

## Securities Regulation Daily Wrap Up, ENFORCEMENT—2d Cir.: Convicted inside trade tipper's appellate arguments come up short, (Jan. 14, 2016)

By Jay Fishman, J.D.

The Second Circuit affirmed a lower court's criminal conviction of an insider trading tipper, ruling that his arguments regarding insufficient evidence, evidentiary rulings, jury instructions, and sentencing guideline range calculations were unfounded (*United States v. Riley*, January 14, 2016, per curiam.).

The defendant tipper, following a jury trial, was convicted of three counts of conspiratorial and substantive securities fraud for tipping inside information to a tippee. He was sentenced to concurrent 78-month prison terms, significantly below his 121 to 151-month guideline range.

Previous to this conviction, the SEC obtained final consent judgments against the above tipper and tippee for trading on insider information ahead of their company's publicly announced acquisition by another company. The defendants agreed to a permanent antifraud injunction and to being permanently barred from the securities industry. Additionally, the tippee agreed to pay disgorgement and prejudgment interest totaling \$166,532, and to pay a civil penalty of \$133,000; the tipper agreed to pay disgorgement, interest and penalties totaling \$9,072 (*SEC v. Teeple*, June 12, 2015).

**Insufficient evidence.** The appellate court proclaimed that even though the case review was *de novo*, the court would have to affirm a conviction "if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." While the defendant contended that anyone could have accessed the inside information and communicated it to the tippee, the court determined that the trial evidence was sufficient to allow a reasonable jury to conclude that the defendant had access to the information and that he communicated it to the tippee. The court noted from the record that the defendant: (1) accessed the database of inside information 57 times using several logins while on the phone with the tippee; and (2) was among the few officials with access to the confidential information.

The court similarly found that the defendant's other insufficient evidence assertions were contradicted by the trial record. The defendant, for example, claimed that the information was pretty publicly known but the record revealed a surprise reaction from the public after the release of the sales data following the tippee's trading on the information. The record also showed that the defendant received investment advice from the tippee as a personal benefit for providing the information to him.

**Jury instructions.** The court debunked the defendant's challenges to the jury instructions on the personal benefit to the defendant. The court determined that even if the district court's instruction was clearly erroneous, it did not affect the defendant's substantial rights, including the fairness, integrity or public reputation of the proceedings. Furthermore, said the court, the defendant's actual receipt of the investment advice, which the government highlighted at trial, was compelling enough to leave no doubt that a jury would have found the defendant guilty regardless of the instruction given to the jury. The court additionally stated that the law did not require proof of the motive for receiving the personal benefit to support the criminal conviction.

**Evidentiary rulings.** The defendant challenged the evidentiary rulings for abuse of discretion by arguing, among other things, that a June 15, 2009 recording of the tippee telling a government cooperator that he was going to meet his "best guy from Foundry [the tipper's employer]" constituted insufficient evidence for proving that the conspiracy between the defendant and tippee was furthered in early 2009. But the court determined that the mere absence of conspiratorial activity in early 2009 was not enough to render the district court's ruling "manifestly erroneous." The court, moreover, declared that the recording permitted the district court to make a preponderance of the evidence finding that a conspiracy between the two men did, in fact, exist and that the tippee furthered the conspiracy by communicating details about his ongoing relationship with his co-conspirator (the defendant) who was the best source for obtaining the nonpublic information.

**Sentencing guideline range calculations.** The court, following review of the guideline range for calculating the defendant's sentence, concluded that there was no procedural error in the calculation as claimed by the

defendant. The court specifically found no clear error in the district court's considering a particular trade made by the tippee's employer, to calculate the gain resulting from the defendant's inside tip. The district court was permitted to rely on the guideline's background commentary which defined "gain" as "the value realized through trading in securities by persons to whom the defendant provided inside information."

The court, therefore, concluded that the district court properly considered the above trade to assess the seriousness of the defendant's offense. The court further stated the district court's approach for calculating the defendant's sentence comported with the U.S. Supreme Court's observation that insider trading reflects a breach of duty owed by the tipper to the entity whose confidential information was disclosed.

The case is No. 15-1541-cr.

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