**15.38 Attempted Bank Fraud—Scheme to Deprive Bank of Intangible**

**Right of Honest Services (18 U.S.C. §§ 1344(1), 1346)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with attempted 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 consisted 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 plan or scheme was material; that is, it had a natural tendency to, or was capable of depriving the [*specify* *financial institution*] of the right of honest services.

Sixth, the defendant did something that was a substantial step toward carrying out the plan or scheme to deprive the [*specify* *financial institution*] of the right of honest services, and that strongly corroborated the defendant’s intent to commit that crime; and

Seventh, 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.

A “substantial step” is conduct that strongly corroborated the defendant’s intent to commit the crime. To constitute a substantial step, a defendant’s act or actions must unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances. Mere preparation is not a substantial step toward committing the crime.

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime.

**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 15.34 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services).

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

“To constitute a substantial step, a defendant’s ‘actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.’ ” *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007) (per curiam) (quoting *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir. 1995)).

The “strongly corroborated” language in this instruction comes from *United States v. Snell*, 627 F.2d 186, 187 (9th Cir. 1980) (per curiam) (“A conviction for attempt requires proof of culpable intent and conduct constituting a substantial step toward commission of the crime that strongly corroborates that intent.”) and *United States v. Darby*, 857 F.2d 623, 625 (9th Cir. 1988) (same).

Jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010).

“[A] person may be convicted of an attempt to commit a crime even though that person may have actually completed the crime.” *United States v. Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003).

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