8.121 MAIL FRAUD—SCHEME TO DEFRAUD OR TO OBTAIN MONEY OR PROPERTY BY FALSE PROMISES (18 U.S.C. § 1341)

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. In order 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 knowingly [participated in] [devised] [intended to devise] a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;

Second, the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;

Third, the defendant acted with the intent to defraud; that is, the intent to deceive or cheat; and

Fourth, the defendant used, or caused to be used, the mails to carry out or attempt to carry out an essential part of the scheme.

In determining whether a scheme to defraud exists, you may consider not only the defendant's words and statements, but also the circumstances in which they are used as a whole.

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

Use this instruction with respect to a crime charged under the second clause of 18 U.S.C. § 1341.

Much of the language in this instruction is taken from the instructions approved in *United States v. Woods*, 335 F.3d 993 (9th Cir.2003). Materiality is an essential element of the crime of mail fraud. *Neder v. United States*, 527 U.S. 1 (1999). Materiality of statements or promises must be established, *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir.1981), but the jury need not unanimously agree that a specific material false statement was made. *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir.), *cert. denied*, 550 U.S. 937 (2007). Materiality is a question of fact for the jury. *United States v. Carpenter*, 95 F.3d 773, 776

(9th Cir.1996). The common law test for materiality in the false statement statutes, as reflected in the second element of this instruction, is the preferred formulation. *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir.2008).

Success of the scheme is immaterial. *United States v. Rude*, 88 F.3d 1538, 1547 (9th Cir.1996); *United States v. Utz*, 886 F.2d 1148, 1150-51 (9th Cir.1989).

See Schmuck v. United States, 489 U.S. 705, 712 (1989) (mailing that is "incident to an essential part of the scheme" or "a step in the plot" satisfies mailing element of offense); *United States v. Hubbard*, 96 F.3d 1223, 1228–29 (9th Cir.1996) (same).

See United States v. LeVeque, 283 F.3d 1098, 1102 (9th Cir.2002) (government-issued license does not constitute property for purposes of § 1341).

8.122 SCHEME TO DEFRAUD—VICARIOUS LIABILITY (18 U.S.C. §§ 1341, 1343, 1344, 1346)

If you decide that the defendant was a member of a scheme to defraud and that the defendant had the intent to defraud, the defendant may be responsible for other co-schemers' actions during the course of and in furtherance of the scheme, even if the defendant did not know what they said or did.

For the defendant to be guilty of an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the scheme to defraud.

Comment

This instruction is based on the co-schemer liability instruction approved by *United States v. Stapleton*, 293 F.3d 1111, 1115-18 (9th Cir.2002) (no error of law in court's instruction on elements of co-schemer vicarious liability, when court also correctly instructed on scheme to defraud), and the Ninth Circuit's guidance on vicarious liability in *United States v. Green*, 592 F.3d 1057, 1070-71 (9th Cir.2010).

Where this instruction is appropriate, it should be given in addition to Instructions 8.121 (Mail Fraud—Scheme to Defraud or to Obtain Money or Property by False Promises), 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services, 8.124 (Wire Fraud) or 8.127 (Bank Fraud—Scheme to Defraud by False Promises). *See Stapleton*, 293 F.3d at 1118-20.

On co-schemer liability generally, *see United States v. Blitz*, 151 F.3d 1002, 1006 (9th Cir.1998) (knowing participant in scheme to defraud is liable for fraudulent acts of co-schemers); *United States v. Lothian*, 976 F.2d 1257, 1262-63 (9th Cir.1992) (similarity of co-conspirator and co-schemer liability); and *United States v. Dadanian*, 818 F.2d 1443, 1446 (9th Cir.1987), *modified*, 856 F.2d 1391 (1988) (like co-conspirators, "knowing participants in the scheme are legally liable for their co-schemer's use of mails or wires.").

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. In order 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 acted with the intent to defraud by depriving [*name of victim*] of [his] [her] right of honest services;

Fourth, 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

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

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*, __ U.S. __, 130 S. Ct. 2896, 2931 (2010); *Black v. United States*, __ U.S. __, 130 S. Ct. 2963, 2968 (2010). Undisclosed conflicts of interest, or undisclosed self-dealing, is not sufficient. *Skilling*, 130 S. Ct. at 2932. 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 Skilling*, 130 S. Ct. at 2933 ("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). 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*, 130 S. Ct. at 2934 (citing *United States v. Ganim*, 510 F.3d 134, 147-49 (2d Cir.2007), *cert denied*, 552 U.S. 1313 (2008); *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*, 130 S. Ct. at 2933-34 ("'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)).

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

The materiality element was included in this instruction based on the presumption that Congress intended to incorporate the well-settled meaning of the common-law term "fraud" into the mail, wire, and bank fraud statutes. *See Neder v. United States*, 527 U.S. 1, 22-23 (1999). The common law test for materiality in the false statement statutes, as reflected in the fourth element of this instruction, is the preferred formulation. *United States v. Peterson,* 538 F.3d 1064, 1072 (9th Cir.2008).

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)).