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Insider Trading & Disclosure Update
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Insider Trading & Disclosure Update

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Welcome to our latest issue of the Insider Trading & Disclosure Update, Debevoise's periodic update focusing on recent legal, compliance and enforcement developments in the areas of insider trading, the management of material non-public information, and disclosure-based matters.

In this Update, we highlight recent developments regarding the SEC's use of administrative proceedings with the D.C. Circuit's decision in *Lucia v. SEC* potentially signaling the end of one line of attack by defendants. Also figuring prominently in this Update is a Second Circuit decision further clarifying the application of the Supreme Court's decision in *Omnicare* and a review of the highly anticipated Supreme Court review of the Ninth Circuit's decision in the *Salman* insider trading case.

We hope that you find this Update useful and informative, and we look forward to bringing you further news and analyses in future issues.

Sincerely,

The Editorial Board

Case Law & Market Updates

Lucia v. SEC: D.C. Circuit Upholds Constitutionality of SEC's In-House Courts

On Tuesday, August 9, 2016, the Circuit Court of the District of Columbia delivered a significant victory to the U.S. Securities and Exchange Commission (the "SEC" or the "Commission") in *Raymond James Lucia Cos. Inc. v. S.E.C.*,[1] holding that the procedures for appointing the SEC's Administrative Law Judges ("ALJs") are consistent with the Appointments Clause of the Constitution. With this ruling, the D.C. Circuit becomes the first federal appellate court to directly address the recent constitutional challenges to the Commission's administrative proceedings.

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The *Lucia* case arose during an upsurge in the SEC's use of administrative proceedings under the leadership of SEC Chair Mary Jo White. This trend sparked significant criticism of the SEC's administrative process and ALJs,[2] which detractors argue unfairly advantage the SEC from a procedural standpoint (*e.g.*, by operating outside of the Federal Rules of Evidence and the right to a jury trial) and overwhelmingly rule against respondents. Among the responses to the SEC's increased use of the administrative process and ALJs were a series of challenges to the constitutionality of the ALJs, in many cases litigating whether the process for appointing and removing the ALJs contravenes the requirements of Article II of the Constitution.[3]

In *Lucia*, former investment adviser Ray Lucia had appealed the SEC's findings that he misled investors as to his firm's retirement wealth-management strategy in violation of Investment Advisers Act Sections 206(1), (3) and (4). In contrast to the petitioners whose challenges were rejected on jurisdictional grounds in recent decisions by various federal appellate courts,[4] Lucia exhausted his appellate options within the Commission itself before pursuing his constitutional claims at the circuit court level. An ALJ had imposed a lifetime industry bar and $300,000 in monetary penalties and disgorgement on Lucia in a December 2013 initial decision. Lucia appealed directly to the Commission, challenging the ALJ's conclusions and arguing that the ALJ was a constitutional "Officer" of the United States who had been unconstitutionally appointed and lacked authority to render a decision. The Commission upheld the ALJ's findings in a final order issued September 2015.

After laying out the statutory history behind the Commissions' delegation of power to its ALJ function, the Court analyzed the Appointments Clause, which provides that the President nominate and appoint "Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law," and empowers Congress to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[5] Per Supreme Court precedent, Officers are defined as appointees who exercise "significant authority pursuant to the laws of the United States," which the D.C. Circuit evaluates based on the significance of the matters that they resolve, the level of discretion they hold in reaching those decisions, and the finality of those decisions.[6] The SEC's ALJs are hired through the agency's Office of Administrative Law Judges, rather than appointed through the constitutional processes for Officers.

The Court focused on the Commission's issuance of a final Order that either memorializes or alters an initial decision by an ALJ:[7]

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"The Commission's final action is either in the form of a new decision after *de novo* review or, by declining to grant or order review, its embrace of the ALJ's initial decision as its own. In either event, the Commission has retained full decision-making powers."[8] Noting that the Commission could affirm, reverse, modify, set aside or reach different findings from an ALJ's decision, and that the initial decision would be "of no effect" if a majority of participating Commissioners could not agree to an outcome on the merits, the Court determined that the ALJ's actions fell below the threshold of authority required to be considered an Officer.[9] As such, the Court determined, petitioners had offered no "reason to understand the finality order to be merely a rubber stamp."[10]

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Because petitioners had failed to identify duties that would render the ALJs "inferior Officers" for constitutional purposes, the Court concluded that it "could not cast aside a carefully devised scheme established after years of legislative consideration and agency implementation."[11]

The Court went on to reject petitioner's alternative argument that the Commission's findings of liability lacked substantial support in the evidentiary record, and upheld the Commission's decision to impose a lifetime bar as being within the Commission's discretion.[12]

The decision by the D.C. Circuit is likely to influence the ultimate outcome of numerous similar constitutional challenges that have been raised across the country.[13] The Court's analysis would apply directly, and with similar results, to claims stemming from the tenure protections that ALJs enjoy from the President's authority to remove executive officers.[14] However, although arguments that ALJs are constitutionally infirm have largely focused on Article II issues, some petitioners have raised challenges on the basis of due process and equal protection violations.[15] Other circuits that entertain such challenges may also diverge from the reasoning in *Lucia*. Nonetheless, the D.C. Circuit's ruling represents a major win for the SEC following several years of legal controversy over its administrative process.

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SEC Adopts Amendments to Rules of Practice for Administrative Proceedings

On July 13, 2016, the SEC voted to adopt several important amendments to its rules of practice governing administrative proceedings.[16] The amendments are an attempt by the SEC to respond to the widespread public criticism of the agency's use of the administrative process to adjudicate cases—particularly in the insider trading area—that had traditionally been pursued in federal district court, where defendants are afforded the procedural protections of the Federal Rules of Civil Procedure. Commenting on the amendments, SEC Chair Mary Jo White noted that the rules "provide parties with additional opportunities to conduct depositions and add flexibility to the timelines of our administrative proceedings, while continuing to promote the fair and timely resolution of the proceedings."[17] The amendments impact five primary areas:

Prehearing Period: The amendments to Rule 360 will extend the prehearing period to allow for discovery. The prehearing period is the period of time between the entry of an Order Instituting Proceedings ("OIP") and the date by which the hearing must be held. Under the amendments, OIPs will designate the time period for preparing an Initial Decision "as 30, 75, or 120 days from the completion of post-hearing or dispositive motion briefing or a finding of a default."[18] The maximum length of the prehearing period will be increased from the current four months to a maximum of 10 months for cases designated as 120-day proceedings, a maximum of six months for 75-day cases, and a maximum of four months for 30-day cases.

Discovery and Depositions: The amendments to Rule 233 will allow parties in 120-day proceedings to notice three depositions per side if there is a single respondent, or five depositions per side if there are multiple respondents. Each side will also be permitted to request an additional two depositions under expedited procedures. Under the current rules, parties can only take depositions by oral examination if a witness is unable to attend or testify at a hearing. In addition, the amendment to Rule 221(c) provides that one of the topics to be discussed at the prehearing conference is the timing of the SEC staff's production of documents pursuant to Rule 230, which relates to the Division of Enforcement's investigative file.

Dispositive Motions: The amendments to Rule 856 will provide for three types of dispositive motions that may be filed at different stages of the proceeding. A motion for a ruling on the pleadings may be filed 14 days after the answer and allows a respondent to seek a ruling as a

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matter of law on the factual allegations asserted in the OIP. A motion for summary disposition allows any party to move as a matter of law on one or more claims or defenses. Leave of the hearing officer is *not* required to file a motion for summary disposition in 30- and 75-day cases, but is required for 120-day cases. Finally, a motion for a ruling as a matter of law may be filed after the Commission presents its case in chief at the hearing.

Affirmative Defenses: The amendments to Rule 220 will require respondents to assert affirmative defenses in their answers including affirmative defenses such as *res judicata*, the expiration of the statute of limitations, and any reliance defenses, including reliance upon "the advice of counsel, accountants, auditors, or other professionals."[19] If an affirmative defense is not asserted as part of the answer, it is deemed waived.

Hearsay Evidence: The amendments to Rule 320 will exclude evidence that is "irrelevant, immaterial, unduly repetitious, or unreliable."[20] Previously, Rule 320 had not included reliability as one of the bases for excluding evidence. The amendments also clarify that hearsay is admissible if it is considered relevant, material, and reliable, which will be determined on a case-by-case basis.

The amendments also provide procedures addressing service in foreign jurisdictions, disclosures regarding expert witnesses and their reports, and appeals to the Commission. The amendments to the rules of practice will become effective 60 days after publication in the Federal Register, and will apply to all proceedings initiated on or after the effective date, as well as any phases of pending proceedings taking place on or after that date.

Although the amendments to the rules of practice do not fully address the concerns raised by critics of the SEC's administrative proceedings, by borrowing from some aspects of the Federal Rules of Civil Procedures, the amendments are a step in the direction of providing greater procedural protections to defendants.[21] Nevertheless, many due process concerns remain unaddressed, including the absence of a jury and the Commission's role as both prosecutor and adjudicator.

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Tongue v. Sanofi: Second Circuit Issues Its First Published Opinion Applying Supreme Court's *Omnicare* Decision

On March 4, the Second Circuit issued a significant company-friendly decision interpreting and applying the Supreme Court's landmark decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund.*[40] In the *Tongue v. Sanofi* decision, a panel of the Second Circuit applied a context-specific analysis to affirm the dismissal of claims under Sections 11 and 12 of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act, holding that *Omnicare* does not impose a blanket requirement to disclose every fact that may undermine statements of opinion regarding company projections.[41]

Omnicare does not impose a blanket requirement to disclose every fact that may undermine statements of opinion regarding company projections.

Background

In *Omnicare*, the Supreme Court resolved a circuit split and articulated the standard for analyzing whether a statement of opinion is materially misleading under Section 11 of the Securities Act. Specifically, in order to allege that an issuer omitted material information and thereby rendered an honestly believed statement of opinion misleading, the Court held that:

> [t]he investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.[42]

The *Omnicare* ruling modified the standard that had previously been used in the Second Circuit, which had required showing subjective falsity to prove an issuer liable for statements of opinion.[43] The *Sanofi* decision is the first published opinion by the Second Circuit applying the Supreme Court's *Omnicare* holding.

The underlying facts in *Sanofi* related to the promising multiple sclerosis drug, Lemtrada. The patent for Lemtrada was owned by Genzyme, a company that Sanofi acquired in April 2011. As part

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of its acquisition of Genzyme, Sanofi agreed that each Genzyme shareholder would receive a Contingent Value Right ("CVR"), a tradable security, the value of which was dependent on the FDA's approval of Lemtrada. Between 2011 and 2013, Sanofi made a number of public statements concerning its optimistic outlook for Lemtrada, including estimating a 90% probability that it would be approved by the FDA. Privately, however, the FDA had expressed concern about the clinical trials for Lemtrada, but had also noted that if the single blind studies "reveal an extremely large effect, then the FDA [may] potentially accept" the results of the studies. Sanofi did not disclose the concerns voiced by the FDA concerning the insufficiency of the studies. When the FDA later declined to approve Lemtrada, the value of the CVRs plummeted. Shortly thereafter, a class-action suit was filed by various CVR holders. Relying on Section 10(b) of the Exchange Act and Sections 11 and 12(a)(2) of the Securities Act, plaintiffs alleged that Sanofi had misled investors as to the likelihood of FDA approval by failing to disclose that the FDA had voiced concerns about the studies relied on in Sanofi's application for FDA approval.[44]

The District Court, applying a pre-*Omnicare* standard, dismissed these claims for failure to state a claim. After *Omnicare* was decided, the Second Circuit took the opportunity to examine the impact of *Omnicare* on claims that statements of opinion were materially misleading.

Tongue v. Sanofi

The Second Circuit applied *Omnicare* to three categories of allegedly misleading opinions: 1) statements related to Sanofi's expectation that the FDA would approve Lemtrada by March 31, 2014; 2) statements concerning defendant's satisfaction with the progress being made towards Lemtrada's approval; and 3) positive statements regarding Lemtrada's trial results. The Second Circuit held that Sanofi's statements that it was "relaxed" and "satisfied" with the progress made towards Lemtrada's approval conveyed no facts about how Sanofi had formed its opinion and, in any event, could not be reasonably read to suggest that Sanofi had received no discouraging commentary from the FDA.[45] Similarly, the Second Circuit held that the statements expressing the opinion that trials were showing that Lemtrada exhibited a "strong and robust treatment effect" could not be held to be misleading merely because the FDA ultimately failed to approve Lemtrada, because the trials being performed

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could reasonably support the opinion that Lemtrada was indeed effective at treating multiple sclerosis.[46]

With respect to the first category of statements where Sanofi stated that it estimated a 90% chance of FDA approval for Lemtrada, the Second Circuit held that "*Omnicare* does not impose liability merely because an issuer failed to disclose information that ran counter to an opinion expressed in the registration statement[.]" The Court analyzed whether a reasonable investor in the plaintiffs' position would have been misled by Sanofi's failure to disclose the FDA's statements expressing dissatisfaction with the trials being used to test Lemtrada.[47] Given that "the Plaintiffs are sophisticated investors … aware … [of the] continuous dialogue between the FDA and the proponent of a new drug" and that investors "dealing in a complex financial instrument like the CVRs here" would be well aware of the hedging language surrounding the purportedly misleading opinions, the Second Circuit held that "no reasonable investor would have inferred that mere statements of confidence suggested that the FDA had not engaged in industry-standard dialogue with Defendants about potential deficiencies in either the testing methodology or the drug itself."[48] The Court emphasized that Sanofi's statements could not be misleading simply because the FDA disagreed with the conclusions, provided that Sanofi "in fact held" the view that there was a 90% chance of approval by the FDA.[49] The fact that the FDA later disagreed with Sanofi's interpretation did not render the statement misleading at the time it was made.[50]

Implications of *Sanofi*

The *Sanofi* decision should provide some comfort to companies that satisfying the standard for liability for statements of opinion articulated by the Supreme Court in *Omnicare* continues to be "no small task for an investor."[51] Companies should also take note that Sanofi makes clear that they "need not disclose a piece of information merely because it cuts against their projections." Merely failing to disclose the possession of information that "cut[s] against" the opinion, even where investors "perhaps would have acted otherwise had the [information] been disclosed,"[52] is insufficient to give rise to liability so long as the opinion can be reasonably held while in possession of the contrary information. A company need not show that it provided investors "so much information as might have been desired to make their own determination," but only that the stated opinion "fairly aligns" with the total body of information in its possession when the opinion was transmitted

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to investors.[53] Notwithstanding the Court's ruling, prudence dictates that the *Sanofi* decision be read in context, taking into account that the case involved allegations by sophisticated investors who were investing in complex financial instruments linked to an industry with well established "customs and practices." It therefore remains to be seen how other courts, as well as the Second Circuit, will apply the standard articulated to other factual contexts.

The Traders Strike Back: *Ganek v. Leibowitz*

In the wake of *United States v. Newman*,[54] subjects of insider trading investigations have become increasingly bold in challenging the government's allegations. A few have even gone on the offensive. In perhaps the most high profile of these cases, David Ganek, the former head of hedge fund Level Global, in which Anthony Chiasson (one of the defendants in *Newman*) served as co-manager/co-founder, brought a *Bivens* action seeking compensatory and punitive damages against FBI agents, assistant United States attorneys, and their supervisors, including U.S. Attorney Preet Bharara (the "supervisor defendants").[55] In the complaint, Ganek accuses the defendants of fabricating evidence that led to the raid of the Level Global office and, ultimately, to its collapse and further alleges that the defendants' actions violated his Fourth and Fifth Amendment constitutional rights. Ganek also brought claims against the supervisor defendants for supervisory liability and failure to intercede.

The defendants moved to dismiss the complaint, arguing that it was time barred and failed to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). While dismissing Ganek's Fourth Amendment claim to the extent it challenged the "reasonableness" of the manner in which the search was conducted and his Fifth Amendment claim to the extent it relied on stigma-plus[56] and substantive due process theories of liability, the district court found that Ganek could proceed with most of his Fourth and Fifth Amendment claims under *Bivens* as well as his claims for failure to intercede and supervisory liability.[57]

Specifically, regarding the latter the Court found that "given the high-profile nature of the investigation

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and involvement of the Supervisor Defendants, as alleged in great detail in the Complaint, it is plausible that some of the Supervisor Defendants would have learned [the true facts] and, at the very least, entertained serious doubts as to the truth of the allegations in the Affidavit."[58] The Court further noted that Ganek had plausibly pled that the Supervisor Defendants were kept abreast of developments, prioritized the prosecution of high-level executives, and tipped certain information to the media.[59]

The decision allows Ganek and his counsel to begin discovery, including taking the deposition of U.S. Attorney Bharara, his assistants, and the FBI agents charged with investigating Ganek. That the tables have turned was not lost on the Court, which acknowledged that "in a case alleging unconstitutional overreach, it would be ironic to permit Plaintiff to unnecessarily embroil each of the nine Supervisor Defendants in time-consuming discovery given the possibility (and perhaps probability) that not all of the Supervisor Defendants were directly involved with the allegedly false Affidavit."[60]

The Supervisor Defendants have filed a notice of interlocutory appeal to the Second Circuit.[61]

Who Is the "Reasonable Investor"? *Flannery* and *Litvak*

The materiality standard first prescribed by the Supreme Court in *TSC Industries v. Northway, Inc.* asks whether an omitted or misrepresented fact would be significant to a "reasonable investor."[22] This materiality standard further requires "a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder."[23] The "reasonable investor" assumption enshrined within the materiality standard also extends to cases under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and Rule 10b-5 promulgated thereunder. In *Basic v. Levinson*,[24] the Supreme Court reaffirmed that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information," firmly entrenching the standard in one of the key anti-fraud provisions of the federal securities laws.[25]

Despite the longstanding importance of the "reasonable investor" paradigm, a universally accepted definition of

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the reasonable investor—for instance, characteristics such as investment objectives and financial sophistication—has never been articulated by regulators, scholars or courts.[26] As one scholar has summed up, the reasonable investor "is frequently envisioned as a rational human being of average wealth and ordinary financial sophistication that invests passively for the long term."[27] Further, while the Supreme Court has reaffirmed the applicability of the standard, it has rejected bright-line tests, such as statistical significance, in determining what information is material. In *Matrixx Initiatives v. Siracusano*,[28] the Court again emphasized that reporting companies must instead consider what information a "reasonable investor" would have viewed as significant.

Compounding the difficulty in applying a standard with no clear definition and no bright lines is the problem inherent in analyzing the significance of information through the lens of a theoretical reasonable investor *ex ante*. As with any such analysis, it is an uphill battle to overcome the tendency for parties to second-guess any decision with "20/20 hindsight," particularly when faced with the market's reaction to disclosure. This potentially biased viewpoint is even given credibility by the "market movement test," which views changes in the price of a security after disclosure of allegedly material information as potentially indicative of, though not dispositive of, materiality.[29] The reality that a highly diverse group of institutional investors largely drives market movements further illuminates the frustration faced by companies in applying the "reasonable investor" standard to disclosure questions.

Despite the longstanding importance of the "reasonable investor" paradigm, a universally accepted definition of the reasonable investor—for instance, characteristics such as investment objectives and financial sophistication—has never been articulated by regulators, scholars or courts.

The *Flannery* and *Litvak* Decisions

Two recent cases address whether materiality should be determined on a subjective, rather than objective, basis while underscoring evidentiary burdens in proving materiality. In *Flannery v. SEC*,[30] the First Circuit reversed an SEC Order that had fined two former

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State Street Global Advisors employees for allegedly providing misleading information regarding a bond fund during the 2007 subprime mortgage crisis. In *United States v. Litvak*,[31] the Second Circuit vacated and remanded a criminal conviction of a former Jefferies Group trader for securities fraud.

The *Flannery* case originated as administrative proceedings initiated in 2011 against John Flannery, former chief investment officer for fixed income at State Street Global Advisors, and his colleague James Hopkins, a former vice president and head of product engineering, for allegedly failing to adequately disclose the exposures of a bond fund that was largely invested in subprime mortgage-backed securities. After a divided panel of SEC Commissioners found Flannery and Hopkins liable for various fraud charges, the First Circuit vacated the Commission's order, holding that the Commission's findings did not meet the burden of demonstrating "substantial evidence" of culpability. The First Circuit's ruling emphasized that the Commission had not pointed to any actual investors who could testify to the materiality of the presentation at issue and had "failed to identify a single witness that supports a finding of materiality" as to statements in letters providing investment advice to clients.[32]

The First Circuit noted that, even if it were to accept that a slide prepared by Hopkins was misleading, it did not necessarily follow that the misstatement was material to investors. The Court went on to quote expert testimony that "a typical investor in a registered fund would understand that it could specifically request additional information regarding the fund" and noted that additional information was also included in the available fact sheets and annual audited financial statements. The Court concluded that this context weighed against a finding of materiality under the *TSC/Basic* test, as there was no evidence to suggest that the slide in question "significantly altered the 'total mix' of information" in the eyes of the reasonable investor. The Court concluded that "when a slide is labeled 'typical,' and where a reasonable investor would not rely on one slide but instead would conduct due diligence when making an investment decision, the availability of actual and accurate information is relevant."[33] The Court noted that its determination was "based on how a reasonable investor would react." However, in the same footnote, the Court questioned whether the "level

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of sophistication" of investors in the fund at issue (*i.e.*, institutional investors) could make any misrepresentation immaterial.[34]

On the same day that the First Circuit issued the *Flannery* decision, the Second Circuit overturned the conviction of Jesse Litvak, a former fixed income trader with Jefferies Group. Litvak had been charged with making misleading statements about residential mortgage-backed securities prices to purchasing counterparties in order to maximize Jefferies' profit margin on the transactions. As in the *Flannery* opinion, the *Litvak* decision focused on evidentiary matters related to the government's materiality arguments. The Second Circuit noted in particular that the District Court had excluded expert testimony that investment managers typically conduct their own research to determine fundamental values of a security and tend to disregard statements of traders as relevant only to the "price" and not the true value of a bond.[35]

The Second Circuit distinguished the "complex securities" at issue in the case from ordinary course stock and bond trading, and observed that "[t]he full context and circumstances in which RMBS are traded were undoubtedly relevant to the jury's determination of materiality." Among the excluded testimony, the Court in particular cited one passage claiming that statements by "sell-side" brokers or traders are "not material to a professional investment manager's decision-making."[36] The Court went on to state that the jury could have concluded, based on the excluded testimony, that the misrepresentations at issue would not be material to an investor, as investors in this particular market rely upon "sophisticated valuation methods and computer model[s]," rather than market price, in making investment decisions. The Court held that, without this relevant evidence, the jury could not properly weigh the evidence of importance to investors.

Do "reasonable investors" have subjective characteristics?

These rulings emphasize the government's heavy burden in proving market-based securities fraud offenses in both civil and criminal contexts, and the close analysis courts will apply to evidentiary showings of materiality. Regulators face particularly challenging obstacles in enforcement actions concerning specialized over-the-counter markets, which may operate in a manner distinct from the more

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transparent ordinary course equities or bond markets. These decisions may also suggest that the materiality standard, and therefore the concept of the "reasonable investor," contains a subjective element, tied to the nature of investors in the applicable marketplace. Whereas the *TSC* and *Basic* standards are more objective in nature—*i.e.*, they are concerned only with a hypothetical "ordinary" or "typical" rational investor, and not with any peculiar characteristics of particular categories of investors—the First and Second Circuits in *Flannery* and *Litvak* both acknowledged, and relied upon, the relative sophistication of the investors in question.

The "reasonable investor" standard grew out of the Exchange Act's design to "protect investors against manipulation of stock prices."[37] From this perspective, and in light of the fact that "retail investors" were the dominant market participants when the Exchange Act was enacted, and continued to be so in the decades that followed, the development of the "reasonable investor" paradigm makes sense—it represented the average market participant and served as an objective standard by which to generalize investors. Contrast this with the rapid growth in institutional investor participation in financial markets—from approximately 5% of market capitalization during the first half of the 20th century, to approximately 67% by the end of 2010[38]—and it is far less clear that the "reasonable investor" can generally be characterized as a "rational human being of average wealth and ordinary financial sophistication that invests passively for the long term."[39]

Flannery and *Litvak* suggest that in assessing materiality courts may place greater weight on what information is important to actual investors in securities. In many markets, the average investor might look far more like the institutional investors in *Litvak*, who use sophisticated computer models to determine the value of securities. If that is the case, the spectrum of truly material information as it relates to such securities might be narrower than a traditional "reasonable investor" analysis would indicate.

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Fried v. Stiefel: Insiders Do Not Have an Absolute Duty of Disclosure

In *Fried v. Stiefel Labs Inc.*,[94] the Eleventh Circuit held that the district court properly rejected the plaintiff's proposed addition to a jury instruction instructing the jury that in the context of an "omissions case" under Rule 10b-5(b) under the Exchange Act a corporate insider has an absolute duty to disclose all material information prior to trading in the corporation's stock. The plaintiff in the case, Richard Fried, was the chief financial officer of Stiefel Laboratories, Inc. ("Stiefel Labs") from 1987 through 1997. Through Fried's employment at Stiefel Labs he had accumulated approximately forty shares of Stiefel Labs common stock, the majority of which was subject to a put right pursuant to which Fried could require the company to purchase the shares at a price based on an annual valuation performed by a third party. Fried periodically met with Charles Stiefel, the company's chief executive officer and chairman of the board of directors, to learn how the company was performing. Stiefel Labs, which had a long history as a family-owned enterprise (a fact which the company touted), sold a significant equity position in the company to the Blackstone Group in August 2007.

In September 2007, Fried met with Charles Stiefel and was informed that the Blackstone investment would not affect the value of his shares. After the meeting, Fried sold ten of his shares of common stock in the company. In October 2008, Fried again met with Charles Stiefel and was told that the company had a promising five-year product pipeline but the next few years might be challenging due to competition. Fried testified that he understood this conversation as "kind of a sell signal."[95] In November 2008, Charles Stiefel learned that Sanofi-Aventis was interested in buying the company, and the parties began negotiations in earnest in December 2008. Unaware of these negotiations, Fried exercised his put right and sold the remainder of his common stock to the company on January 6, 2009 at a price of $16,469 per share. On April 20, 2009, GlaxoSmithKline agreed to buy Stiefel Labs for a purchase price equivalent to $69,705 per share. Fried sued Stiefel Labs and other parties asserting various claims, including claims under the federal securities laws. The district court dismissed all of Fried's claims other than those for fraud under Rule 10b-5(b) based on his 2009 sale of stock to the company, and that claim went to the jury.

Rule 10b-5(b) makes it unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities

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exchange, to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.[96] With respect to the proposed jury instructions for the claims under Rule 10b-5(b), Fried requested the following addition: "that the defendants had a 'duty to disclose all material information.'"[97] The district court refused to include the sentence Fried requested and the jury returned a verdict in favor of the defendants. In affirming the district court's refusal to include the additional sentence, the Court focused on the fact that the fraud claim was brought under Rule 10b-5(b). Noting that the parties agreed that the proposed jury instruction already properly included language regarding the defendant's "duty to update," the Court went on to make clear that Rule 10b-5(b) precludes a finding of fraud absent affirmative representations (which are themselves materially misleading or rendered misleading by the omission of a material fact). Further, the Court dispatched the claim that corporate insiders owe an absolute duty of disclosure (with a failure to observe such duty constituting a *de facto* actionable omission), noting that "Rule 10b-5(b) does not proscribe total silence" and that "an insider who makes no affirmative representation but trades on nonpublic information may violate Rule 10b-5(a) or (c), not Rule 10b-5(b)" because insider trading violations under Rule 10b-5(a) and (c) "do not require making statements."[98] Although the Court noted that "[e]ven if Fried's proposed jury instruction had referred to Rule 10b-5(a) or (c) instead of Rule 10b-5(b), his proposed instruction did not adequately state the elements of a claim of insider trading."[99] Because there was no insider trading claim before the Court, the Court did not undertake any analysis of whether Stiefel's actions would have constituted insider trading. However, even assuming that Fried had properly formulated his complaint and proposed jury instructions to state the elements of a claim of insider trading, it is probably fair to speculate that with respect to Stiefel's purchase from Fried of the shares subject to Fried's "put right," succeeding on an insider trading claim would have been difficult given the lack of an obvious fraudulent action by Stiefel in fulfilling its contractual obligation to purchase the shares.

Fried has appealed the Eleventh Circuit's ruling to the Supreme Court.

Developments to Watch

All Eyes on *Salman*: The Supreme Court's Newest Blockbuster Insider Trading Case

On January 19, 2016, the Supreme Court granted *certiorari* in *Salman v. United States* in order to clarify the "personal benefit" element of insider trading liability that it first articulated in *Dirks v. Securities and Exchange Commission*.[62] Specifically, the Supreme Court granted *certiorari* on the following question:

> Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (U.S. Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in [*Salman*]?[63]

The question squarely puts before the Court the differing lenses through which the Ninth Circuit and Second Circuit have viewed *Dirks*. In *Newman*, the Second Circuit's opinion largely rests on *Dirks*'s suggestion that courts "focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary or a reputational benefit that will translate into future earnings."[64] By contrast, in *United States v. Salman*, the Ninth Circuit opinion penned by Judge Rakoff sitting by designation (who had already expressed doubts about whether the Second Circuit's holding in *Newman* was consistent with *Dirks* in his opinion in *SEC v. Payton*[65]), focused on *Dirks*'s suggestion that an insider trading violation could be established by the "gift of confidential information to a trading relative or friend."[66]

At trial, Bassam Yacoub Salman was charged with and convicted of insider trading based on his receipt of material nonpublic information about Citigroup from his future brother-in-law, Michael Kara. Michael Kara in turn received the information from his brother, Maher Kara, who was an employee in Citigroup's healthcare investment banking group. Evidence at trial demonstrated that Salman was aware that the inside information originated

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with Maher Kara, and that from 2004 to 2007, Salman and Michael Kara had profited from trading in securities issued by Citigroup clients just before major transactions were announced.

On appeal to the Ninth Circuit, Salman argued that under *Newman* the existence of friendship or a familial relationship alone is insufficient to demonstrate that the tipper received a benefit and that a tipper must receive a "tangible benefit" in order to establish the requisite breach of duty. Specifically, Salman argued that the government had failed to establish that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, and even if he did, that Salman knew about such benefit. The Ninth Circuit affirmed Salman's conviction and, citing to *Dirks*, made clear that in determining whether the requisite breach of a fiduciary or other duty has occurred, the operative language from *Dirks* governing Salman's appeal is that "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend."[67] Further and importantly, a "tippee is equally liable if 'the tippee knows or should know that there has been [such] a breach.'"[68]

The Ninth Circuit specifically rejected Salman's interpretation of *Newman* and found that Maher Kara knew that Michael Kara was trading on the inside information and this qualified as the "gift of confidential information to a trading relative."[69] In so doing, the Ninth Circuit reasoned that Salman's argument would "require us to depart from the clear holding of *Dirks* that the element of breach of fiduciary duty is met where an insider makes a gift of confidential information to a trading relative or friend."[70] The Ninth Circuit noted that *Newman* itself recognized that the personal benefit is broadly defined to include not only pecuniary gain, but also, the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.[71] The Ninth Circuit explained that if Salman's theory were correct, then "a corporate

Newman itself recognized that the personal benefit is broadly defined to include not only pecuniary gain, but also, the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.

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insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return."[72]

Reviewing the evidence presented at trial, the Ninth Circuit concluded that in Salman's case the jury had more than enough facts to infer that Maher Kara gave confidential information to his brother with the intention to benefit him and that, while Salman may not have been aware of all of the details of the brothers' relationship, as a close friend and member of the family through marriage Salman must have known that when Maher Kara gave inside information to Michael Kara, he did so with the "intention to benefit" him.[73]

Interestingly, although both *Newman* and *Salman* were appealed to the Supreme Court by the losing parties based on the purported split between the circuits in interpreting *Dirks*'s personal benefit requirement, the Supreme Court denied *certiorari* in *Newman*, but granted *certiorari* in *Salman*. It is possible that because the Second Circuit in *Newman* not only found that the jury instructions were incorrect, but also found that the evidence presented at trial was insufficient to prove that the insiders actually had received a personal benefit (and consequently dismissed the indictment), the Supreme Court felt that the case would be an inappropriate vehicle for it to resolve the personal benefit question. Notably, the government's *certiorari* petition in *Newman* specifically declined to challenge the Second Circuit's holding regarding the sufficiency of the evidence, and as a result, the Supreme Court may have considered any action on *Newman* to be an impermissible advisory opinion.[74]

In his merits brief before the Supreme Court, Salman argues that under the Supreme Court's insider trading and fraud precedents as well as constitutional and interpretative principles the personal benefit required to support an insider trading conviction must be limited to pecuniary gain. By contrast, the government's brief contends that "when the objective facts show that information was provided as a gift for securities trading, and no corporate purposes exists for the disclosure, the personal-benefit test is satisfied."[75] The government's suggested reading of the personal benefit requirement would undermine *Newman*'s suggestion that liability under

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a gifting theory requires "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."[76] Amicus briefs have been filed on behalf of the NYU Center on the Administration of Criminal Law, Securities Industry and Financial Markets Association, National Association of Criminal Defense Lawyers and New York Council of Defense Lawyers, Mark Cuban, Daryl M. Payton,[77] as well as the Cato Institute.

It remains to be seen whether the Supreme Court's resolution of *Salman* addresses or even affects the application of *Newman*. The Ninth Circuit's articulation of its holding relative to Newman seemed largely designed to avoid creating a circuit split in favor of narrowing the way in which *Newman* should be read. The Ninth Circuit opinion made clear that only "to the extent *Newman* can be read" to require "at least a potential gain of a pecuniary or similarly valuable nature" where the government has presented evidence of a meaningfully close relationship did the Ninth Circuit "decline to follow it."[78] It will be interesting to see whether the Supreme Court blesses either Circuit's reading of Dirks, or determines a new standard under which lower courts will be bound.

Eleventh Circuit Becomes Fourth Federal Appellate Court to Halt Parallel Federal Litigation Against the SEC's In-House Judges

On June 17, the Eleventh Circuit joined several other circuit courts in ruling that respondents who face ongoing or prospective administrative proceedings by the U.S. Securities and Exchange Commission cannot turn to federal district courts to mount constitutional challenges to the SEC's authority prior to the proceeding. In *Hill v. SEC*, the Eleventh Circuit held that, in light of the comprehensive review scheme under the Exchange Act,[79] Congress intended for respondents to raise and exhaust constitutional claims in the administrative forum before taking their arguments up with a federal court of appeals.[80]

The issue of federal court jurisdiction over challenges to ALJs has been percolating throughout the federal appeals courts for the past year, following a wave of constitutional claims against the in-house proceedings. *Hill* was preceded by the Seventh Circuit's decision in *Bebo v. SEC* in August 2015,[81] the District of Columbia Circuit's *Jarkesy*

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Eleventh Circuit Becomes Fourth Federal Appellate Court to Halt Parallel Federal Litigation Against the SEC's In-House Judges

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v. SEC in November 2015,[82] and—only weeks before *Hill*—the Second Circuit's *Tilton v. SEC*.[83] *Tilton* in particular attracted significant coverage due to the Second Circuit's leading role in adjudicating SEC enforcement cases, but *Tilton*'s conclusion was virtually identical to that of the Seventh and D.C. Circuits: that Congress' intention in passing the federal securities laws was that constitutional claims "be reviewed within the SEC's exclusive statutory structure," and that "the appellants must await a final Commission order" before raising their claims in federal court.[84]

The U.S. Supreme Court, in March 2016, denied a petition for *certiorari* filed by the defendant in *Bebo* and essentially left the issue in the hands of the circuit courts.[85] As the fourth federal appellate court to rule that district courts cannot hear pre-enforcement challenges to the SEC's administrative in-house courts, the Eleventh Circuit's decision in *Hill* significantly diminishes the potential for a circuit split that might attract the High Court's attention, and likely marks the end of a legal debate that has drawn significant public attention over the past several years.

The *Hill* case was one of several recent cases litigating the constitutional validity of the SEC's administrative process.[86] The SEC had instituted proceedings against real estate developer Charles Hill for purchasing stock in a company weeks before it announced a merger. When the SEC scheduled a hearing before an ALJ, Hill filed motions for summary disposition both on the merits and on the grounds that the in-house hearing was unconstitutional. His constitutional argument was threefold, and echoed arguments that several respondents have raised in the past: First, per the Supreme Court's 2010 ruling in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the existence of two layers of tenure protection for ALJs violates Article II's removal provisions.[87] Second, the manner in which the SEC chooses an administrative forum violates the non-delegation doctrine under

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Article I. Third, the SEC's ability to bring enforcement actions in an in-house court deprived Hill of his Seventh Amendment right to a jury trial.

Days after the ALJ denied Hill's motion, opining in part that ALJs have no authority to assess the constitutionality of the Exchange Act, Hill filed a complaint and motion for a temporary restraining order in the U.S. District Court for the Northern District of Georgia. His complaint repeated his previous arguments and added a fourth claim that the ALJs, operating as inferior officers under Article II, were appointed in contravention of the Appointments Clause. The district court granted Hill's motion and a similar motion by investment adviser Gray Financial Group, which had preemptively filed Article II claims under the threat of a potential administrative proceeding. In both instances, the district court held that it had jurisdiction to hear the claims, that ALJs' appointments likely contravened Article II, and that defendants were entitled to injunctive relief.

The SEC appealed the district court's rulings to the Eleventh Circuit, which vacated the injunctions and instructed the district court to dismiss both cases for want of jurisdiction. Reviewing the text of the Exchange Act, the Court explained, "We see no indication that Congress intended to exempt the type of claims the respondents raise here from the review process it created."[88] The Court went on to describe the Exchange Act's comprehensive administrative review scheme: the ALJ issues factual and legal findings, which may then be appealed to or reviewed *sua sponte* by the Commission itself. The Commission has broad, court-like review powers to affirm, reverse, modify or remand the proceedings below. At the conclusion of the process, the Commission issues a final order, which the respondent may then take up with a federal Court of Appeals. The statute also outlines the extent of the appellate court's authority to consider new arguments, reject factual findings, remand or issue a stay. The Court pointed in particular to "the detail in § 78y [which] indicates that Congress intended to deny aggrieved parties another avenue for review," and the fact that the statute "cover[s] all final Commission orders without exception."[89]

It was thus "fairly discernible," the Court concluded, that Congress intended the respondents' claims to be resolved in the first instance *via* administrative proceedings, the final result of which could then be appealed to a federal appellate court. The Court rejected the respondents' arguments that this process should not be applied to their particular type of claims: "Enduring an unwanted administrative process, even at great cost, does not amount to an irreparable injury on its own. . . . Whether an injury has constitutional dimensions is not the linchpin in determining its capacity for

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meaningful judicial review."[90] It further found that any discretion built into the statute to bring claims in federal court was granted solely to the government, and that administrative fact-finding tools, "although less robust than those provided by the Federal Rules of Civil Procedure, do not leave . . . respondents without a meaningful avenue to develop the record."[91] Because the Exchange Act outlined a comprehensive process that allowed for meaningful review of all final Commission orders, the Court concluded that "the respondents' claims are of the type Congress intended § 78 to govern."[92] The decision thus requires Hill and Gray Financial Group to raise their claims before the ALJ and subsequently the Commission, and only at the conclusion of that process can they bring those claims to a federal Court of Appeals.

A case awaiting review by the Fourth Circuit presents the only currently pending vehicle for a circuit split on this issue.[93] However, the string of federal court rulings in the SEC's favor suggests that this issue is now close to being settled. Accordingly, although the circuit court cases on pre-enforcement review by federal district courts do not address or resolve the underlying constitutional challenges to the SEC's use of its administrative forum, respondents in SEC administrative enforcement actions will have to wait until they exhaust the administrative process before litigating their constitutional objections to that process in federal court.

In the meantime, as discussed elsewhere in this Update, the SEC has attempted to address criticism of its ALJ system by following through on long-discussed measures to amend its Rules of Practice. These amendments partially address the procedural fairness to respondents, who enter the proceedings at a significant discovery disadvantage following an SEC investigation. However, the changes do not address the specific claims raised in the *Hill* case, including the lack of jury trial and constitutional ambiguity surrounding the ALJ's appointment and removal procedures. See *SEC Adopts Amendments to Rules of Practice for Administrative Proceedings*, above, for further discussion.

In *Raymond James Lucia Cos. Inc. v. S.E.C.*, the Circuit Court of the District of Columbia focused on constitutional challenges to the appointment of ALJs and held that the procedures for appointing the SEC's ALJs are consistent with the Appointments Clause. See "*D.C. Circuit Upholds Constitutionality of SEC's In-House Courts*," above, for further discussion.

Notable Cases

Charges Against Robert K. Stewart and Conviction of Sean R. Stewart

On May 14, 2015, the SEC charged Robert Stewart and Sean Stewart, a father and son, with conducting a serial insider trading scheme in violation of the federal securities laws.[100] The SEC alleges that Sean Stewart provided his father, Robert Stewart, with non-public information that he obtained while working at two investment banks regarding future mergers and acquisitions involving the investment banks' clients.[101] The SEC's complaint alleges that Robert Stewart used this confidential information to place trades in his own account and in accounts owned by a trader, generating approximately $1.1 million over a four-year period.[102]

In a separate action, the U.S. Attorney for the Southern District of New York brought criminal charges against Robert Stewart and Sean Stewart relating to alleged insider trading in the securities of five publicly traded health care companies.[103] Shortly thereafter, a superseding indictment was filed that included charges of conspiracy to commit securities fraud and fraud in connection with a tender offer, conspiracy to commit wire fraud, securities fraud and securities fraud in connection with a tender offer, against each of Sean and Robert Stewart.[104] Richard Cunniffe, a third member of the charged conspiracy, pled guilty before U.S. District Judge Laura Taylor Swain in May 2015 and served as a cooperating witness.[105] On August 12, 2015, Robert Stewart pled guilty to participating in a conspiracy to trade on inside information.[106]

Sean Stewart filed a motion to dismiss the criminal insider trading charges, arguing that (i) the law of insider trading is unconstitutionally vague and (ii) the indictment failed to sufficiently allege the elements of insider trading.[107] Specifically, Stewart argued that the law is too ambiguous to satisfy the constitutional due process requirement that criminal laws provide clear notice of prohibited conduct, particularly in light of the Second Circuit's decision in *United States v. Newman*.[108] Judge Swain rejected this motion to dismiss the indictment as unconstitutionally vague, explaining that Stewart did not demonstrate that the insider trading law, as applied to his purported conduct, is impermissibly vague.[109]

Stewart's second argument in his motion to dismiss focused on the failure of the indictment to allege that he provided confidential information with the expectation of receiving a personal benefit. Stewart referenced allegations that he wanted his father to help fund his wedding and argued that such allegations do not meet this

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Charges Against Robert K. Stewart and Conviction of Sean R. Stewart

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requirement.[110] He contended that "when *Newman* required proof of a personal benefit of 'some consequence,' it could not have meant the kinds of gifts that any son routinely expects of his father during a major milestone of a son's life."[111] In addition, Stewart argued that the indictment did not sufficiently allege the materiality of the information that he purportedly provided to his father.[112] He argued that the actual information and the timing of such information are predicates to proving that the shared information was material.[113]

Judge Swain denied Stewart's motion to dismiss the indictment as insufficient. Judge Swain concluded that, "[b]y alleging the breach of fiduciary duty, the Government necessarily also alleges that Stewart engaged in the activity for his own personal benefit."[114] Judge Swain also noted that the alleged connections between the information and the trading that occurred imply that the disclosed information was material, and that in any event, "materiality is a question of fact for the jury."[115] In addition, Stewart requested a bill of particulars,[116] which Judge Swain denied. Stewart was found guilty of all nine counts of insider trading on August 17, 2016, and is scheduled to be sentenced in February.[117]

SEC Taps the Brakes on Automakers' Disclosures

The SEC is reportedly investigating Fiat Chrysler ("Fiat") and Tesla Motors ("Tesla") regarding disclosure, or lack thereof, by the two automakers.

Fiat Chrysler

On July 26, 2016, approximately one week after announcing investigations by the Department of Justice and the SEC into its reported vehicle sales, Fiat said that it would change the way it reports new vehicle sales.[118] Under the new method of reporting, Fiat's previously-reported six consecutive years of month-over-month sales growth would have actually ended in September 2013, with two subsequent months of decreased growth which were originally reported as increases. The inquiry by the SEC, which is reportedly reviewing whether Fiat improperly inflated reported sales, was instigated by a lawsuit brought by two dealers, in which it is alleged that Fiat pressured dealers to report higher sales than were supported by actual customer transactions. Despite the questions surrounding previously reported sales statistics, Fiat has stated that revenues reported in its financial statements—which are based on shipments to dealers, rather than sales to end customers—are unaffected.

Tesla Motors

Following a fatal accident on May 7, 2016 in which a Tesla vehicle being

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SEC Taps the Brakes on Automakers' Disclosures
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driven by its "Autopilot" technology collided with a truck in Florida, the SEC is reportedly considering whether Tesla was required to disclose the accident as a material event.[119] Tesla had informed the National Highway Traffic Safety Administration ("NHTSA") of the crash on May 16, coinciding with Tesla initiating its own investigation of the accident. However, the crash was not disclosed in securities filings, including prospectus supplements filed on May 18 and 19 in connection with the sale of over $2 billion in common stock by Tesla and Elon Musk, Tesla's chief executive officer.

According to a Tesla spokesperson, the company was not aware that Autopilot was involved in the crash until the end of May, after the stock sale had occurred, as the relevant data was not retrieved and analyzed until that time. Tesla reportedly sent an investigator to retrieve data from the car for the first time on May 18. Mr. Musk, while reiterating that Tesla does not believe the involvement of Autopilot in the crash was material, has stated that he was only aware that a fatal crash had occurred, and not that Autopilot was engaged, at the time of the sale. Tesla touts Autopilot as a key part of its vehicle offerings and cites the technology as a source of revenue in its management discussion and analysis (MD&A). Tesla's periodic reports, including its most recent quarterly report, also include language in the Risk Factors section regarding potential product liability in connection with failures of the Autopilot feature. The trading price of Tesla shares rose following the public announcement of the involvement of Autopilot in the crash and the investigation by the NHTSA.

United States v. Parigian: First Circuit Sides with *Salman*, For Now

In *United States v. Parigian*,[120] the First Circuit held that gifts of expensive wines, steak dinners and trips to a massage parlor can suffice to establish a personal benefit for purposes of insider trading liability. The First Circuit also addressed the question of whether a "knew or should have known" standard is the appropriate *mens rea* standard for *criminal* insider trading.

The criminal indictment alleged that Eric McPhail, a close friend of an executive at American Superconductor Corporation (AMSC), obtained material, nonpublic information about upcoming earnings announcements from the executive and then, in breach of his duty of trust and confidence to the executive, circulated the information to his friend and golfing buddy, Douglas Parigian. Parigian was alleged to have "paid back"

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McPhail with "wine, steak, and visits to a massage parlor."[121] Parigian moved to dismiss the superseding indictment arguing that it failed to adequately allege several elements of securities fraud. The lower court denied the motion. On appeal, Parigian argued that the indictment failed to allege criminal securities fraud because it (i) did not apply the correct *mens rea*, (ii) did not adequately allege awareness by Parigian that McPhail's disclosures breached a duty of trust and confidentiality owed to the insider, (iii) failed to allege a personal benefit to McPhail from tipping off Parigian, and (iv) failed to allege that the insider received a personal benefit.

With respect to the *mens rea* issue, the First Circuit held that Parigian had waived his right to challenge the application of the "knew or should have known" standard in a criminal context by failing to raise the issue with the lower court. Nevertheless, the First Circuit went on to provide its views on the standard noting that in criminal cases, the "'knew or should have known' formulation runs up against a decades-long presumption that the government must prove that the defendant knew the facts that made his conduct illegal."[122] The Court added that "in the case of a criminal violation of Rule 10b-5, the government need prove that defendant 'willfully' violated the provision . . . that is, that the defendant acted with 'culpable intent'."[123]

The First Circuit then addressed Parigian's argument regarding the duty of trust and confidence, holding that the indictment sufficiently alleged such a duty existed between McPhail and the insider and that Parigian was aware of the relationship. The Court also weighed in on the circuit split regarding the personal benefit issue—noting that the First Circuit's *SEC v. Rocklage*, 470 F.3d 1, 6-7 (1st Cir. 2006) holding that the "mere giving of a gift to a relative or friend is a sufficient personal benefit to the giver" more closely aligns with the Ninth Circuit's holding in *U.S. v. Salman*, 702 F.3d 1087 (9th Cir. 2015) as opposed to *U.S. v. Newman*'s "more discriminating definition."[124] The First Circuit ultimately held that "the indictment's allegations of a friendship between McPhail and Parigian plus an expectation that the tippees would treat McPhail to a golf outing and assorted luxury entertainment is enough to allege a benefit if a benefit is required."[125]

The First Circuit ultimately held that "the indictment's allegations of a friendship between McPhail and Parigian plus an expectation that the tippees would treat McPhail to a golf outing and assorted luxury entertainment is enough to allege a benefit if a benefit is required."

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DOJ Elects Not to Seek Supreme Court Review of Conflict Minerals Decision

Following two extensions of time to file a petition for a writ of *certiorari*, the Department of Justice determined not to seek further review of the D.C. Circuit Court's 2014 decision finding that the conflicts mineral disclosure requirement contained in the Conflict Minerals Rule violates the First Amendment.[126] The Conflict Minerals Rule was promulgated by the SEC in 2012 pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, which called on the Commission to require issuers for whom conflict minerals (*e.g.*, tantalum, tin, tungsten and gold) are necessary to the production of a product they manufacture to investigate and disclose the source of conflict minerals used in their products.[127] The Conflict Minerals Rule requires issuers to file a report with the Commission including both a description of measures taken to exercise due diligence about the source and chain of custody of conflict minerals and a description of any products that the issuer has not determined to be "DRC conflict free." Conflict minerals are "DRC conflict free" if they do not directly or indirectly finance or benefit armed groups identified as perpetrators of human rights abuses in the Democratic Republic of Congo or adjoining countries.

Though it rejected several other challenges raised by petitioners (three associations representing manufacturers and other business interest groups), a divided D.C. Circuit held that the Conflict Minerals Rule's requirement to describe certain products as having "not been found to be 'DRC conflict free'" unconstitutionally compels speech.[128] The Court's majority opinion noted, however, that its holding applies only to this specific descriptor—that products have "not been found to be 'DRC conflict free.'"[129] As a result, it is possible that only the Conflict Minerals Rule, and not the Dodd-Frank Act's requirement for such a rule to be promulgated, unconstitutionally compels speech. For example, if this description arose from the Commission's discretion in promulgating the rule, and not the statute itself, the Commission, or the District Court on remand, will be in a position to determine whether an amended rule, which omits the descriptor ruled unconstitutional, can be promulgated in the future.

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SEC Charges Texas Attorney General with Fraud

On April 11, 2016, the SEC announced fraud charges against Texas-based technology company Servergy, Inc. ("Servergy") and its co-founder William E. Mapp, III.[130] The SEC accused Servergy and Mapp of boosting stock sales by misleading investors with false claims.[131] The SEC's complaint also charged Texas Attorney General Warren K. Paxton, Jr., a former member of Servergy's board of directors, for allegedly recruiting investors while failing to disclose that he was being compensated to promote the company's stock.[132]

The SEC alleges that Paxton received 100,000 shares of Servergy in return for raising $840,000 in investments for Servergy, and that he failed to disclose his commission to investors.[133] In response to the SEC's investigation, Paxton claimed the shares were a gift from Mapp.[134] Among other charges, the SEC also alleges that Caleb White, who served on Servergy's board as a purported independent director between September 2011 and September 2015,[135] solicited investors in exchange for undisclosed cash commissions offered by Mapp.[136]

The SEC ordered Mapp, White and Paxton to disgorge any ill-gotten gains or unjust enrichment resulting from the charges, plus prejudgment interest, and to pay a civil monetary penalty.[137] Servergy agreed to pay a $200,000 fine to settle the SEC's claims without admitting or denying any wrongdoing.[138] White agreed to disgorge $66,000 and return his shares of Servergy stock without admitting or denying any wrongdoing.[139] The SEC's litigation continues against Paxton.[140]

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SEC Accuses KPMG Partner of Insider Trading

On July 7, the SEC filed a complaint charging KPMG tax partner Thomas Avent, along with two alleged tippees, with insider trading.[141] Avent is alleged to have passed tips about pending mergers to his stockbroker, Raymond Pirrello, who is alleged to have passed these tips to friends and colleagues who made trades netting more than $111,000 in profits. The tippees are alleged to have given Avent cash and investment advice, and repaid debts on Avent's behalf, in exchange for the information. Avent performed tax due diligence in connection with the mergers with respect to which he is alleged to have provided tips to Pirrello, including NCR Corporation's 2011 purchase of Radiant Systems Inc., TBC Corporation's 2011 acquisition of Midas Incorporated Inc., and Ingram Micro Inc.'s 2012 takeover of BrightPoint Inc. Avent has denied the charges; however, KPMG placed Avent on administrative leave as a result of the allegations.

Four Years After Beating Insider Trading Claims, Spanish National Charged with Perjury

On June 30, 2016, a federal grand jury in Chicago indicted Spanish citizen and resident Luis Martin-Caro Sanchez on one count of obstruction of justice and two counts of perjury arising from the SEC's investigation of Sanchez for insider trading in 2010 and 2011.[142] The indictment comes four and a half years after a federal judge dismissed the case against Sanchez due to lack of evidence, criticizing the SEC for being overly aggressive in its prosecution of the case. Sanchez now faces extradition and up to 30 years in prison.

In August 2010, the SEC filed an emergency action against Sanchez, charging him with insider trading after it received a tip from his online brokerage firm. The brokerage firm had notified the SEC that Sanchez purchased 331 out-of-the-money call options on Potash Corporation stock, and then sold all of the options less than a week later immediately following a public announcement that Potash had received and rejected a takeover bid from BHP Billiton ("BHP"). Sanchez had never traded call options before this transaction, and he netted profits of almost $500,000 on the sale. Sanchez voluntarily cooperated with the SEC's investigation, appearing at court hearings, providing sworn testimony, and producing documents. In particular,

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Four Years After Beating Insider Trading Claims, Spanish Man Charged with Perjury

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Sanchez testified that he did not know anyone who purchased Potash securities in 2010 or 2011, and that he did not know two of the telephone numbers listed on his personal phone records. Ultimately, the documents and testimony that Sanchez provided did little to help the SEC satisfy its evidentiary burden to show that Sanchez received a tip regarding BHP's takeover bid. In December 2011, a federal judge ruled against the SEC on summary judgment, noting that the regulator had failed to provide more than circumstantial evidence of insider trading.[143]

More than two years later, however, the SEC discovered a Swiss bank account holding €100,000 that had been transferred from Sanchez's personal friend who also purchased Potash call options prior to the BHP takeover bid. Sanchez had not produced documents relating to this account, despite the SEC's request for all documents relating to bank accounts in which Sanchez "had any control and/or direct or indirect beneficial interest."[144] The indictment claims that Sanchez concealed records pertaining to the Swiss bank account, and that he lied under oath about his communications with his friend and other third parties who purchased Potash securities.

More than two years later, however, the SEC discovered a Swiss bank account holding €100,000 that had been transferred from Sanchez's personal friend who also purchased Potash call options prior to the BHP takeover bid.

United States v. Klein: DOJ, SEC Take Different Approaches in Insider Trading Investigation

On August 10, 2016, the U.S. Attorney's Office for the Eastern District of New York ("EDNY") charged investment advisor Tibor Klein and his client, Robert Schulman, a former partner at the law firm of Hunton & Williams LLP, with insider trading ahead of the 2010 acquisition of King Pharmaceuticals, Inc. ("King") by Pfizer, Inc. ("Pfizer").[145] The SEC brought a parallel civil action against Klein and a separate downstream tippee in 2013, which was stayed pending the criminal proceedings.[146] Interestingly,

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***United States v. Klein*: DOJ, SEC Take Different Approaches in Insider Trading Investigation**

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the DOJ and the SEC appear to have slightly different views of the facts supporting a charge against the tipper, Schulman. These contrasting views are a vivid reminder of the fact-specific nature of insider trading cases and the unpredictability surrounding government decisions to criminally and/or civilly charge individuals.

Prosecutors allege that Schulman, an intellectual property attorney in Washington, D.C., learned about the pending merger between Pfizer and King while he was representing King in a patent lawsuit. Klein visited Schulman at his home in McLean, Virginia to review Schulman's investment portfolio. During the visit, prosecutors allege that Schulman told Klein about the pending merger. Klein subsequently purchased King stock for himself, Schulman, and other clients. Klein continued to purchase King stock over the following month, and he shared the tip with a co-conspirator, who also purchased King stock, along with call options. After the merger between Pfizer and King was announced, Klein immediately sold the King shares, generating more than $300,000 in profits for himself, Schulman, and other clients.

In a recent news release, prosecutors described Klein and Schulman as "licensed professionals who used their positions of trust to fraudulently enrich themselves" and "satisfy their appetite for money."[147] This description, however, differs from the SEC's complaint, filed in 2013, which portrayed Schulman as a victim who had no intention to get rich from insider trading. According to the SEC's complaint, Klein misappropriated the inside information from Schulman with whom he "enjoyed a close professional and personal relationship."[148] Klein allegedly visited Schulman's home not only to discuss Schulman's portfolio, but also to stay overnight and socialize with Schulman and his wife. During a meal with Klein, Schulman "drank several glasses of wine and became intoxicated" and then "blurted out" that "It would be nice to be King for a day."[149] According to the SEC's version of events, Schulman was simply bragging when he made his comment to Klein and had no intention for Klein to trade on the information.

The U.S. Attorney for the EDNY apparently disagreed with the SEC's version of events. Although it is possible that facts were developed as part of the criminal investigation that did not come to light during the SEC's investigation, the government's decision to charge Schulman criminally when the SEC passed on including him in the civil complaint is a reminder that governmental agencies may have differing interpretations of the same facts, particularly in an environment where aggressive prosecution of criminal insider trading is a continued focus of the DOJ.

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Notes

1. *Raymond James Lucia Cos. Inc. v. Secs. & Exch. Comm'n*, No. 15-1345 (D.C. Cir. Aug. 9, 2016).
2. In addition to criticism by the press, judges and the defense bar, the SEC's increased use of its administrative forum inspired the "Due Process Restoration Act," H.R. 3798, 114th Cong. (as introduced Oct. 22, 2015), a bill that would authorize a respondent to terminate an administrative proceeding by the SEC and require the SEC to bring a civil action instead. *As of this writing, the bill remains pending in the House of Representatives.*
3. *See* Debevoise & Plimpton LLC, "Constitutional Challenges to the SEC's Appointment of Administrative Law Judges," *Insider Trading & Disclosure Update* vol. 2.2, pp. 23–24 (Dec. 2015), *available at* http://www.debevoise.com/insights/publications/2015/12/insider-trading_disclosure_vol-2_iss-2.
4. *Hill v. Secs. & Exch. Comm'n*, No. 15-13738 (11th Cir. June 17, 2016); *Tilton v. Secs. & Exch. Comm'n*, No. 15-2103, 2016 WL 3084795 (2d Cir. June 1, 2016); *Bebo v. Secs. & Exch. Comm'n*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S.Ct. 1500 (2016); *Jarkesy v. Secs. & Exch. Comm'n*, 803 F.3d 9 (D.C. Cir. 2015). *See also* "Eleventh Circuit Becomes Fourth Federal Appellate Court to Halt Parallel Federal Litigation Against the SEC's In-House Judges," *infra*.
5. U.S. Const. art. II, § 2, cl. 2.
6. *Raymond*, No. 15-1345 at 9, 10 (citing *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *Tucker v. Comm'r, Internal Revenue*, 676 F.3d 1129, 1133 (D.C. Cir. 2012)).
7. *See* Securities Exchange Act of 1934, 15 U.S.C. § 78d-1(b) (2012); 17 C.F.R. § 201.360(d)(2).
8. *Raymond*, No. 15-1345 at 13.
9. *Id.* at 15–16.
10. *Id.* at 15.
11. *Id.* at 18.
12. *Raymond*, No. 15-1345 at 19–31.
13. For Debevoise's previous coverage of constitutional challenges to ALJs, *see* Debevoise & Plimpton LLC, "Constitutional Challenges to the SEC's Appointment of Administrative Law Judges," *Insider Trading & Disclosure Update* vol. 2.2, pp. 23–24 (Dec. 2015), *available at* http://www.debevoise.com/insights/publications/2015/12/insider-trading_disclosure_vol-2_iss-2.
14. *See, e.g.*, *Duka v. Secs. & Exch. Comm'n*, 103 F.Supp. 3d 382 (S.D.N.Y. 2015).
15. *See, e.g.*, *Chau v. Secs. & Exch. Comm'n*, 72 F. Supp. 3d 417 (S.D.N.Y. 2014).
16. Press Release, *U.S. Sec. and Exch. Comm'n, SEC Adopts Amendments to Rules of Practice for Administrative Proceedings* (July 13, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-142.html.
17. *Id.*
18. Amendments to the Commission's Rules of Practice, Exchange Act Release No. 34-78319; File No. S7-18-15 (July 13, 2016).
19. *Id.*
20. *Id.*
21. *See, e.g.*, Mark Schoeff Jr., *SEC Approves Reforms to In-House Process for Enforcement Cases*, InvestmentNews (July 13, 2016), *available at* http://www.investmentnews.//20160713/FREE/160719966/sec-approves-reforms-to-in-house-process-for-enforcement-cases; Richard J.L. Lomuscio, *SEC Tweaks In-House Court Rules*, National Law Review (July 14, 2016), *available at* http://www.natlawreview.com/article/sec-tweaks-house-court-rules.
22. *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 445 (1976).
23. *Id.* at 449.
24. *Basic v. Levinson,* 485 U.S. 224 (1988).
25. *Id.* at 240.
26. *See* Tom C.W. Lin, *Reasonable Investors*, 95 B.U. L. Rev. 461, 466 (2015).
27. Lin at 468.
28. 563 U.S. 27 (2011).
29. *See e.g. Secs. & Exch. Comm'n v Willis*, 777 F. Supp. 1165, 1170 n.3 (S.D.N.Y. 1991); *Secs. & Exch. Comm'n v. Hoover*, 903 F. Supp. 1135, 1140 (S.D. Tex. 1995).
30. *Flannery v. Secs. & Exch. Comm'n*, 810 F.3d 1 (1st Cir. 2015).
31. *United States v. Litvak*, 808 F.3d 160 (2d Cir. 2015).
32. *Flannery*, 810 at 14.
33. *Id.* at 11.
34. *Id.* at n.9.
35. *Litvak*¸ 808 F.3d at 181-83.
36. *Id.* at 182.
37. *Basic,* 485 U.S. at 230.
38. Marshall E. Blume and Donald B. Keim, *Institutional Investors and Stock Market Liquidity: Trends and Relationships*

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(August 21, 2012), *available at* https://www.researchgate.net/publication/256034545_Institutional_Investors_and_Stock_Market_Liquidity_Trends_and_Relationships.

39. Lin at 468.
40. *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015).
41. *Tongue et al. v. Sanofi et al.*, ,816 F.3d 199 (2d Cir. 2016).
42. *Omnicare*, 135 S. Ct. at 1332.
43. *See, e.g.*, *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011).
44. *Sanofi*, 816 F.3d at 203-207.
45. *Id.* at 213.
46. *Id.*
47. *Id.* at 212.
48. *Id.* at 211-13.
49. *Id.* at 214.
50. *Id.* at 212.
51. *Id.* at 210.
52. *Id.* at 212.
53. *Id.* at 210-12.
54. *Newman*, 773 F.3d 438.
55. *Ganek v. Leibowitz et al.*, No. 15-1446, 2016 WL 929227 (S.D.N.Y. March 10, 2016).
56. A principle that enables a plaintiff, in limited circumstances, to invoke the protections of the Due Process Clause if such plaintiff suffers a loss of reputation coupled with the deprivation of a more tangible interest. *See, e.g.*, *Segal v. City of N.Y.*, 459 F.3d 207, 212 (2d Cir. 2006).
57. *Ganek*, No. 15-1446, 2016 WL 929227 at *16.
58. *Id.* at *15 (internal citations omitted).
59. *Id.*
60. *Id.*
61. Notice of Interlocutory Appeal, *Ganek*, No. 15-1446, (S.D.N.Y. May 6, 2016).
62. *See Dirks v. Secs. & Exch. Comm'n*, 463 U.S. 646 (1983).
63. *Salman v. United States*, No. 15-628 (S. Ct. Jan 19, 2016), *granting cert. to United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015).
64. *Dirks*, 463 U.S. at 663; *see United States. v. Newman*, 773 F.3d 438, 452-53 (2d Cir. 2014).
65. *Secs. & Exch. Comm'n v. Payton*, 97 F. Supp. 3d 558. 562-63 (S.D.N.Y. 2015).
66. *Salman*, 792 F.3d at 1092 (*quoting Dirks*, 463 U.S. at 664).
67. *Dirks*, 463 U.S. at 664; *see Salman*, 792 F.3d at 1092.
68. *Salman*, 792 F.3d at 1092 (quoting *Dirks*, 463 U.S. at 660).
69. *Id.* at 1094.
70. *Id.* at 1093. The separate holding in *Newman* that even a remote tippee must have some knowledge of the personal benefit received by the tipper was not at issue in *Salman* because the jury was instructed that it had to find that Salman "knew that Maher Kara personally benefitted in some way, directly or indirectly, from the disclosure of the allegedly inside information to Mounir ('Michael') Kara." *Salman*, 792 F.3d at 1091 n.2.
71. *Id.* at 1093-94 (quoting *Newman*, 773 F.3d at 452).
72. *Id.* at 1094.
73. *Id.*
74. *See* Petition for Writ of Certiorari at i, *Newman*, 773 F.3d 438 (No. 15-137).
75. Brief of Respondent at 11, *Salman v. United States*, No. 15-628 (S. Ct. Aug. 1, 2016).
76. *Newman*, 773 F.3d at 452.
77. Payton was tried and found civilly liable for insider trading in February 2016. His motion for judgment as a matter of law is still pending. Defendants' Renewed Motion for Judgment as a Matter of Law, *Secs. & Exch. Comm'n v. Payton*, No. 14-CV-4644 (S.D.N.Y. June 13, 2016).
78. *Salman*, 792 F.3d at 1093.
79. 15 U.S.C. § 78y.
80. *Hill v. Secs. & Exch. Comm'n*, No. 15-13738, 2016 WL 3361478 (11th Cir. June 17, 2016).
81. *Bebo v. Secs. & Exch. Comm'n*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).
82. *Jarkesy v. Secs. & Exch. Comm'n*, 803 F.3d 9 (D.C. Cir. 2015).
83. *Tilton v. Secs. & Exch. Comm'n*, 824 F.3d 276 (2d Cir. 2016).
84. *Id.* at 291.
85. *Bebo v. Secs. & Exch. Comm'n*, 136 S. Ct. 1500 (Mem.) (Mar. 28 2016).
86. In recent years, the SEC had noticeably stepped up its reliance on administrative proceedings in insider trading cases like *Hill*, in contrast to the agency's almost uniform practice prior to 2014 of litigating such cases in district court. The number of insider

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trading actions brought annually as administrative proceedings increased from 2% in 2013 to 23% in 2014. Sara Gilley, *SEC Focus On Administrative Proceedings: Midyear Checkup*, Law360 (May 27, 2015), *available at* http://www.law360.com/articles/659945/sec-focus-on-administrative-proceedings-midyear-checkup. For Debevoise's previous coverage of this trend, including summaries of relevant actions, *see* Debevoise & Plimpton LLC, "SEC Ramping Up Use of Administrative Proceedings in Insider Trading Cases," *Insider Trading & Disclosure Update* vol. 2.1, pp. 15-16 (Jan. 2015), *available at* http://www.debevoise.com/insights/publications/2015/01/insider-trading-and-disclosure-update.

87. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).
88. *Hill*, No. 15-13738 at 1.
89. *Id.* at 6.
90. *Id.* at 8.
91. *Id.* at 11.
92. *Id.* at 13.
93. *Bennett v. Secs. & Exch. Comm'n*, No. 15-2584 (4th Cir., appeal filed Dec. 28, 2015). The Second Circuit had also ruled in June that Lynn Tilton could join another respondent, Barbara Duka, in a joint petition to revive their appeals; however, the Circuit reversed course and vacated this order in early July, offering no explanation of its reasoning. *Duka v. Secs. & Exch. Comm'n*, No. 15-2732 (2d Cir. July 8, 2016), *available at* http://www.law360.com/articles/815470/attachments/0.
94. *Freid v. Stiefel* No. 14-14790, 2016 WL 787986 (11th Cir. Mar. 1, 2016).
95. *Id.* at 1291.
96. 17 C.F.R. 240.10b-5(b).
97. *Id.* at 1292.
98. *Id.* at 1294-95.
99. *Id.* at 1295.
100. Press Release, *U.S. Sec. and Exch. Comm'n, SEC Charges Father and Son in $1.1 Million Insider Trading Scheme* (May 14, 2015), *available at* https://www.sec.gov/news/pressrelease/2015-90.html.
101. *Id.*
102. Complaint at 2, *Secs. & Exch. Comm'n v. Sean R. Stewart and Robert K. Stewart*, No. 15-CV-03719 (S.D.N.Y. May 14, 2015), *available at* http://www.sec.gov/litigation/complaints/2015/comp-pr2015-90.pdf.
103. Press Release, U.S. *Dept. of Justice, Manhattan U.S. Attorney and FBI Announce Insider Trading Charges Against Managing Director of Investment Bank and his Father* (May 14, 2015), *available at* https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-and-fbi-announce-insider-trading-charges-against-managing.
104. Superseding Indictment, *U.S. v. Sean Stewart and Robert Stewart*, No. 15-CR-287-LTS (S.D.N.Y. July 15, 2015).
105. Press Release, *U.S. Dept. of Justice, Father Of Former Investment Bank Managing Director Pleads Guilty To Insider Trading Conspiracy* (August 12, 2015), *available at* https://www.justice.gov/usao-sdny/pr/father-former-investment-bank-managing-director-pleads-guilty-insider-trading.
106. *Id.*
107. Memorandum of Law in Support of Motion to Dismiss for Bill of Particulars, *U.S. v. Sean Stewart and Robert Stewart*, No. 15-CR-287-LTS (S.D.N.Y. September 18, 2015).
108. *Id.* at 3.
109. Opinion and Order, at 13-14, *U.S. v. Sean Stewart*, No. 15-CR-287-LTS (S.D.N.Y January 19, 2016).
110. Memorandum of Law in Support of Motion to Dismiss or for Bill of Particulars, at 18-20, *U.S. v. Sean Stewart and Robert Stewart*, No. 15-CR-287-LTS (S.D.N.Y. September 18, 2015).
111. *Id.* at 20.
112. *Id.* at 21-24.
113. *Id.*
114. Opinion and Order, at 17-18, *U.S. v. Sean Stewart*, No. 15-CR-287-LTS (S.D.N.Y January 19, 2016).
115. *Id.* at 19.
116. Memorandum of Law in Support of Motion to Dismiss or For Bill of Particulars, at 3-4, *U.S. v. Sean Stewart and Robert Stewart* No. 15-CR-287-LTS (S.D.N.Y. September 18, 2015).
117. Stewart Bishop, *Ex-JPMorgan Banker Convicted of Insider Trading*, Law360 (Aug. 17, 2016), *available at* http://www.law360.com/securities/articles/826574?nl_pk=39b92265-f0bc-442b-8f8c-bf4e2ad0c9a8&utm_source=newsletter&utm_medium=email&utm_campaign=securities.
118. Neal E. Boudette, *Fiat Chrysler Revises Sales Data Lower After Doubts Raised*, N. Y. Times, July 26, 2016, http://www.nytimes.com/2016/07/27/business/fiat-chrysler-revises-5-years-of-sales-data-recanting-vaunted-winning-streak.html.
119. Jean Eaglesham, Mike Spector, Susan Pulliam, *SEC Investigating Tesla for Possible Securities-Law Breach,* Wall Street Journal, July 11, 2016, http://www.wsj.com/articles/sec-investigating-tesla-for-possible-securities-law-breach-1468268385.
120. *United States v. Parigian*, No. 15-1994 (1st Cir. May 26, 2016), *available at* media.ca1.uscourts.gov/pdf.opinions/15-1994P-01A.pdf.

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121. *Id.* at 5.
122. *Id.* at 10.
123. *Id.* at 11.
124. *Id.* at 21.
125. *Id.* at 22.
126. Letter from Attorney General Loretta Lynch to Speaker Paul Ryan (March 4, 2016), https://www.justice.gov/oip/foia-library/osg-530d-letters/3-4-2016.pdf/download).
127. Conflicts Mineral Rule, 17 CFR 240.13p-1, 77 Fed Reg 56274 (Sept. 12, 2012).
128. *National Ass'n of Mfrs. v. Secs. & Exch. Comm'n*, 800 F.3d 518, 530 (DC Cir. 2014).
129. *Id.*
130. Press Release, *U.S. Sec. and Exch. Comm'n, SEC: Company Misled Investors About Energy-Efficient Technology* (April 11, 2016), *available at* https://www.sec.gov/news/pressrelease/2016-65.html.
131. *Id.*
132. Complaint at 17-21, *Secs. & Exch. Comm'n v. William E. Mapp, III, Warren K. Paxton, JR, Caleb J. White, and Servergy, Inc.* No. 4:16 CV-00246 (E.D. Tex. April 14, 2016), *available at* http://www.sec.gov/litigation/complaints/2016/comp-pr2016-00246.pdf.
133. *Id.* at 20-21.
134. *Id.* at 20.
135. *Id.* at 3.
136. *Id.* at 17-21.
137. *Id.* at 25.
138. Press Release, *U.S. Sec. and Exch. Comm'n, SEC: Company Misled Investors About Energy-Efficient Technology* (April 11, 2016), https://www.sec.gov/news/pressrelease/2016-65.html.
139. *Id.*
140. *Id.*
141. Press Release, *U.S. Sec. and Exch. Comm'n, SEC Sues Accounting Firm Partner, Stock Broker and Securities Law Recidivist in Insider Trading Scheme* (July 8, 2016), *available at* https://www.sec.gov/litigation/litreleases/2016/lr23593.htm.
142. Indictment, *United States v. Luis Martin-Caro Sanchez*, No. 16-CR-00426 (N.D. Ill. June 30, 2016).
143. *Secs. & Exch. Comm'n v. Garcia*, 2011 WL 6812680 (N.D. Ill. Dec. 28, 2011).
144. Indictment at 12, *United States v. Luis Martin-Caro Sanchez*, No. 16-CR-00426 (N.D. Ill. June 30, 2016).
145. Indictment, *United States v. Tibor Klein*, No. 16-CR-00442 (E.D.N.Y. August 10, 2016).
146. Complaint, *Secs. & Exch. Comm'n v. Tibor Klein and Michael R. Shechtman*, No. 9:13-CV-80954 (S.D. Fla. Sept. 19, 2013), *available at* https://www.sec.gov/litigation/complaints/2013/comp-pr2013-188.pdf.
147. Press Release, Department of Justice, Long Island Investment Advisor And Law Firm Attorney Indicted In Insider Trading Scheme (August 10, 2016) *available at* https://www.justice.gov/usao-edny/pr/long-island-investment-advisor-and-law-firm-attorney-indicted-insider-trading-scheme.
148. Complaint at 5, *Secs. & Exch. Comm'n v. Tibor Klein and Michael R. Shechtman*, No. 9:13-CV-80954 (S.D. Fla. Sept. 19, 2013), *available at* https://www.sec.gov/litigation/complaints/2013/comp-pr2013-188.pdf.
149. *Id.* at 6.

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