**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 or 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 14a-9, which broadly prohibits the solicitation of proxies using any communication, written or oral, that contains a misleading statement or omission of material fact.

Among the primary objectives of the Securities Exchange Act of 1934 were the elimination of manipulative and deceptive practices, and the promotion of fair corporate suffrage.” *See United States v. Charnay*, 537 F.2d 341, 347 (9th Cir.), *cert. denied*, 429 U.S. 1000, 97 S. Ct. 527 (1976) (“Congress enacted the Securities Exchange Act of 1934 to outlaw deceptive and inequitable practices in the securities business.”). *See also* 4-82 Modern Federal Jury Instructions - Civil “The statutes and rules are designed to prevent a wide variety of devices and schemes that are contrary to a climate of fair dealing, including deceptive and unfair practices in connection with the solicitation of votes of security holders.” *See Borak*, 377 U.S. at 431-32, 84 S. Ct. at 1559.

Section 14 of the Securities Exchange Act of 1934 [15 USC § 78j] provides:

It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, 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, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78*l* of this title.

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.

Pursuant to the authority granted to it in Section 14, the SEC adopted Regulation 14A: Solicitation of Proxies. Rule 14A-9, False and Misleading Statements, 17 C.F.R. 240.14a-9, provides as follows:

No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

The SEC’s proxy rules in turn define a “proxy” as including every proxy, consent or authorization within the meaning of section 14 of the Act. 17 C.F.R. § 240.14a-1. While the term “proxy” is not itself defined, Rule 14a-4 sets forth the items that any proxy must include and makes clear that a proxy is an authorization to vote on particular identified matters:

Means shall be provided in the form of proxy whereby the person solicited is afforded an opportunity to specify by boxes a choice between approval or disapproval of, or abstention with respect to each separate matter referred to therein as intended to be acted upon, other than elections to office and votes to determine the frequency of shareholder votes on executive compensation pursuant to § 240.14a-21 of this chapter. A proxy may confer discretionary authority with respect to matters as to which a choice is not specified by the security holder provided that the form of proxy states in bold-face type how it is intended to vote the shares represented by the proxy in each such case.

The proxy rules, 17 C.F.R. 240.14a-1, also define “solicitation” broadly as:

Any request for a proxy whether or not accompanied by or included in a form of proxy;

Any request to execute or not to execute, or to revoke, a proxy; or

The furnishing of a form of proxy or other communication to security holders under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.

Finally, the proxy rules generally require persons who solicit proxies to provide a proxy statement to security holders: “The term “proxy statement” means the statement required by § 240.14a-3 whether or not contained in a single document. 17 C.F.R. § 240.14a-1.

To prevail on a claim pursuant to Section 14, the Plaintiff must show that a person solicited a proxy by use of a proxy statement or other solicitation that contained a material misrepresentation or omitted material facts, which caused the plaintiff injury, and that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 385 (1970).

Materiality was defined in the context of a proxy claim by the Supreme Court in *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976), as follows:

The general standard of materiality that we think best comports with the policies of Rule 14a-9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. This standard is fully consistent with *Mills* general description of materiality as a requirement that “the defect have a significant propensity to affect the voting process.” It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.

The Eleventh Circuit has not yet addressed the standard of care required in a Section 14 case, the Second, Third and Seventh Circuits have held that a showing of negligence is sufficient to establish liability. Moreover, where corporate insiders know of the falsity of the misrepresented facts or know of material facts that are omitted from the soliciting materials, negligence is established as a matter of law. “Use of a solicitation that is materially misleading is itself a violation of law.” *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 382 (1970); *Seinfeld v. Barrett*, 2006 U.S. Dist. LEXIS 14827 (D. Del. Mar. 31, 2006) (“[I]f Section 14 and Rule 14a-9 were violated, they were violated by the making of the allegedly false and misleading statements in order to solicit shareholder approval. There is no additional requirement that a defendant do anything beyond making the false statement.”); *Wilson v. Great American Industries, Inc.*, 855 F. 2d 987, 995 (2nd Cir. 1988) (finding all defendants liable under section 14, court found that “[a]s a matter of law, the preparation of a proxy statement by corporate insiders containing materially false or misleading statements or omitting a material fact is sufficient”.

The essential link requirement was set forth in *Mills v. Electric Auto-Lite*, 396 U.S. 375, 385 (1970). *Mills* rejected the lower court’s requirement that plaintiff show that the misrepresentation or omission had a decisive effect on the voting:

Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction. This objective test will avoid the impracticalities of determining how many votes were affected, and, by resolving doubts in favor of those the statute is designed to protect, will effectuate the congressional policy of ensuring that the shareholders are able to make an informed choice when they are consulted on corporate transactions.

An essential link is established only if the votes of the solicited shareholders are legally required in order for the transaction to be approved. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090 (1991).

A court considering a proxy claim has the power to provide a wide range of equitable remedies. *Mills*, 396 U.S. at 386. A damage remedy, however, is subject to jury trial. The Private Securities Litigation Reform Act, to which a Section 14 claim is subject, also requires that in any claim for damages in a class action claim, “the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.” 15 U.S.C. § 78u-4. This language has resulted in two-alternative interpretations as to what a private plaintiff must allege in order to satisfactorily allege causation.

The first school of thought - the “causal connection” theory- has not as yet been adopted by any circuit thus far. Under this theory, a plaintiff is not required to prove that the outcome of the vote which the plaintiff claims was solicited by a defective proxy solicitation would have been different. The argument is that Section 14 does not impose this causation standard and that all that must be shown is an improper solicitation and a “casual connection” with a resulting loss. In other words, a plaintiff is not required to show the loss would not have been incurred “but for” the particular misrepresentation or omission alleged. That is, a plaintiff is not required to show that the vote would have been different if the misrepresentation or omission had not been made. These lawyers further believe that since equitable remedies are decided by the court it is not necessary to address equitable claims in jury instructions – that a Court will decide if a loss was caused by the alleged misrepresentation or omission.

The second school of thought is the “but for” theory of causation which is based on the long-standing negligence principal that a plaintiff is ordinarily required to establish that he or she suffered actual damages as a proximate result of a defendant’s wrongful conduct. This theory derives from the Ninth Circuit’s decision in *NYCERS v. Jobs*, 593 F.3d 1018 (9th Cir. 2010). In *NYCERS*, the court found that a “but for” theory of causation is consistent with causation analysis set forth by the Supreme Court case of *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), wherein the Court held that “private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentations action[s]… [and that the] common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he ‘suffered damage’ and that the ‘damage followed proximately the deception’” *Dura*, 544 U.S. at 343-44 (internal citations omitted).

Additionally supporting this theory is the fact that “[t]he PSLRA does not differentiate between plaintiffs seeking legal and equitable remedies, and thus, without an allegation of economic loss, no remedy, equitable or otherwise, is available.” *NYCERS v. Jobs*, 593 F.3d at 1024. *See also, Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1207 (9th Cir. 2012) ("[seeking] rescission does not alleviate [a securities plaintiff from] the burden of producing evidence of economic loss”). Supporters of the *NYCERS* "but for" approach contend that after *Dura*, claims that were previously considered equitable claims for the Court's consideration may be more appropriately considered legal claims that must be resolved by the jury. Proponents of the "causal connection" theory oppose this interpretation and note that: *Dura* did not concern equitable remedies and did not use the term “actual damages,” but instead referred to “actual economic loss;” and *Dura*, because it concerned a Section 10 claim, did not alter the loss causation principles under Section 14.

The Eleventh Circuit has not addressed the causation issue presented here, however, the Committee finds that the Ninth Circuit *NYCERS* reasoning to be consistent with Eleventh Circuit principals, and accordingly has drafted the causation element to be consistent with that decision. We note, however, that should the Eleventh Circuit determine that the "causal connection" theory to be more appropriate, the fourth element of this jury instruction (along with its related special interrogatory) should be appropriately amended to reflect such determination.