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THE BHARARA TASK FORCE ON

# INSIDER TRADING

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## Report of the Bharara Task Force on Insider Trading

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## Executive Summary

For too long, insider trading law has lacked clarity, generated confusion, and failed to keep up with the times. Without a statute specifically directed at insider trading, the law has developed through a series of fact-specific court decisions applying the general anti-fraud provisions of our securities laws across a broadening set of conduct. As a consequence, the law has suffered—and continues to suffer—from uncertainty and ambiguity to a degree not seen in other areas of law, with elements of the offense defined by—and at times, evolving with—court opinions applying particular fact patterns. The rules of the road have been drawn and redrawn around these judicial decisions, and not always consistently across the country or over time. Although there have been attempts in the past to codify the law to bring greater certainty and clarity to the offense of insider trading, none has succeeded. This has left market participants without sufficient guidance on how to comport themselves, prosecutors and regulators with undue challenges in holding wrongful actors accountable, those accused of misconduct with burdens in defending themselves, and the public with reason to question the fairness and integrity of our securities markets.

The Bharara Task Force on Insider Trading (“Task Force”)<sup>1</sup> has brought together a group of experts on insider trading—from academia, private practice, and the judiciary as well as former Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) officials—to review and assess the current state of insider trading law and to explore proposals to improve it. This Report reflects the culmination of the Task Force’s work and the unanimous conclusions of its members.

After studying the history and current state of insider trading law, reviewing the different legislative proposals that have been presented over the years, and receiving input from various interested groups, the Task Force has reached the following conclusions.

- Reform that simplifies, clarifies, and modernizes insider trading law is necessary and long overdue.
- A legislative solution, in the form of a new statute expressly setting out the elements of an insider trading offense, would be the best vehicle for such reform. While other measures, including regulatory rule-making, could provide incremental benefits, any steps short of a new statute will continue to be burdened by the uncertainty that accompanies existing common law.
- To improve upon the current insider trading regime and to confront its most significant problems, the Task Force believes any new legislation should seek to apply the following key principles:

- The language and structure of any statute should aim for clarity and simplicity.
- The law should focus on material nonpublic information that is “wrongfully” obtained or communicated, as opposed to focusing exclusively on concepts of “deception” or “fraud,” as the current case law does.
- The “personal benefit” requirement should be eliminated.
- The law should clearly and explicitly define the knowledge requirement for criminal and civil insider trading enforcement, as well as the knowledge requirement for downstream tippees who receive material nonpublic information and trade on it.

The Task Force believes that new legislation applying these principles would help eliminate areas of uncertainty and confusion in insider trading law and provide greater clarity for courts, practitioners, and market participants. Applying these principles, the Task Force has drafted certain proposed language that could be used as a template for potential legislation.

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## Statement of the Task Force's Purpose and Areas of Focus

The rationale for prohibiting insider trading is straightforward—protecting the fairness and integrity of our securities markets and holding wrongdoers accountable. Most agree that there is something fundamentally unfair about insiders with special access to secret corporate information making a profit from trading on such information, at the expense of the rest of the market. However, insider trading law—as developed by the courts over time—is not built around a notion of fairness in trading. The Supreme Court rejected the “parity-of-information rule” that would entitle the counterparty to a trade to know all that an insider knows. Instead, in applying Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”)—which prohibits “manipulative or deceptive device[s]”—courts have focused, not on the harm to the counterparty or the other market participants, but rather on the idea of fraud or deception committed against the holder of the information.

We recognize that a small number of economists and commentators have touted purported benefits of allowing insider trading, arguing that it would enhance the market’s efficiency.<sup>2</sup> This argument ignores, among other things, the critical importance of the ownership interest in the inside information. Confidential corporate information belongs to the corporation and its shareholders. And the use of such information for non-corporate personal purposes—such as trading for personal gain—amounts to theft or “misappropriation.” Claims of market efficiencies (the impact of which are likely to be nonexistent or negligible at best) cannot—and should not—be allowed to justify what amounts to theft of corporate information.

Nor do they justify the perverse incentives that would be unleashed from allowing insiders to profit from confidential corporate information, including the wholesale discrediting of the principle of fairness in the U.S. markets.

Courts have recognized that information ownership provides the underpinning of insider trading law. As Task Force member Judge Jed Rakoff noted in a recent decision:

[I]nsider trading is a variation of the species of fraud known as embezzlement, which is . . . ‘the fraudulent taking of personal property with which one has been entrusted, especially as a fiduciary’ . . . Insider trading occurs when someone to whom this property has been entrusted pursuant to a fiduciary or similar relationship secretly embezzles, or ‘misappropriates,’ the information in order to take advantage of its securities-related value.<sup>3</sup>

But over the years, a number of quirks and uncertainties have emerged in the development of insider trading law. Courts have had to confront questions that lacked clear answers under existing common law precedent. These questions included:

- When precisely does a person breach a duty owed to the owner of the information? What if talking with other market participants such as analysts about the company is part of a person’s job?<sup>4</sup> What if the person is sharing

information to blow the whistle on a company fraud?<sup>5</sup> What if the person has a history of entrusting confidential information to a friend? What if information was shared mistakenly or overheard by others?

- Courts have introduced the concept of “personal benefit” as a way of differentiating between an act of self-dealing, and thus a breach of a duty, from a legitimate “corporate” purpose.<sup>6</sup> But that has led to another set of thorny questions about what constitutes a “personal benefit.” Money and property—that seems easy. But does a steak dinner count?<sup>7</sup> What about helping someone find a job? Reading a resume?<sup>8</sup> Maintaining an existing friendship?<sup>9</sup> What if you are family?<sup>10</sup> In-laws? What if you are just making a gift to someone with whom you have no particularly close relationship for reasons that are not known or clear to others?
- When should so-called downstream “tippees” be held liable for insider trading? How much do they need to know about the tipper’s motivations or about how the inside information was procured?
- If someone obtains confidential information illegally (albeit without breaching any particular duty), and subsequently trades on that information, is that insider trading?<sup>11</sup>

Under the current legal regime, these types of recurring questions have not always had clear answers. Courts have faced challenges in consistently applying the law to each new set of facts presented before them. Prosecutors have seen convictions overturned as a result of changes in the interpretation of the case law. Defense counsel and compliance professionals have struggled to explain to their clients the difference between illegal insider trading and acceptable market research and intelligence gathering. The public has been left to question the fundamental fairness and integrity of the markets.

The purpose and focus of this Task Force has been to study these challenges and to propose reforms that could help clear up the uncertainty and modernize insider trading law.

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# Review of Insider Trading Law: History and Current State

## Early Days of Insider Trading Law

Even before the Exchange Act's enactment in 1934, courts prohibited certain types of trading based on inside information. In the 1909 decision *Strong v. Repide*, the Supreme Court found a company's director liable for fraud when he purchased stock from a shareholder using information he obtained as a corporate insider, but had not shared with the counterparty to the trade.<sup>12</sup> Specifically, the director, also a 75% shareholder, purchased stock in the company without disclosing that the company's land was about to be sold to the government at a substantial premium. The director bought the shares while he was personally negotiating the lucrative land sale to the government. Under these circumstances, the Court held that the director owed a duty to disclose the inside information to the shareholding counterparty, and in failing to do so, he had committed common law fraud.<sup>13</sup>

In the seminal 1961 administrative opinion, *In the Matter of Cady, Roberts & Co.*, the SEC held that the anti-fraud provisions of the securities laws establish a general duty for corporate insiders to refrain from trading on the basis of material nonpublic information. The decision articulated the “disclose or abstain” rule for corporate insiders in possession of material non-public information.<sup>14</sup> In a 1968 decision, *SEC v. Texas Gulf Sulphur*, the Second Circuit discussed a principle of “equal access” to information suggesting that anyone—not just corporate insiders—in possession of “material inside

information must either disclose it to the investing public . . . [or] abstain from trading in . . . the securities concerned while such inside information remains undisclosed.”<sup>15</sup>

## The Development of Classical and Misappropriation Theories of Insider Trading

In *Chiarella v. United States*, decided in 1981, the Supreme Court rejected an expansive “equal access” standard. Vincent Chiarella worked at a company that printed documents for confidential corporate transactions. He used information he obtained from these documents to trade ahead of the public announcement of certain transactions.<sup>16</sup> The Supreme Court overturned his insider trading conviction, noting that a “duty to disclose under Section 10(b) does not arise from the mere possession of nonpublic market information.”<sup>17</sup> Instead, the Court held that insider trading was a species of fraud requiring deception, in this case a breach of a fiduciary or fiduciary-like duty owed to the shareholders of the company whose securities were traded. As the Supreme Court explained, Chiarella's failure to disclose the material nonpublic information he possessed was not actionable under the securities laws absent a duty to speak. And in this case, the jury had not been asked to find such a duty. The *Chiarella* decision gave rise to the “classical” or “traditional” theory of insider trading, premised not on informational parity, but rather on the breach of a duty of trust and confidence a corporate insider owes to his or her company's shareholders.<sup>18</sup>

Over time, a second theory of insider trading liability developed. Referred to as the “misappropriation theory,” courts found liability based on breaches, not of duties owed by corporate insiders to their shareholders, but rather of duties owed to the sources of the information. Like the classical theory, the misappropriation theory was also premised on a finding of fraud or deception—a “fiduciary’s undisclosed, self-serving use of a principal’s information.”<sup>19</sup> The Supreme Court first adopted this theory in its 1997 decision *United States v. O’Hagan*.<sup>20</sup> James O’Hagan was a partner at a law firm that represented Grand Metropolitan PLC in a tender offer for Pillsbury Company. O’Hagan traded in Pillsbury stock ahead of the public announcement of the tender offer, and as a consequence, was charged with and convicted of insider trading. The Eighth Circuit Court of Appeals, applying the classical theory of insider trading, reversed the conviction, holding that O’Hagan owed no duties to Pillsbury’s shareholders.<sup>21</sup> The Supreme Court disagreed, and in doing so, extended insider trading liability to “outsiders” who owed no duties to the shareholders of the company’s stock that was traded, but did owe duties to the source of the information used in the trade.<sup>22</sup> This “misappropriation theory” greatly expanded insider trading law, and brought within reach of insider trading enforcement the breach of a duty of trust and confidence owed to the source of the information, not just the issuer’s shareholders.

## Evolution of the Breach of a Duty Standard and the Personal Benefit Test

As the line between lawful and unlawful trading converged around the breach of a duty—owed either to the company’s shareholders or to the

source of information—the question of what conduct constituted a breach became a focal point. The Supreme Court confronted the issue in a seminal 1983 decision, *Dirks v. SEC*, which was the first to address the liability of a “tippee” who traded on material nonpublic information. The case involved corporate insiders who leaked information to a securities analyst, Raymond Dirks, in order to expose ongoing fraud inside the company. Dirks openly discussed the information obtained from the whistleblowing insiders with clients and investors, who in turn traded on that information. In the unique circumstances of this case, the Supreme Court held that assessing whether dissemination of inside information by the insider constituted a breach of a duty actionable under Section 10(b) required a “focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure.”<sup>23</sup> The Court explained, “[f]or example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend.”<sup>24</sup> The Court’s purpose was to distinguish disclosures of inside information for a corporate purpose, which are permissible, from those that constitute self-dealing and therefore a breach. This test explicitly made the tippee’s liability derivative of the tipper’s. And under this test, the Court reversed the finding of liability against Dirks, because the insider had not been motivated by personal benefit.

In the decades that followed *Dirks*, courts applied—and at times struggled with—the “personal benefit” test that *Dirks* announced.

Most significantly, in its 2014 decision in *United States v. Newman*, the Second Circuit Court of Appeals articulated a “personal benefit” standard using language that appeared to mark a significant change in the law.<sup>25</sup> The two defendants in *Newman* were remote tippees, hedge fund portfolio managers who made substantial profits trading on material nonpublic information they received through tipping chains that originated with company insiders. The Second Circuit overturned their convictions; first, on the ground that the jury instruction did not require the defendants to have knowledge of the original tippers’ breach of duty, and second, on the ground that the evidence was insufficient to establish a “personal benefit” obtained by the tippers in exchange for the information. Establishing the requisite “personal benefit,” the court stated, required “proof of *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*.”<sup>26</sup> This language appeared to substantially narrow the “personal benefit” standard and, some argued, effectively eliminated the possibility that a benefit could be found in “a gift of confidential information to a trading relative or friend,” something that *Dirks* had expressly recognized as actionable.<sup>27</sup>

The impact of the *Newman* decision was swift and far reaching. Over the ensuing weeks and months, trial convictions were overturned, defendants who had previously pled guilty were allowed to withdraw their pleas, pending cases and investigations were put on hold as practitioners struggled to understand the new legal landscape. It suddenly became unclear whether an executive could knowingly tip a good friend or associate with material nonpublic information for that friend to trade

on—lawfully—so long as she did not receive or expect a pecuniary benefit in return.

The uncertainty generated by *Newman*’s “pecuniary or similarly valuable nature” language lasted until the Supreme Court decided *Salman v. United States*, a case that made its way to the Supreme Court through the Ninth Circuit Court of Appeals. *Salman* involved an investment banker who provided material nonpublic information to his brother. The brother provided the information to the investment banker’s brother-in-law, who in turn traded on that information. The defendant (the brother-in-law) challenged his conviction on the ground that the personal benefit requirement under *Newman* had not been met; he argued there had been no exchange of anything of “pecuniary or similarly valuable nature” when the investment banker provided information to his brother. The Supreme Court rejected *Salman*’s argument, making clear that to the extent *Newman* intended to impose a requirement of something of “pecuniary or similarly valuable nature” in exchange for a gift of information to family or friends, that holding was inconsistent with binding precedent. The Court noted, as it did in *Dirks*, that a tipper benefits personally by gifting information “because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds.”<sup>28</sup>

As *Salman* did not directly address *Newman*’s “meaningfully close personal relationship” language, the Second Circuit revisited it in its August 2017 decision in *United States v. Martoma*. Matthew Martoma, a hedge fund professional, shorted stock in two drug companies based on inside information he obtained from doctors who were conducting confidential clinical drug trials and were also working as paid consultants to Martoma. On

appeal from his insider trading conviction, Martoma argued that in order for a jury to infer a “personal benefit” from a tip of information under *Newman*, the tipper and tippee needed to have shared a “meaningfully close personal relationship”—something he claimed he did not have with the doctors.<sup>29</sup> In its initial opinion, the Second Circuit rejected that argument, stating that the “logic of *Salman* abrogated *Newman*’s ‘meaningfully close relationship’ requirement” altogether.<sup>30</sup> Then, a year later, the Second Circuit vacated and substantially amended its opinion, deciding instead that it “need not” reach the question of “whether *Newman*’s gloss on the gift theory is inconsistent with *Salman*.”<sup>31</sup> The Second Circuit reasoned that *Newman* had presented two independent bases for establishing a “personal benefit”—a *quid pro quo* and an intent to benefit the tippee—and that a *quid pro quo* existed in Martoma’s case. Thus, how much of the controversial personal benefit standard articulated in *Newman* remains good law (if any) remains an open question.

In the latest twist, the Second Circuit just last month in *United States v. Blaszczyk* held that insider trading prosecuted under wire fraud and securities fraud under Title 18, as opposed to Title 15, does not require a showing of a “personal benefit” at all. As a result, prosecutors have been provided with greater flexibility to charge other statutes, including wire fraud (18 U.S.C. § 1343) and securities fraud (18 U.S.C. § 1348) that could allow them to bypass the personal benefit jurisprudence altogether.<sup>32</sup>

As this summary of important insider trading cases shows, the elements and theories of insider trading have shifted and evolved over time, often in unpredictable and confusing ways. Theories of insider trading have come and gone, and

elements of the offense that once seemed well-settled (like the “personal benefit” test) have at times been thrown into doubt by unexpected or unclear language in court decisions.

## Deception and Cyber Insider Trading

The focus on deception and the breach of a duty for Section 10(b) insider trading liability has also led to confusion in other areas, particularly in the rapidly-changing world of technology and cybercrime. In *SEC v. Dorozhko*, the Second Circuit confronted the question of whether a defendant who hacked into a computer system, obtained inside information and then traded on it, had violated insider trading laws.<sup>33</sup> The *Dorozhko* court focused on the question of whether the hacking involved a “deceptive” device under Section 10(b), and ultimately concluded that, if misrepresentations were made to gain access to the information (for example by falsifying one’s identity) then that violated Section 10(b), but if the hack involved no deception (for example, if it involved exploiting a weakness in the computer coding), then it did not.<sup>34</sup> Under this standard, the difference between lawful and unlawful trading—in the context of material nonpublic information obtained through a hack—rests on the artificial distinction between unauthorized access that involves deception and that which does not.

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# Legislative and Executive Reforms to Insider Trading Law

The development of insider trading case law has also been accompanied over the years by attempts at legislative reform and SEC rule-making.

## The 1980s: Supreme Court Decisions and Congressional Responses

In the 1980s, a decade that saw a number of highly public insider trading prosecutions, as well as a number of the important court decisions discussed above, including *Chiarella* and *Dirks*,<sup>35</sup> the SEC promulgated a new rule lowering the bar to insider trading prosecutions in the tender offer context, and Congress enacted legislation that increased civil and criminal penalties for insider trading. Legislative efforts to codify insider trading or otherwise change or clarify the substantive elements of the offense, however, failed.

### Rule 14e-3(a)

Around the same time the Supreme Court decided *Chiarella*, holding that insider trading required a breach of a duty owed to shareholders, the SEC promulgated Rule 14e-3(a) under Section 14(e) of the Exchange Act.<sup>36</sup> Rule 14e-3(a) removed the fiduciary duty requirement in the context of tender offers, making it unlawful for a person to trade on the basis of material nonpublic information concerning a pending tender offer. The SEC noted that the *Chiarella* decision made the rule necessary, emphasizing the importance of protecting information relating to tender offers

because of the detrimental impact such trading has on “tender offer practice, shareholder protection and the securities markets.”<sup>37</sup> In 1997, the Supreme Court held in *O’Hagan* that the SEC had not exceeded its rule-making authority in adopting Rule 14e-3(a) without requiring “a showing that the trading at issue entailed a breach of fiduciary duty[.]”<sup>38</sup>

### Insider Trading Sanctions Act of 1983 (ITSA)

Following the Supreme Court’s decisions in *Chiarella* and *Dirks*, Congress enacted stronger penalties for securities law violations. The Insider Trading Sanctions Act of 1983 (H.R. 559) (“ITSA”) amended the Exchange Act to increase the amount of civil penalties that could be imposed on a violation—up to “three times the profit gained or loss avoided as a result of such unlawful purchase or sale”—and to increase maximum criminal fines from \$10,000 to \$100,000.<sup>39</sup> Significantly, in passing legislation to increase penalties for trading in securities “while in possession of material nonpublic information,” Congress did not define “insider trading” or provide greater clarity regarding the elements of the offense in ITSA, opting instead to continue to rely on existing common law, even though Congress was contemporaneously discussing proposals to change the substantive law of insider trading (including a parity-of-information bill presented by Senator Alfonse D’Amato).<sup>40</sup>

## **Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA)**

Following a number of high profile insider trading prosecutions, including those of well-known financiers Ivan Boesky and Michael Milken, Congress responded with stiffer penalties in the Insider Trading and Securities Fraud Enforcement Act of 1988 (H.R. 5133) (“ITSFEA”). Congress reacted to the “dramatic increase in insider trading cases, including cases against some of the most prominent officials in Wall Street investment banking firms,” which occurred despite the enactment of ITSA several years earlier.<sup>41</sup> In the view of the House Committee considering the bill, “the scandals of the last two years demand[ed] a legislative response.”<sup>42</sup>

In discussing the bill, Congress again considered whether to include a definition of insider trading in the legislation, before ultimately deciding against it. The House Report on ITSFEA acknowledged its decision not to include an insider trading definition, stating:

While cognizant of the importance of providing clear guidelines for behavior which may be subject to stiff criminal and civil penalties, the Committee nevertheless declined to include a statutory definition in this bill for several reasons. First, the Committee believed that the court-drawn parameters of insider trading have established clear guidelines for the vast majority of traditional insider trading cases, and that a statutory definition could potentially be narrowing, and in an unintended manner facilitate schemes to evade the law. Second, the Committee did not

believe that the lack of consensus over the proper delineation of an insider trading definition should impede progress on the needed enforcement reforms encompassed within this legislation. Accordingly, the Committee does not intend to alter the substantive law with respect to insider trading with this legislation.<sup>43</sup>

Accordingly, ITSFEA focused on deterrence, which included increasing criminal penalties, both by raising the maximum sentence from five to ten years’ imprisonment and by increasing the \$100,000 maximum penalty adopted in ITSA to \$1,000,000.<sup>44</sup> ITSFEA also authorized the SEC to pay up to 10 percent of all amounts recovered to whistleblowers who provided information leading to the imposition of such penalties.<sup>45</sup>

## **Insider Trading Proscriptions Act of 1987**

At the same time ITSFEA was being presented in the House, the Senate considered a new insider trading bill, the Insider Trading Proscriptions Act of 1987 (S. 1380).<sup>46</sup> Several prominent securities lawyers, including Harvey Pitt, the former General Counsel (and future Chairman) of the SEC, and John Olson, the Chairman of the ABA’s Task Force on Regulation of Insider Trading, drafted the legislation, which was sponsored by Senators Donald Riegle and Alfonse D’Amato.<sup>47</sup> The Insider Trading Proscriptions Act went a step further than ITSA and ITSFEA by actually defining insider trading. The bill would have amended the Exchange Act to prohibit any person from trading on material nonpublic information when the trader knew or was reckless in not knowing that the information had been obtained “wrongfully.” The proposed bill defined “wrongfully,” as being the result of

“theft, conversion, misappropriation or a breach of any fiduciary, contractual, employment, personal or other relationship of trust and confidence.”<sup>48</sup> Although the bill was introduced in the Senate, it did not progress outside committee.

## **Additional SEC Rules and the STOCK Act**

In October 2000, the SEC formally adopted three new rules affecting the offense of insider trading: Regulation Fair Disclosure (“Reg. FD”), Rule 10b5-1, and Rule 10b5-2.<sup>49</sup> Several years later, in 2006, Congress introduced the Stop Trading on Congressional Knowledge Act (“STOCK Act”).<sup>50</sup>

### **Regulation Fair Disclosure (2000)**

Reg. FD provides that when “an issuer, or any person acting on its behalf, discloses any material nonpublic information” to securities market professionals or other enumerated persons, it must make public disclosure of that information.<sup>51</sup> Reg. FD was created in response to the growing practice at the time of issuers giving advance warning of earnings results and other nonpublic information to select institutional investors and analysts.

### **Rules 10b5-1 and 10b5-2 (2000)**

Rule 10b5-1 addresses the issue of when insider trading liability arises in connection with a trader’s “use” or “knowing possession” of material nonpublic information. The rule focused on defining what constitutes trading “on the basis of” material, nonpublic information and attempted to address arguments that sought to require the government to prove “use” by providing that a trade is “on the basis of” material, nonpublic

information when the trader is “aware” of such information.<sup>52</sup> The rule also provides a number of affirmative defenses, including the use of information barriers (so-called “Chinese walls”). Rule 10b5-1 also allows company insiders to set up a predetermined trading plan to sell company stock without running afoul of insider trading law.

Rule 10b5-2 was adopted to “provide greater certainty and clarity” on the issue of when, under the misappropriation theory, a breach of “trust or confidence” arises, in particular in the context of a family or other non-business relationship.<sup>53</sup> The SEC passed the rule following a number of cases that explored the nature of familial and other relationships.<sup>54</sup> The Rule provides that a duty of trust or confidence exists in certain enumerated circumstances, including when the parties have agreed to maintain information in confidence or they have a “history, pattern or practice” of sharing confidences.<sup>55</sup>

### **The STOCK Act (2012)**

In 2006, Congress introduced the STOCK Act. The bill was proposed following insider trading investigations by the SEC and the DOJ into Senate Majority Leader Bill Frist in 2005, in connection with his sale of stock of a hospital company founded by his father. The bill was reintroduced several times before becoming law in 2012. The STOCK Act prohibits members of Congress from making a private profit from nonpublic information acquired by virtue of their official positions.<sup>56</sup> The Act further provides that members and Congressional employees are not exempt from the securities laws, including the Exchange Act and Rule 10b-5, and as such, they owe a duty that arises from the relationship of trust to Congress, the U.S. government, and U.S. citizens.<sup>57</sup>

## Thirty Years Later: Legislative Proposals in the Wake of *United States v. Newman*

In the wake of *Newman*, and in the midst of another era of vigorous insider trading enforcement in the hedge fund industry and elsewhere, various members of Congress introduced bills seeking to define and update insider trading law. These included “The Ban Insider Trading Act of 2015” (H.R. 1173) introduced in 2015 by Representative Stephen Lynch, “The Stop Illegal Insider Trading Act” (S. 702) introduced in 2015 by Senator Jack Reed, and “The Insider Trading Prohibition Act” (H.R. 2534) (the “Himes Bill”) introduced in 2019 by Representative Jim Himes (following a similar predecessor bill introduced in 2015 (H.R. 1625)). Two of these bills (H.R. 1173 and S. 702) would have amended Section 10 of the Exchange Act, while the other (H.R. 2534) proposed a new Section 16A to follow current Section 16. Of the three, only the Himes Bill has gained any momentum, advancing out of the House Financial Services Committee on September 27, 2019, and passing through the House of Representatives on December 5, 2019 by an overwhelmingly bipartisan vote of 410-13.

All these proposed bills establish a separate cause of action that explicitly prohibits insider trading, but none would supplant Section 10(b). Two of these bills (H.R. 1173 and S. 702) remove the personal benefit requirement established by insider trading cases beginning with *Dirks*, a change that is not surprising given that the bills were largely proposed in reaction to *Newman*. The Himes Bill includes a “wrongfully obtained” standard that is similar to the standard proposed by

the Insider Trading Proscriptions Act of 1987.<sup>58</sup> And while the initial version of the Himes Bill removed the personal benefit requirement, just before the vote by the full house, language was added to retain the personal benefit requirement, at least in cases where the information was “wrongfully obtained” due to a breach of duty.<sup>59</sup>

The passage of the Himes Bill in the House just last month by an overwhelming and bipartisan vote—at a time of extreme political partisanship—reflects the broad consensus that has developed over the need to clarify and modernize our insider trading laws. The Himes Bill has progressed far, in our view, because it includes several important improvements to the law. Most importantly, it sensibly shifts the focus to information that is “wrongfully” obtained as opposed to having to rely entirely on concepts of fraud or deception and fills a number of holes left ambiguously open by the current common law. However, the re-introduction of the “personal benefit” standard—the root, as we have noted, of much of the current confusion and ambiguity—undermines much of the improvement and simplification that the Himes Bill otherwise achieves and to which we believe a new insider law should aspire. In addition, should the *Blaszczak* decision (holding that Title 18 securities fraud does not require a showing of personal benefit) be left undisturbed, then alternative statutes like Title 18 securities fraud or wire fraud would, even after passage of the Himes Bill, present an even more attractive vehicle for prosecutors because of the absence of the requirement of proof of personal benefit. And the sought-after clarity in the Himes Bill could remain elusive.

In addition, on January 13, 2020, the House passed—by a vote of 384 to 7—the 8-K Trading Gap Act (H.R. 4335). The Act, if passed into law, would require public companies to establish policies, procedures, and controls to prohibit executives and directors from trading in equities in advance of the announcement, by Form 8-K, of certain corporate events.

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# Task Force's Findings and Conclusions

After studying the current state of the law, including the extensive common law, prior attempts at legislation and rulemaking, as well as hearing from various interested constituencies (all of whom recognized the challenges created by the uncertainty and ambiguity in the law), the Task Force has concluded that reform that simplifies, clarifies, and modernizes insider trading law is indeed necessary and long overdue.

With that conclusion reached, the Task Force then asked itself what is the best form for such reform to take? Should it come through legislation in Congress or would SEC rulemaking be sufficient? Legislation allows for a clean slate upon which to write a new and sensible law, freed from any of the long-accumulated baggage of existing common law. It also carries with it the imprimatur of democratic legitimacy. The Task Force has concluded that because the SEC is bound in its rulemaking to existing Supreme Court precedent, it would be constrained by and unable to fully clear itself from many of the ambiguities and uncertainties that currently plague the legal regime. The SEC could seek to provide some greater clarity at the margins, but in the Task Force's view, real and substantial improvement will need to take the form of new legislation.

In thinking about what such legislation should look like, the Task Force has distilled its conclusions into a number of general principles that it believes should guide efforts at drafting any new legislation.

## Principle 1

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### Aim for clarity and simplicity.

Uncertainty and complexity in current insider trading law drives the need for reform. Thus, any efforts at new legislation should focus on providing greater clarity and simplicity. Any new statute should not simply replace one set of uncertainties and ambiguities with another. In line with this basic principle, the Task Force concludes that:

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

## Principle 2

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### Focus on "wrongful" use of material nonpublic information, not exclusively on "deception" or "fraud."

The Task Force believes any effort to improve upon the current legal regime should decouple the offense of insider trading from its exclusive reliance on concepts of "deception" and "manipulation," and tie it instead to "wrongfully" obtained or communicated information. Much of the uncertainty currently present in insider

trading law, as discussed above, stems from its grounding in common law interpretations of the “manipulative or deceptive device” language of Section 10(b) and Rule 10b-5. But insider trading is just as unfair and harmful when information is obtained through wrongful means not involving manipulation or deception. It should not matter, for example, if a cyber intruder seeking to trade on material nonpublic information accesses a company’s servers through deception or instead, through some other improper means. The law should clearly and expressly prohibit trading in securities based on any such “wrongfully obtained” material nonpublic information.

This is not an idea original to the Task Force. Indeed, as discussed above, legislation proposed in 1987 in the wake of another insider trading enforcement wave, proposed this change as a key element of its reform, as does the more recently-introduced Himes Bill. The Task Force agrees that a move from “deception” and “manipulation” to “wrongfulness” is a sensible change, particularly in view of technological advances that have affected the different ways in which information can be misappropriated. The concept of “wrongfulness” also captures the distinction—drawn in *Dirks*—between inside information used for illegitimate or self-serving purposes from that used for a “corporate or otherwise permissible purpose,” without necessarily forcing the analysis into the constricting framework of deceit or fraud. A new standard based on information “wrongfully obtained” or “wrongfully communicated” would also eliminate the distinction between “classical” and “misappropriation” cases, as well as the persistent questions surrounding how the elements of the offense apply to the two different theories. It would also treat separately—in a clearer way—the culpability of the tippee from the tipper.

In implementing this change, the Task Force recommends that “wrongfulness” for the purpose of insider trading be clearly and strictly defined, while capturing the variety of ways in which material nonpublic information can be obtained and communicated. It should be defined to include deception and misrepresentation, as well as breaches of duties of trust and confidence and agreements to keep information confidential, theft, misappropriation and embezzlement. In doing so, the definition of “wrongfulness” could encompass conduct from “classical” and “misappropriation” cases, as well as hacks and other unauthorized means of accessing corporate secrets.

In its discussions, the Task Force also considered whether an explicit exception should exist, in the definition of “wrongfulness,” for those who disclose information for the purpose of reporting a fraud, illegal acts, or other misconduct, as the corporate insiders did in the *Dirks* case. Although we recognized the challenges presented by the circumstances in *Dirks*—where the original tipper was motivated by a desire to blow the whistle on a fraud—in light of all the avenues now available to and protections provided for whistleblowers, the Task Force did not believe an express exception was necessary.<sup>60</sup>

### Principle 3

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#### Eliminate the “personal benefit” requirement.

The “personal benefit” requirement originated with *Dirks* as a seemingly “objective” way of distinguishing between the self-serving use of corporate information (and thus the breach of duty), versus a legitimate corporate use. But over the years—and particularly with the *Newman* decision—it has generated a disproportionate

share of confusion and uncertainty. In the last five years, for example, juries in different cases in the Second Circuit (where a vast majority of criminal insider trading cases are brought) have been instructed differently about the personal benefit element, in particular whether it requires the showing of a pecuniary gain. Investigation and litigation over what constitutes a cognizable personal benefit—even when the breach of a duty is otherwise clear—has taken on outsized importance and generated incongruent results.<sup>61</sup> Pinning the personal benefit requirement on a jury’s finding of a “meaningfully close personal relationship” also has the potential to produce inconsistent and arbitrary results. One person’s best friend may be someone else’s distant acquaintance, and should that really matter for purposes of policing the integrity of the markets?

The necessity of proving “personal benefit” not only creates this type of confusion, but it also unduly narrows the way in which wrongful dissemination of inside information can be actionable. Because of the focus on “benefit,” the requirement can create the misimpression in the market (and in the courts, as we saw with *Newman*) that a pure gift of material nonpublic information, without any expectation of reciprocity, to someone who trades on that information might be allowed. The law should be clear on this point, and eliminating the “personal benefit” requirement and replacing it with a “wrongfulness” standard can help eliminate the uncertainty. Clearer rules and greater certainty benefit all involved—whether it be market participants who want to avoid investigation or sanction, or law enforcement seeking to aggressively enforce the law.

In advocating for a new insider trading statute that moves away from “deception”

and “manipulation” and toward a concept of “wrongfulness,” and eliminates the “personal benefit” requirement, the Task Force recognizes that other fraud-based statutes will remain available to prosecutors. For example, although Section 10(b) historically has been the principal means through which insider trading has been prosecuted, prosecutors have occasionally turned to other statutes, including the mail and wire fraud statutes, as well as securities fraud under 18 U.S.C. § 1348, enacted as part of the Sarbanes-Oxley Act of 2002, to prosecute insider trading.<sup>62</sup> Section 1348, which tracks language from the mail and wire fraud statutes, prohibits the obtaining of any money or property “by means of false or fraudulent pretenses, representations, or promises . . . with the purchase or sale of any commodity . . . or any security.”<sup>63</sup> As noted above, in the *Blaszczak* decision last month, the Second Circuit held that prosecutions under Sections 1348 (securities fraud) and 1343 (wire fraud), even in the insider trading context, do not require a separate showing of “personal benefit” or other elements of a Title 15 insider trading charge.<sup>64</sup> Thus, the continued availability of these other fraud-based statutes will leave some uncertainty even with the passage of a new statute. But because our proposed statute would not require a showing of personal benefit, it would be as attractive to prosecutors as Sections 1343 and 1348, and thus, prosecutors would be less likely to prosecute insider trading under other non-specific fraud-based statutes. Moreover, a new insider trading statute would apply to both the DOJ and the SEC, as opposed to the Title 18 offenses that are available only to criminal prosecutors. In any event, it is not uncommon for multiple statutes to cover a range of overlapping criminal conduct, and with the introduction of a new insider trading-specific statute, we would expect that that would become

the principal means of prosecuting insider trading offenses (as Section 10(b) has been historically).<sup>65</sup>

## Principle 4

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### **Clearly and explicitly define the state of mind requirement for criminal and civil insider trading, as well as the knowledge requirement for tippees.**

The differing standards between criminal enforcement by the DOJ (“willfulness”) and civil enforcement by the SEC (“recklessness”) have the potential to cause uncertainty and confusion in the market, as does the potentially differing knowledge requirements for tippers and tippees. Any proposed legislation should make the different state of mind requirements clear and explicit.<sup>66</sup>

As a preliminary matter, the Task Force concludes that an important role exists for both criminal and civil enforcement of insider trading laws. Proving the requisite criminal state of mind—willfulness—is difficult, as it should be. But it is doubly difficult in insider trading cases involving tipping chains (a common insider trading fact pattern), because it requires proving that a tippee had knowledge of the tipper’s breach of duty. If limited to criminal enforcement, market participants could readily circumvent insider trading laws by ignoring or not inquiring about the origins of any inside information, so long as such steps do not rise to the level of criminal conscious avoidance. The SEC’s ability to pursue insider trading civilly, where market participants act recklessly, plays an important role in ensuring the integrity and fairness of the securities markets.

Any new legislation should expressly set forth the two different intent requirements for criminal and civil enforcement. In this regard, the proposed Himes Bill defines the relevant mental state as “aware, consciously avoided being aware, or recklessly disregarded,”<sup>67</sup> without differentiating between criminal and civil states of mind. Because such a formulation risks confusion about which standards apply to criminal and civil enforcement, the Task Force would propose defining the state of mind requirements clearly as willfulness for criminal violations and recklessness for civil violations.<sup>68</sup> This would provide market participants with fair warning of the boundaries of criminal liability and at the same time leave room for civil enforcement to police less egregious offenses when appropriate.

In addition, considering the confusion that has emerged at times over the requisite state of mind for tippees versus tippers, particularly with respect to a tippee’s knowledge of the underlying breach of duty, any new legislation should expressly set forth a tippee’s knowledge or intent requirements. For criminal liability, the tippee should know that the tipper obtained or communicated information wrongfully, and for civil liability, the tippee should have at least recklessly disregarded that fact.

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## Proposed Language for Model Legislation

Applying the principles set forth above, the Task Force developed the following draft language that could be used in proposed legislation. While other variations in terms of language or format could also serve the principles discussed above, the Task Force concluded it would be useful to provide some model language that seeks to apply the general principles outlined above.

- **Operative Language**  
“It shall be unlawful for any person, (a) directly or indirectly, to purchase or sell any security, while in possession of material, nonpublic information relating to such security, knowing that such information had been obtained or communicated wrongfully, or (b) to wrongfully communicate or communicate wrongfully-obtained material, nonpublic information knowing that such information will be used in the purchase or sale of any security.”
- **Definition of “Wrongfully”**  
“Wrongfully shall mean obtained or communicated in a manner that involves (a) deception, fraud, or misrepresentation, (b) breaches of duties of trust or confidence or breach of an agreement to keep information confidential, express or implied,<sup>69</sup> (c) theft, misappropriation, or embezzlement, or (d) unauthorized access to electronic devices, documents, or information.”
- **Knowledge Requirement**  
“Any person who willfully violates this statute shall be sentenced to a fine not to exceed \$5,000,000 or imprisonment of not more than 20 years, or both, except that when such person is a person other than a natural person, a fine shall not exceed \$25,000,000. The Securities and Exchange Commission shall be authorized to enforce violations of this statute involving the reckless disregard of the fact that material nonpublic information was wrongfully obtained or communicated.”

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## Conclusion

Reform that replaces the years of accumulated ambiguities in insider trading law with clearer rules of the road is long overdue. Based on the House’s recent passage of the Himes Bill, by an overwhelming and bipartisan majority, there appears to be a broad consensus around this view. After analyzing the history and current state of the law—and consulting with various interested constituencies—the Task Force has concluded that this much-needed improvement should take the form of new, insider trading-specific legislation. Such legislation should aim for simplicity and clarity. And to address the ambiguities that have plagued insider trading common law for years, any new legislation should move away from an exclusive focus on “deception” and “manipulation” and instead move to a concept of “wrongfully” obtained or communicated information; eliminate the personal benefit requirement; and make the state of mind requirements for civil and criminal liability, as well as for tippers and tippees, explicit and clear. Legislation that applies these principles will serve to clarify and modernize insider trading law, and in that process, help bring more fairness and integrity to our securities markets.

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# Appendix A

## List of Task Force's Members



**Preet Bharara** (Chair)

- Distinguished Scholar in Residence, NYU School of Law
- Co-Chair, National Task Force on Rule of Law and Democracy, Brennan Center for Justice
- Former U.S. Attorney for the Southern District of New York



**Hon. Joseph A. Grundfest**

- Professor – Stanford Law School
- Former SEC Commissioner



**Joon H. Kim** (Vice-Chair)

- Partner – Cleary Gottlieb Steen & Hamilton LLP
- Former acting U.S. Attorney for the Southern District of New York



**Melinda Haag**

- Partner – Orrick, Herrington & Sutcliffe
- Former U.S. Attorney for the Northern District of California



**John C. Coffee, Jr.**

- Adolf A. Berle Professor of Law – Columbia Law School



**Joan E. McKown**

- Partner – Jones Day
- Former Chief Counsel of the SEC's Division of Enforcement



**Katherine R. Goldstein**

- Partner – Milbank
- Former Chief of the U.S. Attorney's Office for the Southern District of New York's Securities and Commodities Fraud Task Force



**Hon. Jed S. Rakoff**

- Senior U.S. District Judge for the Southern District of New York

## The Task Force's Process

The inaugural meeting of the Task Force was held on November 14, 2018. At that meeting, the group established informal procedures for deliberations, set high-level goals, and agreed on a timeframe for completing our work. Among other things, the group agreed to meet on a regular basis to discuss substantive issues, confer with outside constituencies, and establish a framework for exploring proposals to improve insider trading law. The Task Force met, either telephonically or in person, on seven occasions between November 14, 2018 and the present.

From the outset, there was consensus that hearing from outside groups would be valuable in ensuring that the Task Force considered perspectives that were not represented by the Task Force members' own experiences. As a result, the Task Force compiled a list of groups and organizations, including those representing the legal community, criminal defense groups, industry organizations, among others, and solicited their views. The Task Force received submissions from the following groups:

1. The Financial Industry Regulatory Authority;
2. The National Association of Criminal Defense Lawyers (“NACDL”);
3. The U.S. Chamber Institute for Legal Reform;
4. Professor Yesha Yadav of Vanderbilt Law School;
5. Professor Donald C. Langevoort of Georgetown Law; and
6. Professor Joel Seligman formerly of the University of Rochester.

The Task Force invited certain of these groups and law professors to give presentations to the Task Force. On May 2, 2019, Professors Seligman and Langevoort made a presentation to the Task Force. On July 11, 2019, the Task Force heard from members of the ABA's Civil Litigation and SEC Enforcement Matters Subcommittee and the NACDL.

During the course of our meetings, the Task Force discussed the form of work product that the Task Force planned to produce. Members agreed that the Task Force should work with an open mind toward the goal of reaching consensus-based and practicable recommendations for the improvement and reform of insider trading laws. Multiple approaches were discussed, including drafting proposed statutory language and/or rules, or preparing, as part of a report, a discussion of the principles that should underlay any new rule or statute.

The Task Force also discussed substantive issues and considered a variety of reform options in these meetings. Some of these options were ultimately rejected. For instance, the Task Force considered whether a parity-of-information approach should be adopted, but ultimately rejected it as too likely to disincentive market participants from pursuing innovative and beneficial trading strategies and research from which such participants do (and should) benefit.<sup>70</sup> The Task Force also considered replacing the “personal benefit” element with a “personal advantage” and/or “personal purpose” test. In considering the advantages and disadvantages to this proposal, the Task Force discussed what conduct would be covered by adopting a “personal advantage” test as opposed to a “personal purpose” test or both, and the plausibility of a “social benefit exclusion.” Ultimately, this option was rejected as likely unworkable. In addition, the Task Force discussed the possibility of replacing the personal benefit requirement with a rebuttable presumption that any tip would result in a violation of Rule 10b-5. We considered that while a rebuttable presumption would fix the problem of criminalizing disclosures that have a salutary, non-personal purpose (like whistleblowing), such a change might unfairly shift the burden to defendants, contravene general criminal law concepts, and generate new uncertainty relating to what purposes would serve as an exemption from liability. Thus, this option was similarly rejected by the Task Force.

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## Endnotes

- <sup>1</sup> The list of the Task Force members and a description of the process the Task Force followed is attached to this Report as Appendix A.
- <sup>2</sup> For the best known example of this argument, see Henry G. Manne, *Insider Trading and the Stock Market* (1966) (arguing that allowing insider trading would enable corporate managers to be better compensated). For a reply, see Roy A. Schotland, *Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 Va. L. Rev. 1425 (1967). This topic has been debated for decades and we cannot cover the full literature here.
- <sup>3</sup> *United States v. Pinto-Thomaz*, 352 F. Supp. 3d 287, 295–96 (S.D.N.Y. 2018).
- <sup>4</sup> *United States v. Newman*, 773 F.3d 438, 454 (2d Cir. 2014), *abrogated in part on other grounds by Salman v. United States*, 580 U.S. \_\_\_\_, 137 S. Ct. 420 (2016).
- <sup>5</sup> *See Dirks v. SEC*, 463 U.S. 646, 649–50 (1983).
- <sup>6</sup> *Salman*, 137 S. Ct. at 426, 428 (citing *Dirks*, 463 U.S. at 654).
- <sup>7</sup> *United States v. Parigian*, 824 F.3d 5, 9 (1st Cir. 2016).
- <sup>8</sup> *Newman*, 773 F.3d at 453.
- <sup>9</sup> *United States v. Martoma*, 894 F.3d 64, 77–78 (2d Cir. 2017), *as amended* June 25, 2018.
- <sup>10</sup> *Salman*, 137 S. Ct. at 424.
- <sup>11</sup> *SEC v. Dorozhko*, 574 F.3d 42, 48–50 (2d Cir. 2009).
- <sup>12</sup> *Strong v. Repide*, 213 U.S. 419, 433 (1909).
- <sup>13</sup> *Id.* at 433.
- <sup>14</sup> *In the Matter of Cady, Roberts & Co.*, 40 SEC 907, 911 (1961).
- <sup>15</sup> *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (*en banc*).
- <sup>16</sup> *Chiarella v. United States*, 445 U.S. 222, 224 (1980).
- <sup>17</sup> *Id.* at 223, 235.
- <sup>18</sup> *Id.* at 228, 230.
- <sup>19</sup> *United States v. O’Hagan*, 521 U.S. 642, 652 (1997).
- <sup>20</sup> *Id.* at 642.

- <sup>21</sup> *Id.* at 649.
- <sup>22</sup> *Id.* at 653.
- <sup>23</sup> *Dirks*, 463 U.S. at 663 (1983).
- <sup>24</sup> *Id.* at 664.
- <sup>25</sup> *Newman*, 773 F.3d at 452.
- <sup>26</sup> *Id.* (emphasis added).
- <sup>27</sup> *Id.*
- <sup>28</sup> *Salman*, 137 S. Ct. at 428.
- <sup>29</sup> *Martoma*, 894 F.3d at 68, 77.
- <sup>30</sup> *United States v. Martoma*, 869 F.3d 58, 61 (2d Cir. 2017), *opinion amended and superseded*, 894 F.3d 64 (2d Cir. 2017), *cert. denied*, 139 S. Ct. 2665 (2019).
- <sup>31</sup> *Martoma*, 894 F.3d at 71.
- <sup>32</sup> *United States v. Blaszczyk*, ---- F.3d ----, No. 18-2811, 2019 WL 7289753, at \*8–9 (2d Cir. Dec. 30, 2019).
- <sup>33</sup> *Dorozhko*, 574 F.3d at 44–45.
- <sup>34</sup> *Id.* at 51.
- <sup>35</sup> In *Carpenter v. United States*, 484 U.S. 19 (1987), the Supreme Court affirmed the Second Circuit’s holding that the defendants’—a reporter and his friends—misappropriation of pre-publication information of a Wall Street Journal column, which they used to trade the stock of the companies to be featured in the column, was sufficient to affirm mail and wire fraud convictions. The Supreme Court was evenly divided on whether to affirm the securities fraud convictions, and thus deferred to the Second Circuit’s affirmation. The “misappropriation theory” of insider trading continued to develop over subsequent years until it was adopted by the Supreme Court in *United States v. O’Hagan* in 1997.
- <sup>36</sup> 15 U.S.C. § 78n(e); 17 CFR § 240.14e-3.
- <sup>37</sup> 45 Fed. Reg. 60, 410–13 (1980).
- <sup>38</sup> *O’Hagan*, 521 U.S. at 666–67.
- <sup>39</sup> Insider Trading Sanctions Act of 1984, Pub. L. No. 98–376, §§ 2(A)(i), 3, 98 Stat 1264 (codified as amended in scattered sections of 15 U.S.C. §§ 78a, 78u, 78ff).

- <sup>40</sup> Insider Trading Sanctions Act of 1983, *Hearing on H.R. 559 Before the Subcomm. on Securities of the Senate Committee on Banking, Housing and Urban Affairs*, 98th Cong. 1 (1984) (statement of Senator D’Amato, Chairman).
- <sup>41</sup> See H.R. Rep. No. 100-910, at 11–12 (1988). The first of these insider trading cases took place in May of 1986 and involved the prosecution of an insider trading group referred to as the “Yuppie Five.” *Id.* All five individuals pled guilty. Around the same time, the government brought an action against Dennis Levine, the managing director of Drexel Burnham Lambert, Inc. in New York, for insider trading in connection with the securities of “at least 54 issuers while in possession of material nonpublic information about actual or proposed tender offers and mergers,” which had resulted in profits of over \$12 million. *Id.* at 12. The investigation into these professionals ultimately led to the investigation into Ivan Boesky, who had made over \$50 million in illicit profits from purchasing stock in corporations prior to takeover announcements. Boesky pled guilty and was sentenced to three years in prison. See *id.* at 12. After Boesky’s prosecution, Michael Milken, the creator of the junk bond market in the 1980s, was charged with insider trading for supplying capital and information to Boesky. In April of 1990, Milken pled guilty and was sentenced to ten years in prison, which was later reduced to two years. Kurt Eichenwald, *The Milken Sentence; Milken Gets 10 Years for Wall St. Crimes*, N.Y. Times, Nov. 22, 1990, at A1, available at <http://www.nytimes.com/1990/11/22/business/the-milken-sentence-milken-gets-10-years-for-wall-st-crimes.html>; Ronald Sullivan, *Milken’s Sentence Reduced by Judge; 7 Months Are Left*, N.Y. Times, Aug. 6, 1992, at A1, available at <https://www.nytimes.com/1992/08/06/business/milken-s-sentence-reduced-by-judge-7-months-are-left.html>.
- <sup>42</sup> See H.R. Rep. No. 100-910, at 14.
- <sup>43</sup> *Id.* at 11.
- <sup>44</sup> Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100–704, §§ 3(a)(2), 4(1, 2), 102 Stat 4677 (codified as amended in 15 U.S.C. §§ 78u–1).
- <sup>45</sup> *Id.* at 3(e).
- <sup>46</sup> H.R. Rep. No. 100-910, at 10.
- <sup>47</sup> *Insider Trading Proscriptions Act of 1987, Hearing on S. 1380 Before the Subcomm. on Banking, Housing, and Urban Affairs*, 100th Cong. 1–2 (1987) (statement of Senator Riegle); Charles W. Murdock, *The Future of Insider Trading after Salman: Perpetuation of a Flawed Analysis or a Return to Basics*, 70 Hastings L.J. 1547, 1605 (2019).
- <sup>48</sup> *Insider Trading Proscriptions Act of 1987, Hearing on S. 1380 Before the Subcomm. on Banking, Housing, and Urban Affairs*, 100th Cong. 6–7 (1987) (statement of Senator Riegle); Murdock, *supra* note 42 at 1606.

- <sup>49</sup> SEC Selective Disclosure and Insider Trading, 17 CFR §§ 240, 243, 249 (2000) (*available at* <https://www.sec.gov/rules/final/33-7881.htm>).
- <sup>50</sup> Stop Trading on Congressional Knowledge Act of 2012 (“STOCK Act”), Pub. L. No. 112-105, § 1, 126 Stat. 291 (codified at 5 U.S.C. App. 4 § 101).
- <sup>51</sup> 17 CFR § 243.100.
- <sup>52</sup> 17 CFR § 240.10b5-1.
- <sup>53</sup> SEC Selective Disclosure and Insider Trading, 17 CFR §§ 240, 243, 249 (2000).
- <sup>54</sup> *See, e.g., United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc), *cert. denied*, 503 U.S. 1004 (1992); *United States v. Reed*, 601 F. Supp. 685 (S.D.N.Y. 1985), *rev’d on other grounds*, 773 F.2d 447 (2d Cir. 1985); SEC Selective Disclosure and Insider Trading, 17 CFR §§ 240, 243, 249 (2000).
- <sup>55</sup> 17 CFR § 240.10b5-2. Specifically, Rule 10b5-2 provides that a “duty of trust or confidence” exists in the following circumstances, among others: (1) “[w]hen a person agrees to maintain information in confidence”; (2) “[w]hen the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality”; or (3) “[w]hen a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; provided, however, 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.*
- <sup>56</sup> STOCK Act, S. 2038, 112th Cong. § 3 (2012).
- <sup>57</sup> *Id.* § 4.
- <sup>58</sup> *Compare* Insider Trading Prohibition Act, H.R. 2534, 116th Cong. §16A(c)(1)(A)–(D) (2019) (defining inside information as being obtained wrongfully when “obtained by, or its communication or use would constitute, directly or indirectly – (A) theft, bribery, misrepresentation, or espionage (through electronic or other means); (B) a violation of any Federal law protecting computer data or the intellectual property or privacy of computer users; (C) conversion, misappropriation, or other unauthorized and deceptive taking of such information; or (D) a breach of any fiduciary duty, a breach of a confidentiality agreement, a breach of contract, or a breach of any other

personal or other relationship of trust and confidence for a direct or indirect personal benefit (including pecuniary gain, reputational benefit, or a gift of confidential information to a trading relative or friend)”) with Insider Trading Proscriptions Act, S. 1380, 100th Cong. § 16A(b)(2) (1987) (defining inside information as being obtained wrongfully “only if it has been obtained by, or its use would constitute, directly or indirectly, theft, conversion, misappropriation or a breach of any fiduciary, contractual, employment, personal or other relationship of trust and confidence”).

<sup>59</sup> Insider Trading Prohibition Act, H.R. 2534, 116th Cong. §16A(c)(1)(D) (outlawing trading while aware of material, nonpublic information where, among other things, the information has been obtained in “a breach of any fiduciary duty, a breach of a confidentiality agreement, a breach of contract, a breach of any code of conduct or ethics policy, or a breach of any other personal or other relationship of trust and confidence for a direct or indirect personal benefit (including pecuniary gain, reputational benefit, or a gift of confidential information to a trading relative or friend)”).

<sup>60</sup> See 18 U.S.C.A. § 1514A (West, 2010) (the whistleblower provisions of the Sarbanes Oxley Act); see also 15 U.S.C.A. § 78u-6 (West, 2010) (the whistleblower provisions of the Dodd Frank Act).

<sup>61</sup> Compare *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (a jar of honey and an iPhone are a sufficient personal benefit) with *United States v. McPhail*, 831 F.3d 1, 11 (1st Cir. 2016) (wine and a free dinner is sufficient) with *Newman*, 773 F.3d at 452 (career advice and friendship are insufficient as a personal benefit).

<sup>62</sup> See, e.g., Indictment, *United States v. Chow*, No. 17 Cr. 667 (S.D.N.Y. Oct. 30, 2017), ECF 2.

<sup>63</sup> 18 U.S.C. § 1348(2).

<sup>64</sup> *Blaszczak*, 2019 WL 7289753, at \*8–9.

<sup>65</sup> The impact of any new insider trading statute on certain related laws and rules, including (i) Exchange Act Rule 14e-3, which makes it unlawful to trade on the basis of material nonpublic information concerning a pending tender offer, (ii) SEC Rule 10b5-2, which enumerates the circumstances under which duties of trust and confidence might be created, and (iii) insider trading-related private rights of actions brought under Exchange Act Section 20A, would have to be examined and considered. The SEC would have to review the existing rules in light of any new statute and make modifications as appropriate.

<sup>66</sup> We do not intend that recommendations included in this Report concerning state of mind requirements for the enforcement of insider trading should affect the elements of other provisions of the federal securities laws, including, for example, Regulation FD.

<sup>67</sup> Insider Trading Prohibition Act, H.R. 2534, 116th Cong. §16A(c)(2) (2019).

- <sup>68</sup> We believe negligence should be insufficient for a violation of our proposed statute.
- <sup>69</sup> This language is meant to supersede SEC Rule 10b5-2 and to encompass both contractual language, as well as the pattern or practice of divulging secrets with the expectation that those secrets will remain confidential.
- <sup>70</sup> The Task Force also considered the position of those—like Professor Henry Manne—who have argued against the criminalization of insider trading on the grounds that such activity furthers “efficient[] and accurate[] pricing” of company shares. Henry G. Manne, *The Case for Insider Trading*, Wall St. J., March 17, 2003. For the reasons discussed above, the Task Force continues to believe that the efficient and fair functioning of the public markets requires prohibitions against the wrongful use of material non-public information, whether through theft, deception, breach of duty, or other wrongful act.

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THE BHARARA TASK FORCE ON  
**INSIDER  
TRADING**

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