

Notable Recent Insider Trading Updates

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Insider trading cases are likely to remain a key priority for both civil and criminal regulators in 2023 and beyond. Notable recent developments are highlighted below.

SEC Argues Appeal to the Fourth Circuit After Rule 50 Defeat

On December 7, 2022, the U.S. Securities and Exchange Commission presented its oral arguments to the U.S. Court of Appeals for the Fourth Circuit in the SEC's bid to overturn its loss on a judgment as a matter of law in *SEC v. Clark*, 1:20-cv-01529. A year prior, U.S. District Court Judge Claude M. Hilton for the Eastern District of Virginia ruled mid-trial that the SEC had failed to present enough evidence that a jury could find that Defendant Christopher Clark committed insider trading.

The case arose from allegations that Clark had traded on non-public information provided to him by his brother-in-law, William Wright, about an upcoming merger between CEB Inc. and Gartner, a technological research and consulting company. The SEC alleges that Wright was the former corporate controller for CEB and tipped Clark to the merger during phone calls and meetings between November 2016 and early January 2017. The SEC alleges that Clark subsequently engaged in high-risk trades—funded by borrowing money and mortgaging his car—of CEB stock to great success. Judge Hilton was unconvinced, stating that it was not suspicious for the brothers-in-law to talk and meet regularly, that Clark had engaged in risky trades long before he allegedly received any confidential information and that Clark's methods of raising money were not suspicious because his assets always exceeded his liabilities.

The Fourth Circuit's decision is likely to influence the amount and quality of circumstantial evidence deemed sufficient for the SEC to pursue insider trading cases. A negative outcome for the SEC in the Fourth Circuit may, in conjunction with the Second Circuit case described below, signal an emerging trend of cases limiting regulators' efforts to broaden the parameters of insider trading.

The Second Circuit Finds That Information Regarding Federal Regulations Is Not "Property"

On January 9, 2023, a divided U.S. Court of Appeals for the Second Circuit overturned the convictions of three defendants alleged to have participated in an insider trading scheme to profit off of pending reimbursement rate changes in the Centers for Medicare and Medicaid Services (CMS). In the case, *United States v. Blaszczyk*, the U.S. Department of Justice alleged that David Blaszczyk, a former CMS employee, misappropriated CMS reimbursement information and funneled it to hedge fund analysts who traded on the information. While the Second Circuit originally affirmed judgments against the defendants for violations under 18 U.S.C. §§ 641 (conversion of government property), 1343 (wire fraud) and 1348 (securities fraud), the Second Circuit reconsidered its judgments on remand from the U.S. Supreme Court in light of its decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020), which held that misappropriating the government's regulatory rights of "allocation, exclusion, and control" over the lanes of a bridge open to traffic was not akin to a property interest that fell under the scope of federal fraud statutes.

On remand, the defendants renewed their argument that the CMS reimbursement information was not a "property" or "thing of value" within the fraud and conversion statutes. The DOJ agreed, stating that it now takes the view that confidential government information "must have economic value in the hands of the relevant government entity to

constitute “property” for the purposes of 18 U.S.C. §§ 1343 and 1348,” and that a related analysis applies to determine whether information is a “thing of value” under 18 U.S.C. § 641. *United States v. Blaszczyk*, 18-2811, at 12 (2d Cir. Dec. 27, 2022). The Second Circuit held that, while confidential information may constitute property of a commercial entity, the same is not true for a regulatory entity like CMS because premature disclosure of proposed regulations has no impact on the government’s finances nor does it remove the decision of how and when to promulgate the regulation from the government’s control. It is therefore not a “thing of value” that can be converted. *Id.* at 29-30.

The Second Circuit’s decision clarifies that a government entity’s confidential information must in and of itself be economically valuable to that government entity in order for such confidential information to be considered a property interest under Title 18. As a result, it may become more challenging for the DOJ to obtain convictions when the insider trading scheme is based on government information.

Federal Prosecutors Obtain Guilty Plea in First Crypto Insider Trading Case

On January 10, 2023, a defendant pled guilty to illegally trading on secret offering information from Coinbase Global Inc., a cryptocurrency trading platform. The defendant faces 10 months in prison, must disgorge over \$892,000 of profits and will likely be deported to India, his home country, after his prison term. The defendant was alleged to have been part of a scheme with two others to trade on 40 different crypto assets, prior to such assets being listed on the Coinbase platform, using inside information, in violation of 18 U.S.C. § 1343.

The DOJ’s efforts to curb insider trading in the cryptocurrency market underscore recent regulator communications flagging concerns regarding potential illegal activity involving crypto markets. For example, at the [SEC Speaks Conference in 2022](#), both the SEC’s Chair Gary Gensler and Director of the SEC’s Division of Enforcement Gurbir Grewal highlighted the SEC’s interest in the crypto market and promised to treat crypto currencies as securities for the purposes of enforcement. The SEC Division of Enforcement also significantly expanded its Crypto Assets and Cyber Unit and delegated additional resources to the unit to pursue market fairness. Given the government’s focus on the cryptocurrency market and recent turbulence in this space, it is likely that both the DOJ and SEC will continue to announce additional crypto cases throughout 2023.

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