

COURT INSTRUCTION NO. 13
MATERIALITY – DEFINED

If you should decide that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a “material” fact or a “material” omission under the evidence received in this case.

In order for you to find a “material” fact or a “material” omission, the government must prove beyond a reasonable doubt that the fact misstated or the fact omitted was of such importance that it could reasonably be expected to cause or to induce a person to act or to cause or to induce a person not to act with respect to the securities transaction at issue. Information may be material even if it relates not to past events but to forecasts and forward-looking statements, so long as a reasonable investor would consider it important in deciding to act or not to act with respect to the securities transaction at issue.

The securities fraud statute under which the charges are brought is concerned only with such “material” misstatements or such “material” omissions and does not cover minor, or meaningless, or unimportant ones.

O'Malley, *et al.*, Federal Jury Practice and Instructions, (5th ed.) 2007, § 62.14

In Basic Inc. v. Levinson, 485 U.S. 224, 239 (1988); *United States v. Smith*, 155 F.3d 1051, 1064-66 (9th Cir. 1998)

COURT INSTRUCTION NO. 14
INSIDER TRADING ELEMENTS

With respect to the first element of the offense, you must find that Defendant Joseph P. Nacchio employed the fraudulent “device” of “insider trading.” “Insider trading” occurs when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information. This rule exists because of the unfairness that would result from allowing insiders with access to material, nonpublic information intended to be used only for corporate purposes to benefit from trading on the basis of such information.

In order to find Defendant Joseph P. Nacchio employed the fraudulent device, scheme, or artifice of insider trading, you must find that the Government has proved beyond a reasonable doubt that:

1. Defendant was an “insider” at Qwest;
2. Defendant was aware of “material” information about Qwest or its securities;
3. The information of which Defendant was aware was nonpublic; and
4. Defendant sold Qwest stock “on the basis of” the material, nonpublic information.

See O’Hagan, 521 U.S. at 651–52 (stating an insider trading on material, nonpublic information employs a “deceptive device” under section 10[b] of the ‘34 Act); *accord United States v. Skilling*, 04–cr–00025, Docket No. 960 at 48 (hereinafter “*Skilling* Jury Instructions”) (attached) (“In order to find that defendant . . . employed the fraudulent ‘device’ of ‘insider trading,’ you must find. . .”).

O’Hagan, 521 U.S. at 652 (stating “[section] 10(b) and Rule 10b–5 are violated when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information”).

SAND § 57–23.

Modeled after *Skilling* Jury Instructions at 48–49.

COURT INSTRUCTION NO. 15
DEFINITION OF INSIDER

An officer or director of a corporation is an “insider” of that corporation because a relationship of trust and confidence exists between a corporate insider and the corporation’s shareholders.

O’Hagan, 521 U.S. at 652 (“Trading on [inside] information qualifies as a ‘deceptive device under [section] 10[b] . . . because ‘a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.’”); *see also Skilling* Jury Instructions at 49 (“Corporate ‘insiders’ are the officers, directors, and other permanent employees of the corporation.”).

COURT INSTRUCTION NO. 16
DEFINITION OF “ON THE BASIS OF”

A person trades “on the basis of” inside information if the person actually used material, nonpublic information in deciding to trade. It is not sufficient for the an insider to have merely possessed material, nonpublic information when he traded.

The inside information need not have been the sole cause of a trade. It is sufficient that the inside information was a significant factor in an insider’s decision to sell stock.

Smith, 155 F.3d at 1068 (rejecting a “possession” standard and endorsing a “use” requirement as consistent with the language of section 10[b] and Rule 10b–5, which emphasizes “manipulation, deception, and fraud”).

Id. at 1070 n.28 (“It is sufficient . . . that the material, nonpublic information be a ‘significant factor’ in the insider’s decision to buy or sell.”).

COURT INSTRUCTION NO. 17
GOOD FAITH EXPLAINED

The “good faith” of the defendant is a complete defense to the charge of securities fraud contained in each count of the Indictment, because good faith on the part of the defendant is, simply, inconsistent with the intent to defraud alleged in each charge of the Indictment.

A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment does not rise to the level of criminal conduct.

A defendant does not act in “good faith” if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises to others.

The law is written to subject criminal punishment to only those people who knowingly defraud or attempt to defraud. While the term “good faith” has no precise definition, it encompasses, among other things, a belief or opinion honestly held, an absence of an intention to defraud, and an intention to avoid taking unfair advantage of another.

The burden of proof is not on Mr. Nacchio to prove his good faith, since a defendant has no burden to prove anything. The government must establish beyond a reasonable doubt that Mr. Nacchio acted with the intent to defraud as charged in the indictment.

If the evidence in the case leaves you with a reasonable doubt as to whether Mr. Nacchio acted with the intent to defraud or in good faith then you must acquit him.