IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	
v.	**:**	**CRIMINAL NO. 15-398**
WAYDE MCKELVY	**:**	

Government's Revised Proposed Jury Instructions

The government hereby submits its revised proposed jury instructions for the above reference trial. All instructions are taken from the Third Circuit's Model Jury Instructions unless otherwise noted.

Respectfully submitted,

WILLIAM M. McSWAIN
United States Attorney

/s/
ROBERT J. LIVERMORE
SARAH M. WOLFE
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served filing upon:

Walter Batty, Esq.
William Murray, Esq.
Counsel for WAYDE MCKELVY

/s/
Robert J. Livermore
Assistant United States Attorney

3.01 Role of Jury

Members of the jury, you have seen and heard all the evidence and the arguments of the lawyers. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence that you have heard and seen in court during this trial. That is your job and yours alone. I play no part in finding the facts. You should not take anything I may have said or done during the trial as indicating what I think of the evidence or what I think about what your verdict should be.

Your second duty is to apply the law that I give you to the facts. My role now is to explain to you the legal principles that must guide you in your decisions. You must apply my instructions carefully. Each of the instructions is important, and you must apply all of them. You must not substitute or follow your own notion or opinion about what the law is or ought to be. You must apply the law that I give to you, whether you agree with it or not.

Whatever your verdict, it will have to be unanimous. All of you will have to agree on it or there will be no verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up his or her own mind. This is a responsibility that each of you has and that you cannot avoid.

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone, Blackberry or computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or

electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom.

Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. You should also not be influenced by any person's race, color, religion, national ancestry, or gender (, sexual orientation, profession, occupation, celebrity, economic circumstances, or position in life or in the community).

3.02 Evidence

You must make your decision in this case based only on the evidence that you saw and heard in the courtroom. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence from which you are to find the facts consists of the following:

(1) The testimony of the witnesses;

(2) Documents and other things received as exhibits; and

(3) Any fact or testimony that was stipulated; that is, formally agreed by the parties.

The following are not evidence:

(1) The indictment;

(2) Statements and arguments of the lawyers for the parties in this case;

(3) Questions by the lawyers and questions that I might have asked;

(4) Objections by lawyers, including objections in which the lawyers stated facts;

(5) Any testimony I struck or told you to disregard; and

(6) Anything you may have seen or heard about this case outside the courtroom.

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience and common sense tells you that certain evidence reasonably leads to a conclusion, you may reach that conclusion.

As I told you in my preliminary instructions, the rules of evidence control what can be received into evidence. During the trial the lawyers objected when they thought that evidence was offered that was not permitted by the rules of evidence. These objections simply meant that the lawyers were asking me to decide whether the evidence should be allowed under the rules.

You should not be influenced by the fact that an objection was made. You should also not be influenced by my rulings on objections or any sidebar conferences you may have overheard. When I overruled an objection, the question was answered or the exhibit was received as evidence, and you should treat that testimony or exhibit like any other. When I allowed evidence (testimony or exhibits) for a limited purpose only, I instructed you to consider that evidence only for that limited purpose and you must do that.

When I sustained an objection, the question was not answered or the exhibit was not received as evidence. You must disregard the question or the exhibit entirely. Do not think about or guess what the witness might have said in answer to the question; do not think about or guess what the exhibit might have shown. Sometimes a witness may have already answered before a lawyer objected or before I ruled on the objection. If that happened and if I sustained the objection, you must disregard the answer that was given.

Also, if I ordered that some testimony or other evidence be stricken or removed from the record, you must disregard that evidence. When you are deciding this case, you must not consider or be influenced in any way by the testimony or other evidence that I told you to disregard.

Although the lawyers may have called your attention to certain facts or factual conclusions that they thought were important, what the lawyers said is not evidence and is not binding on you. It is your own recollection and interpretation of the evidence that controls your decision in this case. Also, do not assume from anything I may have done or said during the trial that I have any opinion about any of the issues in this case or about what your verdict should be.

3.03 Direct and Circumstantial Evidence

Two types of evidence may be used in this trial, "direct evidence" and "circumstantial (or indirect) evidence." You may use both types of evidence in reaching your verdict.

"Direct evidence" is simply evidence which, if believed, directly proves a fact. An example of "direct evidence" occurs when a witness testifies about something the witness knows from his or her own senses — something the witness has seen, touched, heard, or smelled.

"Circumstantial evidence" is evidence which, if believed, indirectly proves a fact. It is evidence that proves one or more facts from which you could reasonably find or infer the existence of some other fact or facts. A reasonable inference is simply a deduction or conclusion that reason, experience, and common sense lead you to make from the evidence. A reasonable inference is not a suspicion or a guess. It is a reasoned, logical decision to find that a disputed fact exists on the basis of another fact.

For example, if someone walked into the courtroom wearing a wet raincoat and carrying a wet umbrella, that would be circumstantial or indirect evidence from which you could reasonably find or conclude that it was raining. You would not have to find that it was raining, but you could.

Sometimes different inferences may be drawn from the same set of facts. The government may ask you to draw one inference, and the defense may ask you to draw another. You, and you alone, must decide what reasonable inferences you will draw based on all the evidence and your reason, experience and common sense.

You should consider all the evidence that is presented in this trial, direct and circumstantial. The law makes no distinction between the weight that you should give to either direct or circumstantial evidence. It is for you to decide how much weight to give any evidence.

3.04 Credibility of Witnesses

As I stated in my preliminary instructions at the beginning of the trial, in deciding what the facts are you must decide what testimony you believe and what testimony you do not believe. You are the sole judges of the credibility of the witnesses. Credibility refers to whether a witness is worthy of belief: Was the witness truthful? Was the witness' testimony accurate? You may believe everything a witness says, or only part of it, or none of it.

You may decide whether to believe a witness based on his or her behavior and manner of testifying, the explanations the witness gave, and all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward, and accurate in his or her recollection. In deciding the question of credibility, remember to use your common sense, your good judgment, and your experience.

In deciding what to believe, you may consider a number of factors:

(1) The opportunity and ability of the witness to see or hear or know the things about which the witness testified;

(2) The quality of the witness' knowledge, understanding, and memory;

(3) The witness' appearance, behavior, and manner while testifying;

(4) Whether the witness has an interest in the outcome of the case or any motive, bias, or prejudice;

(5) Any relation the witness may have with a party in the case and any effect the verdict may have on the witness;

(6) Whether the witness said or wrote anything before trial that was different from the witness' testimony in court;

(7) Whether the witness' testimony was consistent or inconsistent with other evidence

that you believe; and

(8) Any other factors that bear on whether the witness should be believed.

Inconsistencies or discrepancies in a witness' testimony or between the testimonies of different witnesses may or may not cause you to disbelieve a witness' testimony. Two or more persons witnessing an event may simply see or hear it differently. Mistaken recollection, like failure to recall, is a common human experience. In weighing the effect of an inconsistency, you should also consider whether it was about a matter of importance or an insignificant detail. You should also consider whether the inconsistency was innocent or intentional.

You are not required to accept testimony even if the testimony was not contradicted and the witness was not impeached. You may decide that the witness is not worthy of belief because of the witness' bearing and demeanor, or because of the inherent improbability of the testimony, or for other reasons that are sufficient to you.

After you make your own judgment about the believability of a witness, you can then attach to that witness' testimony the importance or weight that you think it deserves.

The weight of the evidence to prove a fact does not necessarily depend on the number of witnesses who testified or the quantity of evidence that was presented. What is more important than numbers or quantity is how believable the witnesses were, and how much weight you think their testimony deserves.

3.05 Not All Evidence, Not All Witnesses Needed

Although the government is required to prove the defendant guilty beyond a reasonable doubt, the government is not required to present all possible evidence related to the case or to produce all possible witnesses who might have some knowledge about the facts of the case. In addition, as I have explained, the defendant is not required to present any evidence or produce any witnesses.

3.06 Presumption of Innocence; Burden of Proof; Reasonable Doubt

The defendant WAYDE MCKELVY pleaded not guilty to the offenses charged. WAYDE MCKELVY is presumed to be innocent. He started the trial with a clean slate, with no evidence against him. The presumption of innocence stays with WAYDE MCKELVY unless and until the government has presented evidence that overcomes that presumption by convincing you that WAYDE MCKELVY is guilty of the offenses charged beyond a reasonable doubt. The presumption of innocence requires that you find WAYDE MCKELVY not guilty, unless you are satisfied that the government has proved guilt beyond a reasonable doubt.

The presumption of innocence means that WAYDE MCKELVY has no burden or obligation to present any evidence at all or to prove that he is not guilty. The burden or obligation of proof is on the government to prove that WAYDE MCKELVY is guilty and this burden stays with the government throughout the trial.

In order for you to find WAYDE MCKELVY guilty of the offenses charged, the government must convince you that WAYDE MCKELVY is guilty beyond a reasonable doubt. That means that the government must prove each and every element of the offenses charged beyond a reasonable doubt. A defendant may not be convicted based on suspicion or conjecture, but only on evidence proving guilt beyond a reasonable doubt.

Proof beyond a reasonable doubt does not mean proof beyond all possible doubt or to a mathematical certainty. Possible doubts or doubts based on conjecture, speculation, or hunch are not reasonable doubts. A reasonable doubt is a fair doubt based on reason, logic, common sense, or experience. It is a doubt that an ordinary reasonable person has after carefully weighing all of the evidence, and is a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life. It may arise from the evidence, or from the

lack of evidence, or from the nature of the evidence.

If, having now heard all the evidence, you are convinced that the government proved each and every element of the offense charged beyond a reasonable doubt, you should return a verdict of guilty for that offense. However, if you have a reasonable doubt about one or more of the elements of the offense charged, then you must return a verdict of not guilty of that offense.

3.07 Nature of the Indictment

As you know, the defendant WAYDE MCKELVY is charged in the indictment with violating federal law, specifically, conspiracy to commit wire fraud, wire fraud, conspiracy to commit securities fraud, and securities fraud. As I explained at the beginning of trial, an indictment is just the formal way of specifying the exact crimes the defendant is accused of committing. An indictment is simply a description of the charges against a defendant. It is an accusation only. An indictment is not evidence of anything, and you should not give any weight to the fact that WAYDE MCKELVY has been indicted in making your decision in this case.

3.08 On or About

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

3.10 Elements of the Offenses Charged

The defendant WAYDE MCKELVY is charged in the indictment with committing the offense of conspiracy to commit wire fraud. This offense has four essential elements, which are:

First: That two or more persons agreed to commit wire fraud, as charged in the indictment.

Second: That WAYDE MCKELVY was a party to or member of that agreement;

Third: That WAYDE MCKELVY joined the agreement or conspiracy knowing of its objective to commit wire fraud and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that WAYDE MCKELVY and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit wire fraud; and

Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objectives of the agreement.

WAYDE MCKELVY is also charged with committing the offense of wire fraud. The elements of that offense are:

First: That the defendant knowingly devised a scheme or willfully participated in a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations or promises;

Second: That the defendant acted with the intent to defraud; and

Third: That in advancing, furthering, or carrying out the scheme, the defendant transmitted any writing, signal, or sound by means of a wire, radio, or television communication

in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.

WAYDE MCKELVY is also charged with the offense of conspiracy to commit securities fraud. This offense has four essential elements, which are:

First: That two or more persons agreed to commit securities fraud, as charged in the indictment.

Second: That WAYDE MCKELVY was a party to or member of that agreement;

Third: That WAYDE MCKELVY joined the agreement or conspiracy knowing of its objective to commit securities fraud and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that WAYDE MCKELVY and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit securities fraud; and

Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objectives of the agreement.

WAYDE MCKELVY is also charged with committing the offense of securities fraud. The elements of that offense are:

First, that in connection with the purchase or sale of a security, the defendant did any one or more of the following:

(1) employed a device, scheme or artifice to defraud, or

(2) made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or

(3) engaged in an act, practice or course of business that operated, or

would operate, as a fraud or deceit upon a purchaser or seller.

Second, that the defendant acted willfully, knowingly and with the intent to defraud.

Third, that the defendant knowingly used, or caused to be used, any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.

In order to find WAYDE MCKELVY guilty of these offenses, you must all find that the government proved each of these elements beyond a reasonable doubt, as I will explain in more detail shortly.

3.12 Separate Consideration – Single Defendant Charged with Multiple Offenses

The defendant WAYDE MCKELVY is charged with several offenses; each offense is charged in a separate count of the indictment.

The number of offenses charged is not evidence of guilt, and this should not influence your decision in any way. You must separately consider the evidence that relates to each offense, and you must return a separate verdict for each offense. For each offense charged, you must decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of that particular offense.

Your decision on one offense, whether guilty or not guilty, should not influence your decision on any of the other offenses charged. Each offense should be considered separately.

3.16 Election of Foreperson; Unanimous Verdict; Do Not Consider Punishment; Duty to Deliberate; Communication with Court

That concludes my instructions explaining the law regarding the testimony and other evidence, and the offenses charged. Now let me explain some things about your deliberations in the jury room, and your possible verdicts.

First: The first thing that you should do in the jury room is choose someone to be your foreperson. This person will speak for the jury here in court. He or she will also preside over your discussions. However, the views and vote of the foreperson are entitled to no greater weight than those of any other juror.

Second: I want to remind you that your verdict, whether it is guilty or not guilty, must be unanimous. To find WAYDE MCKELVY guilty of an offense, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves each element of that offense beyond a reasonable doubt. To find WAYDE MCKELVY not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

Third: If you decide that the government has proved WAYDE MCKELVY guilty, then it will be my responsibility to decide what the appropriate punishment should be. You should never consider the possible punishment in reaching your verdict.

Fourth: As I have said before, your verdict must be based only on the evidence received in this case and the law I have given to you. You should not take anything I may have said or done during trial as indicating what I think of the evidence or what I think your verdict should be. What the verdict should be is the exclusive responsibility of the jury.

Fifth: Now that all the evidence is in, the arguments are completed, and once I have

finished these instructions, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that--your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience. Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. You should all feel free to speak your minds.

Remember, if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

Sixth: Once you start deliberating, do not talk, communicate with, or provide any information about this case by any means to the court officials, or to me, or to anyone else except each other. During your deliberations, you may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any

information about this case or to conduct any research about this case.

Seventh: If you have any questions or messages, your foreperson should write them down on a piece of paper, sign them, and then give them to the court official who will give them to me. I will first talk to the lawyers about what you have asked, and I will respond as soon as I can. In the meantime, if possible, continue with your deliberations on some other subject.

One more thing about messages. Do not ever write down or tell anyone how you or any one else voted. That should stay secret until you have finished your deliberations. If you have occasion to communicate with the court while you are deliberating, do not disclose the number of jurors who have voted to convict or acquit on any offenses.

3.17 Verdict Form

A verdict form has been prepared that you should use to record your verdict.

Take this form with you to the jury room. When you have reached your unanimous verdict, the foreperson should write the verdict on the form, date and sign it, return it to the courtroom and give the form to my courtroom deputy to give to me. If you decide that the government has proved WAYDE MCKELVY guilty of any or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved WAYDE MCKELVY guilty of some or all of the offenses charged beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form.

4.04 Audio/Video Recordings - Consensual

During the trial you heard audio and video recordings of conversations with the defendant and alleged co-conspirators made without their knowledge. These recordings were made with the consent and agreement of one of the other parties to the conversations. The use of this procedure to gather evidence is lawful and the recordings may be used by either party.

4.06 Audio/Video Recordings - Transcripts

You have heard audio recordings that were received in evidence, and you were given written transcripts of the recordings.

Keep in mind that the transcripts are not evidence. They were given to you only as a guide to help you follow what was being said. The recordings themselves are the evidence. If you noticed any differences between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read. And if you could not hear or understand certain parts of the recordings you must ignore the transcripts as far as those parts are concerned.

4.09 Opinion Evidence (Lay Witnesses) (F.R.E. 701)

Witnesses are not generally permitted to state their personal opinions about important questions in a trial. However, a witness may be allowed to testify to his or her opinion if it is rationally based on the witness' perception and is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue.

In this case, I permitted *(name)* to offer *(his)(her)* opinion based on *(his)(her)* perceptions. The opinion of this witness should receive whatever weight you think appropriate, given all the other evidence in the case and the other factors discussed in these instructions for weighing and considering whether to believe the testimony of witnesses.

4.11 Summaries – Underlying Evidence Not Admitted (F.R.E. 1006)

Certain charts and summaries offered by the government were admitted as evidence. You may use those charts and summaries as evidence, even though the underlying documents and records have not been admitted into evidence.

4.14 Specific Investigation Techniques Not Required

During the trial you heard testimony of witnesses and argument by counsel that the government did not use specific investigative techniques. You may consider these facts in deciding whether the government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, there is no legal requirement that the government use any of these specific investigative techniques or all possible techniques to prove its case. There is no requirement to use any specific investigative techniques. Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the defendant's guilt beyond a reasonable doubt.

4.19 Credibility of Witnesses - Witness Who Has Pleaded Guilty to Same or Related Offense, Accomplices, Immunized Witnesses, Cooperating Witnesses

You have heard evidence that certain witnesses are alleged co-conspirators, have made a plea agreement with the government, or have received a promise from the government that they will not be prosecuted. The testimony of these witnesses was received in evidence and may be considered by you. The government is permitted to present the testimony of someone who has entered into a cooperation plea agreement or an immunity agreement, but you should consider the testimony of these witnesses with great care and caution. In evaluating these witnesses' testimony, you should consider this factor along with the others I have called to your attention. Whether or not these witnesses' testimony may have been influenced by the plea agreement or immunity agreement is for you to determine. You may give this testimony such weight as you think it deserves.

You must not consider any witness's guilty plea as any evidence of defendant WAYDE MCKELVY's guilt. The decision to plead guilty was a personal decision about his or her own guilt. Such evidence is offered only to allow you to assess the credibility of the witness; to eliminate any concern that the defendant has been singled out for prosecution; and to explain how the witness came to possess detailed first-hand knowledge of the events about which he or she testified. You may consider a guilty plea agreement only for these purposes.

6.18.371A Conspiracy To Commit An Offense Against The United States Basic Elements (18 U.S.C. § 371)

Count One of the indictment charges that WAYDE MCKELVY agreed or conspired with one or more other persons to commit an offense against the United States, namely, wire fraud, and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act. Count Nine of the indictment charges that WAYDE MCKELVY agreed or conspired with one or more other persons to commit an offense against the United States, namely, securities fraud, and that, to further the objective of the conspiracy, at least one member of the conspiracy committed at least one overt act.

It is a federal crime for two or more persons to agree or conspire to commit any offense against the United States, even if they never actually achieve their objective. A conspiracy is a kind of criminal partnership.

In order for you to find WAYDE MCKELVY guilty of conspiracy to commit an offense against the United States, as charged in Counts One and Nine, you must find that the government proved beyond a reasonable doubt each of the following four elements:

First: That two or more persons agreed to commit an offense against the United States, as charged in the indictment.

Second: That WAYDE MCKELVY was a party to or member of that agreement;

Third: That WAYDE MCKELVY joined the agreement or conspiracy knowing of its objective to commit an offense against the United States and intending to join together with at least one other alleged conspirator to achieve that objective; that is, that WAYDE MCKELVY and at least one other alleged conspirator shared a unity of purpose and the intent to achieve a common goal or objective, to commit an offense against the United

States; and

Fourth: That at some time during the existence of the agreement or conspiracy, at least one of its members performed an overt act in order to further the objectives of the agreement.

I will explain each of these elements in more detail.

6.18.371C Conspiracy – Existence of an Agreement

The first element of the crime of conspiracy is the existence of an agreement. The government must prove beyond a reasonable doubt that two or more persons knowingly and intentionally arrived at a mutual understanding or agreement, either spoken or unspoken, to work together to achieve the overall objective of the conspiracy, to commit the offense of wire fraud or securities fraud.

The government does not have to prove the existence of a formal or written agreement, or an express oral agreement spelling out the details of the understanding. The government also does not have to prove that all the members of the conspiracy directly met, or discussed between themselves their unlawful objective, or agreed to all the details, or agreed to what the means were by which the objective would be accomplished. The government is not even required to prove that all the people named in the indictment were, in fact, parties to the agreement, or that all members of the alleged conspiracy were named, or that all members of the conspiracy are even known. What the government must prove beyond a reasonable doubt is that two or more persons in some way or manner arrived at some type of agreement, mutual understanding, or meeting of the minds to try to accomplish a common and unlawful objective.

You may consider both direct evidence and circumstantial evidence in deciding whether the government has proved beyond a reasonable doubt that an agreement or mutual understanding existed. You may find the existence of a conspiracy based on reasonable inferences drawn from the actions and statements of the alleged members of the conspiracy, from the circumstances surrounding the scheme, and from evidence of related facts and circumstances which prove that the activities of the participants in a criminal venture could not have been carried out except as the result of a preconceived agreement, scheme, or understanding.

6.18.371D Conspiracy – Membership in the Agreement

If you find that a criminal agreement or conspiracy existed, then in order to find WAYDE MCKELVY guilty of conspiracy you must also find that the government proved beyond a reasonable doubt that WAYDE MCKELVY knowingly and intentionally joined that agreement or conspiracy during its existence. The government must prove that WAYDE MCKELVY knew the goal or objective of the agreement or conspiracy and voluntarily joined it during its existence, intending to achieve the common goal or objective and to work together with the other alleged conspirators toward that goal or objective.

The government need not prove that WAYDE MCKELVY knew everything about the conspiracy or that he knew everyone involved in it, or that he was a member from the beginning. The government also does not have to prove that WAYDE MCKELVY played a major or substantial role in the conspiracy.

You may consider both direct evidence and circumstantial evidence in deciding whether WAYDE MCKELVY joined the conspiracy, knew of its criminal objective, and intended to further the objective. Evidence which shows that WAYDE MCKELVY only knew about the conspiracy, or only kept "bad company" by associating with members of the conspiracy, or was only present when it was discussed or when a crime was committed, is not sufficient to prove that WAYDE MCKELVY was a member of the conspiracy even if WAYDE MCKELVY approved of what was happening or did not object to it. Likewise, evidence showing that WAYDE MCKELVY may have done something that happened to help a conspiracy does not necessarily prove that he joined the conspiracy. You may, however, consider this evidence, with all the other evidence, in deciding whether the government proved beyond a reasonable doubt that WAYDE MCKELVY joined the conspiracy.

6.18.371E Conspiracy – Mental States

In order to find WAYDE MCKELVY guilty of conspiracy you must find that the government proved beyond a reasonable doubt that WAYDE MCKELVY joined the conspiracy knowing of its objective and intending to help further or achieve that objective. That is, the government must prove: (1) that WAYDE MCKELVY knew of the objective or goal of the conspiracy, (2) that WAYDE MCKELVY joined the conspiracy intending to help further or achieve that goal or objective, and (3) that WAYDE MCKELVY and at least one other alleged conspirator shared a unity of purpose toward that objective or goal.

You may consider both direct evidence and circumstantial evidence, including WAYDE MCKELVY's words or conduct and other facts and circumstances, in deciding whether WAYDE MCKELVY had the required knowledge and intent. For example, evidence that WAYDE MCKELVY derived some benefit from the conspiracy or had some stake in the achievement of the conspiracy's objective might tend to show that WAYDE MCKELVY had the required intent or purpose that the conspiracy's objective be achieved.

6.18.371F Conspiracy – Overt Acts

With regard to the fourth element of conspiracy – overt acts – the government must prove beyond a reasonable doubt that during the existence of the conspiracy at least one member of the conspiracy performed at least one of the overt acts described in the indictment, for the purpose of furthering or helping to achieve the objective of the conspiracy.

The indictment alleges certain overt acts. The government does not have to prove that all of these acts were committed or that any of these acts were themselves illegal. Also, the government does not have to prove that WAYDE MCKELVY personally committed any of the overt acts. The government must prove beyond a reasonable doubt that at least one member of the conspiracy committed at least one of the overt acts alleged in the indictment and committed it during the time that the conspiracy existed, for the purpose of furthering or helping to achieve the objective of the conspiracy. You must unanimously agree on the overt act that was committed.

6.18.371K Conspiracy – Acts and Statements of Co-Conspirators

Evidence has been admitted in this case that certain persons, who are alleged to be co-conspirators of WAYDE MCKELVY, did or said certain things. The acts or statements of any member of a conspiracy are treated as the acts or statements of all the members of the conspiracy, if these acts or statements were performed or spoken during the existence of the conspiracy and to further the objectives of the conspiracy.

Therefore, you may consider as evidence against WAYDE MCKELVY any acts done or statements made by any members of the conspiracy, during the existence of and to further the objectives of the conspiracy. You may consider these acts and statements even if they were done and made in WAYDE MCKELVY's absence and without his knowledge. As with all the evidence presented in this case, it is for you to decide whether you believe this evidence and how much weight to give it.

Acts done or statements made by an alleged co-conspirator before WAYDE MCKELVY joined the alleged conspiracy may also be considered by you as evidence against WAYDE MCKELVY. However, acts done or statements made before the alleged conspiracy began or after it ended may only be considered by you as evidence against the person who performed that act or made that statement.

6.18.1343 Wire Fraud – Elements of the Offense

Count Two through Eight of the indictment charge WAYDE MCKELVY with wire fraud, which is a violation of federal law.

In order to find the defendant guilty of these offenses, you must find that the government proved each of the following three elements beyond a reasonable doubt:

First: That the defendant knowingly devised a scheme or willfully participated in a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations or promises;

Second: That the defendant acted with the intent to defraud; and

Third: That in advancing, furthering, or carrying out the scheme, the defendant transmitted any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.

6.18.1341-1 Wire Fraud – "Scheme to Defraud or to Obtain Money or Property" Defined

The first element that the government must prove beyond a reasonable doubt is that WAYDE MCKELVY knowingly devised or willfully participated in a scheme to defraud the victims of money or property by materially false or fraudulent pretenses, representations or promises.

A "scheme" is merely a plan for accomplishing an object.

"Fraud" is a general term which embraces all the various means by which one person can gain an advantage over another by false representations, suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses, representations or promises reasonably calculated to deceive persons of average prudence.

In this case, the indictment alleges that the scheme to defraud was carried out by making false or fraudulent statements. The representations which the government charges were made as part of the scheme to defraud are set forth in the indictment. The government is not required to prove every misrepresentation charged in the indictment. It is sufficient if the government proves beyond a reasonable doubt that one or more of the alleged material misrepresentations were made in furtherance of the alleged scheme to defraud. However, you cannot convict the defendant unless all of you agree as to at least one of the material misrepresentations.

A statement, representation, claim or document is false if it is untrue when made and if the person making the statement, representation, claim or document or causing it to be made knew it was untrue at the time it was made.

A representation or statement is fraudulent if it was falsely made with the intention to

deceive.

In addition, deceitful statements of half-truths or the concealment of material facts or the expression of an opinion not honestly entertained may constitute false or fraudulent statements. The arrangement of the words, or the circumstances in which they are used may convey the false and deceptive appearance.

The deception need not be premised upon spoken or written words alone. If there is deception, the manner in which it is accomplished is immaterial.

The failure to disclose information may constitute a fraudulent representation if the defendant was under a legal, professional or contractual duty to make such a disclosure, the defendant actually knew such disclosure ought to be made, and the defendant failed to make such disclosure with the intent to defraud.

The false or fraudulent representation or failure to disclose must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision with respect to a proposed investment.

This means that if you find that a particular statement of fact was false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions of material facts.

In order to establish a scheme to defraud, the government must also prove that the alleged scheme contemplated depriving another of money or property.

However, the government is not required to prove that WAYDE MCKELVY originated the scheme to defraud. Furthermore, it is not necessary that the government prove that WAYDE

MCKELVY actually realized any gain from the scheme or that any intended victim actually suffered any loss. In this case, it so happens that the government does contend that the proof establishes that persons were defrauded and that WAYDE MCKELVY profited. Although whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed.

If you find that the government has proved beyond a reasonable doubt that the scheme to defraud charged in the indictment did exist and that the defendant knowingly devised or participated in the scheme charged in the indictment, you should then consider the second element.

6.18.1341-4 Wire Fraud – "Intent to Defraud" Defined

The second element that the government must prove beyond a reasonable doubt is that WAYDE MCKELVY acted with the specific intent to defraud.

To act with an "intent to defraud" means to act knowingly and with the intention or the purpose to deceive or to cheat.

In considering whether WAYDE MCKELVY acted with an intent to defraud, you may consider, among other things, whether WAYDE MCKELVY acted with a desire or purpose to bring about some gain or benefit to himself or someone else or with a desire or purpose to cause some loss to someone.

5.01 Proof of Required State of Mind – Knowingly

Often the state of mind with which a person acts at any given time cannot be proved directly, because one cannot read another person's mind and tell what he or she is thinking. However, WAYDE MCKELVY's state of mind can be proved indirectly from the surrounding circumstances. Thus, to determine WAYDE MCKELVY's state of mind (what WAYDE MCKELVY intended or knew) at a particular time, you may consider evidence about what WAYDE MCKELVY said, what WAYDE MCKELVY did and failed to do, how WAYDE MCKELVY acted, and all the other facts and circumstances shown by the evidence that may prove what was in WAYDE MCKELVY's mind at that time. It is entirely up to you to decide what the evidence presented during this trial proves, or fails to prove, about WAYDE MCKELVY's state of mind.

You may also consider the natural and probable results or consequences of any acts WAYDE MCKELVY knowingly did, and whether it is reasonable to conclude that WAYDE MCKELVY intended those results or consequences. You may find, but you are not required to find, that WAYDE MCKELVY knew and intended the natural and probable consequences or results of acts he knowingly did. This means that if you find that an ordinary person in WAYDE MCKELVY's situation would have naturally realized that certain consequences would result from his actions, then you may find, but you are not required to find, that WAYDE MCKELVY did know and did intend that those consequences would result from his actions. This is entirely up to you to decide as the finders of the facts in this case.

5.02 Knowingly

The offense of conspiracy to commit wire fraud and wire fraud charged in the indictment requires that the government prove that WAYDE MCKELVY acted "knowingly" with respect to an element of the offense. This means that the government must prove beyond a reasonable doubt that WAYDE MCKELVY was conscious and aware of the nature of his actions and of the surrounding facts and circumstances, as specified in the definition of the offenses charged.

In deciding whether WAYDE MCKELVY acted "knowingly", you may consider evidence about what WAYDE MCKELVY said, what WAYDE MCKELVY did and failed to do, how WAYDE MCKELVY acted, and all the other facts and circumstances shown by the evidence that may prove what was in WAYDE MCKELVY's mind at that time.

The government is not required to prove that WAYDE MCKELVY knew his acts were against the law.

6.18.1343-1 Wire Fraud - "Transmits by means of wire, radio, or television communication in interstate commerce"- Defined

The third element that the government must prove beyond a reasonable doubt is that in advancing, furthering, or carrying out the scheme, WAYDE MCKELVY transmitted, or caused to be transmitted, a writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of a writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.

The phrase "transmits by means of wire, radio, or television communication in interstate commerce" means to send from one state to another by means of telephone or telegraph lines or by means of radio or television. The phrase includes a telephone conversation by a person in one state with a person in another state, or electronic signals sent from one state to another, such as by fax or financial wire. The use of the Internet to send a message, such as an e-mail, or to communicate with a web site may constitute a wire transmission in interstate commerce.

The government is not required to prove that WAYDE MCKELVY actually used a wire communication in interstate commerce or that WAYDE MCKELVY even intended that anything be transmitted in interstate commerce by means of a wire, radio, or television communication to further, or to advance, or to carry out the scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.

However, the government must prove beyond a reasonable doubt that a transmission by a wire, radio, or television communication facility in interstate commerce was, in fact, used in some manner to further, or to advance, or to carry out the scheme to defraud. The government must also prove either that WAYDE MCKELVY used wire, radio, or television communication in interstate commerce, or that WAYDE MCKELVY knew the use of the wire, radio, or

television communication in interstate commerce would follow in the ordinary course of business or events, or that WAYDE MCKELVY should reasonably have anticipated that wire, radio, or television communication in interstate commerce would be used.

It is not necessary that the information transmitted by means of wire, radio, or television communication in interstate commerce itself was false or fraudulent or contained any false or fraudulent pretense, representation, or promise, or contained any request for money or thing of value.

However, the government must prove beyond a reasonable doubt that the use of the wire, radio, or television communication in interstate commerce furthered, or advanced, or carried out, in some way, the scheme.

18.1343-2 Wire Fraud - Each Transmission by Wire Communication a Separate Offense

Each transmission by wire communication in interstate commerce to advance, or to further, or to carry out the scheme or plan may be a separate violation of the wire fraud statute.

No Model Wire Fraud – Statute of Limitations

The indictment in this case was returned on September 2, 2015. The statute of limitations for conspiracy to commit securities fraud and securities fraud is six years from the end of the commission of the offense. The statute of limitations for conspiracy to commit wire fraud and wire fraud (Counts One through Eight) ordinarily is five years from the end of the commission of the offense.[1] However, the statute of limitations for wire fraud and conspiracy to commit wire fraud is extended to ten years from the end of the commission of the offense if the offense affects a financial institution.[2] I will define for you the meaning of both "affects" and "financial institution."

The term 'to affect' includes a broad range of action.[3] "To affect" means to influence, change, or to produce an effect upon.[4] A scheme affects a financial institution if the scheme exposed the financial institution to a new or increased risk of loss.[5] A financial institution need not have actually suffered a loss in order to have been affected by the scheme.[6]

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1 18 U.S.C. § 3282

2 18 U.S.C. § 3293(2); United States v. Heinz, 790 F.3d 365, 367, (2d Cir. 2015).

3 United States v. Heinz, 790 F.3d 365, 367, (2d Cir. 2015) (citing United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 90 (2d Cir. 1999).

4 United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 90 (2d Cir.1999) (citing Blacks Law Dictionary).

5 United States v. Serpico, 320 F.3d 691, 694 (7th Cir. 2003) (citing United States v. Longfellow, 43 F.3d 318, 324 (7th Cir.1994); United States v. Hord, 6 F.3d 276, 282 (5th Cir.1993) ("risk of loss, not just loss itself, supports conviction" for bank fraud)); United States v. Colton, 231 F.3d 890, 907 (4th Cir.2000).

6 United States v. Serpico, 320 F.3d 691, 695 (7th Cir. 2003).

Financial institutions include banks, credit unions, and mortgage lending businesses.[7] A mortgage lending business means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.[8] Even if the financial institution was an active participant in the fraud, it still qualifies as a financial institution.[9]

Before you can find defendant WAYDE MCKELVY guilty of one or more of Counts One through Eight of the indictment charging conspiracy to commit wire fraud and wire fraud, you must find that the government has established beyond a reasonable doubt that the wire fraud scheme affected a financial institution. You need not find that WAYDE MCKELVY specifically intended to defraud a financial institution. All the government must show to satisfy the statute of limitations is that the defendant engaged in a scheme with the specific intent to defraud and that the scheme affected a financial institution in some way.[10]

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7 18 U.S.C. § 20.

8 18 U.S.C. § 27.

9 United States v. Serpico, 320 F.3d 691, 695 (7th Cir. 2003).

10 United States v. Pellulo, 964 F.2d 193, 214-16 (3d Cir. 1992); see also United States v. Bouyea, 152 F.3d 192, 195 (2d Cir. 1998).

No Model Securities Fraud: The Indictment and the Statute

Count Ten of the indictment charges WAYDE MCKELVY with fraud and deceit in connection with investments in Mantria.

The relevant statute on the subject is Title 15, United States Code, Section 78j(b). It provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered …any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission or SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 as promulgated enacted by the SEC reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Sand, Modern Federal Jury Instructions, Instruction 57-18 (2006) (unmodified).

No Model Securities Fraud: The Statutory Purpose

The defendant is charged with violating the Securities Exchange Act of 1934. The 1934 Securities Exchange Act was the second of two laws passed by Congress to provide a comprehensive plan to protect the investing public in the purchase and sale of securities that are publicly distributed. Even though the first Act – the 1933 Securities Act – is not directly involved in this case, I shall briefly discuss its history and purpose to provide you with a better understanding of the entire legislative scheme.

The stock market crash of 1929 led to much legislation in the area of federal regulation. Included in this legislation was the Securities Act of 1933, and the creation of the Securities and Exchange Commission ("SEC"). The Securities Act was enacted to protect the investing public in the purchase of stock that is publicly distributed. The Act requires full and fair disclosure of all important facts so that the investing public can make informed investment decisions.

When it enacted the Securities Act, Congress recognized that the purchase of a stock is different from the purchase of a vegetable bought in the grocery store in that the average investor is not in a position to make a personal investigation to determine the worth, quality and value of securities.

The Securities Act requires a company wishing to sell its stock to disclose information about the issuing company which would be material to the investment decisions of a person interested in buying stock. Under the Securities Act, the disclosure takes the form of a registration statement filed with the Securities and Exchange Commission and a prospectus, summarizing the information in the registration statement, which is available to the prospective investors. The Securities Act does not authorize the Securities and Exchange Commission to pass upon the merits of the securities proposed to be offered.

Among other matters, a registration statement must disclose information about the nature of the company and its stock, including information about the financial condition of the company, the persons who control the company and its stock, a reasonable factual basis for anticipated prospects for the future and its assets. In sum, the registration statement contains information that is designed to protect investors by furnishing them with detailed knowledge of the company and its affairs to make it possible to form an informed investment decision.

Unless and until these requirements are fulfilled, the security may not be offered to the public, and the mails and channels of interstate commerce are closed to the distribution or redistribution of an issue.

Following enactment of the Securities Act of 1933 requiring full and fair disclosures relating to the offering of stock to the investing public, Congress enacted the Securities Exchange Act of 1934 to ensure fair dealing and outlaw deceptive and inequitable practices by those selling or buying securities on the securities exchanges, over-the-counter markets or in face-to-face transactions. Among the primary objectives of the Exchange Act are the maintenance of fair and honest security markets and the elimination of manipulative practices that tend to distort the fair and just price of stock. The statute and rules are designed to support investor expectations that the securities markets are free from fraud and to prevent a wide variety of devices and schemes that are contrary to a climate of fair dealing. Congress recognized that any deceptive or manipulative practice that influenced or related to trading activity undermined the function and purpose of a free market.

Sand, Modern Federal Jury Instructions, Instruction 57-19 (2006) (unmodified).

No Model Securities Fraud: Elements of The Offense

In order to meet its burden of proof, the government must establish beyond a reasonable doubt the following elements of the crime of securities fraud:

First, that in connection with the purchase or sale of Mantria securities the defendant did any one or more of the following:

(1) employed a device, scheme or artifice to defraud, or

(2) made an untrue statement of a material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or

(3) engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.

Second, that the defendant acted willfully, knowingly and with the intent to defraud.

Third, that the defendant knowingly used, or caused to be used, any means or instruments of transportation or communication in interstate commerce or the use of the mails in furtherance of the fraudulent conduct.

Sand, Modern Federal Jury Instructions Instr. 57-20 (2006) (unmodified).

No Model Securities Fraud: First Element -- Fraudulent Act

The first element that the government must prove beyond a reasonable doubt is that in connection with the purchase or sale of Mantria securities the defendant did any one or more of the following:

(1) employed a device, scheme or artifice to defraud; or

(2) made an untrue statement of a material fact, or omitted to state a material fact which made what was said, under the circumstances, misleading; or

(3) engaged in an act, practice or course of business that operated, or would operate, as a fraud or deceit upon a purchaser or seller.

It is not necessary for the government to establish all three types of unlawful conduct in connection with the purchase or sale of Mantria securities. Any one will be sufficient to establish this element, if you so find, but you must be unanimous as to which type of unlawful conduct you find to have been proven.

A device, scheme or artifice to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term which embraces all efforts and means that individuals devise to take advantage of others. The law which the defendant is alleged to have violated prohibits all kinds of manipulative and deceptive acts.

The fraudulent or deceitful conduct alleged need not relate to the investment value of the securities involved in this case.

You need not find that the defendant actually participated in any securities transaction if the defendant was engaged in fraudulent conduct that was "in connection with" a purchase or sale. The "in connection with" aspect of this element is satisfied if you find that there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of

securities. Fraudulent conduct may be "in connection with" the purchase or sale of securities if you find that the alleged fraudulent conduct "touched upon" a securities transaction.

It is no defense to an overall scheme to defraud that the defendant was not involved in the scheme from its inception or played only a minor role with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant was the actual seller or offeror of the securities. It is sufficient if the defendant participated in the scheme or fraudulent conduct that involved the purchase or sale of securities. By the same token, the government need not prove that the defendant personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentations and omissions, you must determine whether the statement was true or false when it was made, and, in the case of alleged omissions, whether the omission was misleading.

If you find that the government has established beyond a reasonable doubt that a statement was false or omitted, you must next determine whether the fact misstated was material under the circumstances. A material fact is one that would have been significant to a reasonable investor's investment decision. This is not to say that the government must prove that the misrepresentation would have deceived a person of ordinary intelligence. Once you find that there was a material misrepresentation or omission of a material fact, it does not matter whether the intended victims were gullible buyers or sophisticated investors, because the securities laws protect the gullible and unsophisticated as well as the experienced investor.

Nor does it matter whether the alleged unlawful conduct was successful or not, or that the defendant profited or received any benefits as a result of the alleged scheme. Success is not an element of the crime charged. However, if you find that the defendant did profit from the

alleged scheme, you may consider that in relation to the third element of intent, which I will discuss in a moment.

Sand, Modern Federal Jury Instructions Instr. 57-21 (2006) (unmodified).

No Model Securities Fraud: Second Element – Knowledge, Intent and Willfulness

The second element that the government must establish beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully, and with the intent to defraud.

To act "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

To act "willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with a purpose to disobey or disregard the law.

"Intent to defraud" in the context of the securities laws means to act knowingly and with the intent to deceive.

The question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves the defendant's state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from the evidence.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the

government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

Under the anti-fraud statutes, even false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, even if the statements may have turned out to be inaccurate.

In considering whether or not a defendant acted in good faith, you are instructed that a belief by the defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not require a finding by you that he acted in good faith. No amount of honest belief on the part of a defendant that the scheme will ultimately make a profit for the investors will excuse fraudulent actions or false representations by him to obtain money.

As a practical matter, then, in order to sustain the charges against the defendant, the government must establish beyond a reasonable doubt that he knew that his conduct as a participant in the scheme was calculated to deceive and nonetheless, he associated himself with the alleged fraudulent scheme.

The government may prove that the defendant acted knowingly in either of two ways. First, it is sufficient, of course, if the evidence satisfies you beyond a reasonable doubt that the defendant was actually aware he was making or causing a false statement to be made. Alternatively, the defendant's knowledge may be established by proof that the defendant was aware of a high probability that the statement was false, unless, despite this high probability, the facts show that the defendant actually believed the statement to be true.

Knowledge may be found from circumstances that would convince an average ordinary person. Thus, you may find that the defendant knew that the statement was false if you conclude beyond a reasonable doubt that he made it with deliberate disregard of whether it was true or false and with a conscious purpose to avoid learning the truth. If you find beyond a reasonable doubt that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statement to be true. This guilty knowledge, however, cannot be established by demonstrating merely negligence or foolishness on the part of the defendant.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme and lacked the intent to deceive, you should acquit the defendant on the count you are considering. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely, the existence of a scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with intent to defraud, and if the government also establishes the third element, as to which I am about to instruct you, then you have a sufficient basis upon which to convict the defendant on the count you are considering.

Sand, Modern Federal Jury Instructions Instr. 57-24 (2006) (unmodified).

No Model Securities Fraud: Third Element – Instrumentality of Interstate Commerce

"The use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly," is an essential element of the crime of securities fraud as charged in the indictment.

This element of the crime charged may be established if the government proves beyond a reasonable doubt that any means or instruments of interstate transportation or communication, or the mails, were, in fact, used in the scheme or that such use was reasonably foreseeable.

In this regard, however, it is not necessary for the government to prove that WAYDE MCKELVY personally carried out the use of an instrument of communication or the use of the mails. It is not necessary to prove that such use was contemplated or intended by anyone involved in any scheme. It is sufficient for the government to prove beyond a reasonable doubt that the defendant set forces in motion which foreseeably resulted in such use.

The matter, material, or information mail, transported, or communicated need not itself contain a fraudulent representation or request for money, but must be part of the overall scheme.

O'Malley, Grenig and Lee, Federal Jury Practice and Instructions, Instruction 62.04 (2000).