Debevoise & Plimpton

December 2023
Volume 10

INSIDER TRADING & DISCLOSURE UPDATE

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From the Editors

Welcome to the latest installment of the Insider Trading & Disclosure Update, Debevoise's periodical focusing on the intersection of legal, compliance and enforcement developments in the areas of insider trading, managing material non-public information and disclosure rules.

As we have reported throughout the year, the SEC and DOJ have been active in the enforcement arena, and this issue includes a recap of several recent cases across the spectrum of insider trading and disclosure enforcement, from "shadow trading" and tipper/tippee liability to related party transactions, accounting controls and a 12b-25 sweep. Of note, we report on three issuers that avoided monetary penalties through their significant cooperation with the SEC—a continuing trend as the SEC seeks to reward cooperation. The SEC's in-house courts, staffed by Administrative Law Judges, are also back in focus, with oral argument at the U.S. Supreme Court focusing on a Seventh Amendment challenge to their use. With the SEC's new material cybersecurity incident disclosure rules going into effect on December 18, this issue also includes a reminder about managing material non-public information when responding to cybersecurity incidents.

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

Enforcement Activity

Supreme Court Revisits SEC's In-House Courts

On November 29, 2023, the United States Supreme Court (the "Supreme Court") heard oral argument in the case of *Securities and Exchange Commission v. George R. Jarkesy, Jr., et al.*[1] on appeal from a decision by a divided panel of the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). This case raises three distinct constitutional challenges to aspects of the Securities and Exchange Commission's (the "SEC" or the "Commission") enforcement powers and process under (i) the Seventh Amendment to the United States Constitution (the "Constitution"), (ii) the nondelegation doctrine and (iii) the Take Care Clause of Article II of the Constitution.[2] This challenge to the SEC's enforcement power follows on a prior similar successful challenge, in *Raymond James Lucia Cos. Inc. et al. v. Securities and Exchange Commission*, in which the Supreme Court held that the appointment of the SEC's Administrative Law Judges (the "ALJs") by members of the Commission's staff, rather than the Commission itself, violated the Appointments Clause of the Constitution.[3]

Case Background

Jarkesy arose from an administrative proceeding, initiated in 2013, in which the SEC found that George Jarkesy and his advisory firm, Patriot28, L.L.C., had violated antifraud provisions of the Securities Act of 1933, the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940.[4] The Commission's final order, among other things, barred Jarkesy from participating in the securities industry and imposed a civil penalty of $300,000 and disgorgement of approximately $685,000 plus prejudgment interest.[5] Jarkesy appealed to the Fifth Circuit to review the Commission's final order, and a divided panel of the Fifth Circuit vacated the SEC's decision, holding that the SEC's administrative proceedings suffered from the three constitutional defects: (1) the Commission's administrative proceedings violate the Seventh Amendment right to a jury trial, (2) the SEC's ability to choose to pursue a claim through an administrative enforcement action or through a lawsuit in federal court is an impermissible delegation of legislative power to the executive branch and (3) the fact that the SEC's ALJs are removable from their positions only "for good cause" violates the Take Care Clause of Article II of the Constitution.[6]

The Seventh Amendment

The Seventh Amendment to the Constitution guarantees a right to a jury trial in "suits at common law," *i.e.*, suits where legal (rather than equitable) rights and remedies are at stake. This includes most cases where the defendant may be subject to civil monetary penalties.[7] The Fifth Circuit held that, under the Seventh Amendment, the SEC's administrative proceeding against Jarkesy was unconstitutional because the right at issue is a legal one, and adjudication by an administrative agency deprived Jarkesy of the right to a jury trial.[8]

Relying on *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977), the Commission argued that the Seventh Amendment poses no bar to the administrative adjudication of "public rights"—of which government enforcement of rights created by statute are an example.[9] Jarkesy argued that the public rights doctrine has been eroded and overruled in more recent Supreme Court cases and is antithetical to the fundamental right to a jury trial as it was understood when the Seventh Amendment was ratified.[10]

The Nondelegation Doctrine

When enforcing securities laws, the SEC may decide to bring an administrative proceeding, within the SEC's own, non-judicial adjudicative process, or file suit in federal court. The Fifth Circuit held that the SEC's power to determine which enforcement path to use violates the nondelegation doctrine; *i.e.*, that Congress cannot delegate its legislative power to administrative agencies without providing an intelligible principle to guide the agencies' exercise of such legislative power, as doing so would violate the constitutional separation of powers.[11] Jarkesy contended that the power to choose a mechanism of enforcement is a purely legislative one that cannot be delegated to an executive branch agency without an intelligible principle to guide the Commission in deciding which mechanism is applicable in a given case.[12] The SEC countered that Congress's legislative power is to designate chargeable offenses and to design acceptable means of enforcement, but it is an executive power to choose which legally permissible enforcement mechanism to use.[13]

The Take Care Clause

SEC ALJs adjudicate administrative proceedings within the SEC. As established by *Lucia*, ALJs must be appointed by the Commission itself and not by members of the Commission's staff.[14] Under the existing system, ALJs are removable only for cause, as determined by the Merits Systems Protection Board (the "MSPB"). Similarly, Commissioners and MSPB members are only removable by the President for cause.[15] Jarkesy argued that this double insulation—that ALJs are only removable for cause by Commissioners and MSPB members who are themselves only removable for cause—is an impermissible violation of the Take Care Clause in Article II of the Constitution.[16] The Take Care Clause says that the president "shall take Care that the Laws be faithfully executed," which the Supreme Court interpreted in *Free Enterprise Fund v. Public Company* to mean that multiple levels of protection from removal in administrative agencies is an unconstitutional limit on the president's power and obligation to oversee officers in the executive branch.[17] In *Free Enterprise*, the Supreme Court found this prohibition on multiple levels of protection unconstitutional with respect to "policymakers."[18] Whether that ruling should be extended to others was left open, and whether it should be applicable to SEC ALJs specifically is the key point of contention between Jarkesy and the SEC.[19]

Oral Argument

In a departure from the briefs, the unusually lengthy oral argument focused on the Seventh Amendment question and did not engage with the nondelegation doctrine or Take Care Clause arguments.[20] Justices Clarence Thomas and Neil Gorsuch seemed to align with Jarkesy, with the former having historically stated that the public rights doctrine does not extend to any issue concerning rights to property[21] and the latter expressing unease at the idea that the Seventh Amendment right to a jury trial could be extinguished by the enactment of a new statutory cause of action.[22] Justices Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson seemed more sympathetic to the Commission's argument, with Justices Kagan and Jackson aligning with the Commission's view of the Supreme Court precedents (*i.e.*, those that held the Seventh Amendment does not prevent the application of the public rights doctrine)[23] and Justice Sotomayor pointing to the ways the securities law action for fraud differs from the common law claim.[24] The remaining three justices, Chief Justice John Roberts and Justices Brett Kavanaugh and Amy Coney Barrett, seemed focused on understanding the hypothetical edges of each side's arguments but did not clearly indicate their favored conclusions.[25]

Impact and Takeaways

If any one of Jarkesy's three constitutional challenges to the SEC's enforcement power is upheld by the Supreme Court, it could have significant implications for the SEC and for the administrative state more broadly. If Jarkesy's arguments with respect to the Seventh Amendment or Take Care Clause arguments are sustained, the SEC may be required to reevaluate which causes of action are adjudicated by ALJs or restructure the removal process for ALJs. Given that many other federal agencies also have ALJs—the majority of ALJs are within the Social Security Administration[26]—the impact of such a decision could broadly change how many other federal agencies operate. If Jarkesy's nondelegation doctrine argument is sustained, however, it could lead to much more significant changes. Initially, such a decision could significantly slow SEC enforcement activity, while the Commission awaits an intelligible principle from Congress allowing the resumption of in-house enforcement activities. Other similarly situated federal agencies may also be required to pause or slow their enforcement actions, pending congressional clarification. Of course, clarity from a divided Congress may not be forthcoming in a timely manner, or at all, which could lead to greater disruption.

The oral argument seems to foreshadow an opinion focused on the Seventh Amendment question, but we may not see the final opinion on this case until late Spring or Summer of 2024.

SEC's "Shadow Trading" Theory Survives Summary Judgment

On November 20, 2023, the United States District Court for the Northern District of California denied defendant Matthew Panuwat's motion for summary judgment in a 2021 case brought by the SEC alleging that Panuwat engaged in so-called shadow insider trading in the securities of his former employer's competitor based on MNPI that Panuwat obtained from his former employer.[27] In surpassing this latest hurdle, the SEC has a clear path forward to present its theory of the case to a jury.

According to the SEC's complaint, from 2014 to 2017, Panuwat worked as a business development executive at the biopharmaceutical company Medivation.[28] Around April 2016, in connection with a failed takeover attempt of Medivation, a theory emerged among industry analysts that a larger company's successful acquisition of Medivation would increase the attractiveness of Incyte, one of Medivation's few competitors.[29] After the failed takeover attempt, Medivation began exploring other potential buyers, and Panuwat was allegedly kept apprised of information on the potential sale.[30] On August 18, 2016, Medivation's CEO emailed Panuwat and 11 others, sharing information indicating that a counterparty, Pfizer, hoped to complete a sale that weekend.[31] Within an hour of receiving this email, Panuwat purchased $116,905 of Incyte call options.[32] Pfizer announced its acquisition of Medivation the following Monday, and Panuwat subsequently sold his Incyte options, making a profit of $120,031.[33]

The SEC claimed that Panuwat violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder when he traded in Incyte options, allegedly based on the MNPI he received while working on the Medivation deal.[34] Panuwat filed for summary judgment on September 27, 2023, arguing that Medivation and Incyte, from a business and economic perspective, were entirely different entities, that he had valid reasons for purchasing Incyte securities apart from the Medivation MNPI and that were consistent with his prior trading patterns, and that Medivation's policies did not prohibit him from investing in Incyte.[35]

In denying Panuwat's motion for summary judgment, the Northern District of California found genuine disputes of fact as to whether Panuwat received MNPI, whether that MNPI was material to Incyte, whether Panuwat breached his duty to Medivation by using such information and whether Panuwat acted with scienter.[36] At the outset, the court reiterated its previous ruling that "information may be material to more than one company and that information does not need to come from the issuer of the security to be material."[37] The court mentioned several media reports indicating a sufficient market connection between Medivation and Incyte as well as evidence from Medivation's investment bankers suggesting that Incyte was a comparable company.[38]

Regarding Panuwat's alleged breach of duty to Medivation, the court found evidence under all three of the SEC's insider trading theories. First, Medivation's Insider Trading Policy covered trading in a non-exhaustive list of other public companies associated with Medivation, "including all significant collaborators, customers, partners, suppliers or competitors."[39] While Panuwat argued that Incyte did not fall into any of these categories, the court found that the word "including" indicates that the list is non-exhaustive and a jury could find that the policy encompasses other companies not specifically enumerated. [40] Second, Medivation's Confidentiality Agreement prohibited Panuwat from using Medivation's confidential information for his own personal benefit.[41] Lastly, the SEC claimed that Panuwat breached a duty of trust and confidence that was established when Medivation entrusted him with confidential information.[42] With respect to this misappropriation based theory, the court highlighted the Ninth Circuit precedent in *SEC v. Talbot*, which found that traditional agency law could create a duty for the defendant, not only an official policy or agreement.[43]

Regarding scienter, the court found that a genuine dispute of fact exists as to whether Panuwat knowingly misappropriated the MNPI when he traded in Incyte securities, primarily due to the close proximity between Panuwat's receipt of the CEO's email and his purchase of the call options.[44] The court also pointed to Panuwat's limited trading history in options as evidence the jury could find to suggest scienter.[45]

Having survived summary judgment, the SEC's case against Panuwat will be closely watched as a potential roadmap for future shadow trading theory cases. The court's evaluation of the scope of MNPI and insiders' duties should be carefully considered by counsel when maintaining a robust insider trading policy and compliance program. The summary judgment order highlights the importance of educating employees about their obligations under a company's insider trading policy and confidentiality agreements, as well as their duties under other applicable laws, in order to protect insiders and the company from claims of wrongdoing.

DOJ's RMBS Working Group Settles Final Civil Penalty Case Related to 2008 Financial Crisis

Roughly 15 years after the 2008 financial crisis, the Department of Justice (the "DOJ") settled the 18th, and last, of its civil actions alleging fraud and misconduct on the part of financial institutions the government claims contributed to the crisis.[46] On August 14, UBS AG and its affiliates ("UBS") agreed to pay $1.435 billion in penalties to settle the DOJ's civil complaint filed in 2018.[47] As in actions previously brought against similar institutions, the DOJ alleged that UBS made false and misleading statements to buyers of residential mortgage-backed securities regarding the characteristics of the underlying loans in those instruments.[48]

Specifically, the government's complaint charged UBS with engaging in mail fraud, wire fraud, bank fraud and other misconduct in violation of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA").[49] Between 2005 and 2007, UBS allegedly packaged $41 billion of loans into 40 residential mortgage-backed securities ("RMBS") identified in the complaint.[50] The DOJ claimed that at the time when these offerings were made, UBS was aware of "severely deteriorating" standards at the originating lenders, that many of the loans were provided to borrowers with little ability to pay and that the loan amounts were often not supported by the underlying property values, yet employees frequently made false representations to investors, rating agencies and others regarding the nature of the securities.[51] Additionally, the complaint alleged that while packaging and offering these instruments to other institutions, UBS simultaneously attempted to minimize its own risk and exposure stemming from the securities.[52]

In 2012, the DOJ created its RMBS Working Group, a task force intended to prosecute financial institutions and other entities that played a role in the mortgage crisis and ensuing economic downturn.[53] Since then, the group has collected over $36 billion in penalties from banks, originators and rating agencies, including the latest settlement with UBS.[54]

Visiting International Attorney at Law Firm Arrested for Insider Trading

On August 22, 2023, Romero Cabral Da Costa Neto ("Costa")—a former visiting international attorney at Gibson Dunn & Crutcher LLP ("Gibson Dunn")—was charged with insider trading by both the SEC and DOJ for purchasing securities issued by the law firm's clients while in possession of MNPI that he learned in the course of his employment at the firm. The charges against Costa deliver a stark warning to attorneys and other professionals who gain access to non-public information through their work or employment. The charges also demonstrate how data analysis conducted by the SEC's Market Abuse Unit can yield speedy results, and how a law firm's document management system records can be a valuable information source for government investigations.

According to the SEC's complaint against Costa[55] and the DOJ's press release announcing his arrest,[56] Costa—a Brazilian national licensed in his home country—was in the U.S. on a temporary visa to work as a visiting attorney at Gibson Dunn's Washington, D.C. office under a one-year contract.[57] When he began working at the law firm, Costa signed and acknowledged that he agreed to comply with the firm's internal policies and procedures, including its insider trading policy and its confidentiality policy.[58] The insider trading policy required all firm employees—including visiting attorneys such as Costa—to "maintain the confidence of all confidential information relating to or obtained from a [law firm] client or firm representation," and it prohibited employees from "using confidential information for their own personal purposes or benefit."[59] Similarly, the law firm's confidentiality policy required employees to safeguard confidential information relating to firm clients and to not use the information for personal gain.[60]

Despite signing and acknowledging his understanding of these policies, Costa allegedly accessed MNPI about Gibson Dunn's clients and traded in their stock while in possession of MNPI several months into his year-long contract at the firm, thereby breaching his duty to the law firm and its clients. In April 2023, Gibson Dunn's client CTI BioPharma Corp. ("CTI") began non-public merger discussions with Swedish Orphan Biovitrium AB ("Sobi").[61] According to the government's review of Gibson Dunn's document management system, Costa accessed and viewed approximately 25 documents relating to the transaction, including draft SEC filings, board minutes and other relevant materials, even though he had "no apparent business purpose" for reviewing the materials.[62] Records showed that Costa viewed these documents over 100 times in the week leading up to the public announcement of the merger, and on May 9, 2023—the day before the merger was announced publicly—he allegedly purchased 10,400 CTI shares through two brokerage accounts that he opened one month after beginning his employment in the United States.[63] On the day of the merger announcement, Costa allegedly sold all of his CTI shares, realizing over $42,000 in profits in one day.[64]

According to the government, Costa also accessed and traded while in possession of MNPI relating to the firm's representation of two other clients in June 2023, realizing profits totaling approximately $9,500. Similar to the CTI transaction, Costa was not assigned to the matters in question and allegedly did not have a legitimate reason to access the related client files. The government highlighted one instance in which Costa both purchased stock before a positive market event and sold before a subsequent negative event as a likely indicator of his improper access to—and use of—MNPI.[65]

The criminal case against Costa is being prosecuted by the U.S. Attorney's Office for the District of Columbia. In a statement published by the SEC in connection with its parallel charges, the SEC stressed the sensitive role that lawyers play in accessing confidential client information and warned that "[w]hen lawyers abuse that access, as Costa allegedly did here, we will promptly take action to hold them accountable." The government's case against Costa, which yielded an arrest less than four months after the first set of alleged trading activity, highlights the government's ability to take swift action through data analysis.

British Billionaire, Girlfriend and Associates Charged in Tipping Scheme

On July 26, 2023, the SEC and DOJ announced charges against Joseph Lewis—an 86-year-old British billionaire businessman and investor who is the principal owner of Tavistock Group, an international private investment organization—for allegedly orchestrating a tipping scheme involving Lewis's girlfriend and two longtime private pilots employed by Lewis, who were also charged. The government's access to various written communications, including on what Lewis's associates believed to be encrypted platforms, appears to have played a significant role in helping the government build its case.

According to the government's charging documents,[66] Lewis made investments in several biotechnology companies through a hedge fund that he controlled and, in connection with his investments, received inside information about the portfolio companies, including the results of certain clinical trials.[67] Additionally, due to the size of his investments, Lewis controlled board seats in some of the portfolio companies and appointed employees of his hedge fund to serve on those boards, through which those employees received MNPI which they shared with Lewis.[68] The government claimed that Lewis owed a duty of confidence to both the portfolio companies as the source of the information, based on the confidentiality agreements between the hedge fund and the companies, and to the hedge fund principals and minority owners.[69]

The government alleged that Lewis tipped MNPI related to at least two of the portfolio companies to his girlfriend and two of his private pilots. In July 2019, Lewis purportedly learned of a private investment in public equity ("PIPE") offering for a public biotechnology company focused on developing treatments for a genetic disease. Several hours after receiving this information, Lewis allegedly informed his girlfriend, Carolyn Carter, who then purchased the company's stock.[70] Virtually all of Carter's brokerage account was invested in the biotechnology company at that point, and she had not previously traded in the company's securities. Following the PIPE announcement, Carter allegedly sold her shares for a profit of approximately $172,000.[71] The government emphasized the romantic relationship between Lewis and Carter to establish that Lewis received a personal benefit from providing MNPI as a gift.[72] Notably, unlike Lewis and the other defendants, Carter was charged only by the SEC, possibly indicating an evidentiary challenge to meet the higher burden of proof for Carter's knowledge in a criminal case.

Lewis also allegedly tipped insider information about an oncology company focused on the development of cancer therapeutics to both Carter and his private pilots, Patrick O'Connor and Bryan Waugh. According to the government, in September 2019, an officer of Lewis' hedge fund who also served on the board of the oncology company learned, while aboard Lewis's yacht, that one of the company's trial drug patients had experienced positive results.[73] The officer allegedly passed this MNPI to Lewis, including the possibility that the company would announce the results of the trial. Shortly after his meeting with the officer, Lewis allegedly tipped the MNPI to Carter, who then purchased the company's securities, and a few weeks later, he also allegedly tipped the MNPI to O'Connor and Waugh, who also traded in the company's securities.[74]

Notably, the government described Lewis's tip to O'Connor and Waugh as a gift and/or part of a "*quid pro quo* for direct or indirect pecuniary gain as a substitute for providing a formal retirement plan for his pilots."[75] The government's evidence included messages that O'Connor sent to another individual on an encrypted mobile application stating that he thought Lewis had "inside info. Otherwise why would he make us invest," that Lewis "lent [Waugh] and [O'Connor] $500,000 each for this" and that he was "pretty sure [Lewis] knows the outcome."[76] O'Connor also wrote that "[a]ll conversation on app is encrypted so all good. No one can ever see[.]"[77] This evidence is a prime example of the government's increasing reliance on messaging application data, including data on "encrypted" applications that is nonetheless accessible by the government.

The SEC charged Lewis, Carter, O'Connor and Waugh with violating Section 10(b) of the Securities

Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder and named O'Connor's wife as a relief defendant. The DOJ charged Lewis, O'Connor and Waugh with multiple counts of Title 15 and Title 18 securities fraud as well as conspiracy to commit securities fraud. In addition to the insider trading allegations, the DOJ also charged Lewis with conspiring to hide his ownership shares of a pharmaceutical company through false filings and misleading statements.[78]

Former Blackstone and Goldman Sachs Analyst Charged with Insider Trading after Tipping Friends

On September 28, 2023, the SEC charged Anthony Viggiano, Christopher Salamone, Stephen Forlano and Nathan Bleckley with insider trading in connection with MNPI Viggiano obtained while working at two major investment firms.[79]

Viggiano worked as an analyst at Blackstone from April 2021 to October 2021.[80] He left this position after the investment firm discovered he had personally traded in certain securities without proper pre-clearance, in violation of firm policies.[81] In February 2022, Viggiano began working as analyst at Goldman Sachs, where he was employed until July 2023.[82]

According to the SEC's complaint, Viggiano was regularly entrusted with MNPI related to acquisitions and strategic financings at both of his former jobs.[83] From July 2021 to May 2023, he obtained MNPI on several deals, including those involving AIG, Harmony Biosciences Holdings, CDK Global, Computer Services Inc., Channel Advisor Corp., Maxar Technologies, Atlas Technical Consultants and Syneos Health, Inc.[84]

Around August 2022, Viggiano and Salamone—close friends—allegedly entered into an agreement where Viggiano would provide cash and stock recommendations to Salamone, who would then trade in his own brokerage account based on the information.[85] Viggiano and Salamone agreed to communicate via Signal, an encrypted messaging platform, and purportedly discussed how they would purchase multiple stocks in a particular industry as a "smokescreen."[86] According to the SEC's complaint, from April 2022 to April 2023, Viggiano provided Salamone with MNPI related to multiple deals and Salamone traded based on that information.[87] Viggiano and Salamone allegedly agreed to equally split the profits from these trades, and in January 2023 Salamone transferred funds from his brokerage account to his bank account and gave Viggiano $35,000 in cash.[88]

The SEC also claimed that Viggiano provided Forlano, another close friend, with MNPI related to four deals, and Forlano traded based on that information from August 2022 to August 2023.[89] With both Salamone and Forlano, Viggiano allegedly received the personal benefit of providing a gift to a close friend.[90] According to the complaint, Forlano subsequently provided Bleckley, his friend from college and a captain in the U.S. army, and other friends and family members with information related to two deals Forlano learned from Viggiano.[91] And yet further down the chain, Bleckley allegedly tipped additional individuals who also traded on the information.[92]

The SEC charged Viggiano, Salamone, Forlano and Bleckley with violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[93] Viggiano and Salamone were also charged with violating Section 14(e) of the Exchange Act and Rule 14e-3 thereunder based on their use of MNPI involving the tender offer for CDK Global in March and April 2022.[94] The DOJ filed parallel charges in September against Viggiano, Salamone and Forlano for securities fraud and conspiracy, but did not charge Bleckley.[95] The DOJ's decision not to file charges against Bleckley highlights the high evidentiary hurdle required to charge downstream tippees who are further removed from the original tipper.

Judge Hands Down Short Sentence in Novel NFT Insider Trading Case

As discussed in our September 2022 and June 2023 updates, OpenSea product manager Nathaniel Chastain was convicted of wire fraud and money laundering in the DOJ's first ever insider trading case involving a digital asset.[96] Significantly, the DOJ relied on wire fraud charges in this case, rather than the traditional insider trading charges brought under Exchange Act Section 10(b) and Rule 10b-5.[97] Despite the attention garnered by the novel case, on August 22, 2023, United States District Judge Jesse Furman sentenced Chastain to just three months in prison, three months of home confinement, a $50,000 fine and community service. In a statement following the sentence, Furman described it as "unusually difficult" and expressed doubts as to whether prosecutors would have brought the case had it not involved the "slightly sexy new arena" of cryptocurrency.[98] Accordingly, Chastain's three month prison sentence—which is much lower than the 21 to 27 months requested by the DOJ—highlights some skepticism around the government's creative charging decisions in the midst of the ongoing regulatory uncertainty surrounding financial instruments like NFTs.

SEC Charges Broker-Dealer with Inaccurate Information Barrier Disclosures

On September 12, 2023, the SEC filed a complaint in U.S. District Court against Virtu Americas LLC and Virtu Financial Inc. (together, "Virtu") charging the firm with making false and misleading disclosures related to information barriers between its trade order execution and proprietary trading businesses and failing to maintain adequate policies and procedures to prevent the misuse of MNPI.[99] Notably, the complaint does not allege that any data was inappropriately accessed or used.

Prior to its acquisition of broker-dealer KCG Holdings in July 2017, Virtu's trade execution business consisted largely of trades made for its own benefit and in its own name.[100] Virtu used a database to record and store information regarding these trades, and employees across both the trade order execution and proprietary trading business lines could access the database using a generic username and password.[101] In July 2017, Virtu acquired KCG Holdings and its sizable trade execution business, which according to the SEC complaint executed 25% of U.S. retail investor trade orders at various points in time.[102] After the acquisition, Virtu employees, including those in the expanded trade execution business, retained access to Virtu's post-trade information database and, around January 2018, this database began storing data on trades that Virtu placed for its institutional customers.[103]

The Commission claims that Virtu's proprietary traders used information from the database to create trading algorithms and strategies, and that around August 2018, Virtu's database developers became aware that proprietary traders had access to customer MNPI in the form of post-trade data in the database and acknowledged a need for updated database permissions.[104] Further, the SEC claims that from November 2018 to March 2019, Virtu made misleading statements in investor presentations, earnings calls, customer letters, press releases and customer due diligence questionnaires stating that Virtu had policies and procedures in place to safeguard MNPI, including information barriers, when in fact the firm lacked sufficient policies and procedures around access to the database and was unable to monitor such access due to the generic login credentials.[105]

The Commission charged Virtu with violating Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 and Section 15(g) of the Exchange Act.[106] Virtu has since issued a press release noting that the SEC's enforcement action follows Virtu's criticism of recent market structure rule proposals and claims that the Commission's position in the matter "appears to be driven by politics and headlines rather than the facts and the law."[107]

SEC Charges Lyft with Failing to Disclose Director's Role in Pre-IPO Stock Sale

On September 18, 2023, Lyft Inc. ("Lyft") agreed to pay $10 million to settle SEC charges that the company failed to disclose a director's role in facilitating a significant shareholder's sale of approximately $424 million in Lyft shares ahead of the company's IPO.[108] The SEC found that the Lyft director arranged for the shareholder to sell shares to a special purpose vehicle that was organized by an investment adviser with which the director was affiliated. Lyft reviewed and approved the sale and secured a number of terms in the transaction, which—according to the SEC order—rendered Lyft a "participant" in the transaction and therefore required the company to make related party transaction disclosures. However, the director did not disclose to Lyft that he received "millions of dollars in compensation" from the adviser for his role structuring the transaction. As a result, the SEC found that Lyft failed to disclose in its 2019 Form 10-K "that a director profited from a transaction in which Lyft itself was a participant," as required by Item 404(a) of Regulation S-K.

In addition to paying a $10 million civil penalty, Lyft agreed to a cease-and-desist order without admitting or denying the SEC's finding that the company violated its reporting obligations under Exchange Act Section 13(a) and Rule 13a-1. According to news reports, the seller in the transaction at issue was Carl Icahn, the buyer was George Soros and the Lyft director was Jonathan Christodoro, who had previously worked for Icahn. None of the individuals were charged with wrongdoing, and—accordingly—they were not named in the SEC order.

Cooperating Smart Window Manufacturer Settles Disclosure Charges without Civil Penalty

On July 3, 2023, the SEC announced settled charges against View Inc. ("View"), a California-based smart window manufacturer, for failing to properly account for and disclose approximately $28 million of projected warranty-related liabilities, consisting primarily of costs that the company agreed to pay for shipping and installing replacement windows. Notably, the SEC did not impose a civil penalty against View, noting in its press release that the company self-reported the misconduct, promptly undertook remedial measures and cooperated with the SEC's investigation. At the same time, however, the Commission also filed a complaint against View's former CFO for failing to ensure that the warranty-related liabilities were properly disclosed.[109] The SEC's settlement with View highlights the possible benefits of a proactive and cooperative posture in dealings with the SEC, while the case against the company's former CFO shows that the government remains committed to holding individuals accountable for misconduct.

According to the SEC's order, View discovered a defect in the sealing component manufactured by a third-party supplier for some of its windows in 2019. The company's standard warranty required it to replace any windows that had failed due to this defect, but the warranty did not require the company to pay for the cost of installing or shipping the replacement windows.[110] Notwithstanding the requirements of its standard warranty, View's management decided to incur the costs of installing and shipping the replacement windows because the company was "trying to build market share and wanted to satisfy its customers."[111] However, in several periodic reports, proxy statements and registration statements that View filed with the SEC between 2020 and 2021, the company only accounted for and disclosed its projected warranty costs associated with manufacturing the replacement windows; the company did not recognize or disclose its projected costs of installing and shipping the replacement windows. According to the SEC's order, View should have accounted for and disclosed these installation and shipping costs under generally accepted accounting principles because they were "probable and reasonably estimable."[112] The order also found that throughout the period in question, View had insufficient accounting controls and disclosure controls and procedures.

Significantly, the SEC decided not to impose a civil penalty against View based on the company's self-reporting, remedial steps and cooperation with the SEC. In August 2021, View reported to the SEC that its audit committee was "conducting an investigation into the adequacy of the company's previously disclosed warranty liability."[113] Later that year, View stated in a Form 8-K that its audit committee concluded that the previously reported liabilities were materially misstated because they excluded certain costs that View decided to incur when replacing defective windows. Subsequently, in 2022, View disclosed its restated warranty liability figures in a Form 8-K and its Form 10-K.[114] The SEC also acknowledged several acts undertaken by View, including providing the Commission with "detailed financial analyses from an outside consulting firm," "identifying key documents and witnesses that [the SEC] had not yet identified," and "making witnesses available quickly, including coordinating with one traveling overseas[.]"[115] Finally, the SEC gave credit to the company for its remedial measures, including the implementation of new controls, hiring a new CFO and other senior accounting staff and implementing enhanced training for relevant staff.[116]

Overall, View's proactive efforts and willingness to cooperate with the SEC and remediate through a targeted approach proved valuable for the company. However, the SEC continues to pursue charges against the company's former CFO, Vidul Prakash. In its complaint filed in the Northern District of California, the SEC alleged that Prakash approved the liability amounts that the company accrued for and disclosed even though the amounts excluded shipping and installation costs that he knew the company would incur.[117] The SEC alleged that Prakash violated Section 17(a)(3) of the Securities Act, Section 14(a) of the Exchange Act and Rules 14(a)-9 and 13b2-1 thereunder. The SEC is also seeking civil penalties and an officer and director ban against Prakash.

GTT Communications Escapes Fine for Misleading Disclosures after Substantial Cooperation with the SEC

On September 25, 2023, the SEC charged GTT Communications ("GTT") with making materially misleading statements and omissions in the company's 2019–2020 filings.[118] In 2017 and 2018, GTT completed eight acquisitions, significantly increasing the size of the company as well as its total revenues and expenses.[119] The SEC found that after this period of acquisitions, GTT struggled to integrate the newly acquired companies into its systems, and a large discrepancy developed between the company's actual cost of revenue recorded in its bill processing system and the expected cost of revenue recorded in its client management database.[120] According to the SEC, GTT was aware of this discrepancy yet failed to resolve which data source was accurate and should be used to report the company's cost of revenue. As a result, the SEC found that GTT failed to implement sufficient policies and procedures to ensure that the company's reported cost of revenue was accurate and based on reasonable support.[121] The SEC also found that GTT's annual and quarterly filings from September 2019 to March 2020 excluded certain material facts regarding "certain unsupported and highly uncertain" adjustments to its cost of revenue figures, rendering its disclosures related to cost of revenue misleading.[122]

The SEC charged GTT with violating Sections 17(a)(2) and (3) of the Securities Act; Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, 13a-11, 13a-13 and 13a-15(a) thereunder.[123] Following what the Commission described as "substantial cooperation," GTT settled the matter with the SEC and received no monetary penalty.[124] The SEC acknowledged that GTT promptly reported the violations, gave multiple presentations covering its internal investigation findings and identified key documents and witnesses for the government.[125] GTT was also recognized for its significant remedial actions, including rebuilding its cost of revenues accounts, management and board changes and hiring a new auditor.[126]

SEC Settles Charges against Stanley Black & Decker and Former Executive for Failures in Executive Perks Disclosure

On June 20, 2023, the SEC settled charges against Stanley Black & Decker Inc. ("SBD"), a publicly traded tools company, for failing to disclose perquisites it provided to certain executives.[127] At the same time, Jeffery D. Ansell, a former SBD executive, agreed to settle charges that he caused SBD to violate federal securities laws related to proxy solicitation and books and records-keeping.[128] Similar to View and GTT, SBD was able to avoid a monetary penalty through self-reporting and cooperation, which was highlighted by Gurbir S. Grewal, Director of the SEC's Division of Enforcement, in a statement about the settlement.

Stanley Black & Decker Inc.

According to the SEC's order against SBD, the company failed to disclose at least $1.3 million worth of perquisites and personal benefits paid to, or on behalf of, four of its executive officers and one of its directors between 2017 and 2020, the bulk of which consisted of expenses from the executives' use of corporate aircraft.[129] The SEC claimed that SBD failed to appropriately apply compensation disclosure rules to its system for identifying, tracking and calculating perquisites.[130]

The order did not impose any civil penalty against the company, which self-reported the disclosure failures, cooperated with the SEC's investigation and implemented remedial measures.[131] After learning of potential misconduct, SBD promptly hired outside counsel to conduct an internal investigation under the direction and oversight of a Special Committee of independent directors. SBD later reported the investigation's findings to the SEC.[132] SBD additionally cooperated with the SEC's investigation by providing compilations of relevant documents, information and data.[133] Finally, SBD implemented remedial measures designed to ensure compliance in the future, while making disclosures concerning the previously undisclosed expenses in their next Form 10-K.[134]

SBD consented, without admitting to or denying the SEC's findings, to an order requiring it to cease and desist from violations of reporting and proxy solicitation provisions of the Exchange Act.[135]

Ansell

The SEC alleged that in definitive proxy statements disclosing executive compensation earned for 2017–2020, SBD disclosed an annual average of approximately $167,000 in "All Other Compensation" for Ansell, failing to disclose a total of over $647,000 worth of perquisites and personal benefits, thereby understating the "All Other Compensation" portion of his compensation.[136] In connection with the preparation of its definitive proxy statements, SBD required Ansell to complete questionnaires, which included requests for information regarding perquisites. In his responses, Ansell did not identify approximately $280,000 in personal expenses that he charged to SBD, including, but not limited to, chauffer services, other travel items, meals, apparel and car repair services. As a result of his conduct, Ansell allegedly caused SBD to violate Sections 13(b)(2)(A) and 14(a) of the Exchange Act and Rule 14a-3 thereunder.

Ansell consented to an order without admitting to or denying the SEC's findings, requiring him to cease and desist from violations of proxy solicitation and books and records provisions of the Exchange Act and to pay a $75,000 civil penalty.[137]

Court Rules against Company for Describing Lawsuit as "Without Merit"

Companies commonly describe lawsuits against them as being "without merit," but a recent ruling in *City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc.* may bring this practice to an end.[138] Pegasystems Inc. ("Pega"), a software developer, was accused in a putative class action of misleading investors by, among other things, describing a lawsuit filed against Pega by competitor Appian Corporation ("Appian") as being "without merit" when Pega executives allegedly knew that the Appian suit, in fact, had legs.[139]

The Appian Suit

The Appian suit involved accusations that Pega engaged in acts of corporate espionage against Appian to discover flaws or weaknesses in Appian's software.[140] Specifically, the Appian suit alleged, and a unanimous jury ultimately found,[141] that Pega, with the knowledge and involvement of its senior executives, engaged in two separate multiyear campaigns of espionage with the goal of misappropriating Appian's trade secrets.[142] In the first of these campaigns, which lasted from 2012 to 2014 and was codenamed "Project Crush," Pega hired an outside contractor with access to Appian's software to provide them with trade secrets and confidential information at the direction of Pega executives, including CEO Alan Trefler.[143] The second campaign, codenamed "Teardown," lasted from 2019 until 2022 and was again led by Trefler and other Pega executives.[144] This campaign involved Pega's own employees posing as business owners and improperly seeking trials of Appian's software in order to locate weaknesses.[145] Throughout both campaigns, Pega employees referred to the individuals conducting the alleged espionage as "sp[ies]"[146] and Pega executives ignored internal questions about the campaigns' legality.[147]

In 2020, two former Pega employees revealed the espionage to Appian, leading Appian to file its lawsuit in May 2020. Pega did not disclose the lawsuit until its annual report on Form 10-K for the 2021 fiscal year filed February 16, 2022,[148] shortly after Appian revised its damages claim to approximately $3 billion, multiple times Pega's annual revenue.[149] In the 10-K, Pega and Trefler, as a signatory to the 10-K, described the lawsuit as "without merit."[150] Following this disclosure, Pega's stock price dropped by nearly 16%.[151]

In May 2022, the Appian suit went to trial, and the jury returned a unanimous verdict in Appian's favor, awarding over $2 billion in damages and concluding that Pega had "willfully and maliciously misappropriated Appian's trade secrets."[152]

The Fort Lauderdale Suit

Ten days after the Appian jury reached its verdict, the City of Fort Lauderdale Police and Firefighters' Retirement System ("Fort Lauderdale") filed suit individually and on behalf of others similarly situated alleging, among other things, securities fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Fort Lauderdale alleged that Pega's assurances that Appian's claims were "without merit" were false and misleading, and thus created liability under Rule 10b-5, despite the fact that these assurances were both vague and commonplace. The suit further alleged that Pega and Trefler knew or were reckless in not knowing that the assurances posed a substantial risk of misleading investors.[153]

In its denial of Pega's motion to dismiss the Fort Lauderdale suit, the court found that the statement that Appian's claims were "without merit" was an actionable false and misleading opinion statement since the statement "did not 'fairly align' with [Trefler's] awareness of, involvement in, and direction of Pega's espionage campaign."[154] The court also found that the facts supported a strong inference of scienter on the part of Trefler and Pega since Trefler himself was actively involved in the espionage.[155]

Addressing concerns that punishing an issuer for describing a lawsuit as "without merit" would force issuers to confess to any wrongdoing when faced with a lawsuit, the court explained that "an issuer may validly assert its intention to oppose the lawsuit" or "state that it has 'substantial defenses' against it" even if the issuer believes the allegations to be true, but companies may not make misleading declarations about the merits of the litigation.[156]

SEC Settles Five Actions in Sweep of Rule 12b-25 Disclosure Violations

On August 22, 2023, the SEC settled a sweep of enforcement actions against five companies for violating Exchange Act Rule 12b-25, which requires public companies to file a notification with the SEC on Form 12b-25 (also known as "Form NT") if they determine that they will be unable to file their Form 10-K or Form 10-Q by the prescribed deadline.[157] The SEC found that each of the five companies violated Rule 12b-25 by failing to disclose on Form NT that their delayed filing was caused by an anticipated restatement or correction of prior financial reporting.[158] In April 2021, the SEC brought a similar enforcement sweep against eight public companies.

Rule 12b-25 requires companies to disclose on Form NT "in reasonable detail" the reasons that they are unable to file their Form 10-K or Form 10-Q within the prescribed time period.[159] Issuers are also required to confirm on Form NT whether they anticipate reporting any significant change in results of operations from the corresponding period for the prior fiscal year when they do file the delayed Form 10-K or Form 10-Q.[160] If such a significant change is expected, companies must include a narrative and quantitative explanation of the anticipated change and, if appropriate, state the reasons why a reasonable estimate of the results cannot be made.[161]

In connection with the recent enforcement sweep, the SEC found that each of the five companies announced restatements or corrections to financial reporting within three weeks after their Form NT filings, but had failed to disclose that anticipated restatements or corrections were among the reasons for their delay. Instead, each company's Form NT generically stated that the company could not meet its filing deadline because it required additional time to prepare, compile and/or review the information to be included in the filing. The SEC also found that each of the five companies failed to disclose on their Form NT that management anticipated significant changes in results of operations.[162]

Each of the five companies agreed to pay a civil penalty: three of the companies agreed to pay a penalty of $35,000 each, while the remaining two companies agreed to pay a penalty of $60,000 each. The SEC's April 2021 enforcement sweep was settled for similar penalties of $25,000 and $50,000.[163]

Developments to Watch

New Cybersecurity Disclosure Rules and Their Implications for Insider Trading

On July 26, 2023, the SEC adopted long-anticipated final rules on cybersecurity risk management, strategy, governance and incident disclosure for issuers (the "Cybersecurity Rules"). The Cybersecurity Rules significantly change the status quo and introduce three new types of disclosure requirements relating to: (1) material cybersecurity incidents, (2) cybersecurity risk management processes and (3) cybersecurity oversight and governance. For additional information on the Final Rules, please see our Debevoise Update here and Debevoise In Depth here.

No Explicit Ban on Insider Trading During Materiality Determination Period

Despite suggestions by some commenters, the SEC declined to adopt a specific ban on trading by insiders during the time between a materiality determination and disclosure.[164] The SEC reiterates that individuals with a fiduciary duty or other relationship of trust and confidence with the company are already prohibited from trading while in possession of material, non-public information.[165] Furthermore, given the limited time period—four business days—to disclose a material cybersecurity incident on a Form 8-K, the SEC views the risk of insider trading to be low.[166] The SEC also noted that they recently adopted amendments to Rule 10b5-1 under the Exchange Act that added a "no-MNPI" certification for directors and officers wishing to avail themselves of the rule's affirmative defense. For more information about the amendments to Rule 10b5-1 under the Exchange Act and new disclosure requirements relating to trading activity of corporate insiders and trading policies of issuers, please see our Debevoise Update here. Given the timing of the incident disclosure requirement, the recently adopted amendments to Rule 10b5-1, and existing guidance relating to cybersecurity incidents and insider trading, the SEC did not believe it was necessary to adopt a new rule banning trading by insiders during the time period between the materiality determination and disclosure.[167]

Expansion of 2011 Staff Guidance and 2018 Interpretive Guidance

In connection with adopting its new Cybersecurity Rules, the SEC also reaffirmed the guidance issued by the Division of Corporation Finance in 2011 (the "2011 Staff Guidance") and the interpretive guidance issued by the SEC in 2018 (the "2018 Interpretive Guidance"). The 2011 Staff Guidance directed public companies to consider the materiality of cybersecurity risks and incidents when preparing public disclosures, when complying with periodic and current reporting requirements and in connection with securities offerings. The 2018 Interpretive Guidance expanded on the scope of the 2011 Staff Guidance by highlighting the importance of insider trading prohibitions and the need to refrain from making selective disclosures of cybersecurity risks or incidents.[168]

In particular, the 2018 Interpretive Guidance advised companies to consider whether it may be appropriate to implement restrictions on insider trading during the period following an incident and prior to disclosure.[169] It underscored the importance of policies and procedures to prevent directors, officers and other corporate insiders with material non-public information relating to cybersecurity matters from trading in breach of their duty of trust or confidence. The SEC noted that "information about a company's cybersecurity risks and incidents may be material non-public information, and directors, officers and other corporate insiders would violate the antifraud provisions if they trade the company's securities in breach of their duty of trust or confidence while in possession of that material non-public information."[170] The SEC also suggests that *during* the assessment and investigative stage of a cybersecurity incident—when information about, and the materiality of, the incident is uncertain—it is important to impose "prophylactic measures" to protect directors, officers and insiders from trading on the basis of information that is later determined to be material.[171] To do so, the SEC advised that companies should establish comprehensive policies and procedures that restrict trading on information related to cybersecurity risks or incidents. Specifically, companies should consider whether and when it may be appropriate to implement restrictions on insiders trading on their securities to "avoid the appearance of improper trading during the period following an incident and prior to the dissemination of disclosure."[172]

Takeaways

Although the new Cybersecurity Rules did not include an express ban on insider trading while companies investigate and assess the materiality of cybersecurity incidents, the SEC has nonetheless re-emphasized its prior advice that companies should avoid the appearance of improper trading during this period. As a result, adequate internal controls are not only necessary to identify when a potentially material cybersecurity incident has occurred but also to ensure directors, officers and other corporate insiders with material non-public information regarding the cybersecurity incident do not trade in the company's securities.

As such, companies should consider reviewing their insider trading and other policies as well as their cybersecurity incident response plans and disclosure controls and procedures to determine whether changes are appropriate. We recommend that companies review their cybersecurity incident response plans to ensure there is a process in place whereby individuals responsible for pre-approving trades or closing the trading window are promptly notified of the occurrence of a potentially material cybersecurity incident. Additionally, we recommend that companies create and maintain a list of persons with knowledge of the incident, and the date on which they learned of the incident (sometimes called a "tent list"), in order to protect insiders who may trade for reasons entirely unrelated to knowledge of the cybersecurity incident and before they became aware of it. Given the uncertain nature, scope and materiality of cybersecurity incidents in the hours, days and even weeks after initial detection, companies should consider imposing trading restrictions for persons with knowledge of the incident early in the process, until a comprehensive materiality assessment can be made.

Notes

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4 Petition for Writ of Certiorari, *Securities and Exchange Commission v. Jarkesy*, at 3-5 (No. 22-859) (Mar. 8, 2023).
5 Jarkesy, Securities Act Release No. 10834, Exchange Act Release No. 89775, Investment Advisers Act Release No. 5572, Investment Company Act Release No. 34003 (ALJ Sept. 4, 2020).
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7 Brief for the Respondent, *Securities and Exchange Commission v. Jarkesy*, at 8-9 (No. 22-859) (Oct. 11, 2023).
8 *Jarkesy v. Securities and Exchange Commission*, at 2, 4-18 (No. 20-61007) (5th Cir. 2022).
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22 *Id.* at 12:17, 49:54.
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24 *Id.* at 14:20.
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57 Both the DOJ and SEC anonymized the law firm's name, but media reports identified Gibson Dunn as counsel appearing in public filings concerning the relevant transactions. *See* Jessica Corso, *Ex-Gibson Dunn Visiting Atty Charged With Insider Trading*, Law360 (Aug. 23, 2023), https://www.law360.com/articles/1714473/ex-gibson-dunn-visiting-atty-charged-with-insider-trading.
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66 *See* SEC Complaint, *SEC v. Lewis*, 23-cv-06438 (S.D.N.Y. July 23, 2023), https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-138.pdf [hereinafter "Lewis Complaint"]; Indictment, United States v. Lewis, 1:23-cr-00370 (S.D.N.Y.), https://www.justice.gov/media/1307591/dl?inline [hereinafter "Lewis Indictment"].
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[115] *Id*. at ¶ 33.
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[130] *Id*.
[131] *Id*.
[132] *In re Stanley Black & Decker Inc.*, Release No. 97761 Securities Exchange Act of 1934 (June 20, 2023).
[133] *Id*.
[134] *See SBD Settlement Press Release*.
[135] *Id*.
[136] *In re Jeffrey D. Ansell*, Release No. 97760 Securities Exchange Act of 1934 (June 20, 2023).
[137] *See SBD Settlement Press Release*.
[138] *See City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc.*, No. 22-cv-11220-WGY, 2023 WL 4706741 (D. Mass. July 24, 2023).
[139] *Id.* at *1.
[140] *Id.* at *1.
[141] *Id.* at *4.
[142] *Id.* at *2.
[143] *Id.* at *2-3.
[144] *Id.* at *3.
[145] *Id*.
[146] *Id.* at *2-3.
[147] *Id*.
[148] *Id.* at *4.
[149] *Id.* at *8.
[150] *Id.* at *4.
[151] *Id.* at *4.
[152] *Id*.
[153] *Id.* at *1
[154] *Id.* at *10.
[155] *Id.* at *6-7.
[156] *Id.* at *10.
[157] SEC Press Release, *SEC Charges Five Companies for Failure to Disclose Complete Information On Form NT* (Aug. 22, 2023), https://www.sec.gov/enforce/34-98192-s.
[158] *Id.*
[159] *See In re Black Spade Acquisition Co.*, Exchange Act Rel. No. 98188, at ¶ 5 (Aug. 22, 2023), https://www.sec.gov/files/litigation/admin/2023/34-98188.pdf.
[160] *Id.*
[161] *Id.*
[162] SEC Admin. Proceeding, File No. 3-21574, *SEC Charges Five Companies for Failure to Disclose Complete Information On Form NT* (Aug. 22, 2023), https://www.sec.gov/enforce/34-98192-s.

[163] *Id.*
[164] Final Rule, at 41.
[165] *United States v. O'Hagan*, 521 U.S. 642 (1997).
[166] Final Rule, at 41.
[167] *Id*.
[168] *Commission Statement and Guidance on Public Company Cybersecurity Disclosures*, Release No. 33-10459 (Feb. 21, 2018) [2018 Interpretive Guidance], at 7.
[169] *Id*. at 21.
[170] *Id*.
[171] *Id*. at 22.
[172] *Id*.

Insider Trading & Disclosure Update is a publication of

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