

## [Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—E.D.N.Y.: Shkreli securities fraud, conspiracy convictions follow multiple jury instruction drafts, \(Aug. 7, 2017\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

Martin Shkreli's conviction of securities fraud and conspiracy last week followed some fine-tuning of the instructions to be sent to the jury. The final instructions spanned nearly 90 pages and [included](#) a definition of what it means to be an "affiliate" of Shkreli's company Retrophin for purposes of count eight, conspiracy to commit securities fraud. Shkreli was convicted on that count and on two direct securities fraud counts relating to MSMB Capital and MSMB Healthcare ([U.S. v. Shkreli](#), August 4, 2017).

**Conspiracy instructions.** The parties [stipulated](#) that the term "affiliate" be defined as "a person that directly, or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, such issuer." The instruction further stated that whether a person is a Retrophin affiliate is a question of fact for the jury.

According to the [superseding indictment](#), Shkreli sent an email terminating all but four Retrophin employees, including employees and contractors who had received unrestricted and free trading shares. Shkreli then filed Schedules 13D with the SEC that failed to disclose his control over the unrestricted or free trading shares. In another email, Shkreli wrote that shares paid to a defrauded MSMB Healthcare investor could be "Take[n] from anyone—I don't care—do the math?"

**Securities fraud instructions.** The final jury instructions also struck language from a previous draft that incorporated a "knowing and intentionally" state of mind into the first element of securities fraud. The government [wrote](#) the court objecting to the inclusion of this language, which it said neither party requested at the July 26 charge conference. Instead, the prosecutors wrote that the intent standard for securities fraud is discussed in detail in the other elements of securities fraud; the first element—the requirement of a fraudulent act—is distinct. The pattern jury instructions also did not include the "knowing and intentionally" language. The final jury instructions strike the language for the first count but retain the language on the second element of securities fraud: knowledge, intent, and willfulness.

Although the jury convicted Shkreli on the direct securities fraud charges, it acquitted him of conspiracy to commit securities fraud in connection with MSMB Capital and MSMB Healthcare. Shkreli was also acquitted of conspiracy to commit wire fraud, including in connection with Retrophin. This Retrophin count, count seven, charged Shkreli with conspiring to defraud Retrophin by causing it to transfer shares to MSMB Capital, enter into settlement agreements with defrauded investors in MSMB Capital and MSMB Healthcare, and enter into a sham consulting agreement with a defrauded investor to settle other liabilities.

The case is [No. 10-cr-637](#).

Attorneys: Winston M. Paes, U.S. Attorney's Offices, for the United States. Andrea L. Zellan (Brafman & Associates, PC) for Martin Shkreli.

Companies: Elea Capital Management; MSMB Capital Management LP; MSMB Healthcare LP; Retrophin, Inc.; Desert Gateway, Inc.

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