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Insider Trading

The SEC's New Focus on Insider Trading by Hedge Funds

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The Securities and Exchange Commission (SEC) has attempted to stop insider trading since its creation. Eliminating this misconduct has proven to be an elusive goal, as the Boesky scandal of the 1980s demonstrated.

The growth of the hedge fund industry has heightened the SEC's challenge. There is a longstanding and widespread belief among law enforcement personnel that insider trading involving hedge funds is a systemic problem.[1] Until recently, however, very few of the SEC's insider trading cases involved hedge funds.

Today, the SEC is committed "to root[ing] out insider trading on Wall Street and in the hedge fund industry."[2] It is bringing to bear more resources and new investigative tools to do the job. A restructured Enforcement Division has new units ramping up that will concentrate on, among other things, insider trading by market professionals, including hedge funds. In addition, joint investigations with the Department of Justice (DOJ) are now more common, allowing the SEC to take advantage of investigative strategies and tools long used in criminal cases.

Several insider trading cases involving hedge funds were brought in the past year, and more can be expected.[3] It has been reported that the SEC sent "at least" three dozen subpoenas to hedge funds and brokerages in "an expanding sweep of potential insider trading violations" relating to health care mergers in the past three years.[4] Also, the SEC filed charges in May 2010 against a Walt Disney Company executive and her companion, who allegedly shopped confidential earnings information about the company to over 30 hedge funds (some – but not all – of which reported the overture to the government).[5]

Given this unprecedented level of enforcement attention, hedge funds and their investment advisers need to make sure that adequate procedures, customized for their particular business models and strictly enforced, are in place to minimize the risk of insider trading violations.[6] Fund managers that fail to consult counsel now may discover, only when it is too late, that they are the target of an extensive undercover government investigation.

The Law of Insider Trading

The typical SEC insider trading case arises under the general antifraud provisions of the federal securities laws, particularly Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("1934 Act"). No statute fully defines illegal insider trading, but many believe that, like pornography, they "know it when they see it." Courts, however, require slightly more analytic rigor before imposing sanctions for improper trading, and have struggled to develop workable liability theories. As one commentator has noted, the absence of "a clear definition of insider trading . . . has led to hundreds of decisions grappling with the issue," and many of these decisions "are confusing and inconsistent with one another."[7]

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At present, there are two primary theories of liability: (1) the "classical" theory, which applies to traditional corporate insiders (such as directors, officers, and employees) and "temporary insiders" (such as lawyers, accountants, investment bankers, and other consultants hired to assist in corporate activities) who learn material nonpublic information in the course of their service to the company, and who owe a fiduciary duty to the company not to use it for their personal benefit; and (2) the "misappropriation" theory, which applies to persons unrelated to the company who learn material nonpublic information, and who owe a fiduciary duty to the source of the information not to use it for their own personal benefit.[8]

Liability also can be imposed on "tippees" who learn of and trade on the basis of material nonpublic information from insiders or misappropriators – "tippers." In the classical case, the tipper is a corporate (or temporary) insider who reveals the information in order to obtain a personal benefit, and the tippee is someone who knows or has reason to believe that the tipper breached a duty by providing the information.[9]

The SEC has adopted two rules in an attempt to fill in some of the gaps in insider trading law. Rule 10b5-1 provides guidance as to what constitutes trading "on the basis of" inside information, and Rule 10b5-2 provides guidance as to when a duty exists not to trade on the basis of inside information.

Penalties for insider trading can be severe, including disgorgement of ill-gotten gains, large penalties, and prison sentences. In addition, regulated persons (such as brokers or investment advisers) who engage in insider trading can be banned from the industry for a number of years or permanently.[10] In the hedge fund context, moreover, an insider trading violation can destroy the fund itself.

The Difficulty of Policing Insider Trading

Typically, the SEC's insider trading investigations are opened as a result of: (1) tips from informants; (2) referrals of suspicious trading activity from self-regulatory organizations (SROs) such as the Financial Industry Regulatory Authority (FINRA), which use market surveillance tools and conduct initial trading inquiries; or (3) its own review of trading through market surveillance and other resources.

After opening an investigation, the SEC usually asks the public company whose stock was traded for a chronology showing who (in and outside the company) knew about the material nonpublic information and when the information was first disclosed to them. The company also would be asked to identify any connections with a list of account holders whose trades appear to be unusual. In the end, however, almost all insider trading cases are based on circumstantial evidence, making them hard to prove.

Indeed, a former director of the Enforcement Division described insider trading cases as "unquestionably among the most difficult cases we are called upon to prove."[11] She noted:

> It is rare to find a "smoking gun"; virtually all insider trading cases hinge upon circumstantial evidence. It is quite common for insider traders to come up with alternative rationales for their trading – rationales that the staff must refute with inferences drawn from the timing of trades, the movement of funds and other facts and circumstances. And because many insider trading cases involve secret communications between two people

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– the tipper and the tippee – assembling compelling circumstantial evidence is often difficult.[12]

Insider trading investigations are particularly difficult in the hedge fund milieu. It is hard to uncover suspicious trading in a thicket of complex and active trading strategies and to prove that such trades did not have an innocent explanation. For example, active in-and-out trading by the Galleon Group in 2007 apparently stymied the SEC's ability to bring an insider trading case against Galleon at that time.[13]

Hedge fund investment strategies can embrace a wide variety of complex, sophisticated trading techniques, including selling short, trading derivatives and arbitrage. Many core hedge fund strategies are based analytically on a rejection of the efficient market theory. Portfolio managers using these core strategies seek to exploit perceived market inefficiencies in order to create positive absolute returns. Accordingly, they are always looking for an "edge" that has eluded the competition. And, because market inefficiencies typically are short-lived, hedge funds are actively trading, in an effort to preserve capital while at the same time accepting risks considered to be worth taking to achieve premium returns.

Hedge funds tend to be in and out of large positions on a frequent basis, both on the buy and sell sides, and often are contrarian in nature. As a consequence, the circumstances normally used to detect and prove a case involving an insider at a company, or a small individual trader, are problematic in the hedge fund context. Unusual trading behavior suggestive of insider-trading in the typical case, such as a first-time purchase of naked out-of-the-money options, might not be anywhere near as compelling in the hedge fund context. Moreover, hedge funds often can "explain" a trade by claiming it was the result of a computerized trading strategy or by describing a "mosaic" of information that was gathered to support the investment case – bits of data that individually are not material, but that, when put together by a diligent buy-side analyst, become significant and provide a valuable (but legal) informational edge. For example, a hedge fund manager can lawfully compile a mosaic that includes public information, his or her own analysis and evaluation of information and market trends, and even nonpublic information that is not material.

The end result is that, historically, the SEC has brought relatively few insider trading cases involving hedge funds. Given the new trends in enforcement at the SEC, however, the regulatory environment for hedge funds is changing.

New SEC Enforcement Program

Much has changed at the SEC since early 2009. Under former Chairman Christopher Cox, enforcement efforts slowed as the Commissioners reportedly clashed with the Enforcement Division.[14] President Obama promised to remake the agency, and the new Chairman – Mary L. Schapiro – has repeated on several occasions that reinvigorating the Enforcement Division is a major priority.[15] Notably, Chairman Schapiro selected a former white-collar federal prosecutor, Robert Khuzami, to head up the Division. This was widely interpreted as a signal that Enforcement would become more aggressive in the current administration.[16]

The jury is still out on this potential shift – many changes remain to be implemented – but the SEC has stepped up its enforcement efforts since President Obama's inauguration, and insider trading was a significant part of the SEC's enforcement program in 2009. While somewhat fewer

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insider trading cases were brought in 2009 than in recent years,[17] the Enforcement Division filed headline-grabbing cases against large insider trading rings involving millions of dollars in trades. Indeed, one senior enforcement official recently called insider trading "the defining story of 2009."[18]

The Enforcement Division has a number of new tools at its disposal for pursuing insider trading that make hedge funds and other market participants more vulnerable to enforcement actions. Significantly, the Enforcement Division has developed sophisticated computer modeling techniques, which allow it to identify anomalous trading activity that previously might have gone undetected, even by SROs. For the last few years, the Enforcement Division has employed software that sifts through millions of electronic trading records flagged by stock exchanges as suspicious and identifies trading patterns. Reportedly, this software detected questionable trades at the center of an $8 million insider trading action filed in February 2009.[19] Upgrading and refining the modeling software is an important priority of the Enforcement Division, and Chairman Schapiro has pledged "significant resources" to improving the Division's technology even more.[20]

The Enforcement Division also announced a significant "cooperation initiative" in January 2010.[21] The Division revised its Enforcement Manual to permit the Enforcement staff – without prior Commission approval – to provide assurances of non-prosecution and enter into cooperation agreements. This could well aid the SEC in bringing insider trading cases, which have traditionally lacked direct evidence of scienter. The head of the Justice Department's criminal division recently predicted that these innovations by the SEC "will likely lead to even earlier and closer coordination between the SEC and the Justice Department."[22]

Finally, the SEC announced a major restructuring of the Enforcement Division's staff in January 2010. The restructuring includes the creation of national units – virtual swat teams – "dedicated to particular highly specialized and complex areas of the securities law."[23] Two of these units – the Asset Management Unit (with oversight over investment advisers and investment vehicles, including hedge funds) and the Market Abuse unit (which focuses on large-scale market abuses, including suspected insider trading networks and rings) –have jurisdiction to investigate insider trading involving hedge funds.[24] Their work could overlap with a third unit, the Structured and New Products Unit, which monitors complex derivatives and financial products.[25] As discussed below, the SEC has moved to curb insider trading of credit default swaps. The Enforcement Division is now hiring over one hundred new professionals as part of this restructuring process.[26] The Asset Management Unit has even started to recruit personnel from the hedge fund industry to provide additional expertise.[27]

A Wake Up Call for Hedge Funds

Collectively, these developments are a wake-up call for hedge funds. Director Khuzami explicitly made a similar point in October 2009, on the day the government announced major insider trading charges against members of a large insider trading ring, including Raj Rajaratnam, the billionaire founder of the Galleon Group hedge fund management company, and the fund itself: "It would be wise for investment advisers and corporate executives to closely look at . . . the increasing focus and scrutiny on hedge fund trading activity by the SEC and others, and consider what lessons can be learned and applied to their own operations."[28]

The government's investigation of insider trading in and

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around the Galleon Group – now the largest insider trading case in history, with up to $73 million at issue – is instructive of the new enforcement trends that are impacting hedge funds. The government's entire investigation started with the FBI's arrest of a single former hedge fund manager, involved in a different insider trading ring, who agreed to cooperate and wear a wire for more than a year. The DOJ and the SEC have now charged 21 managers, traders, corporate executives and attorneys – with at least seven defendants reaching cooperation agreements.[29] As one commentator noted, "The government's criminal complaint . . . reads at certain points like an episode of The Wire, with the defendants meeting in cars, paying each other off in cash, and using prepaid cell phones to pass tips to one another."[30]

Soon after the charges against the Galleon Group were made public, it was reported that Galleon was "bombarded with withdrawal requests from investors" and was closing down its hedge funds.[31] The insider trading case has pretty much sunk this ship.

Given Director Khuzami's concern with the lack of transparency in the hedge fund industry and the competitive pressures on hedge funds to outperform both the market and the competition, there is every reason to believe that the Enforcement Division will continue to be aggressive in pursuing insider trading by hedge funds.[32] Last year, the SEC filed the first insider trading case involving a credit default swap, and the case involved a hedge fund.[33] It also successfully pursued an insider trading case against a foreign national who obtained access to a public company's forthcoming earnings release by hacking into the computer network of the investor relations company that was distributing the release. Significantly, in that case, the SEC did not even allege a breach of the fiduciary duty that has traditionally been at the core of insider trading cases against outsiders.[34]

Just last month, the SEC announced a settlement of insider trading charges by the hedge fund manager Pequot Capital Management and its CEO.[35] Pequot also is winding down its operations in the wake of the SEC's investigation.[36]

The recent Disney case has led to media speculation that the next step in hedge fund insider trading enforcement might even be "sting" operations.[37] This speculation is doubtlessly fueled by public reports that some of the hedge funds who were sent an e-mail offering to sell inside information about Disney did not report it.[38] While there may well be innocent explanations for such a failure (e.g., a disbelief that the e-mail was serious), this episode cannot have lessened the government's already significant concern regarding hedge fund compliance with the federal securities laws. Though the government is likely to be selective in the use of an enforcement tool as aggressive as a sting, and it likely would be difficult to mount a credible sting without actually divulging some nonpublic information, one cannot say that such speculation is unfounded.

There is evidence that hedge fund managers are paying attention to this increased scrutiny. Reportedly, some managers have been holding extra compliance meetings to review the law and discuss what activities are likely to attract SEC scrutiny.[39] Moreover, managers reportedly are scrubbing their marketing material to remove references to "proprietary information channels" and their "proprietary edge on company information."[40] The challenge for hedge fund managers will be to develop internal procedures that

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can effectively monitor written and oral communications by traders and analysts without stifling the innovative work that hedge fund managers do on behalf of their fund investors. In addition, it is critical to make sure that policies are specifically designed for the business model of the fund in question and then maintained and followed. Hedge fund managers are on notice that their business model is being subjected to close regulatory scrutiny. The question for hedge fund managers is not what to do when the SEC calls, but rather what to do to prevent such a call from ever taking place.

One insider trading case that hedge fund managers should keep a close eye on is *SEC v. Cuban.*[41] There, the SEC alleged that Mark Cuban (owner of the Dallas Mavericks) traded on the basis of inside information misappropriated from the CEO of a company in which Mr. Cuban held stock. It was not alleged that Mr. Cuban had a fiduciary duty to the CEO or the company, but rather that, pursuant to SEC Rule 10b5-2(b)(1), he had a similar relationship of trust and confidence, arising from his undisputed agreement to keep the information confidential. Chief Judge Fitzwater dismissed the SEC's complaint, holding, among other things, that an agreement to keep information confidential is not the same as an agreement to refrain from trading, and that, despite the language in Rule 10b5-2(b)(1), absent any allegation that Mr. Cuban had agreed not to trade, the SEC had not plead a necessary element of a misappropriation case. According to the Court:

> Because Rule 10b5-2(b)(1) attempts to predicate misappropriation theory liability on a mere confidentiality agreement lacking a non-use component, the SEC cannot rely on it to establish Cuban's liability under the misappropriation theory. To permit liability based on Rule 10b5-2(b)(1) would exceed the SEC's §10(b) authority to proscribe conduct that is deceptive.[42]

The SEC has appealed this decision. Should it be affirmed, it would appear more difficult for the SEC to argue that hedge funds have a duty not to trade on the basis of information of the sort often obtained by hedge fund management company personnel in creating the "mosaic" of information supporting an investment decision.

Analysts, traders and portfolio managers at hedge fund management companies routinely learn information through legitimate conversations with issuers, broker-dealers and other market participants. When investigating a suspicious hedge fund trade, the SEC is likely to scrutinize each piece of information supporting the trade to see if the collective whole or any one bit, whether issuer- or market-related (such as order-flow data), was material nonpublic information, and if so, whether the manager breached a duty to the source of the information not to trade on it. If the hedge fund manager's investment decision on behalf of a fund was based in part on information that the manager promised to keep confidential, but not to refrain from trading on, the Court's analysis in Cuban would seem to provide a defense to any claim that a subsequent trade based in part on this information constituted insider trading. Of course, this assumes that the Cuban case is not reversed on appeal.[43]

Conclusion

An SEC investigation into possible insider trading by a hedge fund, not to mention an actual case brought against the fund or its investment adviser, could have a major adverse effect on the fund's or the adviser's ability to do business. Given that many hedge fund investors are investment vehicles with

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their own fiduciary duties, it could even be fatal, as was the case with Galleon and Pequot. Accordingly, it is imperative that hedge fund managers recognize the changed enforcement environment in which they now live, and take appropriate action to prevent the misuse of inside information.

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[1] *See, e.g.*, L. Thomsen, D.C. Bar Program, Remarks on The Latest Trends In Insider Trading Law and Enforcement Priorities (Mar. 18, 2010) ("D.C. Bar Program").

[2] R. Khuzami, Remarks at Press Conference (Nov. 5, 2009).

[3] *See, e.g., SEC v. Galleon Management*, LP, No. 09 Civ 8811 (S.D.N.Y. 2009); *SEC v. Stephanou*, No. 09 Civ 01043 (S.D.N.Y. 2009); *SEC v. Rorech*, 673 F.Supp.2d 217 (S.D.N.Y. 2009); *SEC v. Lyon*, 605 F. Supp.2d 531 (S.D.N.Y. 2009); "Billionaire Founder of Hedge Fund Manager Galleon Group, Raj Rajaratnam, Charged in Alleged Insider Trading Conspiracy," The Hedge Fund Law Report, Vol. 2, No. 42 (Oct. 21, 2009); "SEC's First-Ever Credit Default Swap Insider Trading Case Survives Motion to Dismiss," The Hedge Fund Law Report, Vol. 2, No. 51 (Dec. 23, 2009).

[4] K. Scannell & J. Strasburg, *SEC Steps Up Insider-Trading Probes*, Wall St. J., Dec. 2, 2009.

[5] P. Henning, Dealbook, *The Next Step in Catching Insider*

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Trading, N.Y. Times, May 27, 2010.

[6] Section 15(f) of the Securities Exchange Act of 1934 and Section 204A of the Investment Advisers Act of 1940 (part of The Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA)) mandate that broker-dealers and investment advisers adopt policies and procedures reasonably designed to prevent the misuse of inside information. ITSFEA also authorized the SEC to police violations of these provisions even if no illegal insider trading has occurred. Hedge fund managers, whether or not their funds are registered, can be liable for insider trading by persons under their control. See Section 21A(b)(1) of the 1934 Act (as modified by ITSFEA to remove good faith defense).

[7] T. Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Nonpublic Information*, 61 Hastings L.J. 881, 883 (2010).

[8] *See United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997); *see also Chiarella v. United States*, 445 U.S. 222, 227-30 (1980).

[9] *Dirks v. United States*, 463 U.S. 646, 661 (1983). In the tender offer context, there is also a third theory of tipper/tippee liability, based on Section 14(e) of the 1934 Act and Rule 14e-3 thereunder. *O'Hagan*, 521 U.S. at 669.

[10] Similarly, for insider trading violations, public company officers and directors can be barred from future service in such positions and attorneys and accountants can be barred from practicing before the agency. *See* Section 21C(f) of the 1934 Act and SEC Rule 102(e), respectively.

[11] L. Thomsen, Director, Division of Enforcement, SEC, Testimony before Senate Committee on the Judiciary (Sept. 26, 2006).

[12] *Id.*

[13] *See* Susan Pulliam, *Goldman Director in Probe*, Wall St. J., Apr. 13, 2010. As described below, Galleon's escape from the insider trading net in 2007 proved to be only a temporary respite.

[14] J. Westbrook & D. Scheer, *Cox's SEC Hindered Probes, Slowed Cases, Shrank Fines, GAO Says*, Bloomberg.com, May 6, 2009.

[15] *See* Press Release, Office of the President Elect, President-elect Obama announces choices for SEC, CFTC, and Federal Reserve Board (Dec. 18, 2008); M. Schapiro, Chairman, SEC, Testimony before House Appropriations Subcommittee on Financial Services and General Government (Mar. 11, 2009); M. Schapiro, Chairman, SEC, Address to Practising Law Institute (Feb. 6, 2009).

[16] *See, e.g.*, D. Bayless & T. Albarŕan, *Keeping Current: Securities*, 19 ABANet 3 (Jan./Feb. 2010).

[17] *Compare* Select SEC and Market Data Fiscal 2009 *with* Select SEC and Market Data Fiscal 2008. Scott Friestad, an Associate Director of the Enforcement Division, has indicated that many other insider trading cases are in the pipeline. S. Friestad, Remarks at SEC Speaks (Feb. 5, 2010).

[18] R. Kaplan, Co-Chief of Enforcement Division's Asset Management Unit, D.C. Bar Program, Remarks on The Latest Trends In Insider Trading Law and Enforcement Priorities (Mar. 18, 2010) ("D.C. Bar Program").

[19] *See* J. Gallu & D. Sheer, *U.S. Said to Target Wave of Insider-Trading Networks*, Bloomberg.com, Oct. 19, 2009; *see also* K. Scannell & J. Strasburg, *supra* note 4 (quoting former Chief Litigation Counsel in Enforcement Division, who noted that the Division now has "more-sophisticated surveillance tools").

[20] *See* M. Schapiro, Chairman, SEC, Testimony before House Appropriations Subcommittee on Financial Services and General Government (Mar. 17, 2010); *see, e.g.*, D. Hawke,

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Chief of Market Abuse Unit, Remarks at News Conference Announcing New Leaders in Enforcement Division (Jan. 13, 2010) ("Hawke Jan. 13 Remarks") ("[A] key objective will be developing and deploying automated trading data analysis."); *see also* "SEC Enhances its Investigative Capabilities with Powerful New Document Review Software," The Hedge Fund Law Report, Vol. 3, No. 7 (Feb. 17, 2010).

[21] Press Release, SEC Announces Initiative to Encourage Individuals and Corporations to Cooperate and Assist in Investigations (Jan. 13, 2010).

[22] L. Breuer, Assistant Attorney General of Criminal Division, U.S. Department of Justice, Remarks to Compliance Week 2010 (May 26, 2010).

[23] Press Release, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010); "SEC Names New Co-Chiefs of Enforcement Division Asset Management Unit and Other Specialized Unit Chiefs," The Hedge Fund Law Report, Vol. 3, No. 3 (Jan. 20, 2010).

[24] R. Kaplan, Remarks at D.C. Bar Program. *See also* Hawke Jan. 13 Remarks.

[25] Press Release, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010).

[26] M. Schapiro, Chairman, SEC, Testimony before the House Appropriations Subcommittee on Financial Services and General Government (Mar. 17, 2010).

[27] D. Scheer & J. Gallu, *Hedge Funds May Be Hunted by Peers as SEC Poaches From Industry*, Bloomberg.com, Apr. 15, 2010.

[28] R. Khuzami, Remarks at Press Conference (Oct. 16, 2009).

[29] S. Pulliam & C. Bray, *Mole Who Wore Wire in Galleon Case Is Identified*, Wall St. J., Feb. 2, 2010; C. Bray, *Spherix Capital Founder Far, Ex-Pres Lee Agree To Settle SEC Insider Case*, Wall St. J., Jan. 25, 2010. The SEC lacks DOJ's authority to seek wiretaps, but can benefit from recordings made by cooperators. Moreover, the SEC has won the right to access Galleon wiretaps that the DOJ has provided to the criminal defendants in pretrial discovery (although that issue is on appeal). See P. Henning, Dealbook, *State of Play in the Galleon Insider Trading Case*, N.Y. Times, Mar. 30, 2010.

[30] B. Baxter, *Ropes & Gray Lawyer Arrested in Insider Trading Probe*, AmLaw Daily, Nov. 5, 2009. A map of the defendants' complex web of contacts, prepared by The New York Times, is available here.

[31] *See* S. Pulliam, *Galleon Sinks; Informant Surfaces*, Wall. St. J., Oct. 22, 2009.

[32] Interview of R. Khuzami by Peter Cook at Bloomberg Washington Summit, Nov. 12, 2009 (unofficial transcript).

[33] *SEC v. Rorech*, 673 F.Supp.2d 217 (S.D.N.Y. 2009). The non-jury trial in this case recently concluded; as of this writing, a verdict has not been announced.

[34] Press Release, SEC Obtains TRO and Asset Freeze Against Foreign Defendant for Unlawful Trading (Oct. 30, 2007). The U.S. Court of Appeals for the Second Circuit reversed the district court's dismissal of the complaint, ruling that a breach of a fiduciary duty of disclosure is not a required element of a "deceptive" device under § 10(b), and holding that if the hacking alleged by the SEC involved affirmative misrepresentations, there would be "deception." *SEC v. Dorozhko*, 574 F.3d. 42, 51 (2d Cir. 2009). On remand, the defendant abandoned the case and did not oppose the SEC's motion for summary judgment, which was granted on March 24, 2010. Press Release, SEC Obtains Summary Judgment Against Computer Hacker for Insider Trading (Mar. 29, 2010).

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[35] G. Morgenson, *Pequot Capital and Its Chief Agree to Settle S.E.C. Suit for $28 Million*, N.Y. Times, May 27, 2010.

[36] *Id; see also* "A Pequot Postmortem: What is Headline Risk and How Can it be Avoided or Mitigated?," The Hedge Fund Law Report, Vol. 2, No. 24 (Jun. 17, 2009).

[37] P. Henning, Dealbook, *The Next Step in Catching Insider Trading*, N.Y. Times, May 27, 2010.

[38] *Id.*

[39] K. Scannell & J. Strasburg, *supra* note 4.

[40] *Id.; see generally id.* ("The heightened regulatory attention is rattling the hedge-fund community.").

[41] *SEC v. Cuban*, 634 F.Supp.2d 713, 727-28 (N.D. Tex. 2009).

[42] *Id.* at 730-31.

[43] *See, e.g.*, T. Hazen, *supra* note 7, at 912 ("It remains to be seen whether other courts will accept the unusually narrow reading of Rule 10b-5 in *Cuban*.").