XII. Insider Trading and Newman *Applied: Goldman Sachs*

A. Introduction

Rajat Gupta was charged and convicted of "three counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. §371" on June 15, 2012.[1] At the time, Gupta was on the board of directors for The Goldman Sachs Group, Inc. (Goldman), a leading American multinational finance company, and was the head of McKinsey & Co., a management consulting firm.[2] Gupta's convictions are associated with his position as a member on the board of directors for Goldman.[3] Gupta was convicted of leaking confidential information to Raj Rajaratnam who was both head of the Galleon Group, a hedge fund management firm and a close business acquaintance of Gupta's.[4] Rajaratnam traded on the information Gupta provided to him for a profit.[5] Following the Second Circuit's ruling in *United States v. Newman*, where the court used a stricter standard for tippee liability, Gupta filed a motion to vacate his sentence.[6]

The information leaked from Gupta to Rajaratnam on September 23, 2008 was a tip that Warren Buffet was going to invest $5 billion in shares of Goldman in the middle of the financial crisis.[7] After receiving the tip from Gupta, Rajaratnam invested his Galleon funds in Goldman.[8] When the news came out the following day, Goldman's stock soared, and Rajaratnam realized a $1,231,630 gain.[9]

---

[1] United States v. Gupta, 747 F.3d 111, 115 (2d Cir. 2014).

[2] *Id.* at 116; Jacob Gershman, *Rajat Gupta's Quest to Clear His Name Returns to Second Circuit,* WALL ST. J.: LAW BLOG (May 6, 2016, 12:14 PM), http://blogs.wsj.com/law/2016/05/06/rajat-guptas-quest-to-clear-his-name-returns-to-second-circuit/ [https://perma.cc/5JMY-LYL4] (Gupta was the "first foreign-born head" of McKinsey & Co. and occupied "elite" seats on the boards at both Goldman Sachs and Procter & Gamble Co.).

[3] *Gupta*, 747 F.3d at 116–17.

[4] *Id.* at 116, 121.

[5] *Id.* at 116.

[6] Gershman, *supra* note 2 (stating Gupta's lawyers are "seeking to add him to the list of insider-trading defendants who've benefitted from a recent landmark ruling that made it harder to prove insider trading").

[7] Sentencing Memorandum and Order at 7–8, United States v. Gupta, 747 F.3d 111 (2d Cir. 2014) (No. 1:11-cr-00907).

[8] *Id.*

[9] *Id.* at 8.

Then, on October 23, 2008 Gupta shared information with Rajaratnam again and informed Rajaratnam that Goldman stock was going to devalue, allowing Rajaratnam to sell before the information hit the market and avoiding losses of $3,800,565.[10] Given these facts, Gupta was convicted and sentenced to two years in prison, one year of supervised release, and a fine of $5 million on October 24, 2012.[11]

This article discusses insider trading liability generally, and then focuses on the implications of the *Newman* decision for insider trading jurisprudence and on Gupta's specific circumstances. First, Section B provides an overview of insider trading liability. Next, Section C addresses if and how the *Newman* decision impacted Gupta. Section D discusses the overall impacts of the *Newman* decision for future insider trading liability. Section E explores future implications and possible avenues of reform for insider trading jurisprudence. Lastly, Section F provides concluding thoughts on the issue.

B. Tipper/Tippee Liability for Insider Trading

Tipper/Tippee liability for insider trading is one of many theories of insider trading liability and is nested under the overarching misappropriation theory.[12] The tipper is the "insider" who is in possession of the "material, nonpublic information," and the tippee is the "outsider" who the tipper shares the information with.[13] Tippee liability allows one who receives information from an insider and then trades on that information to be held liable for insider trading even though the tippee did not originally owe a fiduciary duty to the tipper's corporation.[14] To hold a tippee liable for insider trading, the tipper must have breached its fiduciary duty to the shareholders of the tipper's corporation.[15] A tipper is said to breach its fiduciary duty when it "benefit[s], directly or indirectly, from [the] disclosure" of the information to the tippee.[16] The tippee is then liable only if the tippee knew "the insider has breached his fiduciary duty . . . and the tippee

---

[10] *Id.*
[11] *Id.* at 14–15.
[12] United States v. Newman, 773 F.3d 438, 445–46 (2d Cir. 2014) ("[T]he 'misappropriation' theory expands insider trading liability to certain other 'outsiders.'").
[13] *Id.*
[14] *Id.*
[15] *Id.* at 445.
[16] *Id.* at 446.

knows or should know that there has been a breach" and the tipper benefits from sharing the information.[17]

The rationale behind extending liability to a tippee that does not owe a fiduciary duty to the shareholders was established in *Dirks v. SEC*.[18] The *Dirks* court held that a tippee has a fiduciary duty to refrain from trading on "material nonpublic information" once the tippee knows that the tipper breached its fiduciary duty; the tippee is liable if it then trades on said information because by trading it breaches the fiduciary duty "assumed" from the tipper.[19] The *Newman* court built upon the *Dirks* standard, and found that whether the tipper received a "direct or indirect personal benefit" from disclosing information to the tippee, particularly in the form of a *quid pro quo* relationship, and whether the tipper intended to provide the tippee with a benefit, will determine whether the tipper breached tipper's fiduciary duty.[20]

C. *United States v. Newman* and Gupta's Appeal

Newman was decided by the Second Circuit on December 10, 2014, and its holding lead Gupta to move to vacate the sentence and judgment, by arguing that he did not receive the personal benefit required for an insider trading conviction and there was no *quid pro quo* relationship between himself and Rajaratnam.[21] Judge Rakoff authored a memorandum order in response to Gupta's motion on July 2, 2015 outlining why Gupta's arguments were not valid.[22] First, Judge Rakoff assured that the standard for tipper liability remains unchanged from the standard established in *Dirks.*[23] Rather, *Newman* focused on tippee liability and held that friendship alone is not enough to show a personal benefit, particularly for a remote tippee who received the information far removed from the original tipper.[24] Further, Judge Rakoff explained that if the tipper intended to benefit the tippee, the

---

[17] *Id.*
[18] 463 U.S. 646, 661–65 (1983) (outlining the elements needed to find insider trading liability for a tippee who was given material nonpublic information from an insider).
[19] *Id.* at 660.
[20] *Id.* at 663–64.
[21] Memorandum Order, United States v. Gupta, 747 F.3d 111 (2nd Cir. 2014) (No. 1:11-cr-00907).
[22] *Id.*
[23] *Id.* at 4.
[24] *Id.* at 4–5.

benefit requirement would be satisfied for the tipper.[25] Because Gupta was a tipper and there was evidence from a wiretap that he shared information with Rajaratnam intended to benefit Rajaratnam, the personal benefit requirement was met.[26] As such, his convictions cannot be overturned under the theory there was no personal benefit.[27]

Additionally, Gupta argued that his convictions should be vacated because *Newman* should be read to require the tipper to have a *quid pro quo* relationship with the tippee in the form of a potential gain, particularly of a monetary nature.[28] Gupta claimed that he did not have a *quid pro quo* relationship with Rajaratnam, thus the standard was not met.[29] However, Judge Rakoff explained that Gupta misread *Newman*.[30] Judge Rakoff also expounded on the relationship between Gupta and Rajaratnam, which demonstrated their relationship was more than a friendship.[31] For example, Gupta and Rajaratnam were "close business associates" and had a "considerable history of exchanging financial favors."[32] Furthermore, Gupta and Rajaratnam had launched an investment fund together and each had a stake in companies the other was heavily involved with.[33] Judge Rakoff confirmed this was enough evidence to show that Gupta and Rajaratnam were more than friends; they were close acquaintances that shared inside information with each other regarding business.[34] Therefore, Gupta's arguments to set aside his convictions on this front are not valid.[35]

---

[25] *Id.* at 5.
[26] *Id.* at 7.
[27] *Id.*
[28] *Id.* at 4–5.
[29] *Id.* at 6.
[30] *Id.*
[31] *Id.*
[32] *Id.* (stating Gupta and Rajaratnam had formed Voyager Capital Partners Ltd. together, and together with other investors they formed another fund, the New Silk Route).
[33] *Id.*
[34] *Id.*
[35] *Id.* at 8–9.

D. Impact of *United States v. Newman*

Newman has received both criticism and praise for the standard it set forth for tippee liability.[36] Critics argue that *Newman* restricted the government's ability to regulate insider trading.[37] This restriction undermines the government's 2014 to 2015 initiative to better monitor markets and bad actors in the marketplace.[38] On the other hand, supporters of the *Newman* decision applaud the clarity in outlining the "requirements necessary to sustain a conviction" for tippee liability.[39] Also, supporters argue that *Newman* will help the effort to fight insider trading by forcing the government to acquire evidence to punish the main individuals partaking in insider trading, rather than convicting individuals far removed from the original tipper and tippee.[40]

1. Critics of *Newman*

Newman has been labeled the "biggest challenge to date to the government's campaign against insider trading."[41] Critics of *Newman* point to the Court's allegedly impermissible narrowing of what constitutes insider trading and its mischaracterization of what "personal benefit" means in the tipper/tippee relationship.[42] As to the narrowing of what constitutes insider trading, critics state that *Newman* heightened the personal benefit element making it harder to establish insider-trading liability for tippers and tippees.[43] Now, in the Second

---

[36] *See, e.g.*, Carlyle H. Dauenhauer, *Justice in Equity: Newman and Egalitarian Reconciliation for Insider-Trading Theory*, 12 RUTGERS BUS. L. REV. 39, 48 (2015) (arguing that the Second Circuit's ruling in *Newman* was detrimental to insider trading jurisprudence); Tebsy Paul, *Friends with Benefits: Analyzing the Implications of United States v. Newman for the Future of Insider Trading*, 5 AM. U. BUS. L. REV. 109, 109–10 (2015).

[37] *See* Dauenhauer, *supra* note 36, at 39, 41.

[38] Reed Harasimowicz, *Nothing New, Man!—The Second Circuit's Clarification of Insider Trading Liability in the United States v. Newman Comes at a Critical Juncture in the Evolution of Insider Trading*, 57 B.C. L. REV. 765, 794 (2016).

[39] Paul, *supra* note 36, at 109–10.

[40] Harasimowicz, *supra* note 38, at 798.

[41] William A. Haddad, *The Newman Decision and Its Ramifications*, 39 CHAMPION 48, 59 (2015).

[42] Dauenhauer, *supra* note 36, at 55–57.

[43] *Id.* at 55–56.

Circuit, "the Government's argument that a mere tip to a friend violates insider trading law is dead on arrival."[44] Critics believe the Second Circuit mischaracterized the personal benefit prong of insider trading liability because the Court held that there must be "substantive reciprocity" for the personal benefit requirement to be met.[45] It is suspected that the Court did this because it "was concerned that the government was overreaching in its insider trading prosecutions and that the line between lawful and unlawful conduct had become blurred."[46]

Critics further argue the *Newman* Court limited the personal benefit element established in *Dirks* in such a way that is detrimental.[47] While the SEC argued that relationships or interactions such as "social friendship, cooperation as members of the same church or club, career advice, and examination preparation" should satisfy the personal benefit rule, the Second Circuit did not agree.[48] Instead, the Second Circuit required a showing of personal benefit greater than these relationships, thus creating a more favorable environment for tippees.[49] As such, persons in such relationships may be able to escape a conviction so long as there is a lack of evidence showing a personal benefit.[50] The Second Circuit set this standard because the relationships mentioned are "virtually always present" in the

---

[44] Jonathan Eisenberg, *"Friends" Who Trade on Inside Information: How United States v. Newman Changes the Law*, HARV. L. SCH. F. ON CORP. GOV. & FIN. REG. (May 3, 2015) https://corpgov.law.harvard.edu/2015/05/03/how-united-states-v-newman-changes-the-law/ [https://perma.cc/D46L-5HGW].

[45] *See* Dauenhauer, *supra* note 36, at 55–57.

[46] JONATHAN N. EISENBERG ET AL., K&L GATES, GOVERNMENT URGES THE SUPREME COURT TO SIGNIFICANTLY EXPAND INSIDER TRADING LIABILITY 3 (2016), http://www.klgates.com/files/Publication/a8089cda-c1f4-488b-ab7a-77776c290c49/Presentation/PublicationAttachment/7954fb40-83d6-4b93-a6ef-7ead05e4a251/Government_Enforcement_Alert_08052016.pdf [https://perma.cc/C3K9-ADQG].

[47] Dauenhauer, *supra* note 36, at 65–66 (declaring that the fact pattern was so distinct in *Dirks* that extending the standard as it did, the court created a situation where activity that is the same will sometimes be characterized as insider trading, while other times it will not be).

[48] Richard A. Epstein, *Returning to Common-Law Principles of Insider Trading After* United States v. Newman, 125 YALE L. J. 1482, 1519 (2016).

[49] Dauenhauer, *supra* note 36, at 67.

[50] *Id.*

investment world as it "relies on high levels of informal interaction."[51] Thus, this standard establishes the difference between business activity and insider trading.[52] Overall, the *Newman* standard makes it more difficult for the government to prove an insider trading case such that individuals that would have been convicted pre-*Newman* can no longer be convicted because of the heightened standard needed to show a personal benefit.[53]As such, the new standard will prove much more difficult to prosecute remote tippees, as well as cases that lack the *quid pro quo* element.[54]

One alternative to the *Newman* holding "would have been the categorization of two different types of tippees" instead of creating a rule for all tippers and tippees regardless of their motives.[55] This would allow one standard for individuals that share information for fraudulent reasons and a separate standard for individuals who share information within a friendship whose motives in regards to the personal benefit are not as apparent.[56] This standard would allow the government to maintain convictions for both groups: individuals whose intentions were clear and individuals whose intentions were not.[57]

A second alternative is to remove the personal benefit requirement for insider trading and substitute it with a fiduciary duty element.[58] This approach focuses more on corporations controlling the flow of information than what the information share does for the individuals involved.[59] It suggests that firms release the information pieces they want to the group of people they want, and then those individuals who receive the information can do with it what they please.[60] The focus in this method is on whether a fiduciary duty was violated by the release of information for insider trading convictions.[61] However, this method would only be available if the SEC takes action

---

[51] *See* Epstein, *supra* note 48, at 1519 (explaining the investment world is a "clubby industry").
[52] *See id.*
[53] Dauenhauer, *supra* note 36, at 66.
[54] Eisenberg, *supra* note 44, at page 4.
[55] Dauenhauer, *supra* note 36, at 64.
[56] *Id.*
[57] *Id.* at 64–66.
[58] Epstein, *supra* note 48, at 1521.
[59] *See id.* at 1522.
[60] *Id.*
[61] *Id.*

to re-vamp insider trading law and remove its current ban on selective disclosures.[62]

Applying this method to *Newman*, the outcome of the case would have been obvious.[63] Once the information that triggered the trades was released, it would have been considered public information.[64] Thus, the individuals accused of insider trading would not have been insider trading, as there would not have been a trade on non-public information, which means a criminal conviction for insider trading could not stand as they would have lacked the necessary *mens rea*.[65] This method focuses wholly on the individual that shares the inside information and disregards whether a benefit is received by either of the parties.[66] Also, it is argued to provide more clarity in cases like *Newman* and avoid the issues previously noted that have presented themselves following *Newman*.[67]

2. Proponents of *Newman*

Many individuals argue the *Newman* decision was a beneficial addition to insider trading jurisprudence.[68] *Newman* has been labeled as "a well-deserved generational setback for the Government."[69] Proponents argue that the *Newman* decision was beneficial because it set forth the *mens rea* for remote tippees, which is that the tippee knew the tipper breached a "fiduciary duty for personal benefit."[70] Additionally, it confronts the government's overreaching in insider trading cases and "establishes brighter lines" for prosecutors and the SEC.[71] Furthermore, *Newman* has been said to have "returned life to

---

[62] *Id.* at 1523.
[63] *See id.* at 1525.
[64] *Id.* (explaining one of the main elements, that the information be nonpublic, would be removed under the proposed standard, and thus not an issue in *Newman*).
[65] *Id.* (stressing that for a criminal conviction for insider trading, an individual must have the requisite *mens rea* and under the proposed standard that would be easier to determine).
[66] *See id.* at 1522–25.
[67] *See id.* at 1530.
[68] *See, e.g.*, Paul, *supra* note 36, at 109–10.
[69] Eisenberg, *supra* note 44, at 1.
[70] Paul, *supra* note 36, at 126.
[71] Eisenberg, *supra* note 44, at 1; *see also* Avi Weitzman & Daniel P. Chung, *United States v. Newman: Second Circuit Ruling Portends Choppier Waters for Insider Trading Charges Against Downstream Tippees*, GIBSON DUNN

the 'personal benefit' test for when a tipper breaches a fiduciary duty."[72] Even though this means the government will be able to sustain fewer convictions for insider trading, the *Newman* standard is beneficial because it ensures that the government is only going after and convicting individuals that have the requisite *mens rea* for an insider trading conviction.[73]

Again, the *Newman* standard requires more than a friendship between the tipper and tippee to show a personal benefit.[74] Proponents welcome this heightened standard, as it combats the government's recent "crusade" in prosecuting individuals for insider trading even when there was a lack of evidence to prove the allegations.[75] The *Newman* standard requires that the government supply evidence that shows beyond a reasonable doubt the individual has met all of the elements of insider trading before they are convicted.[76] This is contrary to recent cases in which the Government has stretched precedence and evidence to sustain insider-trading convictions.[77] The clarification provided by *Newman* aligns with "fundamental principles of criminal law: giving fair notice of what is illegal, and protecting against arbitra[r]y enforcement of the law."[78]

Furthermore, *Newman* takes leaps and bounds towards accomplishing the original goal of prosecuting insider trading—to "improv[e] the fairness of the markets for investors."[79] Before *Newman,* the Government had been prosecuting individuals for insider trading based on bad feelings towards corporations and funds.[80] *Newman* brought the original purposes for creating the laws that

---

(Dec. 15, 2014), http://www.gibsondunn.com/publications/pages/US-v-Newman--Second-Circuit-Ruling-Portends-Choppier-Waters--Insider-Trading-Charges-Against-Downstream-Tippees.aspx [https://perma.cc/R99J-RXB3].

[72] Weitzman, *supra* note 71.

[73] *See* Paul, *supra* note 36, at 125–26 (stating the decision "reins in" a prosecutor's ability to prosecute insider trading cases against a remote tippee only "tangentially related to the illegal activity").

[74] *Id.* at 127.

[75] *Id.* at 131.

[76] *Id.*

[77] *Id.* (arguing that the Government had been stretching evidence and precedent, where lacking, to form "legally conclusory cases").

[78] Harasimowicz, *supra* note 38, at 790–91; *see also* Haddad, *supra* note 41, at 52.

[79] Paul, *supra* note 36, at 134.

[80] *Id.*

govern insider trading back to center stage.[81] Now, the focus is that of what was "intended in *Dirks*," which "is on policing insiders rather than policing information."[82] Additionally, *Newman* is expected to "re-invigorate the original meaning of the *Dirks* personal benefit test."[83] Higher standards for prosecuting insider trading will make individuals more comfortable investing in the markets because they will be encouraged to seek information to more effectively execute trades.[84] Overall, the *Newman* standard is meant to "impose a requirement that is concrete and meaningful."[85] This promotes the goal of "policing insiders rather than information" and "the Second Circuit's focus on providing brighter line standards."[86]

Opponents have made the argument that the explicit standard in *Newman* gives individuals the opportunity to find loopholes and exploit them such that they are able to commit insider trading and avoid prosecution.[87] However, the need for a straightforward standard is more important when a person's liberty is at stake.[88] Thus, proponents argue the positives of the stricter standard outlined in *Newman* outweigh the negatives.[89]

E. Future Implications of *Newman* and Proposed Reform

Overall, the Second Circuit's ruling in *Newman* appears to be beneficial and much needed in insider trading jurisprudence.[90] *Newman* may be the first step to igniting change in insider trading jurisprudence, an area of law that is "now in a sad state of intellectual and administrative disarray."[91] The clear standard for tippee liability will bring insider-trading convictions back to focusing on the real issue—those who are insiders that impermissibly provide confidential tips to others for personal benefit.[92] This is important because the SEC

---

[81] *Id.*
[82] Eisenberg, *supra* note 44, at 3.
[83] Weitzman, *supra* note 71.
[84] Paul, *supra* note 36, at 110.
[85] Eisenberg, *supra* note 44, at 7.
[86] *Id.*
[87] Harasimowicz, *supra* note 38, at 791–92.
[88] *Id.*
[89] Paul, *supra* note 36, at 134–35.
[90] Harasimowicz, *supra* note 38, at 768.
[91] Epstein, *supra* note 48, at 1530.
[92] *See* Harasimowicz, *supra* note 38, at 796; Epstein, *supra* note 48, at 1519.

has trended toward pursuing remote tippees and not the inside tippers.[93] The shift back toward the tipper is important because the liability for a tippee specifically stems from the inside tipper's breach of fiduciary duty.[94] Thus, it makes sense to focus on convicting the individual that began the chain of bad behavior in the first place.[95]

There is also a need for action from the legislature on this front.[96] There is no regulation that "expressly prohibits insider trading."[97] Prosecutors have to rely on the case law that has been created based on Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.[98] The SEC prosecutes individuals for insider trading anytime an individual trades on inside information; however, current law only prohibits insider trading when it is "deceptive or fraudulent."[99] Thus, under current law one is not always automatically liable for insider trading if they trade on material nonpublic information.[100] Case law forms most of the law in this area, but courts are limited to shaping insider trading law based on the types of cases that come before them, which does not necessary allow for comprehensive governance.[101] Therefore, if the Government wishes to change the law or override *Newman*, it will need to come from the legislature and not the courts.[102] *Newman* interpreted the law as written and highlighted an area where the legislature must intervene to implement further restrictions, if desired.[103]

An alternative avenue to take steps to provide clarity in this area is for the SEC to review and redo regulations, and specifically lay

---

[93] Harasimowicz, *supra* note 38, at 796.
[94] *Id.* at 798.
[95] *Id.* (stating that the SEC should "focus on those individuals who disclose confidential information in breach of a duty, which hurts shareholders").
[96] Laura Palk, *Ignorance is Bliss: Should Lack of Personal Benefit Knowledge Immunize Insider Trading?*, 13 BERKELEY BUS. L.J. 101, 123 (2016) (arguing that it is the Legislative body, not the court, that needs to take action to change insider trading law).
[97] *See Post* Chiasson/Newman—*The Future of Insider Trading Laws, Regulations and Litigation*, STEPTOE (Oct. 13, 2015), http://www.steptoe.com/publications-10806.html [https://perma.cc/7FRF-W5ZG].
[98] *Id.*
[99] *See* Palk, *supra* note 96, at 125.
[100] *See id.*
[101] *Post* Chiasson/Newman—*The Future of Insider Trading Laws, Regulations and Litigation*, *supra* note 97.
[102] *See* Palk, *supra* note 96, at 123.
[103] *Id.* at 134; Harasimowicz, *supra* note 38, at 787.

out the requirements for insider trading.[104] One suggestion is for the SEC to simply clarify what qualifies as "material and nonpublic."[105] This definition is particularly relevant in the circumstances present in *Newman* because the individuals that were accused of insider trading were not the only individuals that knew of the "material and nonpublic" information.[106] The argument has been made that once the number of individuals aware of certain pieces of information grows to a certain size, the information is no longer material or nonpublic.[107] In *Newman*, it could be argued that so many individuals knew about the information that it was no longer material because "[t]he value of information varies inversely with the number of people who share it."[108] Further, it can be argued the information was not nonpublic because the more that know the information and use it, the quicker the market will adjust, and thus the information will be accounted for in the share price.[109] It is obvious how definitions of material and nonpublic would be helpful in situations such as this, and the SEC should take action to define these terms.[110] As mentioned, the *Newman* decision provided an explanation for the tippee liability outlined in *Dirks*.[111] While doing so, the Second Circuit reminded the government that not everyone in the market is entitled to all information.[112] Rather, the Second Circuit re-affirmed *Dirks*' proposition that liability depends on the duty the insider owes when releasing the inside information, not on whether everyone in the market is privy to the information released.[113] Harm is caused by releasing the information, not by only selective individuals having the information.[114] Furthermore, an individual that has inside information is required to disclose that information based on its relationship and fiduciary duty with the shareholders of the corporation, not because of its relationship and

---

[104] *See generally* Epstein, *supra* note 48, at 1523.
[105] *Id.*
[106] *Id.*
[107] *See id.*
[108] *See id.* (stressing the idea that materiality of information comes from it having a high value, which is lost when many people know the information).
[109] *Id.*
[110] *See generally id.*
[111] EISENBERG ET AL., *supra* note 46, at 1.
[112] *See generally id.* (explaining *Newman*'s "rejection of the government's parity-of-information standard").
[113] *See id.*
[114] *See id.*

duty to everyone else in the market.[115] *Newman* was helpful in restating this distinction that has long been part of securities law, and providing clarity to this area of law.[116]

In another vein, *Newman* was able to state these clarifying sentiments and impact securities law while leaving the general role and day-to-day activities of investment advisors relatively intact.[117] Post-*Newman*, investment advisors may think that rules are more relaxed, since *Newman* made a stricter standard for tippee liability.[118] However, there are reasons that investment advisors should not change their day-to-day activities.[119] For example, if an investment advisor were to become more lax, "it could be interpreted as an effort to consciously avoid knowledge about an advisor's Information Resources."[120] Furthermore, it is likely that "the same level of regulatory scrutiny—at least from the SEC" will be present for investment advisors.[121] Thus, legally *Newman* had a strong impact, but market participants will not feel that impact in their day-to-day activities.[122]

F. Conclusion

Overall, *Newman* set a standard that renders insider-trading convictions involving remote tippees more difficult for the Government to prosecute.[123] However, Judge Rakoff's memorandum order to Gupta's motion showed that the standard for tippers remains unchanged, and Gupta's convictions will not be overturned following *Newman*.[124] Even though *Newman* set a stricter standard for establishing tippee liability, the standard provides clarity and forces the Government to fully establish a case against a tippee before a

---

[115] *See id.*
[116] *See id.*
[117] *See* Marc E. Elovitz et al., *The Impact of* United States v. Newman *on the Use by Investment Advisors of Information Resources*, INV. LAWYER (June 2015), https://www.srz.com/images/content/6/9/v2/69959/The-Investment-Lawyer-The-Impact-of-United-States-v.-Newman-on-t.pdf [https://perma.cc/58CJ-4AME] (providing an overview of the lack of change in an investment advisor's activities post *Newman*).
[118] *Id.*
[119] *Id.* at 2, 4.
[120] *Id.* at 2.
[121] *Id.* at 5.
[122] *See id.*
[123] Paul, *supra* note 36, at 111.
[124] *Gupta*, *supra* note 21, at 8–9.

conviction can be established.[125] *Newman* correctly interpreted the law as it is, and if change is to occur to insider trading law, it will have to come from the legislature.[126]

Newman also spurred numerous attempts to "withdraw pleas, vacate convictions, and seek other relief."[127] While none have been successful, the numerous attempts show the need for the legislature and/or SEC to clarifying its standards in this area.[128] *United States v. Salman* is the most noted case since the *Newman* decision.[129] The Ninth Circuit rejected *Newman's* holding that "there must be a personal benefit to the tipper of 'pecuniary or similarly valuable nature' and that all tippees must know of that benefit."[130] This results in a circuit split that will hopefully be resolved with the Supreme Court's decision in *Salman*.[131]

There are also three bills in Congress that would help answer some of these questions.[132] However, until one of those passes, the securities law arena is still void of a guiding hand.[133] Additionally, whether or not *Newman* applies to civil actions for insider trading is unclear.[134] Thus, whether *Newman* is utilized for civil cases as well as criminal and the Supreme Court's take on *Newman's* interpretation of the law will be answers to come in the future.[135]

Even though *Newman* put a stricter standard on tippee liability, it is likely the questions remaining following the holding will be addressed in the near future, as it is likely that regulators will

---

[125] Palk, *supra* note 96, at 125.
[126] *See* Palk, *supra* note 96, at 123, 125.
[127] *See* Haddad, *supra* note 41, at 50 (showcasing other cases where individuals have felt their convictions should be overturned following *Newman*).
[128] *See generally id.* at 59 (explaining that lawyers should not change how they advise their clients, but clarification should be brought soon so lawyers can continue to appropriately advise their clients).
[129] *See id.* at 51.
[130] *Id.*
[131] *Id.* at 51–52.
[132] *Id.* at 58–59 (explaining that the Stop Illegal Insider Trading Act bill makes it illegal for people to trade on information they "know or ha[ve] reason to know is not publicly available"); *see also Post* Chiasson/Newman—*The Future of Insider Trading Laws, Regulations and Litigation*, *supra* note 97 (highlighting that no bills have been taken up by committee yet).
[133] *See generally* Haddad, *supra* note 41, at 58–59.
[134] *Id.* at 59.
[135] *Id.*

"continue to aggressively pursue insider trading cases."[136] However, it is clear that the "Government pushed too far in its insider trading prosecutions, and the Second Circuit has now put on the brakes."[137] On November 16, 2016, Gupta appeared in front of the Second Circuit Court of Appeals in New York, and while a decision has not been made, the court has "signaled it [i]s unlikely to overturn the 2012 insider trading conviction" that Gupta was given.[138] These hints align with the memorandum Judge Rakoff issued indicating that Gupta's arguments are not meritorious or likely to succeed.[139]

Natalie Witter[140]

---

[136] *Post* Chiasson/Newman—*The Future of Insider Trading Laws, Regulations and Litigation*, *supra* note 97 (stressing that future "proceedings have no choice but to confront the issues raised by *Newman*).

[137] Eisenberg, *supra* note 44, at 7.

[138] *Ex-Goldman Director Gupta Seeks Reversal in Insider Trading Case*, CNBC (Nov. 16, 2016), http://www.cnbc.com/2016/11/16/ex-goldman-director-gupta-seeks-reversal-in-insider-trading-case.html [https://perma.cc/V7M5-JDE7] (explaining "Members of the three-judge panel appeared accepting of the prosecution's arguments that evidence showed Gupta was motivated by a desire to secure Rajaratnam's help in recouping losses he sustained in an investment fund they formed together").

[139] Memorandum Order, *supra* note 21, at 8–9.

[140] Student, Boston University School of Law (J.D. 2018).