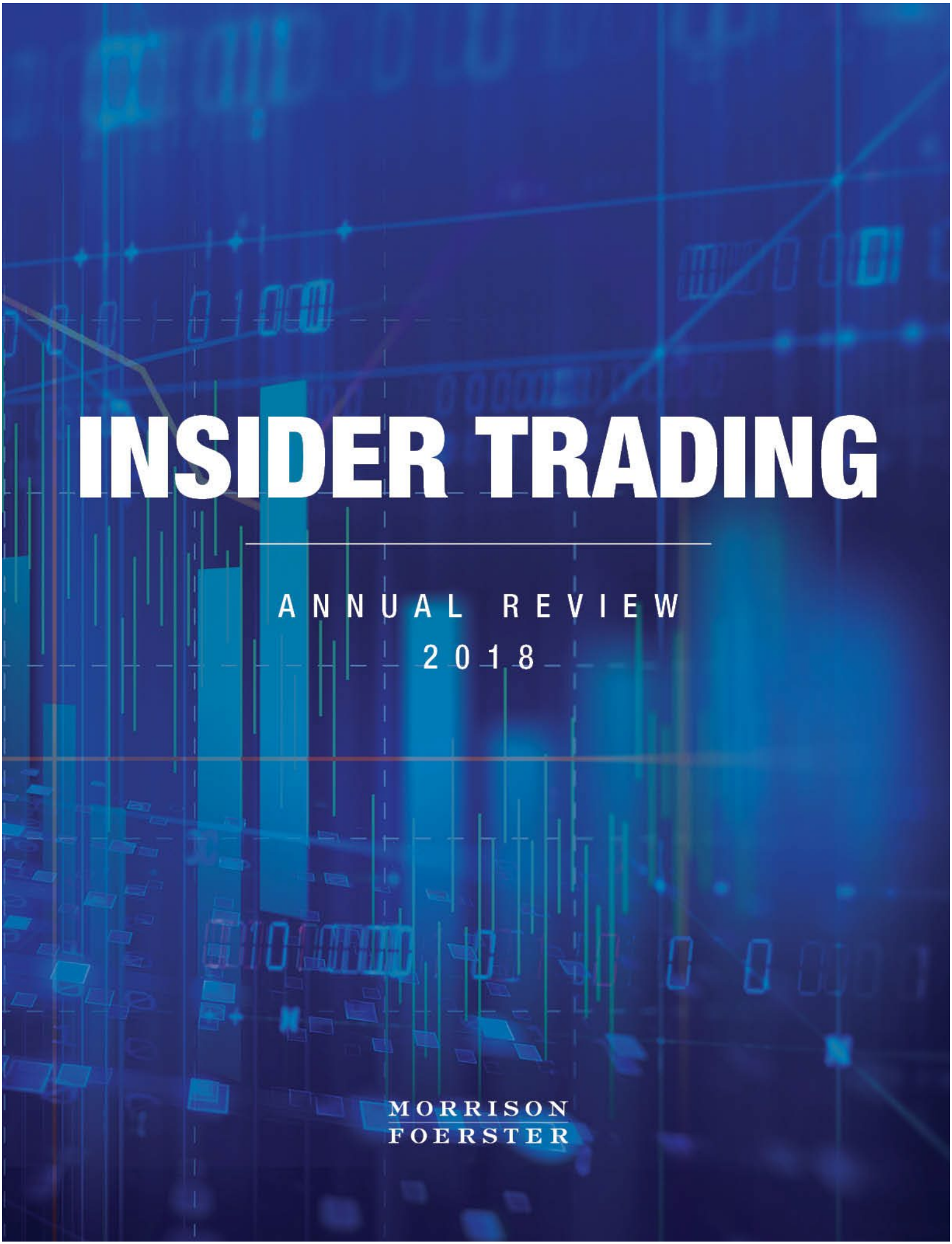

INSIDER TRADING

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INSIDE

LOOKING BACK

"The crime of insider trading is a straightforward concept that some courts have somehow managed to complicate." So lamented United States District Court Judge Jed Rakoff in December 2018. His unorthodox first sentence of a decision denying a motion to dismiss an insider trading indictment in fact understates the ambiguity and confusion that pervades the law of insider trading. Grappling with the uncertainties created by a line of cases following the U.S. Court of Appeals for the Second Circuit's controversial 2014 opinion in *United States v. Newman*, judges in the Second Circuit found themselves having to determine the criminal culpability of a defendant—as they did for Mathew Martoma—based in part on close consideration of what it means to be a friend. Perhaps because of this uncertainty—what former U.S. Attorney Preet Bharara referred to as "[t]he shoddy state of American insider-trading law"—the types of cases brought by the Department of Justice ("DOJ") in 2018 were relatively safe cases that did not test the outer limits of the puzzling state of insider trading law.

Civil insider trading cases in 2018 did not yield significant changes in the law. As has been the growing trend over the past few years, the Securities and Exchange Commission ("SEC") chose to bring the overwhelming proportion of its insider trading enforcement cases as either settled matters or actions filed in parallel with a criminal matter. Not surprisingly, the SEC's recent pursuit of fewer contested SEC-only cases led to fewer court opinions examining how the evolving law of insider trading applies in a civil enforcement action. If you are looking for an SEC insider trading trial in 2018, you will not find one—the SEC tried a grand total of zero insider trading cases in 2018. The lack of trials or of reported decisions involving the SEC does not, however, mean that the SEC is no longer enforcing laws against insider trading. Rather, the SEC's efforts largely manifest themselves in civil complaints alongside criminal indictments and in settled actions, as well as through investigations that lead to criminal referrals. The SEC's insider trading enforcement efforts in 2018 kept pace with its efforts in prior years.

For the past decade, our Insider Trading Annual Review has tracked sentencing trends in insider trading cases. In 2018, it was difficult to discern a pattern concerning the extent to which cooperators received significantly better treatment than did other convicted insider trading defendants. Until 2014, there was a clear pattern showing that cooperators in insider trading cases benefitted by receiving a sentence of probation or a far reduced prison sentence when compared to convicted defendants who had not cooperated. That calculus changed in 2014 when some defendants started to prevail against the DOJ and SEC in contested matters and the groundbreaking *Newman* decision led to the reversal of many prior government victories. In 2018, while the data is not as stark as in prior years, the earlier trend of significant credit for cooperation appears to be re-emerging.

OVERVIEW OF INSIDER TRADING LAW

"Insider trading" is an ambiguous and overinclusive term. Trading by insiders can be legal or illegal. The legal version occurs when certain corporate insiders, including officers, directors, and employees, buy or sell the stock of their own company without taking advantage of knowledge of material nonpublic information ("MNPI"). Illegal insider trading occurs when a person buys or sells a security while in possession of MNPI that was obtained in violation of a breach of fiduciary duty or similar duty of trust and confidence.

For as long as the crime has existed, it has been plagued by ambiguity. Insider trading is not expressly prohibited by the securities laws. Rather, the prohibition on trading on the basis of MNPI has been crafted by courts through interpretation of the antifraud provisions of the Securities Exchange Act of 1934, including Section 10(b) and Rule 10b-5, and the Securities Act of 1933, including Section 17(a). As a result of the piecemeal judicial crafting of the crime, the standards for determining what constitutes insider trading have not always evolved in a way that establishes bright-line tests.

Since insider trading was first recognized as a violation of the securities laws in 1961, two primary theories have emerged. Under the "classical theory" of insider trading, a corporate insider commits insider trading when he trades on MNPI obtained from his company, in violation of a fiduciary duty to the company and its shareholders to refrain from using corporate information for personal gain. Under the "misappropriation theory," a person who is not a corporate insider commits insider trading when she trades on MNPI that she has misappropriated from a party to whom she owes a fiduciary duty, such as the duty owed by a lawyer to a client.

Under either theory, the law imposes liability for insider trading on any person who obtains MNPI and then trades while in possession of such information in violation of a fiduciary duty or other duty of trust and confidence. Also under either theory, both the "tippers" and the "tippees"—that is, individuals sharing information and those with whom information is shared, respectively—may also be liable for insider trading under certain circumstances.

The circumstances under which tippees can be held liable for insider trading have narrowed and shifted over time. Until 2012, tippees could be liable for insider trading so long as they knew that the information on which they were trading had been obtained in breach of a duty. In 2012, a decision by the United States Court of Appeals for the Second Circuit in *SEC v. Obus* arguably expanded tipper/tippee liability—at least in SEC civil enforcement actions—to encompass cases where neither the tipper nor tippee had actual knowledge that the inside information was disclosed in breach of a duty. Rather, a tipper's liability could flow from recklessly disregarding the nature of the confidential or nonpublic information, and a tippee's liability could arise in cases where the sophisticated investor tippee should have known that the information was likely disclosed in violation of a duty of confidentiality.

The *Obus* holding was narrowed in 2014 by the Second Circuit's controversial opinion in *United States v. Newman*, a landmark case that resulted in numerous insider trading convictions being overturned. In *Newman*, the Second Circuit held that downstream tippees in insider trading cases brought under Section 10(b) and Rule 10b-5 could be convicted of insider trading only if (1) the tippee knew that the insider or misappropriator had received a personal benefit in exchange for his or her disclosure of the information, and (2) this personal benefit was "objective" and "consequential." To the extent that the government sought to establish a personal benefit to the tipper based on a relationship between the tipper and tippee, *Newman* held that such an inference can be made only in cases of "meaningfully close personal

relationship[s]." The *Newman* decision not only significantly narrowed the scope of tippee liability, but also left open questions, including what exactly would constitute a personal benefit to the insider or misappropriator.

The Supreme Court somewhat clarified this question in its narrow 2016 decision in *Salman v. United States*. *Salman* was a case of family insider trading, in which an investment banker shared MNPI with his brother, who in turn shared the information with the tipper's wife's brother, Salman, who then traded on the information knowing it had come from his brother-in-law. A jury in the Northern District of California found Salman guilty on all counts, and the Ninth Circuit affirmed. The Supreme Court granted certiorari to resolve the apparent tension between *Newman* and the Ninth Circuit's decision in *Salman* regarding the scope of the requirement that tippers receive some personal benefit in exchange for sharing confidential information. The Court upheld Salman's conviction, affirming the ruling in *Dirks v. SEC* that a gift of confidential information to a trading relative or friend is sufficient to establish a personal benefit to the tipper, and overturned *Newman* to the extent that *Newman* had required a tipper to receive something of a "pecuniary or similarly valuable nature" in the context of a gift of confidential information to trading relatives or friends. The Court reasoned, as it had in *Dirks*, that making a gift of confidential information to a friend or relative was essentially equivalent to the insider or misappropriator trading on the information himself and then making a gift of the profits.

While *Salman* provided some additional clarity regarding the liability of downstream tippees in certain contexts, it left intact the rule from *Newman* that a tippee must have knowledge of all of the elements comprising the tipper's breach of duty, i.e., the tippee must know that the tipper received some personal benefit in exchange for his tips. This requirement is likely to pose a barrier for the government in proving cases involving downstream tippees. *Salman* also left open many questions that courts and prosecutors are likely to continue to grapple with as they consider both what constitutes a personal benefit and what evidence supports a finding of the tippee's knowledge of that benefit.

The uncertainty created by the law is troubling particularly given the severe consequences of being found liable for insider trading. Individuals convicted of criminal insider trading can face up to 20 years imprisonment per violation, criminal forfeiture, and fines up to $5,000,000 or twice the gain from the offense. A successful action by the SEC may lead to disgorgement of profits and, in some cases, a similarly significant penalty of up to three times the amount of the profit gained or loss avoided. In addition, individuals can be barred from serving as an officer or director of a public company, acting as a securities broker or investment advisor, or in the case of licensed professionals, such as attorneys and accountants, from serving in their professional capacity before the SEC.

2018 DOJ ENFORCEMENT OVERVIEW

2018 saw the National Football League indefinitely suspend a player found guilty of insider trading,[1] while voters in New York re-elected Rep. Chris Collins to Congress despite his being under indictment for insider trading.[2] 2018 also saw the growing intersection between insider trading and the hot topic of cybersecurity. In one case, a former hedge fund manager and a securities trader were convicted of insider trading, among other charges, in connection with their roles in an international scheme to hack into three business newswires

[1] *See* Ken Belson, *N.F.L. Suspends Mychal Kendricks Indefinitely for Insider Trading*, N.Y. TIMES (Oct. 2, 2018), https://www.nytimes.com/2018/10/02/sports/mychal-kendricks-suspended-insider-trading.html.

[2] *See* Michael Burke, *GOP Rep. Chris Collins wins reelection in NY despite insider trading charges*, THE HILL (Nov. 6, 2018), https://thehill.com/homenews/campaign/414420-gop-rep-chris-collins-wins-reelection-in-ny-despite-insider-trading-charges.

and steal yet-to-be published press releases containing nonpublic financial information.[3] In another matter, regulators brought charges against former Equifax employees who were aware of the company's massive data breach and traded on that information before the breach was publicly announced.[4]

The year was also punctuated with mixed losses and wins for DOJ. In the month of December alone, the famous gambler William Walters had his conviction for insider trading affirmed by the U.S. Court of Appeals for the Second Circuit,[5] while prosecutors in the Southern District of New York asked the court to schedule the retrial of Sean Stewart, whose insider trading conviction had been overturned the prior month.[6]

But what 2018 will likely be remembered for is the continual confusion created by the courts in defining insider trading. Perhaps recognizing that the contours of the law remain amorphous, the government resorted to charging mostly fairly straightforward cases and to reviving its belt-and-suspenders strategy of charging insider trading cases under both Title 15 (securities fraud) and Title 18 (mail fraud, wire fraud, and securities fraud).

DOJ Focuses on Classical Insider Trading and Misappropriation

DOJ continued to actively pursue insider trading matters in 2018. But unlike cases brought in years past involving remote tippees, DOJ appeared to be fairly restrained in the conduct it chose to charge in 2018, primarily focusing directly on the misappropriator of, or the direct recipient of, the MNPI.

For example, in the case against Woojae Jung, the government alleged that Mr. Jung stole insider information "over and over again" from his investment bank employer.[7] Specifically, the government alleged that Mr. Jung violated his duty to his employer and used his position within the bank to obtain MNPI about a number of the bank's clients and then, using a co-conspirator's brokerage account, used the information to improperly trade.[8]

Another example is the case against Jun Ying, former Chief Information Officer ("CIO") of Equifax U.S. Information Solutions ("Equifax"). In his role as CIO, Ying became aware that Equifax had been the victim of a data breach. At that time, Equifax had not yet disclosed the breach to the public. The government alleged that, knowing of the breach, Mr. Ying conducted online research on the stock price impact for Experian, a company that had experienced a breach in 2015. Later that same day, Mr. Ying exercised all of his available stock options in Equifax and sold the resulting shares of common stock.[9]

Similarly, while the case against Rep. Chris Collins received a fair amount of attention given the notoriety of the defendant and the timing of the indictment in the midst of his campaign for reelection to Congress, the case itself is straightforward. The government alleged that Rep. Collins tipped off his son Cameron about a failed drug trial by the pharmaceutical company Innate Immunotherapeutics. At the time, Rep. Collins served on the company's board and is alleged to have been privy to the news of the

[3] Press Release, U.S. Dep't of Justice, Two Defendants Convicted on All Counts for International Computer Hacking and Securities Fraud Scheme (July 6, 2018), available at https://www.justice.gov/usao-edny/pr/two-defendants-convicted-all-counts-international-computer-hacking-and-securities-fraud.

[4] *See, e.g.*, Press Release, U.S. Dep't of Justice, Former Equinox Employee Indicted for Insider Trading (Mar. 14, 2018), available at https://www.justice.gov/usao-ndga/pr/former-equifax-employee-indicted-insider-trading.

[5] Letter for Plaintiff, *United States v. Walters*, No. 17-2373 (2d Cir. Dec. 4, 2018). Note that the crux of Walter's appeal was focused on government misconduct and not the substantive insider trading violation.

[6] *United States v. Stewart*, No. 15-cr-287 (LTS) (S.D.N.Y. Jan. 9, 2019), ECF No. 283.

[7] Press Release, U.S. Dep't of Justice, Investment Bank Vice President Arrested in Insider Trading Scheme (May 31, 2018), available at https://www.justice.gov/usao-sdny/pr/investment-bank-vice-president-arrested-insider-trading-scheme.

[8] *Id.*

[9] *See* Press Release, *supra* at n. 20.

clinical failure. Cameron is alleged to have sold his shares before news of the failed drug trial became public and the company's stock tumbled. The government charged both Rep. Collins and Cameron with insider trading.[10]

What these cases have in common is that they squarely fit within the traditional theories of classical insider trading and misappropriation. In charging these clear-cut cases, DOJ avoided testing new theories of the law by not having to contend with complicated questions of remote relationships between tipper/tippee or questions about the personal benefit to the tipper.

What It Means to Be a Friend

A key question left open by *Salman* was how to determine what kinds of relationships constitute a "friendship" such that a tip would constitute a "gift" of the information within the meaning of *Dirks* and *Salman*. This question came to the fore in the appeal of Mathew Martoma, a trader at SAC Capital Advisors who was convicted of insider trading in February 2014. The government alleged that Martoma received inside information from expert network firm consultant Dr. Sidney Gilman about disappointing clinical trial results for an Alzheimer's drug. After receiving this information from Gilman, Martoma reduced SAC Capital's long positions and established short positions that ultimately resulted in approximately $275 million in gains and losses avoided for SAC Capital.

a. *Martoma I*

After the Second Circuit's decision in *Newman*, Martoma appealed his conviction to the Second Circuit, arguing that there was insufficient evidence under *Newman* that Dr. Gilman had received any personal benefit in exchange for providing the inside information to Martoma, and that the jury had been improperly instructed on the requirement that Dr. Gilman receive a personal benefit in exchange for his tips.[11] According to Martoma, Gilman was only a casual acquaintance and had not been paid for the two consulting meetings at which he passed along the inside information, and the jury was not properly instructed that the government need to prove a "meaningfully close personal relationship" between him and Gilman under *Newman* in the absence of a pecuniary benefit.

After the Supreme Court's decision in *Salman*, the Second Circuit requested briefing on if and how *Salman* affected Martoma's appeal.[12] Martoma took the position that *Salman* held that the government need not prove a pecuniary benefit to the tipper only if there was a "meaningfully close personal relationship" between the tipper and tippee; in the absence of such a close relationship, *Newman*'s pecuniary benefit requirement remained.[13] Martoma contended that he and Dr. Gilman "were not even friends, let alone 'meaningfully close' ones" that would allow for a personal benefit to Gilman to be inferred from their relationship.[14] The government argued that *Salman* applied to any gift of information to a trading relative or friend without regard to the closeness of the relationship, noting that the Supreme Court "undertook no analysis of the depth of the relationship between the tipper and tippee."[15]

In August 2017, a divided panel of the Second Circuit affirmed Martoma's conviction, holding that *Salman* had abrogated *Newman*'s "meaningfully close personal relationship" requirement.[16] The panel stated that *Salman* does not "support[] a distinction between gifts to people with whom a tipper shares a

[10] *See United States v. Collins*, No. 18-cr-567 (VSB) (S.D.N.Y. Aug. 7, 2018).

[11] *See* Brief for Appellant, *United States v. Martoma*, No. 14-3599 (2d Cir. Feb. 2, 2015), ECF No. 70.
[12] Carmen Germaine, *2nd Circ. Asks How Salman Applies to SAC Trader's Case*, Law360, Dec. 12, 2016, https://www.law360.com/articles/871460/2nd-circ-asks-how-salman-applies-to-sac-trader-s-case.
[13] *See* Letter Brief for Appellant, *United States v. Martoma*, No. 14-3599 (2d Cir. Jan. 6, 2017), ECF No. 152.
[14] *Id.* at 7.
[15] *See* Letter Brief for Appellee at 6, *United States v. Martoma*, No. 14-3599 (2d Cir. Jan. 6, 2017), ECF No. 151.
[16] *United States v. Martoma*, 869 F.3d 58 (2d Cir. 2017) ("Martoma I").

'meaningfully close personal relationship' … and gifts to those with whom a tipper does not share such a relationship."[17] Rather, "the straightforward logic of the gift-giving analysis in *Dirks*, strongly reaffirmed in *Salman*, is that a corporate insider personally benefits whenever he discloses inside information as a gift with the expectation that the recipient would trade on the basis of such information or otherwise exploit it for his pecuniary gain."[18]

The panel then issued the broad holding that "an insider or tipper personally benefits from a disclosure of inside information whenever the information was disclosed with the expectation that the recipient would trade on it, and the disclosure resembles trading by the insider followed by a gift of the profits to the recipient, whether or not there was a meaningfully close personal relationship between the tipper and tippee."[19]

b. *Martoma II*

In June 2018, the Second Circuit vacated its prior decision in *Martoma I* and issued an amended decision[20] which walked back its sweeping holding about the impact of *Salman* on *Newman*'s "meaningfully close personal relationship" requirement. The panel noted that "because there are many ways to establish a personal benefit, we conclude that we need not decide whether *Newman*'s gloss on the gift theory is inconsistent with *Salman*,"[21] and instead upheld Martoma's conviction on the grounds that any errors in the jury instructions on the personal benefit requirement were harmless given the evidence that the relationship between Martoma and Dr. Gilman was of a *quid pro quo* character, with Dr. Gilman providing Martoma with inside information in exchange for lucrative consulting fees.[22]

In attempting to square *Newman* with *Salman*, the panel noted that "[i]mmediately after introducing the 'meaningfully close personal relationship' concept, *Newman* held that it requires evidence of a relationship between the insider and the recipient that suggests a quid pro quo from the latter, or an intention to benefit the latter."[23] Thus the panel ultimately read *Newman* as "cabin[ing] the gift theory using two *other* freestanding personal benefits"—a *quid pro quo* relationship between the tipper and tippee, or a tipper's intent to benefit the tippee by sharing the information.[24]

c. *Martoma II* Applied: Rajat Gupta

On January 7, 2019, the Second Circuit once again upheld the insider trading conviction of former Goldman Sachs director Rajat Gupta.[25] Gupta was initially convicted in 2012 for having tipped Galleon Group founder Raj Rajaratnam about Warren Buffett's plans to make a $5 billion investment in Goldman at the height of the 2008 financial crisis. Gupta first challenged his conviction on direct appeal in 2014, challenging the admission and exclusion of certain evidence, but the Second Circuit rejected these challenges and affirmed the conviction.[26] After *Newman*, Gupta joined numerous others—including Martoma and Rajaratnam—in challenging his conviction on the grounds that the jury had not been properly instructed on *Newman*'s personal benefit requirement, this time via a motion to vacate his conviction pursuant to 28 U.S.C. § 2255.[27]

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[17] *Id.* at 69.
[18] *Id. (*citation and internal quotation marks omitted).
[19] *Id.* at 70 (internal citations and quotation marks omitted).
[20] *United States v. Martoma*, 894 F.3d 64 (2d Cir. 2017), *as amended* June 25, 2018 ("*Martoma II*").
[21] *Id.* at 71.
[22] *Id.* at 78.
[23] *Id.* at 77 (citation and internal quotation marks omitted).
[24] *Id.*
[25] Summary Order, *Gupta v. United States,* No. 15-2707 (2d Cir. Jan 7, 2019), ECF No. 126 ("*Gupta III*").
[26] *United States v. Gupta*, 747 F.3d 111 (2d Cir. 2014) ("*Gupta I*").
[27] *United States v. Gupta*, 111 F. Supp. 3d 557 (S.D.N.Y. 2015) ("*Gupta II*"), *aff'd*, *Gupta v. United States*, No. 15-2707, 2019 U.S. App. LEXIS 364 (2d Cir. Jan 7, 2019), *withdrawn and substituted*, No. 15-2707, 2019 U.S. App. LEXIS 1005 (2d Cir. Jan. 11, 2019).

The District Court denied the motion on the grounds that Gupta had failed to challenge his jury instructions on the direct appeal, but also noted that the jury instructions in Gupta's trial were consistent with *Newman*.[28]

Gupta appealed, conceding that he had procedurally defaulted on his challenge to the trial court's jury instructions but arguing that the default should be excused, and once again challenging the jury instructions under *Newman*.[29] The challenged instruction had indicated that the jury must find that Gupta received some benefit in exchange for his tips to Rajaratnam, but stated that "the benefit does not need to be financial or tangible in nature. It could include, for example, maintaining a good relationship with a frequent business partner, or obtaining future financial benefits."[30] Gupta argued that this instruction was improper because it suggested that the relationship between him and Rajaratnam was alone sufficient to establish a personal benefit, while *Newman* required that a personal benefit must take the form of an exchange or *quid pro quo* involving some pecuniary gain.[31]

The Second Circuit concluded that there was no basis for excusing Gupta's procedural default, holding in relevant part that Gupta was not prejudiced by the jury instructions on the personal benefit issue. The Court held that the jury instructions were consonant with *Dirks*, noting that *Dirks* provides for various circumstances in which a tipper can be found to have personally benefited from his disclosure, including "a reputational benefit that will translate to future earnings," or "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient," both of which could reasonably be inferred from the "maintaining a good relationship with a frequent business partner" language in the jury instruction.[32]

While this alone was likely sufficient grounds on which to uphold the jury instructions, the Court then went on to note that *Dirks* makes clear that a personal benefit need not be pecuniary, since *Dirks* allows for a benefit to be inferred in the context of gifts of information to trading friends or relatives, and as further support cited to *Martoma II* for the proposition that a tipper's intent to benefit the tippee can also constitute a personal benefit.[33] The Court then cited to *Salman*, noting that it had overturned *Newman* to the extent that it required tippers to receive a pecuniary benefit in exchange for gifts to family or friends.[34]

The Court does not appear to be taking the position that Gupta and Rajaratnam were friends or that the tips were a gift to Rajaratnam within the meaning of *Dirks* and *Salman*. Nor does it appear to be suggesting that Gupta tipped Rajaratnam out of some general intent to benefit him, as indicated in *Martoma II*. It may be that the Court is attempting to establish some clarity on the interplay between the various cases addressing the personal benefit issue—connecting *Martoma II*'s "intent to benefit the tippee" formulation with the functional intent to make cash gifts of trading profits to friends or relatives as expressed in *Dirks* and *Salman*—and thereby moving away from the thorny territory of examining relationships and toward the more straightforward exercise of examining a tipper's intent. But given the central importance of relationships in *Dirks* and particularly *Salman*, as well as the continued viability of *Newman*'s "meaningfully close personal relationship" standard, such movement may not be feasible.

[28] *Id.* at 561.
[29] *Gupta III*, at 2-3.
[30] *Id.* at 3.
[31] *Id.*
[32] *Id.* at 5-6 (citing *Dirks v. SEC*, 463 U.S. 646, 663-64 (1983)).
[33] *Id.* at 6.
[34] *Id.*

d. Continued Uncertainty Post-*Martoma II*

Despite its apparent attempt to narrow the *Martoma I* holding, the panel's ruling in *Martoma II* is likely to have the effect of further muddying the waters as to when a personal benefit can be inferred from the relationship between a tipper and tippee. As noted by former prosecutor Brian A. Jacobs in a recent trenchant analysis, "[b]y upholding *Newman*, while at the same time holding that *Newman*'s 'meaningfully close personal relationship' test can be met by a showing of a tipper's 'intention to benefit' the tippee, *Martoma II* creates a problematic ambiguity" that courts, prosecutors, and defense counsel are all likely to have to grapple with.[35] These include how to deal with cases in which there is no "meaningfully close personal relationship" between tipper and tippee, but in which the tipper does appear to have intended to benefit the tippee, or, in the alternative, cases in which the tipper and tippee do share a "meaningfully close personal relationship," but the tipper had no apparent intent to benefit the tippee when sharing inside information. In the former case, *Martoma II* suggests that the tipper's intent to benefit the tippee is likely sufficient to establish a personal benefit to the tipper, but this is difficult to square with the "meaningfully close personal relationship" requirement in *Newman*, which remains good law. And in the latter case, *Martoma II* arguably holds that the relationship alone is insufficient in the absence of intent to benefit the tippee, but this appears contrary to the holdings of *Dirks* and *Salman*.

Adding more fuel to the ambiguity fire is the fact that the *Martoma II* panel also made multiple suggestions in dicta that any disclosure of inside information for a non-corporate purpose could support a finding of personal benefit to the tipper.[36] The uncertainty as to how the various cases on personal benefit interact came to the fore in the recent *Gupta III* decision, in which the Second Circuit attempted to knit together the holdings of *Dirks*, *Newman*, *Salman*, and *Martoma II*, but which may have raised more questions than it answered.

e. Judge Rakoff Strikes Again

At the end of 2018, in *United States v. Pinto-Thomaz*,[37] U.S. District Judge Jed Rakoff was given a second opportunity (having sat by designation in the Ninth Circuit's *Salman* case) to criticize what he sees as tenuous Second Circuit jurisprudence and to recalibrate insider trading law. In *Pinto-Thomaz*, the defendants, a credit rating analyst and his friend, moved to dismiss the insider trading charges against them on the theory that the indictment failed to allege that the two defendants shared a "meaningfully close personal relationship."[38]

In denying the motion to dismiss, Judge Rakoff wrote that insider trading is a "straightforward concept that some courts have managed to complicate."[39] According to Judge Rakoff, "insider trading is a variation of the species of fraud known as embezzlement," in which MNPI (the embezzled property) is taken and either used for the benefit of the embezzler or passed along to a third party who knows the MNPI was stolen but nonetheless trades on it.[40] This simplified formulation of an insider trading violation avoids the issue of having to evaluate whether the initial tipper (the embezzler)

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[35] Brian A. Jacobs, *How Institutional Dynamics Have Shaped Insider Trading Law*, 51 REV. SECS. & COMMODITIES REG. 247, 254 (Nov. 21, 2018).
[36] *See Martoma II*, at 73 ("The insider who personally benefits—i.e., whose purpose is to help himself—from disclosing confidential information therefore breaches that duty; the insider who discloses for a legitimate corporate purpose does not."); *id.* at 75 ("The tipper's intention to benefit the tippee proves a breach of fiduciary duty because it demonstrates that the tipper improperly used inside information for personal ends and thus lacked a legitimate corporate purpose."); *id.* at 79 ("We think a jury can often infer that a corporate insider receives a personal benefit (i.e., breaches his fiduciary duty) from deliberately disclosing valuable, confidential information without a corporate purpose....").
[37] *United States v. Pinto-Thomaz*, No. 18-cr-579 (JSR) (S.D.N.Y. 2018).
[38] *Id.*, ECF No. 75, at 3 (Dec. 6, 2018).
[39] *Id.* at 1.
[40] *Id.* at 1, 8-9.

received a "personal benefit" from the disclosure.

According to Judge Rakoff, insider trading liability should rest on the *purpose* for which the MNPI was used or disclosed. Surveying past law starting with *Dirks*, Judge Rakoff concludes that the Supreme Court did not intend to suggest that "'personal benefit' consisted of any particular kind of benefit, but only that it was a benefit grounded in using company information for personal advantage, as opposed to a corporate or otherwise permissible purpose (such as whistleblowing). . . . [W]hile the use of the term of 'personal purpose' or 'personal advantage,' rather than 'personal benefit', could perhaps have averted subsequent confusion, *Dirks* was quite clear as to the wide breadth of its understanding of a personal benefit." [41]

Judge Rakoff's focus on purpose is not a novel theory. The government suggested such a test in its briefing in *Salman*, but the Supreme Court did not engage, instead issuing the narrow ruling discussed above. Dicta in *Martoma II*, discussed above, similarly suggested that the relevant inquiry may be whether the tipper disclosed inside information for a non-corporate purpose. With Judge Rakoff's opinion being issued only in December 2018 and at a preliminary stage in the case, it remains to be seen how the *Pinto-Thomaz* case will proceed and whether Judge Rakoff's opinion will have any precedential impact in (re)defining the contours of insider trading law.

The uncertainties created by the post-*Newman* line of cases about what constitutes a personal benefit to a tipper sufficient to prove the required breach of duty under Section 10(b), and the difficulties such ambiguities are likely to pose for prosecutors, defense counsel, and market participants, highlight the shortcomings of the judicial crafting of the crime of insider trading, as well as the need for legislative correction. The law in its current state leaves considerable room for doubt among market participants as to whether their trading on information received from others may violate the law, renders prosecutors uncertain as to how to build and prove insider trading cases involving tipping, and impairs the ability of defense counsel to advise their clients on the strength of the government's case against them.

While defendants have not yet succeeded in overturning securities fraud convictions on the basis that the statute is void for vagueness,[42] the accumulating arcana of insider trading law may at some point lead the Second Circuit or, more likely, the Supreme Court to agree with Judge Rakoff and rule that enough is enough—that criminal liability for insider trading should not hinge on court-made definitions of personal benefits and degrees of friendship that appear nowhere in the statute. It should be a warning sign about the fairness of employing Section 10(b) and Rule 10b-5 in criminal cases that successive panels of the Second Circuit continue to struggle to define the offense. It should have been a further warning sign when the briefings in *Martoma I* engaged in extensive discussion about whether Martoma was really a "friend" of the tipper, Dr. Gilman, given the complicated circumstances of their business and personal relationship.[43] Should a person's liberty under a criminal law that prohibits manipulative and deceptive devices in securities trading hinge on the amorphous concept of what it means to be a friend?

[41] *Id.* at 8-9.

[42] *See, e.g.*, Brief for Petitioner at 41, *Salman v. United States*, No. 15-628, (U.S. May 6, 2016) (arguing that *Dirks* gift-giving standard for assessing personal benefit is unconstitutionally vague as applied); *Salman*, 137 S. Ct. at 428 (rejecting vagueness challenge); Memorandum in Support of Motion to Dismiss, *United States v. McGee*, No. 12-cr-236 (TJS) (E.D. Pa. June 15, 2012), ECF No. 15 (arguing that Rule 10b5-2 is void for vagueness); *United States v. McGee*, 892 F. Supp. 2d 726 (E.D. Pa. 2012) (rejecting vagueness challenge).

[43] *See* Letter Brief for Appellee at 5-6, *United States v. Martoma*, No. 14-3599 (S.D.N.Y. Jan. 6, 2017), ECF No. 151; *Id.*, Letter Brief for Appellant at 2 (S.D.N.Y. Jan. 6, 2017), ECF No. 152.

Back to Basics: The Return of Mail and Wire Fraud?

Aside from the unfairness to defendants, the fuzzy mosaic resulting from the *Newman-Salman-Martoma* line of cases creates a massive challenge for district court judges attempting to fashion charges to the jury that will be at all comprehensible. If appellate judges struggled to understand this doctrine, how is a judge supposed to explain it to jurors? And what is the likelihood that jurors can apply this baffling line of cases in any meaningful way? In the 2018 insider trading trial in *United States v. Blaszczak* in the Southern District of New York, U.S. District Judge Lewis Kaplan's charge to the jury on the elements of the Section 10(b) securities fraud offense ran to 20 transcript pages and presented the jury with 10 specific questions.[44] By contrast, the Title 18 securities fraud[45] charge took up only four pages of the transcript. Given the complexity of the respective charges, perhaps not unexpectedly, the defendants in *Blaszczak* were found guilty of the Title 18 violations but were acquitted of the charges related to the very same transactions brought under Title 15.

In our *2014 Insider Trading Annual Review*, we predicted that a possible response to the Second Circuit's decision in *Newman* might be for federal prosecutors to resume reliance on the mail fraud and wire fraud statutes under Title 18 in insider trading cases. Likely pushed by the further uncertainty for claims brought under Title 15 resulting from the decisions in *Newman* and *Martoma*, four years later, in *Blaszczak*, we saw the return of an insider trading conviction for fraud under Title 18. The indictment in *Blaszczak* demonstrated the government's confidence in charging downstream tippees under Title 15 offenses even in light of *Newman*. Specifically, the government seemed unfazed about indicting two analysts who—at least from the face of the indictment—seemed to have little knowledge of any personal benefit to the tipper or the insider. Just in case, the prosecutors also charged the parallel Title 18 offenses. This move proved to be what ultimately saved the government's case.

During the height of insider trading enforcement in the late 1980s, the U.S. Attorney's Office for the Southern District of New York typically charged defendants under the mail and wire fraud statutes as well as under Section 10(b), in part because of uncertainties at the time about the viability of the misappropriation theory of insider trading. The misappropriation theory did not become settled law until the Supreme Court's 1997 decision in *United States v. O'Hagan*.[46] Before *O'Hagan*, many understood the reach of the mail and wire fraud statutes to be broader than Section 10(b), provided the statutes' jurisdictional predicates had been met. For example, in *Carpenter v. United States*—a pre-*O'Hagan* misappropriation theory prosecution of a *Wall Street Journal* columnist tipper and two tippees who traded on advance knowledge of the content of his column—the Supreme Court split 4-4 on the Section 10(b) conviction, but affirmed the mail and wire fraud convictions by an 8-0 vote.[47]

In recent years, however, prosecutors seemed to abandon charging insider trading schemes as mail and wire frauds. The government primarily had been charging the insider trading (aside from the conspiracy counts) under Title 15, often without adding parallel mail or wire fraud counts under Title 18. That was true, for example, in the high-profile prosecutions against Rajaratnam, former Galleon Group trader Zvi Goffer, Gupta, SAC Capital portfolio manager Michael Steinberg, Newman, and Martoma.

Notably, in the recent cases, prosecutors frequently omitted mail and wire fraud counts even while alleging the jurisdictional predicate of the use of the U.S. Mail or interstate wires in

[44] *United States v. Blaszczak*, No. 17-cr-357 (LAK) (S.D.N.Y. Apr. 27, 2018).
[45] 18 U.S.C. § 1348.
[46] 521 U.S. 642 (1997).
[47] *Carpenter v. United States*, 484 U.S. 19 (1987).

the charging instrument. It was not clear why this trend developed, but a possibility could be from a perception that, with the misappropriation theory well established under Section 10(b), additional mail and wire fraud charges were simply duplicative and did not benefit the government's case. With the growing ambiguity in the jurisprudence requiring proof of a personal benefit for a violation under Title 15, however, the time seemed ripe for prosecutors to return to the argument that, even if misappropriation of confidential information in violation of a duty is not *fraudulent* absent a personal benefit to the party misappropriating the information, misappropriation in violation of a duty of confidentiality violates the Title 18 fraud statutes regardless of any personal benefit to the misappropriator.

The result in *Blaszczak* and the sheer difficulty in understanding and explaining tipper-tippee liability under Section 10(b) will likely induce prosecutors to charge insider trading not only under Section 10(b) (or not at all under Section 10(b)), but also as mail fraud, wire fraud, and securities fraud offenses under Title 18.[48] There is a well-established body of law construing the Title 18 fraud offenses. Only time will tell whether Congress will ever provide a clear definition of insider trading under Title 15, and, in the meantime, how prosecutors and lower courts will continue to attempt to cope with the current morass.

2018 SEC INSIDER TRADING CASES

As measured by cases filed, the SEC's focus on insider trading in 2018 kept pace with its efforts in prior years. The SEC reported that approximately 10% of the 490 "standalone" cases it filed in its Fiscal Year 2018[49] were insider trading cases, after 9% of the 446 standalone cases filed in Fiscal Year 2017 addressed alleged insider trading.[50] A look beyond the numbers, however, suggests that the SEC is unlikely to litigate many of these cases, as the overwhelming proportion of SEC insider trading cases filed throughout calendar year 2018 were either settled matters or actions filed parallel to criminal actions against the same defendants.

Among the consequences of the SEC bringing fewer contested SEC-only cases in recent years is that there are fewer court opinions examining how evolving insider trading law is applied to civil litigants and fewer trials testing allegations of insider trading against the less exacting "preponderance of the evidence" standard. Indeed, throughout the entire United States, there were exactly zero trials of SEC insider trading cases in 2018. Given the SEC's acknowledgement that resource constraints adversely affect its ability to pursue cases against individuals,[51] it is reasonable to question whether contested SEC insider trading cases will become increasingly rare, as such cases by their very nature are likely to be against individual defendants.

Perhaps further contributing to the dearth of contested SEC cases is the continued de facto unavailability of the SEC's in-house court system. What few contested "civil-only" insider trading cases the SEC pursued in 2018 were filed in federal court, rather than as administrative proceedings, though the SEC continues to utilize its in-house tribunal to file certain settled insider trading cases and follow-on proceedings seeking various bars for individuals already found liable in federal court for civil or criminal insider trading. This choice of venue is likely motivated by the uncertainty

[48] 18 U.S.C. §§ 1341, 1343, and 1348, respectively.
[49] The SEC Fiscal Year 2018 runs from October 1, 2017 through September 30, 2018. Our Year End Review does not follow the SEC's Fiscal Year and instead analyzes SEC cases on a calendar-basis from January to December 2018.

[50] *See* SEC Fiscal Year 2018 Report at 10, https://www.sec.gov/files/enforcement-annual-report-2018.pdf; SEC Fiscal Year 2017 Report at 15, https://www.sec.gov/files/enforcement-annual-report-2017.pdf.
[51] *See* SEC Fiscal Year 2018 Report at 14, *supra* at n.66 (noting reduced resources and explaining that "with more resources the SEC could focus more on individual accountability, as individuals are more likely to litigate and the ensuing litigation is resource intensive.").

surrounding the legitimacy of the SEC's in-house system—something the Supreme Court's decision in *Lucia v. SEC*[52] failed to fully resolve.[53] But whatever the reason for avoiding administrative proceedings, this approach has deprived the SEC of a forum that limits defendants' discovery rights and ordinarily proceeds to a trial within a year of when an action is filed.

Nevertheless, the lack of SEC-only contested insider trading cases should not be misinterpreted to mean a lack of enforcement activity. As criminal authorities routinely acknowledge, many of the insider trading cases they file originate from SEC investigations.[54] And the SEC did bring several contested cases, and many settled ones, on its own. The small number of civil-only non-settled SEC insider trading enforcement actions does not necessarily mean that the SEC has gotten soft on insider trading or that it is afraid to try cases. Rather, when the securities enforcement system works as it should, egregious violations should result in criminal charges, with or without parallel SEC actions, and the SEC should file standalone enforcement actions only when such actions have solid support in the evidence and the law. In such cases, reasonable, well-represented defendants will often try to settle the matter at the outset. That is, when the system is operating as it should, we would not expect to see a large number of contested standalone SEC trials of insider trading cases.

It is difficult to divine why the criminal authorities passed on, or have not yet announced, charging defendants in unsettled actions filed by the SEC. Some of these actions allege the kind of bread-and-butter misappropriation of company information or trading by an insider unlikely to present any substantial legal difficulties, but involved relatively small profits, potentially making them less attractive to criminal authorities. For example, in *SEC v. Long*, defendant Bryan Long allegedly made $35,842 by purchasing call options ahead of PayPal's announcement of an offer to acquire Zoom Corporation.[55] In *SEC v. Morano*,[56] defendant Robert Morano, an employee of global supply chain services company UTi Worldwide Inc., allegedly gained $38,242 by trading on MNPI he obtained through his employment at UTi concerning a pending acquisition of that company.[57]

In another matter, *SEC v. Fishoff*, [58] the SEC filed a civil action parallel to a related criminal case but apparently made different charging decisions from the criminal authorities. In *Fishoff*, the SEC sued several individuals allegedly involved in what it called "a serial insider trading scheme," including tipper Winsom Tang, who it alleged tipped another defendant "with the expectation of conferring a benefit on [him] and because of their close

[52] *Lucia v. SEC*, 138 S. Ct. 2044 (2018).
[53] *See* Michael Birnbaum, Jordan Eth, Joel Haims & Craig Martin, Lucia *Leaves Many Important Questions Unanswered*, Law360 (June 25, 2018), https://www.law360.com/articles/1056183.
[54] *See, e.g.*, Press Release, U.S. Dep't of Justice, Former Investment Banker Pleads Guilty to Insider Trading Scheme (Dec. 19, 2018), *available at* https://www.justice.gov/usao-sdny/pr/former-investment-bank-employee-pleads-guilty-insider-trading-scheme (thanking SEC while announcing settlement with Woojae Jung); Press Release, Department of Justice, Chinese National Charged with Insider Trading Scheme Conducted with Principal of Private Equity Fund (July 17, 2018), *available at* https://www.justice.gov/usao-sdny/pr/chinese-national-charged-insider-trading-scheme-conducted-principal-private-equity-fund (thanking SEC while announcing indictment of Michael Yin).
[55] *SEC v. Long*, No. 18-cv-05973 (EMC) (N.D. Cal. 2018).
[56] *SEC v. Morano*, No. 18-cv-00386 (HZ) (D. Or. 2018).
[57] Along with these contested cases, the SEC also settled matters involving similar amounts of alleged profits without any parallel, publicly announced criminal charges. *See, e.g.*, Final Judgment as to Defendant Yang Xie, *SEC v. Xie*, No. 18-cv-02779 (BRM) (LHG) (D.N.J. May 16, 2018), ECF No. 4 (disgorging alleged profits of $2,287 where employee traded on nonpublic information regarding a strategic transaction minutes after receiving an email warning recipient not to trade in relevant company's stock); *SEC v. Hengen*, No. 18-cv-03135 (WMW) (DTS) (D. Minn. Nov. 8, 2018) (disgorging alleged profits of $31,489 based on defendant's alleged misappropriation from his wife of MNPI about an acquisition involving his wife's employer).
[58] *SEC v. Fishoff*, 18-cv-07685 (ALC) (S.D.N.Y. Aug. 23, 2018), ECF No. 1, at 1, 15.

friendship." That tippee, in turn, allegedly tipped others who traded on the same information. While it is too early to tell what arguments defendants will offer in this case, it presents an opportunity to see how a Southern District of New York court deals with the difficult doctrines flowing from the *Newman*, *Salman*, *Martoma I* and *Martoma II* cases in the context of a civil action involving remote tippees.

The SEC's allegations in *SEC v. Carr*[59] also raise interesting issues. In that case, the SEC alleged that defendant Carr, CEO of Heartland Payment Systems, Inc., tipped "his romantic partner" Katherine Hanratty about the potential acquisition of Heartland by Global Payments, Inc.[60] Hanratty allegedly traded on that information for a profit of approximately $250,000 and has settled the SEC's case against her. Carr, however, has moved to dismiss, arguing that his sharing information with Hanratty was not actionable because any information he shared was intended simply to tell her about his day—as Carr argues, "in passing and amidst daily minutiae and romantic pleasantries"—and not with any expectation that she would trade on such information.[61] Carr invokes the *Martoma* line of cases in arguing that he cannot be liable for sharing information with his romantic partner because any such information was not shared with the intent to confer a benefit on her.

Finally, there are certain cases in which the SEC's ability to obtain particular relief provides the Commission with additional impetus to file suit. For example, the SEC's ability to obtain equitable relief against an individual makes that individual a logical plaintiff in cases where an asset freeze or other expedited relief might be necessary. The SEC obtained such relief, including an asset freeze, in *SEC v. One or More Unknown Traders in the Securities of Bioverativ, Inc.*,[62] where unknown traders allegedly placed trades yielding approximately $5 million in profits ahead of an announcement of Sanofi S.A.'s acquisition of Biovertiv, Inc. This followed several similar actions against unknown traders the SEC filed in previous years,[63] and may occur more frequently as the SEC's investigative tools enable it to more quickly identify questionable trades before the traders behind them move their profits beyond the SEC's reach.

The SEC's ability to obtain an order freezing assets might also explain its filing of a complaint in *SEC v. Gannamaneni*,[64] where no criminal case has been announced. In *Gannamaneni*, the SEC alleged that a software consultant for a prominent investment bank took advantage of his access to the bank's MNPI concerning at least 40 contemplated mergers, acquisitions, and other significant events. Gannamaneni allegedly traded on that information and shared it with his codefendants, his wife and father, both of whom did the same. The SEC alleged profits of $600,000 through the defendants' combined trades, and immediately moved for injunctive relief to freeze their assets.[65]

Finally, the SEC continues to sue parties not alleged to have violated any securities laws as relief defendants in order to recover their alleged ill-gotten gains. For example, in *SEC v. Chen*,[66] the SEC sued both Charlie Jinan Chen,

[59] *SEC v. Carr*, 18-cv-0115 (SRU) (D. Conn. 2018).
[60] For a thorough review of the overlap of romance and insider trading, see chapter 8 of INSIDER TRADING: LAW AND DEVELOPMENTS ("The Perils of Pillow Talk") (C. Loewenson & R. Smithline, eds., April 2017).
[61] Memorandum of Law in Support of Defendant Robert O. Carr's Motion to Dismiss the Complaint at 11, *SEC v. Carr*, No. 18-cv-01135 (SRU) (D. Conn. Oct. 10, 2018), ECF No. 27.
[62] *SEC v. One or More Unknown Traders in the Secs. of Bioverativ, Inc.*, No. 18-cv-00701 (JGK) (S.D.N.Y.).
[63] *See, e.g., SEC v. One or More Unknown Traders in the Secs. of Gen. Commc'n, Inc.*, No. 17-cv-02659-KPF (S.D.N.Y. 2017); *SEC v. One or More Unknown Traders in the Secs. of Fortress Inv. Grp., LLC*, No. 17-cv-01287 (CCC) (MF) (D.N.J. 2017).
[64] Complaint, *SEC v. Gannamaneni*, No. 18-cv-11390 (ALC) (S.D.N.Y. Dec. 6, 2018), ECF No. 1.
[65] *Id.*, Temporary Restraining Order Freezing Assets and Granting Other Relief and Order to Show Cause, (Dec. 6, 2018), ECF No. 3.
[66] Complaint, *SEC v. Chen*, No. 18-cv-10657 (DPW) (D. Mass. Apr. 5, 2018), ECF No. 1.

who was also charged criminally, and his wife, Shui Foon Mok. The SEC's lawsuit provides the ability to reach profits on trades Mr. Chen made using his wife's brokerage account. The SEC took the same approach in the unrelated case of *SEC v. Rong Chen*,[67] in which it sued Rong Chen alleging insider trading and named his wife as a relief defendant to reach profits transferred to their joint bank account.

ENFORCEMENT BEYOND DOJ AND SEC

a. CFTC

The Commodity Futures Trading Commission ("CFTC") reentered the insider trading arena in 2018, announcing on September 28, 2018 the creation of an "Insider Trading and Information Protection Task Force," which the CFTC described as "a coordinated effort across the Division [of Enforcement] to identify and charge those who engage in insider trading or otherwise improperly use confidential information in connection with markets regulated by the CFTC."[68]

On the same day the CFTC announced the creation of its Task Force, it filed *CFTC v. EOX Holdings, LLC and Andrew Gizienski*, its first insider trading case since 2016.[69] In *EOX Holdings*, the CFTC alleged that EOX broker Gizienski provided MNPI regarding EOX's customers to a friend with whom he wanted to curry favor. Gizienski then allegedly helped the friend execute trades in futures contracts based on the tipped information. The CFTC also charged EOX with a failure to diligently supervise its employees.

The CFTC's authority to pursue insider trading comes from Section 753 of the Dodd Frank Act, under which the CFTC promulgated Rule 180.1, prohibiting "trading on the basis of material, nonpublic information in breach of a pre-existing duty… or by trading on the basis of material nonpublic information that was obtained through fraud or deception." Unlike the SEC's Rule 10b-5, the scope of the CFTC's analogous rule has not been tested, though that may now change once a decision is reached on the *EOX Holdings* defendants' motion to dismiss the CFTC's complaint.[70] Indeed, as the CFTC did not file any additional insider trading cases in 2018 following the announcement of its Task Force, how the court treats the allegations in *EOX Holdings* may affect the kinds of insider trading cases the CFTC brings in the future.

b. FINRA

Many of the civil and criminal insider trading cases described above relied on information gathered by the Financial Industry Regulatory Authority ("FINRA"), as demonstrated by the number of insider trading matters identified on FINRA's list of "Actions Resulting from Referrals to Federal and State Authorities."[71] In addition to investigating possible insider trading, FINRA also seeks to enforce rules aimed at preventing and detecting insider trading at its member firms.

In 2018, FINRA brought at least three such actions. On March 9 and May 9, 2018, respectively, FINRA entered into agreements with Credit Suisse Securities (USA) LLC ("Credit Suisse") and Barclays Capital Inc. ("Barclays") for their failures to (i) accurately report options positions "in millions of instances" to the Large Options Positions Reporting ("LOPR") system, and (ii) establish, maintain, and enforce adequate supervisory procedures and controls designed to ensure the proper reporting of such positions and compliance with position limit requirements.[72]

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[67] Complaint, *SEC v. Rong Chen,* No. 18-cv-07840 (CAS) (JPR) (C.D. Cal. Sept. 10, 2018), ECF No. 1.
[68] Press Release, U.S. Commodity Futures Trading Commission, CFTC Charges Block Trade Broker with Insider Trading (Sept. 28, 2018), *available at* https://www.cftc.gov/PressRoom/PressReleases/7811-18.
[69] Complaint, *CFTC v. EOX Holdings, LLC and Andrew Gizienski*, No. 18-cv-08890 (S.D.N.Y. Sept. 28, 2018).
[70] *Id.*, Motion to Dismiss, (Dec. 3, 2018), ECF No. 23.
[71] *See* http://www.finra.org/newsroom/actions-resulting-referrals-federal-and-state-authorities.
[72] FINRA Letter of Acceptance, Waiver and Consent, No. 20140421675-01, RE: Credit Suisse Securities (USA) LLC, Respondent (Mar. 9, 2018); FINRA Letter of Acceptance,

As FINRA explained in its settlement with Barclays, "[t]he accuracy of LOPR data is essential for analysis of potential violations related to, among other things, insider trading, position limits, exercise limits, front-running, capping and pegging, mini-manipulation, and marking-the-close."[73] Barclays agreed to a $400,000 fine, and Credit Suisse, which self-reported its position limit violations, agreed to a $200,000 fine. Both companies also agreed to a censure and an undertaking to address their reporting and controls and procedures deficiencies.

On June 12, 2018, FINRA entered into a settlement with Northeast Securities, Inc., for violations of FINRA Rules 3010, 3110, and 2010.[74] FINRA found the company had failed to maintain reasonable written supervisory procedures concerning the review of registered representatives' email and outside brokerage accounts, and failed to supervise the review of such email and accounts. Northeast Securities agreed to a $50,000 fine, a censure, and undertakings to certify compliance with the FINRA rules it was found to have violated. In describing the undertakings, FINRA specified that Northeast Securities must certify that it completed a review of company records during the relevant period "to detect potential violations of the federal securities laws and FINRA rules, including those prohibiting insider trading and front-running."[75]

COOPERATION: DOES IT STILL PAY?

For DOJ Matters, Probably

As we have noted in prior *Annual Reviews*, an analysis of insider trading sentences handed down from 2010 through 2014 suggested that cooperation was often a significant factor in sentencing. Defendants who pleaded guilty and cooperated historically received no prison time or reduced sentences compared to defendants who entered guilty pleas without cooperating, even when the cooperators' recommended sentencing guidelines ranges were higher. Comparing those outcomes to trial outcomes and non-cooperating pleas yielded interesting insights as well. Although prosecutors secured convictions in the vast majority of trials, the prison sentences that followed trial varied from no prison time for one defendant to a maximum of 86% of the minimum guidelines sentence. Cooperators received an average sentence equal to approximately 11% of the minimum guidelines on average, as compared with 43% for settling non-cooperators and 45% for those who went to trial.

However, the gap in expected outcomes between cooperators and those who went to trial narrowed substantially in 2014, starting with the DOJ's loss in the Rengan Rajaratnam trial. This was followed by the Second Circuit's reversal of the Todd Newman and Anthony Chiasson convictions and the aftermath of that decision—including the vacating of prior sentences—for various prior and pending cases.

Although four tumultuous years have passed since the reversal in *Newman*, given the uncertainties in the insider trading law created by *Newman* and its progeny, it remains too soon to tell whether sentences post-*Newman* will continue to follow the patterns evident from 2010 through 2014.

For now, since 2015, sentences have generally been consistent with prior patterns. In 2015, in the eight cases involving cooperators, only two cooperating defendants received significant prison sentences (60 months) in spite of cooperation.[76] Two of the other cooperators received relatively light prison sentences (6

Waiver and Consent, No. 20130364720-01, RE: Barclays Capital Inc., Respondent (May 9, 2018).

[73] Barclays Letter of Acceptance, Waiver and Consent at 1-2.

[74] FINRA Letter of Acceptance, Waiver and Consent, No. 2014040769402, RE: Northeast Securities, Inc. (Jun. 12, 2018).

[75] *Id.* at 4.

[76] *United States v. Femenia*, No. 12-cr-00386 (W.D.N.C. 2012). Defendants John Femenia and Shawn Hegedus were both sentenced to 60 months imprisonment and 24 months of supervised release.

months and 21 days, respectively[77]), and the remaining four cooperators received no prison sentences.[78]

There were only three cooperator sentences in 2016, all of which resulted in the defendants being sentenced to probation with no imprisonment.[79] That same year, however, of the non-cooperating defendants, about half of them also received no prison time,[80] leaving open the question of whether the cooperators received any real benefit as compared to the non-cooperators.

In 2017, and also consistent with prior trends, almost all of the cooperators were sentenced to time served and/or probation.[81] These cooperators fared better than most non-cooperators. Of the six non-cooperators in 2017, five[82] received prison time and only one[83] received probation. The only counterexample for the favorable pattern for cooperators was *United States v. Davis*,[84] in which Judge P. Kevin Castel sentenced the defendant to 24 months imprisonment, despite prosecutors' request for leniency. *Davis* is an important reminder of the practical limits on prosecutors' ability to ensure that a defendant is rewarded for cooperation.

As reflected in Appendix A, there were only three cooperator sentences (out of twenty cases resolved by guilty pleas) in 2018.[85] Consistent with prior patterns, each of the cooperators was sentenced to time served and/or probation, whereas the non-cooperators tended to receive prison time. Out of the 17 non-cooperator defendants, twelve received prison time and five received time served and/or probation. Out of the 11 defendants who went to trial in 2018, all of them received substantial prison time.

From the limited data available from 2018, it appears that 2014 may have been an anomaly and that the pattern continues to be that defendants who plead guilty and cooperate tend to receive far more lenient sentences that non-cooperators. This pattern, however, cannot yet be confirmed as a firm trend given both the limited number of cases and the outliers that have arisen over the years.

For SEC Matters, Insufficient Activity to Meaningfully Analyze Trends

In SEC insider trading enforcement actions, the data does not provide a clear picture for a defendant facing the difficult calculus of whether to settle or fight an enforcement action. On the one hand, historically, settling typically involved paying a penalty equal to, and in addition to, the disgorgement amount. On the other hand, going to trial presented both a real chance of success with no liability, but also a real risk of a higher penalty. A predictable trend is not any more discernible in 2018.

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[77] *United States v. Post*, No. 1:14-cr-00715 (AKH) (S.D.N.Y. 2014); *United States v. Lee*, No. 1:09-cr-00972 (PKC) (S.D.N.Y. 2009).
[78] *United States v. Freeman*, No. 1:11-cr-00116 (JSR) (S.D.N.Y. 2011); *United States v. Hardin*, No. 1:10-cr-00399 (LTS) (S.D.N.Y. 2010); *United States v. Femenia*, No. 3:12-cr-00386 (KBF) (W.D.N.C. 2012) (Defendant Danielle C. Laurenti); *United States v. Johnso*n, No. 1:13-cr-00190 (VEC) (S.D.N.Y. 2013).
[79] *United States v. Barai*, No. 1:11-cr-00116 (JSR) (S.D.N.Y. 2011); *United States v. Melvin*, No. 3:14-cr-00022 (*TCB) (RGV) (N.D. Ga. 2014) (Defendant C. Roan Berry); United States v. O'Neill*, No. 1:14-cr-10317 (WGY) (D. Mass. 2014).
[80] *United States v. Melvin*, No. 3:14-cr-00022 (TCB) (RGV) (N.D. Ga. 2014) (Defendant Michael S. Cain); *United States v. Melvin*, No. 3:14-cr-00022 (TCB) (RGV) (N.D. Ga. 2014) (Defendant Thomas Melvin); *United States v. Cunniffe*, No. 1:15-cr-00287 (LTS) (S.D.N.Y. 2015) (Defendant Robert Stewart); *United States v. Cope*, No. 3:16-cr-00210 (AAT) (M.D. Tenn. 2016).
[81] *United States v. Cunniffe*, No. 1:15-cr-00287 (LTS) (S.D.N.Y. 2015) (Defendant Richard Cunniffe); *United States v. Maciocio*, No. 1:16-cr-00351 (LTS) (S.D.N.Y. 2016); *United States v. Pusey*, No. 1:16-cr-00369 (KPF) (S.D.N.Y. 2016).
[82] *United States v. McClatchey*, No. 1:16-cr-00369 (KPF) (S.D.N.Y. 2016); *United States v. Hobson*, No. 1:16-cr-00351 (LGS) (S.D.N.Y. 2016); *United States v. Ly*, No. 2:16-cr-00316 (JCC) (W.D. Wash. 2016); *United States v. Krishnamoorthy*, No. 1:17-mj-03002 (UA) (S.D.N.Y. 2017); *United States v. Kennedy*, No. 2:17-cr-00211 (RSM) (W.D. Wash. 2017).
[83] *United States v. Zeringue*, No. 3:14-cr-00067 (BAJ) (RLB) (M.D. La. 2014).
[84] *United States. v. Davis*, No. 16-cr-338 (PKC) (S.D.N.Y. 2016).
[85] *United States v. Basrai*, No. 17-cr-00634 (TMD) (N.D. Ill. 2017); *United States v. Little and Berke*, No. 17-cr-00450 (KPF) (S.D.N.Y. 2017); *United States v. Fogel*, No. 17-cr-00308 (LAK) (S.D.N.Y. 2017).

It is too early to make generalizations concerning SEC enforcement actions in the wake of *Newman, Salman*, and *Martoma*, but the very limited data since 2017 is consistent with the principle of benefiting cooperators. For example, in 2017, the SEC resolved three cooperator cases. Of those, two did not have to pay any penalties,[86] and the third paid a penalty less than the typical penalty equal to disgorgement. Out of 58 non-cooperator cases in 2017:

- 39 received both penalties and disgorgement;
- 17 were ordered to pay only disgorgement;
- 1 was ordered to pay only a penalty; and
- 1 has a stayed case pending resolution in the parallel criminal proceeding.

As shown in Appendix B, the SEC appears to have resolved one cooperator case in 2018, in which the defendant did not pay a civil penalty.[87] Out of 71 non-cooperators:

- 43 received both penalties and disgorgement;
- 14 were ordered to pay only disgorgement;
- 8 were ordered to pay only a penalty;
- 3 have stayed cases pending resolution in parallel criminal proceedings; and
- 3 received neither disgorgement nor penalty.

When it came to success at trials, the results were similarly inconsistent. The SEC received a mixed outcome at the 2017 trial in *SEC v. Melvin*.[88] The jury found one defendant, Peter Doffing, liable for insider trading and he was ordered to pay disgorgement and a penalty of twice the disgorgement amount. Meanwhile, his co-defendant Joel Links was found not liable.[89] In another 2017 trial, *SEC v. Sabrdaran*,[90] both defendants were found to have committed insider trading and ordered to pay disgorgement. The SEC also sought a monetary penalty against one defendant, but the Court declined to assess any additional monetary penalty against him because "the Court has already taken Dr. Sabrdaran's post-insider trading conduct into account in imposing the serious penalty of a permanent officer and director bar. No further penalty is necessary or warranted."[91] As these cases demonstrate, it is possible to beat the SEC at trial, and even in cases where the SEC prevails, penalties may be limited to disgorgement of trading profits.

In 2018, however, the SEC did not bring any insider trading cases to trial, thus making it impossible to draw any conclusions from this past year.

CONCLUSION

As Judge Rakoff, Preet Bharara, and many commentators have noted, United States insider trading law is, to use the technical legal term, a mess. With the Supreme Court limiting itself to narrow decisions, and the Second Circuit resisting taking cases en banc, prosecutors, defense lawyers, lower courts, jurors, and market participants will have to do their best to make sense of a baffling body of law. If trends in insider trading cases in 2018 continue, prosecutors will refrain from bringing cases against remote tippees, and the SEC will limit itself to solid, settled enforcement actions or actions parallel to criminal prosecutions.

[86] *SEC v. McClatchey*, No. 16-cv-4029 (VSB) (S.D.N.Y. 2016).
[87] *SEC v. Cunniffe*, No. 18-cv-06667 (AT) (S.D.N.Y. 2018).
[88] No. 12-cv-02984-CAP (N.D. Ga. 2012).
[89] *Id.*, Jury Verdict (Feb. 17, 2017), ECF Nos. 185-86.
[90] *SEC v. Sabrdaran*, No. 14-cv-4825 (JSC) (N.D. Cal. 2014). This case went to trial in 2016, but defendants were not sentenced until 2017.
[91] *SEC v. Sabrdaran*, 252 F. Supp. 3d 866, 906 (N.D. Cal. 2017).

APPENDICES

APPENDIX A: CRIMINAL PROSECUTIONS

Date	Defendant	Role[1]	Trial or Plea	Sentence
2/1/2018	Bilal Basrai (*U.S. v. Basrai*, N.D. Ill. 2017)	Misappropriator	Plea (Cooperator)	2 years of supervised release Guidelines Calculation: Offense level 10 (6 to 12 months): +8 base +4 gain -2 level reduction for acceptance of responsibility $100 assessment $20,000 fine
2/14/2018	Tibor Klein (*U.S. v. Klein and Schulman*, E.D.N.Y. 2016)	Tippee	Plea	6 months imprisonment and 1 year of supervised release Guidelines Calculation: Offense level 21 (37 to 46 months):[2] +8 base +12 gain +2 level enhancement for use of special skill +2 level enhancement for obstruction of justice $100 assessment $20,000 fine $37,225 forfeiture
2/26/2018	Walter C. Little (*U.S. v. Little and Berke*, S.D.N.Y. 2017)	Misappropriator/Tipper	Plea	27 months imprisonment and 3 years of supervised release Guidelines Calculation: Offense level 21 (37 to 46 months): +8 base +14 gain +2 level enhancement for abuse of trust -3 level reduction for acceptance of responsibility $100 assessment $452,998 forfeiture

Date	Defendant	Role[1]	Trial or Plea	Sentence
4/3/2018	Fei Yan (*U.S. v. Yan*, S.D.N.Y. 2017)	Misappropriator	Plea	15 months imprisonment and 2 years of supervised release Guidelines Calculation: Offense level 13 (12 to 18 months): +8 base +8 gain -3 level reduction for acceptance of responsibility $100 assessment $119,428.50 forfeiture
4/20/2018	Andrew M. Berke (*U.S. v. Little and Berke*, S.D.N.Y. 2017)	Tippee	Plea (Cooperator)	Time served and 3 years of supervised release Guidelines Calculation: Offense level 17 (24 to 30 months): +8 base +12 gain -3 level reduction for acceptance of responsibility $600 assessment $10,000 fine $249,850 forfeiture
5/16/2018	Steven Metro (*U.S. v. Metro*, D. N.J. 2015)	Misappropriator	Plea	37 months imprisonment and 3 years of supervised release[3] [4] $200 assessment $10,000 fine $668 forfeiture[5]
5/25/2018	William Scott Blythe (*U.S. v. Rampoldi and Blythe*, S.D. Cal. 2016)	Tippee	Plea	5 years of supervised release[6] $100 assessment $3,000 fine $41,493 forfeiture
6/13/2018	Jason Napodano (*U.S. v. Napodano*, N.D. Ill. 2017)	Insider	Plea	4 months imprisonment and 1 year of supervised release Guidelines Calculation: Offense level 13 (12 to 18 months):[7] +8 base +8 gain -3 level reduction for acceptance of responsibility $100 assessment $5,000 fine

Date	Defendant	Role[1]	Trial or Plea	Sentence
6/14/2018	Peter C. Chang (*U.S. v. Chang*, N.D. Cal. 2018)	Insider	Plea	24 months imprisonment and 3 years of supervised release Guidelines Calculation: Offense level 23 (46 to 57 months): +8 base +16 gain +2 level enhancement for abuse of trust -3 level reduction for acceptance of responsibility $400 assessment $782,141.50 restitution $22,685.50 forfeiture
6/21/2018	Robert Gadimian (*U.S. v. Gadimian*, D. Mass. 2016)	Insider	Plea	27 months imprisonment and 2 years of supervised release Guidelines Calculation: Offense level 21 (37 to 46 months): +8 base +14 gain +2 level enhancement for abuse of trust -3 level reduction for acceptance of responsibility $700 assessment $25,000 fine $1,161,000 forfeiture
7/24/2018	Paul Rampoldi (*U.S. v. Rampoldi and Blythe*, S.D. Cal. 2016)	Tippee	Trial	18 months imprisonment and 3 years of supervised release[8] $100 assessment $20,000 forfeiture
7/25/2018	Kevin Hamilton (*U.S. v. Hamilton*, E.D. Pa. 2016)	Misappropriator	Plea	10 months imprisonment and 3 years of supervised release[9] $200 assessment $635,000 restitution $656,421.11 forfeiture
8/13/2018	Daniel Perez (*U.S. v. Perez*, D.N.J. 2017)	Tippee	Plea	1 year of supervised release[10] $100 assessment $1,000 fine $157,660.90 forfeiture
8/13/2018	Richard Yu (*U.S. v. Yu*, D.N.J. 2017)	Tipper/Tippee	Plea	1 year of supervised release[11] $100 assessment $7,500 fine $93,024.50 forfeiture

Date	Defendant	Role[1]	Trial or Plea	Sentence
9/7/2018	Evan Kita (*U.S. v. Kita*, D.N.J. 2017)	Tipper	Plea	6 months imprisonment and 2 years of supervised release Guidelines Calculation: Offense level 19 (30 to 37 months)[12] +8 base +12 gain +2 level enhancement for obstruction of justice -3 level reduction for acceptance of responsibility $200 assessment $5,000 fine $8,920 forfeiture
9/21/2018	Theodore Huber (*U.S. v. Huber, et al.*, S.D.N.Y. 2017)	Tippee	Trial	36 months imprisonment and 2 years of supervised release Guidelines Calculation: Offense level 28 (78 to 97 months): +8 base +18 gain +2 level enhancement for use of special skill $500 assessment $1,250,000 fine $1,644.26 restitution $87,078 forfeiture
9/21/2018	Robert Olan (*U.S. v. Olan, et al.*, S.D.N.Y. 2017)	Tippee	Trial	36 months imprisonment and 2 years of supervised release Guidelines Calculation: Offense level 28 (78 to 97 months): +8 base +18 gain +2 level enhancement for use of special skill $500 assessment $1,250,000 fine $1,644.26 restitution $98,244 forfeiture

Date	Defendant	Role[1]	Trial or Plea	Sentence
9/21/2018	Christopher Worrall (*U.S. v. Worrall, et al.*, S.D.N.Y. 2017)	Insider/Tipper	Trial	20 months imprisonment and 1 year of supervised release Guidelines Calculation: Offense level 28 (78 to 97 months): +8 base +18 gain +2 level enhancement for abuse of trust $200 assessment $1,644.26 restitution
9/24/2018	David Blaszczak (*U.S. v. Blaszczak, et al.*, S.D.N.Y. 2017)	Tipper/Tippee	Trial	12 months plus 1 day imprisonment and 2 years of supervised release Guidelines Calculation: Offense level 26 (63 to 78 months): +8 base +18 gain $1,000 assessment $1,644.25 restitution $727,500 forfeiture
9/27/2018	Chiang Yu (*U.S. v. Yu*, D.N.J. 2017)	Tippee	Plea	1 year of supervised release Guidelines Calculation: Offense level 13 (12 to 18 months)[13] +8 base +8 gain -3 level reduction for acceptance of responsibility $100 assessment $5,500 fine $107,045 forfeiture
10/12/2018	Edward J. Kosinski (*U.S. v. Kosinski*, D. Ct. 2016)	Misappropriator	Trial	6 months imprisonment and 2 years of supervised release[14] $200 assessment $500,000 fine

Date	Defendant	Role[1]	Trial or Plea	Sentence
10/23/2018	Sudhakar Reddy Bonthu (*U.S. v. Bonthu*, N.D. Ga. 2018)	Insider	Plea	8 months of supervised release Guidelines Calculation: Offense level 12 (10 to 16 months):[15] +8 base +6 gain +2 level enhancement for abuse of trust -3 level reduction for acceptance of responsibility -1 downward variance $100 assessment $50,000 fine $75,979.38 forfeiture
10/25/2018	Victory Nam Ho (*U.S. v. Ho*, M.D. La. 2017)	Tippee	Trial	32 months imprisonment and 2 years of supervised release[16] $200 assessment $15,000 fine $302,512.64 forfeiture
11/5/2018	Salvadore Joseph Russo, III (*U.S. v. Russo, III*, M.D. La. 2017)	Tippee	Trial	16 months imprisonment and 1 year of supervised release[17] $200 assessment
11/30/2018	Jordan Fogel (*U.S. v. Fogel, et al.*, S.D.N.Y. 2017)	Tippee	Plea (Cooperator)	Time served and 3 years of supervised release[18] $600 assessment $250,000 fine $1,644.26 restitution $32,828.76 forfeiture
12/3/2018	Schultz Chan (*U.S. v. Chan and Wang*, D. Mass. 2016)	Insider/Tipper/Tippee	Trial	36 months imprisonment and 1 year of supervised release Guidelines Calculation: Offense level 26 (63 to 78 months)[19] $400 assessment $65,000 fine
12/3/2018	Steven Fishoff (*U.S. v. Fishoff*, D.N.J. 2015)	Misappropriator/Tipper	Plea	30 months imprisonment and 3 years of supervised release[20] $100 assessment $50,000 fine Forfeiture (undisclosed amount)

Date	Defendant	Role[1]	Trial or Plea	Sentence
12/3/2018	Songjiang Wang (*U.S. v. Chan and Wang*, D. Mass. 2016)	Tipper/Tippee	Trial	6 months imprisonment and 1 year of supervised release Guidelines Calculation: Offense level 24 (51 to 63 months)[21] $300 assessment $50,000 fine
12/4/2018	Matthew Brunstrum (*U.S. v. Brunstrum*, D. Ill. 2018)	Insider/Tipper	Plea	8 months imprisonment and 1 year of supervised release Guidelines Calculation: Offense level 17 (24 to 30 months)[22] $100 assessment $10,000 fine
12/12/2018	Steven Constantin (*U.S. v. Constantin, et al.*, D.N.J. 2016)	Tippee	Plea	12 months and one day imprisonment and 3 years of supervised release Guidelines Calculation: Offense level 23 (46 to 57 months)[23] +8 base +16 gain +2 level enhancement for abuse of trust -3 level reduction for acceptance of responsibility $200 assessment $10,000 fine Forfeiture (undisclosed amount)
12/20/2018	Tinghui Xie (*U.S. v. Xie*, M.D. La. 2017)	Tipper	Trial	16 months imprisonment and 1 year of supervised release[24] $300 assessment $7,500 fine

APPENDIX B: SEC ENFORCEMENT ACTIONS

Date	Defendant	Role	Trial or Settlement	Outcome
1/5/2018	Justin Cary (*SEC v. Cary*, C.D. Cal. 2017)	Insider	Settlement	Permanent injunction $8,140.25 disgorgement $514.78 prejudgment $8,140.25 civil penalty Director/officer bar
1/10/2018	Jamie Meadows (*SEC v. McPhail, et al.*, D. Mass. 2014)	Tippee	Settlement	Permanent injunction $191,521 disgorgement $41,841 prejudgment interest $191,521 civil penalty
1/11/2018	Jeffrey Belfiore (*In the Matter of Anthony P. Chiera and Jeffrey R. Belfiore*, File No. 3-18335)	Tipper	Settlement	Cease and desist order $25,000 civil penalty Officer/director bar
1/11/2018	Anthony Chiera (*In the Matter of Anthony P. Chiera and Jeffrey R. Belfiore*, File No. 3-18335)	Tippee	Settlement	Cease and desist order $48,983.67 disgorgement $2,847.17 prejudgment interest $48,983.67 civil penalty Securities industry bar
2/1/2018	Maziar Rezakhani (*SEC v. Kennedy, et al.*, W.D. Wash. 2017)	Tippee	Default judgment	Permanent injunction $94,397.65 disgorgement $9,286.82 prejudgment interest $103,684.47 civil penalty
2/12/2018	Ara Chackerian (*In the Matter of Ara Chackerian*, File No. 3-18370)	Insider	Settlement	Cease and desist $157,207.80 disgorgement $18,635.55 prejudgment interest $157,207.80 civil penalty
2/15/2018	Todd LaVelle (*SEC v. LaVelle*, M.D. Fla. 2018)	Insider	Settlement	Permanent injunction $25,342.40 disgorgement $2,629.81 prejudgment interest $25,342.40 civil penalty
2/16/2018	Eric McPhail (*SEC v. McPhail, et al.*, D. Mass. 2014)	Tipper	Settlement	Permanent injunction

Date	Defendant	Role	Trial or Settlement	Outcome
2/26/2018	Kumar Ananda (*SEC v. Jayapalan, et al.*, C.D. Cal. 2017)	Tippee	Settlement	Permanent injunction $209,940.96 disgorgement $2,099.41 prejudgment interest $209,940.96 civil penalty
2/27/2018	Vijaya Ananda (*SEC v. Jayapalan, et al.*, C.D. Cal. 2017)	Tippee	Settlement	Permanent injunction $5,145.05 disgorgement $51.45 prejudgment interest $5,145.05 civil penalty
2/26/2018	Anand Jayapalan (*SEC v. Jayapalan, et al.*, C.D. Cal. 2017)	Tipper	Settlement	Permanent injunction $173,208.85 civil penalty
2/26/2018	Rajni Nair (*SEC v. Jayapalan, et al.*, C.D. Cal. 2017)	Tippee	Settlement	Permanent injunction $1,425.05 disgorgement $14.25 prejudgment interest $1,425.05 civil penalty
3/13/2018	Steven Metro (*SEC v. Eydelman, et al., D.N.J.* 2014)	Misappropriator/Tipper	Summary judgement	Permanent injunction $25,000 civil penalty
3/19/2018	James Moodhe[25] (*SEC v. Rivas, et al.*, S.D.N.Y. 2017)	Tipper/Tippee	Settlement	Permanent injunction Securities industry bar
4/16/2018	Douglas Nelson (*In the Matter of Douglas Nelson*, File No. 18439)	Misappropriator	Settlement	Cease and desist order $15,141.97 disgorgement $1,740.39 prejudgment interest $15,141.97 civil penalty
4/17/2018	Thomas Davis (*SEC v. Walters, et al.*, S.D.N.Y. 2016)	Tipper	Settlement	Permanent injunction Officer/director bar
4/17/2018	William Walters (*SEC v. Walters, et al.*, S.D.N.Y. 2016)	Tippee	Settlement	Permanent injunction[26] $19,004,429.26 disgorgement $3,552,429.20 prejudgment interest
4/20/2018	Saverio Barbera (*SEC v. Barbera*, E.D.N.Y. 2018)	Tipper	Settlement	Permanent injunction $289,650.72 civil penalty

Date	Defendant	Role	Trial or Settlement	Outcome
4/24/2018	Gary Yin (*SEC v. Wang and Yin*, S.D. Cal. 2013)	Insider	Settlement	Permanent injunction $27,444.02 disgorgement[27] $2,348.77 prejudgment interest Securities industry bar[28]
4/24/2018	Aaron Wens (*SEC v. Femenia, et al.*, W.D.N.C. 2012)	Tippee	Settlement	Permanent injunction $160,000 disgorgement
5/1/2018	Kevin Hamilton (*In the Matter of Kevin Hamilton*, File No. 3-18463)	Tipper/Tippee	Settlement	Securities industry bar
5/1/2018	Todd Alpert (*SEC v. Alpert*, S.D.N.Y. 2017)	Misappropriator	Settlement	Permanent injunction $43,873.32 disgorgement $1,627.94 prejudgment interest $43,873.32 civil penalty
5/8/2018	Russel Schiefer (*SEC v. Zimliki and Schiefer*, M.D. Pa. 2018)	Tippee	Settlement	Permanent injunction $5,877.52 disgorgement $238.51 prejudgment interest $5,877.52 civil penalty
5/8/2018	David Zimliki (*SEC v. Zimliki and Schiefer*, M.D. Pa. 2018)	Misappropriator/Tippee	Settlement	Permanent injunction $9,319.62 disgorgement $378.18 prejudgment interest $9,319.62 civil penalty
5/9/2018	Joseph Spera (*SEC v. Spera*, D.N.J. 2017)	Misappropriator/Tippee	Settlement	Permanent injunction[29]
5/16/2018	Yang Xie (*SEC v. Yang Xie*, D.N.J. 2018)	Insider	Settlement	Permanent injunction $2,287.20 disgorgement $239.38 prejudgment interest $6,861.60 civil penalty
5/16/2018	Robert Morano (*SEC v. Morano*, D. Or. 2018)	Insider	Settlement	Permanent injunction $38,242 disgorgement $2,317 prejudgment interest
5/22/2018	Alexander Carlucci (*SEC v. Fleming, et al.*, N.D. Ill. 2017)	Tippee	Settlement	Permanent injunction $14,491.64 disgorgement $1,307.21 prejudgment interest

Date	Defendant	Role	Trial or Settlement	Outcome
5/22/2018	Peter Kourtis (*SEC v. Fleming, et al.*, N.D. Ill. 2017)	Tipper/Tippee	Settlement	Permanent injunction[30]
7/6/2018	Michael Johnson (*In the Matter of Michael Johnson*, File No. 3-18574)	Misappropriator	Settlement	Cease and desist $88,699 disgorgement $6,721 prejudgment interest $88,699 civil penalty
7/10/2018	Sudhakar Bonthu (*SEC v. Bonthu,* N.D. Ga. 2018)	Insider	Settlement	Permanent injunction $75,167.68 disgorgement [31] Prejudgment interest[32]
7/12/2018	Fei Yan (*SEC v. Yan and Wu*, S.D.N.Y. 2017)	Misappropriator	Settlement	Permanent injunction $119,428.50 disgorgement[33]
7/13/18	Gene Shen (*SEC v. Shen,* N.D. Cal. 2018)	Insider/Tipper	Settlement	Permanent injunction $40,622 disgorgement $4,228 prejudgment interest $43,342 civil penalty
7/15/2018	Richard Cunniffe (*SEC v. Cunniffe,* S.D.N.Y. 2018)	Tippee	Settlement (Cooperator)	Permanent injunction $983,272.96 disgorgement[34] $55,284.32 prejudgment interest Securities industry bar[35]
7/16/2018	Robert Gadimian (*SEC v. Gadimian,* D. Mass. 2016)	Insider	Settlement	Permanent injunction $1,161,000 disgorgement[36]
7/24/2018	Yao Li (*In the Matter of Yao Li*, File No. 3-18614)	Insider	Settlement	Cease and desist order $196,203 disgorgement $23,062 prejudgment interest $196,203 civil penalty Officer/director bar
7/27/2018	Kurt Bordian (*SEC v. Bordian,* D. N.J. 2018)	Misappropriator	Settlement	Permanent injunction $220,500 disgorgement $14,358 prejudgment interest $220,500 civil penalty Accountant bar[37]
7/31/2018	Fred Tinker (*In the Matter of Fred Tinker*, File No. 3-18618)	Insider	Settlement	Cease and desist order $89,171.88 disgorgement $8,506.64 prejudgment interest $89,171.88 civil penalty

Date	Defendant	Role	Trial or Settlement	Outcome
7/31/2018	Nelson Molina (*SEC v. Molina*, N.D. Tex. 2018)	Insider	Settlement	Permanent injunction $78,460 disgorgement $1,564 prejudgment interest $39,230 civil penalty
8/1/2018	Anup Madan (*SEC v. Madan*, W.D. Wash. 2017)	Insider	Settlement	Permanent injunction $14,023 disgorgement $618.47 prejudgment interest $14,023 civil penalty
8/3/2018	Gary Williky (*SEC v. Williky*, S.D. Ind. 2015)	Insider	Settlement	Permanent injunction $863,834 disgorgement $173,977.10 prejudgment interest $1,746,434 civil penalty Officer/director bar
8/7/2018	Aaron Smith (*In the Matter of Aaron R. Smith*, File No. 3-18625)	Misappropriator	Settlement	Cease and desist order $40,578.28 disgorgement $3,205.07 prejudgment interest $40,578.28 civil penalty
8/14/2018	Lauren Zarsky (*SEC v. Zarsky*, S.D.N.Y. 2018)	Tippee	Settlement	Permanent injunction $19,440 disgorgement $839.27 prejudgment interest $19,440 civil penalty
8/14/2018	Dorothy Zarsky (*SEC v. Zarsky*, S.D.N.Y. 2018)	Tippee	Settlement	Permanent injunction $22,600 disgorgement $975.70 prejudgment interest $22,600 civil penalty
8/16/2018	Honglan Wang (*In the Matter of Honglan Wang*, File No. 3-18645)	Insider	Settlement	Cease and desist order $134,000 disgorgement $3,698.94 prejudgment interest $67,000 civil penalty
8/16/2018	William Scott Blythe (*SEC v. Rampoldi and Blyth*e, S.D. Cal. 2016)	Tippee	Settlement	Permanent injunction $41,493 disgorgement[38] $5,778.68 prejudgment interest
8/20/2018	Joseph Jennings (*In the Matter of Joseph Jennings*, CPA, File No. 3-18652)	Misappropriator	Settlement	Cease and desist order $150,500 civil penalty

Date	Defendant	Role	Trial or Settlement	Outcome
8/21/2018	Ismail Lila (*In the Matter of Ismail Lila*, File No. 3-18655)	Insider	Settlement	Cease and desist $28,642.04 disgorgement $1,015.19 prejudgment interest $28,623.04 civil penalty
8/22/2018	James Lentz (*In the Matter of James T. Lentz*, File No. 3-18665)	Insider	Settlement	Cease and desist order $9,115 disgorgement $608 prejudgment interest $9,115 civil penalty
9/5/2018	A. Catlin Cade, IV (*SEC v. Cade,* N.D. Ala. 2018)	Misappropriator	Settlement	Permanent injunction $8,745.68 disgorgement $637.57 prejudgment interest $8,745.68 civil penalty
9/6/2018	Amer Deeba (*SEC v. Deeba,* N.D. Cal. 2018)	Tipper	Settlement	Permanent injunction $581,170 civil penalty
9/12/2018	Robert Lozuk (*SEC v. Lozuk,* S.D. Cal. 2018)	Tipper	Settlement	Permanent injunction $26,643.80 civil penalty Officer/director bar
9/13/2018	Matthew Brunstrum (*SEC v. Brunstrum,* N.D. Ill. 2018)	Insider/Tipper	Settlement	Permanent injunction $159,904 disgorgement $5,394 prejudgment interest
9/13/2018	Susan Brunstrum (*SEC v. Brunstrum,* N.D. Ill. 2018)	Tippee	Settlement	Permanent injunction $170,252 disgorgement $6,913 prejudgment interest
9/17/2018	Peter Chang (*SEC v. Chang*, N.D. Cal. 2017)	Tipper/Tippee	Settlement	Permanent injunction $1,727,864 disgorgement[39] $129,710 prejudgment interest $500,000 civil penalty
9/17/2018	Christopher Bonvissuto (*SEC v. Fleming, et al.*, N.D. Ill. 2017)	Tippee	Settlement	Permanent injunction $33,677.11 disgorgement $3,037.79 prejudgment interest
9/17/2018	Shane Fleming (*SEC v. Fleming, et al.*, N.D. Ill. 2017)	Tipper	Settlement	Permanent injunction $9,500 disgorgement $856.92 prejudgment interest

Date	Defendant	Role	Trial or Settlement	Outcome
9/17/2018	Dimitri Kandalepas (*SEC v. Fleming, et al.*, N.D. Ill. 2017)	Tippee	Settlement	Permanent injunction $37,612.56 disgorgement $3,392.76 prejudgment interest
9/25/2018	Dennis Wayne Hamilton (*SEC v. Hamilton*, D. Conn. 2016)	Insider	Settlement	Permanent injunction $730,279 disgorgement $102,145 prejudgment interest $584,047 civil penalty Officer/director bar
9/27/2018	Thomas Earl Hayden, II (*In the Matter of Thomas Earl Hayden, II, et al.*, File No. 3-18847)	Tipper/ Insider	Settlement	Cease and desist order $97,367.01 disgorgement $14,090.70 prejudgment interest $197,814.02 civil penalty
9/27/2018	Thomas Earl Hayden Sr. (*In the Matter of Thomas Earl Hayden, Sr., et al.*, File No. 3-18847)	Tippee	Settlement	Cease and desist order $22,266.31 disgorgement $3,222.26 prejudgment interest $22,266.31 civil penalty
9/27/2018	John McDaniel (*In the Matter of John McDaniel, et al.*, File No. 3-18847)	Tippee	Settlement	Cease and desist order $78,180.70 disgorgement $11,314.01 prejudgment interest $78,180.70 civil penalty
9/27/2018	Gary Ross (*In the Matter of Gary Bernard Ross*, File No. 3-18848)	Misappropriator	Settlement	Cease and desist order $86,117.82 disgorgement $12,864.41 prejudgment interest $86,117.82 civil penalty
9/28/2018	Amish Patel (*In the Matter of Unal Patel and Amish Patel*, File No. 3-18858)	Tippee	Settlement	Cease and desist order $15,978 disgorgement $1,511.36 prejudgment interest $15,978 civil penalty
9/28/2018	Unal Patel (*In the Matter of Unal Patel and Amish Patel*, File No. 3-18858)	Tipper/Tippee	Settlement	Cease and desist order $7,321 disgorgement $599.34 prejudgment interest $14,642 civil penalty
10/1/2018	Paul Rampoldi (*SEC v. Rampoldi and Blythe*, S.D. Cal. 2016)	Tippee	Settlement	Permanent injunction $20,041 disgorgement $2,791.09 prejudgment interest Securities industry bar[40]

Date	Defendant	Role	Trial or Settlement	Outcome
10/4/2018	Katherine Hanratty (*SEC v. Carr and Hanratty*, D. Conn. 2018)	Tippee	Settlement	Permanent injunction $250,628 disgorgement $27,351.82 prejudgment interest $250,628 civil penalty
10/22/2018	Bryan Ziegenfuse (*SEC v. Ziegenfuse*, E.D. Pa. 2018)	Insider	Settlement	Permanent injunction $64,065 disgorgement $2,224 prejudgment interest $64,065 civil penalty
11/27/2018	John Afriyie (*SEC v. Afriyie,* S.D.N.Y. 2016)	Misappropriator	Summary judgment	Permanent injunction $1,670,483.98 disgorgement and prejudgment interest[41] $1,576,445.98 civil penalty
12/6/2018	James Mazzo (*SEC v. Mazzo, et al.*, C.D. Cal. 2012)	Tipper	Settlement	Permanent injunction $1,500,000 civil penalty Officer/director bar[42]
12/12/2018	Slobodan Dragojlovic (*SEC v. Dragojlovic*, C.D. Cal. 2018)	Misappropriator	Settlement	Permanent injunction $20,101 disgorgement $1,038 prejudgment interest $20,101 civil penalty
12/18/2018	Peter Cho (*SEC v. Cho*, S.D.N.Y. 2018)	Misappropriator	Settlement	Permanent injunction $251,386 disgorgement $30,005 prejudgment interest $251,386 civil penalty

[1] For purposes of these charts the roles are defined as follows: (1) Insider (traded on the basis of MNPI received by an employee in the course of his/her employment); (2) Misappropriator (traded on MNPI received or misappropriated by a third party in a position of trust outside of the company whose shares are being traded, such as an attorney or accountant); (3) Tipper (provided MNPI to a third party who trades based on that information); and (4) Tippee (received and traded on MNPI from a third party).
[2] Calculation based on USAO Sentencing Memorandum.
[3] Correction of Sentence on Remand.
[4] Precise guidelines calculation unknown.
[5] Previously satisfied.
[6] Precise guidelines calculation unknown.
[7] Calculation based on USAO Sentencing Memorandum.
[8] Precise guidelines calculation unknown.
[9] Precise guidelines calculation unknown.
[10] Precise guidelines calculation unknown.
[11] Precise guidelines calculation unknown.
[12] Calculation based on Plea Agreement.
[13] Calculation based on Plea Agreement.
[14] Precise guidelines calculation unknown.
[15] Calculation based on USAO Sentencing Memorandum.
[16] Precise guidelines calculation unknown.
[17] Precise guidelines calculation unknown.
[18] Precise guidelines calculation unknown.
[19] Calculation based on Statement of Reasons; precise guidelines breakdown unknown.
[20] Precise guidelines calculation unknown.
[21] Calculation based on Statement of Reasons; precise guidelines breakdown unknown.
[22] Calculation based on USAO Sentencing Memorandum; precise guidelines breakdown unknown.
[23] Calculation based on Plea Agreement.
[24] Precise guidelines calculation unknown.
[25] Stayed pending criminal case. Disgorgement, prejudgment interest, and civil penalty to be determined, if necessary, at a later date upon motion by the Commission.
[26] Disgorgement and prejudgment interest satisfied by Order of Forfeiture and Order of Restitution in parallel criminal proceeding.
[27] Disgorgement and prejudgment interest satisfied by Order of Forfeiture in parallel criminal proceeding.
[28] On 05/03/2018 in SEC Administrative Proceeding (*In the Matter of Gary Yin,* File No. 3-18165).
[29] Disgorgement, prejudgment interest, and civil penalty to be determined, if necessary, at a later date upon motion by the Commission.
[30] Disgorgement, prejudgment interest, and civil penalty to be determined, if necessary, at a later date upon motion by the Commission.
[31] Disgorgement and prejudgment interest to be deemed satisfied by amount of forfeiture ordered in parallel criminal proceeding.
[32] Amount not disclosed.
[33] Disgorgement to be deemed satisfied by amount of forfeiture ordered, if any, in parallel criminal proceeding.
[34] $900,000 of disgorgement deemed satisfied by parallel criminal proceeding.
[35] On 07/23/2018 in SEC Administrative Proceeding (*In the Matter of Richard T. Cunniffe,* File No. 3-18611).
[36] Satisfied by the judgement in parallel criminal proceeding.
[37] On 8/3/2018 in SEC Administrative Proceeding (*In the Matter of Kurt J. Bordian, CPA,* File No. 3-18621).
[38] Disgorgement and prejudgment interest satisfied by Order of Forfeiture in parallel criminal proceeding.
[39] Disgorgement and prejudgment interest of $804,827 is to be offset by the stipulated Orders in the criminal case.
[40] On 10/04/2018 in SEC Administrative Proceeding (*In the Matter of Paul T. Rampoldi,* File No. 3-18862).
[41] Satisfied if the corresponding criminal case Orders are satisfied.
[42] Can apply for reinstatement after five years.

ABOUT MORRISON & FOERSTER'S SECURITIES LITIGATION, ENFORCEMENT + WHITE COLLAR DEFENSE PRACTICE GROUP

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