**8.124 WIRE FRAUD**

**(18 U.S.C. § 1343)**

 The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with wire fraud in violation of Section 1343 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, an interstate [or foreign] wire communication 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 wire 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 which it would ordinarily exercise.]

 A wiring is caused when one knows that a wire will be used in the ordinary course of business or when one can reasonably foresee such use.

 It need not have been reasonably foreseeable to the defendant that the wire communication would be interstate [or foreign] in nature. Rather, it must have been reasonably foreseeable to the defendant that some wire communication would occur in furtherance of the scheme, and an interstate [or foreign] wire communication must have actually occurred in furtherance of the scheme.

**Comment**

 *See also* Comment to Instruction 8.121 (Mail Fraud—Scheme to Defraud or to Obtain Money or Property by False Promises). For cases involving wire fraud by deprivation of honest

services, see Instruction 8.123 (Mail Fraud—Scheme to Defraud—Deprivation of Intangible Right of Honest Services).

 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 this instruction and held that wire fraud requires the intent to “deceive *and* cheat”, thereby overruling 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* reasoned that “to be guilty of wire fraud, a defendant must act with the intent not only to make false statements or utilize other forms of deception, but also to deprive a victim of money or property by means of those deceptions. In other words, a defendant must intend to deceive *and* cheat.” *Id.* at 1101. *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. *Miller* also left unchanged the precedent that inten to repay “is not a defense to wire fraud.”  *Miller*, 953. F.3d at 1103.

 A defendant acts with the intent to *deceive* when he “make[s] false statements or utilize[s] other forms of deception[.]”  *Miller*, 953 F.3d at 1101. A defendant acts with the intent to *cheat* when he engages in “a scheme or artifice to defraud or obtain money or property” and “deprive[s] a victim of money or property[.]” thereby “cheat[ing] someone out of something valuable.”  *Id.*

In clarifying the distinction between “deceive” and “cheat,” *Miller* cites to *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). In *Walters*, the court reviewed the conviction for mail fraud of a sports agent who had defrauded the NCAA, not by stealing its property, but by inducing college athletets to sign secret representation contracts in violation of the Association’s rules. *Id.* at 1221. Finding that the agent had deceived, but not cheated, his victim, the Seventh Circuit reversed the agent’s conviction, holding that the statute requires “a scheme to obtain money or other property from the victim,” and that while a deprivation of money or property is a necessary condition of mail fraud, “[l]osses that occur as byproducts of a deceitful scheme do

not satisfy the statutory requirement” *Id.* at 1227.

 The only difference between mail fraud and wire fraud is that the former involves the use of the mails and the latter involves the use of wire, radio, or television communication in interstate or foreign commerce. Much of the language of this instruction comes from the instructions approved in *United States v. Jinian*, 712 F.3d 1255, 1265-67 (9th Cir. 2013).

 As with mail fraud, materiality is an essential element of the crime of wire fraud. *Neder v. United States*, 527 U.S. 1 (1999); *United States v. Milovanovic*, 678 F.3d 713, 726-27 (9th Cir. 2012) (en banc).

 In a case involving wire fraud that “affects a financial institution” within the meaning of 18 U.S.C. § 1343, *see* *United States v. Stargell*, 738 F.3d 1018, 1022-23 (9th Cir. 2013)

(defining term “affects”).

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.

 **Cases Involving Mortgage Fraud**. In prosecutions for mortgage fraud under this statute, lender negligence in verifying loan application information, or even intentional disregard of the information, is not a defense to fraud, and so evidence of such negligence or intentional disregard is inadmissible as a defense against charges of mortgage fraud. *See United States v. Lindsey*, 850 F.3d 1009, 1015 (9th Cir. 2017). Also, when a lender requests specific information in its loan applications, that information is objectively material as a matter of law, regardless of the lenders’ policies or practices with respect to use of that information. *Id*. at 1015. Evidence of general lending standards in the mortgage industry, however, is admissible to disprove materiality. “This difference matters because materiality measures natural capacity to influence, not whether the statement actually influenced any decision.” *Id*. at 1016.

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