**15.36 Bank Fraud—Scheme to Defraud Bank**

**(18 U.S.C. § 1344(1))**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with bank fraud in violation of Section 1344(1) 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 beyond a reasonable doubt:

 First, the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution of something of value;

 Second, that the statements made [or facts omitted] as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant did so with the intent to defraud the financial institution; and

 Fourth, the financial institution was insured by the Federal Deposit Insurance Corporation.

 A “scheme to defraud” means any deliberate plan of action or course of conduct by which someone intends to deceive and cheat, in other words to deprive the victim of money or property by means of deception. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.

An “intent to defraud” means to act willfully and with the specific intent to deceive and cheat.

**Comment**

 When the scheme or artifice to defraud is a scheme or artifice to deprive another of the intangible right to honest services under 18 U.S.C. § 1346, use Instruction 15.37 (Bank Fraud—Scheme to Deprive Bank of Intangible Right of Honest Services).

 A “scheme to defraud” under 18 U.S.C. § 1344(1) “must be one to [both] deceive the

bank *and* deprive it of something of value.” *Shaw v. United States*, 137 S. Ct. 462, 469 (2016).

 In *Shaw*, the defendant created a scheme to siphon off funds from a bank depositor’s

account through the use of PayPal, an online payment and money transfer service. The defendant argued that because the losses were eventually borne by the depositor and PayPal, and not the bank, he had not defrauded a “financial institution” within the meaning of § 1344(1). The Supreme Court rejected this argument, holding 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,” at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds.

*Id*. at 466. The Court also clarified that in a prosecution under § 1344(1), the government is not required to prove that the bank ultimately suffered a financial loss, that the defendant intended the bank to suffer a financial loss, or that the defendant was aware the bank had a property interest in its customer accounts. *Id*. at 467; *see also United States v. Shaw*, 885 F.3d 1217, 1219 (9th Cir. 2018) (“As the Supreme Court has now clarified, an intent to obtain money from a depositor’s bank account is sufficient to constitute bank fraud under 18 U.S.C. § 1344(1). It is not necessary to show an intent to cause the bank itself a financial loss.”).  Although the government need not prove an intent for a bank to suffer a financial loss, the government must prove an intent to “defraud a financial institution.” *Loughrin v. United States*, 573 U.S. 351, 355–57 (2014). The Supreme Court has explained that a key difference between § 1344(1) and (2) is that subsection (1) requires an intent to defraud a bank, “indeed, that is § 1344(1)’s whole sum and substance”; whereas subsection (2) does not require proof of specific intent to defraud the financial institution, only the intent to “obtain bank property.” *Id*.

“Materiality of the scheme is an essential element of bank fraud in violation of 18 U.S.C. § 1344(1).”  *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005); *see also Neder v. United States*, 527 U.S. 1, 25 (1999) (“[M]ateriality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.”).

 *S*ee *United States v. Miller*, F.3d 1095 (9th Cir. 2020), defining “intent to defraud”.

In *United States v. Yates*, 16 F.4th 256 (9th Cir. 2021), the Ninth Circuit vacated and remanded a conviction of two bank executives for bank fraud. The court rejected the government’s theories that the deprivation of “accurate information” or the officers’ salaries and bonuses could constitute the requisite deprivation of “something of value.” *Id*. at 264‑66. The court explained that “property deprivation ‘must play more than some bit part in a scheme’—the loss to the victim ‘must be an “object of the fraud,”’ not a mere ‘implementation cost [ ]’ or ‘incidental byproduct of the scheme.’” *Id.* at 264, quoting *Kelly v. United States*, 140 S. Ct. 1565, 1573-74 (2020). The court, however, agreed with the government’s third theory of deprivation of something of value. “[W]e agree with the government that a bank has a property interest in its funds and that it ‘has the right to use [its] funds as a source of loans that help the bank earn profits.’” *Id*. at 268, quoting *Shaw* (alterations in original). “In addition, a bank’s right to its funds extends to the right to decide how to use those funds. So the fraudulent diversion of a bank’s funds for unauthorized purposes certainly could be the basis for a conviction under section 1344.” *Id*.

The final element concerns proof that the institution’s deposits were federally insured. For a definition of “financial institution,” see 18 U.S.C. § 20.

Effective May 20, 2009, the definition of “financial institution” set forth in 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. *See United States v. Grasso*, 724 F.3d 1077, 1089 n.13 (9th Cir. 2013) (explaining that Congress amended 18 U.S.C. § 20 to expand the definition of “financial institution” for purposes of § 1344(1) to cover “mortgage lending businesses”). This instruction should be appropriately modified if the indictment charges a scheme directed at the money or property of a financial institution other than a federally insured bank.

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