**15.48 Sale of Unregistered Securities**

**(****15 U.S.C. § 77e)**

The defendant is charged in [Count \_\_\_\_\_\_\_ of] the indictment with the sale of unregistered securities 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 sold securities;

Second, the securities that were sold were required to be registered with the Securities and Exchange Commission—that is, the transactions were not exempt from registration;

Third, the securities that were sold were not registered with the Securities and Exchange Commission;

Fourth, knowing the shares were not registered and not exempt, the defendant willfully sold or caused the shares to be sold to the public; and

Fifth, the defendant knowingly, directly or indirectly, used or caused to be used the mails or the means and instrumentalities of interstate commerce for the purpose of selling the securities.

**Comment**

This instruction is for use in any case involving a violation of 15 U.S.C. § 77e, involving the offer or sale of an unregistered security in interstate commerce.

“Security” is defined at 15 U.S.C. § 77b(a)(1).

As to the fifth element, 15 U.S.C. § 77e also applies to a defendant who uses the mails or interstate commerce for the delivery after sale of an unregistered security. *See* 15 U.S.C. § 77e(a)(2).

“To establish a prima facie case for violation of Section 5, the [government] must show that (1) no registration statement was in effect as to the securities; (2) the defendant directly or indirectly sold or offered to sell securities; and (3) the sale or offer was made through interstate commerce.” *SEC v. CMKM Diamonds, Inc.*, 729 F.3d 1248, 1255 (9th Cir. 2013) (citing *SEC v. Phan*, 500 F.3d 895, 902 (9th Cir. 2007)).

“‘Once the [government] introduces evidence that a defendant has violated the registration provisions, the defendant then has the burden of proof in showing entitlement to an exemption.’” *CMKM Diamonds, Inc.*, 729 F.3d at 1255 (quoting *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980)). Exemptions to 15 U.S.C. § 77e are listed in 15 U.S.C. § 77d. “Exemptions from registration provisions are construed narrowly ‘in order to further the purpose of the Act: To provide full and fair disclosure of the character of the securities, and to prevent frauds in the sale thereof.’” *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1086 (9th Cir. 2010) (quoting *Murphy*, 626 F.2d at 641).

Scienter is not an element of liability for civil enforcement of 15 U.S.C. § 77e. *See Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 714 n.5 (1980) (“The prohibition in § 5 of the 1933 Act, 15 U.S.C. § 77e, against selling securities without an effective registration statement has been interpreted to require no showing of scienter.”). However, a criminal prosecution under 15 U.S.C. § 77x for the violation of § 77e requires a showing that the sale or offer of unregistered securities was done “willfully.” “Willfully” in this context does not require that the actor know specifically that the conduct was unlawful. *See United States v. Lloyd*, 807 F.3d 1128, 1166 (9th Cir. 2015).

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