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INSIDER TRADING & DISCLOSURE UPDATE

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Editors' Remarks

Welcome to the Thanksgiving 2020 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 nonpublic information and disclosure-based matters.

In this Update, we highlight a rare SEC enforcement action arising in the context of a private securities offering against a foreign private issuer. Also figuring prominently in this Update are two SEC enforcement actions that serve as a reminder to private equity and other investment managers about the importance of vigilance relating to beneficial ownership reporting under Section 13 and maintaining effective controls and procedures relating to the possession and use of material non-public information, as well as an update on the Supreme Court's decision in *Liu v. SEC*—which could have the effect of limiting the SEC's ability to seek disgorgement in insider trading cases—and updates on various SEC and disclosure-related developments.

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

BMW Settles Charges of Misleading Disclosures in Rule 144A Offering Memoranda

In a rare action arising in the context of a private securities offering against a foreign issuer, in September 2020, the SEC announced settled charges against BMW AG and two domestic subsidiaries arising from allegedly misleading disclosures in connection with bond offerings. The settled order alleged violations of Section 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and imposed a civil money penalty of $18 million,[1] an amount that had been "reduced" due to BMW's "substantial cooperation" with the SEC.

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BMW Settles Charges of Misleading Disclosures in Rule 144A Offering Memoranda

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The SEC's allegations focused on BMW of North America's ("BMW NA's") reporting of its retail vehicle sales volume in Rule 144A offering memoranda, investor presentations, and press releases. The SEC alleged that BMW NA systematically manipulated reporting of its U.S. retail sales volume.

The SEC alleged that BMW NA, with BMW AG's approval, created financial incentives for dealers to designate vehicles as "demonstrators" (i.e., vehicles used for test drives, showrooms and other marketing purposes) or as service loaners, then included those vehicles in the dealers' reported retail sales in order to meet monthly sales targets. In reality, the vehicles had not been sold, nor were many of the vehicles ever put to use as demonstrators or as service loaners. As a result of these practices, 80 percent of the demonstrator and loaner designation at BMW's American dealerships were reported on the last day of each month—*i.e.*, when it became clear that the retail sales target could not be met by authentic sales and that new designations were needed to "close the gap." As a result of this practice, demonstrator and loaner vehicles accounted for over one quarter of BMW NA's reported retail sales between 2015 and 2017. BMW NA failed to change this practice—and in fact increased designations of demonstrators—after BMW's Internal Audit team recommended that the improper designations be discontinued. BMW's dealers also repeatedly informed BMW NA that the incentive programs encouraged "false reporting" and that BMW NA's volume goals could not be "achieved through retail sales to BMW buyers," to no avail.

The SEC further alleged that BMW NA's management improperly reserved retail sales reporting between 2015 and 2019. According to the settled order, BMW NA opted not to report any excess retail sales in months during which dealer sales exceeded targets. It then drew on this reserve of unreported sales—referred to internally as "the bank"—in months during which a sales gap would otherwise exist between actual and forecasted sales. During months that BMW NA expected slow retail sales, BMW NA's management actively built the "banked" sales into the company's planning assumptions. The resulting adjustments frequently exceeded 10%, and sometimes exceeded 20%, of total monthly retail sales. As with the vehicle designations, Internal Audit cautioned that BMW NA's use of the "bank" was inappropriate, but BMW nevertheless continued the practice for an additional five years.

The effect of these practices was compounded by improper adjustments to BMW NA's retail sales reporting calendar. Although BMW NA usually followed a calendar that was standard in the industry, the calendar was extended by multiple days in January 2015 and January 2017 to ensure the company appeared to meet its retail sales targets.

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BMW Settles Charges of Misleading Disclosures in Rule 144A Offering Memoranda

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The disclosure case against BMW NA arose in the context of private securities offerings from 2016 through 2019 in which BMW AG guaranteed approximately $18 billion in bonds sold by BMW US Capital in Rule 144A offerings in the United States. The accompanying offering memoranda, as well as BMW's investor presentations and monthly press releases, allegedly reported inaccurate retail sales volume. Although BMW had disclosed that "Retail vehicle sales data . . . do not correlate directly to the revenue BMW recognizes during a given period" and that the data "includes . . . vehicles delivered for dealer use or demonstration and service loaners," the SEC deemed the disclosures inaccurate because they "did not reflect BMW NA's reliance on these practices to increase retail sales volumes" and included vehicles designated as demonstrators or service loaners "solely for purposes of increasing reporting sales."

As SEC Enforcement Director Stephanie Avakian observed, the BMW order serves as a reminder that "[c]ompanies accessing U.S. markets to raise capital have an obligation to provide accurate information to investors" consistent with U.S. securities laws.[2] The order is also notable for its relatively lenient $18 million penalty, paid jointly by the BMW entities, as well as for its non-scienter charges in the face of apparently intentional conduct. The SEC has held this matter out as exemplifying the value of "the significant benefits to companies for providing concrete cooperation" to the SEC's investigative teams.[3]

SEC Enforcement Focus on Beneficial Ownership Reporting by Investment Advisors

On September 17, 2020, the U.S. Securities and Exchange Commission (the "SEC") announced the institution of a settled cease and desist proceeding against an SEC-registered investment adviser ("WCAS") to multiple private funds operating under the name Welsh, Carson, Anderson & Stowe (the "WC Funds") for failures to satisfy reporting obligations under Section 13(d) of the Securities Exchange Act of 1934.[1] Specifically, the SEC's Cease and Desist Order, which WCAS consented to without admitting or denying the SEC's findings, found that WCAS caused the WC Funds to violate Section 13(d)(2) and Rule 13d-2 of the Exchange Act by failing to timely update its Schedule 13D to reflect (i) the investment intent to liquidate its reported position in a public company and (ii) the subsequent sales disposing of such position.[2] The SEC's Order required WCAS to pay a civil penalty of $100,000 and to cease and desist from

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SEC Enforcement Focus on Beneficial Ownership Reporting by Investment Advisors
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future violations.[3] This latest action serves as another reminder of the need to implement and adhere to robust controls and procedures to ensure beneficial ownership reporting compliance.

Background

According to the SEC's Order, in 2016, the WC Funds began acquiring shares of common stock of Hanger, Inc. ("Hanger"), a prosthetics company listed on the New York Stock Exchange, with the intent of taking Hanger private. In July 2016, the WC Funds first reported a combined 6.7% ownership stake in Hanger on a Schedule 13D filed with the SEC in July 2016 (the "2016 13D Filing"), with Item 4 (Purpose of Transaction) noting that the WC Funds "may explore a possible acquisition or restructuring" of Hanger. Shortly thereafter, WCAS discussed with Hanger management the possibility of a take-private transaction. Hanger, however, indicated that it was not interested in such a transaction, and no further action was taken over the next three years.

In June 2019, WCAS engaged an external consultant to assist with a possible sale of its position in Hanger and evaluate how and when to sell. At that same time, WCAS also contacted its broker-dealer about the forthcoming sale. According to the SEC's Order, by no later than June 17, 2019, WCAS "had abandoned its interest in acquiring Hanger, formulated a definitive intention to liquidate the entirety of its Hanger holdings, and taken steps to liquidate its Hanger shares." On July 1, 2019, the WC Funds sold shares totaling approximately 4.6% of the outstanding shares of Hanger common stock. On August 8, 2019, the WC Funds sold their remaining shares, which equaled approximately 1.9% of the outstanding shares of Hanger. On September 6, 2019, WCAS, on behalf of the WC Funds, filed Amendment No. 1 to the 2016 13D Filing, which disclosed the disposition of all of the WC Funds' shares of Hanger common stock.

Failure to Amend Upon a Material Change in Investment Intent and Failure to Amend Upon the Disposition of a Material Amount of Securities.

According to the SEC's Order, WCAS caused the WC Funds to violate Section 13(d)(2) and Rule 13d-2 of the Exchange Act when it failed to promptly amend the description of its investment intent, as disclosed in Item 4 of the 2016 13D Filing. The 2016 13D Filing included disclosure indicating that the acquisition of Hanger stock was for "investment purposes" and that, based on discussions with Hanger management, the WC Funds could "explore a possible acquisition or restructuring" of Hanger. In addition, in response to Item 4(a) of Schedule 13D, the 2016 13D Filing stated that WCAS did not have any plan to dispose of Hanger securities while reserving its right to do so. Section 13(d)(2) and Rule 13d-2(a) of the Exchange Act together require prompt amendments to a previously filed Schedule 13D when there are any material changes or developments in

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the information previously reported, with "material" defined as information regarding matters where there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities.[4] Further, generic or boilerplate disclosure that indicates that the insider is reserving the right to engage in any of the kinds of transactions enumerated in Item 4(a)-(j) of Schedule 13D (including plans related to acquisitions or disposition of securities) must be amended promptly when a material change occurs in the facts previously reported.

According to the SEC's Order, WCAS's investment intent, evidenced by specific steps taken to liquidate its position, had materially changed from the disclosure set forth in the 2016 13D Filing by no later than June 17, 2019, over two months prior to the Amendment No. 1 filing. Further, as the July 1, 2019 sale exceeded four percent of Hanger's then-outstanding shares of common stock, the eventual disclosure of such sale in Amendment No. 1 to the 2016 13D Filing filed on September 6, 2019 was delinquent resulting in a violation of Rule 13d-2(a) which specifies that acquisitions or dispositions of registered securities of one percent or more of the class are considered "material" and trigger an amendment obligation.

The SEC's Order also includes a discussion of WCAS's Section 13(d) compliance procedures and the specific deficiencies that contributed to the cited filing delinquencies. In the words of the SEC, WCAS "essentially outsourced the responsibility to comply with Section 13(d) to outside counsel" and, in this case, the designated WCAS employees failed to retain and notify outside legal counsel in connection with the contemplated, and then completed, sale of securities.

Key Takeaways

The SEC's enforcement action demonstrates the SEC's ongoing interest in monitoring and enforcing beneficial ownership reporting obligations with a particular focus on disclosure practices by institutional investors and other insiders of public companies involving beneficial ownership. In particular, the SEC Order's focus on an insider's evolving intent and when preliminary activities constitute a "plan or proposal" serves as a cautionary lesson as to the importance of continuously evaluating existing Schedule 13D disclosures as to whether an amendment is required.

Similar to the Ares Management enforcement action discussed below, the SEC's Order is yet another example of the importance of sound compliance polices and procedures. For institutional investors that rely on outside counsel to assist in their compliance with beneficial ownership reporting obligations, both internal legal and business teams must be cognizant of the disclosure requirements of Schedule 13D so as to engage outside counsel as early as possible when actions that could implicate material changes are being contemplated.

SEC to Fund Managers: Take Care with Controls Over the Possession and Use of MNPI

Background

In May 2020, Ares Management, LLC ("Ares") paid a $1 million penalty to settle charges brought by the Securities and Exchange Commission ("SEC"), which alleged that Ares failed to implement and enforce its policies and procedures designed to prevent the misuse of material, nonpublic information ("MNPI"). The SEC's order[1] alleged that, in 2016, Ares Management invested several hundred million dollars in a public company's ("Portfolio Company") debt and equity. Due to its investment, Ares was entitled to appoint two directors to the Portfolio Company's board of directors. One of the two directors also served as a senior member on the internal Ares deal team responsible for trading decisions relating to the Portfolio Company's securities (the "Director"). To facilitate the sharing of confidential information between the Director and Ares, the Portfolio Company and Ares agreed to a confidentiality agreement and loan agreement that outlined the terms of the arrangement, and Ares also had a number of other written policies and procedures to address the treatment of MNPI. During the Director's term on the Portfolio Company's board, Ares purchased shares of Portfolio Company stock in the public market during the Portfolio Company's public trading window.

The SEC's Determination

Despite the compliance policies Ares had in place, the SEC order determined that Ares' systems fell short. Specifically, the order indicated that Ares compliance staff had wide discretion in the pre-approval process relating to Ares investments. The SEC order also alleged that, in the case of the Portfolio Company, Ares compliance staff failed to make an assessment as to whether the Director, who continued to engage in trading decisions in regard to the Portfolio Company's securities, (i) possessed material non public information about the Portfolio Company and (ii) shared such information internally. Due to these violations, the SEC charged Ares with willful violations of Section 204A, Section 206(4) and Rule 206(4)-7 of the Investment Advisers Act. In addition to the settlement, the SEC ordered Ares to cease and desist from future violations of these provisions. For more information about the Ares Management settlement, please see our more detailed Client Update here.

Missing Links

Although Ares ultimately paid a price for its allegedly inadequate compliance procedures, there are a number of elements the SEC order fails to address and may cause uncertainty as other private equity firms consider how to

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SEC to Fund Managers: Take Care with Controls Over the Possession and Use of MNPI
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refine their compliance processes in the wake of this matter. The SEC did not (i) file any insider trading charges against Ares, any employees of Ares or make any finding that Ares engaged in insider trading while in possession of MNPI, (ii) make a determination of what specific MNPI the firm possessed when it engaged in the problematic trading or (iii) address what additional steps Ares could have taken to protect against MNPI charges.

Final Thoughts

The Ares Management settlement serves as a cautionary reminder to private equity firms of the importance of robust compliance policies to protect against the appearance of engaging in trading based on MNPI obtained through confidentiality agreements, board memberships or other arrangements. To avoid the same fate, private equity firms should consider or re-evaluate the following:

- Systematically investigate trading approvals in situations that present a heightened risk of access to MNPI.
- Carefully and consistently document the inquiries and findings that support trading approvals.
- Confirm that policies and procedures require compliance staff to conduct a holistic review, taking into consideration the firm's particular circumstances prior to approving transactions in restricted securities.
- Consider creating an internal list of the typical types of MNPI an individual may have access to when serving in a board capacity in order to allow compliance officers to be able to engage in fulsome discussions with employees on whether they possess MNPI.

SEC's Division of Enforcement Reports Healthy Results for Fiscal Year 2020

On November 2, 2020, the U.S. Securities and Exchange Commission's Division of Enforcement (the "Division") released its 2020 Annual Report (the "Report"), which details the activities and results of the Division for the period October 1, 2019 to September 30, 2020. The Division continued to be active in FY 2020, despite the impact of the global pandemic. Although the number of standalone enforcement actions dropped from 526 to 405 in FY 2020, the Division's year over year results were fairly comparable considering that 95 of the enforcement actions from FY 2019 resulted from the SEC's 2018 Share Class Disclosure Initiative. Of the 405 standalone actions brought in FY 2020, the Division highlighted 62 actions (15%) related to issuer financial

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SEC's Division of Enforcement Reports Healthy Results for Fiscal Year 2020
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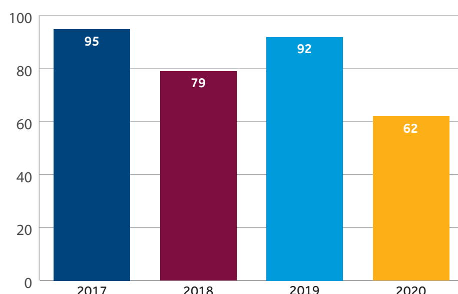
reporting and disclosures issues and 33 actions (8%) against individuals who allegedly misappropriated or traded unlawfully on material, nonpublic information. As a percentage of the total standalone actions, both of these figures are roughly consistent last year's results. However, it is worth noting that the number of insider trading cases was substantially higher in both FY 2018 (51) and FY 2017 (41).

Issuer Disclosures

In fiscal year 2020, the SEC brought a number of enforcement actions against public companies alleging violations related to a wide range of disclosures, including disclosures related to COVID-19, accounting practices, and executive perks, among other topics.

Issuer Reporting and Disclosure Enforcement Actions



Coronavirus-Related Disclosures

Throughout the coronavirus pandemic, the SEC has been actively monitoring public filings from issuers in "highly impacted" industries, with a particular focus on identifying disclosures that appear to be "significantly out of step" with others in the same industry.

Earlier this year, the SEC brought three actions against issuers that allegedly made materially misleading claims in press releases related to their efforts to manufacture and sell COVID-19-related products. On April 28, 2020, the SEC brought an enforcement action against a healthcare company, Praxsyn Corporation, and its CEO for claiming in two press releases that it had a significant number of N95 masks on hand and was establishing a dependable supply chain of masks, when in fact the company's efforts to obtain and sell such masks had been proving futile.[1] On May 13, 2020, the SEC also charged Applied Biosciences Corporation ("Applied Biosciences"), a biotechnology company, with issuing two allegedly misleading press releases that touted the company's line of at-home COVID-19 test kits without indicating that the FDA had not approved or authorized the sale of any at-home test kits.[2] In connection with its announcement of the charges against Applies Biosciences, the SEC also announced charges against Turbo Global Partners ("Turbo Global"), a digital marketing company, and its CEO for issuing misleading press releases regarding its involvement in a public-private partnership to sell thermal scanning equipment that could detect individuals with elevated fevers.[3] According to the SEC order, Turbo Global did not have any agreements to sell the product, nor was it involved in any such partnerships with government entities.

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SEC's Division of Enforcement Reports Healthy Results for Fiscal Year 2020
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EPS Initiative

As part of its focus on pursuing financial fraud and issuer disclosure violations, the Division continues to focus on leveraging new technologies and data analytics to identify potential violations, which led to a new initiative that resulted in several enforcement actions during FY 2020. In September 2020, the Division announced its EPS (Earnings Per Share) Initiative, which utilizes risk-based data analytics to detect potential accounting and disclosure violations that might arise from improper earnings management practices.[4] The Division disclosed the initiative at the same time it announced settled actions with Interface, Inc.[5] and Fulton Financial Corporation[6] alleging improper accounting practices that allowed the companies to report quarterly EPS that met or exceeded analyst consensus estimates. The SEC alleged that both companies failed to sufficiently disclose the impact of the accounting practices at issue. These cases underscore that data analytics, which has been a focus for the Division for a number of years, continues to be a critical tool employed by the SEC to detect potential securities law violations involving the financial reporting process.

Undisclosed Material Trends

The SEC brought several enforcement actions in fiscal year 2020 alleging that issuers failed to sufficiently disclose their accounting practices. For example, the SEC charged HP Inc. ("HP") with failing to disclose the negative impact of its practice of accelerating, or "pulling in," sales expected for future quarters into current quarters in an effort to meet quarterly sales and earnings targets between November 2015 and June 2016.[7] According to the SEC order, these practices eroded HP's profit margin and cannibalized the company's sales in certain regions – both of which, according to the SEC, were known trends that HP failed to disclose as required by Regulation S-K. Earlier in the year, the SEC brought similar charges against alcohol producer Diageo plc ("Diageo"), alleging that Diageo failed to disclose material trends resulting from its practice of shipping products to distributors in excess of demand, which enabled the company to meet internal sales targets in the face of declining market conditions.[8] Notably, the SEC did not allege accounting violations in these cases, but rather focused solely on the companies' inadequate disclosures relating to revenue recognition.

Undisclosed Executive Perks

During fiscal 2020, the SEC also pursued disclosure violations related to executive perks – an area that has received significant attention from the Enforcement Division in prior years. On June 4, 2020, the SEC announced charges against Argo Group International Holdings, Ltd., a Bermuda-based insurance company, for failing to disclose in its proxy statements over $5 million in personal expenses and perks paid to the company's CEO, including the

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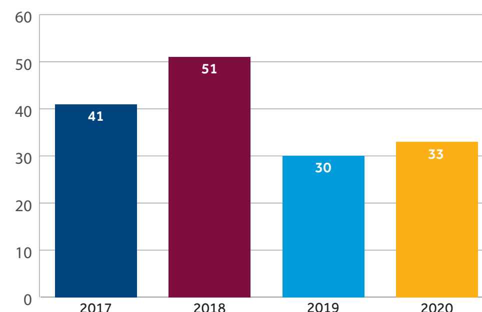
CEO's personal use of corporate aircraft, helicopter trips, transportation for family members, club memberships, and tickets and transportation to entertainment events.[9] More recently, the SEC brought an enforcement action against Virginia-based hospitality company Hilton Worldwide Holdings Inc. for failing to disclose approximately $1.7 million in travel-related perks and personal benefits it provided to executive officers from 2015 through 2018.[10] Similar to the cases against Interface, Inc. and Fulton Financial Corporation noted above, the Division of generated this case through its use of risk-based data analytics.

Insider Trading

Insider trading constituted roughly 8% of the SEC's enforcement docket in fiscal 2020, compared to 6% a year ago, which was lower than historical averages. As with the prior year, the SEC brought insider trading actions against respondents and defendants spanning a wide range of industries, career roles, and geography. During the recent SEC Speaks Conference, the SEC staff emphasized that the insider trading cases brought during FY 2020 reflect the international scope of the Division's program and the staff's ability to use in-house tools to quickly identify and pursue potential insider trading violations, even in complex situations involving multiple parties. For example, the SEC brought a series of enforcement actions during FY 2020 arising from an alleged international insider trading scheme involving an investment banker at a large investment bank, a New York-based trader, two former investment bankers, a London-based trader, and two traders based in Switzerland. These actions originated from the Division's Market Abuse Unit, which monitors for suspicious trading patterns to target insider trading schemes. Each of these case also resulted in parallel criminal charges.



U.S. Supreme Court's Decision in *Liu v. SEC* may Significantly Limit Disgorgement in Insider Trading Cases

On June 22, 2020, the U.S. Supreme Court addressed the question of whether courts posses the authority to order disgorgement in U.S. Securities and Exchange Commission (the "SEC" or the "Commission") enforcement proceedings in *Liu v. SEC*. The Court found that the SEC could seek

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U.S. Supreme Court's Decision in *Liu v. SEC* may Significantly Limit Disgorgement in Insider Trading Cases

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disgorgement, but articulated several limitations. The Court held that a "disgorgement award that does not exceed a wrongdoer's net profits and is awarded for victims is equitable relief permissible under § 78u(d)(5)."[1] Although the holding itself is limited, the Court telegraphed its view that the SEC might exceed its authority to seek disgorgement if the SEC: (1) requires that defendant's gains be deposited with the U.S. Treasury instead of returned to victims; (2) imposes joint-and-several liability; or (3) declines to deduct legitimate business expenses from the award. This combination of requiring both the deduction of legitimate business expenses and that the disgorged amount go to intended "victims" of the violation could have a substantial impact on the SEC's ability to obtain disgorgement in numerous types of cases, particularly insider trading cases. Lower courts, the Staff at the Commission and defense attorneys are starting to interpret and apply the *Liu* decision, and the long-term impact of the decision is still developing.

At the SEC Speaks 2020 conference in October, Staff from the SEC's Office of the General Counsel pointed out three main areas for further refinement from the *Liu* decision. First, the Court left open the question of whether depositing disgorgement in the U.S. Treasury is justified where it is not feasible to return the money to victims. Second, for joint-and-several liability, the Court said there could be liability for partners engaged in a concerted wrongdoing, therefore leaving some flexibility for collective liability. Third, the Court articulated an exception to deducting business expenses from disgorgement for businesses that are wholly not legitimate. How courts address these open questions could significantly affect the amount of disgorgement awarded in insider trading cases.

In insider trading cases, the only arguable "victims" are traders who traded contemporaneously with the insider trading.[2] Yet the SEC has only rarely distributed such funds given the difficulty of identifying counterparties to the illegal insider trading and the impracticability of distributing *de minimis* funds to victims, a situation common in cases both large (e.g., corporate malfeasance and disgorgement to shareholders) and small (e.g., when, based on defendant's demonstrated inability to pay, the distribution fund would not support the cost of the distribution). If courts interpret *Liu* to mean disgorgement cannot be deposited in the U.S. Treasury even when it is not feasible to return the money to victims, then it could be very challenging for the Commission to collect disgorgement in insider trading cases.

The Court stated that the SEC's practice of imposing joint-and-several disgorgement liability on a wrongdoer's affiliates could transform the remedy

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U.S. Supreme Court's Decision in *Liu v. SEC* may Significantly Limit Disgorgement in Insider Trading Cases

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into a penalty, which could impact the disgorgement demanded from unrelated tipper-tippee arrangements.[3] The Court's ruling may restrict the SEC's ability to pursue disgorgement from those who did not directly profit from misconduct and will require the SEC to provide clearer evidence of concerted action when attempting to pursue joint-and-several disgorgement liability. The Court suggested that unrelated tipper-tippee arrangements in an insider trading context fall on the "more remote" end of that spectrum where individual liability may be required.[4] However, the Court recognized there are situations that permit collective liability for partners in wrongdoing "given the wide spectrum of relationships between participants and beneficiaries of unlawful schemes."[5]

Finally, the Court stated that in seeking disgorgement, the SEC must deduct legitimate expenses from the disgorgement amount, provided the business as a whole is not a sham used in pursuit of the wrongdoing.[6] The Court's ruling may have significant implications in connection with negotiating settlement agreements with the SEC, particularly in insider trading and other types of trading cases, where the SEC typically declines to allow the defendant to deduct commissions or other legitimate expenses. The decision provides ammunition to parties arguing for a broader expansion of what constitutes legitimate, deductible expenses.

In a recent insider trading case, the SEC withdrew its request for disgorgement and prejudgment interest and instead requested only a civil penalty that equaled two times the defendant's ill-gotten gains.[7] Staff from the SEC's Office of the General Counsel presenting at the SEC Speaks 2020 conference also mentioned three recent examples of lower courts interpreting and applying *Liu*: the Ninth Circuit remanded a disgorgement decision to the district court to determine whether the disgorgement award is consistent with the guidelines articulated in *Liu* for "the benefit of investors" and joint-and-several liability,[8] in another case that is on appeal, the district court held that *Liu* has no bearing on disgorgement from relief defendants;[9] and another district court held that a defendant must identify a legitimate purpose to deduct business expenses from disgorgement.[10]

The *Liu* decision raises important questions about the limitations on the SEC's ability to pursue disgorgement that relate directly to insider trading cases. The Court has approved disgorgement award constitutes net profits, and the award is distributed to victims, but *Liu* leaves open the question of whether the SEC can continue to pursue a disgorgement remedy when funds cannot be distributed to investors. It will be up to lower courts to interpret the Court's guidance on "those categories of relief that were typically available in equity" to determine the contours and limits of SEC disgorgement powers.

COVID-19 Guidance and Regulation S-K Simplification and Modernization: The Year in Review

SEC Guidance Related to COVID-19

Throughout the course of the COVID-19 pandemic, the SEC has issued guidance, provided targeted temporary regulatory relief and taken other actions intended to facilitate timely, robust and complete reporting by registrants while recognizing the continued uncertainty regarding COVID-19. Highlights of key COVID-19-related guidance and statements from the SEC are summarized below. For further information regarding the SEC's full COVID-19 response and related initiatives to date, please refer to the SEC's website here.

On March 25, 2020, in light of the evolving and uncertain effects and risks of COVID-19 on registrants and their businesses, the SEC Division of Corporation Finance of the SEC released guidance related to COVID-19 to aid registrants in their assessment and disclosure of the impact of COVID-19 and emphasized the importance of providing investors with forward-looking information to "allow investors to evaluate the current and expected impact of COVID-19 through the eyes of management," reminding companies that they can avail themselves of safe harbors under federal securities laws to disclose forward-looking information.

For more information about the March 25, 2020 guidance, please see our more detailed Debevoise In Depth here.

In the same March 25, 2020 guidance, recognizing that companies could also face operational delays due to novel issues presented by COVID-19, the SEC Division of Corporation Finance also provided that it "would not object to companies reconciling a non-GAAP financial measure to preliminary GAAP results that either include provisional amount(s) based on a reasonable estimate, or a range of reasonably estimable GAAP results" in instances where "a GAAP financial measure is not available at the time of the earnings release because the measure may be impacted by COVID-19-related adjustments that may require additional information and analysis to complete," subject to certain conditions. The Division of Corporation Finance revisited the issue of COVID-19-related non-GAAP adjustments in a conversation between William Hinman, Director of the Division of Corporation Finance, and Julie Bell Lindsay, Executive Director of the Center for Audit Quality, posted online by the CAQ on October 1, 2020, during which, Director Hinman cautioned companies against using non-GAAP adjustments to add back lost revenues due to COVID-19 given

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how subjective and difficult it is to evaluate lost revenues and to account for associated expenses.

On April 8, 2020, SEC Chairman Jay Clayton and Director Hinman released a public statement, "The Importance of Disclosure – For Investors, Markets and Our Fight Against COVID-19," highlighting the importance of providing full and detailed disclosure regarding the impact of COVID-19. Chairman Clayton and Director Hinman urged "companies to provide as much information as is practicable regarding their current financial and operating status, as well as their future operational and financial planning" and noted that "[g]iven the uncertainty in our current business environment, we would not expect to second guess good faith attempts to provide investors and other market participants appropriately framed forward-looking information." In a subsequent public statement, "The Importance of Disclosure for Our Municipal Markets," issued on May 4, 2020 regarding disclosure by issuers in the municipal securities markets, Chairman Clayton and Rebecca Olsen, Director of the Office of Municipal Securities, reiterated the Agency's request to issuers that they provide investors with "as much information about their current financial and operating condition as is reasonably practicable," in particular "forward-looking information regarding the potential future impact of COVID-19 on [issuers'] financial and operating conditions."

The Division of Corporation Finance released additional guidance on June 23, 2020 related to COVID-19 regarding operations, liquidity and capital resources disclosures that companies should consider. Among other considerations, the Division of Corporation Finance emphasized the importance of companies providing "robust and transparent disclosures about how they are dealing with short- and long-term liquidity and funding risks in the current economic environment, particularly to the extent efforts present new risks or uncertainties to their business."

Looking ahead, we expect that the SEC will continue to focus on and encourage registrants to provide full, accurate and detailed disclosure—both current and forward-looking—regarding the ongoing impact of COVID-19. The SEC's Division of Enforcement and the Office of Compliance Inspections and Examinations has issued over 30 trading suspensions since the SEC's initial March 25, 2020 guidance due to issues with the adequacy and accuracy of disclosures related to COVID-19.

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COVID-19 Guidance and Regulation S-K Simplification and Modernization: The Year in Review
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Updates to Regulation S-K

In Fall 2020, the SEC continued to produce incremental changes to simplify and modernize disclosure requirements in Regulation S-K as part of its Disclosure Effectiveness Initiative[1] and updated statistical disclosure requirements for bank and savings and loan registrants in light of changes in the banking sector over the past 30 years.

Modernizing Updates to Management's Discussion and Analysis and Financial Disclosure Requirements

On November 19, 2020, the SEC adopted final rules intended to modernize, simplify and enhance certain financial disclosures required by Regulation S-K, including Item 303 requirements governing MD&A disclosure. The SEC intends the rules changes to sharpen the focus on the disclosure of material information. Of particular note, the amendments will:

- Eliminate the requirement to disclose Selected Financial Data (S-K Item 301).
- Replace the requirement to include separate disclosure regarding Off-balance sheet arrangements with an instruction to discuss such obligations in the broader context of MD&A (S-K Item 303(a)(4)).
- Eliminate the requirement to include Tabular disclosure of contractual obligations (S-K Item 303(a)(5)).
- Permitting registrants to compare their most recently completed quarter to either the corresponding quarter of the prior year (as is currently required) or the immediate preceding quarter.

The amendments will become effective 30 days after they are published in the Federal Register, and registrants are required to comply with the rule changes beginning with the first fiscal year ending on or after the date that is 210 days after publication in the Federal Register.

New Statistical Disclosures for Banking Registrants

On September 11, 2020, the SEC adopted final rules codified in new Item 1400 of Regulation S-K to update the required statistical disclosures for bank and savings and loan registrants, which, among other things, codify certain disclosures required under Industry Guide 3, Statistical Disclosure by Bank Holding Companies ("Guide 3") and eliminate other Guide 3 disclosures that are duplicative of requirements under SEC rules, U.S. GAAP and International Financial Reporting Standards. The final rules will apply to registrants beginning on the first fiscal year ending on or after December 15, 2021, and voluntary early compliance is permitted prior to December 15, 2021. Guide 3 will be rescinded effective January 1, 2023. For more information about these rule amendments, please see our more detailed Debevoise In Depth here.

Disclosure Simplification and Modernization

On August 26, 2020, the SEC announced the adoption of rule amendments

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intended to simplify and modernize its disclosure requirements under Regulation S-K related to the description of business (Item 101), disclosure of legal proceedings (Item 103) and risk factors (Item 105). The amendments reflect the SEC's commitment to a principles-based disclosure framework based on materiality standards and aim to elicit registrant-specific disclosures and reduce the compliance burden for registrants. For more information about these rule amendments, please see our more detailed Client Update here.

Insufficient Internal Controls Result in SEC Enforcement in Connection with Rule 10b5-1 Plan

On October 15, 2020, the Securities and Exchange Commission ("SEC") announced a $20 million settlement resulting from a finding of insufficient internal controls at Andeavor LLC ("Andeavor").[1] The SEC found that Andeavor violated an Exchange Act provision requiring the implementation and maintenance of effective internal controls through its improper initiation of, and repurchase of shares pursuant to, a Rule 10b5-1 plan while in possession of material non-public information ("MNPI") and in violation of Andeavor's internal policies.[2]

Background

In 2017, Andeavor engaged in significant discussions with Marathon Petroleum Corporation ("Marathon") about, and began working toward, a potential business combination. Discussions were halted in the fourth quarter of 2017, but on February 21, 2018, Andeavor's then-Chairman and Chief Executive Officer directed Andeavor's Chief Financial Officer to initiate a share buyback to repurchase $250 million of shares over a period of several weeks pursuant to a standing Board authorization that specifically required that any purchases comply with Andeavor's securities trading policy. At the time of this direction, Andeavor's CEO was scheduled to meet with his counterpart at Marathon two days later to resume the confidential discussions about Marathon's potential acquisition of Andeavor at a significant premium. On February 22, Andeavor's legal department reviewed and approved a Rule 10b5-1 plan to repurchase $250 million of stock; a review which the SEC order described as "abbreviated and informal." As a result, Andeavor purchased its stock on the open market between late February and late March 2018, as negotiations were ongoing with Marathon, at a price of no more than $103 per share. On April 30, 2018, Andeavor publicly announced the merger at a price of over $150 per share.

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Enforcement Action And Settlement

The SEC concluded that Andeavor's internal controls were deficient as they failed not only to ensure that the Rule 10b5-1 plan would be approved and executed in accordance with Andeavor's internal policies, but also failed to ensure that those involved in the approval process were aware of material company information so as to allow for a proper analysis of the probability of an acquisition transaction with Marathon. In particular, the SEC noted that Andeavor's chief executive officer, a key participant in the Marathon negotiations, was not directly consulted, and was not required to be consulted by Andeavor's policies, prior to approval of the Rule 10b5-1 plan by the legal department. By failing to consult with the chief executive officer, the SEC asserted that "the company failed to appreciate that the probability of Andeavor's acquisition by Marathon was sufficiently high at that time as to be material to investors."

According to the SEC's Order, Andeavor's conduct resulted in a violation of Section 13(b)(2)(B) of the Securities Exchange Act of 1934 which require a public company to devise and maintain effective internal accounting controls. Andeavor settled without admitting or denying the SEC's findings and agreed to pay a civil money penalty of $20 million. Please see our more detailed Debevoise Update on this matter here.

Insider Trading Reform: New Administration, New Congress, Renewed Momentum?

As we reported in the December 2019 issue of the Insider Trading & Disclosure Update, the House of Representatives passed the *Insider Trading Prohibition Act*, H.R. 2534 (the "Insider Trading Act") on December 5, 2019. The Insider Trading Act would bring insider trading law firmly within the statutory framework of the Securities Exchange Act of 1934 (the "Exchange Act") and clarify the standard for insider trading liability. While the Insider Trading Act was passed by the House of Representatives by a bi-partisan vote of 410-13, neither it nor any other recently proposed piece of legislation relating to insider trading has made any further progress towards becoming law.[1] Undaunted by this graveyard of legislation and in light of: (i) confusion resulting from aspects of key holdings under recent insider trading case law (*e.g.* to what extent the personal benefit standard set forth in *United States v. Newman*[2] remains valid); (ii) the use by prosecutors of non-traditional statutory provisions (such as the wire fraud statutes[3]) thereby avoiding having

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to establish certain elements of a traditional insider trading violation; and (iii) the need to provide prosecutors with appropriate tools with which to address alleged improper trading activity by a range of market participants,[4] prominent voices have stepped into the breach.

The highest profile non-legislative recent effort to foment insider trading reform is the formal report (the "Report") published in early 2020 by a task force (the "Task Force") led by Preet Bharara, former U.S. Attorney for the Southern District of New York.[5] Key among the Task Force's conclusions is that new legislation (as opposed to, *e.g.*, regulatory rule-making) expressly setting out the elements of an insider trading offense would be the best vehicle for reform that simplifies, clarifies, and modernizes insider trading law. As stated in the Report, such new legislation should apply the following key principles:

Focus on "wrongful" use of material nonpublic information, not exclusively on "deception" or "fraud." Noting that insider trading is just as unfair and harmful when information is obtained through wrongful means not involving manipulation or deception, the Report recommends (consistent with the approach taken in the Insider Trading Act) that any new legislation decouple the offense of insider trading from its exclusive reliance on concepts of "deception" and "manipulation"," and tie it instead to "wrongfully" obtained or communicated information. Specifically, the Report states that "wrongfulness" for this purpose be defined to include deception and misrepresentation, as well as breaches of duties of trust and confidence, breaches of agreements to keep information confidential, theft, misappropriation and embezzlement. By defining wrongfulness in this way, the Task Force believes that the sometimes troublesome distinctions in the requisite conduct as between "classical" and "misappropriation" insider trading cases would be eliminated and the culpability of a tippee (*v.* the tipper) would be treated separately and in a clearer way. The Report points to *SEC v. Dorozhko*[6] in support of its position. In *Dorozhko*, the Second Circuit found that a hacker had violated the insider trading laws because the "hack" in question involved a misrepresentation (*i.e.*, a "deceptive" device under Section 10(b) of the Exchange Act) used to gain access to material non-public information. However, under the Court's logic, had the insider information been obtained through a means that did not involve a deceptive device (such as by exploiting a weakness in the computer coding), then the hacker may not have violated the insider trading laws when it traded on the basis of the ex-filtrated information. As the Report notes, under these facts, whether trading on the basis of material non-public information should be subject to prosecution should not depend upon how the cyber intruder seeking to trade on material non-public information accesses a company's servers.

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Eliminate the "Personal Benefit" Requirement. The Task Force advocates for the elimination of any "personal benefit" requirement in new insider trading legislation noting in the Report that eliminating the personal benefit requirement would clarify the application of insider trading laws and ensure that the way in which wrongful dissemination of insider information can be actionable is not unduly narrowed. The Report highlights the recent confusion generated from the *Newman* decision and its progeny as evidence of the need for this type of change.[7] Further and while other non-traditional statutory schemes will remain available to pursue insider trading cases (*e.g.* the wire fraud statutes), the Report notes that the elimination of the personal benefit requirement could have the effect of making new insider trading legislation as attractive to prosecutors as these other statues, thereby keeping insider trading jurisprudence within a more traditional insider trading legal framework.

Clearly and Explicitly Define the State of Mind Requirement for Criminal and Civil Insider Trading. Recognizing the important role for both criminal and civil enforcement of insider trading laws, the Task Force would define the state of mind requirements clearly as "willfulness" for criminal violations and "recklessness" for civil violation. This clear delineation stands in contrast to the provisions of the Insider Trading Act which defines the relevant mental state for insider trading offenses as "aware, consciously avoided being aware, or recklessly disregarded," without differentiating between criminal and civil states of mind. With regard to "tippee" liability, the Task Force would require that a tippee "know" that the tipper obtained the communicated information wrongfully for criminal liability and that the tippee should have at least recklessly disregarded that fact for civil liability.[8]

Aim for Clarity and Simplicity. So as to not replace the set of uncertainties and ambiguities that persist under current insider trading law with another:

- The language and structure of the legislation should be plain and straightforward.
- Exceptions and elements subject to interpretation or requiring cross-referencing to other laws should be kept to a minimum.
- Terms and elements to the extent they are subject to interpretation, should be defined as clearly as possible.

Given the bi-partisan support for many legislative insider trading reform proposals and the similarly strong and supportive views among prominent former prosecutors that reform is required, it is not unreasonable to think that renewed focus will be brought to bear on these efforts with the change in administration.

United States v. Blaszczak: Second Circuit Opens the Door to U.S.C. Title 18 Insider Trading Prosecutions

As we reported in the December 2019 issue of the Insider Trading & Disclosure Update, the U.S. Court of Appeal for the Second Circuit was set to decide on appeals brought by four defendants convicted of insider trading under 18 U.S.C. §§ 1343 and 1348 — the Sarbanes-Oxley Act's criminal wire fraud and securities fraud provisions. In upholding the convictions under §§ 1343 and 1348 in *United States v. Blaszczak*, the Second Circuit opened the door to expanded insider trading liability without requiring prosecutors to prove the "personal benefit" element under the anti-fraud provisions of Section 10(b) and Rule 10b-5 to successfully prosecute criminal insider trading violations.[1]

Prosecutors in Blaszczak alleged that between 2009 and 2014 a government employee provided material non-public information about Medicare reimbursement rates to a political intelligence consultant.[2] The consultant allegedly tipped two analysts at a hedge fund advisory firm that paid him as a consultant who, in turn, allegedly used the nonpublic information to recommend that the firm trade in the stocks of four health care companies, resulting in more than $3.9 million in illicit profits. At trial, the judge instructed the jury that a conviction under Section 10(b) of the Exchange Act required a breach of a duty for personal gain, but declined to give a similar instruction for the counts under Title 18.[3] The jury subsequently acquitted the defendants of insider trading under Section 10(b) but convicted the defendants under §§ 1343 and 1348, and the Second Circuit upheld their convictions on appeal.[4]

As we have reported in prior issues of the Insider Trading & Disclosure Update, what constitutes a "personal benefit" for purposes of insider trading "tippee" liability under the U.S. Supreme Court's *Dirks* test has been the subject of significant dispute in recent years. In 2014, the Second Circuit in *Newman* applied a heightened "personal benefit" test requiring "at least a potential gain of a pecuniary or similarly valuable nature."[5] In 2016, the U.S. Supreme Court in *Salman* narrowed *Newman's* reach in holding that a personal benefit may be inferred from the gift of confidential information to a relative.[6] The decision in *Blaszczak* adds a new dimension to this already complex puzzle, discarding the "personal benefit" test entirely for purposes of §§ 1343 and 1348. In its place, the Second Circuit in *Blaszczak* relied upon "the embezzlement theory of fraud" in which a breach of duty is "inherent" and requires no further proof that a defendant has received a personal benefit in order to establish a breach of duty.

The degree of separation between misappropriation or embezzlement, on the one hand, and a breach of duty involving the receipt of a personal benefit, on the other hand, will likely be the subject of future dispute. For now, the door has been propped open for prosecutors to utilize §§ 1343 and 1348 to assert criminal insider trading violations even where a Rule 10b-5 prosecution may not be successful.

Notes

BMW Settles Charges of Misleading Disclosures in Rule 144A Offering Memoranda

1. *In the Matter of Bayerische Motoren Werke Aktiengesellschaft, et al.*, Rel. No. 33-10850 (Sept. 24, ,2020), https://www.sec.gov/litigation/admin/2020/33-10850.pdf.
2. Press Release, *SEC Charges BMW for Disclosing Inaccurate and Misleading Retail Sales Information to Bond Investors*, Secs. & Exchange Comm'n (Sept. 24, 2020), https://www.sec.gov/news/press-release/2020-223.
3. *Id.*

SEC Enforcement Focus on Beneficial Ownership Reporting by Investment Advisors

1. *In the Matter of WCAS Management Corp*, Exchange Act Rel. No. 89914 (Sept. 17, 2020), https://sec.gov/litigation/admin/2020/34-89914.pdf.
2. 15 U.S.C. § 78m
3. *See id.*
4. 15 U.S.C. § 77m; 17 C.F.R. 240.13d-2(a).

SEC to Fund Managers: Take Care with Controls Over the Possession and Use of MNPI

1. In the Matter of Ares Management LLC: Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order, Release No. 5510 (May 26, 2020), https://www.sec.gov/litigation/admin/2020/ia-5510.pdf.

SEC's Division of Enforcement Reports Healthy Results for Fiscal Year 2020

1. *See* Litigation Release, SEC Charges Company and CEO for Covid-19 Scam (April 28, 2020), https://www.sec.gov/litigation/complaints/2020/comp24807.pdf.
2. *See* Litigation Release, SEC Charges Company for Misleading Covid-19 Claims (May 14, 2020), https://www.sec.gov/litigation/litreleases/2020/lr24819.htm.
3. *See* Litigation Release, SEC Charges Penny Stock Company and Its CEO for Misleading Covid-19 Claims (May 14, 2020), https://www.sec.gov/litigation/litreleases/2020/lr24820.htm.
4. Press Release, SEC Charges Companies, Former Executives as Part of Risk-Based Initiative (Sept. 28, 2020), https://www.sec.gov/news/press-release/2020-226.
5. *In the Matter of Interface Inc. et al.*, Exchange Act Rel. No. 90018 (Sept. 28, 2020), https://www.sec.gov/litigation/admin/2020/33-10854.pdf.
6. *In the Matter of Fulton Financial Corporation*, Exchange Act Rel. No. 90017 (Sept. 28, 2020), https://www.sec.gov/litigation/admin/2020/34-90017.pdf.
7. *See* In the Matter of HP Inc., Exchange Act Release No. 90060 (Sept. 30, 2020), https://www.sec.gov/litigation/admin/2020/33-10868.pdf.
8. *See* In the Matter of Diageo plc, Exchange Act Release No. 88234 (Feb. 19, 2020), https://www.sec.gov/litigation/admin/2020/33-10756.pdf.
9. *See* In the Matter of Argo Group International Holdings Ltd., Exchange Act Release No. 89009 (June 4, 2020), https://www.sec.gov/litigation/admin/2020/34-89009.pdf.
10. *See* In the Matter of Hilton Worldwide Holdings Inc., Exchange Act Release No. 90052 (Sept. 30, 2020), https://www.sec.gov/litigation/admin/2020/34-90052.pdf.

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U.S. Supreme Court's Decision in *Liu v. SEC* may Significantly Limit Disgorgement in Insider Trading Cases

1. *Liu v. SEC*, 140 S. Ct. 1936, at 1936 (2020).
2. *See, e.g.,* SEC Press Rel. 2019-257 (Dec. 9, 2019) (Former U.S. Representative Christopher Collins and two others agreed to disgorge avoided losses of $634,299); *In the Matter of Tai-Cheng Yang*, Exchange Act Rel. No. 85525 (April 5, 2019) (Yang agreed to disgorge $27,761.55).
3. *See Liu*, 140 S. Ct. at 1949.
4. *See id.*
5. *See id.*
6. *See id.* at 1950.
7. *See SEC v. Govender*, 2020 WL 5758997, at 2, 4 (S.D.N.Y. Sept. 28, 2020).
8. *See SEC v. Janus Spectrum LLC*, 811 Fed. Appx. 432, at 434 (9th Cir. July 1, 2020).
9. *See SEC v. SFRC*, 2020 WL 4569844, at 3 (N.D. C.A. Aug. 7, 2020).
10. *See SEC v. Mizrahi*, 2020 WL 6114913, at 3 (C.D.C.A. Oct. 5, 2020).

COVID-19 Guidance and Regulation S-K Simplification and Modernization: The Year in Review

1. In 2013, the SEC staff launched the Disclosure Effectiveness Initiative with a goal of improving the disclosure regime for investors and registrants. At that time, the staff published a study that recommended the SEC re-evaluate: (i) the current disclosure requirements, (ii) the location of disclosed information and (iii) the improved utilization of technology in required disclosures. Since then, the SEC has taken a number of incremental steps to update and simplify disclosure requirements.

Insufficient Internal Controls Result in SEC Enforcement in Connection with Rule 10b5-1 Plan

1. *In the Matter of Andeavor LLC*, Exchange Act Rel. No. 90208 (Oct. 15, 2020), https://sec.gov/litigation/admin/2020/34-90208.pdf.
2. *See id.*

Insider Trading Reform: New Administration, New Congress, Renewed Momentum?

1. *E.g.*, The Ban Insider Trading Act of 2015 (H.R. 1173); The Stop Illegal Insider Trading Act (S. 702); and Promoting Transparent Standards for Corporate Insiders Act (H.R. 624). The House of Representatives also passed, by a vote of 384 to 7, the 8-K Trading Gap Act (H.R. 4335).
2. *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).
3. As was the case in *United States v. Blaszczak*.
4. *E.g.*, four U.S. senators were accused in March of using insider information about the coronavirus pandemic to profit in the stock market. Concern has grown that the *Stop Trading on Congressional Knowledge Act*, passed in 2012, is insufficient to ensure that members of Congress do not inappropriately profit from their access to material information.
5. Mr. Bharara has previously joined other prominent voices in the securities community to advocate for insider trading reform. *See, e.g.*, on October 9, 2018, Mr. Bharara and SEC Commissioner Robert J. Jackson Jr. co-authored an Op-Ed piece in The New York Times titled "The laws around insider trading are outdated and unclear. They don't even define "insider trading." We have a way to fix that."
6. *SEC v. Dorozhko*, 574 F.3d 42 (2d Cir. 2009).
7. H.R. 1173 and S. 702 as proposed would similarly eliminate the personal benefit requirement.
8. The Insider Trading Act does not explicitly address "tippee" liability.

United States v. Blaszczak: Second Circuit Opens the Door to U.S.C. Title 18 Insider Trading Prosecutions

1. *See United States v. Blaszczak*, No. 18-2811 (2d Cir. 2019).
2. Press Release, Dep't of Justice, Four Defendants Sentenced Following Convictions At Trial For Stealing Confidential Government Information And Using It To Engage In Illegal Trading (Sept 13, 2018), https://www.justice.gov/usao-sdny/pr/four-defendants-sentenced-following-convictions-trial-stealing-confidential-government.
3. *See id* at 13, 14.
4. *See id.*
5. 773 F.3d 438 (2d Cir. 2014).
6. 137 S. Ct. 420 (2016).

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