

PUBLICATION

***Salman v. U.S.*: More Questions than Answers?**

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December 20, 2016

The United States Supreme Court recently rendered a decision in *Salman*¹ resolving a circuit split over whether the government prosecuting an insider trading case must show that the person giving an insider tip received something of pecuniary value in return. Although the Court resolved the narrow question before it, the decision ultimately leaves us with more uncertainty than reassurance.

A. Background

The laws concerning insider trading are relatively well-established. A corporate insider owes a fiduciary duty to a publicly traded company not to exploit knowledge of the company's non-public information for personal benefit. This duty is breached when that insider trades in the securities of the company on the basis of material, non-public information. Similarly, a person receiving inside information (the "tippee") from the insider (the "tipper") acquires the tipper's fiduciary duty and breaches this duty by trading in the securities of the company with knowledge of the tipper's improper disclosure.

However, prior to the *Salman* opinion, there existed a circuit split over what personal benefit the tipper must receive from the tippee in order to be found liable for insider trading. The U.S. Supreme Court held in *Dirks*² that a personal benefit may be inferred where the tipper receives something of value in exchange for the tip or "makes a gift of confidential information to a trading relative or friend." Calling this into question, the Second Circuit Court of Appeals in *Newman*³ interpreted the *Dirks* ruling narrowly and held that in order to infer a personal benefit, the exchange must "represent[] at least a potential gain of a pecuniary or similarly valuable nature" to the tipper. This conflict set the stage for the issue presented in the *Salman* case.

B. *Salman v. United States*

In *Salman*, an investment banker gave inside information to his brother. The brother then gave the information to his brother-in-law ("Salman"), who knew the information was not public and that it came from the investment banker. *Salman* then used the information to trade in the securities of the company. The crux of the dispute in *Salman* was over whether the investment banker received "value" or "a personal benefit" in exchange for the tip to his brother. After being initially convicted of insider trading, *Salman* sought to overturn this conviction on the basis that his tipper (the investment banker) did not personally receive money or property in exchange for the tip and thus did not obtain a personal benefit.

Salman's conviction was upheld by the Ninth Circuit Court of Appeals which, relying on *Dirks*, held that the relationship between the investment banker and his brother was sufficiently close to infer that the investment banker received a personal benefit. The Ninth Circuit also specifically rejected the Second Circuit's approach in *Newman*, requiring the tipper to receive something of pecuniary value in exchange for the tip.

The United States Supreme Court sided with the Ninth Circuit in upholding *Salman*'s conviction. Specifically, the Court relied upon language in *Dirks* that "[t]he elements of fiduciary duty and exploitation of non-public information also exist *when an insider makes a gift of confidential information to a trading relative or friend.*" In other words, a tipper receives value or a personal benefit when he makes a "gift" of non-public information to a relative. The Court found that the analysis in *Dirks* clearly applied to the circumstances here: the investment banker (the tipper) provided inside information to a close relative, his brother (the tippee), and thereby

breached his duties to the company. The Court also found that Salman acquired this duty, and breached it himself, by trading on the information with full knowledge that it had been improperly disclosed by the investment banker.

Although the Court sufficiently answered the question at hand – whether the tipper must receive pecuniary value or whether a familial relationship is sufficient to infer value received – the Court left significant lingering questions:

What We Know	What Remains Open
A familial or friendship relationship is sufficient to infer a personal benefit to the tipper; a pecuniary benefit is not necessary.	Just how close must the friendship must be? What if the original tipper and tippee are family but subsequent tippees are just acquaintances?
The government is entitled to a presumption of value received by the tipper when the relationship is sufficiently close.	How may this presumption be rebutted? More specifically, how do you prove the negative – <i>i.e.</i> that <i>no</i> value was received?
The person who ultimately trades using the information must know of the original tipper's breach of fiduciary duty.	Must the person who ultimately trades using the information know the specific source of the information or is it sufficient that he knows the information is non-public?

C. Conclusion

Because the *Salman* opinion was the first time the Supreme Court issued an insider trading opinion in nearly two decades, it may be a while before we have specific answers to these questions. In the interim, we will have to see how lower courts tackle these issues. In any event, it is clear that the *Salman* opinion lowers the burden government prosecutors will face when charging insider trading in cases involving family and friends. In light of this, compliance departments should be vigilant in establishing policies and procedures, and training insiders on safeguarding their company's material, non-public information, especially in the context of communication with family and friends.

If you have any questions regarding these issues or any other securities-related matters, please contact one of the attorneys in Baker Donelson's Government Enforcement and Investigations or Broker-Dealer/Registered Investment Adviser [groups](#).

¹*Salman v. United States*, 137 S. Ct. 420, 422 (2016).

²*Dirks v. S.E.C.*, 103 S.Ct. 3255 (1983).

³*United States v. Newman*, 773 F.3d 438, 452, cert. denied, 577 U.S. _____, 136 S.Ct. 242, 193 L.Ed.2d 133.