**8.126 BANK FRAUD—SCHEME TO**

**DEPRIVE BANK OF INTANGIBLE RIGHT**

**OF HONEST SERVICES**

**(18 U.S.C. §§ 1344(1) and 1346)**

 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 elements beyond a reasonable doubt:

 First, the defendant devised or knowingly participated in a scheme or plan to deprive the [*specify financial institution*] of the 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 [*specify financial institution*];

 Fourth, the defendant acted with the intent to defraud by depriving the [*specify financial institution*] of the right of honest services;

 Fifth, the defendant’s act was material; that is, the act had a natural tendency to influence, or was capable of influencing, the decisionmaker or decision-making body to which it was directed; and

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

 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.

**Comment**

**Caution**: Honest services fraud criminalizes only schemes to defraud that involve bribery or kickbacks. *Skilling v. United States*, 561 U.S. 358, 408-409 (2010); *Black v. United States*, 561 U.S. 465, 471 (2010).

*See* Comment to Instruction 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services).

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

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