

50.1
Mail Fraud
18 U.S.C. § 1341

It's a Federal crime to [use the United States mail] [transmit something by private or commercial interstate carrier] in carrying out a scheme to defraud someone.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly devised or participated in a scheme to defraud someone, or obtain money or property, using false or fraudulent pretenses, representations, or promises;
- (2) the false or fraudulent pretenses, representations, or promises were about a material fact;
- (3) the Defendant intended to defraud someone; and
- (4) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier] something meant to help carry out the scheme to defraud.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers items from one state to another. It doesn't matter whether the message or item actually moves from one state to another as long as the message or item is delivered to the

carrier.]

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property using false or fraudulent pretenses, representations, or promises.

A statement or representation is "false" or "fraudulent" if it is about a material fact, it is made with intent to defraud, and the speaker either knows it is untrue or makes it with reckless indifference to the truth. It may be false or fraudulent if it is made with the intent to defraud and is a half-truth or effectively conceals a material fact.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else.

The Government does not have to prove all the details about the precise nature and purpose of the scheme or that the material [mailed] [deposited with an interstate carrier] was itself false or fraudulent. It also does not have to prove that the use of [the mail] [the interstate carrier]

was intended as the specific or exclusive means carrying out the fraud, or that the Defendant did the actual [mailing] [depositing]. It doesn't even have to prove that anyone was actually defrauded.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [the carrier] will usually follow in the ordinary course of business or where that use can reasonably be foreseen.

Each separate use of [the mail] [an interstate carrier] as part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post-office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine. (If the violation affects a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, thirty (30) years imprisonment and \$1 million fine).

If the offense involved telemarketing, 18 U.S.C. § 2326 requires enhanced imprisonment penalties:

A person who is convicted of an offense under section 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense, in connection with the conduct of telemarketing - - -

(1) shall be imprisoned for a term of up to 5 years in addition to any term of imprisonment imposed under any of those sections, respectively; and

(2) in the case of an offense under any of those sections that -

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(A) victimized ten or more persons over the age of 55;
or

(B) targeted persons over the Age of 55,

shall be imprisoned for a term of up to 10 years in addition to any term of imprisonment imposed under any of those sections, respectively.

An additional element is required under the *Apprendi* doctrine when the indictment alleges any facts that would result in enhanced penalties under 18 U.S.C. § 1341 or § 2326. If the alleged offense involved telemarketing, or involved telemarketing and victimized 10 or more persons over age 55 or targeted persons over age 55, or the scheme affected a financial institution, or is in relation to or in connection with a presidentially declared major disaster or emergency, the Court should consider including a fourth element for that part of the offense and giving a lesser included offense instruction for just the Section 1341 offense. Alternatively, an instruction (to be used with a special interrogatory on the verdict form) can address those statutory variations of the scheme:

If you find beyond a reasonable doubt that the Defendant is guilty of using the mail in carrying out a scheme to defraud, then you must also determine whether the Government has proven beyond a reasonable doubt that [the scheme was in connection with the conduct of telemarketing and (a) victimized ten or more persons over the age of 55, or (b) targeted persons over the age of 55] [the scheme affected a financial institution] [the scheme was in relation to, or in connection with, a presidentially declared major disaster or emergency].

The 1994 amendment to Section 1341 now also applies it to the use of “any private or commercial interstate carrier.” Where such private carriers are involved, the statute requires the government to prove only that the carrier engages in interstate deliveries and not that state lines were crossed. *See United States v. Marek*, 238 F.3d 310, 318 (5th Cir.) *cert. denied* 534 U.S. 813, 122 S. Ct. 37, 151 L. Ed. 2d 11 (2001).

Mail fraud requires a showing of “(1) knowing participation in a scheme to defraud, and (2) a mailing in furtherance of the scheme.” *United States v. Photogrammetric Data Svcs., Inc.*, 259 F.3d 229, 253 (4th Cir. 2001). The mailing, however, need only “be incident to an essential part of the scheme or a step in the plot,” and does not have to be an essential element of the scheme to be part of the execution of the fraud. *Schmuck v. United States*, 489 U.S. 705, 710-11, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

Materiality is an essential element of the crimes of mail fraud, wire fraud, and bank fraud, and must be decided by the jury. *Neder v. United States*, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The definition of materiality used here comes from that decision and the Eleventh Circuit’s decision in the case upon remand. *United States v. Neder*, 197 F.3d 1122, 1128-29 (11th Cir. 1999), *cert. denied* 530 U.S. 1261, 120 S. Ct. 2727, 147 L. Ed. 2d 982 (2000).

In mail fraud cases involving property rights, “the Government must establish that the defendant intended to defraud a victim of money or property of some value.” *United States v. Cooper*, 132 F.3d 1400, 1405 (11th Cir. 1998). State and municipal licenses in general are not “property” for the purposes of Title 18, United States Code, Section 1341. *Cleveland v. United States*, 531 U.S. 12, 15, 121 S. Ct. 365, 369, 148 L. Ed. 2d 221 (2000).

In the Eleventh Circuit, there has been considerable activity with respect to whether the measure of the alleged fraudulent conduct should be an objective “intended to deceive a reasonable person” standard, or whether conduct intended to deceive “someone,” including the ignorant and gullible, was sufficient.

In *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009), the Eleventh Circuit, in an en banc decision, held that:

Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent.

556 F.3d 1157, 1165 (11th Cir. 2009).

50.2
Mail Fraud:
Depriving Another of an Intangible
Right of Honest Services
18 U.S.C. §§ [1341] and 1346

It's a Federal crime to [use the United States mail] [transmit something by private or commercial interstate carrier] to carry out a scheme to fraudulently deprive someone else of a right to honest services.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly devised or participated in a scheme to fraudulently deprive [the public] [another person] of the intangible right of honest services;
- (2) the Defendant did so with an intent to defraud; and
- (3) the Defendant used [the United States Postal Service by mailing or by causing to be mailed] [a private or commercial interstate carrier by depositing or causing to be deposited with the carrier] some matter or thing to carry out the scheme to defraud.

[A "private or commercial interstate carrier" includes any business that transmits, carries, or delivers items from one state to another. It doesn't matter whether the message or item actually moves from one state to another as long as the message or item is delivered to the carrier.]

A "scheme" includes any plan or course of action intended to deceive or cheat someone.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, usually for personal financial gain or to cause financial loss to someone else.

To "deprive someone else of the intangible right of honest services" is to violate, or to cause [a public official or employee] [an employee or agent of another person] to violate, a duty to provide honest services to an employer.

[Public officials and public employees must act in the public's best interest; in other words, they have a duty to the public to do what's best and what's right for the public. So if an [official] [employee] does something or makes a decision that serves the [official's] [employee's] personal interests by, for example, taking a bribe or kickback or benefitting from an undisclosed conflict of interest, the official or employee defrauds the public of honest services, even if the public agency suffers no monetary loss.]

[Regarding the private sector, an employee or agent who works for or represents a private employer has a legal duty to be honest and faithful in all dealings with the private employer and to do business in the employer's best interests. For instance, the employee or agent must tell an employer about any personal interest or profit [or kickback] the

employee or agent has received or expects to receive from working on any of the employer's business transactions.

The Government must prove that the Defendant intended to breach that duty and foresaw, or should have foreseen, that the employer would suffer a loss as a result of the breach.]

[A "kickback" is any kind of secret payment or reward a person gives to an employee who has been dealing in the course of employment with that person so that the employee's personal financial interest interferes with the employee's obligation to get the best deal for the employer.]

The Government does not have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. It doesn't have to prove the material [mailed] [deposited with an interstate carrier] was itself false or fraudulent; or that the use of the [mail] [interstate carrier] was intended as the specific or exclusive way to carry out the alleged fraud; or that the Defendant actually [mailed] [deposited] the material. And it doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone.

To "cause" [the mail] [an interstate carrier] to be used is to do an act knowing that the use of [the mail] [an interstate carrier] will follow in the ordinary course of business or where that use can reasonably be expected to follow.

Each separate use of [the mail] [an interstate carrier] as a part of the scheme to defraud is a separate crime.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post-office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service [by any private or commercial interstate carrier] [shall be guilty of an offense against the laws of the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

18 U.S.C. § 1346 provides:

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

This instruction is prepared for mail fraud involving the "intangible right of honest services," but may be modified to fit the other types of fraud.

In addition to property rights, the statute protects the intangible right to honest services as a result of the addition of 18 U.S.C. § 1346 in 1988. The Supreme Court had ruled in *McNally v. United States*, 483 U.S. 350, 360, 107 S. Ct. 2875, 2882, 97 L. Ed. 2d 292 (1987), that Section 1341 was limited in scope to the protection of property rights and did not prohibit schemes to defraud citizens of their intangible right to honest and impartial government. Thus, Congress passed Section 1346 to overrule *McNally* and reinstate prior law. Defrauding one of honest services typically involves government officials depriving their constituents of honest governmental services. Such "public sector" fraud falls into two categories: first, "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud;" second, "an individual without formal office may be held to be a public fiduciary if others rely on him because of a special relationship in the government and he in fact makes governmental decisions." *United States v. deVegter*, 198 F.3d 1324, 1328 n.3 (11th Cir. 1999) (quoting *McNally* and addressing wire fraud); *United*

States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) (addressing mail fraud). Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest. "If the official instead secretly makes his decision based on his own personal interests - - as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest - - the official has defrauded the public of his honest services." *Lopez-Lukis*, 102 F.3d at 1169.

Although the typical case of defrauding one of honest services is the bribery of a public official, section 1346 also extends to defrauding some private sector duties of loyalty. Since a strict duty of loyalty ordinarily is not part of private sector relationships, it is not enough to prove that a private sector defendant breached the duty of loyalty alone. In the private sector context, the breach of loyalty must inherently harm the purpose of the parties' relationship. *deVegter*, 198 F.3d at 1328-29. "The prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 1329 (quoting *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997)). Federal law governs the existence of a fiduciary duty owed under this statute. *Id.* at 1329 & n.5.

The Supreme Court has recently granted *certiorari* in a line of cases involving prosecutions under this statute. See *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2379 (2009); *United States v. Weyhrauch*, 548 F. 3d 1237 (9th Cir. 2008), *cert. granted*, 129 S. Ct. 2863 (2009); *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009).