**8.123 MAIL FRAUD—SCHEME TO DEFRAUD—DEPRIVATION OF**

**INTANGIBLE RIGHT OF HONEST SERVICES**

**(18 U.S.C. §§ 1341 and 1346)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with mail fraud in violation of Section 1341 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 devised or knowingly participated in a scheme or plan to deprive [*name of victim*] of [his] [her] right of honest services;

Second, the scheme or plan consists of a [bribe] [kickback] in exchange for the defendant’s services. The “exchange” may be express or may be implied from all the surrounding circumstances;

Third, the defendant owed a fiduciary duty to [*name of victim*];

Fourth, the defendant acted with the intent to defraud by depriving [*name of* *victim*] of [his] [her] right of honest services;

Fifth, the defendant’s act was material; that is, it had a natural tendency to influence, or was capable of influencing, [a person’s] [an entity’s] acts; and

Sixth, the defendant used, or caused someone to use, the mails to carry out or to attempt to carry out the scheme or plan.

A “fiduciary” duty exists whenever one [person] [entity] places special trust and confidence in another person–the fiduciary–in reliance that the fiduciary will exercise [his] [her] discretion and expertise with the utmost honesty and forthrightness in the interests of the [person] [entity], such that the [person] [entity] relaxes the care and vigilance that [he] [she] [it] would ordinarily exercise, and the fiduciary knowingly accepts that special trust and confidence and thereafter undertakes to act on behalf of the other [person] [entity] based on such reliance.

The mere fact that a business relationship arises between two persons does not mean that either owes a fiduciary duty to the other. If one person engages or employs another and thereafter directs, supervises, or approves the other’s actions, the person so employed is not necessarily a fiduciary. Rather, as previously stated, it is only when one party places, and the other accepts, a special trust and confidence—usually involving the exercise of professional expertise and discretion—that a fiduciary relationship exists.

A mailing is caused when one knows that the mails will be used in the ordinary course of business or when one can reasonably foresee such use. It does not matter whether the material mailed was itself false or deceptive so long as the mail was used as a part of the scheme, nor does it matter whether the scheme or plan was successful or that any money or property was obtained.

**Comment**

Honest services fraud criminalizes only schemes to defraud that involve bribery or kickbacks. *Skilling v. United States*, 561 U.S. 358, 408-09 (2010); *Black v. United States*, 561 U.S. 465, 471 (2010). Undisclosed conflicts of interest, or undisclosed self-dealing, is not sufficient. *Skilling*, 561 U.S. at 409-10. This instruction is limited to honest services schemes to defraud that involve a bribe or kickback because there is, as yet, no controlling case law subsequent to *Skilling* that extends honest services fraud to any other circumstance. *See id.* at 412 (“no other misconduct falls within § 1346’s province”).

The “prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing – and defining – similar crimes.” *Id.* (citing 18 U.S.C. §§ 201(b) (bribery), 666(a)(2); 41 U.S.C. § 52(2) (kickbacks)); *see also McNally v. United States*, 483 U.S. 350 (1987). However, conduct constituting a bribe or kickback under either state law or federal law establishes the second element of a charge of services fraud. *See United States v. Christensen*, 828 F.3d 763, 785 (9th Cir. 2015), *as amended on denial of reh’g* (July 8, 2016) (affirming RICO conviction when honest services fraud predicate act under § 1346 was premised on violation of California state bribery law). Although it did not define bribery or kickbacks, the Supreme Court in *Skilling* cited three appellate decisions that reviewed jury instructions on the bribery element of honest services fraud. *Skilling*, 561 U.S. at 413

(citing *United States v. Ganim*, 510 F.3d 134, 147-49 (2d Cir. 2007); *United States v. Whitfield*, 590 F.3d 325, 352-53 (5th Cir. 2009); and *United States v. Kemp*, 500 F.3d 257, 281-86 (3d Cir. 2007)). In the Ninth Circuit, bribery requires at least an implicit *quid pro quo*. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 941 (9th Cir. 2009). “Only individuals who can be shown to have had the specific intent to trade official actions for items of value are subject to criminal punishment on this theory of honest services fraud.” *Id.* at 943 n.15. The *quid pro quo* need not be explicit, and an implicit *quid pro quo* need not concern a specific official act. *Id.* at 945-46 (citing *Kemp*, 500 F.3d at 282 (“[T]he government need not prove that each gift was provided with the intent to prompt a specific official act.”)). A *quid pro quo* requirement is satisfied if the evidence shows a course of conduct of favors and gifts

flowing to a public official in exchange for a pattern of official acts favorable to the donor. *Id.* at 943. Bribery is to be distinguished from legal lobbying activities. *Id.* at 942, 946 (citing *Kemp*, 500 F.3d at 281-82). These principles are consistent with the appellate decisions cited by the Supreme Court.

The Supreme Court in *Skilling* cited a statutory definition of kickbacks. *Skilling*, 561 U.S. at 412 (“‘The term ‘kickback’ means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to [enumerated persons] for the purpose of improperly obtaining or rewarding favorable treatment in connection with [enumerated circumstances].’”) (quoting 41 U.S.C. 52(2)).

Relying on *Skilling*, the Ninth Circuit determined that breach of a fiduciary duty is an element of honest services fraud. *United States v. Milovanovic*, 678 F.3d 713 (9th Cir. 2012) (en banc). The fiduciary duty required is not limited to the classic definition of the term but also extends to defendants who assume a comparable duty of loyalty, trust, or confidence with the victim. *Id*. at 723-24. “The existence of a fiduciary duty in a criminal prosecution is a fact-based

determination that must ultimately be determined by a jury properly instructed on this issue.” *Id* at 723.

Honest services fraud requires a “specific intent to defraud.” *Kincaid-Chauncey*, 556 F.3d at 941.

The Ninth Circuit has expressly adopted the “materiality test” to bring § 1346 in line with the mail, wire, and bank fraud statutes. *Milovanovic*, 678 F.3d at 726-27. The common law test for materiality in the false statement statutes, as reflected in the fifth element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir. 2008). In a public sector case, the government need not prove that the fraud involved any foreseeable economic harm.  *Milovanovic*, 678 F.3d at 727 (“We do not need to decide whether in a private sector case there might be a requirement that economic damages be shown”).

In the case of mail or wire fraud, the government need not prove a specific false statement was made. *United States v. Woods*, 335 F.3d 993, 999 (9th Cir. 2003). “Under the mail fraud statute the government is not required to prove any particular false statement was made. Rather, there are alternative routes to a mail fraud conviction, one being proof of a scheme or artifice to defraud, which may or may not involve any specific false statements.” *Id.* (quoting *United States v. Munoz*, 233 F.3d 1117, 1131 (9th Cir. 2000) (internal citations omitted)).

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