Insider Trading:
Perspectives from Across the Table

Presentation for ACIC Spring Investment Forum
David I. Miller
Greenberg Traurig, LLP

David I. Miller | David.Miller@gtlaw.com | 212.801.9205
Outline

1. **Lay of the Land:** Insider trading law
2. **Examples of Insider Trading Actions:** Four Case Studies
3. **Salman v. United States:** A watershed decision?
4. **The Martoma and Blaszczak decisions:** Tackling insider trading post-*Salman*
5. **COVID-19 and Insider Trading**
6. **Initiation:** How investigations and enforcement actions begin
7. **Avoiding Investigations:** Best practices
8. **What’s Coming Down the Pike?**
The Lay of the Land: Laws Prohibiting Insider Trading
Insider Trading: Classical Theory

- **General:** Bars “insiders” from trading based on material nonpublic information.
- **Statute:** No “insider trading” statute; case law driven.
  - Section 10(b) of Securities Exchange Act of 1934 and SEC Rule 10b-5.
  - Bars use of “deceptive device, scheme or artifice to defraud” in connection with buying or selling of security.
- **Elements:**
  1. **Corporate “insider”**—officers, directors, employees, and their family. Includes “temporary” insiders.
  2. **Material information**—Objective tests: “reasonable investor” and “total mix” tests. Hindsight focus.
    - **Reasonable Investor:** Is there a substantial likelihood that a reasonable investor would consider information important in making an investment decision?
    - **Total Mix:** Would disclosure of information have been viewed by the reasonable investor as having significantly altered the total mix of available information?
    - **E.g.**, Earnings, ratings changes, buy/sell rec’s, news stories, M&A activity, management/control changes, new products or discoveries, customer/supplier developments, auditor changes, events involving company’s securities (e.g., tender offers, private placement, default, redemption, splits)
  3. **Nonpublic information**—includes released-but-undigested and “unimpounded” information, and information distributed solely to special persons or groups, rather than broadly disseminated.
  4. **Duty**—duty of trust owed by insiders to shareholders; must disclose or abstain from trading.
  5. **Scienter**—must have knowledge of duty breached. NOTE: “willfulness” is required in criminal cases.
Insider Trading: Misappropriation Theory

- **General:** Sweeps beyond traditional “insiders.”
  - Bars *any* person (with a duty of confidentiality) from misappropriating confidential information to trade securities.

- **Elements**
  1. **Material Information**—same as classical theory
  2. **Nonpublic Information**—same as classical theory
  3. **Duty of Trust and Confidence**—duty owed to source of information not to trade based on nonpublic information.
    - **Examples:** Duty owed by investment bankers, lawyers, business partners, consultants, financial printers, journalists, psychiatrists, mailroom employees, broker-dealers, and family members.
    - **SEC Rule 10b5-2**—*when* (1) recipient agrees to maintain information in confidence; (2) history, pattern or practice of sharing confidences; or (3) recipient receives MNPI from family member (unless source did not expect information to be kept confidential). (Non-exhaustive list).
  4. **Use / Misappropriation:** Possessing material nonpublic information when transacting sufficient. **Practical test**—information was a factor, however small, in buy/sell decision.
    - **Control Persons:** “Culpable participants” controlling trader liable
  5. **Scienter required.**
Insider Trading: Tipper/Tippee Liability

- **Tipper Liability: Elements**
  1. **Tip**—material nonpublic information given to tippee by insider or other tippee.
  2. **Breach**—tipper breaches duty of trust to shareholders or source of information.
  3. **Sciente**—tipper aware of duty owed to shareholders or source of information.
  4. **Personal Benefit**—tipper receives personal benefit for tip.
     - *Personal Benefit: United States v. Newman, 773 F.3d 438 (2d Cir. 2014)*, held that exchange must be “objective,” “consequential,” and “represent[ ] at least a potential gain of a pecuniary or similarly valuable nature.”
     - *Seminal Case: Dirks v. SEC, 463 U.S. 646, 647 (1983).*

- **Tippee Liability: Elements**
  1. **Tipper**—Tipper liability requirements met (see above).
  2. **Sciente**—*Newman* found that tippee must know that tipper breached fiduciary duty—*i.e.* tippee must know that: (1) tipper improperly disclosed confidential information, **and** (2) tipper received personal benefit for tip.
     - *Criminal Case: “willful” conduct required. Must know tipper acted wrongfully.*
Insider Trading: Tender Offers

• **Section 14(e):** Prohibits insider trading in connection with tender offers.

• **Rule 14e-3(a):** Prohibits trading in connection with tender offer if person:
  
  1. **MNPI**—possess material, nonpublic information.
  2. **Scienter**—knows, or has reason to know, information directly or indirectly obtained from offeror, issuer, or their agent.
  3. **Trades**—buys or sells securities in connection with tender offer.
  4. **Not Required**—any breach of duty of trust.
Penalties

- **Criminal Penalties**
  - Up to a $5,000,000 fine (individuals)
  - Up to a $25,000,000 fine (entities)
  - Up to 20 years in prison

- **Civil Penalties**
  - Penalties up to *three* times the gain or avoided loss
  - Disbarment / loss of license
  - Employer also fined up to $1,000,000 in certain circumstances (requires direct or indirect control)

- **Post Violation Oversight**
  - SEC may require fund to enforce its insider trading policy strictly
  - Company may have to report compliance
Examples of Insider Trading Actions: Four Case Studies
Case Study 1: Galleon/Raj Rajaratnam

- **Facts**
  - **Background:** Galleon head Raj Rajaratnam convicted of trading based on vast network of insiders who tipped on Intel, Goldman Sachs, IBM and others between 2003 and 2009.
  - **Sentence:**
    - *Imprisonment*—11 years
    - *Fine*—$10 million. *SEC fine:* $92.8 million.
    - *Forfeiture*—$53.8 million.

- **Significance**
  - **Ring Unraveled:** Dozens convicted in connection with Galleon insider trading—within and outside firm.
  - **Sentencing:** Trend → tougher sentences and longer jail time
  - **Wiretaps:** Extensive use of recorded phone conversations:
    - “As the defendants in this case have now learned the hard way, they may have been privy to a lot of confidential corporate information, but there was one secret they did not know: We were listening. Today, tomorrow, next week, the week after, privileged Wall Street insiders who are considering breaking the law will have to ask themselves one important question: Is law enforcement listening?”
    - Preet Bharara, Former U.S. Attorney, S.D.N.Y.
  - **Text Messages:** Former Intel employee Roomy Khan sent key text to Raj: “Don't buy Polycom's stock till I get guidance; want to make sure guidance OK.” Khan → key cooperating witness.
Case Study 2: SAC Capital

• **Facts**
  
  • **SAC Prosecution:** SAC guilty plea to insider trading in 2013. Agreed to pay $1.2 billion fine plus additional $600 million payment (largest insider trading settlement) to settle civil and criminal probes; must cease managing outside money.
  
  • **Key Individual Convictions:** PMs Mathew Martoma, Michael Steinberg
    
    • **Martoma** — convicted for trading based on tip about trouble with clinical trial for experimental drug in 2008; helped SAC generate profits, avoid losses of $275mm.
      
      • Sentence: 9 years’ imprisonment. $9.38mm forfeiture.
    
    • **Steinberg** — convicted for trading based on tip about Dell, Nvidia.
      
      • Sentence: *3.5 years’* imprisonment. $2.0mm fine.
      
      • *But conviction was vacated and charges dismissed because of Newman.*

• **Significance**
  
  • **Spin-off Prosecutions:** Eight former SAC employees convicted or pled guilty.
  
  • **Cooperators:** SAC analysts Jon Horvath → star witness against Steinberg; pled guilty in 2012. SAC manager Noah Freeman testified against Winifred Jiau.
  
  • **Legal Issue:** Steinberg’s conviction vacated post-Newman.
Case Study 3: PGR Expert Network Firms

**Facts**

- **Background:** James Fleishman (sales manager) and other Primary Global Research (“PGR”) staff allegedly provided hedge fund clients access to 15,000 corporate consultants who funneled secret tips on Dell and AMD, among others.

- **Fleishman:** Center of DOJ’s year-long “Matchmaker” probe into PGR; convicted of insider trading with year-long wiretap evidence; sentenced to 2.5 years’ imprisonment in 2011.

- **Winifried Jiau:** PGR consultant convicted of insider trading in June 2011; sentenced to four years’ imprisonment. Cooperators → PMs Noah Freeman and Samir Barai.

**Significance**

- **Confidential Informant:** Marvell consultant Karl Motey; 400 conversations with 50 subjects.
  - **Fleishman juror:** “Secret FBI recordings were key evidence, especially that of Karl Motey.”
  - **Motey’s testimony** → 20 convictions.

- **Cooperators:** Extensive cooperator testimony – former Dell, AMD, and Samsung employees.

- **Wiretaps & IMs Key:** 300 hours of wiretaps - conversations with 250 consultants; 11,000 pages of instant messages between hedge funds and PGR employees; 6,500 pages of email.

- **Expert Firms Targeted:** 50 hedge funds and affiliated people investigated. Over a dozen charged in connection with expert networking generally by Southern District of New York.
Case Study 4: Burger King

• Facts
  • Background: Insider trading charges against Wells Fargo broker, Waldyr Da Silva Prado Neto, and Brazilian banker, Igor Cornelsen, in January 2014.
    1. Principal of 3G Capital Partners told 3G investor about 3G’s impending BK acquisition.
      ▶ 3G investor was brokerage client of Defendant Prado.
    2. Under auspices of confidentiality agreement with 3G, 3G investor discussed with his adviser, Prado, the investor’s financing commitment to 3G for BK acquisition.
    3. Prado improperly exploited confidences by immediately buying BK stock; ultimately reaped $175,000 in profits.
    4. Prado then tipped Cornelsen, who also immediately bought BK options. Cornelsen made $1.4mm in net profits.
  • Parallel SEC Action: Cornelsen settled related SEC probe for $5.18mm; Prado – default judgment of $5.6mm.

• Significance
  • Trading analysis and emails proved critical: timing of “tip” communications and trades.
  • Fraud in connection with tender offer.
  • Breach of fiduciary duties to brokerage client.
Salman v. United States: A Closer Look at the Decision and Its Implications
Understanding *Salman*: *United States v. Newman*

- **Alleged Scheme in Newman**
  - Anthony Chiasson, a PM at Level Global Investors (“LGI”), and Todd Newman, a PM at Diamondback Capital Management (“Diamondback”), convicted of trading based on material nonpublic earnings information, tipped by Dell and NVIDIA employees, after a six-week jury trial.

- **Remote Tippees**
  - **Dell Tipping Chain**: Rob Ray (Dell, Investor Relations) → Sandy Goyal (Neuberger Berman, Analyst) → Jesse Tortora (Diamondback, Analyst) → *NEWMAN* and Spyridon Adondakis (LGI, Analyst) → *CHIASSON* (receipt from Adondakis).
  - **NVIDIA Tipping Chain**: Chris Choi (NVIDIA) → Hyung Lim (Broadcom Corp. and Altera, former executive and church acquaintance of Choi) → Danny Kuo (Whittier Trust, Analyst) → Tortora and Adondakis → *CHIASSON* and *NEWMAN*.
  - **No Evidence of Knowledge**: Government proffered no affirmative evidence that Newman and Chiasson were aware of the source of tips or any benefit received by their respective tippers.
    - **“Must Have Known”**: Government urged that Newman and Chiasson were sophisticated traders who “must have known” that tippers breached fiduciary duties.
Understanding *Salman*: *United States v. Newman* (cont’d)

• **The Appeal**
  
  • **Challenged Jury Instruction:** Chiasson and Newman argued the jury instruction was erroneous because it failed to apprise the jury that a tippee must know that the tipper received a personal benefit in exchange for the tip.

  • **Insufficient Evidence:** Chiasson and Newman also argued that the Government’s evidence was legally insufficient to establish that: (1) the tipper received a cognizable personal benefit for the tip; and (2) the tippee knew of this benefit.

• **Key Principles**
  
  • **Tipper Liability:** Requires breach of fiduciary duty by tipper. To breach fiduciary duty, tipper must *both*: (1) disclose material nonpublic information and (2) receive a personal benefit, “directly or indirectly,” in exchange for the tip.

  • **Tippee Liability:** Tippee liability derivative of tipper liability; hence, tippee liable “only when the insider [original tipper] has breached his fiduciary duty . . . and the tippee knows or should know that there has been a breach”—*i.e.*, when the tippee knows that the tipper has (1) disclosed material nonpublic information and (2) received a personal benefit for such disclosure.

    • **Trading on Inside Information Alone Insufficient:** “[T]he tippee’s liability derives only from the tipper’s breach of a fiduciary duty, not from trading on material, non-public information.”
United States v. Newman: Key Principles

- **Key Principles (cont’d)**
  - **Sophistication Insufficient**: ReJECTs presumption that sophisticated tippee must know tipper received personal benefit in exchange for tip because no tip is made for free.
  - **Personal Benefit**: Requires 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.”
    - **Casual Friendship and “Career Advice” Insufficient**: Must be more definite and concrete quid pro quo.
  - **Authoritative Test**: The Second Circuit set forth the following definitive statement of the elements required to sustain an insider trading conviction:

  “In sum, we hold that to sustain an insider trading conviction against a tippee, the Government must prove each of the following elements beyond a reasonable doubt: that (1) the corporate insider was entrusted with a fiduciary duty; (2) the corporate insider breached his fiduciary duty by (a) disclosing confidential information to a tippee (b) in exchange for a personal benefit; (3) the tippee knew of the tipper’s breach, that is, he knew the information was confidential and divulged for personal benefit; and (4) the tippee still used that information to trade in a security or tip another individual for personal benefit.”
The Supreme Court Weighs In:  
**U.S. v. Salman**

### Background Facts

- Defendant Bassam Salman, a remote tippee, had received and traded on MNPI from his brother-in-law Michael Kara, who in turn had obtained the information from his older brother Maher, an investment banker at a major global bank.

- Evidence showed that Salman was aware that the MNPI originated with Maher, and that from 2004 to 2007, Salman and Michael had profited from trading in securities issued by the bank’s clients just before major transactions were announced. Salman was convicted at trial.

### Appealed to 9th Circuit

- Judge Rakoff (sitting by designation on the Ninth Circuit) held that *Newman’s* personal benefit language must be interpreted in a narrower way than others might attempt to use it, and that to the extent *Newman* cannot be interpreted so narrowly, the Ninth Circuit would “decline to follow it.”
The Supreme Court Weighs In: U.S. v. Salman (cont’d)

- Supreme Court’s Ruling
  - The Court rejected Salman’s argument that an insider must receive a pecuniary quid pro quo from a tippee for there to be a sufficient personal benefit. The Court found that *Dirks* made clear that a tipper breaches a fiduciary duty—and receives a personal benefit—by making a gift of confidential information to a “trading relative or friend.”
  - In applying *Dirks*, the Court held that “Maher, a tipper, provided inside information to a close relative, his brother Michael. *Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to ‘a trading relative,’ and that rule is sufficient to resolve the case at hand.”
  - The Court declined to adopt the government’s broader argument that “a tipper personally benefits whenever the tipper discloses confidential trading information for a noncorporate purpose.”
  - Second Circuit’s holding in *Newman*: “[t]o the extent the Second Circuit held that the tipper must also receive something of a ‘pecuniary or similarly valuable nature’ in exchange for a gift to family or friends . . . we agree with the Ninth Circuit that this requirement is inconsistent with *Dirks*.”
• **Significance:** *Salman* overrules *Newman*’s requirement that there must be proof of a quid pro quo exchange between tipper and tippee “that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature” where the tipper and tippee are close relatives or close friends.

  • But it leaves lower courts with a number of questions as to the holding’s scope, and the continuing validity of other important aspects of *Newman*.

  • In cases premised upon friendship, does the relationship still need to be “meaningfully close” to support a *Salman* “gift” theory?

• Government’s insider trading enforcement efforts re-invigorated?
The *Martoma* and *Blaszczak* Decisions: Tackling Insider Trading Post-*Salman*
Understanding *Martoma*: Background

- **Alleged Scheme in *Martoma***
  - Martoma worked as PM at SAC, focusing on pharmaceutical and healthcare companies.
  - Caused SAC to acquire shares of two companies that were developing jointly an experimental drug called bapineuzumab used to treat Alzheimer’s disease.
  - Martoma obtained information about drug from Dr. Sidney Gilman, chair of safety monitoring committee for bapineuzumab clinical trial, in meetings arranged by expert networking firm.
  - Dr. Gilman participated in approx. 43 consultations with Martoma, for some of which he was paid $1,000/hour.
  - Despite obligation to keep results of clinical trial confidential, Dr. Gilman disclosed test results and other confidential information to Martoma during consultations.
  - On July 17 and 19, 2008, in advance of a July 29, 2008 conference at which Dr. Gilman was due to present bapineuzumab test results, Dr. Gilman and Martoma met. On July 21, 2008, SAC began to reduce positions in two companies at issue through short sales and option trades.
  - On July 29, 2008, immediately following Dr. Gilman’s presentation, share prices of two companies at issue fell significantly.
  - Trades that SAC made in advance of presentation resulted in approximately $80 million in gains and $195 million in averted losses.

- **Charges**
  - Martoma indicted for insider trading in SDNY and convicted following four-week trial. Appealed to Second Circuit. Second Circuit heard oral argument twice – second time after *Salman*.
Understanding Martoma: The First Decision

• **Post-Salman Confusion?**
  
  • After *Salman*, a dispute remained as to whether (i) any gift sufficed for a personal benefit, and (ii) whether a close personal relationship in gift-giving context was necessary to satisfy the personal-benefit requirement.

• **The Second Circuit Rules in August 2017:**
  
  • **First:** Rational jury could have found essential elements of insider trading under a pecuniary quid pro quo theory.
    
    • Dr. Gilman and Martoma maintained a quid pro quo relationship that presented opportunity to “yield future pecuniary gain.” Martoma was frequent client for Dr. Gilman and Dr. Gilman regularly feeding Martoma confidential information about safety results of clinical trials.
  
  • **Second:** As for jury instruction challenge, court held that the logic of *Salman* abrogated *Newman’s* “meaningfully close personal relationship” requirement.
    
    • Gift-giving analysis is that corporate insider **personally benefits whenever he discloses inside information as a gift with expectation that recipient would trade or otherwise exploit it for pecuniary gain.**
    
    • Equivalent of insider trading on information himself and giving cash gift to the recipient.
    
    • Thus, “**insider or tipper personally benefits from a disclosure of inside information whenever the information was disclosed with the expectation that the recipient would trade on it**” even if there was not a “close personal relationship” between tipper and tippee.
Understanding *Martoma*: Reaction to the First Decision

• **Broad holding**
  
  • Personal benefit test can be met in the gift-giving context where the tipper expects the tippee to trade even if the tipper/tippee are not friends or relatives.

• *Martoma I* appeared to eviscerate *Newman*’s personal benefit test.

• Some criticized *Martoma* panel for effectively overruling *Newman* without *en banc* review.

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Understanding *Martoma*: The Amended Opinion

**The Second Circuit Issues an Amended Opinion in June 2018**
- Reaches same ultimate conclusion as original opinion but within *Newman’s* personal-benefit standard.

**Jury-Instruction Challenge**
- Majority walked back its finding that *Salman* abrogated *Newman’s* “meaningfully close personal relationship” requirement.
- Held that requirement satisfied where tipper gifts insider information:
  - (1) to someone with whom tipper shares quid-pro-quo relationship; or
  - (2) with *intention to benefit* recipient of information.
  - “Intention to benefit” sufficient to satisfy *Newman’s* “meaningfully close personal relationship” requirement in gift-giving context.
- Because instructions allowed jury to find personal benefit based on “gift of confidential information to trading relative or friend” without finding (1) or (2) above, they were erroneous.
- But error did not impair Martoma’s rights because of “compelling evidence that at least one tipper received a different type of personal benefit from disclosing inside information: $70,000 in ‘consulting fees.’”
- And at end of opinion court noted that insider receives personal benefit when discloses information with *expectation tippee will trade on it.* (Same language as before!)

**Sufficiency Challenge**
- In context of Gilman’s ongoing quid-pro-quo relationship with Martoma, evidence sufficient to support conviction. Even if no quid pro quo during two key sessions, rational jury could find Gilman personally benefited by disclosing information with *intention to benefit* Martoma.
- As in *Martoma I*, Judge Pooler dissented arguing that “meaningfully close personal relationship” requirement cannot be proven without objective evidence concerning nature of tipper-tippee relationship.

**Supreme Court Declined to Hear the Case**
Understanding Blaszczak: Background

**Facts**

- On May 24, 2017, SDNY and SEC unsealed charges against five individuals in a “political intelligence” tipping chain involving Deerfield Management.
  - David Blaszczak (Political Intelligence Consultant, former Health Insurance Specialist at the Center for Medicaid & Medicare Services (“CMS”))
  - Christopher Worrall (Senior Technical Advisor at CMS)
  - Jordan Fogel (analyst on Deerfield’s Healthcare Services Team) (cooperated with the government)
  - Ted Huber (analyst on Deerfield’s Medical Devices Team)
  - Robert Olan (analyst on Deerfield’s Medical Devices Team) (criminal charges only).
- Blaszczak is alleged to have obtained MNPI about upcoming reimbursement announcements from CMS and provided it to hedge fund clients and other lobbyists. Time period: 2009-2014.
- Deerfield’s trades allegedly resulted in over $7 million in profits; Blaszczak allegedly earned approx. $1 million in fees.

**Criminal Charges: Conspiracy/substantive counts of Securities Fraud, Wire Fraud, Conversion of Government Property, and Defrauding the United States.**

- Defendants convicted after four-week trial in April 2018.
- Deerfield settled with the SEC and paid over $4.6 million over failure to establish, maintain, and enforce policies and procedures to prevent the misuse of MNPI, including information regarding confidential government decisions.
- SEC and SDNY relied upon Worrall’s duties under the STOCK Act to establish the duty of trust and confidence required to trigger insider trading liability.
Understanding *Blaszczak*: Insider Trading Easier to Prosecute?

- Court originally held: (i) Confidential government information such as the CMS information at issue may constitute “property” in the government’s hands for purposes of the wire fraud and Title 18 securities fraud statutes; and (ii) personal-benefit test does not apply to Title 18 securities fraud (SOX statute: 18 U.S.C. § 1348).

- **Information is property?**
  - Confidential business information has been recognized as property. *Carpenter v. United States*, 484 U.S. 19 (1987).
  - Court held that CMS has property right in keeping confidential and using nonpublic, pre-decisional information. Right to exclude public implicates government’s role as property holder, not like licensing/regulatory role. Court notes that CMS invested time/resources into generating/maintaining confidentiality of information. Leaks could make CMS less efficient.

- **Personal-Benefit test does not apply to Title 18 securities fraud.**
  - Misappropriation of confidential information in breach of duty of trust/confidence constitutes fraud akin to embezzlement.
  - Congress enacted Title 15 fraud with purpose of eliminating use of inside information for personal advantage – *Dirks* effected this purpose by holding insider only breaches fiduciary duty by tipping confidential information in exchange for personal benefit.
  - Test has no support in embezzlement theory of fraud in *Carpenter*. Cannot embezzle money of another without committing a fraud – breach inherent in embezzlement; no additional requirement that breach duty in specific manner (like tipped for personal benefit).
  - Section 1348 was added to overcome technical requirements of Title 15 fraud; more like bank/health care fraud.
  - Criminal code has other examples of provisions that criminalize overlapping conduct.
  - Congress’s prerogative to enact broader securities fraud provision – not place of court to check this.

- **BUT 1/11/2021:** *Blaszczak* Vacated and Remanded in Light of *Kelly v. United States* (Sup. Ct. 2020).
  - DOJ remand brief calls for property fraud (including wire fraud and § 1348 securities fraud counts) and conversion convictions to be dismissed. Confidential information did not = property in light of *Kelly.*
COVID-19 and Insider Trading
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• March 23, 2020 statement by former SEC Co-Directors of Enforcement

• What does it mean?
  • Authorities are watching.
  • Especially true when markets are volatile.
COVID-19 and Insider Trading

• The STOCK Act
  • Creates a duty of relationship of trust and confidence to USG and people of U.S. owed by Congressional members/staff, Executive employees, etc.
  • But structural and constitutional enforcement hurdles remain.
• New enforcement focus area of “political intelligence.”
• COVID-19-related trading.
DOJ Investigations

1. SEC and FBI referrals
   • *FBI embeds agents*: speeds reaction time
   • 55%-65% of SEC cases have parallel criminal investigation

2. Cooperators
   • *Southern District*: numerous cooperation agreements in last several years; virtually all SDNY insider trading jury trials → cooperators

3. Confidential informants

4. Subpoenas
   • *E.g.*, emails, chats, text and instant messages. Trading, telephone and transit records
   • Account transactions → to show “personal benefit” received
   • Grand jury materials not shared with SEC

5. Wiretaps
   • *Galleon*: First use of wiretaps to investigate insider trading; Court upheld
   • *Close Cooperation*: NY FBI and SDNY
   • Restrictions on sharing Title III information

6. Search Warrants
   • Avoids “disappearance” of information sought in grand jury subpoena
SEC Investigations

1. Trading data — regularly collected.
2. Bluesheets — SEC information requests; bluesheet databases.
3. Market Abuse Unit — focus on insider trading; complex analytics to identify illicit networks.
4. Complaints — SRO and other referrals collected by Office of Market Intelligence.
5. Inspections — administered regularly by the Division of Examinations (formerly known as Office of Compliance Inspections and Examinations).
6. FINRA Referrals:
   - FINRA response to material event.
   - Information collected by FINRA from subject companies.
7. Registration Statements
   - “While the primary aim [of the registration requirement] was to create a source of data . . . to use in assessing systemic risk, the [SEC] . . . is using the information to support its own regulatory programs, including examinations, investigations and investor protection efforts relating to private fund advisers.”
     - — Norm Champ, Former SEC Director of the Division of Investment Management
8. SEC Whistleblower Hotline — Tips, complaints, and referrals leading to successful enforcement actions are rewarded.
9. Other — Telephone records, prior or existing investigations of traders, anonymous tips, and whistleblowers.
FINRA Investigations

- **Examinations**: Administers routine examinations; collects information from broker-dealers and companies.
- **Complaints**: Handles customer complaints; responds to material events.
- **Investigations**: Investigates allegations of wrongdoing or rule violations; issues report; may order disciplinary action.
- **Disciplinary Action**: May initiate formal disciplinary action; issue written statement of charges to targets.
  - *Three-person panel*: two industry peers and FINRA hearing officer.
- **Penalties**: Potential fines, suspension of registration, professional bar.
- **Referral**: Refers egregious violations to state and federal authorities.
Avoiding Investigations: Best Practices
Avoiding Investigations: What the Government Is Focused On

- **Number of Professionals** — sufficient number of trained compliance professionals.
- **Authority** — clear lines of responsibility, ample authority.
- **Document** — document specific compliance efforts and activities to demonstrate steps were followed and commitment to abide by the law.
- **Compliance manual** — clear written policies for specific types of employees.
  - Broad scope of individuals covered by the policy.
  - Definition of material and non-public.
  - Broad scope of covered transactions (not just stock transactions).
  - Explanation of prohibited activities.
- **Culture of compliance** — senior management ethics; policy handbook; regular reminders.
- **Expert networks** — prohibit or strictly limit use of expert networking firms and industry experts?
- **Audits** — regular testing and audit of compliance systems.
Avoiding Investigations: What the Government Is Focused On (cont’d)

- **Monitor systems and restricted lists**
  - Restricted Lists — use of restricted lists for companies about which fund has MNPI.
  - Trading — internal surveillance of trading activity.
  - Monitoring — periodically monitor emails, telephone calls, and instant messages.
  - Clearance — pre-clear trading from personal investment accounts.

- **Monitor outside activities** — board service, retained consultants, etc.

- **Information barriers** — between firm’s public and private side.

- **Education and training** — tailored education programs for specific departments and roles.
  - Annual training: aim to inform and provide practical guidance.
  - Specialized training for high-risk groups, e.g., the deal team invested in activist strategy.
  - Post educational slides on shared drive.
  - Periodic firm reminders.
What’s Coming Down the Pike?
What’s Coming Down the Pike? Investigation and Enforcement Priorities

- Traditional insider trading and misappropriation cases (COVID-19)
- Political intelligence
- Commodities/Futures/ Swap fraud/manipulation
- Market manipulation: Spoofing/High Frequency Trading
- Bank Secrecy Act / AML Act of 2020 (AML Compliance)
- FCPA (Anti-Bribery)
- Cryptocurrency/ICO s
- Offering fraud
- Ponzi schemes
- Obstruction-related investigations
- Microcap Fraud/ Pump-and-Dump Schemes
- (SEC) Operations Broken Windows and Broken Gate Coming Back?
Biography

David I. Miller
Shareholder
New York, NY

T: 212.801.9205
David.Miller@gtlaw.com

White Collar, Government Investigations, and Securities and Commodities Enforcement/Litigation

David I. Miller, an experienced trial lawyer and former federal prosecutor, focuses his practice on white collar criminal defense, government and internal investigations, securities and commodities enforcement, related complex civil litigation, and cryptocurrency, cybersecurity, anti-money laundering, and national security matters. Previously, David served for five years as an Assistant U.S. Attorney in the Southern District of New York (S.D.N.Y.), over half that time as a member of the Securities and Commodities Fraud Task Force. He also served as a terrorism prosecutor with the Department of Justice in Washington, D.C., as a Special Assistant U.S. Attorney in the Eastern District of Virginia, as an Assistant General Counsel for the Central Intelligence Agency, and as a white-collar, securities, and commercial litigation attorney in private practice. Before joining Greenberg Traurig, David was a partner at another global law firm.
David represents a variety of clients – including banks, broker-dealers, hedge funds, private equity funds, investment companies and advisers, public and private companies, cryptocurrency businesses, senior officers, directors, and managers, and other individuals – facing risks of government investigation, criminal, civil and regulatory enforcement and prosecution, related civil litigation, and in matters requiring complex internal investigations. David regularly assists clients facing insider trading, market manipulation (including spoofing), accounting fraud, valuation fraud, and other securities/commodities and financial fraud issues; Foreign Corrupt Practices Act and Bank Secrecy Act/anti-money laundering compliance concerns; and issues implicating cryptocurrency, cybersecurity, forfeiture, and national security matters. To this end, David represents clients before federal and state courts, the Department of Justice, US Attorney's Offices, the Securities and Exchange Commission, Commodity Futures Trading Commission, self-regulatory organizations, state attorneys general offices, and other regulators and enforcement authorities.

As an experienced trial and appellate litigator with more than two decades of white-collar criminal and financial litigation experience (as both a federal prosecutor and defense lawyer), David represents clients at all stages of litigation through trial and appeal. David has conducted 10 jury and bench trials, several of which were multi-defendant trials, including securities and accounting fraud trials, with guilty verdicts secured for nearly all defendants on all counts. As an appellate advocate, David has briefed and argued several appeals before the U.S. Court of Appeals for the Second Circuit. The Legal 500 US notes that David has been praised by industry insiders for his “sharp mind, strategic thinking and client-focused advice.” He has been recognized as a New York Super Lawyer in the area of white collar criminal defense and by Who’s Who Legal as a “Future Leader.”
As an Assistant U.S. Attorney in S.D.N.Y.’s Securities and Commodities Fraud Task Force, David was responsible for investigating and prosecuting a wide range of high-profile securities and commodities fraud offenses, including insider trading, investment adviser fraud, offering fraud, accounting fraud, options backdating, market manipulation, reverse mergers, credit default swap schemes, hedge fund improprieties, and Ponzi schemes. David handled multiple insider trading matters and was part of a team of prosecutors leading the government’s investigation and prosecution of Operation Perfect Hedge, which resulted in the conviction of more than 80 individuals for insider trading offenses since 2009. As part of his duties, he worked closely with, and coordinated parallel civil enforcement proceedings with, the SEC, CFTC, FINRA, and other regulatory agencies. While David was an Assistant U.S. Attorney, he also prosecuted numerous other criminal offenses, including bank, mail, wire, health care, and tax fraud; credit card fraud and identity theft; money laundering; obstruction of justice and false statements; terrorism offenses; export control violations; and narcotics, firearms, and robbery offenses. Additionally, he has substantial experience with asset forfeiture issues, having litigated several criminal and civil forfeiture proceedings.

David previously served as a terrorism prosecutor with the DOJ’s Counterterrorism Section in Washington, D.C., where he investigated and prosecuted several high-profile terrorism-related cases through trial. He also served as a Special Assistant U.S. Attorney in the Eastern District of Virginia, where he investigated and prosecuted white collar, firearms, narcotics, and gang-related offenses through trial.
David’s career includes his time as an Assistant General Counsel for the Central Intelligence Agency, where he litigated and prosecuted cases on the CIA’s behalf (including classified and state secrets matters); was the assigned CIA representative to the prosecution team in United States v. I. Lewis (“Scooter”) Libby (D.D.C.); regularly advised senior CIA officials; and represented the CIA at high-level, interagency meetings implicating sensitive national security issues.

Before joining government service in 2005, David spent six-and-a-half years as a securities, complex commercial, and bet-the-company litigator with two large law firms in New York.

David has been recognized for his public service with Department of Justice and Central Intelligence Agency awards, has been selected to the New York “Super Lawyers” list from 2015 through the present, is regularly quoted in the news media, and often appears on television news programs providing expert opinion. David is also a technical advisor for a popular television drama series.
Thank You!