**ANNOTATIONS AND COMMENTS**

This pattern instruction is drafted for use in cases brought by private plaintiffs and the SEC. Particular attention should be paid to material in brackets because certain of the bracketed material will or will not be included in the instruction depending on whether the plaintiff is a private party of the SEC. Bracketed material in other instances is provided to consider for inclusion depending on the facts and claims in a particular case. The instruction is drafted for general application to all cases under Rule 10b-5, which broadly prohibits the use of “any act practice or course of business that operates or would operate as a fraud… 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 will depend largely on how the investment was portrayed to investors. *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995) (“[I]t is the representations made by the promoters, not their actual conduct, that determine whether an interest is an investment contract (or other security).”) 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.