

## 18 U.S.C. §§ 1341 & 1343 DEFINITION OF MATERIAL

A false or fraudulent pretense, representation, [or] promise[, ] [omission, or concealment] is “material” if it is capable of influencing the decision of the [person[s]] [or] [list victim] to whom it was addressed.

[It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim, as long as it is capable of doing so.]

### Committee Comment

*Neder v. United States*, 527 U.S. 1 (1999), held that materiality is an essential element of mail/wire fraud. Cases recommend inclusion of the materiality element in jury instructions. See *United States v. Fernandez*, 282 F.3d 500, 509 n.6 (7th Cir. 2002); *United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 2000).

The mail/wire fraud statutes do not include the words “omission” or “concealment,” but cases interpreting them hold that omissions or concealment of material information may constitute fraud without proof of a duty to disclose the information pursuant to a specific statute or regulation. See *United States v. Powell*, 576 F.3d 482, 490–92 (7th Cir. 2009); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005); *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 868 (7th Cir. 1998); *United States v. Biesiadecki*, 933 F.3d 539, 543 (7th Cir. 1991); *United States v. Keplinger*, 776 F.2d 678, 697–98 (7th Cir. 1985); see also *United States v. Colton*, 231 F.3d 890, 891–901 (4th Cir. 2000). It is unclear whether an omission by itself is sufficient to comprise a scheme to defraud. Most of the cases cited above also involved other misrepresentations or acts of concealment. Some cases suggest that an omission-based fraud scheme must be accompanied by an act of concealment. *Powell*, 576 F.3d at 491 (“a failure to disclose information may constitute fraud if the ‘omission [is] accompanied by acts of concealment’”); quoting *Stephens*, 421 F.3d at 507. It is also worth noting that, in *Skilling v. United States*, 130 S. Ct. 2896, 2932–33 (2010), the Supreme Court declined to interpret honest-services fraud to encompass an undisclosed conflict of interest by itself. The Court cautioned that an attempt to criminalize undisclosed conflicts of interest would require answering specific questions. *Id.* at 2933 n.44 (“How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.”)

Captured 5/30/2014