**8.127 BANK FRAUD—SCHEME TO**

**DEFRAUD BY FALSE PROMISES
(18 U.S.C. § 1344(2))**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with bank fraud in violation of Section 1344(2) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

 First, the defendant knowingly carried out a scheme or plan to obtain money or property from the [*specify* *financial institution*] by making false statements or promises;

 Second, the defendant knew that the statements or promises were false;

 Third, the statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

 Fourth, the defendant acted with the intent to defraud; and

 Fifth, [*specify* *financial institution*] was federally [chartered] [insured].

**Comment**

 In *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), the Ninth Circuit approved the following instruction in a case involving the crime of bank fraud:

You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant’s belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

 Materiality is an essential element of the crime of bank fraud. *Neder v. United States*, 527 U.S. 1 (1999). The common law test for materiality in the false statement statutes, as reflected in the third element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008).

 In *Loughrin v. United States*, 573 U.S. 351 (2014), the defendant used a forged, stolen check to buy merchandise from a store, which he immediately returned for cash. On appeal he contended there was no evidence he intended to defraud a bank, only evidence that he intended to defraud the store. The Supreme Court held that the government need not prove the defendant intended to defraud a bank, and that Section 1344(2)’s “by means of” language is satisfied when “the defendant’s false statement was the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control.” *Id.* at 363.

 The government need not prove the defendant knowingly made false representations directly to a bank. *United States v. Cloud*, 872 F.2d 846, 851 n.5 (9th Cir. 1989).

 For a definition of “financial institution,” see 18 U.S.C. § 20.

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