**15.47 Securities Fraud (15 U.S.C. §§ 78j(b), 78ff;**

**17 C.F.R. § 240.10b-5)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with securities fraud in violation of federal securities law. 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 willfully[used a device or scheme to defraud someone] [made an untrue statement of a material fact] [failed to disclose a material fact that resulted in making the defendant’s statements misleading] [engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person];

Second, the defendant’s [acts were undertaken] [statement was made**]** [failure to disclose was done] in connection with the [purchase] [sale] of [*specify security*];

Third, the defendant directly or indirectly used the [*specify instrument or facility*] in connection with [these acts] [making this statement][this failure to disclose]; and

Fourth, the defendant acted knowingly.

“Willfully” means intentionally [undertaking an act] [making an untrue statement] [failing to disclose] for the wrongful purpose of defrauding or deceiving someone. Acting willfully does not require that the defendant know that the conduct was unlawful. You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted willfully.

“Knowingly” means [[to make a statement or representation that is untrue and known to the defendant to be untrue] [to fail to state something that the defendant knows is necessary to make other statements true] [to make a statement with reckless disregard as to its truth or falsity] [to fail to make a statement with reckless disregard that the statement is necessary to make other statements true] in respect to a material fact] [intentional conduct that is undertaken to control or affect the price of securities]. [An act is done] [A statement is made] [A failure to disclose is done] knowingly if the defendant is aware of [the act] [making the statement] [the failure to disclose] and did not [act or fail to act] [make the statement] [fail to disclose] through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that [[his] [her] acts were unlawful] [it was unlawful to make the statement] [[his] [her] failure to disclose was unlawful]. You may consider evidence of the defendant’s words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

[“Reckless” means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to the defendant or so obvious that the defendant must have been aware of it.]

[A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to [purchase] [sell] securities.]

It is not necessary that an untrue statement passed [through] [over] the [*specify instrument or facility*] so long as the [*specify instrument or facility*] was used as a part of the [purchase] [sale] transaction.

It is not necessary that the defendant made a profit or that anyone actually suffered a loss.

**Comment**

“Willfully” as used in 15 U.S.C. § 78ff(a) does not require the actor to know that the conduct was unlawful. *United States v. Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004); *see also United States v. Reyes*, 577 F.3d 1069, 1079 (9th Cir. 2009) (holding that jury need only find defendant acted knowing the falsification to be wrongful).

The Ninth Circuit has held reckless disregard for truth or falsity to be sufficient to sustain a conviction for securities fraud. *See Tarallo*, 380 F.3d at 1188 (stating that government need only prove that defendant made false representation with reckless indifference to its falsity); *United States v. Farris*,614 F.2d 634, 638 (9th Cir. 1980).

As in the Securities Exchange Act §10(b) context, 18 U.S.C. § 1348’s requirement of “in connection with” is broadly construed and can be met by proof of dissemination and materiality of the misrepresentation or omission. *See United States v. Hussain*, 972 F.3d 1138, 1147 (9th Cir. 2020).

For Rule 10b-5(a) and (c) violations for schemes or practices designed to defraud investors by controlling or artificially manipulating the market, such as in “pump and dump” cases, use thebracketed language in the instruction defining “knowingly” as: “intentional conduct that is undertaken to control or affect the price of securities” and omit the paragraph as to the meaning of “to be material.” Such cases may also proceed under Rule 10b-5(b) for omitting to state a material fact. *United States v. Charnay*, 537 F.2d 341, 351 (9th Cir. 1976) (holding that failure to disclose that market prices are being artificially depressed operates as deceit on marketplace *and* is omission of material fact, which is actionable under Rule 10b-5(b)). But there must be a duty to disclose such as that arising from a fiduciary or quasi-fiduciary relationship between the defendant and his or her victim. *Chiarella v. United States*, 445 U.S. 222, 231 (1980) (reversing conviction when trial court failed to instruct jury as to need for fiduciary duty).

Materiality, in the context of securities fraud, is measured by a reasonable investor standard. *United States v. Berger*, 473 F.3d 1080, 1100 (9th Cir. 2007); *Tarallo*, 380 F.3d at 1182.

*Apprendi v. New Jersey,* 530 U.S. 466 (2000)does not apply to the§ 78ff penalty provision that “no person shall be subject to imprisonment under this section for a violation of a rule or regulation if he proves that he had no knowledge of such rule or regulation” because it is an affirmative defense that may mitigate the defendant’s sentence. *Tarallo*, 380 F.3d at 1192.

Depending on the facts in evidence, it may be appropriate to amend this instruction with language requiring specific jury unanimity. *See* Instruction 6.27 (Specific Issue Unanimity). *See, e.g.*, *United States v. Weiner*, 578 F.2d 757, 788 (9th Cir. 1978) (explaining distinction between scheme to defraud, which is theory of liability under Rule 10b-5, and means adopted to effectuate scheme; unanimity is required for former, but not latter); *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007) (holding that there was no need for unanimity instruction where there is simply more than one alleged false promise).

For insider trading schemes, Rule 10b-5(b) prohibits individuals owing a fiduciary duty to a source from using material, undisclosed insider information from that source for their personal benefit. *See Dirks v. S.E.C.*, 463 U.S. 646, 653-54 (1983). Thus, tipping inside information to others for one’s own personal benefit violates Rule 10b-5. *Id*. at 659 (“Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they may not give such information to an outsider for the same purpose of exploiting the information for their personal gain.”). In such a situation, the person receiving the undisclosed, material inside information (the “tippee”) is equally liable under Rule 10b-5(b) if: (1) “the tippee knows or should know” that the person disclosing the information (the “tipper”) did so for their personal benefit; and (2) the tippee trades on that information anyway. *Id*. at 662-63; *see also Salman v. United States*, 137 S. Ct. 420, 421 (2016). A jury can infer the tipper personally benefitted “where the tipper receives something of value in exchange for the tip or ‘makes a gift of confidential information to a trading relative or friend.’” *Salman*, 137 S. Ct. at 423 (quoting *Dirks*, 463 U.S. at 664). But if the tipper did not personally benefit from tipping the undisclosed inside information, then the tippee is not liable under Rule 10b-5(b). *See*, *e.g.*, *Dirks*, 463 U.S. at 665 (holding that there was no tippee liability because tipper was whistleblower who did not personally benefit from tipping material, undisclosed inside information).

*Revised Dec. 2020*