. Saks*, 964 F.2d 1514, 1518 (5th Cir. 1992)). See also *United States v. Pettigrew*, 77 F.3d 1500, 1512–13 (5th Cir. 1996). The Fifth Circuit has followed the Fourth Circuit in holding that § 1344 may be violated even when the principal target is a third party. *United States v. Morganfield*, 501 F.3d 453, 464 (5th Cir. 2007).

This instruction incorporates 18 U.S.C. § 1346, which states that, "[f]or 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." That language should be in the jury charge only if the indictment alleges a violation of § 1346. See *United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003). In *Skilling v. United States*, the Supreme Court held that "honest services" fraud under § 1346 consists only of bribery and kickbacks, not undisclosed self-dealing. 130 S. Ct. 2896, 2931–32 (2010); see also *United States v. Barraza*, 655 F.3d 375, 382 (5th Cir. 2011). Section 1346 reaches both private and public sector fraud. See *Skilling*, 130 S. Ct. at 2934 n. 45. The Fifth Circuit has held that § 1346 prosecutions may involve bribery and kickbacks as defined by federal or state law. See *United States v. Teel*, 691 F.3d 578, 584 (5th Cir. 2012).

The definition of a "false statement" is derived from *United States v. Dillman*, 15 F.3d 384, 392–93 (5th Cir. 1994) (citing *United States v. Gunter*, 876 F.2d 1113, 1120 (5th Cir. 1989)). See also *United States v. Loeffel*, 172 F. App'x 612, 617 (5th Cir. 2006) (reiterating that "this circuit has previously accepted this definition of 'false statement' in the context of jury instructions for a bank fraud cause under 18 U.S.C. § 1344.").

For a definition of "financial institution," see 18 U.S.C. § 20. The appropriate definition should be included in the instruction, depending on the sort of financial institution alleged in the indictment. The requirement of FDIC insurance, which is part of the definition of "financial institution" found in § 20(1), may be proved by the testimony of a bank officer. *United States v. Sanders*, 343 F.3d 511, 516–17 (5th Cir 2003).

The discussion of the "financial risk" element is derived from *Morganfield*, 501 F.3d at 465–66. See also *United States v. McCauley*, 253 F.3d 815, 820 (5th Cir. 2001) (citing cases).

For a definition of "knowingly," see Instruction No. 1.37 "Knowingly — to Act."

Section 1344 includes attempts. If an attempt is charged, see Instruction No. 1.32 "Attempt."

A sixth element, prompted by the *Apprendi* doctrine, is required when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 2326. See *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2351–63 (2000). If these are disputed issues, the court should consider giving a lesser included instruction. See Instruction No. 1.33.

**Pattern Jury Instruction 2.95**

**Note- Addendum**

The 2015 edition of the Instructions amended the elements of the jury instruction for 21 U.S.C. § 846 offenses to require two jury findings as to the types and quantities of the controlled substances involved. The first finding, as to the types and quantities involved in the overall scope of the conspiracy, was required to set the maximum penalty under the doctrine set out in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). The second finding, as to the types and quantities that each defendant knew or reasonably should have known was involved, was necessary to set the applicable minimum mandatory penalty under the doctrine set out in *Alleyne v. United States*, 133 S. Ct. 2151 (2013). Prior to *Alleyne*, a jury finding as to the overall conspiracy set the maximum statutory penalty available, but judge-made findings set the applicable minimum for each defendant in the conspiracy. See *United States v. Keith*, 230 F.3d 784, 787 (5th Cir. 2000); *United States v. Clinton*, 256 F.3d 311, 314 (5th Cir. 2001).

The need for these two separate findings to be made by the jury was confirmed by the Fifth Circuit in *United States v. Haines*, 803 F. 3d 713, 741 (5th Cir. 2015) (*Apprendi* and *Alleyne* require the jury (rather than the court) to determine the amount which each defendant knew or should have known was involved in the conspiracy.). Although *Haines* addresses the issue of drug quantity rather than drug type, the type of controlled substance likewise can affect the minimum penalty available. Accordingly, an individualized jury finding as to drug type is also recommended, at least in those conspiracies involving multiple drug types.

At least one well respected judge in this circuit has expressed reservations about our new Instruction. The Committee shares concerns about the state of the law in this area. That said, *Haines* has now been reaffirmed in two published cases (*U.S. v. Benitez*, 809 F.3d 243, 250 (5th Cir. 2015), and *U.S. v. Koss*, 812 F.3d 460, 465 n.3 (5th Cir. 2016) (finding plain error)), and it was the basis for a joint motion for remand in another unpublished case (*U.S. v. Haynes*, 647 Fed. App'x 394 (5th Cir. April 29, 2016)).

It should be noted, however, that notwithstanding *Alleyne*, a sentencing judge may still conduct fact-finding by calculating a greater drug quantity solely for purposes of determining a defendant's Guideline range without requiring proof beyond a reasonable doubt or a jury finding or admission, as long as the fact-finding does not increase the statutory mandatory minimum sentence. See *United States v. Hinojosa*, 749 F.3d 407, 412 (5th Cir. 2014) ("The foundational opinion was *Apprendi*, where the Court held that a statutory sentencing enhancement which increased a potential criminal penalty beyond the maximum sentence provided by the statute of conviction is to be considered an element of the crime itself and accordingly must be found beyond a reasonable doubt by a jury. 530 U.S. at 490, 120 S. Ct. 2348. In *Alleyne*, the Supreme Court expanded this principle to include any statutory provision which, by its operation,

increases the mandatory minimum sentence. 133 S. Ct. at 2155. Applicable here, the *Alleyne* opinion did not imply that the traditional fact-finding on relevant conduct, to the extent it increases the discretionary sentencing range for a district judge under the Guidelines, must now be made by jurors.").