# Insider Trading Laws and Enforcement

*By Christopher LaVigne and Brian Calandra*

## Introduction

The past three years have witnessed significant developments in the law of insider trading. Most noteworthy is the Second Circuit's December 2014 decision in *United States v. Newman*,[1] where a three-judge panel issued a ruling that has rolled back the tide of insider trading enforcement actions. In reversing the convictions of two hedge fund portfolio managers, the panel outlined the degree of "knowledge" a "remote tippee" must possess to be liable for insider trading and the scope of the "personal benefit" that must be provided to a corporate insider to sustain a civil or criminal enforcement action. As a result of *Newman*, over a dozen insider trading convictions have been vacated and Securities and Exchange Commission (the "SEC") enforcement actions have been dismissed. Commentators have opined on whether this decision will hamper U.S. Department of Justice ("DOJ") enforcement efforts going forward, with the U.S. Attorney for the Southern District of New York suggesting such is the likely outcome of the Second Circuit's decision.[2]

Yet questions still abound regarding the precise contours of insider trading liability in the wake of the *Newman* decision, particularly regarding remote tippees. The Supreme Court is hearing a case next fall where such issues will squarely be presented, providing the Court with an opportunity to delineate the contours of "tipper-tippee" liability for the first time since the early 1980s. Despite the *Newman* decision, federal regulators continue to vigorously police insider trading; the SEC has already filed 11 separate actions in 2016 alone, after filing more enforcement actions in 2015 than in 2014.[3] Moreover, the SEC's recent trial success in a civil enforcement action—after federal prosecutors dismissed a parallel criminal indictment—may foreshadow continued aggressive enforcement from the agency, which faces a lower burden of proof in civil enforcement actions than the DOJ does in criminal proceedings.

In short, since 2013, court decisions have provided more clarity on the scope of insider trading laws in the types of actions that always have represented the greatest challenge for federal enforcement officials—"remote tippees." Such actions have increasing relevance for the hedge

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fund industry, where portfolio managers and analysts may receive information that ultimately came from an insider, but is not specifically identified as such, nor even sourced.

This article provides a general overview of insider trading laws, outlines key developments since early 2013, and highlights recent trends and open issues pending before the Supreme Court, all of which should prove instructive to members of the hedge fund industry.

## Overview of Insider Trading Law

Unlike many federal crimes, insider trading is not specifically prohibited by any statute. Rather, courts have interpreted insider trading to be prohibited by the general federal securities anti-fraud statute, Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"). This statute prohibits the use of "any manipulative or deceptive device" in connection with the purchase or sale of a security.[4] Courts have interpreted this statute's anti-fraud prohibitions to include insider trading, since Section 10(b) "was designed as a catch-all clause to prevent fraudulent practices."[5]

At its core, insider trading law prohibits trading on the basis of material non-public information ("MNPI") that the trader knows or has reason to know was disclosed or obtained in breach of a duty of trust and confidence to the source of the information and in exchange for a personal benefit. There are some narrow statutes/regulations that prohibit insider trading in limited factual circumstances as well. Rule 14e-3 under the Exchange Act, for example, strictly prohibits trading or "tipping" on the basis of MNPI concerning a tender offer, and avoids many of the legal nuances (such as breaches of duties) associated with traditional insider trading actions.[6]

### *Classical Insider Trading*

Under the so-called "classical theory" of insider trading, a corporate insider, *e.g.*, an officer or director of a corporation, can be liable for trading in his corporation's securities on the basis of MNPI that he possessed by virtue of his position with the corporation. Courts have found that an insider who trades on MNPI violates Section 10(b) because of the "relationship of trust and confidence [that exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[7] An insider thus commits fraud when he "takes advantage of information intended to be available only for a corporate purpose," and "fails to disclose [this MNPI] before trading on it and thus makes 'secret profits.'"[8] The classical theory applies not only to officers, directors, and other permanent insiders of a corporation, but also to "temporary insiders" or attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation.[9]

### *Misappropriation Insider Trading*

A trader can be liable for insider trading even if he is not an insider, *i.e.*, even if there is no fiduciary relationship between the trader and the shareholders of the company that issued the securities. Under this "misappropriation theory" of insider trading, a trader breaches a duty of trust or confidence owed to the *source* of the information by trading on the basis of information that the source expected the trader to keep confidential.[10]

As the Supreme Court explained in *United States v. O'Hagan*, the trader's use of his source's MNPI to purchase or sell securities, in breach of a duty of trust and confidence, defrauds the source of the exclusive use of that information.[11] While liability under the classical theory of insider trading arises out of the fiduciary relationship between the insider of a corporation and the shareholder of the corporation who is buying or selling stock, liability under the misappropriation theory arises out of the trader's "theft" of the MNPI from the source who entrusted him with it.

### *Tipper-Tippee Insider Trading*

Insider trading enforcement actions often involve webs of interconnected corporate insiders, research analysts, and traders, all of whom can be "putative defendants," even though many of them did not actually trade any securities. Such sprawling actions are brought under the theory of "tipper-tippee" liability, which developed from a 1983 Supreme Court case called *Dirks v. SEC*.[12]

In *Dirks,* the Supreme Court recognized that insider trading actions must be predicated on "personal gain," which can be established by an insider's trading for profit, or "tipping" information to a third party in exchange for a "personal benefit."[13] The latter standard has been elusive to define. And foreshadowing the defenses successfully raised 30 years later in *Newman*, *Dirks* made clear that "[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts."[14] The Court stated, however, that there are "objective facts and circumstances" that justify the inference that a disclosure has been made in exchange for a benefit. For example, the Court wrote, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." The Court also held that a tipper could also be liable where he "makes a gift of confidential information to a trading relative or friend."[15]

*Dirks* also examined when a "tippee" would be liable for trading on MNPI. The Court stated that "a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on [MNPI] only when the insider has breached his fiduciary duty . . . by disclosing the information to the tippee *and the tippee knows or should know that there has been a breach*" (emphasis added). In so holding, however, the Court made clear that such a duty does not arise by the tippee's "mere possession" of MNPI, which "could have an inhibiting influence on the role of market analysts." Rather, such a duty arises from the relationship between the tipper and tippee, such that the tippee "knew" that the MNPI was provided in breach of the insider's duty.[16]

*The past three years have witnessed significant developments in the law of insider trading.*

## Recent Developments in Insider Trading Law

### *United States v. Newman*

In December 2014, the Second Circuit applied the holding of *Dirks* to a case involving several "remote tippees" and in so doing vacated the convictions of two hedge fund portfolio managers.[17]

In *Newman*, the DOJ charged hedge fund portfolio managers Todd Newman (who worked for Diamondback Capital Management ("Diamondback")) and Anthony Chiasson (who worked for Level Global Investors ("Level Global")) with insider trading in the securities of two publicly-traded companies—Dell and NVIDIA. The Government alleged that the defendants' trades were based on MNPI disclosed by a corporate insider at each company, which related to earnings information prior to Dell's earnings announcements in May and August 2008 and NVIDIA's earnings announcement in May 2009. The jury convicted Newman and Chiasson on all counts, and the District Judge sentenced them principally to 54 months and 78 months in prison, respectively.[18]

Newman and Chiasson, however, were several steps removed from the insider's alleged disclosure of MNPI, which proved to be a critical fact on appeal.[19] Regarding the Dell trades, the DOJ offered evidence at trial that a Dell Investor Relations employee disclosed earnings information to a research analyst at Neuberger Berman, who passed it on to a Diamondback research analyst, who in turn provided the information to Newman, and to other analysts who provided it to Chiasson.[20] The NVIDIA "tipping chain" followed a similar path—the Government alleged that an NVIDIA insider provided MNPI regarding earnings information to a former executive at the technology companies Broadcom Corp. and Altera Corp., whom the insider knew from church. The former executive shared it with an analyst at Whittier Trust, who disclosed it to two analysts at Diamondback and Level Global, who in turn shared the information with Newman and Chiasson, respectively.[21]

On appeal, the defendants argued, among other things, that they lacked the *mens rea* to commit insider trading because they had no knowledge of the insider's "breach" under *Dirks*. The defense argued that, to be guilty of insider trading, the remote tippees must have knowledge of the benefit that was provided to the insider, to which the Government responded that the tippees merely needed to know that the MNPI was disclosed in violation of a company's policies on confidentiality. Newman also argued that there was insufficient evidence that the insiders received a benefit for allegedly disclosing MNPI.[22]

Regarding the first question, the Second Circuit panel adopted the defense's argument. The panel emphasized that, for an insider to "breach" his fiduciary duty to shareholders by disclosing MNPI, he or she must do so in exchange for a personal benefit. That is, "the insider's disclosure of confidential information, standing alone, is not a breach." The panel thus reasoned that for a tippee to have knowledge of such a "breach," he must "know[] of the personal benefit received by the insider in exchange for the disclosure," since such a benefit is essential to establish the "breach." Accordingly, the panel found that the trial court's instructions were infirm, because the court instructed the jury that the Government need only establish that the defendants "knew that the [MNPI] has been disclosed by the insider in breach of a duty of trust and confidence." The panel further stated that the erroneous instructions were not harmless.[23]

The panel next considered defendant Newman's second argument. The panel again sided with the defense, concluding that the "circumstantial evidence in this case was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips." In reaching this conclusion, the panel conceded that the scope of personal benefit was "broadly defined" to include "not only pecuniary gain, but also, *inter alia*, any reputational benefit that will translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." The panel clarified, however, that while this standard is "permissive," it "does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." The panel elaborated that "to the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship," "such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." The panel clarified that "this requires evidence of a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the latter." In sum, the personal benefit provided in exchange for confidential information "must be of some consequence."[24]

Applying these principles, the panel found that the Government had not established that the corporate insiders at Dell and NVIDIA provided confidential information in exchange for a "personal benefit." Regarding the Dell tips, the Government argued that the Dell insider provided MNPI in exchange for "career advice" from the Neuberger Berman analyst who received it. In rejecting this argument, the panel found that such "career advice" was "little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance." The panel further noted that the research analyst testified that he would have given the Dell insider the same advice regardless of whether the insider had disclosed MNPI, that he began providing such advice prior to receiving the alleged MNPI, and that no *quid pro quo* existed. The panel then held that the "benefit" evidence relating to NVIDIA was "even more scant," because the NVIDIA insider and the research analyst were "merely casual acquaintances."[25] Further, the tippee testified that he did not provide anything of value to the NVIDIA insider in exchange for the MNPI, and that the insider did not know that the tippee was trading NVIDIA stock. The panel further held that even if there was sufficient evidence of a benefit, there was "absolutely no testimony or any other evidence that Newman and Chiasson knew" of these alleged benefits. Similarly, the panel concluded that there was insufficient evidence to establish that the defendants consciously avoided learning the facts surrounding this alleged benefit, since they were so far removed from the initial disclosure, and because evidence showed that information similar to that disclosed by the insiders was often obtained through authorized leaks or analyst modeling.[26]

After the panel reversed Newman's and Chiasson's conviction, the DOJ requested that the entire Second Circuit rehear the *Newman* appeal *en banc*, arguing that "if the Opinion stands, the Panel's erroneous redefinition of the personal benefit requirement will dramatically limit the Government's ability to prosecute some of the most common, culpable, and market-threatening forms of insider trading."[27] The DOJ's pleas went unheeded, however, as the Second Circuit denied the rehearing request without comment and the Supreme Court denied the DOJ's petition for a writ of *certiorari* as well.

### *Convictions Vacated as a Result of Newman*

As a result of the *Newman* decision, courts have vacated a dozen criminal convictions for insider trading.

The first convictions to fall concerned a group of traders who pled guilty to trading on the basis of MNPI concerning IBM Corporation's 2009 acquisition of SPSS Inc. [28]

The alleged "insider" at the start of this "tipping chain" was Michael Dallas—an associate at the law firm that had represented IBM in the acquisition. The DOJ charged that Dallas disclosed MNPI regarding the acquisition to Trent Martin, his close friend and a research analyst at an investment bank. Martin then allegedly tipped his roommate, Thomas Conradt, who worked as a broker. The DOJ alleged that Conradt, in turn, tipped his fellow brokers David Weishaus, Daryl Payton, and Benjamin Durant, all of whom allegedly traded in the securities of SPSS before the acquisition was announced.[29]

In charging the case, the DOJ relied on the misappropriation theory of insider trading, alleging that Dallas and Martin were close friends who had a "history, pattern and practice" of sharing confidential information, including MNPI obtained through their jobs. Based on this relationship of "trust and confidence," the DOJ contended, Martin had a duty to keep Dallas's MNPI regarding the IBM acquisition confidential. The DOJ charged that Martin breached his relationship of trust and confidence with Dallas by buying SPSS common stock and disclosing the MNPI to various tippees.[30]

Martin, Conradt, Weishaus, and Payton pled guilty to the charges before the *Newman* decision was issued. Within days of the *Newman* decision, however, Southern District of New York Judge Andrew L. Carter advised the parties that he was inclined to vacate the defendants' guilty pleas in light of *Newman*, as there was insufficient evidence of a cognizable benefit provided to the source of the MNPI. After extensive briefing, Judge Carter vacated the defendants' guilty pleas in February 2015, finding an insufficient factual basis for them.[31] After Judge Carter vacated the guilty pleas, the DOJ moved to dismiss the indictments against all five defendants,[32] effectively conceding that they could not prove their case beyond a reasonable doubt given Judge Carter's interpretation of *Newman*.

In October 2015, the DOJ agreed to vacate seven more convictions. Most prominently, the DOJ vacated the conviction of Michael Steinberg (a former SAC Capital Advisors Portfolio Manager), who was found guilty of insider trading after a jury trial for allegedly trading in shares of Dell and NVIDIA on the basis of the same MNPI allegedly used by Newman and Chiasson. The DOJ also vacated the guilty pleas entered by the cooperating witnesses who had been used to build the prosecutions of Newman, Chiasson, and Steinberg: Jon Horvath, the analyst who allegedly tipped Steinberg, Jesse Tortora, the analyst who allegedly tipped Newman, Spyridon Adondakis, the analyst who allegedly tipped Chiasson, Sandeep Goyal, an analyst at Neuberger Berman, Danny Kuo, an analyst at Whittier Trust, and Hyung Lim, an executive at Altera Corporation.[33]

It is worth mentioning, however, that despite the number of vacated convictions referenced above, courts have declined to vacate or dismiss a number of *Newman*-based challenges to prior convictions or indictments. To date, courts in the Southern District of New York have denied at least 15 motions to dismiss indictments or complaints, vacate convictions, or withdraw guilty pleas. Though the reasoning in those cases has varied, the courts found sufficient evidence in the record to support the defendants' convictions (including on issues of personal benefit and knowledge), and have emphasized that "*Newman* could not, and did not, overturn any prior precedent regarding the meaning of personal benefit."[34] Thus, while the *Newman* decision has caused the DOJ to seek dismissal of certain cases involving remote tippees, it has not resulted in a complete upheaval of the scores of insider trading convictions the DOJ has obtained over the last five years.

### *Civil Actions Affected by Newman*

The holdings in *Newman* also presented challenges in civil actions brought by the SEC. On September 14, 2015, the SEC suffered a defeat in an administrative proceeding when Administrative Law Judge ("ALJ") Jason Patil dismissed insider trading claims against Joseph Ruggieri, a former trader at Wells Fargo Securities LLC. The SEC alleged that Gregory Bolan, considered a "rising star" in Wells Fargo's research department, tipped Ruggieri about changes to ratings on certain companies. The SEC alleged that Bolan disclosed the ratings changes in exchange for favorable performance reviews from Ruggieri, which gave Bolan access to valuable promotions and salary increases. ALJ Patil, however, held that positive performance reviews were not a sufficient "benefit" under *Newman* because Ruggieri's feedback appeared genuine and part of a standard practice. ALJ Patil also emphasized that Ruggieri had given Bolan positive feedback even before being provided with the alleged MNPI.[35]

### *United States v. Salman*

On January 19, 2016, the Supreme Court granted *certiorari* in *United States v. Salman*, a case that could further clarify the test regarding the sufficiency of a "benefit" in an insider trading case.[36] The convicted defendant in *Salman* is a "remote tippee," though not as remote as the defendants in *Newman.*

The tipping chain in *Salman* proceeded as follows:

- Maher Kara (the "Insider") worked at a major bank's healthcare investment banking group. Through this role, the Insider learned of MNPI regarding mergers and acquisitions by the bank's clients. The Insider disclosed this information to his older brother (the "Tippee"), who regularly traded on it from 2004 to 2007;
- The Tippee then began disclosing this MNPI to Bassam Salman, the defendant. The Tippee and Salman were

close, as the Insider became engaged to Salman's sister. Salman traded on this MNPI, earning close to $2 million from the trades.[37]

At trial, the Government offered proof that the Insider and Tippee enjoyed a "close and mutually beneficial relationship," that the Tippee helped pay for the Insider's college, stood in for the Insider's father at the Insider's wedding, and taught science to the Insider to help him succeed at his job. In addition, the Insider testified that he provided the MNPI to the Tippee in order to "benefit him," and "fulfill whatever needs he had."[38]

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On appeal, Salman argued that the Government's proof of benefit was insufficient under *Newman,* since there was no evidence that the Tippee provided anything tangible to the Insider. The Ninth Circuit rejected this argument, finding that the Insider's disclosure was "intended as a gift of market sensitive information," which it found to be sufficient under *Dirks* and *Newman*.[39] The Ninth Circuit further stated that "to the extent *Newman* can be read to go so far [as requiring there to be a] tangible benefit," as opposed to an insider's gift to a friend, "we decline to follow it." Salman also argued that the evidence was insufficient to show that he "knew" of this benefit, which the panel rejected.[40]

The Supreme Court has agreed to hear the case in order to determine whether the benefit cited in *Salman* is sufficient under *Dirks*.[41]

## Enforcement Actions Post-*Newman*

Despite *Newman*, the SEC has continued to bring insider trading actions at a brisk pace. Thus far in 2016, the SEC has already brought insider trading actions against 11 individuals and entities, after bringing actions against 87 individuals and entities in fiscal year 2015 and 80 individuals and entities in 2014.[42] Although the volume of such actions has not slowed, recent actions generally appear to focus on traditional insider trading cases involving direct tippers, or clear misappropriation of information related to corporate transactions prior to their announcements.[43]

While the pace of criminal insider trading enforcement actions does not appear to have kept up with pre-*Newman* rates, federal prosecutors continue to bring insider trading actions when it is clear that the allegations of wrongdoing are sufficient under *Newman*. In August 2015, for example, federal prosecutors in the Eastern District of New York and the District of New Jersey charged 32 traders and hackers with a wide-ranging insider trading scheme. According to the indictments, the traders sent hackers a "wish list" of corporate news releases they wanted to see before the releases became public. The hackers allegedly broke into companies like Business Wire, PR Newswire and Marketwired over five years and stole more than 150,000 news releases before the releases were published. The traders would then allegedly trade based on the stolen information and kick back a portion of the profits to the hackers.[44]

One other noteworthy development post-*Newman* is the SEC's trial victory in a civil enforcement action against Daryl Payton and Benjamin Durant. This case was discussed above—both defendants were remote tippees, indicted in the Southern District of New York, and the DOJ dismissed both cases after *Newman.* The SEC, however, continued to move forward with the case, and ultimately prevailed at trial against the defendants.

In declining to dismiss the SEC's action on *Newman*-related grounds, Judge Rakoff highlighted the advantages the SEC has in pursuing civil enforcement actions—a lower burden of proof, and a lower *mens rea*: "[W]hile a person is guilty of criminal insider trading only if that person committed that offense 'willfully,' *i.e.*, knowingly and purposely, a person may be civilly liable if that person committed the offense recklessly, that is, in heedless disregard of the probable consequences. With the respect to the motion here pending, that distinction arguably makes a difference."[45]

In finding that the SEC had sufficiently alleged a "benefit" to the source (Martin), Judge Rakoff focused on the tippee's (Conradt's) payment of certain living expenses or negotiation of reduced expenses for Martin, as well as his assistance to Martin with certain legal issues. The Court also cited Martin's statement to Conradt that Martin was happy Conradt profited from the SPSS trading. Judge Rakoff found such facts were "indicative of Martin's intent to benefit Conradt at the time of the disclosure of the information," "evidence of a *quid pro quo* relationship," and more than sufficient to allege "that Martin and Conradt had a meaningfully close personal relationship and that Martin disclosed the inside information for a personal benefit."[46]

Judge Rakoff also held that the SEC properly alleged that the two remote tippees—Payton and Durant—had sufficient knowledge of the benefits provided to Martin "to meet the civil standard of 'knowing or reckless.'" Judge Rakoff noted that while "there is no evidence that [Payton and Durant] knew specifically about Conradt's help to Martin," the SEC alleged that Payton and Durant "knew the basic circumstances surrounding the tip," including that Martin was the source of the MNPI, that Martin and Conradt were friends and roommates, and that Payton knew about Martin's legal issues. Judge Rakoff also cited to the defendants' repeated requests for more information from Conradt, and their efforts to conceal their trading. Judge Rakoff found that these circumstances were sufficient to raise the inference that Payton and Durant knew Martin's relationship with Conradt involved "reciprocal benefits." The Court distinguished these facts from those in *Newman*, where the defendants knew "next to nothing" about the tippers, were unaware of how the MNPI was obtained, and did not know the relationship between the tipper and tippee.[47]

In so holding, the Court also made clear that the SEC could prove its case through a "conscious avoidance" theory, explaining that "[d]espite their market sophistication and their knowledge that Conradt had learned the information from Martin, [the defendants] did not ask Conradt why Martin shared the information or how Martin learned of it in the first place." Judge Rakoff stated that "[t]he Court may draw an adverse inference from their conscious avoidance of details about the source of the inside information and nature of the initial disclosure."[48]

## Key Take-Aways Post-*Newman* and *Salman*

After *Newman* and the Ninth Circuit's decision in *Salman*, the law appears settled that a remote tippee must know of the "benefit" that an insider received in exchange for providing confidential information to a direct tippee. The Second Circuit clearly held this to be the case, and the Ninth Circuit endorsed that approach as well. As discussed in *Durant*, however, the Government will still have the opportunity to argue that this "knowledge" element is satisfied by "conscious avoidance." In other words, traders and portfolio managers cannot simply put their heads in the sand when provided with information they consider to be MNPI—the *Newman* decision is not *carte blanche* to trade on such information. Both federal prosecutors and SEC enforcement officials can also continue to pursue insider trading cases relating to tender offers under Rule 14e-3, without the restrictions of establishing a sufficient "benefit," and a tippee's "knowledge" of the benefit.

There remain lines to be drawn regarding the sufficiency of the benefit that must be established to sustain an insider trading action. The Supreme Court will soon address whether the "benefit" inuring to an insider from making a "gift" of inside information to a friend will suffice. Even if the Supreme Court affirms on that narrow issue, questions may remain as to whether an insider's "tip" in a particular case "generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as required by *Newman*. Such a test is necessarily fact-specific, as the Supreme Court noted decades ago, although the Court may offer clarity when it decides *Salman.* It seems unlikely that the Court will take issue with the *Newman* Court's recognition that the friendship between an insider and tippee—standing alone—can permit an inference of "personal benefit," but time will tell.

Regardless of the evolving standards, the fact remains that insider trading enforcement actions will continue to remain a priority of both the SEC and the DOJ. And while the DOJ historically has taken the lead in prosecuting insider trading offenses, the SEC's recent success in the *Durant* case may foreshadow an increasing role for this agency in pursuing insider trading cases that lack the proof necessary for a criminal case.

Even if the number of charged cases decreases, it behooves all compliance officers and legal professionals to regularly educate and train their institution's traders about the insider trading laws and the dangers that can result from trading on what may appear to be MNPI. Similarly, maintaining restricted lists and a vigorous insider trading policy are measures that compliance officers should follow in order to protect the institution from the stigma of a widely publicized investigation or enforcement action. As the law evolves, questions no doubt will arise relating to fact-specific, detailed scenarios that often crop up in insider trading questions. Consulting outside counsel when necessary is another measure that can help protect the institution and its traders, and highlight the good faith of those working at the institution.

## ENDNOTES

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Chris also worked in the SDNY's Terrorism and International Narcotics Unit, where he served as lead counsel in several of the Office's highest profile international criminal prosecutions. Chris' noteworthy cases include the successful prosecution of individuals charged with conspiring to export military parts and carbon fiber from the United States to Iran and China, in violation of OFAC and other regulations. Chris has prosecuted several cases involving national security matters; foreign terrorist organizations such as al Qaeda and al Shabaab; export and money laundering offenses relating to embargoed countries and entities; and cases involving foreign corruption.

1 773 F.3d 438 (2d Cir. 2014).

2 Matt Turner, *Sheriff of Wall Street: We're no longer able to bring certain insider trading cases*, Business Insider, Jan. 17, 2016, http://www.businessinsider.com/preet-bharara-on-newman-case-2016-1.

3 SEC, *SEC Announces Enforcement Results for FY 2015*, Rel. No. 2015-245 (Oct. 22, 2015), https://www.sec.gov/news/pressrelease/2015-245.html ("Enforcement Announcement").

4 15 U.S.C.A. § 78j(b) (2016).

5 *Chiarella v. United States*, 445 U.S. 222, 226 (1980).

6 17 C.F.R. § 240.14e-3.

7 *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997).

8 *Dirks v. SEC,* 463 U.S. 646, 647, 654 (1983).

9 *Id.* at 655 n.14.

10 *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

11 *Id.*

12 463 U.S. 646 (1983).

13 *Id.* at 662–63.

14 *Id.* at 664.

15 *Id.* at 663–64.

16 *Id.* at 660–61.

17 *Newman*, 773 F.3d at 443

18 Walter Pavlo, *Newman And Chiasson Insider Trading Conviction Overturned*, Forbes, Dec. 10, 2014, http://www.forbes.com/sites/walterpavlo/2014/12/10/newman-and-chiasson-insider-trading-conviction-overturned/#3f3fd28a4e6e.

19 *Newman*, 773 F.3d at 443.

20 *Id.*

21 *Id.*

22 *Id.* at 450–452.

23 *Id.* at 451.

24 *Id.* at 451–54.

25 *Id.* at 453–55.

26 *Id.* at 454–55.

27 Petition of the United States of America for Rehearing and Rehearing En Banc, *United States v. Newman*, No. 13-1837, at 3 (Jan. 23, 2015), ECF No. 279.

28 *See* Superseding Indictment, *United States v. Durant, et al.*, No. 12-cr-00887 (ALC), at ¶¶ 10–11 (S.D.N.Y. Oct. 29, 2014), at ECF No. 95.

29 *Id*.

30 *Id.*

31 *United States v. Conradt*, No. 12 CR. 887 (ALC), 2015 WL 480419, at *1 (S.D.N.Y. Jan. 22, 2015).

32 Nolle Prosequi, *United States v. Conradt, et al.*, No. 12-cr-00887 (ALC) (S.D.N.Y. Feb. 03, 2015), at ECF No. 170.

33 Patricia Hurtado, *SAC Capital's Steinberg Gets Insider Trading Charges Dropped*, Bloomberg, Oct. 22, 2015, http://www.bloomberg.com/news/articles/2015-10-22/u-s-drops-charges-against-sac-capital-s-michael-steinberg.

34 *See, e.g., United States v. Whitman*, 115 F. Supp. 3d 439, 444 (S.D.N.Y. 2015).

35 Ed Beeson, *SEC Loses Insider Trading Case on Home Court*, Law360, Sep. 14, 2015, http://www.law360.com/articles/702227/sec-loses-insider-trading-case-on-home-court.

36 Order, *Salman v. United States*, No. 15-628 (U.S. Jan. 19, 2015), http://www.supremecourt.gov/qp/15-00628qp.pdf.

37 *United States v. Salman*, 792 F.3d 1087, 1093 (9th Cir. 2015).

38 *Id.* at 1089.

39 *See id.* at 1094 ("Proof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary duty element of insider trading.").

40 *Id.* at 1093.

41 Order, *Salman*, *supra* n. 36.

42 Enforcement Announcement, *supra* n. 3.

43 Shearman & Sterling LLP, *Securities Enforcement: 2015 Year-End Review*, at 23 (Feb. 2016), http://www.shearman.com/en/newsinsights/publications/2016/02/securities-enforcement-2015-year-end-review.

44 *See, e.g.*, Indictment, *United States v. Korchevsky, et al.*, No. CR 15-381 (RJD) (E.D.N.Y. Aug. 5, 2015), ECF No. 1.

45 *S.E.C. v. Payton*, 97 F. Supp. 3d 558, 559 (S.D.N.Y. 2015).

46 *Id.* at 562.

47 *Id.* at 564.

48 *Id.*