**ANNOTATIONS AND COMMENTS**

The instruction is drafted for general application to all cases under Rule 10b-5, which broadly prohibits the use of “any device, scheme, or artifice to defraud… in connection with the purchase or sale of any security.”

Section 10 of the Securities Exchange Act of 1934 [15 USC § 78j] provides that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange… [to] use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement… any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

With respect to the definition of “security,” *see SEC v. Edwards*, 540 U.S. 389, 124 S. Ct. 892, 157 L. Ed. 2d 813 (2004) and Exchange Act Section 3, 15 U.S.C. § 78c. The issue of whether a particular investment is a “security” is frequently a question of law for the court. *Robinson v. Glynn*, 349 F.3d 166, 170 (4th Cir. 2003); *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970). In those cases where the court determines that the investment at issue is a security, it should so instruct the jury.

In *Gower v. Cohn*, 643 F.2d 1146, 1151 (5th Cir. Unit B, May 1981), the former Fifth Circuit held that a single interstate telephone call satisfied the jurisdictional requirement of use of any means or instrumentality of interstate commerce as long as the telephone call was made in connection with the fraudulent scheme and was an important step in the scheme.

SEC Manipulative and Deceptive Devices and Contrivances Rule, 17 C.F.R. § 240.10b-5 (2004):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

• To employ any device, scheme, or artifice to defraud,

• To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

• To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

“Although Rule 10b-5 could be read broadly to require disclosure of any nonpublic information about a security that is the subject of a transaction, the Supreme Court has held that ‘a duty to disclose under § 10 does not arise from the mere possession of nonpublic market information.’” *Badger v. Farm Bureau Life*, 612 F.3d 1334, 1340 (11th Cir. 2010) (*quoting Chiarella v. United States*, 445 U.S. 222, 235, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980)). Rather, “in order to be liable under [Rule 10b-5] for failing to disclose a material fact, an entity must have a prior duty to disclose that fact.” *Id*. Applying this standard, the Eleventh Circuit further noted in *Badger* that courts have uniformly declined to find a duty to disclose running from one party in an arm’s-length securities transaction to the shareholders of the counterparty to the transaction, absent some fiduciary or other special relationship between them.” *Id*. at 1343 (collecting multiple cases).