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Ask the Professor: Will the Recent Supreme Court Case in Salman Result in More CFTC Enforcement Actions Charging Insider Trading?

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ASK THE PROFESSORS—WILL THE RECENT SUPREME COURT CASE IN *SALMAN* RESULT IN MORE CFTC ENFORCEMENT ACTIONS CHARGING INSIDER TRADING?

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Introduction

The answer to the question is that the Supreme Court's decision should, at most, affect only a very narrow range of claims brought by the CFTC that involve trading on non-public information.

On December 6, 2016, the U.S. Supreme Court issued its much anticipated decision in *Salman v. United States*.[1] That decision refined the "personal benefits test" that has been used to analyze tipper-tippee liability in SEC insider trading cases. Over thirty years ago, in *Dirks v. SEC*,[2] the Supreme Court ruled that, for there to be a violation of the securities laws, the insider providing non-public information to a tippee must receive some benefit for making the tip. If that test is met, trading by the tippee can result in criminal or SEC enforcement actions brought against the tipper and/or the tippee. The issue addressed by *Salman* was whether the benefit to the tipper had to be a substantial monetary amount. It was the unanimous decision of the Court in *Salman* that a personal benefit is present where inside information is provided to a relative as a gift even if the tipper received no monetary benefit.

This article will examine the scope and history of the insider trading prohibition under the federal securities laws and its application to cases brought under the Commodity Exchange Act of 1936 ("CEA"). This article then analyzes the application of the personal benefits test for tippee liability under the CEA and how the *Salman* decision may affect future CFTC enforcement actions.

SEC Insider Trading Violations

The SEC has dealt with the concept of insider trading for over fifty years,[3] yet no express statutory provision defines this crime.[4] Section 10(b) of the 1934 Act does delegate to the SEC the authority to establish by regulation prohibitions of fraudulent conduct in connection with the purchase and sale of a security from which SEC Rule 10b-5 has emerged.[5] It is this important rule that has formed the basis of all insider trading cases, yet the rule does not mention the words "insider trading." Historically, there was no common law that defined this term, yet many federal cases have evolved that have resulted in a so-called federal common law on what constitutes "insider trading," and the U.S. Supreme Court has dealt with this concept for many years.[6] Let's take a look at some of the major insider trading cases involving securities.

The first seminal case dealing with insider trading involved the SEC enforcement case in *Cady Roberts*.[7] There, the SEC had imposed sanctions against a broker-dealer, which had advised customers to sell their holdings in Curtiss-Wright stock because the broker[8] had been tipped by a corporate insider that the company was cutting its dividend. The SEC held that the broker's conduct violated SEC Rule 10b-5 as these sales constituted a fraud on the purchasers of the stock.[9] The SEC concluded that the theory of "disclose or abstain," that is associated with SEC Rule 10b-5, "rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing."[10]

Following *Cady Roberts*, the next major insider trading case was *SEC v. Texas Gulf Sulphur Co.*[11] In *Texas Gulf Sulphur*, the Second Circuit held that corporate insiders, who knew of a large mineral find that had not been disclosed to the public, violated SEC Rule 10b-5 by making purchases of the company's stock and stock options.[12] It were these stock and option purchases by the corporate insiders that formed the basis for the Second Circuit's finding of materiality.[13] The duty to disclose or abstain became the major focus on all future cases following *Cady Roberts* and *Texas Gulf Sulphur*.

Now, enter the U.S. Supreme Court with three major decisions involving "insider trading." The first such case was *Chiarella v. United States*.[14] In *Chiarella*, the Supreme Court distinguished the theories found in *Cady Roberts* and *Texas Gulf Sulphur* and found no duty to disclose information that was obtained by an employee at a printing firm who traded stock of the target company based on information he discovered at his firm. The target company's identity was concealed in the actual documents but Chiarella was able to determine who the target company was. Based on this information, he bought stock in the target company and then sold it for a profit after the tender offer was publicly announced.[15] The Supreme Court held that there was no duty by Chiarella to disclose based solely on the possession of inside information.[16] In particular, the Court distinguished *Cady Roberts* as the broker-dealer in that case had wrongfully obtained the inside information whereas Chiarella had no relationship of trust and confidence with the target company as Cady Roberts did. Therefore, Chiarella had no legal duty to disclose the information that he had obtained prior to trading the stock of the target company.[17] In other words, there was no wrongful misappropriation of the information and, therefore, no 10b-5 violation.[18]

The second major Supreme Court case was *United States v. O'Hagan*.[19] In *O'Hagan*, the Court noted the existence of two theories for finding insider trading. The first is a "classical" theory in which an insider breaches a fiduciary duty to hold non-public information confidential. For example, an executive trades in advance of the publication of information about his company that will affect the price of the company's stock. The second insider trading theory articulated by the Supreme Court in *O'Hagan* is the "misappropriation" of confidential information. In such cases, the party trading is not an insider owing the company a fiduciary duty not to trade. Rather, the information was stolen.[20] O'Hagan was a partner in a large Minneapolis law firm, which was advising on a tender offer. Although O'Hagan was not involved in the actual transaction, he learned about the tender offer through papers that he found in the law firm's offices. The Eighth Circuit found no insider trading violations by O'Hagan, but the Supreme Court reversed and based its decision on the grounds that Rule 10b-5 was breached by the misappropriation of the confidential information by O'Hagan.[21]

The Supreme Court in *Dirks v. SEC*, held that a tippee receiving inside information "assumes a fiduciary duty to the shareholders of a corporation only when the insider has breached his fiduciary duty to the shareholders and the tippee knows or should know that there has been a breach."[22] Such a breach occurs if "the insider personally will benefit, directly or indirectly, from his disclosure."[23] It is this personal benefit test that *Salman* dealt with. What constitutes this personal benefit is the key issue. Prior to the Ninth Circuit opinion in *Salman*, the Second Circuit in *U.S. v. Newman* held that the mere existence of a friendship between the tipper and the tippee does not satisfy the personal benefit test.[24] The *Newman* case literally changed the insider trading landscape and highly restricted the ability to bring criminal and SEC enforcement actions against tippees. Now comes *Salman* which solidified the personal benefit test first pronounced in *Dirks*.[25] The Ninth Circuit in *Salman* did not agree with the Second Circuit's view and applied a much wider framework regarding the personal benefit test.[26]

The Supreme Court Case in *Salman*

A unanimous Supreme Court affirmed the Ninth Circuit's decision in *Salman* and held that no pecuniary or tangible benefit was necessary to establish a personal benefit.[27] *Salman* involved many familial relationships, linked by blood and marriage, that did not exist in *Newman*. This so-called "gift of confidential information" was, in essence, the heart of the Court's reasoning in *Dirks*.[28] The Court appears to have focused on the fact that the insider (the tipper) would have breached his duty had he traded on the information that he gave his brother.[29] Salman obtained the confidential, non-public information from his future brother-in-law, and the original tipper was the brother of this person so this may have greatly assisted the Court in forming its decision.

It will be interesting to see if the Supreme Court has a different view of the personal benefit test if this familial relationship does not exist in the next insider trading case. For example, in a pre-*Salman* decision, a district court ruled that neither the tipper nor the tippee were liable for insider trading under Rule 10b-5 where an executive tipped his barber with inside information. The barber made a profit of $192,000 from the use of that information. The court found that there was no agreement to split profits and any reputational benefit to the tipper was unlikely to result in any meaningful future advantage. Moreover, there was no family or personal relationship that might have caused the tipper to bestow a significant gift on the tippee.[30] However, in another case, a tip given to the tipper's dentist were found to bestow a benefit to the tipper because they also had close social and business ties.[31] In another case, a district court held that a famous football coach who traded on insider information that he obtained by overhearing a conversation by insiders was not actionable.[32]

Insider Trading Under the CEA

Historically, as ruled by the Supreme Court in 1817 in *Laidlaw v. Organ*,[33] there was no common law insider trading prohibition for commodity transactions. In that case, a merchant purchased tobacco after receiving advance information of the signing of the treaty of Ghent. This information was valuable because it meant that tobacco prices would rise sharply. Justice Marshall's ruled for the Court in

Laidlaw that there was no duty to disclose that information to the vendor. Nevertheless, Marshall opined that the party in possession of non-public information could not mislead a counterparty, if that counterparty asked about the existence of such information.

The issue of insider trading prohibitions for commodity traders thereafter remained pretty much dormant until the Commodity Exchange Act ("CEA") was amended in 1974. That legislation created the CFTC and prohibited trading by CFTC commissioners and employees on material non-public information that could affect futures prices. That legislation imposed no prohibitions against trading on non-public information by other persons. Nevertheless, the growth of SEC insider trading jurisprudence continued to raise the issue of whether such prohibitions should be applied to the futures markets. In 1982, Congress directed the CFTC to conduct a study to determine whether an insider trading prohibition would be appropriate for the commodity futures industry.[34] A report on that study was published by the CFTC in 1984.[35] That report rejected application of the "classical" and "misappropriation" theories of insider trading that had been espoused in SEC cases. With respect to the former, the CFTC report noted that hedgers and speculators often have non-public information about their trading plans that will have market effect. The CFTC stated that "[s]uch access to superior or more timely information is inherent in the markets, and futures market participants voluntarily accept this situation if they choose to trade."[36] With respect to the misappropriation theory, the CFTC report stated that it was not clear who would be harmed by such trading because the person from whom the information is stolen may not even trade in the markets. "In addition, the party transacting with the insider may claim harm by his or her lack of access to the nonpublic information.[37] Nevertheless, the CFTC enacted rules prohibiting employees of exchanges or the National Futures Association (collectively "SROs") from trading on non-public information obtained through their employment.[38]

In 1991, an effort was made in Congress to enact legislation that would have prohibited employees of private firms from trading on non-public information about their employer's commodity or futures positions. That legislation was opposed by the CFTC, and it was not enacted.[39] The CFTC stated in its opposition that:

> The prohibition against insider trading based on material nonpublic information originated in the securities markets. It is well recognized, however, that there are significant differences between the securities markets and the futures markets. It is possible that making insider trading a felony, without more information on what problems might exist, could have an unintended chilling effect on the normal flow of information in the futures markets. . . . and while as a general matter we agree that employees should not misuse their firms' information for personal gain in the futures or options markets, we believe more information regarding the nature and magnitude of this problem is needed in order to justify statutory solutions like those in the bill.[40]

The CFTC also advised the General Accounting Office in 1995 that there was no counterpart in the CEA to SEC insider trading prohibitions.[41]

In another pushback against SEC style insider trading prohibitions, Congress added a proviso to the CEA in 2008, which adopted the approach taken by the Supreme Court in *Laidlaw v. Organ*. That amendment stated that the CEA does not require disclosure of "nonpublic information that may be material to the market price, rate, or level of the commodity or transaction, except as necessary to make any statement made to the other person in or in connection with the transaction not misleading in any material respect."[42]

Section 746 of the Dodd-Frank Act that was enacted in July 2010 prohibits employees of the federal government from trading directly or indirectly, on nonpublic information acquired in their jobs. That provision also prohibits those employees in their personal capacity from tipping third parties with such information for the employee's "personal gain" with the intent to assist the tippee in using that information to trade

CEA regulated products.[43] This is known as the "Eddie Murphy" rule, a reference to the movie *Trading Places*, that involved a fake scheme to deceive other traders by providing false non-public information that had purportedly been obtained from a government official.

Section 753 of the Dodd-Frank Act of 2010 also amended the CEA by adopting language from the SEC's Rule 10b-5 on which most of its insider trading claims are based.[44] However, Congress again rejected any general application of SEC insider trading prohibitions to commodity traders. Section 753 of Dodd-Frank thus contained the same *Laidlaw v. Organ*, style language that was added to the CEA's traditional antifraud provision in 2008.[45] CFTC Rule 180.1 implementing Section 753 also rejected a broad SEC style classical information theory.[46] The CFTC did so because of the *Laidlaw* language that allows trading on material non-public information. However, the CFTC did suggest, in adopting Rule 180.1, that trading is allowed only where the information is "lawfully" obtained. The CFTC stated that "it is not a violation "to withhold information that a market participant lawfully possesses about market conditions . . . either in an anonymous market setting or in bilateral negotiations . . .. "[47]

In 2012, Congress extended the SEC's insider trading prohibitions to include members of Congress and judicial officers and their employees. That legislation also amended the CEA to add such persons to the government employees barred from insider trading by Section 746 of Dodd-Frank.[48]

Despite these efforts to reject application of SEC insider trading standards in the futures industry, the slate is not completely bereft of insider trading jurisprudence. A form of inside trading that has gained some traction in the futures industry is the practice of "front-running."[49] This term is a reference to a situation in which a trader having knowledge of a customer order trades in front of that order. In *United States v. Dial*,[50] the Seventh Circuit described front-running as providing "preferential access to information" which it equated with trading on inside information. The court held that such trading violated mail and wire fraud statutes. The court rejected the defendant's argument that there was no rule prohibiting the use of inside information in the futures markets. Rather, the court found a "classic" fraud because there was a fiduciary relationship between the broker and the customer that required disclosure of all material facts. This case appears to be premised on the SEC's classical theory of insider trading. Although *Dial* preceded the amendments to the CEA in 2008 and 2010 that rejected such a classical theory, this decision could be alternatively premised on a misappropriation theory, *i.e.*, front-running involves the theft of information from customers. However, the CFTC's 1984 report had rejected any broad application of that theory for commodity traders.

In a criminal case brought by the U.S. Attorney in New York alleging wire fraud, and in a civil case brought by the CFTC alleging CEA fraud, two individuals were charged with front-running the trades of a large money manager. One of the defendants worked for that money manager and was misappropriating and tipping the other trader on the money manager's trading plans so that they could front-run the trades. The defendants then split the almost $5 million in profits they acquired from this scheme. The defendants pleaded guilty to criminal charges and were permanently enjoined from further violations of the CEA.[51] More recently, in a consent order, the CFTC found that a respondent engaged in front-running the trades of his employer, a fraud that was accomplished "by misappropriating non-public, confidential and material information." The CFTC order stated that " '*[t]hat trading on material non-public information "in breach of a pre-existing duty* (established by another law or rule, or agreement, understanding, or some other source) . . . .' " (in this case confidential information misappropriated from the employer), may constitute a violation of Regulation 180.1[52]

The CFTC's swap rules added some nuance to front-running claims. Its antifraud prohibition for swaps seeks to define those instances in which customer information must be held confidential and when it may be used for trading.[53] That rule generally prohibits swap dealers and major swap participants from trading on or disclosing non-public information obtained from a swap counterparty. Nevertheless,, disclosure is allowed when necessary for effective execution of a swap or in hedging the exposure from the counterparty's swap. This provision thus distinguishes improper front-running from the valid use of such information for executions and hedging.

There are also a few outlier insider trading cases that go beyond front-running. In *Minpeco S.A. v. ContiCommodity Services, Inc.*,[54] a district court held in a manipulation case that there is normally no duty to disclose non-public information to traders on the other side of the market. Nevertheless, the court held that a duty to speak arose in this case because the defendants engaged in deceit by creating a false "price mirage."[55]

In another case, *CFTC v. Byrnes*,[56] a district court denied a motion to dismiss of a claim that a SRO was responsible for the leaking of non-public information by two of its employees. Those employees had disclosed information about the positions and identities of traders using the SRO's electronic trading facility. The CFTC's complaint alleged that the SRO employees were given benefits in the form of meals, drinks and entertainment for this information. This decision appears to be seeking to apply a classical theory of insider trading. Apparently, this is because the case, which is still pending, is premised on a duty created by CFTC rules prohibiting SRO employees from disclosing such information.[57]

Another outlier is *Premium Plus Partners, L.P. v. Davis*.[58] There, a district court denied motions to dismiss and for summary judgment in a case charging manipulation of the Treasury bond futures market through the use of non-public information. The complaint alleged that Goldman Sachs and the Massachusetts Financial Services Company traded on non-public information about the decision by the Treasury Department to suspend further issues of the thirty-year Treasury bond. That information had been embargoed by the Treasury Department, but the embargo was breached by defendants who traded on that information. Since there is no classical inside information liability under the CEA, this case raises the issue of whether an informal governmental embargo can create the basis for a misappropriation claim, given the CFTC's 1984 report on that subject. Further, the initial tipper, the Treasury Department, did not receive any benefit from the trading. It was only the tippees and sub-tippees that benefited. This case was settled.

Application of *Salman* to CFTC Enforcement Cases

As noted above, *Salman* involves the misappropriation of confidential information by a tippee that resulted in a personal benefit to the tipper. So, what kind of cases could this involve in the derivatives world where there is no classical insider trading theory. For example, would any of the following hypothetical factual cases result in an insider trading violation involving the CEA or CFTC regulation:

A. An officer of a publicly traded company tips his cousin and a casual friend with non-public information gained from the officer's position at the company (e.g., there's a glut of wheat this season). The cousin and friend use that information to trade CEA regulated futures contracts and makes a large profit?

B. Executives at a large publicly traded mining company trade in the futures markets on the basis of non-public information they obtained from a geological report commissioned by the company. The executives also tip friends about the report who also trade?

C. An SRO official with possession of important market information provides this confidential information to a trader at a hedge fund. The exchange official receives no personal benefit from providing that information. The hedge fund trader tips another trader about that information and both trade?

D. A well known financial analyst trades in interest rate futures in advance of a report he publishes that will have a price effect on those futures?[59]

E. A large bank, which owns the world's largest, fastest computer, is able to program its computer trading system to anticipate customer and non-customer orders before they hit the exchange terminal. A bank employee uses that information to trade for his own account?

F. A high frequency trader receives trading data from a commodity exchange ahead of other traders as an incentive to act as a market maker?[60]

G. A non-U.S. entity is able to hack into the CFTC's data base and obtains the Large Trader Reports and SDR files and sells this information to a hedge fund?[61]

H. A program computer at a large FCM provides information regarding futures orders placed by the FCM's customers and proprietary traders via the FCM's front-end trading platform to his former college roommate, who is now a trader at a large hedge fund. Both use a secret code that they had established while at MIT to provide this data. Neither the FCM nor the hedge fund were able to detect this flow of data from the programmer to the trader. The trader opened a 529 College Savings Plan for the programmer's son and deposits $50,000 in the 529 account?

I. Remember the movie, "Trading Places," noted above. A senior employee within the Fed advises his best friend, who is a trader at a large bank, with information about FOMC meetings before any public announcement is made. The trader then acquires several options on T-Bond futures. There is no evidence that the Fed employee received any monetary benefit?

Conclusion

Time will tell what the CFTC's Division of Enforcement may do in the future. *Salman* may have armed the Division with some limited new grounds to bring insider trading cases. However, as noted above, *Salman* was primarily based on the familial relationships that existed in that case and thus the scope of the personal benefit test is still one to be determined in the future. Moreover, the lack of a classical insider trading theory for private traders will compound the difficulties of any expansive application of *Salman* by the CFTC.

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ENDNOTES:

[1]*Salman v. United States*, 580 U.S. ________ (2016).

[2] *Dirks v. SEC*, 463 U.S. 646 (1983).

[3]*Cady Roberts & Co.*, 40 S.E.C. 907, 1961 WL 60175 (SEC 1961).

[4]Section 16(b) of the 1934 Act, 15 U.S.C. § 78p(b), prohibits short-swing profits by corporate insiders but it's Section 10(b) that most cases deal with regarding any such insider trading violation. Congress did amend the 1934 Act in 1984 by giving the SEC greater enhancements and bolstered penalties involving insider trading violations. See Pub. L. No. 98-376, 98 Stat. 1264 (1984).

[5]See 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. Section 10(b) of the 1934 Act simply states that it is unlawful "to use or employ [any means or instrumentality of interstate commerce] in connection with the purchase or sale of any security . . .. any manipulative or deceptive device or contrivance *in contravention of such rules and regulations as the*

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors (emphasis added). SEC Rule 10b-5 was first promulgated in 1942 and has seen very few changes since then.

[6]See, for example, *Chiarella v. United States,* 445 U.S. 222 (1980); *United States v. O'Hagan*, 445 U.S. 642 (1997); *Dirks* (see Note 4, *infra*) and, most recently, *Salman* (see Note 3, *infra).*

[7]See Note 10, *infra.*

[8]The broker in *Cady Roberts* was thus a tippee.

[9]40 S.E.C. at 913.

[10]40 S.E.C. at 912. Interestingly, this "personal benefit" element first espoused in *Cady Roberts* has become the focus in other insider trading cases, including *Dirks, Newman,* and now *Salman.*

[11]401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

[12]*Id.*

[13]Materiality is the key concept involving SEC Rule 10b-5. See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). As the Supreme Court noted in *Basic,* it consists of those facts which a reasonable investor would consider significant in making an investment decision.

[14]See Note 13, *infra.*

[15] *Id.*

[16]445 U.S. at 231.

[17] *Id.* The Court focused on the type of information obtained by Chiarella. It distinguished that the information was "market" information and not information that belonged to the target company.

[18]However, in *Carpenter v. United States*, 484 U.S. 19 (1987), the Supreme Court did hold that the misappropriation of information did constitute a violation of the Mail Fraud Act. 18 U.S.C. § 1341.

[19]521 U.S. 642 (1997). On a personal note, we remember Mr. O'Hagan, who often attended the ABA Derivatives & Futures Law Subcommittee meetings as he practiced in this field.

[20]*Id.*

[21]See *United States v. O'Hagan*, 92 F.3d 612 (8th Cir. 1996), *rev'd* 521 U.S. 642 (1997).

[22]463 U.S. at 660.

[23] *Id.*

[24] *U.S. v. Newman*, 773 F. 3d 438 (2014), *cert. denied* 2015 W.L. 4575840 (2015).

[25]See Note 3, *infra.*

[26] *United States v. Salman*, 792 F. 3d 1087 (9th Cir. 2015), *cert. granted* 2016 W.L. 207256 (2016).

[27]See Note 3, *infra.*

[28]See Note 4, *infra.*

[29]See Note 3, *infra.*

[30] *SEC v. Maxwell*, 341 F. Supp. 2d 941 (S.D. Oh. 2004).

[31] *SEC v. Sargent*, 229 F.3d 68 (1st Cir. 2000).

[32]*SEC v. Switzer*, 590 F. Supp. 756 (W.D. Ok. 1984).

[33]*Laidlaw v. Organ*, 15 U.S. (2 Wheat) 178 (1817). *See generally*, Andrew Verstein, Insider Trading in Commodities Markets, 102 Va. L. Rev. 447 (2016) (describing insider trading concepts in the context of commodities trading).

[34]*Jerry W. Markham, The History of Commodity Futures Trading and Its Regulation* 111 (1987).

[35]CFTC, *A Study of the Nature Extent and Effects of Futures Trading by Persons Possessing Material, Nonpublic Information*, submitted to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition and Forestry of the Senate pursuant to Sec. 23(b) of the Commodity Exchange Act, as amended (Sept. 1984).

[36]*Id.*

[37]*Id.*

[38]17 C.F.R. § 1.59. Section 214 of the Futures Trading Practices Act of 1992 ("FTPA") added Section 9(e) to the CEA, which was titled by Congress as "*Insider trading prohibited.*" See, Section 214, 102 P.L. 546 (1992) (emphasis added). That legislation made it a felony for SRO employees, or their tippees, to engage in "insider trading" on the basis of "material nonpublic information" obtained by SRO employees in the course of their duties.

[39]*See*, H.R. Rep. No. 102-6, at 11 and 59 (1991).

[40]1991 WL 46205, at 61., quoted in *Jerry W. Markham, Commodities Regulation: Fraud, Manipulation & Other Claims*, § 18:8 (2016).

[41]*See, Jerry W. Markham, Commodities Regulation: Fraud, Manipulation & Other Claims*, § 18:8 (2016) (describing that reaction).

[42]7 U.S.C. 6b(b).

[43]7 U.S.C. § 6c(a) (3).

[44]17 C.F.R. 240.10b-5.

[45]7. U.S.C. § 9(c).

[46]17 C.F.R. § 180.1.

[47]76 Fed. Reg. 41398, 41402 (July 14, 2011).

[48]Stop Trading on Congressional Knowledge Act of 2012 ("STOCK Act"), 112 P.L. 105; 126 Stat. 291.

[49]*See*, Jerry W. Markham, "Front-Running"—Insider Trading Under the Commodity Exchange Act, 38 Cath. U. L. Rev. 69 (1988) (describing this practice).

[50]757 F.2d 163 (7th Cir. 1985).

[51] *See, Jerry W. Markham, Commodities Regulation: Fraud, Manipulation & Other Claims*, § 18:8 (2016) (describing those cases). See also, *See*, In the Matter of DiFrancesco, Comm. Fut. L. Rep. (CCH) ¶ 29,115 (C.F.T.C. 2002) (consent order in front-running scheme).

[52]*In the Matter of Motazedi*, CFTC Doc. No. 16-01 (C.F.T.C. 2015) (emphasis in CFTC order).

[53]17 C.F.R. § 23.410.

[54]552 F. Supp. 332 (S.D.N.Y. 1982).

[55] *See also, Cargill v. Hardin*, 452 F.2d 1154, 1159 (8th Cir. 1971) the defendant's knowledge of its own dominant position in the cash market aided its manipulation of futures prices).

[56]58 F. Supp. 3d 319 (S.D.N.Y. 2014).

[57]17 C.F.R. § 1.59.

[58]2005 WL 711591 (N.D. Ill. 2005) & 653 F. Supp. 2d 855 (N.D. Ill. 2009).

[59]The CFTC rejected such a fact pattern as justifying the need for a general CEA insider trading prohibition in its 1984 report. CFTC, *A Study of the Nature Extent and Effects of Futures Trading by Persons Possessing Material, Nonpublic Information*, submitted to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition and Forestry of the Senate pursuant to Sec. 23(b) of the Commodity Exchange Act, as amended (Sept. 1984).

[60]*See generally, In re Barclays Liquidity Cross and High Frequency Trading Litigation*, 126 F. Supp.3d 342 (S.D.N.Y. 2015) (dismissing such a claim under the federal securities laws).

[61]See the recent indictment and SEC Complaint brought in the SDNY alleging insider trading violations against three residents of Macau who hacked some large U.S. law firms (see SEC Complaint filed by the SEC in the SDNY in *SEC v. Iat Hong, Bo Zheng and Hung Chin, No. 16 CIV ___, December 30, 2016).*