**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. 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[, or omitted facts.] [Deceitful statements of half-truths may constitute false or fraudulent representations];

 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 and 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.

 [To convict defendant[s] of mail fraud based on omission[s] of material fact[s], you must find that defendant[s] had a duty to disclose the omitted fact[s] arising out of a relationship of trust. That duty can arise either out of a formal fiduciary relationship, or an informal, trusting relationship in which one party acts for the benefit of another and induces the trusting party to relax the care and vigilance that it would ordinarily exercise.]

 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.

 The validity of this instruction was initially confirmed in *United States v. Holden*, 908 F.3d 395, 399-401 (9th Cir. 2018), *as amended on denial of reh’g* (Oct. 30, 2018). However, in *United States v. Miller*, 953 F.3d 1095, 1101-03 (9th Cir. 2020), the Ninth Circuit expressly considered the intent language in Instruction 8.124 (Wire Fraud), which mirrors the intent language for mail fraud in this instruction, and held that wire fraud (and thus mail fraud) requires the intent to “deceive *and* cheat.” The *Miller* Court thus overruled prior holdings approving the “deceive *or* cheat” language in light of the Supreme Court’s decision in *Shaw v. United States*, 137 S. Ct. 462, 469 (2016). *Id.* at 1102. *Miller* does not disturb *Holden*’s ruling that, although the mail and wire fraud statutes expressly punish only those who “devise . . . or intend . . . to devise” a fraudulent scheme, those who “participate in” such a scheme also fall within the statute’s ambit.  *Holden*, 908 F.3d at 399-401.

 Much of the language in this instruction comes 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. 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).

 For cases involving the failure to disclose material information, *see United States v. Shields*, 844 F.3d 819, 822-23 (9th Cir. 2016); *United States v. Milovanovic*, 678 F.3d 713, 723-24 (9th Cir.2012).

 For a definition of “fiduciary” duty, *see* Ninth Circuit Model Criminal Instruction 8.123.

 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).

 “[M]ailings designed to avoid detection or responsibility for a fraudulent scheme”—even if sent after the proceeds of the fraud have been obtained—may satisfy the fourth element of the instruction if “they are sent prior to the scheme’s completion.” *United States v. Tanke*, 743 F.3d 1296, 1305 (9th Cir. 2014). To determine when the scheme ends, the jury must look to the scope of the scheme as devised by the perpetrator. *Id.* But allowance must be made for the reality that fraudulent schemes “may evolve over time, contemplate no fixed end date or adapt to changed circumstances.” *Id.* *See also Schmuck v. United States*, 489 U.S. 705, 712 (1989) (holding that 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) (holding that government-issued license does not constitute property for purposes of § 1341).

 A charge of mail fraud can be premised on a mailing that, although not sent by the defendant, was “incident to an essential part of the scheme.” *See* *United States v. Eglash*, 813 F.3d 882, 886 (9th Cir. 2016) (quoting *Schmuck v. United States*, 489 U.S. 705, 721 (1989) (affirming conviction for mail fraud premised on Social Security Administration’s mailing of notice of disability award); *see also United States v. Brown*, 771 F.3d 1149, 1158 (9th Cir. 2014) (affirming conviction for mail fraud based on mailings by bankruptcy court of Notice of Chapter 7 Bankruptcy Case and Notice of Discharge).

*Approved 6/2021*