

SUPREME COURT DECIDES TO WEIGH IN ON PERSONAL BENEFIT TEST

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Government Enforcement Alert

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This week, the Supreme Court agreed to hear an appeal that may resolve ambiguities in the law of insider trading that have arisen in the wake of the Second Circuit's opinion in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) *cert. denied*, 136 S. Ct. 242 (2015). On January 19, 2016, the Court granted *certiorari* in connection with the Ninth Circuit's opinion in *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015) *cert. granted in part*, No. 15-628, 2016 WL 207256 (U.S. Jan. 19, 2016). This represents the Supreme Court's first significant insider trading case in over three decades.

Salman involves a defendant who allegedly traded on material, nonpublic information that initially was divulged by his future brother-in-law, a former banker at Citigroup. The Ninth Circuit opinion was authored by Judge Jed S. Rakoff of the Southern District of New York, sitting by designation. Judge Rakoff has criticized the Securities and Exchange Commission for not being "tough enough" on large financial institutions (see, e.g., *S.E.C. v. Bank of Am. Corp.*, 653 F. Supp. 2d 507 (S.D.N.Y. 2009); *S.E.C. v. Citigroup Glob. Markets Inc.*, 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011)). The Ninth Circuit found that the banker passed tips to his own brother as "gifts," and that the banker's brother, in turn, passed them to the defendant, Bassam Salman.

The *Salman* court conceded that *Newman* may be read to require the parties to exchange some type of meaningful benefit, regardless of their relationship; however, the Ninth Circuit refused to extend its logic so far. In *Newman*, the Second Circuit found that two corporate insiders (and alleged tippees) did not breach their fiduciary duties to their respective companies because there was no evidence that they received anything of value in exchange for the alleged tips. And, in the absence of such breaches, the court stated that defendants (and alleged "downstream" tippees) could not be found guilty of insider trading. The *Newman* court went on to hold that the government must prove 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." *Newman*, 773 F.3d at 452. The Second Circuit rejected arguments that the "mere fact of a friendship, particularly of a casual or social nature" was sufficient to show that the tipper received a benefit. *Id.*

Salman is more straightforward than *Newman* because of the clear relationship between the tipper and tippee (brothers by marriage) and because Salman, himself, was not as far downstream as the *Newman* defendants. In his appeal, Salman asked the Supreme Court to decide whether the government must prove that an alleged tipper received a personal benefit in exchange for tips, or whether the existence of a close family relationship is sufficient to show a breach of fiduciary duty. Therefore, *Salman* presents the Supreme Court with an opportunity to clarify the circumstances under which a corporate insider may breach his fiduciary duty when disclosing information to an outsider and, specifically, the type of "benefit" that must be exchanged between a tipper and

tippee in order to trigger liability. Any standard articulated by the Supreme Court may have wide-reaching implications.

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