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In Amended Decision, U.S. Court of Appeals (Second Circuit) Leaves Open the Ability to Prosecute Insider Trading Absent Evidence of a "Meaningfully Close Personal Relationship"

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On June 25, 2018, a divided panel of the U.S. Court of Appeals for the Second Circuit issued an amended decision in *United States v. Martoma*. In its initial decision, the Second Circuit expressly overturned a key requirement for insider trading liability set out by its previous decision in *United States v. Newman.* Under *Newman*, the government was required to prove a "meaningfully close personal relationship" between an individual with material non-public information (tipper) and an individual who is told and ultimately trades on that information (tippee) in order to establish the "personal benefit" element under the "gift theory" of insider trading liability. The initial *Martoma* decision held that the "meaningfully close personal relationship" requirement was no longer tenable in light of the recent Supreme Court decision in *Salman v. United States.*[1]

The Court's amended decision relies on the Supreme Court's decision in *Dirks v. SEC* to find that a "personal benefit" to the tipper may be established either by examining the relationship between the tipper and tippee or by determining that the tipper intended to benefit the tippee. A "meaningfully close personal relationship" or a relationship "that suggests a *quid pro quo*" is sufficient to establish a personal benefit to the tipper. Evidence that the tipper intended to benefit the tippee is independently sufficient to establish a personal benefit. The amended decision remains a victory for prosecutors and leaves open the potential to expand insider trading liability; the continued split decision remains a potential avenue for the Second Circuit to reconsider the issue *en banc*.

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If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Martine M. Beamon
+1 212 450 4262
martine.beamon@davispolk.com

Angela T. Burgess
+1 212 450 4885
angela.burgess@davispolk.com

Neil H. MacBride
+1 202 962 7035
neil.macbride@davispolk.com

Denis J. McInerney
+1 212 450 4477
denis.mcinerney@davispolk.com

Paul J. Nathanson
+1 202 962 7055
+1 212 450 3133
paul.nathanson@davispolk.com

Neal Potischman
+1 650 752 2021
neal.potischman@davispolk.com

Linda Chatman Thomsen
+1 202 962 7125
linda.thomsen@davispolk.com

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