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Making Up Insider Trading Law As You Go

Peter J. Henning*

"I dunno. I'm making this up as I go." Indiana Jones.[1]

INTRODUCTION

We look for coherence in the law, especially when it can result in a prison sentence or substantial monetary penalties for a violation. Statutes give us some comfort that a legislative body has thought about the reason certain conduct is designated as wrongful, and why the moral opprobrium of the community should be visited on offenders.[2] At least, that is what we hope would happen. But, when the law develops in a different way, through ad hoc judicial decisions, administrative regulations, and legislative inaction to correct or redirect its application, then there is a fear that traditional notions of due process and fair notice have not been adequately addressed. Those concerns have not had an impact, however, in the world of securities fraud for one of its prime areas: insider trading. Rather than rational legal development along a relatively clear statutory path, we continue to see that courts—including the Supreme Court—and the Securities and Exchange Commission make up the law as we go.[3]

If that sounds like a criticism, it is not intended as one. Instead, insider

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* Professor of Law, Wayne State University Law School. I appreciate the comments and criticisms of my colleagues at Wayne Law, especially those provided by Will Ortman and Steve Winter.

1 RAIDERS OF THE LOST ARK (Paramount Pictures 1981).

2 *See* Miriam H. Baer, *Insider Trading's Legality Problem*, 127 YALE L.J. FORUM 129, 133 (2017) ("[W]hen we deal with criminal law, we expect statutes to play the starring role in legal analysis. For other types of offenses, criminal law more or less satisfies this expectation.").

3 This is similar to the argument of Professor Bainbridge that insider trading law is an "instructive case study in how a legal regime exhibiting path dependent features went awry, detaching itself from both statutory and policy moorings." Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589, 1589 (1999). His claim was "that path dependence provides a pedagogically useful metaphor, in that it focuses our attention on those aspects of the prohibition's evolution that led it astray," so that "[a]s the prohibition has evolved, the federal securities laws have become an increasingly poor fit within which to confine insider trading." *Id.* at 1590. Whether or not one concludes that insider trading law has gone "awry," I certainly agree with the point that "the path dependence metaphor counsels tinkering with the prohibition, but not sweeping change." *Id.* at 591.

trading law's haphazard development has resulted in a reasonably stable set of rules that can be applied predictably to most instances of trading on confidential information.[4] That may be about as much as we can expect from a white-collar crime that has changed as the markets have evolved. What these rules lack is an expression of congressional policy about why trading on material non-public information is a violation and the parameters of that violation. Without this policy guidance, scholars have struggled to explain what types of trading ought to be prohibited, why the law developed as it did, and whether use of confidential information by those outside a company should be treated the same as the classic situation of a corporate manager trading in the company's shares for personal gain.[5]

Regardless of the lack of a clear policy for what should be considered a violation of the law, the Supreme Court's 2016 decision in *Salman v. United States*[6] shows that the Justices for the most part are satisfied with how lower courts administer the prohibition, even with no overarching theory of what should or should not constitute a violation. The very simplicity of the Court's analysis in *Salman* belies any apprehension that the Justices are dissatisfied with insider trading law, even if some might

4 *See* Peter J. Henning, *What's So Bad About Insider Trading Law?*, 70 BUS. LAW. 751, 757 (2015) ("Since the SEC first initiated an administrative proceeding over fifty years ago to sanction a broker for trading on confidential corporate information, the federal law of insider trading has grown into a reasonably well-defined prohibition, even with questions about its scope around the periphery. Some uncertainty in the law should not be surprising, given that the violation is not a creature of statute but instead more a common law offense developed through a series of judicial decisions."); *but see* Baer, *supra* note 2, at 143 ("[O]ne would vastly prefer a reflective, all-in-one consideration of insider trading law's possible iterations (subject, of course, to updating and amendment), than make do with the path-dependence and uncertainty that arises out of a piecemeal approach.").

5 *See, e.g.*, Kenneth R. Davis, *Insider Trading Flaw: Toward A Fraud-on-the-Market Theory and Beyond*, 66 AM. U. L. REV. 51, 53 (2016) ("Since its inception, the law of insider trading has perplexed the legal community. Scholars have criticized the law for its lack of clarity and over-complexity. Such criticisms are understandable. Insider trading law is a dysfunctional hodge-podge of rules that make little intuitive sense. The problem arises in part because no U.S. statute defines insider trading."); Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 HASTINGS L.J. 881, 883 (2010) ("The absence of a clear definition of insider trading under federal securities law has led to hundreds of decisions grappling with the issue. Many of these decisions are confusing and inconsistent with one another."); Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1646 (2004) ("We suspect that many modern judges are uncomfortable with property-based duties to disclose under Rule 10b-5, and most of the muddles in the law are the product of this discomfort. At base, the cause of the discomfort is the difficulty of determining optimal disclosure rules.").

6 Salman v. United States, 137 S. Ct. 420 (2016).

view the decision as a missed opportunity to rewrite the law.[7] The decision left some questions unanswered, such as what the evidentiary standard is for demonstrating the requisite benefit conferred on a tipper for inside information, but those are better left to the lower courts to flesh out as the circumstances demand.

In this Essay, I discuss how the *Salman* decision reflects two interrelated points. First, insider trading law is comprised of judicial rules fleshed out over time that now amount to a broad prohibition on profiting unfairly from access to confidential information.[8] Whether described as theft, fraud, or embezzlement, the law created by the Supreme Court (and the SEC) designates such profits as wrongful because . . . well, they just are.[9] Second, when a decision goes against the government's view of what should be subject to the prohibition, the government will seek to reverse it through rulemaking and by arguing in the courts for a more favorable analysis. The defining principle of insider trading law seems to be that you make it up as you go, but, if you don't like the outcome in a particular case, just do your best to make sure the law drifts back to the way you wanted it in the first place—a common law crime if there ever was one.[10]

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7 *See* Eric C. Chaffee, *The Supreme Court as Museum Curator: Securities Regulation and the Roberts Court*, 67 CASE W. RES. L. REV. 847, 863 (2017) ("*Salman v. United States* offered the Roberts Court an opportunity to remake federal securities regulation in the area of insider trading, and once again the Court chose to preserve the status quo created by existing precedent."); Donna M. Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 55 (2016) ("[A] choice by the *Salman* Court to narrowly address the central issue of gratuitous tipping or to follow a path that merely clarifies joint tipper-tippee liability would be a lost opportunity."); Baer, *supra* note 2, at 148 ("[T]he Supreme Court's decision in *Salman* reflects a missed opportunity, albeit an opportunity the Court could not have taken advantage of very easily.").

8 *See* Henning, *supra* note 4, at 757 ("Only in the last thirty years has insider trading become a priority for the SEC and federal prosecutors, which means its development has come through numerous judicial decisions. The growth of the law has occurred largely in fits and starts, rather than through a clear progression reflecting a coherent conception of the many aspects that make up a violation.").

9 *See* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 563–64 (2011) ("Fraud is an evolving concept that is contingent on changing social and market norms. Whether conduct is deceptive depends on the expectations that market participants justifiably bring to particular kinds of transactions. People expect disclosure in a lawyer's or investment manager's office, but not necessarily at a used-car lot. At this point, the norm against insider trading is so entrenched in the United States that people are justified in assuming that it is not happening when they go to buy or sell a security—or at least that it is happening infrequently and illegitimately.").

10 *See* Hervé Gouraige, *Do Federal Courts Have Constitutional Authority to Adjudicate Criminal Insider-Trading Cases?*, 69 RUTGERS U.L. REV. 47, 52 (2016) ("Since insider trading, as currently enforced by federal courts, is conceded by nearly all to be a common law crime . . . .");

I. THE ORIGINS OF INSIDER TRADING LAW

The prohibition on insider trading is based on the application of Section 10(b) of the Securities Exchange Act of 1934[11] and Rule 10b-5.[12] The development of Rule 10b-5 shows how the law has been the product of making it up as you go . As recounted many times, it was drafted quickly in 1942, much of it copied from Section 17(a) of the Securities Act of 1933, to address a situation in which a corporate officer was buying up stock in his company while falsely telling shareholders the company was doing badly. [13] After the SEC attorneys hopped on a train to Washington and circulated a draft of the rule to the Commissioners, the Commissioners approved the rule with only one comment: "Well, we are against fraud, aren't we?"[14] Of course they were. And so, a rule crafted almost on the

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Roberta S. Karmel, *The Law on Insider Trading Lacks Needed Definition*, 68 SMU L. REV. 757 (2015) ("[I]nsider trading is not defined in the federal securities laws. It is, essentially, a common law crime, interpreted by the courts."); Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023, 2043 (2005) ("[T]his is the single most disturbing aspect of insider trading law—it is essentially a common law federal crime.");

11 15 U.S.C. § 78j (2010).

12 Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2017).

13 See Hilary Harp, Outsider Trading After Dirks v. Sec, 18 Ga. L. Rev. 593, 598 n.25 (1984) (recounting the drafting of Rule 10b-5).

14 *See* Milton Freeman, Remarks at Conference on Codification of the Federal Securities Laws, *in* 22 BUS. LAW. 793, 922 (1967):

> I was sitting in my office in the S.E.C. building in Philadelphia and I received a call from Jim Treanor who was then the Director of the Trading and Exchange Division. He said, "I have just been on the telephone with Paul Rowen," who was then the S.E.C. Regional Administrator in Boston, "and he has told me about the president of some company in Boston who is going around buying up the stock of his company from his own shareholders at $4.00 a share, and he has been telling them that the company is doing very badly, whereas, in fact, the earnings are going to be quadrupled and will be $2.00 a share for this coming year. Is there anything we can do about it?" So he came upstairs and I called in my secretary and I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where "in connection with the purchase or sale" should be, and we decided it should be at the end.
>
> We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the commissioners. All the commissioners read the rule and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, "Well," he said, "we are against fraud, aren't we?" That is how it happened.

spot became the basis for multiple criminal prosecutions and civil enforcement actions every year. Further, courts have allowed private investors to use the rule to pursue fraud claims against companies and their directors, resulting in hundreds of lawsuits every year against many of the largest companies.[15] As Justice Rehnquist once noted, "When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn."[16]

Neither Section 10(b) nor Rule 10b-5 make any mention, even implicitly, about trading on material nonpublic information. Instead, the prohibition is a creature of judicial and administrative construction.[17] How the law developed is attributable, at least in part, to the visceral appeal of the cases that reached the Supreme Court: these cases may support a narrower view at first, but ultimately support a broader interpretation.[18]

The genesis of the insider trading prohibition under Rule 10b-5 was *In the Matter of Cady, Roberts & Co.*,[19] a SEC administrative decision in 1961 involving a broker who was tipped by a corporate director about a reduction in the company's dividend and later sold shares.[20] The violation was brazen, to say the least, and in finding a violation, the SEC's opinion stated that "insider[s] must disclose material facts which are known to them by virtue of their position but which are not known to persons with

15 *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196 (1976) ("Although § 10(b) does not by its terms create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy, the existence of a private cause of action for violations of the statute and the Rule is now well established.").

16 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975). Calling it a "legislative acorn" may be overestimating the scope of the congressional enactment, but the metaphor remains a useful one.

17 See Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1322 (2009) ("In the United States, the law of insider trading is essentially judge-made."); Richard M. Phillips, *The Insider Trading Doctrine: A Need for Legislative Repair*, 13 HOFSTRA L. REV. 65, 72 (1984) ("In the absence of additional specific statutory prohibitions, the insider trading doctrine is almost entirely the creature of judicial development based on the very general proscriptions of the antifraud provisions of Section 10(b) and Rule 10b-5 of the 1934 Act.").

18 *Compare* Chiarella v. United States, 445 U.S. 222 (1980) (overturning first criminal insider trading conviction) *and* Dirks v. S.E.C., 463 U.S. 646 (1983) (dismissing SEC administrative sanctions for tipping inside information) *with* United States v. O'Hagan, 521 U.S. 642 (1997) (upholding insider trading conviction based on the misappropriation theory) *and* Salman v. United States, 137 S. Ct. 420 (2016) (upholding conviction of tippee of inside information).

19 40 S.E.C. 907 (1961).

20 *Id.*at 908-09.

whom they deal and which, if known, would affect their investment judgment."[21] Trading on such information without disclosure "constitutes a violation of the anti-fraud provisions,"[22] specifically Rule 10b-5. As Professor Langevoort pointed out, the SEC's decision was the result of a push by its chairman, William Cary, to remake insider trading law by overturning a thirty-year-old state court decision holding that open-market securities trading while in possession of inside information was not fraudulent.[23]

A few years later, the SEC brought its first civil enforcement action in federal court for insider trading against a group of defendants working for the Texas Gulf Sulphur Company who traded ahead of the release of news about a major ore strike in Canada.[24] They took advantage of a privileged position to make quick, risk-free profits—conduct that would never receive a judicial imprimatur. The United States Court of Appeals for the Second Circuit upheld the SEC's claim that the trading violated Rule 10b-5 in *SEC v. Texas Gulf Sulphur Co.*,[25] explaining that,

> anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed.[26]

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21 *Id*. at 911.

22 *Id.*

23 Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319 (1999):

> We are told that when William Cary became Chairman of the SEC in 1961, he had only a short policy agenda. One item on it, however, was to overturn the Supreme Judicial Court of Massachusetts's decision in *Goodwin v. Aggasiz*, which had held thirty years earlier that open-market insider trading was not actionable as common law fraud. Cary soon wrote the Commission's opinion in an administrative broker- dealer disciplinary proceeding, *In re Cady, Roberts & Co*., that for the first time treated exchange -based insider trading as federal securities fraud. He thus set in motion the modern law of insider trading.

Id. at 1319.

24 *See* Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 268-70 (S.D.N.Y. 1966), aff'd in part, rev'd in part, 401 F.2d 833 (2d Cir. 1968).

25 Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc).

26 *Id.* at 848.

Trading based on the possession of valuable information is not necessarily fraudulent in other contexts, but the Second Circuit took the lead in adopting a rule the SEC and federal prosecutors would find most accommodating to their desire to pursue a wide variety of cases. Professor Bainbridge rightfully points out that the Second Circuit's equal-access rule "rests on a foundation of sand,"[27] because there was neither judicial precedent nor congressional policy to support such a broad prohibition. What a sandcastle the courts and the SEC have built since then.

II. *CHIARELLA* AND *O'HAGAN*

Since *Texas Gulf Sulphur*, the Supreme Court has issued a grand total of four decisions setting the parameters of insider trading, relying on its own understanding of what should be prohibited absent congressional direction on the law's application.[28] For a prohibition generating so many prosecutions and civil enforcement actions, not to mention headlines and even a movie featuring it,[29] it is a bit surprising that it has not drawn more attention from the justices. The first case, *Chiarella v. United States,*[30] involved a sympathetic defendant, and resulted in a narrower reading of the scope of the prohibition than the SEC and federal prosecutors wanted. As Professor Pritchard noted, the author of the opinion, Justice Powell, "worried that prohibitions against insider trading could chill incentives for analysts and other market professionals to uncover information about publicly traded companies."[31] But, even Justice Powell's formidable presence did not deter federal prosecutors and the SEC from getting the expansive view they wanted: ultimately, they used a case involving a greedy lawyer—not surprisingly—to establish a more favorable theory of liability.

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27 STEPHEN M. BAINBRIDGE, EQUAL ACCESS TO INFORMATION: THE FRAUD AT THE HEART OF Texas Gulf Sulphur 13 (UCLA School of Law, Law & Economic Research Paper Series No. 17-14 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3014977##.

28 A fifth case, *Carpenter v. United States*, 484 U.S. 19 (1987), made it to the Supreme Court on the issue of whether the misappropriation theory came within Section 10(b) and Rule 10b-5, but the justices were evenly divided on the issue and did not address it further in the case. Id. at 24.

29 *See* WALL STREET (Twentieth Century Fox 1987). Please avoid the sequel, however.

30 Chiarella v. United States, 445 U.S. 222 (1980).

31 A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 931 (2003).

A. The Classic Theory

Chiarella established the basic requirement that the trader breach a fiduciary duty, or other duty of trust and confidence, in disclosing inside information for the purpose of trading. This was the first criminal prosecution for insider trading, and the charges were filed after the defendant, Vincent Chiarella, settled with the SEC by paying back about $30,000 in profits.[32] Working at a financial printer in New York, Chiarella deciphered the names of the target companies in filings prepared on behalf of the offerors.[33] Justice Powell's majority opinion expressed the basic proposition that "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud,"[34] thereby clearly tying the proscription to the common law fraud offense. Such an offense requires proof of a misstatement or omission of a material fact. That means "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak," so that "liability is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction."[35]

The Court found this duty only flowed to the shareholders of the company whose securities were traded, and, because Chiarella traded in the shares of the targets of potential takeovers, he did not have any legal obligation to disclose the nonpublic information he had unearthed before trading. Out the window went *Texas Gulf Sulphur*'s expansive view that only required possession of confidential information to violate Rule 10b-5. Instead, the focus became whether there was "an affirmative duty to disclose" information before trading on it,[36] which tied insider trading to state law fiduciary duties, at least initially.[37]

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32 *Chiarella*, 445 U.S. at 224-25, 235 n. 20.

33 *Id.* at 224 ("The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents.").

34 *Id.* at 234-35.

35 *Id.* at 230.

36 *Id.* at 231.

37 *See* Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1209 (1995) ("[T]he federal securities laws are violated only upon breach of this purported state common-law duty."); Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-*Chiarella *Restatement*, 70 CAL. L. REV. 1, 3

Of course, the parity-of-information rule espoused in *Texas Gulf Sulphur* would not die quite so easily. Shortly after *Chiarella*, the SEC adopted Rule 14e-3[38] to prohibit trading by someone who receives information about a tender offer for a security once a substantial step is taken toward that transaction. Acquiring confidential information triggers the prohibition, and there is no mention of any breach of a duty of trust and confidence in obtaining the information or trading on it.[39] The SEC specifically rejected the argument that *Chiarella* limited its rulemaking authority by defining the scope of all insider trading, stating instead that "the decision did not suggest any limitation on the Commission's authority under Section 14(e) to adopt a rule regulating trading while in possession of material, nonpublic information relating to a tender offer."[40] It is always nice when an agency thumbs its nose at the Supreme Court, especially after having its preferred interpretation of the law rejected.

With this seeming rebuke of the Supreme Court, however, Rule 14e-3 only reaches a narrow slice of the insider trading universe, covering deals

(1982) ("Chiarella has made the fiduciary principle a consideration of utmost importance.").

38 Transactions in Securities on the Basis of Material, Nonpublic Information in the Context of Tender Offers, 17 C.F.R. § 240.14e-3 (2017).

39 The release accompanying Rule 14e-3 states:

> Rule 14e-3(a) establishes a "disclose or abstain from trading" rule under the Williams Act. A person who is in possession of material information that relates to a tender offer by another person which information he knows or has reason to know is nonpublic and which he also knows or has reason to know was acquired directly or indirectly from a person who has taken a substantial step or steps to commence or has commenced a tender offer (hereinafter also referred to as the "offering person"), the issuer whose securities are subject to the tender offer or any officer, director, partner or employee or any other person acting on behalf of the offering person or the issuer would be subject to the restrictions of the new rule. Any person subject to the rule would be prohibited from purchasing or selling or causing the purchase or sale of the securities to be sought or being sought in the tender offer unless, within a reasonable period of time prior to the purchase or sale, the information and its source are publicly disclosed.

Exchange Act Release No. 17,120, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,646 (Sept. 4, 1980).

40 *Id.* Section 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e) (2012), is a broad antifraud provision, and further provides that "[t]he Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." The SEC relied on the "reasonably designed" language to adopt a rule that reached a broader array of conduct that just fraud. *See* United States v. O'Hagan, 521 U.S. 642, 672–73 (1997) ("A prophylactic measure, because its mission is to prevent, typically encompasses more than the core activity prohibited.").

in which a tender offer might be made, but not a merger or sale of assets that can also cause a company's price to spike. Furthermore, it does not touch on trading on a broad range of corporate information that can affect the stock price, like earnings or product development. In announcing the adoption of the rule, the SEC also mentioned another means to hold individuals liable to skirt the edge of *Chiarella*: the misappropriation theory. Chief Justice Burger's dissent in that case argued Rule 10b-5 incorporated the principle that "a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading."[41] The majority rejected that approach, but did so only on the grounds that the theory had not been presented to the jury so it could not be a basis to uphold the conviction.[42] Not rejecting the theory on its merits, the majority created an opening for the SEC and federal prosecutors to offer it as a means to avoid the strictures of *Chiarella*. The release accompanying Rule 14e-3, issued less than six months after the Supreme Court's ruling, noted that the agency "continues to believe that such conduct undermines the integrity of, and investor confidence in, the securities markets, and that persons who unlawfully obtain or misappropriate material, nonpublic information violate Rule 10b-5 when they trade on such information."[43]

B. The Misappropriation Theory

Perhaps still smarting from *Chiarella*'s rejection of the possession

41 *Chiarella*, 445 U.S. at 240 (1980) (Burger, C.J., dissenting). The Chief Justice explained his view of the case this way:

> [T]he evidence shows beyond all doubt that Chiarella, working literally in the shadows of the warning signs in the printshop misappropriated—stole to put it bluntly—valuable nonpublic information entrusted to him in the utmost confidence. He then exploited his ill-gotten informational advantage by purchasing securities in the market. In my view, such conduct plainly violates § 10(b) and Rule 10b–5.

Id. at 245.

42 *Id.* at 236-37 ("The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of § 10(b).") (citations omitted).

43 Exchange Act Release No. 17,120, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,646 (Sept. 4, 1980).

theory of liability endorsed in *Texas Gulf Sulphur*, the Second Circuit explicitly adopted the misappropriation theory in *United States v. Newman*[44] a year later. Prosecutors crafted their indictment to avoid the Supreme Court's requirement that only someone who owed a duty directly to the shareholders of the company whose securities were traded could commit insider trading.[45] The defendants were investment bankers who traded and leaked information about pending mergers and acquisitions, buying shares in the target companies.[46] This conduct clearly fell outside *Chiarella*, but the Second Circuit held that, under the misappropriation theory, it "could be found to constitute a criminal violation of section 10(b) and Rule 10b-5 despite the fact that neither [the investment banks] nor their clients was at the time a purchaser or seller of the target company securities in any transaction with any of the defendants."[47] So it was not just the SEC thumbing its nose at *Chiaralla* in Rule 14e-3, so too did the Second Circuit.

In the end, both the SEC and Second Circuit were vindicated when the Supreme Court—ten years after Justice Powell's retirement—heartily endorsed the misappropriation theory in 1997 in *United States v. O'Hagan*.[48] The defendant, James O'Hagan, was a well-regarded lawyer in Minneapolis who also happened to take information about a potential tender offer on which his firm was advising to make over $4 million in profits from buying stock and options in the target—money he apparently could use to try to cover up an earlier embezzlement from client accounts.[49] Trading in the securities of the target, however, and not those of the client, meant he only could be prosecuted under the misappropriation theory, along with violating of Rule 14e-3. The Eighth Circuit overturned his conviction, holding that misappropriation was an impermissible extension of insider trading liability because the theory did

44 United States v. Newman, 664 F.2d 12 (2d Cir. 1981).

45 *Id.* at 15 ("In preparing the indictment, the Government attempted to remedy a deficiency that led to the Supreme Court's reversal of a conviction in *Chiarella v. United States*.") (citation omitted).

46 *Id.*

47 *Id.* at 16.

48 United States v. O'Hagan, 521 U.S. 642 (1997).

49 *See id.* at 647-49, 648 n.2 ("O'Hagan was convicted of theft in state court, sentenced to 30 months' imprisonment, and fined.").

not involve any "deception" as required by Section 10(b) after *Chiarella*.[50]

The government could not have asked for a more amenable case to argue for the misappropriation theory: a miscreant lawyer arguing that he should get to keep millions of dollars derived from a theft of confidential client information that he used to turn a quick profit. Perhaps seeing the error of its ways in Justice Powell's limited approach to liability in *Chiarella*, the majority stated that "it makes scant sense to hold a lawyer like O'Hagan a [section] 10(b) violator if he works for a law firm representing the target of a tender offer, but not if he works for a law firm representing the bidder. The text of the statute requires no such result."[51] Righting a past wrong is certainly a worthy reason for a decision, but one would be hard-pressed to find any citations to the usual legal precedents in the majority opinion to justify the result. The primary sources supporting its analysis are the government's brief and a law review article written over ten years earlier.[52] What the Supreme Court took in its restrictive approach in *Chiarella*, it largely gave back in *O'Hagan*. And, going even further, the Court gave the government even more by putting the seal of approval on Rule 14e-3, accepting a form of the possession theory of liability for tender offers.

O'Hagan obviated whatever harm *Chiarella* might have caused to the insider trading enforcement regime. But, the Supreme Court still tied a violation to a breach of a duty, a more difficult element to prove than mere possession of confidential information. Regardless, the SEC and federal prosecutors could hardly complain, because tying the prohibition to fraud meant that some aspect of fiduciary duty would be part of a case.

50 United States v. O'Hagan, 92 F.3d 612, 617 (8th Cir. 1996), rev'd, 521 U.S. 642 (1997) ("[W]e hold that § 10(b) liability cannot be based on the misappropriation theory. We reach this conclusion because, contrary to § 10(b)'s explicit requirements, the misappropriation theory does not require 'deception,' and, even assuming that it does, it renders nugatory the requirement that the 'deception' be 'in connection with the purchase or sale of any security.'"), *rev'd*, 521 U.S. 642 (1997).

51 United States v. O'Hagan, 521 U.S. 642, 659 (1997).

52 *See, e.g.*, *id.* at 653-54 ("We agree with the Government that misappropriation, as just defined, satisfies § 10(b)'s requirement that chargeable conduct involve a 'deceptive device or contrivance' used 'in connection with' the purchase or sale of securities. We observe, first, that misappropriators, as the Government describes them, deal in deception. A fiduciary who '[pretends] loyalty to the principal while secretly converting the principal's information for personal gain,' Brief for United States 17, 'dupes' or defrauds the principal. *See* Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L.REV. 101, 119 (1984).").

III. *DIRKS* AND *SALMAN*

The law of tipping was the product of the Supreme Court's decision in *Dirks v. SEC*,[53] announced three years after *Chiarella.* Unlike the other cases to reach the Court, which were all criminal prosecutions, this was an administrative proceeding.[54] The respondent was Raymond Dirks, a stock analyst who received information about financial shenanigans from an employee of Equity Funding Corporation, a financial conglomerate. The employee informed Dirks that the company was engaging in fraud, including creating bogus insurance policies. Dirks confirmed the company's conduct and tried to expose it by contacting the media. At the same time, he told brokers at his firm about the issues at the company, leading them to sell Equity Funding shares in their client accounts. The SEC found that Dirks engaged in insider trading because he received a tip from a corporate insider and passed it on to brokers, resulting in a sale of shares before the stock collapsed. Today, he would be celebrated as a whistleblower, a term not in vogue at that time, but instead Dirks found himself on the wrong end of an enforcement action.

A. Dirks v. SEC

Extending the duty analysis from *Chiarella*, the Court, again per Justice Powell, held that

> a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information 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.[55]

53 Dirks v. S.E.C., 463 U.S. 646 (1983).

54 *Id.* at 650-51 ("After a hearing by an administrative law judge, the SEC found that Dirks had aided and abetted violations of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a),5 § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b),6 and SEC Rule 10b–5, 17 CFR § 240.10b–5, 7 (1982) by repeating the allegations of fraud to members of the investment community who later sold their Equity Funding stock.").

55 *Id.* at 660.

To establish the breach, the tipper must receive "a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings."[56] That may sound like a bribe or kickback, but Justice Powell modified this further by explaining that the relationship between the two can also suggest "a *quid pro quo* from the latter," i.e. the tippee, including "when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."[57] Therefore, in tipping cases, the key was finding a sufficient benefit flowing between the source and the trader based on their relationship, which could be either a personal or business relationship. That element was sorely missing in *Dirks*, and the Court easily reversed the finding of a violation, extolling the virtues of what Dirks and other stock analysts do in ferreting out information and passing it along to investors.[58] To show just how sympathetic his position was, the Solicitor General's Office did not support the SEC's position, even filing an amicus brief *against* the agency—a rare occurrence in which the two leading enforcers of the insider trading prohibition are on opposite sides.[59]

Despite the reversal, the kind of back-of-the-envelope legal analysis in *Dirks* that required looking for some ill-defined benefit, at least when there wasn't a bag of cash,[60] gave the SEC and federal prosecutors flexibility to use evidence of a wide range of personal connections to establish unlawful tipping.[61] Personal connections ranging from an

56 *Id.* at 663.

57 *Id.* at 664.

58 *See id.* at 658 n.18 ("Despite the unusualness of Dirks' 'find,' the central role that he played in uncovering the fraud at Equity Funding, and that analysts in general can play in revealing information that corporations may have reason to withhold from the public, is an important one. Dirks' careful investigation brought to light a massive fraud at the corporation. And until the Equity Funding fraud was exposed, the information in the trading market was grossly inaccurate. But for Dirks' efforts, the fraud might well have gone undetected longer.").

59 *See* Pritchard, *supra* note 31, at 935 ("On petition for certiorari, the Solicitor General authorized the SEC to file an opposition to the petition, but refused to join the SEC's position. The Solicitor General took the position that information obtained by Dirks could not be considered confidential").

60 That actually does happen on occasion. *See, e.g.*, United States v. Goffer, No. 10-CR-56-1 (RJS), 2017 WL 203229, at *13 (S.D.N.Y. Jan. 17, 2017) ("Goffer delivered a bag of cash to Goldfarb, who then paid Santarlas and Cutillo.").

61 *See* Sarah Baumgartel, *Privileging Professional Insider Trading*, 51 GA. L. REV. 71, 72 (2016) ("Beyond fiduciary obligations, beyond employers and employees, beyond principals and

Alcoholics Anonymous sponsor to golfing buddies in which no money changed hands were enough to establish the benefit for the *quid pro quo* requirement.[62] Not without a few bumps in the road, of course.

The Second Circuit took a bit more restrictive view of the type of relationship that could be the basis for the duty of trust and confidence needed for an illegal tip in *United States v. Chestman*.[63] The defendants were a man whose in-laws owned a supermarket chain and that man's stock brocker. The man learned from his wife that the company would be acquired in a tender offer. Family members were admonished to keep the information quiet, but the husband told the broker. The broker subsequently bought shares in different accounts that included one for the husband. [64]Sitting en banc, the Second Circuit found that there was no fiduciary duty between a husband and wife that could support a conviction under Rule 10b-5. It stated, "Although spouses certainly may by their conduct become fiduciaries, the marriage relationship alone does not impose fiduciary status."[65] Nor would giving confidential information with an admonishment not to disclose or trade on it be enough to create one, because "entrusting confidential information to another does not, without more, create the necessary relationship and its correlative duty to maintain the confidence."[66] Instead, for relationships that fall outside those recognized by the law, like the lawyer-client relationship, establishing the duty for tipping liability requires showing "[a] fiduciary relationship [that] involves discretionary authority and dependency: One

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agents, modern insider trading enforcement is premised on the idea that personal relationships, such as friendship, can give rise to legally-enforceable duties of loyalty and confidentiality.").

62 *See, e.g.*, United States v. Bray, 853 F.3d 18, 27 (1st Cir. 2017) ("O'Neill claimed that he and 'Bubba' were 'good friends' who, at the time of the Wainwright tip, had known each other for fifteen years. The two men often socialized with each other at the club, dined with each other at local bars and restaurants, and even took each other's counsel."); United States v. McPhail, 831 F.3d 1, 3–4 (1st Cir. 2016) ("[B]eginning in July 2009, unbeknownst to Santamaria, McPhail began passing along the upshot of the information he received in these conversations to a set of friends, most of whom were members of a regular golfing group."); United States v. McGee, 763 F.3d 304, 317 (3d Cir. 2014) ("We reject McGee's argument that he did not share a relationship of trust or confidence with Maguire. McGee contends that membership in AA alone does not generate a duty of trust or confidence and his relationship with Maguire did not bear the hallmark indicators of a confidential relationship.").

63 United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc).

64 *Id*. at 555-56.

65 *Id.* at 568. Try telling that to your spouse or partner some time and see what the reaction is.

66 *Id.*

person depends on another—the fiduciary—to serve his interests."[67]

Much like it did after the *Chiarella* decision, the SEC resorted to its rulemaking authority to expand the definition of the requisite duty for insider trading. In 2000, it adopted Rule 10b5-2[68] to clarify the scope of the prohibition. The rule provides that a duty of trust and confidence exists "whenever a person agrees to maintain information in confidence," when there is a "history, pattern, or practice of sharing confidences" such that an expectation of confidentiality arises, or when information is received from a family member.[69] Of course, the SEC would never say it was contradicting federal judges, so its release noted that the rule provided "more of a bright-line test for certain enumerated close family relationships" that would make it easier for courts by avoiding any need to examine the details of personal relationships.[70] One is reminded of the old adage, "I'm from the government and I'm here to help." The lower courts have upheld Rule 10b5-2 as a permissible exercise of the SEC's authority, even though it gives a broader definition of the requisite duty than found by the Supreme Court and Second Circuit in *Chiarella* and *Chestman*.[71] Moreover, Justice Scalia expressed a contrary view that an administrative agency should not be able to define the parameters of a crime in its

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67 *Id.* at 569.

68 Duties of Trust or Confidence in Misappropriation Insider Trading Cases, 17 C.F.R. § 240.10b5-2 (2017).

69 *Id.* § 240.10b5-2(b)(1)-(3). The family relationship basis for the duty does allow for an affirmative defense if it can be shown "that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information." *Id.* § 240.10b5-2(b)(3). Note that the defendant bears the burden of proof for this defense, so that showing the applicable family relationship would be enough to establish the duty.

70 Selective Disclsoure and Insider Trading, 65 Fed. Reg. 51716-01, at 51730 (Aug. 24, 2000).

71 *See* United States v. McPhail, 831 F.3d 1, 7 (1st Cir. 2016) ("Evidence of a 'history, pattern, or practice of sharing confidences' between the insider and the misappropriator is nothing more than evidence that a relationship of trust and confidence arose by implication. We see no indication in *O'Hagan* or *Chiarella* that these traditional principles are somehow inapplicable when the relationship in question arises outside of a strict, formal business setting."); United States v. McGee, 763 F.3d 304, 313 (3d Cir. 2015) ("Rule 10b5-2(b)(2) is valid and entitled to Chevron deference because it (1) has not been congressionally or judicially foreclosed, and (2) is based on a permissible reading of § 10(b).").

regulations,[72] but whether that proves to be a problem has not yet arisen.

B. Salman v. United States

Although *Chestman* caused a bit of trouble for the SEC, the Second Circuit caused more of a stir in 2014 when it adopted a restrictive requirement for proving the benefit to the tipper in *Untied States v. Newman*.[73] The case involved two downstream tippees well-removed from the initial source of the confidential information. The circuit court stated that when the connection involves only a casual connection the government must show "a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[74] Read broadly, that requirement would make life much more difficult for the SEC and federal prosecutors because there are any number of cases, especially ones involving family relationships, that might not have proof of something more tangible than the warm feeling one gets from giving a gift.

To straighten things out, the Supreme Court granted review in *Salman v. United States*,[75] a case with facts almost as accommodating to the government as those in *O'Hagan* that fell within the core of the prohibition on tipping inside information, resulting in an outcome that was easy to predict.[76] The tipper, Maher Kara, was an investment banker who

72 *See* Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., dissenting from denial of cert.) ("With deference to agency interpretations of statutory provisions to which criminal prohibitions are attached, federal administrators can in effect create (and uncreate) new crimes at will, so long as they do not roam beyond ambiguities that the laws contain."). In his usual way, Justice Scalia questioned the motivations for this approach, stating that "I doubt the Government's pretensions to deference. They collide with the norm that legislatures, not executive officers, define crimes." *Id.*

73 United States v. Newman, 773 F.3d 438 (2d Cir. 2014).

74 *Id.* at 452.

75 Salman v. United States, 137 S. Ct. 420 (2016).

76 *See* Jill E. Fisch, *Family Ties:* Salman *and the Scope of Insider Trading*, 69 STAN. L. REV. ONLINE 46, 52 (2016) ("The conduct in *Salman* falls within the core of illegal tipping as defined by the Court in *Dirks*. Like *Dirks*, *Salman* leaves the outer limits of when a gift involves a personal benefit unclear, recognizing merely that an insider receives a personal benefit when he gives confidential information to a trading friend or relative. Cases involving family members are the easy insider trading cases because, for the reasons set out above, a court can reasonably infer the insider's personal benefit from the mere fact of the family relationship."); A.C. Pritchard, *The SEC, Administrative Usurpation, and Insider Trading*, 69 STAN. L. REV. ONLINE 55, 59 (2016) ("*Salman* is an easy case on the merits.

gave information to his younger brother, Michael Kara, who in turn passed it to Bassam Salman, whose sister was marrying Maher and had been befriended by Michael.[77] The testimony at trial fit the script for a familial tipping case perfectly, with the brothers—who pleaded guilty and were cooperating—stating they had a "very close relationship" in which Maher loved Michael "very much," and shared the confidential information so that Michael could trade on it.[78]

In a unanimous opinion by Justice Alito, the Court gave short shrift to Salman's argument that there was no tangible benefit exchanged among the family members, stating "[w]e adhere to *Dirks*, which easily resolves the narrow issue presented here."[79] Turning to *Newman*'s statement about the proof necessary to show the benefit, it too received a swift rejection: "To the extent the Second Circuit held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends, we agree with the Ninth Circuit that this requirement is inconsistent with *Dirks*."[80]

For all the hand-wringing that *Salman* might result in significant changes to insider trading law, it turns out to be an uninteresting case that adds little to the law of insider trading.[81] The most important aspect of the decision is not what it says, which is pedestrian, but that it shows that the justices view the prohibition as both well-established and sufficiently clear to pass constitutional muster. The Court rejected *Salman*'s vagueness argument, finding that "*Dirks* created a simple and clear 'guiding principle' for determining tippee liability . . . ."[82] Thus, there is no reason for lower courts to experiment with creating limitations that make it more difficult to pursue violations; the law outlined in *Chiarella*, *Dirks*, and *O'Hagan* gives sufficient enough guidance for juries to make the credibility assessments needed to assess liability.

The inference that a tipper receives an indirect personal benefit when he passes information to his brother, or (indirectly) his brother-in-law, as occurred in *Salman*, is a natural one.").

77 Salman v. United States, 137 S. Ct. 420, 424 (2016).

78 *Salman* 137 S. Ct. at 424.

79 *Id.* at 427.

80 *Id.* at 428.

81 Austin J. Green, *(Beyond) Family Ties: Remote Tippees in A Post-Salman Era*, 85 FORDHAM L. REV. 2769, 2771 (2017) ("*Salman* was the Supreme Court's first insider trading case in almost two decades, but it did little to address recent issues within insider trading jurisprudence.").

82 *Salman*, 137 S. Ct. at 428.

The Second Circuit took its cue on interpreting the scope of the prohibition in *United States v. Martoma*,[83] finding that even the sliver of *Newman* that remained was no longer good law after *Salman*. One part of *Newman* the Court did not address directly was the requirement of a "meaningfully close personal relationship" when the benefit to the tipper was a gift between trading friends. In *Martoma*, the Second Circuit held that the "logic" of *Salman* also abrogated that element for insider trading, so that all the government must prove is that the tipper expected the tippee to trade on the information, and that giving it resembles handing over the profits as if the tipper traded and then gave away the money.[84] The whole issue of the warm, fuzzy feeling from giving a gift now shifts to proving the expectation of trading by the tippee, a seemingly broad expansion of insider trading that will be welcomed by prosecutors and the SEC who no longer have to search for evidence of a close relationship.

CONCLUSION

Will we have to wait another two decades for an insider trading case to make it back to the Supreme Court? The problem created by *Newman*'s benefit analysis was the product of the Second Circuit looking for a limiting principle to keep prosecutors from being overly aggressive in pursuing downstream tippees. The circuit court referenced the government's "overreliance" on dicta from prior cases that highlighted "the doctrinal novelty of its recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders."[85] Changing the *Dirks* gift analysis was a step too far, however, and it may be that the only way for a case to make it to the Supreme Court in the future will be for a lower court to cut back on the prohibition in a way that substantially restricts proof of an element of the offense. Tinkering is no doubt permissible, and the Second Circuit's decision in *Martoma* shows that it was willing to pull back from creating

83 United States v. Martoma, 869 F.3d 58 (2d Cir. 2017).

84 *Id.* at 69 ("If the insider discloses inside information 'with the expectation that [the recipient] would trade on it,' and the disclosure 'resemble[s] trading by the insider followed by a gift of the profits to the recipient,' he personally benefits for the reasons described in *Dirks* and *Salman*.") (quoting Salman v. United States, 137 S. Ct. 420, 427-28 (2016)).

85 United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014).

an additional hurdle in proving a violation.

For an area of the law that is the product of judicial creation, with a little help from the SEC in its rulemaking, the Supreme Court seems rather satisfied with how it has turned out—or at least is apathetic with where things stand, as shown by the superficial approach taken in *Salman*.[86] Congress could step in to adopt a clear prohibition, although that is unlikely after *Salman* and *Martoma*.[87] There is no real political impetus in that direction, and there will not be any pressure to enact a statutory prohibition without a case making it appear that Wall Street scions can trade on their favored position too much to their advantage.[88] The probable outcome would be a broader rule, mimicking the possession theory first adopted in *Texas Gulf Sulphur*.

So, when you make it up as you go, sometimes you can be happy with the result. And the current status of insider trading law is one that is largely amenable to the desires of the SEC and prosecutors. To those who might be clamoring for some clarification of the law,[89] whether by Congress or the SEC, the political reality is that such legislation is unlikely to be enacted unless there is a need to reverse a judicial decision that makes it considerably more difficult to pursue insider trading. Absent that, the message from *Salman* is clear: just leave well enough alone.

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86 *See* Pritchard, *supra* note 76 at 62 ("For better or worse, the Court is likely stuck managing the common law of insider trading under Rule 10b-5.").

87 *See* Henning, *supra* note 4, at 766–67 ("There has never been any indication from Capitol Hill that the insider trading prohibition should be restricted, and indeed it has been embraced. There is almost no chance Congress will tinker with the law to authorize some types of trading on confidential information that could be seen as favoring Wall Street and large hedge funds, even if academics could show that it also somehow benefitted small investors. Indeed, the push is much more likely to be in the direction of a broader prohibition rather than a narrowly tailored approach that authorizes some use of confidential information.").

88 *See* James Walsh, *"Look Then to Be Well Edified, When the Fool Delivers the Madman": Insider-Trading Regulation After* Salman v. United States, 67 CASE W. RES. L. REV. 979, 996 (2017) ("[T]he time has come for the federal government to take a hardline stance on insider trading, because there's no telling how many more *Newman*'s are waiting in the wings of appellate courts, and how many insiders are out there seeking 'recognition' and industry status as players with reliable information.").

89 *See, e.g.*, Green, *supra* note 81, at 2798 (proposing the SEC adopt Rule 10b5-D creating a safe harbor for hedge fund managers who disclose information within two days of trading); Bruce W. Klaw, *Why Now Is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory*, 7 WM. & MARY BUS. L. REV. 275, 345 (2016) ("Now is the time to adopt a new statutory provision that finally defines 'insider trading.'").