

[Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: Salman decries common-law crime of insider trading, \(Sept. 8, 2016\)](#)

Securities Regulation Daily Wrap Up

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

In reply to the government's brief in his insider trading case, which argued for a broad application of the *Dirks* standard for tipper liability, Bassam Salman objects that an expansion of the *Dirks* standard for liability would retroactively punish him for conduct he did not know would become criminal. If the Supreme Court elects to preserve the crime of insider trading in the absence of legislation, it should narrowly construe *Dirks* to require proof that the insider sought a pecuniary benefit ([Salman v. U.S.](#), August 31, 2016).

Circuit split. Salman was convicted of conspiracy and insider trading on information he received from two individuals, including the brother of his then-fiancee. His appeal argued that under [Newman](#), the government was also required to prove that he disclosed the information in exchange for a personal benefit. The Ninth Circuit declined to follow *Newman* to the extent it held that evidence of a friendship or familial relationship is insufficient to demonstrate a personal benefit to the tipper. It [sustained](#) the conviction under the "clear holding" of *Dirks v. SEC* (U.S. 1983) that a gift of confidential information to a trading relative or friend constitutes a breach of fiduciary duty. The Supreme Court [granted certiorari](#) in light of the resulting circuit split.

Personal purpose v. personal benefit. The government's [brief](#) before the Court reasserted its broad reading of *Dirks* that the personal benefit required for insider trading liability exists "not only when the insider will reap a pecuniary gain," but also when the insider gifts confidential information to a tippee. The reason that such a gift constitutes a breach of fiduciary duty, the government argues, "is that it serves personal, not corporate, purposes." A court does not need to judge the nature or closeness of the relationship between tipper and tippee to make the call that a personal benefit exists; the line between a personal purpose and a corporate one "is readily intelligible to courts." But if this is the case, Salman argues, why did the *Dirks* Court say that assessing whether there was a personal benefit "will not always be easy for courts," or devote an entire section of its opinion to describing how to apply the test it set forth?

In Salman's view, the government has abandoned the Ninth Circuit's "unconstitutionally vague" test in favor of a rewritten theory of tippee liability. For the first time, the government maintains in its merits brief that the *Dirks* "personal benefit" requirement can be satisfied without proof of any benefit at all. The Court in *Dirks* did not hold that tipping liability depends on whether the insider had a corporate purpose, but described its test in terms of personal gain and benefit. The brief quotes *Dirks* as establishing: "Absent some personal gain, there has been no breach of duty to stockholders." The Court emphasized personal gain, Salman argues, because breaching a fiduciary duty by disclosing inside information for trading does not, without more, violate Section 10(b).

Judge-made crimes. Salman also takes aim more broadly at the permissibility of a judicially created crime of insider trading. According to the government's brief, the proscription on insider trading "is drawn directly from the text of Section 10(b), which forbids any manipulation or deception in connection with the purchase or sale of securities." Other countries that prohibit insider trading, Salman counters, have enacted statutes that use terms like "insider" and "inside information" and delineate when trading is prohibited. The Constitution prohibits common-law crimes, and courts' role is to interpret legislation, not to make policy themselves. The Court should narrowly construe the personal-benefit requirement by requiring the government to show that the inside information was provided for pecuniary gain, until Congress decides on the policy rationale for restricting insider trading and enacts a statute identifying the elements of a violation.

The case is [No. 15-628](#).

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