

[Securities Regulation Daily Wrap Up, TOP STORY—U.S.: Justices uphold Salman insider trading conviction, disagree with part of Newman case, \(Dec. 6, 2016\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

The Supreme Court unanimously upheld the insider trading conviction of Bassam Salman and in doing so reiterated the trading family member theory articulated in its *Dirks* precedent. The case had garnered much attention leading up to an oral argument laden with [complex hypotheticals](#) because of the potential for the justices to speak on *Dirks* and thereby potentially to indirectly speak on the controversial Second Circuit opinion in the *Newman* case. The court in fact disagreed with the Second Circuit to the extent the *Newman* opinion deviated from the [Ninth Circuit's](#) gift analysis in Salman's case ([Salman v. U.S.](#), December 6, 2016, Alito, S.).

Manhattan U.S. Attorney Preet Bharara, who along with the Solicitor General's Office had [argued](#) vigorously, but [unsuccessfully](#), to persuade the Supreme Court to review *Newman*, issued a [statement](#) lauding the outcome in *Salman*. "In its swiftly decided opinion, the Court stood up for common sense and affirmed what we have been arguing from the outset – that the law absolutely prohibits insiders from advantaging their friends and relatives at the expense of the trading public," said Bharara. "Today's decision is a victory for fair markets and those who believe that the system should not be rigged."

Justices follow *Dirks*. Writing for the court, Justice Alito reiterated that the court "adhere[s] to *Dirks*." Salman had argued that the [Newman](#) decision, which the Second Circuit handed down while Salman's appeal was pending, required a greater degree of proof by the government regarding the type of personal benefit needed to establish insider trading. The government, by contrast, argued that a gift of confidential information to anyone would be sufficient if the information was disclosed for a non-corporate purpose.

But the high court's adherence to *Dirks* at least resolved the "narrow issue" in Salman's case. According to the court, the purpose for disclosing confidential information is critical and that disclosure without a personal benefit to the insider is insufficient to establish insider trading. The court also explained that in *Dirks* it had provided courts with tools to evaluate insider trading cases, including instructions to look for direct or indirect personal benefits (e.g., money or reputational benefits), and offered principles regarding the gift of confidential information to a trading relative or friend.

The court further explained that Salman received his tip from an extended family member who was his brother-in-law, who had previously received the tip from a close family member, his brother. One of the brothers, said the court, breached a duty of trust and confidence to a bank and its clients by making a gift of the confidential information to the other brother. Salman then "acquired" that duty and proceeded to breach it by trading on the information with knowledge that the information was improperly disclosed.

As many court watchers had expected, the justices did speak briefly on the Second Circuit's *Newman* opinion. The Ninth Circuit had declined to follow the Second Circuit's view of the gift theory in *Newman*. But the Supreme Court, while not venturing into other issues in the Second Circuit's *Newman* opinion, disagreed with the Second Circuit's gift approach:

To 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*.

Moreover, in a footnote, the court declined to address the question of whether the *Dirks* personal benefit analysis applies in classical or misappropriation insider trading cases. There was no need to decide this question because the parties had agreed, and the court also assumed, that *Dirks* applies in both settings. The Ninth Circuit had said in a footnote of its own that Salman's case was a misappropriation case.

Vagueness, rule of lenity. Salman's lawyers had argued that other constitutional factors worked in favor of overturning his conviction. But the court turned away each of these arguments.

For one, the court said that other insider trading cases (and some other types of criminal fraud cases) that emphasized the receipt of money or property were inapt because of *Dirks*'s "commonsense" approach to gifts of confidential information. Put another way, the court noted the similarity between a tipper gifting the confidential information to a relative and the tipper trading on the information only to give the profits to the relative.

The court also rejected Salman's vagueness claim. According to the justices, the fact that some cases will present challenging gift analyses does not render Exchange Act Section 10(b) or *Dirks*'s guidance vague in light of *Dirks*'s "simple and clear 'guiding principle.'"

Lastly, the court rebuffed Salman's invocation of the rule of lenity. The court said Salman's case simply did not present major uncertainties or otherwise present the kinds of challenging facts that might justify application of the rule of lenity. "To the contrary, Salman's conduct is in the heartland of *Dirks*'s rule concerning gifts," said the court.

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

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