XI. Circuit Split on the Interpretation of the Elements of Tipper/Tippee Liability in Insider Trading Cases

A. Introduction

Most investors in the United States understand illegal insider trading to mean profiting on trades that were influenced by the possession of market information that is not available to the general public.[1] If this form of trading was allowed to proliferate, investors would cease trading in securities, given their disadvantage in the face of an unfair distribution of market information.[2] However, there is no bright-line rule for determining who should be held liable for insider trading. For example, should the client of a broker dealer who executed a trade on the basis of nonpublic information be prosecuted to the same extent as the broker himself?[3] Generally speaking, the client in the aforementioned example could only be convicted if he knew or should have known of the broker dealer's use of nonpublic information.[4] The question of whether tippees, i.e. recipients of nonpublic information, should be punished for trading on that information was recently addressed in the U.S. Supreme Court's December 2016 *Salman v. United States* decision.[5]

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[1] MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RS21127, FEDERAL SECURITIES LAW: INSIDER TRADING 1 (2016) ("Insider trading in securities may occur when a person in possession of material nonpublic information about a company trades in the company's securities and makes a profit or avoids a loss.").

[2] Reem Heakal, *Defining Illegal Insider Trading*, INVESTOPEDIA, http://www.investopedia.com/articles/03/100803.asp [http://perma.cc/NEP2-K3RW].

[3] *Id*.

[4] *Insider Trading After United States v. Newman, the Second Circuit's Landmark Decision Limiting Liability of Downstream Recipients of Insider Information*, QUINN EMANUEL TRIAL LAWYERS (Apr. 2015), http://www.quinnemanuel.com/the-firm/news-events/article-april-2015-insider-trading-after-united-states-v-newman-the-second-circuit-s-landmark-decision-limiting-liability-of-downstream-recipients-of-insider-information/ [http://perma.cc/E4WU-Y5FU] (discussing recent litigation involving insider trading).

[5] Salman v. United States, 137 S. Ct. 420 (2016) (holding that a tippee may be held liable for insider trading even when the tipper did not receive a direct or monetary benefit); Ben Protess & Matthew Goldstein, *What Is a 'Personal Benefit' From Insider Trading? Justices Hear Arguments*, N.Y. TIMES:

This article provides an overview of insider trading law and discusses the development of both tipper and tippee liability through case law. Section B describes the ambiguity in the definition of insider trading and provides a brief summary of the legislation and rules that govern the area of insider trading. Section C explains the early insider trading cases and the origins of tippee liability. Section D discusses the two cases from the Second and Ninth Circuits that caused differing interpretations of tipper and tippee liability, while Sections E and F discuss the implications of the circuit courts' split and the Supreme Court's recent clarification of the differing interpretations among the circuits. This article will conclude by exploring the Supreme Court's decision and what it means for future insider trading prosecutions.

B. Basics of Insider Trading Law

Although permissible insider trading occurs frequently, such as when corporate officers, directors, and employees trade in their company's stock within appropriate guidelines, civil and criminal penalties may be attached to both insiders who have a duty to keep nonpublic information confidential (tippers) and those who receive the nonpublic information (tippees).[6] Illegal insider trading "refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security."[7] Given that unlawful insider trading weakens the public's confidence in the fairness of the securities markets, the Securities and Exchange Commission (SEC) has long treated insider trading cases as an area of regulatory focus.[8] Common examples of illegal insider trading include government officials trading on nonpublic information gleaned through their employment, and lawyers and bankers trading on

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DEALBOOK (Oct. 5, 2016), http://www.nytimes.com/2016/10/06/business/dealbook/supreme-court-insider-trading.html [http://perma.cc/3A8X-XVEW] ("A ruling by the court could clarify one of the most hotly debated issues on Wall Street: what prosecutors must prove to secure insider trading convictions based on confidential tips.").

[6] *See Fast Facts: Insider Trading*, U.S. SEC. & EXCH. COMM'N (Jan. 15, 2013), https://www.sec.gov/answers/insider.htm [http://perma.cc/5A68-DCQD].

[7] *Id*.

[8] *Id.*

information given to them in the course of providing services to the corporation.[9]

Because there is no statute explicitly defining the term "insider trading," judges have largely shaped the law surrounding illegal insider trading.[10] In passing the Securities Exchange Act of 1934, Congress gave the government a directive to protect investors and prevent abuses in the securities market, but the gaps in the legislation have been filled by jurists at the urging of the regulators and prosecutors.[11] Nonetheless, the Securities Exchange Act of 1934 has proven helpful in defining the law of insider trading, with Section 16(b) prohibiting corporate insiders from using their companies' own stock to obtain quick profits, and Section 10(b) and its corresponding Rule 10b-5 broadly prohibiting the use of deception or fraud in the purchase or sale of a security.[12] The interpretation of these rules has been the subject of much litigation.

C. Cases That Have Helped Develop the Law of Insider Trading

To hold a tippee liable for illegal insider trading, it was first necessary to establish that individuals other than true corporate insiders, such as officers, directors, and controlling stockholders, could be deemed "insiders" for the sake of insider trading violations.[13] In the case of *In re Cady, Roberts & Co.*, the SEC ruled that any person may be labeled an insider when the following two elements are present: (1) the "existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone," and (2) an "inherent

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[9] *Id.*

[10] *See* Roger Parloff, *Why Insider Trading May Be Tougher Than Ever to Prosecute*, FORTUNE (Aug. 23, 2016), http://fortune.com/2016/08/23/insider-trading-prosecute-bassam-salman/ [http://perma.cc/N96C-K7E9].

[11] Melissa Robertson, Senior Counsel, Div. of Enf't, Sec. & Exch. Comm'n, Address at the 16th International Symposium on Economic Crime: Insider Trading—A U.S. Perspective (Sept. 19, 1998).

[12] 15 U.S.C.A. § 78j (West 2016) (prohibiting the use of deception or fraud in the purchase or sale of a security); § 78p (regulating the purchase and sale of a security within six months); *see* Robertson *supra* note 11.

[13] *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961) ("Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities.").

unfairness" in allowing the person to take advantage of that information, knowing that others do not have access to such information.[14] The SEC's decision highlighted the agency's belief that a general purpose of the securities laws was to rid the "use of inside information for personal advantage."[15]

After the SEC established that insiders were not limited to the members of a publicly traded corporation, the Supreme Court adopted the SEC's approach in *Chiarella v. United States*.[16] The Supreme Court held that while a duty to disclose nonpublic information prior to trading "does not arise from the mere possession of nonpublic market information," a duty does arise in the presence of a fiduciary relationship.[17] A "fiduciary relationship" was described as "a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation."[18] The Supreme Court also noted, importantly, that the *tippee*'s duty to disclose arises only when the tippee was a "participant" in the tipper's breach of a fiduciary duty.[19]

By the time the Supreme Court decided its next major insider trading case, three important holdings from the previous cases applied: (1) a person outside of a publicly traded company could acquire "insider" status; (2) a fiduciary duty is breached when the insider uses the nonpublic information for personal advantage; and (3) the tippee's duty to disclose derives from the tipper's breach of a fiduciary duty.[20] Using *Cady, Roberts* and *Chiarella* as precedent, the Supreme Court

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[14] *Id.* (holding that officers, directors, and corporate stockholders do not form an exhaustive list of people who may owe a fiduciary duty).

[15] *Id.* at n.15 ("A significant purpose of the Exchange Act was to eliminate the idea that the use of information for personal advantage was a normal emolument of corporate office.").

[16] 445 U.S. 222, 227 (1980).

[17] *Id*. at 235.

[18] *Id.* at 228 ("This relationship gives rise to a duty to disclose because of the 'necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the uninformed minority stockholders.'").

[19] *Id.* at 230 n.12 ("The tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty.").

[20] *See Chiarella*, 445 U.S. at 230 n.12; *In re Cady, Roberts*, 40 S.E.C. at 912.

further clarified and defined the law of insider trading in the seminal case of *Dirks v. SEC*.[21]

Dirks involved an insider of a publicly traded company who disclosed information to Dirks, an investment analyst, in order to expose fraud at the company.[22] Dirks then shared the confidential information with investors who traded on it, prompting an SEC investigation and forcing the Supreme Court to answer whether Dirks's disclosure violated the securities laws.[23]

The *Dirks* Court first reaffirmed *Chiarella*, stating that the tippee's "duty to disclose or abstain [from trading] is derivative from that of the insider's duty."[24] Second, the Supreme Court held that for a tippee to be held liable for insider trading, the tippee must have known or should have known that the tipper breached a fiduciary duty, making it essential for prosecutors to determine whether the tipper breached a duty.[25] Since a core purpose of the securities laws is to prevent the use of inside information for personal advantage, an inside tipper breaches a fiduciary duty when he or she personally benefits, "directly or indirectly," from the disclosure of nonpublic information.[26] Finally, the *Dirks* Court explicitly stated that 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*."[27] Therefore, the benefit to the tipper that will signal a breach of a fiduciary duty is not limited to tangible monetary gains and may include indirect and reputational benefits.[28] The tippee in

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[21] 463 U.S. 646, 666 (1983) (holding that an insider who disclosed confidential information in order to expose fraud at his company could not be held liable for insider trading).

[22] *Id*. at 649.

[23] *Id*. at 648–50.

[24] *Id*. at 659.

[25] *Id*. at 660 ("[S]ome tippees must assume an insider's duty to the shareholders not because they receive inside information, but rather because it has been made available to them *improperly*.").

[26] *Id*. at 663 ("This requires courts to focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings.").

[27] *Id*. at 664 (emphasis added).

[28] *See* Randall Eliason, *Supreme Court Agrees to Clarify the Law of Insider Trading*, SIDEBARS (Jan. 25, 2016), https://rdeliason.com/2016/01/25/supreme-court-clarify-law-insider-trading-salman-newman/ [https://perma.cc/S9WE-H7HZ].

Dirks escaped liability because the insider provided the nonpublic information to expose fraud rather than for a personal benefit, but the "gift" standard established under *Dirks* set the stage for differing interpretations of the element of personal benefit.[29]

D. The Recent Circuit Split: Newman and Salman

1. Second Circuit's Decision in *United States v. Newman*

In *United States v. Newman*, a group of hedge fund and investment firm analysts acquired material, nonpublic information from employees at several publicly traded companies.[30] The analysts proceeded to share the nonpublic information amongst themselves and with the portfolio managers at their respective companies.[31] Newman, one of the portfolio managers who traded on the nonpublic information, argued that the jury should have been instructed that in order to find the defendants guilty, it must find that they knew that the insider disclosed the confidential information in exchange for a personal benefit.[32]

The Second Circuit began by reaffirming the general holding of *Dirks*, that a tippee may be held liable for insider trading "only when the insider has breached his fiduciary duty . . . *and* the tippee knows or should know that there has been a breach."[33] Receiving a personal benefit *is* the breach that triggers liability, and therefore the tippee must know of the personal benefit.[34] Since the breach and the personal benefit are one and the same, according to the *Newman* Court, the tippee must be aware of the benefit.[35]

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[29] Robertson, *supra* note 11.
[30] United States v. Newman, 773 F.3d 438, 442 (2d Cir. 2014).
[31] *Id.* at 443 ("These analysts then passed the inside information to their portfolio managers, including Newman and Chiasson, who, in turn, executed trades in Dell and NVIDIA stock, earning approximately $4 million and $68 million, respectively, in profits for their respective funds.").
[32] *Id.* at 444 ("Newman and Chiasson also argued that, even if the corporate insiders had received a personal benefit in exchange for the inside information, there was no evidence that they knew about any such benefit.").
[33] *Id*. at 446.
[34] *Id*. at 448 (emphasis in original).
[35] *Id.* ("Thus, without establishing that the tippee knows of the personal benefit received by the insider in exchange for the disclosure, the Government cannot meet its burden of showing that the tippee knew of a breach.").

Second, the Second Circuit heightened the requirement to establish a personal benefit.[36] The personal benefit alleged by the Government in *Newman* involved career advice between casual friends.[37] Accepting such a relationship as sufficient to establish a personal gain would make the personal benefit requirement a "nullity."[38] This prompted the Second Circuit to hold that "such an inference is impermissible in the absence of 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."[39] While largely avoiding the question of whether there can be a "gift" of nonpublic information, the Second Circuit stated that the personal benefit must resemble a *quid pro quo* transaction.[40]

The Second Circuit's concern over the less rigorous personal benefit standard was partly due to the nature of *Newman*, in which the tippees were several levels removed from the corporate insiders that originated the nonpublic information.[41] The information given to Newman was information that is regularly assembled by financial analysts, leading the Second Circuit to find that "no reasonable jury could have found beyond a reasonable doubt" that Newman was aware that the information stream started with a corporate insider.[42] The Second Circuit accordingly created a rule that places an additional burden—knowledge of a direct personal benefit—on the government when prosecuting insider trading cases. But its failure to discuss the gift theory from *Dirks* as well as any concrete examples of what may constitute a sufficient relationship between tipper and tippee left the door open for vastly different interpretations of insider trading law.[43]

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[36] *See generally id.* (holding that the benefit must be direct and tangible in order to lead to insider trading liability).
[37] *Id*. at 452.
[38] *Id.* ("If this was a 'benefit,' practically anything would qualify.").
[39] *Id*. (stating that accepting a less stringent standard would mean the Government could meet its burden by showing that "two individuals were alumni of the same school or attended the same church").
[40] *Id*.
[41] *Id*. at 454.
[42] *Id*. at 455 (finding that the nonpublic information in the case "is of a nature regularly and accurately predicted by analyst modeling").
[43] *See generally* Brian P. Keane, *Hello Newman! (and Chiasson): Second Circuit Decision Raises the Bar for Government to Prove Liability of "Remote Tippees" in Insider Trading Cases*, MINTZ LEVIN (Dec. 15, 2014), https://www.mintz.com/newsletter/2014/Advisories/4495-1214-NAT-CORP/

2. Ninth Circuit's Decision in *United States v. Salman*

United States v. Salman involved a Citigroup employee (Maher) who gave information regarding upcoming mergers and acquisitions involving Citigroup clients to his older brother (Michael), who in turn gave the information to Maher's future brother-in-law, Salman.[44] Maher claimed that he "loved his brother very much" and that he gave him the inside information in order to "benefit him" and "fulfill whatever needs he had."[45] Salman knew the family very well and evidence showed that Salman not only had "ample opportunities" to observe the brothers' close relationship at "regular family gatherings," but also knew that the confidential information was coming from Maher.[46] After the jury returned a guilty verdict, Salman appealed on the grounds that he was unaware that the tipper exchanged the confidential information for a personal benefit.[47]

The Ninth Circuit, like the Second Circuit, reiterated the general holding from *Dirks* that a tippee is liable if he or she is aware of the tipper's breach of a fiduciary duty (i.e., that the tipper received a personal benefit).[48] Unlike the Second Circuit in *Newman*, however, the Ninth Circuit placed special emphasis on the *Dirks* standard for evaluating personal benefit.[49] Holding that the "gift" theory from *Dirks* governed the case, the Ninth Circuit held that "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned."[50] As one commenter observed, *Salman* was a case in which a benefit of "love and affection" was sufficient to establish a personal benefit to the tipper.[51]

[http://perma.cc/X6JX-JXKY] (discussing the government's added burden when prosecuting remote tippees).

[44] United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015).

[45] *Id*.

[46] *Id*. at 1089–90 (discussing evidence that showed that Michael gave a toast at Maher's wedding, where Salman was a guest).

[47] *Id*. at 1090.

[48] *Id*. at 1092.

[49] *See id*.

[50] *Id*.

[51] *See* Walter Pavlo, *The Insider Trading Case the Supreme Court Wants to Hear*, FORBES (Jan. 25, 2016), http://www.forbes.com/sites/walterpavlo/2016/01/25/the-insider-trading-case-the-supreme-court-wants-to-hear/#e421c4527889 [https://perma.cc/G2WH-T3YP].

In upholding Salman's conviction, the Ninth Circuit found that the brothers' close relationship was sufficient evidence to show that Salman "could readily have inferred Maher's intent to benefit Michael."[52] The Ninth Circuit further found that adopting the *Newman* standard would "require us to depart from the clear holding of *Dirks* that the element of breach of fiduciary duty is met where an 'insider makes a gift of confidential information to a trading relative or friend.'"[53] By focusing on the clear language of *Dirks* and holding that any gift to a trading relative or friend can satisfy the personal benefit test, the Ninth Circuit created a circuit split that was watched closely by traders and prosecutors alike.[54] In January 2016, the Supreme Court granted review of Salman's conviction.[55]

E. Implications of the Circuit Split

Because the *Newman* decision is binding on New York courts, where a significant number of insider trading cases are heard, it has had a significant effect on government prosecutions.[56] Prosecutors had to prove that "something tangible passed" from the tippee to the tipper in order to get an insider trading case in front of a jury.[57] Preet Bharara[58] is vehemently opposed to the *Newman* standard and claims that it will help foster "a potential bonanza for friends and family of rich people with material nonpublic information" to acquire significant financial gifts without legal consequences.[59] Other critics assert that the *Newman* rule "all but immunizes big shots" and "provides a virtual road map for savvy hedge-fund managers to insulate themselves from tippee liability by knowingly placing themselves at the end of a chain

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[52] *Salman*, 792 F.3d at 1092.
[53] *Id*. at 1093.
[54] *See* John Savarese, *Scope of Insider Trading "Tippee" Liability*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 22, 2016), https://corpgov.law.harvard.edu/2016/01/22/scope-of-insider-trading-tippee-liability/ [https://perma.cc/6KAD-S34F].
[55] Petition for Writ of Certiorari, *Salman*, 136 S. Ct. 899 (No. 15-628), *cert. granted*.
[56] *See* Peter Henning, *Supreme Court Could Redefine Insider Trading Law*, N.Y. TIMES: DEALBOOK (Aug. 1, 2016), http://www.nytimes.com/2016/08/02/business/dealbook/supreme-court-could-rewrite-insider-trading-law.html [https://perma.cc/7VZ5-GMQ6].
[57] *Id*.
[58] Preet Bharara is the U.S. Attorney for the Southern District of New York.
[59] *See* Henning, *supra* note 56.

of insider information and avoiding details about the sources of obvious confidential and improperly disclosed information."[60]

Those in favor of the more relaxed personal benefit standard agree with the Ninth Circuit's reasoning in *Salman* that the higher personal benefit standard established in *Newman* would allow corporate insiders to disclose nonpublic information as long as they asked for no tangible compensation in return.[61] Proponents of the *Newman* holding also believe that the Second Circuit's decision is helpful in preventing innocent tippees from being held liable for insider trading, and is consistent with *Dirks* in that it allows a gift of confidential information to suffice as evidence when there is proof of a "meaningfully close personal relationship."[62] Because there was a meaningfully close relationship in *Salman*, Salman's conduct would violate the law under both the *Newman* and *Salman* standard.[63] Under this line of reasoning, the *Salman* decision does not contradict *Newman*, but it does show that the Government can prove that a remote tippee is liable through circumstantial evidence.[64]

F. Supreme Court's December 2016 Opinion in Salman

The Supreme Court's analysis in *Salman* began with a clear endorsement of *Dirks*, stating, "[w]e adhere to *Dirks*, which easily resolves the narrow issue presented here."[65] Holding that a tippee may be held liable when the tipper intends to benefit the recipient, the Supreme Court described such disclosures as equivalent to profiting

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[60] Parloff, *supra* note 10.

[61] *See Ninth Circuit Disagrees with Second Circuit on Personal-Benefit Requirement for Insider Trading*, PROSKAUER ROSE (July 6, 2015), http://www.proskauer.com/publications/client-alert/ninth-circuit-disagrees-with-second-circuit-on-personal-benefit-requirement-for-insider-trading/ [https://perma.cc/6W2S-P2QY] (discussing the Ninth Circuit's fears of adopting the *Newman* standard).

[62] MICHAEL SCHACHTER ET AL., WILLKIE FARR & GALLAGHER, NINTH CIRCUIT ISSUES INSIDER TRADING DECISION CONSISTENT WITH NEWMAN 3 (July 9, 2015), http://www.willkie.com/~/media/Files/Publications/2015/07/Ninth_Circuit_Issues_Insider_Trading_Decision_Consistent_with_Newman.pdf [https://perma.cc/2E29-ZHHP].

[63] *Id.*

[64] *Id.*

[65] Salman v. United States, 137 S. Ct. 420, 427 (2016) (affirming Salman's conviction).

from an illegal trade and then gifting the profits to a friend or family member.[66] *Dirks* eliminated any possibility of an insider giving gifts in the form of nonpublic market information.[67] Although the Supreme Court did not eliminate the personal benefit requirement, it did decline to follow the holding in *Newman* that a benefit requires something of a "pecuniary or similarly valuable nature." [68] The Supreme Court cited evidence from Salman's trial which showed that Salman was acutely aware of the tipper's close relationship with the first tippee, and accordingly affirmed his conviction.[69] The Supreme Court also assessed the Government's arguments against the proposition that the new standard would lead to unlimited and vague liability.[70] Specifically, the Court stated that the prosecution would still need to prove that the tippee was aware of the personal benefit.[71] As long as the tippee knew that the disclosure was intended as a gift, liability may be found despite the absence of a direct and tangible benefit.[72]

The brief and unanimous decision was quickly praised by prosecutors.[73] However, it is important to note that the Supreme Court's recent ruling does not overturn *Newman* and still requires the government to establish a personal benefit that was apparent to the tippee.[74] For example, because the defendant in *Newman* was many

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[66] *Id.*
[67] *Id.* at 428.
[68] *Id.*
[69] *Id.* at 429.
[70] *Id.* at 427.
[71] *Id.*
[72] *Id.* at 428 ("The facts of this case illustrate the point: In one of their tipper-tippee interactions, Michael asked Maher for a favor, declined Maher's offer of money, and instead requested and received lucrative trading information.").
[73] *See* Ariane de Vogue, *Supreme Court Ruling Makes Insider Trading Cases easier to Prosecute*, CNN (Dec. 6, 2016), http://www.cnn.com/2016/12/06/politics/supreme-court-insider-trading-case/ [https://perma.cc/9739-PHXY] ("In its swiftly decided opinion, the Court stood up for common sense and affirmed what we have been arguing from the outset—that the law absolutely prohibits insiders from advantaging their friends and relatives at the expense of the trading public.").
[74] *See* Jen Wieczner, *Here's What the Supreme Court Insider Trading Ruling Means for Hedge Funds*, FORTUNE (Dec. 6, 2016), http://fortune.com/2016/12/06/supreme-court-insider-trading-salman-hedge-fund/ [https://perma.cc/M94P-NX9Y] ("Still, the Supreme Court's Salman decision isn't an automatic win for the government in other insider trading cases going forward—and it doesn't completely overturn the Newman cases's findings, either.").

levels removed from the tipper, it would still be difficult for the government to prove that the defendant was aware that the tip was revealed for a personal benefit.[75] The Supreme Court's *Salman* decision did not shed much light on what would have been required to support a finding against the *Newman* defendants, because the defendant in *Salman* clearly was aware of the close personal relationship between the tipper and the first tippee.[76] Additionally, the Supreme Court did not provide much guidance on who constitutes a "close friend or relative," leaving that question to be determined on a case-by-case basis.[77] The Supreme Court also did not address what is required for a personal benefit when the information is *not* given to a close friend or relative or how prosecutors must prove personal knowledge.[78]

G. Conclusion

The Supreme Court's decision did not bring a significant change in the rule of law, but it could have a meaningful impact on how the insider trading rule is expressed.[79] The Supreme Court's *Salman* ruling removed the uncertainty surrounding the Second Circuit's interpretation of personal benefit, by expressly affirming the principle that a gift of confidential information to a trading relative or friend is adequate to demonstrate a personal benefit.[80] To some, this clarification signals a return to the pre-*Newman* era of insider trading law and will remove a significant hurdle for prosecutors.[81]

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[75] *See id.*

[76] *See generally Salman*, 137 S. Ct. at 427 (holding that there was sufficient evidence of Salman's knowledge for a conviction).

[77] SULLIVAN & CROMWELL, *SALMAN V. UNITED STATES*: SUPREME COURT ADDRESSES SCOPE OF CRIMINAL INSIDER-TRADING LIABILITY FOR TIPPEES 1 (2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Salman_v_United_States_Supreme_Court_Addresses_Scope_of_Criminal_Insider_Trading_Liability_for_Tippees.pdf [http://perma.cc/5Z9Q-WGGA].

[78] *Id.* ("For traders, Salman underscores the continuing risks associated with all trading on the basis of material, non-public information, even when the precise circumstances of the disclosure of information are opaque.").

[79] Pavlo, *supra* note 51.

[80] *See* SULLIVAN & CROMWELL, *supra* note 77.

[81] *See Salman Decision: Supreme Court Weighs In on Insider Trading*, NAT. L.F. (Dec. 7, 2016), http://nationallawforum.com/2016/12/07/salman-decision-supreme-court-insider-trading/ [https://perma.cc/2FJN-7AFH].

However, some questions remain unanswered, assuring prosecutors and traders alike that insider trading law is far from settled.[82] Although prosecutors believe the Supreme Court's decision will pave the way for successful future prosecutions, others believe the Supreme Court maintained a place for *Newman* in certain scenarios.[83] Importantly, the Supreme Court did not overturn one of the essential holdings of *Newman*—that remote tippees many levels removed from the tipper must still be aware of any personal benefit received by the tipper.[84] The circuit split was the result of two very different streams of leaked market information, making it unnecessary for the Supreme Court to adopt one circuit's approach while completely reversing the other.[85] Additionally, the Supreme Court did not address the question of who may constitute a friend or relative.[86] Whether a distant cousin may be considered a relative, for example, remains a question that will need to be answered in future insider trading cases.[87] By simply affirming an obvious holding of *Dirks* without discussing how to show personal knowledge and whether tenuous relationships may satisfy the gift theory, the Supreme Court left unanswered questions that prosecutors and defense attorneys will eventually be forced to confront.[88]

Max Perricone[89]

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[82] *See generally* MATTHEW E. FISHBEIN ET AL., DEBEVOISE & PLIMPTON, SUPREME COURT'S HOLDING IN SALMAN V. UNITED STATES LEAVES MANY IMPORTANT QUESTIONS UNANSWERED (2016), http://www.debevoise.com/~/media/files/insights/publications/2016/12/20161207_supreme_courts_narrow_holding_in_salman_v%20_united_states_leaves_many_important_questions_unanswered.pdf [https://perma.cc/WQ29-8S42].

[83] *Id.*

[84] *Id.*

[85] *Id.* ("What emerges from the Court's opinion is a recognition that the different glosses added by the circuit courts in their articulation of the personal benefit requirement stem in large part from the specific relationships the courts were considering, a complicating factor that limits any efforts to draw any bright lines in this area.").

[86] Wieczner, *supra* note 74.

[87] *Id.* (discussing the different types of relationships that may or may not be sufficient for insider trading liability).

[88] *See* THOMAS ZACCARO ET AL., PAUL HASTINGS, INSIDER TRADING QUESTIONS REMAIN (2016), https://www.paulhastings.com/docs/default-source/PDFs/2016-12-8-daily-journal-insider-trading-questions-remain.pdf [https://perma.cc/9CBG-DJEN] (discussing the narrow context in which *Salman* was analyzed).

[89] Student, Boston University School of Law (J.D. 2018).