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INSIDER TRADING

ANNUAL REVIEW

INSIDE

LOOKING BACK

2013 witnessed several long-anticipated developments in the world of insider trading, punctuating another year of aggressive enforcement in the United States and abroad. After years of pursuit, the Department of Justice ("DOJ") indicted SAC Capital Advisors LP, ultimately leading to the hedge fund agreeing to plead guilty to insider trading violations and to pay DOJ and the Securities & Exchange Commission ("SEC") a combined $1.8 billion penalty to settle criminal, civil and forfeiture allegations. If the plea agreement is approved by the court, the penalty will be the largest insider trading penalty ever.

2013 also saw Mark Cuban triumph in his nearly decade-long war with the SEC. In contrast to the U.S. Attorney's Office for the Southern District of New York's long-running perfect record in insider trading trials, after approximately 10 years of legal wrangling between Cuban and the SEC, it took a jury less than five hours to reach a verdict in Mr. Cuban's favor. On the other side of the scale, however, the SEC made news by securing against Rajat Gupta a hefty $13.9 million penalty – the statutory maximum of three times the gains made on tips received from him.

Attention in 2014 will remain focused on the United States Court of Appeals for the Second Circuit, which has yet to rule on the appeal of Gupta's criminal conviction and also now has before it the appeals of insider-trading convictions against Todd Newman and Anthony Chiasson. These appeals will test DOJ's impressive winning streak at trial, as the Court of Appeals considers whether criminal tippee liability requires knowledge of a personal benefit to the insider, and also takes a hard look at DOJ's strategy of pursuing downstream tippees without charging the originating tipper whose uncharged conduct is the foundation of the tippee violation.

More broadly, insider trading enforcement in 2013 continued to follow many of the trends of years past identified in our prior Reviews. Most notably, defendants who had entered into cooperation agreements with the government continued to receive the tangible benefits of little to no prison time (and reduced fines). The Southern District of New York's unbeaten streak in criminal insider trading trials remained intact with the mid-December conviction of SAC's Michael Steinberg. Globally, enforcement efforts and cross-border coordination continued apace. The "mosaic theory" defense, while still viable in theory, met with no success in court because defendants who have asserted that they legitimately pieced together a cogent investment thesis from bits of immaterial nonpublic information faced direct evidence – from wiretaps or former co-conspirators – that provided far less innocent explanations for their purchases or sales of securities.

Looking ahead, we may see increasing efforts to limit high-frequency traders' preferential access to publicly disseminated information. New York Attorney General Eric Schneiderman has branded the practice – in which subscribers are offered access to information as little as seconds before it is universally available – as "Insider Trading 2.0." It is not clear that these subscription services violate existing law, but the area is likely to attract increasing regulatory attention by those seeking to level the playing field.

OVERVIEW OF INSIDER TRADING LAW

"Insider trading" is an ambiguous and overinclusive term. Trading by insiders includes both legal and illegal conduct. The legal version occurs when certain corporate insiders – including officers, directors and employees – buy and sell the stock of their own company and disclose such transaction to the SEC. Legal trading also includes, for example, someone trading on information he or she overheard between strangers sitting on a train or when the information was obtained through a non-confidential business relationship. The illegal version – although not defined in the federal securities laws – occurs when a person buys or sells a security while knowingly in possession of material nonpublic information that was obtained in breach of a fiduciary duty or relationship of trust.

Despite renewed attention in recent years, insider trading is an old crime. Two primary theories of insider trading have emerged over time. First, under the "classical" theory, the antifraud provisions of the Securities Exchange Act of 1934's ("Exchange Act") apply to prohibit corporate "insiders" from trading on nonpublic information taken from the company in violation of the insiders' fiduciary duty to the company and its shareholders.[1] Second, the "misappropriation" theory applies to prohibit trading by a person who misappropriates information from a party to whom he or she owes a fiduciary duty – such as the duty owed by a lawyer to a client.[2]

Under either theory, the law imposes liability for insider trading on any person who improperly obtains material nonpublic information and then trades while in possession of such information. The law also holds liable any "tippee" – that is, someone with whom that person, the "tipper," shares the information – as long as – at least prior to 2012 – the tippee also knew that the information was obtained in breach of a duty.

In 2012, a decision by the Court of Appeals for the Second Circuit in *SEC v. Obus* arguably expanded tippee/tipper liability – at least in SEC civil enforcement actions – to encompass cases where neither the tipper nor the tippee has actual knowledge that the inside information was disclosed in breach of a duty of confidentiality.[3] 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 may have been disclosed in violation of a duty of confidentiality.[4] Just what impact *Obus* may have on future insider trading cases remains unclear. At least one district court judge interpreting *Obus* curtailed the holding by finding that: (1) a tipper's knowledge that the "disclosure of inside information was unauthorized" was sufficient for liability in a misappropriation case; but (2) a tippee must have "knowledge" that "self-dealing occurred" to be liable under the classical case.[5] The holding in *Obus* could be further undermined – or at the very least distinguished – depending on how the Second Circuit rules in the appeal filed in 2013 by Todd Newman and Anthony Chiasson. Newman and Chiasson argue that the jury that convicted them of insider trading was improperly charged because the district court did not require the jury to find that each defendant knew that inside tippers received a personal gain in exchange for breaching their duties.[6]

While the interpretation of the scope and applicability of Section 10(b) and Rule 10b-5 to insider trading is evolving, the anti-fraud provisions provide powerful and flexible tools to address efforts to capitalize on material nonpublic information.

Section 14(e) of the Exchange Act and Rule 14e-3 also prohibit insider trading in the limited context of tender offers. Rule 14e-3 defines "fraudulent, deceptive, or manipulative" as the purchase or sale of a security by any person with material information about a tender offer that he or she knows or has reason to know is nonpublic and has been acquired directly or indirectly from the tender offeror, the target, or any person acting on their behalf, unless the information and its source are publicly disclosed before the trade.[7] Under Rule 14e-3, liability attaches regardless of a pre-existing relationship of trust and confidence. Rule 14e-3 creates a "parity of information" rule in the context of a tender offer. Any person – not just insiders – with material nonpublic information about a tender offer must either refrain from trading or publicly disclose the information.

While most insider trading cases involve the purchase or sale of equity instruments (such as common stock or call or put

options) or debt instruments (such as bonds), civil or criminal sanctions apply to insider trading in connection with any "securities." What constitutes a security is not always clear, especially in the context of novel financial products. At least with respect to security-based swap agreements, Congress has made clear that they are covered under anti-fraud statutes applying to securities.[8]

The consequences of being found liable for insider trading can be severe. Individuals convicted of criminal insider trading can face up to 20 years imprisonment per violation, criminal forfeiture, and fines of up to $5,000,000 or twice the gain from the offense. A successful civil action by the SEC may lead to disgorgement of profits and a penalty not to exceed the greater of $1,000,000, or 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 adviser, or in the case of licensed professionals, such as attorneys and accountants, from serving in their professional capacity before the SEC.

Section 20A of the Exchange Act gives contemporaneous traders a private right of action against anyone trading while in possession of material nonpublic information.[9] Although Section 20A gives an express cause of action for insider trading, the limited application and recovery afforded under the statute make Section 20A an unpopular choice for private litigants. Rather, most private securities claims for insider trading are brought under the implied rights of action found in Sections 10(b) and 14(e) and Rules 10b-5 and 14e-3, respectively.

2013 ENFORCEMENT ACTIVITY

In 2013, the SEC filed 43 insider trading actions, including six actions commenced as administrative proceedings, and DOJ brought criminal charges involving insider trading against 20 individuals or entities.

For the first time, we have included in this year's Review the tally of administrative proceedings filed by the SEC. In years past, our Reviews provided only the number of SEC enforcement actions filed in court. However, with the increasing preference by the Staff to bring actions as administrative proceedings instead of federal court cases, reporting only on the number of SEC enforcement actions might give an incomplete picture of enforcement activity. We will have to track the numbers throughout 2014 to see if the Staff's inclination to rely on administrative proceedings becomes a trend in enforcement activity.

It is clear that insider trading enforcement is not a passing trend. 2013 saw aggressive actions by both DOJ and the SEC that signal that neither agency has tired of pursuing insider trading – even in the face of some setbacks. While the combined total of civil and criminal cases brought in 2013 did not surpass the number of cases in 2012, the government continued to expend great resources on trials and appeals in 2013, securing high profile victories – and losses – throughout the year.

HIGH PROFILE CASES

THE GOVERNMENT'S HOT PURSUIT OF SAC

The government continued its relentless pursuit of hedge funds this year, zeroing in on – and securing harsh penalties from – SAC Capital Advisors LP ("SAC") and its affiliates, Sigma Capital Management LLC and CR Intrinsic Investors LLC. In a 41-page indictment unsealed on July 25, 2013, DOJ charged SAC and its related divisions with widespread insider trading in more than 20 publicly traded companies from 1999 to 2010.[10] DOJ alleged that SAC violated the securities laws in three ways: (1) by recruiting analysts and portfolio managers with contacts inside public companies while failing to ensure that its recruits did not use those connections to obtain inside information; (2) by rewarding analysts and portfolio managers who told SAC's founder and owner Steven A. Cohen about "high conviction" trades in which those employees had an "edge" over other investors; and (3) by employing limited compliance measures designed to detect insider trading.

The SAC indictment also cited the guilty pleas of five other SAC portfolio managers and analysts: Jon Horvath, Wes Wang, Donald Longueuil, Noah Freeman, and Richard Choo-Beng Lee (known as CB Lee). On the same day as the SAC indictment, the government also unsealed a sixth guilty plea, this one by former SAC portfolio manager Richard Lee (not to be confused with CB Lee).[11] Richard Lee admitted to trading on

material nonpublic information in Yahoo! and 3Com stock.

After months of press speculation, SAC and its affiliates entered guilty pleas in November.[12] Pursuant to its plea agreement, SAC agreed to pay DOJ and SEC a combined $1.8 billion – the largest insider trading penalty ever – to settle criminal, civil and forfeiture allegations. Notably, SAC's plea allocution described the conduct of the six former employees who had already entered guilty pleas, but did not reference any employees with pending criminal cases.[13]

In its plea agreement, SAC also agreed to discontinue its management of investor funds, limiting the hedge fund to the management of Cohen's personal fortune and that of his employees. While other hedge funds have closed in the wake of the government's widespread insider trading investigations, this marks the first time a hedge fund has pled guilty to insider trading, and the first instance in which a hedge fund has been barred from managing outside funds as a result of the government's enforcement efforts. The judge overseeing the matter, U.S. District Court Judge Laura Taylor Swain, did not immediately accept the plea agreement. Judge Swain reserved judgment, noting that she wanted time to review a presentence report and the sentencing submissions from the government and SAC before deciding whether she would accept the plea. She set sentencing for March 2014.

SAC's staggering $1.8 billion penalty – if approved – includes a significant settlement between CR Intrinsic Investors and the SEC earlier this year. As reported in last year's Review, the government in late 2012 charged CR Intrinsic Investors and its portfolio manager Mathew Martoma with insider trading, alleging that CR Intrinsic Investors sold more than $960 million in shares of Elan Corporation and Wyeth after Martoma received inside information regarding a failed clinical trial for a new Alzheimer's drug.[14] According to the SEC, the sale – in advance of any public announcement regarding the clinical trial – helped CR Intrinsic Investors make over $270 million in illegal profits and avoided losses.[15] In March, CR Intrinsic Investors settled the SEC's charges for a whopping $600 million. Martoma's federal criminal trial in the Southern District of New York is scheduled to begin on January 6, 2014.

The SAC indictment also followed charges against yet another SAC portfolio manager. In March, DOJ and SEC charged Michael Steinberg with insider trading in Dell and Nvidia stock, based on material nonpublic information he allegedly received from his analyst, Jon Horvath.[16] Just prior to year end 2013, a jury in the Southern District of New York found Steinberg guilty of four counts of insider trading, continuing the U.S. Attorney's Office for the Southern District of New York's perfect trial record in recent years in insider trading cases.[17] As was recently reported, "since taking over as the U.S. [A]ttorney for the Southern District of New York in August 2009, [Preet] Bharara is 77 for 77 in convicting defendants in insider trading cases. Eighteen of those defendants pled guilty, and the rest were convicted during jury trials."[18]

SAC's founder Cohen has not been charged with any crimes.[19] However, on July 19, 2013, the SEC charged Cohen in an administrative proceeding with violating Section 203(f) of the Investment Advisers Act. In the order instituting proceedings, the SEC alleged that Cohen failed adequately to supervise his portfolio managers, specifically Martoma and Steinberg. The SEC alleged that Cohen encouraged Martoma to speak with the doctor overseeing the clinical trial, did not sufficiently question Martoma when he abruptly changed his view of the Elan and Wyeth stock after speaking with the doctor, and ultimately paid Martoma a bonus that year exceeding $9 million. The SEC also alleged that Cohen received an email from Jon Horvath regarding Dell gross margin information from "someone at the company" and then traded Dell stock. According to the SEC, Cohen "stood by" while Steinberg traded Dell stock, notwithstanding so-called "red flags" that the information Steinberg possessed could be material nonpublic information.

The SEC's decision to file an administrative proceeding against Cohen was likely motivated by changes in the Dodd-Frank Wall Street Reform Act, which enable the SEC to recover civil penalties in an administrative proceeding – previously only allowed in civil enforcement actions – while offering other advantages to the SEC. Specifically, the SEC will not be subject to the Federal Rules of Evidence and can save expense by trying its case before an administrative law judge rather than a jury. By instituting an administrative proceeding against Cohen, the SEC also avoided the

possibility that the case would be filed before a federal judge who might deny a DOJ request to intervene and stay discovery pending an ongoing criminal case, a situation that has presented difficulties for DOJ. Here, shortly after the administrative action against Cohen was filed, the U.S. Attorney's Office for the Southern District of New York did move to stay the proceeding, and Cohen did not object. The administrative law judge ordered a stay on August 8, 2013, pushing resolution of this matter into 2014.[20]

MARK CUBAN'S HARD-FOUGHT VICTORY OVER THE SEC

2013 saw Mark Cuban finally emerge victorious over the SEC in its long-running enforcement action against him. As we have reported in previous Reviews, the SEC charged Cuban with insider trading in connection with his purchase of Mamma.com stock in March 2004 and sale of that stock in June 2004. According to the SEC, Mamma.com CEO Guy Faure called Cuban days before Mamma.com planned to announce its participation in a private investment in public equity ("PIPE") offering.[21] The SEC further alleged that, in that call, Cuban agreed to keep the impending PIPE confidential, thereby assuming a fiduciary duty to Mamma.com and a duty to abstain from trading. Cuban, however, did not sign a written confidentiality agreement and there was no express commitment to refrain from trading. Shortly after the call, Cuban sold his 6.3% stake in Mamma.com, avoiding $750,000 in losses when the PIPE deal was announced.

As we noted in our previous reviews, Cuban successfully moved to dismiss the SEC's charges in 2009, only to have the dismissal reversed by the United States Court of Appeals for the Fifth Circuit in 2010. Cuban kept fighting, launching his own case against the SEC under the Freedom of Information Act.[22] In 2011, Cuban argued that the SEC's case was barred by unclean hands, and went to battle with the SEC over a number of discovery issues.

Coming into 2013, Cuban showed no signs of giving up the fight and approached his October trial with a multi-prong attack on the SEC's case. The SEC's case hinged on its contention that Cuban had agreed in his call with Faure to keep the PIPE deal confidential, as there was no written confidentiality agreement. But, in nearly two days of testimony, Cuban denied he had ever agreed to keep the PIPE confidential. The only testimony contradicting Cuban's account was that of Faure, who did not appear live. In Faure's videotaped deposition, which was played for the jury, Faure testified he could not remember the specific words that Cuban used, and admitted that he did not swear any other Mamma.com investors to secrecy when discussing the PIPE.[23] Cuban's lawyers argued that Faure fabricated Cuban's agreement in exchange for a deal with the SEC under which the SEC terminated its investigation into possible wrongdoing by Faure. Specifically, Cuban's defense pointed to the fact that in his initial interviews with the SEC, Faure did not mention Cuban's purported agreement to keep the PIPE confidential and developed this version of events only after the SEC stopped investigating Faure.[24]

Cuban then argued that, regardless of what was said in the Cuban-Faure phone call, given the specific facts and circumstances of the case, Mamma.com's participation in the PIPE was not material nonpublic information before Faure called Cuban to discuss it. To support this argument, Cuban's lawyers hired an expert witness who analyzed the market's response to the press release disclosing the PIPE. Cuban's expert opined that, because the market response to the PIPE announcement was not "statistically significant," the PIPE offering was not material to investors in Mamma.com.[25] Further, the expert testified that Mamma.com had filed a form 20-F with the SEC in May 2004 – preceding Cuban's trading – in which it disclosed the possibility of a PIPE offering to raise capital. Spikes of trading in the days leading up to the public announcement further demonstrated that the PIPE was public before Faure's call to Cuban. The expert thus concluded that the PIPE "was immaterial and had become public by the time [Cuban] sold his shares."[26]

Ultimately, Cuban's arguments prevailed. The jury deliberated for less than five hours before vindicating Cuban.[27] Following the jury's verdict, Cuban gave an interview in which he described the SEC as "mischaracteriz[ing] facts" to go after a "big name." He stated that he was grateful that he could afford to stand up to the SEC. Cuban acknowledged that he spent "far more" in legal fees for his defense over the last decade than he would have had to pay had he chosen to settle with the SEC.

THE GUPTA SAGA

In last year's Review, we discussed Rajat Gupta's insider trading conviction for tipping hedge-fund manager Raj Rajaratnam concerning Goldman Sachs' earnings and Mr. Gupta's appeal of that conviction to the Second Circuit. The Court of Appeals heard oral argument on the appeal of Gupta's criminal conviction on May 21, 2013, but it had not handed down a decision by year end. We will continue to follow Gupta's criminal case in 2014.

In the meantime, the SEC made news in 2013 in its civil case against Gupta by securing a hefty $13.9 million penalty.[28] The SEC sought and was granted the statutory maximum penalty of triple the benefit that Rajaratnam had obtained from the tips Gupta passed on to him. This penalty comes on top of the $5 million criminal fine imposed on Gupta at his criminal sentencing in 2012.

When sentencing Gupta to two years in prison in 2012 – substantially below the range set by the Sentencing Guidelines – U.S. District Court Judge Jed Rakoff criticized the Guidelines range and was swayed by, among other factors, Gupta's argument that he had "selflessly devoted a huge amount of time and effort to a very wide variety of socially beneficial activities" and that he had done so "without fanfare or self-promotion."[29]

When it came to civil penalties, however, Judge Rakoff took a notably different approach. He agreed with the SEC that "all of the *Haligiannis* factors counsel in favor of imposing the maximum allowable civil penalty upon Gupta."[30] Those factors are: "(1) the egregiousness of the defendant's conduct; (2) the degree of the defendant's scienter; (3) whether the defendant's conduct created substantial losses or the risk of substantial losses to other persons; (4) whether the defendant's conduct was isolated or recurrent; and (5) whether the penalty should be reduced due to the defendant's demonstrated current and future financial condition."[31]

Gupta argued that the treble penalty was inappropriate in light of the criminal penalties that had already been imposed. The court disagreed, finding that "imposition of an additional civil penalty is called for here in order to effectuate Congress's purpose of making insider trading a money-losing proposition, both for Mr. Gupta and for those who would consider it."[32]

Having found that the statutory maximum treble penalty was appropriate, the remaining question was what baseline profits (or losses avoided) could be used to measure the penalty. The court based the calculation on the three substantive counts of insider trading of which Gupta was convicted and "as to which the issue-preclusion of Gupta's criminal conviction applies."[33] The court rejected the SEC's argument to include other losses and gains as well, finding the record less clear and declining to exercise the court's discretion to include them.

When it came to granting injunctive relief, the court followed the five-factor test set forth by the Court of Appeals for the Second Circuit in *SEC v. Cavanagh*[34] – including whether the defendant maintains that his conduct was blameless – but expressly "decline[d] to attach any significance, one way or the other" to Gupta's decision to contest liability and to pursue appeals.[35] However, the court found that Gupta's "nearly unparalleled level of access to the upper echelons of corporate executives throughout the world" created a risk that he was well-placed to repeat misconduct in the future. The court also barred Gupta from serving as an officer or director of a public company, or associating with brokers, dealers, or investment advisors. In so doing, the court noted that Gupta's conduct "betrayed an impulse to place self-interest ahead of his employer's and its shareholders' interests," thus rendering him unfit to be a fiduciary.[36]

Gupta appealed the civil penalty on the bases that the court failed properly to consider the other penalties imposed on Gupta, including prior criminal punishment, and that comparable cases demonstrate that the magnitude of the penalty imposed on Gupta constitutes an abuse of discretion.[37] The SEC's opposition brief is due in February 2014, so Gupta's civil penalty too will be an issue to watch in 2014 and possibly beyond.

SECOND CIRCUIT APPEAL TESTS DOJ'S WIN STREAK

As we reported in last year's Review, the U.S. Attorney's Office for the Southern District of New York continued its perfect trial record in 2012 by securing convictions against Todd Newman and Anthony Chiasson at the end of the year. Newman and Chiasson – former portfolio managers at

Diamondback Capital and Level Global, respectively – appealed their convictions in 2013, raising substantial issues that may change the landscape of insider trading cases going forward.

Newman and Chiasson were convicted of insider trading in Dell and Nvidia stock beginning in 2008. The government alleged that the defendants traded based on information originating from an insider that was passed to them through multiple levels of downstream tippees. Newman allegedly traded on inside information he received from an analyst he supervised at Diamondback, Jesse Tortora. Tortora in turn had received inside information from another tippee, Sandy Goyal, who himself had spoken with Dell insiders. Newman was therefore a downstream tippee three levels removed from the insider. Chiasson allegedly received the inside information from Sam Adondakis, his analyst at Level Global, and was also three levels removed from any insider. According to DOJ, Tortora and Adondakis were part of a "close-knit criminal club"[38] that exchanged material nonpublic information regarding multiple companies, including Dell and Nvidia, but the government did not allege that Newman or Chiasson were part of that group or that anyone in that group spoke directly with insiders at public companies.

On appeal, both Newman and Chiasson argue that the jury was improperly charged because the district court did not require the jury to find that each defendant knew that inside tippers received a personal gain in exchange for breaching their duties to the companies.[39] Appellants argue that reversal is appropriate because there was no evidence presented that they knew who the Dell or Nvidia insider was, or of any self-dealing by the insiders.

At trial, Newman and Chiasson sought a jury charge that required a finding of knowledge of such a personal benefit in order to convict. However, U.S. District Court Judge Richard Sullivan rejected that request, citing the 2012 opinion of the Court of Appeals for the Second Circuit in *SEC v. Obus*. In *Obus*, the Court of Appeals held that civil liability for securities fraud was appropriate even where the tippee lacked actual knowledge that the inside information was disclosed in breach of a duty of confidentiality. Instead, a tippee's liability could arise in cases where the sophisticated investor tippee should have known that the information may have been disclosed in violation of a duty of confidentiality.[40] *Obus*, a civil enforcement action, did not reach the state of mind requirement for criminal cases; nor did it address the personal benefit issue directly.

On appeal, Newman and Chiasson argue that *Obus* does not apply and instead ask the Court of Appeals for the Second Circuit to look to the Supreme Court's decision in *SEC v. Dirks*. In *Dirks*, the Court held that "a tippee assumes a fiduciary duty to the shareholders of corporation . . . only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach."[41] Appellants further argue, citing the Supreme Court's decision in *Morissette v. United States*,[42] that where wrongfulness turns on the existence of a fact, the government must prove the defendant's knowledge of that fact. In other words, Appellants contend that because "personal benefit to the insider marks a bright line between conduct that is fraudulent . . . and conduct that is entirely legal. . . . [C]riminal tippee liability requires knowledge of a personal benefit to the insider."[43]

Appellants also rely on Judge Rakoff's opinion in *United States v. Whitman* – written after the *Obus* decision – which applied *Dirks* to embrace the argument Newman and Chiasson now make on appeal. Judge Rakoff explained, "[i]f the only way to know whether the tipper is violating the law is to know whether the tipper is anticipating something in return for the unauthorized disclosure, then the tippee must have knowledge that such self-dealing occurred, for without such a knowledge requirement, the tippee does not know if there has been an 'improper' disclosure of insider information."[44] Judge Rakoff thus instructed the jury in the *Whitman* criminal prosecution in line with the charge requested by Newman and Chiasson, notwithstanding the Second Circuit's holding in the *Obus* SEC civil enforcement action.

The Newman and Chiasson appeal is also noteworthy for its taking the "personal benefit" argument a step further, suggesting that the company insiders at issue in their trial did not benefit personally, as demonstrated by the government's failure to charge those insiders.[45] That Rob Ray, the purported Dell

insider, has not been charged with any wrongdoing has been subject to media scrutiny as recently as November, leading many to question how the government can charge downstream tippees who are multiple steps removed, but decline to prosecute the insiders from whose liability all tippee liability is derivative.[46] Leaving aside for a moment the government's curious choice not to charge the individuals who are the but-for cause of the trading that led to a long string of prosecutions, the government seems to be pushing the bounds of any "personal gain" to the insider underlying liability in the Dell and Nvidia cases. In the government's opening statement during the recent *Steinberg* trial, the government argued that Dell insider Ray benefitted from the breach of his fiduciary duties in the form of "career advice" and "personal friendship" of his tippee Goyal.[47] Nvidia insider Choi also benefitted from the "personal friendship" of his tippee in exchange for Choi's disclosure of inside information. Thus, neither Ray nor Choi was alleged to have benefitted in any tangible way in exchange for the risks they undertook in committing a criminal breach of their fiduciary duties.

The resolution of the Newman and Chiasson appeal in 2014 will not only likely shed some light on the precise contours of *Obus* and resolve an apparent split within the United States District Court for the Southern District of New York, but could have far-reaching implications for insider trading prosecutions of downstream tippees. If decided in Appellants' favor, the decision could topple DOJ's perfect record in the Southern District of New York, leading to reversal not only of the Newman and Chiasson convictions, but perhaps to Steinberg's conviction as well.

THE END OF THE MOSAIC THEORY?

The SEC has long recognized the validity of investors compiling disparate pieces of information through analysis and research to decide how to trade. Known as the "mosaic theory," the SEC acknowledges that an investor can legally piece together tidbits of immaterial nonpublic information – including from experts – that reveals a material conclusion.[48] For the theory to be valid, however, none of the pieces of the mosaic may themselves be material nonpublic information.

As we reported in our 2011 Review, Raj Rajaratnam's conviction raised alarms in some corners of the hedge fund industry that the mosaic theory of trading was in danger. Some feared that traders and portfolio managers could no longer try to piece together various tidbits of non-material information obtained from company insiders, into a meaningful – material – mosaic.

The government's aggressive prosecution over the last two years of the "expert networks" did little to allay such fears. "Expert network firms" are research consulting firms that act as matchmakers connecting clients – mostly institutional investors such as hedge funds – with persons who can provide market intelligence based on specialized expertise in the clients' areas of interest. The research outfits pull together vast networks of experts who can provide unique perspective, insight, and tidbits into various industries. For their services, the research firms charge investors substantial hourly or annual fees. The entire point of expert network firms is to give investors an advantage. Investors pay a premium to gain insight into an industry with the obvious goal of making a profit. Expert networks are entirely legal as long as the information that is passed from the research firm to the client is not material nonpublic information obtained in breach of a duty.

The insider trading enforcement actions in the last two years, however, tended to show that rumors of the demise of the mosaic theory were greatly exaggerated. The cases the government brought alleged clear abuses of material nonpublic information – or, in the words of U.S. Attorney for the Southern District, Preet Bharara, cases involving "hard core insider trading in stock after stock – people blatantly trafficking in material nonpublic information."[49] At the time the expert network cases were first surfacing, the government publicly declared that it was not seeking to undercut the mosaic theory. For example, then-Director of the SEC Office of Compliance Inspections and Examinations Carlo V. di Florio declared that, by bringing the expert network cases, the Commission was not "seeking to undermine the mosaic theory, under which analysts and investors are free to develop market insights through assembly of information from different public and private sources, *so long as* that information is not material nonpublic information obtained in breach of or by virtue of a duty or relationship of trust and confidence."[50]

Fast forward to 2013, and it is the latter part of Mr. di Florio's pronouncement – "breach of or by virtue of a duty or relationship of trust and confidence" – that has once again renewed fears of the demise of the mosaic theory.

In a case that appears to be pushing the boundaries of what constitutes a fiduciary duty, in April, the SEC charged a Toronto-based investment banker with insider trading based largely on what he pieced together about a deal from a number of different sources, including intuition and observation.[51] The banker, Richard Bruce Moore, was the managing director in a private equity coverage group at a large Canadian bank. Moore developed a personal and professional relationship with an employee of one of Moore's top clients, the Canadian Pension Plan Investment Board ("CPPIB"). Moore's contact at CPPIB was responsible for taking public companies private. As part of his work for the bank, Moore often pitched investment opportunities to the CPPIB employee.

According to the SEC complaint, sometime in March 2010, the CPPIB employee told Moore that he was working on an interesting, active deal. Moore expressed interest in having the bank participate in the deal, and the CPPIB employee responded that they would have to wait and see how the deal developed. He did not provide Moore with any details about the parties involved in the prospective transaction. Later that same month, in response to a follow-up email from Moore, the CPPIB employee asked if the bank would be willing to underwrite a $2 billion deal. Again, the CPPIB employee provided no information as to the parties involved or the nature of the deal.

Through his ongoing communication with the CPPIB employee, Moore learned that the CPPIB employee was traveling to London on a regular basis between March and May 2010. In June 2010, at a charity event, Moore observed a chance encounter between the CPPIB employee and an unidentified man. The CPPIB employee declined to introduce or identify the man to Moore. Through another colleague at the bank, Moore however learned that the man was the CEO of the company that CPPIB proposed to take private.

Based on the facts Moore knew and observations he made, including that: (1) CPPIB was working on a big deal, (2) his friend was traveling with frequency to London; and (3) his friend had a conversation with the CEO of a particular London-based company, Moore deduced that the CPPIB was working on a deal to acquire that company. A few days after the charity event, through an offshore bank, Moore purchased a significant amount of shares and American depository receipts in the target company. Following the deal announcement between CPPIB and the company, the price of the stock that Moore had purchased went up 27%, and Moore profited by approximately $163,000. It is worth noting that CPPIB never engaged Moore or the bank to work on the transaction.

The SEC nevertheless charged Moore with insider trading on the theory that Moore "on the basis of information that he knew, or was reckless in not knowing, was material, nonpublic, and had been acquired in the course of his employment, knowingly or recklessly misappropriated the information from his employer for his personal benefit by purchasing [the target's] ADRs ahead of the announcement that [the target] had received an acquisition offer."[52]

The SEC did not allege that the CPPIB employee had improperly tipped Moore. Rather, the SEC alleged that Moore had misappropriated the information in breach of his duty to the bank. According to the SEC, the information belonged to the bank and Moore improperly used it for his personal gain.

Because Moore opted to settle with the SEC rather than litigate, the SEC's theory of the case remains untested. Nonetheless, the SEC's aggressive stance against Moore suggests that, if disparate pieces of information – even if nonpublic and immaterial – are gathered in breach of a duty, then the mosaic theory may not be available as an affirmative defense to insider trading.

COOPERATION CONTINUES TO PAY

In prior Reviews, we looked back over years of criminal sentences and civil penalties to assess whether cooperating with authorities provided tangible benefits in insider trading cases. The results were clear: it did. Cooperators received markedly lower prison sentences and civil penalties. The trend held true in 2013. The clear pattern emerges that cooperating yields tangible benefits, and nowhere more so

than in the Southern District of New York, the epicenter of the United States government's insider trading enforcement efforts.

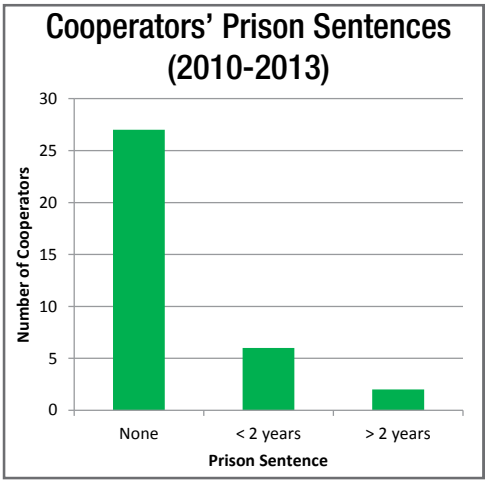
COOPERATION 101

When assessing an individual's cooperation, the SEC engages in a multi-part analysis, of which the individual can really control only one factor – the amount of assistance that the individual provides.[53] To weigh this factor, the SEC looks to the value and the nature of the cooperation, considering issues like the timeliness and voluntariness of the cooperation and the benefits to the SEC of the cooperation. DOJ similarly considers an individual's cooperation when deciding whether to move for a downward departure at sentencing.[54] Likewise, the federal Sentencing Guidelines ("Sentencing Guidelines" or "Guidelines") also focus on the timeliness and comprehensiveness of the defendant's assistance.[55] Entities may cooperate as well. Authorities query whether the organization has sufficient self-policing, self-reported fully and accurately to authorities, took appropriate remedial action, and assisted authorities on an on going basis during their investigation.[56]

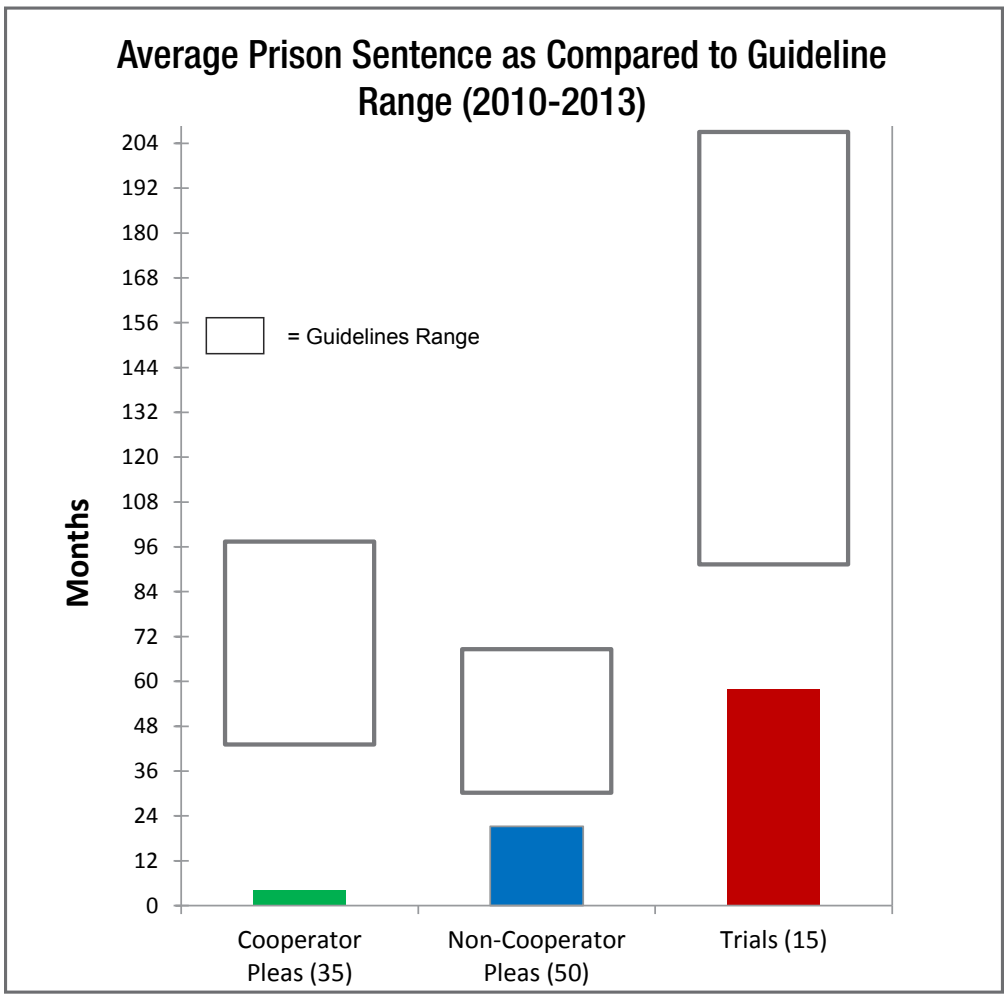
COOPERATORS RECEIVED LESS PRISON TIME, IF ANY

A review of insider trading sentences over the past four years reveals that convicted cooperators routinely receive no prison time. This trend was nearly the rule in 2013. Of the 15 cooperators sentenced in 2013, 11 received no prison time and the longest prison sentences received were for one year in prison on pleas with minimum Sentencing Guideline recommendations of nearly six years, and over eight years, respectively.

By contrast, twelve sentences were handed down to non-cooperators in insider trading cases in 2013. These prison sentences averaged slightly over three years. Only two non-cooperators received no prison time, and they were both outside of the Southern District of New York. The five non-cooperating defendants in the Southern District of New York, including two guilty pleas and three trial verdicts, all received prison sentences of at least one year and averaged approximately three and a half years.



As illustrated in the chart below, the aggregate data from the past four years reflects the same trends that we identified in prior years' Reviews, with cooperators faring better than defendants who entered guilty pleas, even though their recommended Sentencing Guidelines range was



higher. Specifically, cooperators received an average sentence equal to 10% of the minimum recommended Guidelines range. In contrast, non-cooperating defendants who plea bargained received sentences equal to 70% of the minimum recommended Guidelines range, and defendants who went to trial received average sentences equal to 64% of the minimum Guidelines range.

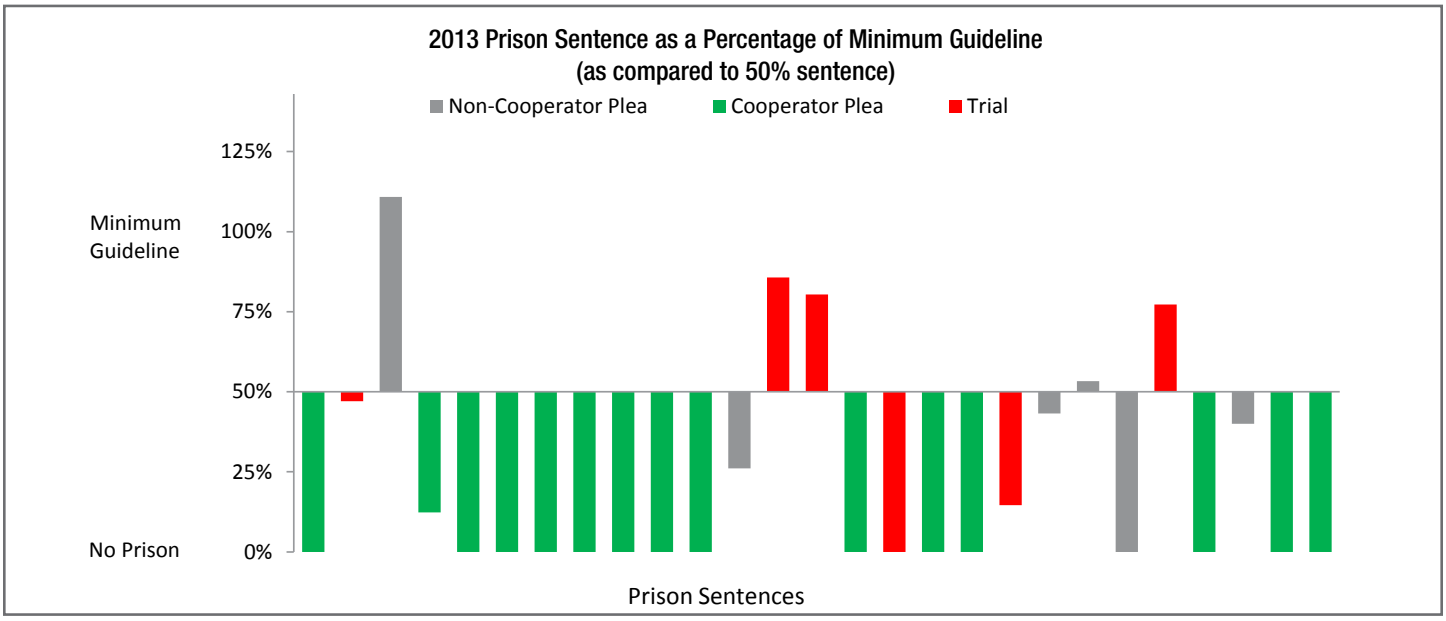
Not every insider trading matter is a mega-case, so we considered whether a few large matters skewed the numbers. They do not. The below chart illustrates how much each insider trading sentence from 2010 through 2013 deviated from a rough average of half the minimum guideline. In 2013, we continued to see cooperators (in green) receive consistently below-average sentences that typically involved no prison time. Comparing the red and gray lines yields an interesting insight as well. While prosecutors continued their success in securing guilty verdicts, the prison sentences that followed trial varied from no prison time for one defendant, to a maximum of 86% of the minimum guideline.

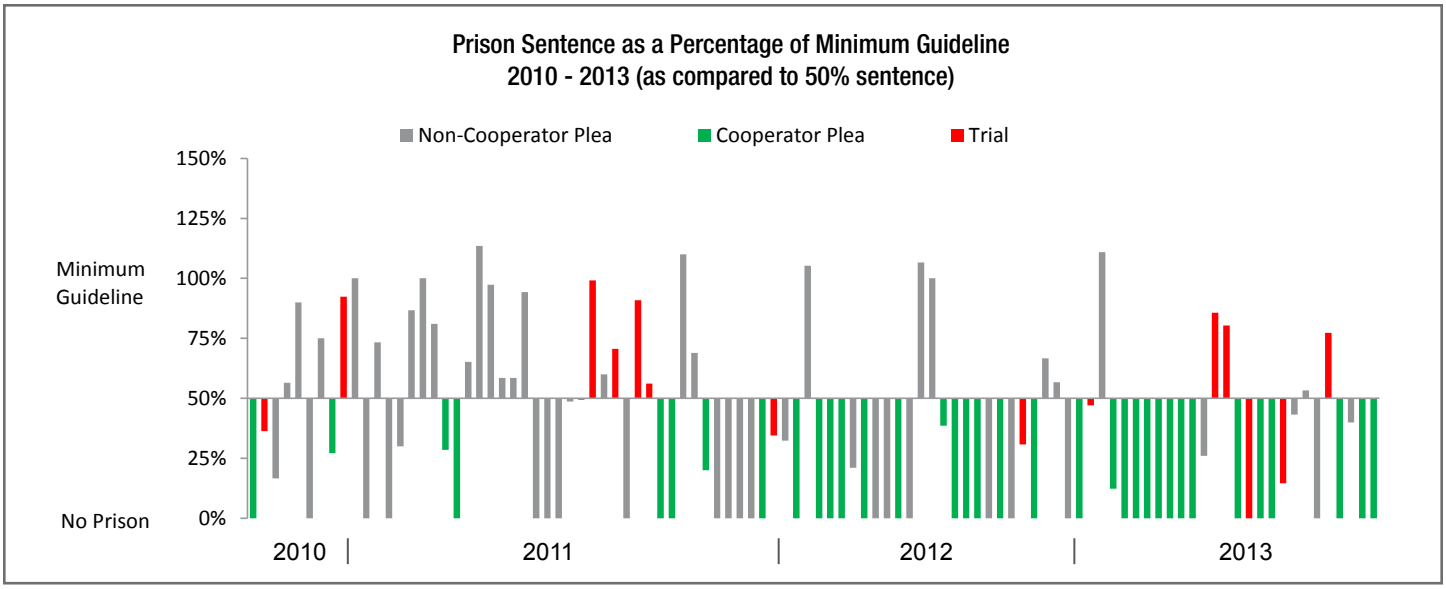
Non-cooperating defendants who enter a plea of guilty continue to receive a wide range of sentences, as illustrated by the gray lines below. It is worth noting that the one defendant to receive a sentence longer than the minimum guideline, John Kinnucan, may represent the antithesis of a cooperator. The press release announcing his sentence noted that his "criminal odyssey" had evolved into a "vile and very public campaign to threaten public servants and obstruct the federal investigation," including repeated threatening calls to prosecutors and investigators.[57] "In these telephone calls, Kinnucan made repeated references to genocide, sexual and other forms of violence and threatened physical harm to one of the prosecutors handling this matter. He also made multiple telephone calls to one cooperating witness and attempted to contact another in an effort to intimidate and harass them."[58] Kinnucan was sentenced to more than four years in prison. Putting aside this one anomalous case, non-cooperating defendants who entered pleas of guilty fared better on average than those who went to trial.

The insider trading sentences handed down in 2013 show a clear continuation of the trends that have become evident in the past few years. From 2010 through 2013, cooperators consistently received substantially reduced prison time and usually no prison time. Those found guilty at trial almost always received some prison time, but the amount varied widely from the Guidelines recommendation. Non-cooperating plea bargainers occupy the entire spectrum.

KNOW YOUR ROLE

The last four years of sentencing data also leave little doubt that prison sentences are highly dependent on whether the defendant was a tipper, a tippee, or both. This holds true for cooperators and non-cooperators alike. The following chart provides the average sentences for 2010 through 2013 in each category. Among cooperators, tippers and defendants who both traded and tipped fared better than tippees. All cooperators, however, received substantially less prison time than non-cooperating defendants regardless of role.





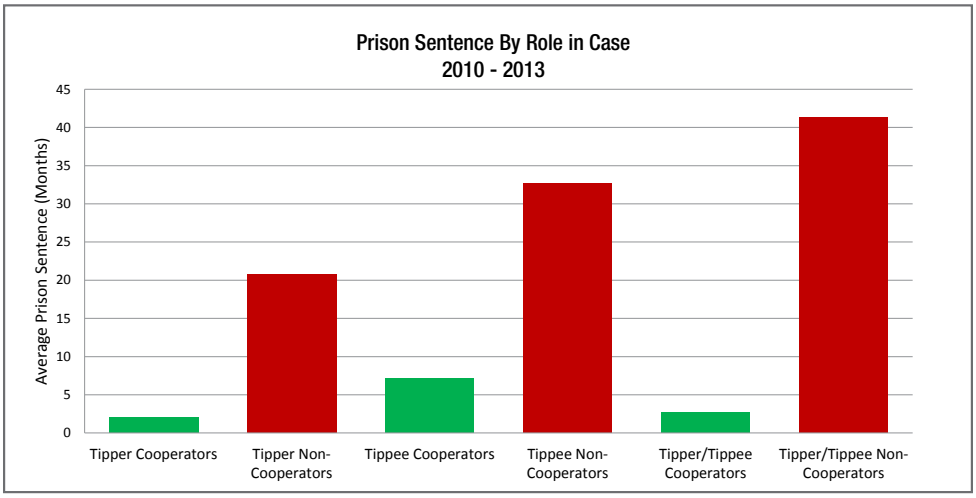
A non-cooperating defendant's role, as illustrated by the red bars below, led to dramatic differences in prison sentences.

The data for 2013, by itself, reflected the same trend even more starkly, with non-cooperating tippers receiving average sentences of less than 15 months, while tippees – those who traded on and profited from the information leaked by the tippers – received over 40 months on average.

IF YOU CAN MAKE IT THERE, YOU'LL MAKE IT ANYWHERE

Prosecutors in and around New York City continue to secure the longest prison sentences for insider trading. Over the past four years, the Southern District of New York has continued to reward cooperation most handsomely as well, with cooperators rarely receiving prison sentences and averaging less than two months of prison time, while non-cooperators average over 30 months of prison time.

Cooperation outside of the Southern District of New York still has benefits, but may not be as advantageous. Cooperators outside of the Southern District received prison sentences averaging slightly over 15 months, whereas non-cooperators averaged just over 27 months. Certainly, there have been fewer cooperators outside of the Southern District of New York over this time period (seven in total, as compared to 28 in the Southern District of New York), because there have been fewer insider trading cases brought outside of the Southern District of New York. The data thus likely reflects more of a collection of recent anecdotes than a trend. Nevertheless, insider trading defendants outside of New York City likely face a different calculus than those within New York City.



A CLEAR FORMULA FOR CIVIL PENALTIES

Although the SEC and courts may impose civil penalties of up to three times the trading profits, this result seems rare. All but two of the civil penalties imposed in civil actions brought by the SEC arose in the context of settlements, and the vast majority of the settlements involved a penalty equal to disgorgement. The only 3X penalty resulted from a default judgment. And akin to the usual no-jail sentence in criminal cases, cooperators in SEC civil enforcement cases were much more likely than non-cooperators to receive no penalty.[59]

Moreover, many of the other deviations are explainable by

unique factors. For example, while the below chart excludes parties that were expressly identified as "relief defendants" only, it does include three individual brokerage customers, all of whom disgorged gains but paid no penalty in a case where the defendant charged with conducting the insider trading and his wife did pay a penalty equal to their personal benefit.

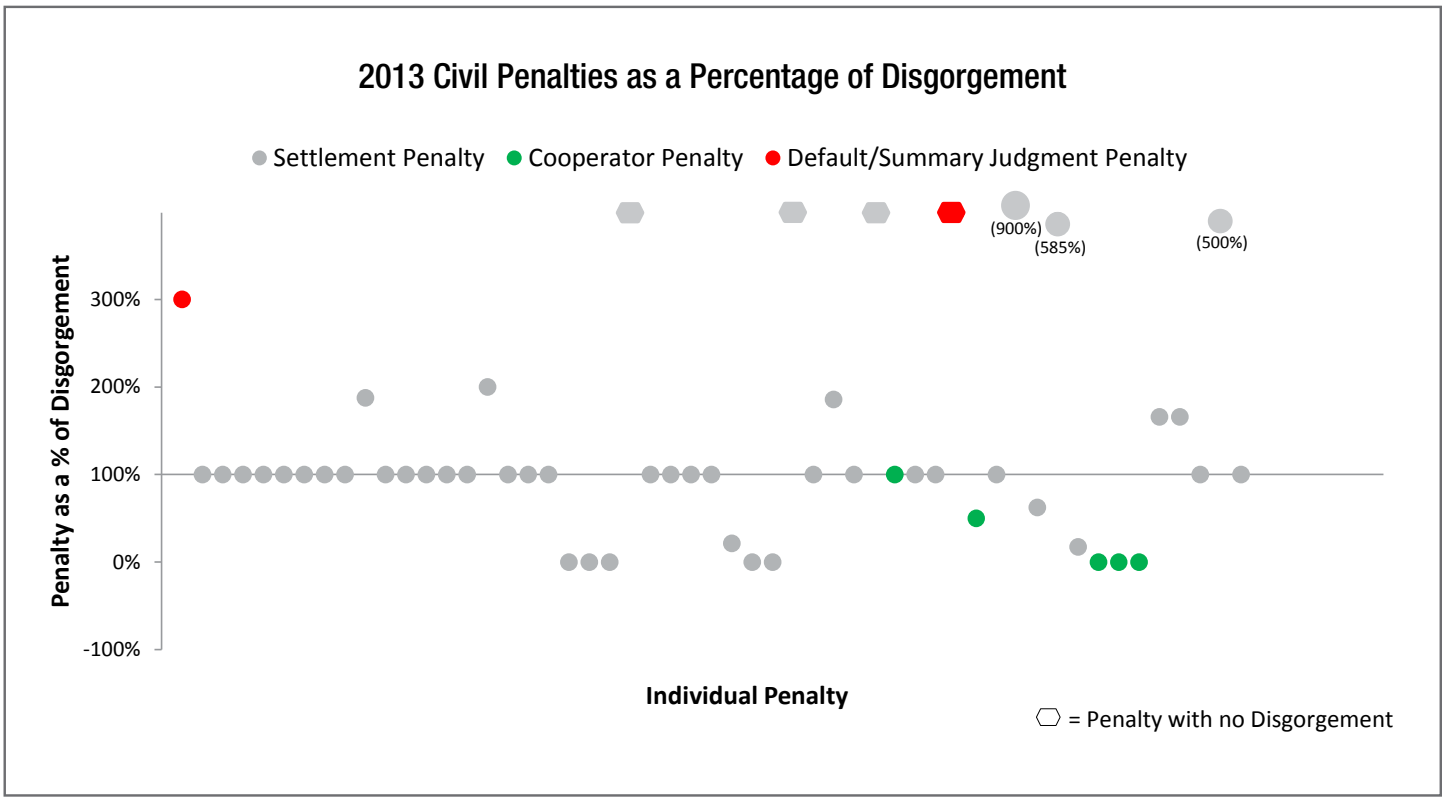
On the other side of the scale stands the $13.9 million fine imposed on Rajat Gupta, notwithstanding that he had no gains to disgorge from any insider trading.[60] This result, as do a couple others where substantial fines were imposed on settling defendants, shows that the SEC will take a tough stance on imposing a sizeable civil penalty where the SEC perceives that doing so is necessary to provide a meaningful disincentive.

COOPERATORS CANNOT ESCAPE IT ALL

Although cooperators generally receive leniency, their violations are not entirely forgiven. Prosecution, a civil injunction, disgorgement of ill-gotten gains, and reputational harm are all near certainties. Indeed, under the SEC's new approach to settlements this year, defendants – perhaps even cooperating defendants – could be forced to admit wrongdoing when settling charges. Plus, defendants might find themselves without a job, or even barred from the securities industry, once the insider trading charge becomes public. Cooperators also face substantial demands on their time due to multiple meetings with prosecutors and SEC enforcement lawyers, testifying (and enduring sometimes grueling cross-examination) at trials, depositions, and hearings, as well as potentially being asked to record certain of their conversations with erstwhile friends and co-workers.

OUR TAKEAWAY

Whether to cooperate always depends on the specific facts and circumstances of the particular situation. The statistics suggest that for a defendant who does not foresee a sufficient likelihood of success at trial, cooperating in a criminal insider trading investigation, especially within the Southern District of New York, makes good sense. The prison sentences that cooperators received (for the few cooperators in recent years who received a prison sentence at all) were significantly less than the sentences imposed on defendants who pled guilty without cooperating or who went to trial and lost.



Cooperating with the SEC seems to almost uniformly result in a reduced civil penalty, if any civil penalty at all. But, the SEC, unlike DOJ, suffered a rather public insider trading trial loss in 2013 and the civil penalties imposed after trials are not unimaginably high. More civil defendants, therefore, might consider taking their cases to verdict. Nevertheless, insider trading cases often are about more than the numbers alone; they are human stories filled with personal risks, emotions and circumstances. These subjective factors may drive the cooperation decision as much as any statistical trend.

THE LONG ARM OF THE LAW

Vigorous global enforcement of insider trading continued in 2013. This year saw an uptick in multi-jurisdictional coordinated global enforcement efforts. U.S. regulators persisted in robust international enforcement while foreign regulators pursued large insider trading matters and certain countries adopted enhanced insider trading legislation.

GLOBAL COORDINATION

Coordination among global regulators occurs either informally, on a case-by-case basis, or formally, under a pre-established information sharing agreement. The former is not easily tracked, and up-to-date data tracking of the latter lags. Nevertheless, currently visible trends indicate that international information sharing has increased.

The International Organization of Securities Commissioners ("IOSCO") established a framework for countries to seek enforcement assistance from each other via a multilateral memorandum of understanding ("MMOU"). Although 2013 numbers have yet to be released, requests under the MMOU grew from 520 in 2006 to 1,624 in 2010, to 2,088 in 2011, and to 2,374 in 2012. IOSCO stated that "[t]he growing number of signatories in recent years has fueled a sharp upsurge in cross-border cooperation among IOSCO members," enabling members to pursue insider trading and other fraud.[61] Indeed, because information may also be shared under bilateral agreements outside of the IOSCO framework, the global-assistance trend is likely even more robust than suggested by the IOSCO published statistics.

The SEC's data and estimates show a similar upswing. In 2012, the SEC made 718 requests to foreign authorities for assistance on behalf of the Division of Enforcement and responded to 450 foreign regulators' requests for enforcement assistance. In 2013, the SEC made 725 requests and responded to 455 requests. The SEC estimates that, in 2014, it will make 735 requests and respond to 460 requests.[62] The numbers of inbound and outbound requests combined are thus relatively stable, albeit rising modestly. It is notable, however, that the outbound requests made by the SEC remain far greater every year than the requests that the rest of the world makes of the SEC in insider trading investigations.

DOUBLE TROUBLE

In 2013, cooperative international enforcement was clearly manifest between the United States and Hong Kong. This year alone brought three separate United States-Hong Kong insider trading matters.

First, regulators on both sides of the Pacific took actions involving Tiger Asia, a New York-based asset manager, and its former personnel. In January 2013, in an administrative proceeding, the SEC barred Raymond Y.H. Park from associating with certain regulated entities for three years following a December 2012 U.S. court action that alleged insider trading in private placements of Chinese bank stocks.[63] In April, the Hong Kong Court of Final Appeal dismissed the appeal by Tiger Asia and three of its officers (including Mr. Park) challenging civil proceedings brought by the Hong Kong Securities and Futures Commission ("SFC") and alleging insider dealing and other violations relating to the same Chinese bank stocks.[64] And in June 2013, the SFC instituted additional civil proceedings against Tiger Asia and certain of its personnel for the same issues.[65] Notably, the SFC has aggressively pursued recovery from Tiger Asia even though the firm has no physical presence in Hong Kong.

Second, the SEC extracted payments totaling approximately $3.9 million via 2013 settlements with defendants named in an action filed last year against traders who bought securities of Nexen, Inc. prior to the announcement of its acquisition by CNOOC Ltd.[66] In Hong Kong, the SFC revoked the SFC license

of one of the defendants who had settled with the SEC and prevented her from reentering the investment industry in Hong Kong for five years.[67]

Third, in September, Trent Martin, a research analyst formerly at an international financial services firm, pled guilty in the Southern District of New York to insider trading.[68] The facts of the case are straightforward: An attorney working on a corporate acquisition tipped his close friend Martin about the deal. Martin traded in the securities of the target company, tipped others, and profited as a result. What is intriguing about this case is that Martin, an Australian citizen, was arrested in Hong Kong and extradited to the United States.[69] At least one U.S. official talked tough about the result, reportedly stating that "Martin could run but he could not hide, as the long arm of the SEC will extend to those who flee the United States hoping to avoid the consequences of their unlawful conduct."[70] Extraditions on insider trading charges are rare, and prior to Martin's case had not occurred for years. Nevertheless, as commerce continues to become more globalized, so has insider trading, and as a result U.S. officials may seek to use this tool more often in the future.

Even without parallel United States action, Hong Kong authorities vigorously pursued their own insider trading cases in 2013. For example, the Hong Kong Market Misconduct Tribunal imposed its highest fine ever – HK$24 million (approximately US$3 million) – against a Hong Kong businesswoman for her alleged insider dealing around a failed takeover of a Hong Kong-listed beverage company by a U.S. soft drink firm.[71]

In short, Hong Kong not only remains a strong insider trading enforcer in its own right, but also appears a strong partner for U.S. enforcement efforts.

U.S.'S GLOBAL REACH

Many insider trading actions pursued in the United States this year involved multi-national elements. For example, in 2013 the SEC charged at least 10 defendants, most living overseas, for allegedly engaging in insider trading and reaping over $11.3 million in trading profits and avoided losses.[72] Five of these defendants settled, providing the SEC with more than $5.3 million in disgorgement and interest, and more than $6.5 million in civil penalties.[73] The SEC also obtained a default judgment this year in a case filed in 2010 against a Russian defendant and his wife (as a relief defendant), for insider trading ahead of numerous health care-related transactions.[74] The Court ordered more than $720,000 in disgorgement and interest and a $1.9 million civil penalty. The SEC also brought multiple actions involving domestic individuals trading in domestic securities, but around international business transactions.[75]

In addition to global traders and transactions, another case in 2013 highlighted the potential for global tippers. The Massachusetts securities regulator fined a bank because an analyst in Taiwan allegedly provided confidential research information about a U.S. company before it was published.[76] Taiwan is home to many companies that manufacture parts for U.S.-listed tech companies and, according to sources quoted by the Wall Street Journal, sharing of such nonpublic information about the supply chain and U.S. companies is not uncommon in Taiwan.[77]

In at least two separate criminal matters, DOJ also took tough stances on defendants' conduct during global insider trading investigations. In one, a U.S.-based broker entered a guilty plea to conspiracy for, among other things, laundering insider trading profits through a British Virgin Islands entity and for hiding the activity by moving money to a new BVI entity once the SEC began investigating.[78] In another, DOJ unsealed an indictment of a former financial adviser to the ousted leaders of Kyrgyzstan for unspecified attempts to obstruct an investigation into alleged insider trading by a Moscow-based firm.[79]

U.S. regulators made clear that geographic boundaries may not necessarily be an impediment to enforcement. An SEC official, for example, reportedly proclaimed that "[t]hose who use foreign accounts to commit insider trading in the U.S. markets should know that their activities can still be tracked and they will be held accountable by the SEC for their actions."[80] Similarly, during a hearing that foreign defendants failed to attend, Judge Rakoff of the U.S. District Court for the Southern District of New York stated that "[i]t appears that the defendants have chosen to remain unknown, at least in terms of any appearance here in court. . . . They can hide, but their assets can't run."[81]

At least some foreign-resident defendants, however, have

challenged the government to produce evidence of more than just suspicious trading. China-based defendants (and a British Virgin Islands entity) in one SEC case moved for summary judgment by arguing that the SEC had failed to produce any evidence that the traders had access to inside information and traded in breach of a duty.[82] Earlier, the SEC voluntarily dismissed a lawsuit filed as an emergency action against unknown traders because the agency was unable to identify the source for allegedly material nonpublic information.[83] And the Second Circuit, curtailed DOJ's ability to impose criminal sanctions on foreign-based insider trading unless the fraud occurred in connection with a security listed on a U.S. exchange or the transaction occurred within the U.S.[84] Although the ruling may have little practical effect on the majority of insider trading cases brought by domestic agencies, it may limit their ability to reach some conduct – such as insider trading using certain bespoke securities or on foreign exchanges.

OTHER COUNTRIES

Other nations around the globe likewise vigorously pursued insider trading in 2013. Many countries undertook significant efforts in this area in 2013; we highlight three.

First, after securing a record-setting 10 convictions in 2012, the United Kingdom's Financial Conduct Authority ("FCA," previously, the Financial Services Authority) secured two more insider dealing convictions in 2013, with another seven prosecutions still pending.[85] The FCA won a four-year conviction for one defendant this year and a two-year conviction for the other.[86] The FCA also announced 14 additional arrests in insider dealing and market abuse investigations during 2013.[87]

Second, Japan's Securities and Exchange Surveillance Commission announced in August 2013 that it was seeking a ¥431.18 million (approx. US$4.4 million) fine against a Singapore-based capital management company for alleged market manipulation and insider trading.[88] The Monetary Authority of Singapore reportedly supported Japanese authorities in the matter, providing yet another global collaboration example.[89] In a separate matter, a former Japanese senior government official was found guilty of insider trading and received a suspended 18-month prison sentence, along with a ¥1 million fine and a surcharge of ¥10.31 million.[90] The senior METI official learned about, and traded on, a merger and a company's decision to accept public funds before they were publicly announced.[91] The trial focused on whether early, unconfirmed media reports of the potential merger sufficiently publicized the information on which the official traded.[92] Although ultimately the judge ruled that "prior newspaper reports cannot be considered facts widely made public for general investors," it is possible that uncertainty in this area led to suspension of the defendant's prison sentence.[93]

Third, the China Securities Regulatory Commission ("CSRC") imposed a record penalty of 523 million yuan (approximately US$85 million), in addition to disgorgement of 87.2 million yuan, against a state-controlled brokerage firm for insider trading.[94] The firm placed approximately 68.6 billion yuan (US$11.2 billion) in erroneous buy orders, which led to a large, but short-lived, surge in the country's main stock index. Before disclosing to the market that it placed the errant orders, the firm engaged in short sales of index futures and exchange-traded funds.[95] In addition, five executives of the firm also were fined, and four of the five were permanently barred from working in the securities industry.[96] Separately, the CSRC suspended approval for certain applications submitted by the country's fifth-largest fund manager after a former employee of the fund was arrested for insider trading.[97]

LEGISLATIVE REVISIONS

Several countries considered enhancements to their insider trading laws in 2013. For example, on June 12, 2013, the Japanese Diet approved sweeping changes to insider trading liability in the country by passing a bill to amend the Financial Instruments and Exchange Act.[98] Prior to the effective date of the changes, Japanese insider trading law did not provide for sanctions against tippers who did not trade. The amendments allow for direct insider trading enforcement action against insiders (or temporary insiders) who tip material nonpublic information to traders. The amendments also increase the amount of fines and potential prison time that may be imposed on violators.

The European Union likewise took steps to strengthen its regulations to combat insider trading.

Specifically, the European Parliament voted to increase fines (for entities – up to 15% of an entity's annual turnover or 15 million euros; for individuals up to 5 million euros) and to extend insider trading and market manipulation rules to additional trading venues and devices (such as certain derivatives).[99]

Authorities in Ontario, Canada amended its Securities Act to expand coverage as well. The Act previously prohibited insider trading by a "person or company in a special relationship with a reporting issuer." The revision amends the Act to include, among others, persons or companies that are *considering or evaluating* whether to make a take-over bid or enter into an arrangement with the reporting issuer as opposed to those simply *proposing* to make such a bid.[100]

THE STOCK ACT TAKES A STEP BACKWARDS

In last year's Review we reported that the Stop Trading on Congressional Knowledge Act (the "Stock Act") was signed into law on April 4, 2012.[101] The Stock Act, in part, made it illegal for members of Congress and their staff to buy or sell securities based on certain nonpublic information. It required members of Congress and government employees to report certain investment transactions within 45 days after a trade and mandated that the information in public financial disclosure reports be made available online. The law made clear that members of Congress and staff owed a duty to the citizens of the United States not to misappropriate nonpublic information to make a profit. In August 2012, the Stock Act was amended to ensure that the same restrictions that applied to members of Congress and their staff applied to their spouses and children. As New York Senator Kirsten Gillibrand stated at the time of the unanimously passed amendment: "The intent of this important reform bill was clear from the start, to restore people's faith in their elected leaders by ensuring we play by the exact same set of rules as every other American."[102]

In April 2013, President Obama signed legislation that rolled back disclosure requirements on Congressional staffers and low-level executive branch officials.[103] By signing into law S. 716, President Obama eliminated the requirement in the Stock Act to make available on official websites the financial disclosure forms for employees of the executive and legislative branches other than "the President, the Vice President, Members of and candidates of Congress, and several specified Presidentially nominated and Senate confirmed officers."[104] The new law also delayed until January 1, 2014 the implementation of the system that will enable public access to financial disclosure forms of covered individuals.

Congressional and executive-branch staff will still be required to report their stock trades publicly. However, those seeking the information will have to request it in person. Commentators criticized the new law as running counter to the original intent of the Stock Act to increase transparency. As the Center for Responsive Politics, a group that tracks campaign spending, explained: "Insider trading by members of Congress and federal employees is still prohibited, but the ability of watchdog groups to verify that Congress is following its own rules is severely limited. . . . This is not true disclosure."[105]

ON THE HORIZON: INSIDER TRADING 2.0

In 2013, we saw the emergence of what New York Attorney General Eric Schneiderman refers to as "Insider Trading 2.0": high-frequency trading based on very brief advantages in gaining access to publicly disseminated market-moving information.

In June 2013, the SEC reportedly inquired into Thomson Reuters' preferential release of manufacturing data from the Institute of Supply Management to Thomson Reuters' high speed data clients.[106] Then, on July 8, 2013, AG Schneiderman announced an agreement with Thomson Reuters to change its preferential dissemination practices for the University of Michigan consumer survey.[107] Until then, Thomson Reuters was selling to high-frequency traders early access to the results of the survey, which is among the most closely watched indicators of consumer sentiment in the United States. Those who paid for this service received access two seconds before the public release, which was more than enough time for high frequency traders to act on the information in advance of the broader market.

Since July 2013, Schneiderman has continued to draw attention to the issue in op-eds and in other public appearances. However, no charges have been brought and no cases have been filed on the basis of selling early access to information bound for public

dissemination. While many are concerned that the early release of market data creates an unfair trading advantage, it is not clear that the practice violates any existing laws. Instead, the issue may call for a regulatory solution, such as the SEC identifying and placing an embargo on the early release of certain market-moving information. For now, this remains an emerging issue, so stay tuned.

CONCLUSION

As has been the trend for the last few years, 2013 was another big year for insider trading cases. The government continued to make insider trading a top enforcement priority, and regulators worldwide continued in 2013 to add resources, time, and attention to insider trading enforcement. Insider trading enforcement looms large in 2014, kicking off the year with one of the biggest insider trading trials in recent history: the Southern District of New York's case against SAC portfolio manager Mathew Martoma.

APPENDICES

2013: Penalties Imposed in Insider Trading Prosecutions and SEC Enforcement Actions

Appendix A

Criminal Prosecutions

Date	Defendant	Role	Trial or Plea	Sentence
1/9/2013	Wesley Wang (*United States v. Wang*, S.D.N.Y. 2012)	Tippee/ Tipper	Plea (Cooperate)	• 2 years supervised release • Guidelines Calculation: Offense level 23 (46 to 57 months): +8 base level +18 gain -3 acceptance of responsibility • $500,000 forfeiture • Fine waived based on inability to pay • $200 special assessment
1/15/2013	John Kinnucan (*United States v. Kinnucan*, S.D.N.Y. 2012)	Tippee/ Tipper	Plea	• 51 months imprisonment plus 3 years supervised release • Guidelines Calculation: Offense level 23 (46 to 57 months): +8 base level +16 gain +2 obstruction of justice -3 acceptance of responsibility • $164,000 forfeiture • $300 special assessment
1/24/2013	Doug Whitman (*United States v. Whitman*, S.D.N.Y. 2012)	Tippee	Trial	• 24 months imprisonment plus 1 year supervised release • Guidelines Calculation: Offense level 24 (51 to 63 months)[108]: +8 base level +14 gain +2 obstruction of justice • $935,306 forfeiture • $250,000 fine • $400 special assessment
1/31/2013	Roomy Khan (*United States v. Khan*, S.D.N.Y. 2009)	Tippee/ Tipper	Plea (Cooperate)	• 12 months imprisonment plus 3 years supervised release • Guidelines Calculation: Offense level 29 (97 to 121 months)[109]: +8 base level +22 gain +2 obstruction of justice -3 acceptance of responsibility • $1,525,000 forfeiture • Fine waived based on inability to pay • $300 special assessment

Appendix A

CRIMINAL PROSECUTIONS (cont'd)

Date	Defendant	Role	Trial or Plea	Sentence
1/31/2013	Jason Pflaum (*United States v. Pflaum*, S.D.N.Y. 2010)	Tippee/ Tipper	Plea (Cooperate)	• 2 years supervised release • Guidelines Calculation: Offense level 23 (46 to 57 months)[110] • $500,000 forfeiture • Fine waived based on inability to pay • $200 special assessment
2/4/2013	Karl Motey (*United States v. Motey*, S.D.N.Y. 2010)	Tippee/ Tipper	Plea (Cooperate)	• 1 year supervised release • Guidelines Calculation: Offense level 15 (18 to 24 months)[111] • $40,000 forfeiture • No fine in light of forfeiture • $200 special assessment
2/11/2013	Ali Far (*United States v. Far*, S.D.N.Y. 2009)	Tippee/ Tipper	Plea (Cooperate)	• 1 year supervised release • Guidelines Calculation: Offense level 23 (46 to 57 months)[112] • $100,000 fine • $200 special assessment • 100 hours of community service
2/13/2013	Steven Fortuna (*United States v. Fortuna*, S.D.N.Y. 2009)	Tippee	Plea (Cooperate)	• 2 years supervised release (including 6 months home confinement) • Guidelines Calculation: Offense level 21 (37 to 46 months)[113] • $200,000 forfeiture • No fine in light of forfeiture and civil penalty • $400 special assessment • 240 hours of community service
2/21/2013	Joseph Seto (*United States v. Seto, et al.*, N.D. Cal. 2011)	Tippee	Plea (Cooperate)	• 6 months imprisonment plus 3 years supervised release (including 12 months home confinement) • Guidelines Calculation: Offense level 21 (37 to 46 months)[114] • $100 special assessment

Appendix A

CRIMINAL PROSECUTIONS (cont'd)

Date	Defendant	Role	Trial or Plea	Sentence
2/21/2013	Zisen Yu (*United States v. Seto, et al.*, N.D. Cal. 2011)	Tippee	Plea (Cooperate)	• 6 months imprisonment plus 3 years supervised release (including 12 months home confinement) • Guidelines Calculation: Offense level 21 (37 to 46 months)[115] • $100 special assessment
2/28/2013	King Chuen Tang (*United States v. Tang*, N.D. Cal. 2010)	Tipper/ Tippee	Plea (Cooperate)	• 12 months and 1 day imprisonment plus 3 years supervised release (including 6 months home confinement) • Guidelines Calculation: Offense level 25 (57 to 71 months): +8 base level +18 gain +2 abuse of trust -3 acceptance of responsibility • $200 special assessment • 1,000 hours of community service
3/14/2013	Tai Nguyen (*United States v. Nguyen*, S.D.N.Y. 2012)	Tippee/ Tipper	Plea	• 12 months and one day imprisonment plus 1 year supervised release • Guidelines Calculation: Offense level 23 (46 to 57 months): +8 base level +18 gain -3 acceptance of responsibility • $400,000 forfeiture • $100 special assessment
5/2/2013	Todd Newman (*United States v. Newman, et al.*, S.D.N.Y. 2012)	Tippee	Trial	• 54 months imprisonment plus 1 year supervised release • Guidelines Calculation: Offense level 26 (63 to 78 months): +8 base level +18 gain • $737,724 forfeiture • $1,000,000 fine • $500 special assessment

Appendix A

CRIMINAL PROSECUTIONS (cont'd)

Date	Defendant	Role	Trial or Plea	Sentence
5/13/2013	Anthony Chiasson (*United States v. Newman, et al.*, S.D.N.Y. 2012)	Tippee	Trial	• 78 months imprisonment plus 1 year supervised release • Guidelines Calculation: Offense level 30 (97 to 121 months): +8 base level +22 gain • $1,382,217 forfeiture • $5,000,000 fine • $600 special assessment
6/5/2013	Carl Binette (*United States v. Binette*, D. Mass. 2010)	Tippee	Trial	• 4 years supervised release, including 6 months in residential re-entry center and 6 months home confinement • Guidelines Calculation: Offense level 22 (41 to 51 months): +8 base level +14 gain • $615,833.06 forfeiture • $600 special assessment • Participation in mental health treatment program to address diminished capacity
6/25/2013	Donald Barnetson (*United States v. Barnetson*, S.D.N.Y. 2012)	Tipper	Plea (Cooperate)	• 1 year supervised release • Guidelines Calculation: Offense level 8 (0 to 6 months)[116] • $4,000 fine • $100 special assessment
7/1/2013	Mark Longoria (*United States v. Nguyen, et al.*, S.D.N.Y. 2011)	Tipper	Plea (Cooperate)	• 2 years supervised release • Guidelines Calculation: Offense level 23 (46 to 57 months): +8 base level +16 gain +2 obstruction -3 acceptance of responsibility • $170,000 forfeiture • $400 special assessment

Appendix A

CRIMINAL PROSECUTIONS (cont'd)

Date	Defendant	Role	Trial or Plea	Sentence
7/1/2013	Walter Shimoon (*United States v. Nguyen, et al.*, S.D.N.Y. 2011)	Tipper	Plea (Cooperate)	• 2 years supervised release • Guidelines Calculation: Offense level 21 (37 to 46 months): +8 base level +16 gain -3 acceptance of responsibility • $45,500 forfeiture • $300 special assessment
7/2/2013	Timothy McGee (*United States v. McGee*, E.D. Pa. 2012)	Tippee	Trial	• 6 months imprisonment plus 2 years supervised release • Guidelines Calculation: Offense level 22 (41 to 51 months)[117] • $100,000 fine • $200 special assessment
7/23/2013	Jauyo (Jason) Lee (*United States v. Lee, et al.*, N.D. Cal. 2013)	Tipper	Plea	• 16 months imprisonment plus 2 years supervised release • Guidelines Calculation: Offense level 21 (37 to 46 months): +8 base level +14 gain +2 abuse of trust -3 acceptance of responsibility • $200 special assessment
7/23/2013	Victor Chen (*United States v. Lee, et al.*, N.D. Cal. 2013)	Tippee	Plea	• 16 months imprisonment plus 2 years supervised release • Guidelines Calculation: Offense level 19 (30 to 37 months): +8 base level +14 gain -3 acceptance of responsibility • $283,817.18 forfeiture • $326,281.82 restitution to Leerink Swann, LLC • $200 special assessment

Appendix A

CRIMINAL PROSECUTIONS (cont'd)

Date	Defendant	Role	Trial or Plea	Sentence
8/14/2013	Michael Van Gilder (*United States v. Van Gilder*, D. Colo. 2012)	Tippee	Plea	• 6 months home detention plus 5 years supervised release • Guidelines Calculation: Offense level 13 (12 to 18 months): +8 base level +8 gain -3 acceptance of responsibility • $81,600 forfeiture • $5,000 fine • $100 special assessment
8/15/2013	David Brooks (*United States v. Schlegel, et al.*, E.D.N.Y. 2006)	Tippee	Trial	• 204 months imprisonment plus 5 years supervised release[118] • Guidelines Calculation not publicly reported • $59,602,931 forfeiture[119] • $8,700,000 fine • $1,700 special assessment
10/17/2013	Bob Nguyen (*United States v. Nguyen, et al.*, S.D.N.Y. 2011)	Tipper	Plea (Cooperate)	• 2 years supervised release • Guidelines Calculation: Offense level 15 (18 to 24 months): +8 base level +10 gain -3 acceptance of responsibility • $30,000 forfeiture • $200 special assessment
10/23/2013	Robert Ramnarine (*United States v. Ramnarine*, D.N.J. 2013)	Tippee	Plea	• 12 months and 1 day imprisonment plus 2 years supervised release • Guidelines Calculation: Offense level 19 (30 to 37 months)[120] • $311,361 forfeiture • $10,000 fine • $100 special assessment
11/5/2013	Joseph Foster (*United States v. Ballard, et al.*, N.D. Ga. 2010)	Tippee	Plea (Cooperate)	• 3 years supervised release • Guidelines Calculation: Offense level 17 (24 to 30 months): +8 base level +12 gain -3 acceptance of responsibility • $100 special assessment • 120 hours community service

Appendix A

CRIMINAL PROSECUTIONS (cont'd)

Date	Defendant	Role	Trial or Plea	Sentence
12/5/2013	Daniel DeVore (*United States v. DeVore*, S.D.N.Y. 2010)	Tipper	Plea (Cooperate)	• 2 years supervised release • Guidelines Calculation: Offense level 14 (15 to 21 months)[121] • $145,750 forfeiture • $200 special assessment

Appendix B

SEC Enforcement Actions

Date	Defendant	Role	Trial or Settlement	Outcome
1/14/2013	Alexander Vorobiev (*SEC v. Poteroba, et al.*, S.D.N.Y. 2010)	Tippee	Default Judgment	• Permanent injunction • $146,541.20 disgorgement • $21,389.80 prejudgment interest • $1,885,382.12 civil penalty
1/14/2013	Tatiana Vorobieva (*SEC v. Poteroba, et al.*, S.D.N.Y. 2010)	Relief Defendant	Default Judgment	• $481,919.71 disgorgement • $70,343.12 prejudgment interest
1/16/2013	Eric Rogers (*SEC v. Rogers*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $103,500 disgorgement • $24,872 prejudgment interest • No civil penalty due to inability to pay
1/22/2013	Steven Harrold (*SEC v. Harrold*, C.D. Cal. 2012)	Tippee	Settlement	• Permanent injunction • $86,850 disgorgement • $8,954.22 prejudgment interest • $86,850 civil penalty • Officer/director bar
1/30/2013	Daniel Vance (*SEC v. Wellington, et al.*, D. Or. 2013)	Tipper	Settlement	• Permanent injunction • $17,509.75 disgorgement • $1,768.18 prejudgment interest • $17,509.75 civil penalty
1/30/2013	Blake Wellington (*SEC v. Wellington, et al.*, D. Or. 2013)	Tippee	Settlement	• Permanent injunction • $55,891.50 disgorgement • $5,644.04 prejudgment interest • $55,891.50 civil penalty
2/5/2013	Patrick Carroll (*SEC v. Carroll, et al.*, W.D. Ky. 2011)	Tipper	Settlement	• Permanent injunction • $34,279 disgorgement • $10,412 prejudgment interest • $34,279 civil penalty
2/5/2013	James Carroll (*SEC v. Carroll, et al.*, W.D. Ky. 2011)	Tippee	Settlement	• Permanent injunction • $3,020 disgorgement • $917 prejudgment interest • $3,020 civil penalty

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
2/5/2013	William Carroll (*SEC v. Carroll, et al.*, W.D. Ky. 2011)	Tippee	Settlement	• Permanent injunction • $54,163 disgorgement • $16,452 prejudgment interest • $54,163 civil penalty
2/5/2013	David Mark Calcutt (*SEC v. Carroll, et al.*, W.D. Ky. 2011)	Tipper	Settlement	• Permanent injunction • $150,297 disgorgement • $45,652 prejudgment interest • $150,297 civil penalty
2/5/2013	Christopher Calcutt (*SEC v. Carroll, et al.*, W.D. Ky. 2011)	Tippee	Settlement	• Permanent injunction • $4,250 disgorgement • $1,291 prejudgment interest • $4,250 civil penalty
2/5/2013	David Stitt (*SEC v. Carroll, et al.*, W.D. Ky. 2011)	Tipper	Settlement	• Permanent injunction • $22,796 disgorgement • $6,924 prejudgment interest • $42,796 civil penalty
2/6/2013	James Balchan (*SEC v. Balchan*, S.D. Tex. 2013)	Tippee	Settlement	• Permanent injunction • $29,052.39 disgorgement • $1,562.79 prejudgment interest • $29,052.39 civil penalty
3/8/2013	Danny Kuo (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined
3/8/2013	Jon Horvath (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined
3/8/2013	Spyridon Adondakis (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined
3/8/2013	Sandeep Goyal (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
3/8/2013	Jesse Tortora (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined
3/11/2013	Michael Dale Lackey (*SEC v. Lackey*, W.D. Tenn 2013)	Tippee	Settlement	• Permanent injunction • $56,533.89 disgorgement • $2,942.26 prejudgment interest • $56,533.89 civil penalty • 5 year officer/director bar
3/15/2013	Sigma Capital Management, LLC (*SEC v. Sigma Capital Management, LLC, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $6,425,000 disgorgement (jointly and severally with Sigma Capital Associates, LLC and S.A.C. Select Fund, LLC) • $1,094,161.92 prejudgment interest (jointly and severally with Sigma Capital Associates, LLC and S.A.C. Select Fund, LLC) • $6,425,000 civil penalty
3/15/2013	Sigma Capital Associates, LLC (*SEC v. Sigma Capital Management, LLC, et al.*, S.D.N.Y. 2012)	Relief Defendant	Settlement	• $5,275,000 disgorgement (jointly and severally with Sigma Capital Management, LLC) • $883,252.05 prejudgment interest (jointly and severally with Sigma Capital Management, LLC)
3/15/2013	S.A.C. Select Fund, LLC (*SEC v. Sigma Capital Management, LLC, et al.*, S.D.N.Y. 2012)	Relief Defendant	Settlement	• $1,150,000 disgorgement (jointly and severally with Sigma Capital Management, LLC) • $210,909.87 prejudgment interest (jointly and severally with Sigma Capital Management, LLC)
3/15/2013	CR Intrinsic Investors, LLC (*SEC v. CR Intrinsic Investors, LLC, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $274,972,541 disgorgement • $51,802,381.22 prejudgment interest • $274,972,541 civil penalty

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
3/20/2013	Doug Whitman (*SEC v. Whitman, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $935,306 disgorgement (jointly and severally with Whitman Capital) • $935,306 civil penalty • Securities industry bar
3/20/2013	Whitman Capital (*SEC v. Whitman, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $935,306 disgorgement (jointly and severally with Doug Whitman)
3/22/2013	Juan Carlos Bertini (*SEC v. Bertini*, N.D. Cal. 2013)	Tippee	Settlement	• Permanent injunction • $16,035 disgorgement • $961 prejudgment interest • $32,070 civil penalty • 5 year officer/director bar
3/29/2013	Ren Feng (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $839,714.57 disgorgement (jointly and severally with CT Prime) • $839,714.57 civil penalty (jointly and severally with CT Prime)
3/29/2013	CT Prime Assets Limited (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $839,714.57 disgorgement (jointly and severally with Ren Feng) • $839,714.57 civil penalty (jointly and severally with Ren Feng)
3/29/2013	Zeng Huiyu (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $202,030.22 disgorgement • $202,030.22 civil penalty
3/29/2013	Wong Chi Yu (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• $641,057.94 disgorgement (jointly and severally with Giant East)

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
3/29/2013	Giant East Investments Limited (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• $641,057.94 disgorgement (jointly and severally with Wong Chi Yu)
3/29/2013	Wang Wei (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• $137,369.56 disgorgement
3/29/2013	Wang Zhi Hua (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• $466,169.15 disgorgement
4/8/2013	ThanhHa Bao (*SEC v. Nguyen, et al.*, S.D.N.Y. 2012)	Tipper	Settlement	• Permanent injunction • $144,910 civil penalty • 5 year officer/director bar
4/15/2013	Scott Reiman (*In the Matter of Scott Reiman*, S.E.C. Admin. 2013)	Tippee	Settlement	• Permanent injunction • $398,000 disgorgement • $93,567 prejudgment interest • $398,000 civil penalty
4/16/2013	Richard Bruce Moore (*SEC v. Moore*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $163,293 disgorgement • $14,905 prejudgment interest • $163,293 civil penalty • Securities industry and penny stock offering bar
4/22/2013	Mark Begelman (*SEC v. Begelman*, S.D. Fla. 2013)	Tippee	Settlement	• Permanent injunction • $14,949.34 disgorgement • $377.22 prejudgment interest • $14,949.34 civil penalty • 5 year officer/director bar

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
4/29/2013	Level Global Investors LP (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $10,082,725.78 disgorgement • $1,348,824.07 prejudgment interest • $10,082,725.78 civil penalty
5/1/2013	Choo Eng Hong (*SEC v. Well Advantage Limited, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • $466,477.62 disgorgement • $100,000 civil penalty
5/3/2013	Jamil Bouchareb (*SEC v. Devlin, et al.*, S.D.N.Y. 2008)	Tippee	Settlement	• Permanent injunction • $921,082 disgorgement • $127,216 prejudgment interest
5/3/2013	Daniel Corbin (*SEC v. Devlin, et al.*, S.D.N.Y. 2008)	Tippee	Settlement	• Permanent injunction • $164,515.50 disgorgement • $26,164.83 prejudgment interest
5/3/2013	Augustus Management, LLC (*SEC v. Devlin, et al.*, S.D.N.Y. 2008)	Tippee	Settlement	• Permanent injunction
5/3/2013	Corbin Investment Holdings, LLC (*SEC v. Devlin, et al.*, S.D.N.Y. 2008)	Tippee	Settlement	• Permanent injunction
5/22/2013	John Stilwell (*SEC v. Stilwell, et al.*, S.D.N.Y. 2013)	Tipper	Settlement	• Permanent injunction • $41,514.34 civil penalty
5/22/2013	Michael Moore (*SEC v. Stilwell, et al.*, S.D.N.Y. 2013)	Tippee/Tipper	Settlement	• Permanent injunction • $53,871.34 disgorgement • $5,310.54 prejudgment interest • $53,871.34 civil penalty
5/22/2013	Jillian Murphy (*SEC v. Stilwell, et al.*, S.D.N.Y. 2013)	Tippee/ Tipper	Settlement	• Permanent injunction • $4,207 disgorgement • $357.29 prejudgment interest • $7,816.51 civil penalty

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
5/24/2013	Steven Dudas (*SEC v. Holley, et al.*, D.N.J. 2011)	Tippee	Settlement	• Permanent injunction • $90,120 disgorgement • $90,120 civil penalty
6/6/2013	Bruce Tomlinson (*SEC v. Tomlinson*, N.D. Cal. 2013)	Tipper	Settlement	• Permanent injunction • $616,000 civil penalty • 5 year officer/director bar
6/7/2013	Emanuel Goffer (*SEC v. Cutillo, et al.*, S.D.N.Y. 2009)	Tippee	Settlement	• Permanent injunction • $1,341,893 disgorgement • $204,128 prejudgment interest • No civil penalty in light of criminal sentence and due to inability to pay • Broker/dealer and penny stock offering bar
6/7/2013	Whittier Trust Co. (*SEC v. Dosti, et al.*, S.D.N.Y. 2013)	Tippee	Settlement (Cooperate)	• Permanent injunction • $724,051.62 disgorgement • $75,296 prejudgment interest • $724,051.62 civil penalty
6/7/2013	Victor Dosti (*SEC v. Dosti, et al.*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $77,900 disgorgement • $2,951.43 prejudgment interest • $77,900 civil penalty
6/11/2013	Robert Kwok (*SEC v. Shah, et al.*, S.D.N.Y. 2012)	Tippee/ Tipper	Settlement	• Permanent injunction • $4,754 disgorgement • $848 prejudgment interest • $4,754 civil penalty • Officer/director bar
6/24/2013	Scott London (*SEC v. London, et al.*, C.D. Cal. 2013)	Tipper	Settlement	• Permanent injunction • Disgorgement to be determined • Prejudgment interest to be determined • Civil penalty to be determined
7/1/2013	David Teekell (*SEC v. Murrell, et al.*, E.D. Mich. 2013)	Tippee	Settlement	• Permanent injunction • $534,526 disgorgement • $105,346 prejudgment interest • $534,526 civil penalty

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
7/15/2013	Daniel Bergin (*SEC v. Bergin, et al.*, N.D. Tex. 2013)	Tippee	Partial settlement	• Permanent injunction • Disgorgement to be determined • Prejudgment interest to be determined • Civil penalty to be determined
7/17/2013	Rajat Gupta (*SEC v. Gupta, et al.*, S.D.N.Y. 2011)	Tipper	Summary Judgment	• Permanent injunction • $13,924,665 civil penalty • Officer/director bar
7/22/2013	Robert Ramnarine (*SEC v. Ramnarine*, D.N.J. 2012)	Tippee	Settlement	• Permanent injunction • $311,361 disgorgement • $13,016 prejudgment interest • Officer/director bar
8/2/2013	Bryan Shaw (*SEC v. London, et al.*, C.D. Cal. 2013)	Tippee	Settlement (Cooperate)	• Permanent injunction • $1,270,000 disgorgement (to be satisfied by entry of restitution order in criminal action) • $635,893 civil penalty
8/12/2013	Joseph Tocci (*SEC v. Tocci*, D. Mass. 2013)	Tippee	Settlement	• Permanent injunction • $82,439 disgorgement • $6,109 prejudgment interest • $82,439 civil penalty
9/3/2013	Phillip DeZwirek (*SEC v. DeZwirek*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $151,278 disgorgement • $11,714.50 prejudgment interest • $1,361,278 civil penalty • 5 year officer/director bar
9/5/2013	Badin Rungruangnavarat (*SEC v. Rungruangnavarat*, E.D. Ill. 2013)	Tippee	Settlement	• Permanent injunction • $3,200,000 disgorgement • $2,000,000 civil penalty
9/12/2013	Richard Lee (*SEC v. Lee, et al.*, S.D.N.Y. 2013)	Tippee	Settlement (Cooperate)	• Permanent injunction • Disgorgement to be determined • Prejudgment interest to be determined • Civil penalty to be determined

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
9/20/2013	Kieran Taylor (*SEC v. Taylor*, S.D.N.Y. 2013)	Tipper	Settlement	• Permanent injunction • $20,635 disgorgement • $4,190.26 prejudgment interest • $120,635 civil penalty • 5 year officer/director bar
9/23/2013	Lawrence Robbins (*SEC v. Robbins*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $865,000 disgorgement and prejudgment interest • $150,000 civil penalty
10/4/2013	Todd Newman (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined
10/4/2013	Anthony Chiasson (*SEC v. Adondakis, et al.*, S.D.N.Y. 2012)	Tippee	Settlement	• Permanent injunction • Disgorgement and prejudgment interest to be determined • Civil penalty to be determined
10/7/2013	John Lazorchak (*SEC v. Lazorchak, et al.*, D.N.J. 2012)	Tipper	Settlement (Cooperate)	• Permanent injunction • $63,800 disgorgement • $7,246.83 prejudgment interest • Officer/director bar
10/7/2013	Aleksey Koval (*SEC v. Poteroba, et al.*, S.D.N.Y. 2010)	Tippee	Settlement	• Permanent injunction • $1,086,457 disgorgement • $159,620 prejudgment interest • No civil penalty in light of imprisonment
10/8/2013	Mark Cupo (*SEC v. Lazorchak, et al.*, D.N.J. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • $65,800 disgorgement • $6,670.94 prejudgment interest • Officer/director bar
10/8/2013	Mark Foldy (*SEC v. Lazorchak, et al.*, D.N.J. 2012)	Tippee/ Tipper	Settlement (Cooperate)	• Permanent injunction • $21,593.10 disgorgement • $3,720.34 prejudgment interest • Officer/director bar

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
10/10/2013	Rodrigo Terpins (*SEC v. Certain Unknown Traders in the Securities of H.J. Heinz Co.*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $1,809,857 disgorgement (jointly and severally liable with Michel Terpins) • $3,000,000 civil penalty (jointly and severally liable with Michel Terpins)
10/10/2013	Michel Terpins (*SEC v. Certain Unknown Traders in the Securities of H.J. Heinz Co.*, S.D.N.Y. 2013)	Tippee/ Tipper	Settlement	• Permanent injunction • $1,809,857 disgorgement (jointly and severally liable with Rodrigo Terpins) • $3,000,000 civil penalty (jointly and severally liable with Rodrigo Terpins)
10/21/2013	Joseph Mancuso (*SEC v. Mancuso*, S.D.N.Y. 2013)	Tippee	Settlement	• Permanent injunction • $349,489 disgorgement • $112,171 prejudgment interest • No civil penalty in light of financial condition
10/23/2013	James Deprado (*SEC v. Lazorchak, et al.*, D.N.J. 2012)	Tippee	Settlement	• Permanent injunction • $30,861.31 disgorgement • $4,904.19 prejudgment interest • $30,861.31 civil penalty
10/29/2013	Dennis Rosenberg (*SEC v. Rosenberg*, N.D. Ga. 2013)	Tippee	Settlement	• Permanent injunction • $500,000 disgorgement • $108,000 prejudgment interest • Civil penalty to be determined
11/13/2013	Stephen Gray (*SEC v. Gray*, S.D. Tex. 2013)	Tippee	Settlement	• Permanent injunction • Disgorgement to be determined • Prejudgment interest to be determined • Civil penalty to be determined • Officer/director bar
11/15/2013	Jennifer Chen (*SEC v. Lee, et al.*, N.D. Cal. 2013)	Relief Defendant	Settlement	• Permanent injunction • $6,178.62 disgorgement • $564.01 prejudgment interest

Appendix B

SEC ENFORCEMENT ACTIONS (cont'd)

Date	Defendant	Role	Trial or Settlement	Outcome
11/21/2013	Sam Miri (*SEC v. Miri*, S.D.N.Y. 2013)	Tipper	Settlement	• Permanent injunction • $10,000 disgorgement • $1,842.90 prejudgment interest • $50,000 civil penalty • 5 year officer/director bar
12/3/2013	Charles Langston III (*SEC v. Langston, et al.*, S.D. Fla. 2013)	Tippee	Settlement	• Permanent injunction • $193,108 disgorgement • $22,204 prejudgment interest • $193,108 civil penalty
12/30/2013	Michael Shechtman *(SEC v. Klein, et al.*, S.D. Fla. 2013)	Tippee	Settlement	• Permanent injunction • Disgorgement to be determined • Prejudgment interest to be determined • Civil penalty to be determined

1 *Chiarella v. United States*, 445 U.S. 222 (1980).
2 *United States v. O'Hagan*, 521 U.S. 642 (1997).
3 *See SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012).
4 *Id.*
5 *United States v. Whitman*, 904 F. Supp. 2d 363, 370-71 (S.D.N.Y. 2012).
6 *See*, *infra* note 39.
7 17 C.F.R. § 240.14e-3.
8 Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, § 1(a)(5), 114 Stat. 2763 (Dec. 21, 2000) (codified at 15 U.S.C. § 78j(b)).
9 15 U.S.C. § 78u-1.
10 Press Release, U.S. Att'y's Off., S.D.N.Y., Manhattan U.S. Attorney And FBI Assistant Director-In-Charge Announce Insider Trading Charges Against Four SAC Capital Management Companies And SAC Portfolio Manager (July 25, 2013), *available at* http://www.justice.gov/usao/nys/pressreleases/July13/SACPR.php; Indictment at 4-5, *United States v. S.A.C. Capital Advisors, L.P.*, No. 13-cr-00541 (LTS) (S.D.N.Y. July 23, 2013), ECF No. 1.
11 *See supra* note 10.
12 Press Release, U.S. Att'y's Off., S.D.N.Y., Manhattan U.S. Attorney Announces Guilty Plea Agreement With SAC Capital Management Companies (Nov. 4, 2013), *available at* http://www.justice.gov/usao/nys/pressreleases/November13/SACPleaPR.php.
13 Allocution, *United States v. S.A.C. Capital Advisors, L.P.*, No. 13-cr-00541 (LTS) (S.D.N.Y. Nov. 8, 2013), *available at* http://static.reuters.com/resources/media/editorial/20131108/allocution.pdf.
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108 The Presentence Report provided an adjusted offense level of 22 (41 to 51 months). The government, however, sought a two-level increase in Mr. Whitman's offense level for obstruction of justice.

109 Ms. Khan had three criminal history points, which accounts for the criminal history category II Guidelines range.

110 Precise calculation unknown; it was publicly reported that Mr. Pflaum faced between 46 and 57 months in prison under the Guidelines.

111 Precise calculation unknown; it was publicly reported that Mr. Motey faced between 18 and 24 months in prison under the Guidelines.

112 Precise calculation unknown; it was publicly reported that Mr. Far faced between 46 and 57 months in prison under the Guidelines.

113 Precise calculation unknown; it was publicly reported that Mr. Fortuna faced between 37 and 46 months in prison under the Guidelines.

114 Precise calculation unknown; it was publicly reported that Mr. Seto faced between 37 and 46 months in prison under the Guidelines.

115 Precise calculation unknown; it was publicly reported that Mr. Yu faced between 37 and 46 months in prison under the Guidelines.

116 Precise calculation unknown; it was publicly reported that Mr. Barnetson faced between 0 and 6 months in prison under the Guidelines.

117 Precise calculation unknown; it was publicly reported that Mr. McGee faced between 41 and 51 months in prison under the Guidelines.

118 In addition to insider trading, Mr. Brooks was charged with various fraud and obstruction of justice offenses for falsifying financial records to artificially inflate DHB Industries Inc. stock prior to selling his shares.

119 This amount reflects Mr. Brooks insider trading forfeiture liability only.

120 Precise calculation unknown; it was publicly reported that Mr. Ramnarine faced between 30 and 37 months in prison under the Guidelines.

121 Precise calculation unknown; it was publicly reported that Mr. DeVore faced between 15 and 21 months in prison under the Guidelines.

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