WILLFUL BLINDNESS, PLAUSIBLE DENIABILITY, AND TIPPEE LIABILITY: SAC, STEVEN COHEN, AND THE COURT'S OPINION IN *DIRKS*

JOAN MACLEOD HEMINWAY*

The lengthy insider trading investigation involving SAC Capital Advisors, L.P. and certain of its affiliates ("SAC"), together with SAC's prosecution emanating from that investigation, have been leading business stories in the news in recent months. Despite settling civil charges with the Securities and Exchange Commission ("SEC"), SAC has been indicted on insider trading charges.[1] Although SAC originally pleaded "not guilty" to those charges,[2] SAC recently revised its plea to "guilty" and is awaiting judicial approval of the plea and related terms.[3] SAC's founder and owner, Steven A. Cohen ("Cohen"), manages and controls the trading activities of SAC[4] but is not named as a defendant in the

---

* W.P. Toms Distinguished Professor of Law, The University of Tennessee College of Law; J.D., New York University School of Law; A.B., Brown University. The original draft of this essay was prepared for use in a discussion group session convened at the Southeastern Association of Law Schools 2013 Annual Meeting. I want to express my thanks to Jennifer Arlen and to the participants in that discussion group session (including John Anderson, Miriam Baer, Jill Fisch, Gerry Moohr, Donna Nagy, Ellen Podgor, Elizabeth Pollman, Charles Pouncy, and Jeanne Schroeder) for their insights and suggestions.

[1] *See generally* Indictment, United States v. S.A.C. Capital Advisors, L.P. et al., 13 Crim. 541 (S.D.N.Y. July 24, 2013), http://www.justice.gov/usao/nys/pressreleases/July13/SACChargingAndSupportingDocuments /SAC%20Indictment%20(Stamped).pdf; *Manhattan U.S. Attorney and FBI Assistant Director-In-Charge Announce Insider Trading Charges Against Four SAC Capital Management Companies and SAC Portfolio Managers* (July 25, 2013), http://www.justice.gov/usao/nys/pressreleases/July13/SACPR.php.

[2] *See* Bernard Vaughan, *SAC Capital pleads not guilty to insider-trading charges*, REUTERS (July26, 2013, 12:42 PM), http://www.reuters.com/article/2013/07/26/us-sac-fund-charges-idUSBRE96O0SD20130726.

[3] *See* Peter Lattman & Ben Protess, *SAC Capital Agrees to Plead Guilty to Insider Trading*, N.Y. TIMES DEALBOOK (November 4, 2013, 11:08 AM), http://dealbook.nytimes.com/2013/11/04/sac-capital-agrees-to-plead-guilty-to-insider-trading/?_r=0.; Ben Protess, *SAC Pleads Guilty, Then Judge Calls a Timeout*, N.Y. TIMES DEALBOOK (November 8, 2013, 8:37 PM), http://dealbook.nytimes.com/2013/11/08/sac-capital-pleads-guilty-then-judge-calls-a-timeout/.

[4] *See* Corrected Order Instituting Administrative Proceedings Pursuant to Section 203(f) of the Investment Advisors Act of 1940 and Notice of Hearing, Steven A. Cohen Release No. IA-3634, 2013 WL 3776681, at *1 (July 19, 2013), *available at* http://www.sec.gov/litigation/admin/2013/ia-3634.pdf (describing Cohen as "the founder and owner of hedge fund investment advisers that bear his initials (S.A.C.) and that until recently

indictment. The SEC has, however, brought administrative proceedings against Cohen for a failure to supervise employees who used material nonpublic information and allegedly illegally used that information in making trades for SAC.[5]

Although the facts associated with the SAC insider trading allegations have not been firmly established, the scuttlebutt in the news is that Cohen has not been indicted or pursued in a public civil enforcement proceeding for insider trading violations because there is insufficient evidence that Cohen violated U.S. insider trading laws.[6] The published facts do not indicate that Cohen is an actual or constructive insider of the firms about which information was received and possessed at the time SAC made trades in related securities. Published facts also do not indicate that Cohen is an outsider who breached a duty of trust and confidence owed to the source of information possessed at the time of a related securities transaction. Rather, Cohen allegedly received material nonpublic information from insiders in his firm—SAC—who had received that information improperly from others.[7] These SAC insiders were in possession of the improperly obtained information when they engaged in securities trading related to that information—trades that were allegedly controlled and financed by Cohen.[8] In other words, Cohen is a possible insider trading tippee (if he is, in fact, an insider trader at all).

Tipper/tippee liability for insider trading in the United States is actionable under Rule 10b-5,[9] adopted by the SEC under the Securities Exchange Act of 1934, as amended (the "1934 Act").[10] The basic framework for tippee liability under Rule 10b-5 was established in *Dirks v. SEC*, a Supreme Court case decided

---

managed portfolios of over $15 billion" and stating that Cohen "founded, owns, and controls investment advisers whose names bear his initials, including S.A.C. Capital Advisors, LLC").

5 *See generally id.*

6 *See, e.g.*, Michael Rothfeld et al., *SAC Capital's Steven Cohen Expected to Avoid Criminal Charges*, WALL ST. J., July 4, 2013 at C13, *available at* http://online.wsj.com/news/articles/SB10001424127887323899704578585953480399358 (reporting that "U.S. prosecutors have concluded that they don't have enough evidence against hedge-fund billionaire Steven A. Cohen to file criminal insider-trading charges against him before a July deadline . . . .").

7 *See* Indictment, *supra* note 1.

8 *Id.*

9 17 C.F.R. § 240.10b-5 (2013).

10 15 U.S.C. §§ 78a-78pp (2012).

thirty years ago.[11] Under *Dirks*, a classical tippee is liable for insider trading if the tipper conveys material nonpublic information to him or her or it improperly—by breaching a fiduciary or fiduciary-like duty of trust and confidence to the shareholders of an issuer of securities.[12]

> [F]or Rule 10b-5 purposes, the insider's disclosure is improper only where it would violate his *Cady, Roberts* duty. Thus, a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach.[13]

The Supreme Court cites to an opinion in an SEC administrative action for support: "Tippee responsibility must be related back to insider responsibility by a necessary finding that the tippee knew the information was given to him in breach of a duty by a person having a special relationship to the issuer not to disclose the information."[14]

Accordingly, under *Dirks*, a tippee may violate U.S. insider trading law when he or she trades on the basis of, or re-tips, information received directly or indirectly from an insider who breaches the requisite type of duty *if* the tippee knows or should have known of the breach.[15] This means that a public or private enforcement agent alleging a tippee violation must effectively establish four essential things relative to the vital breach of duty component of an insider trading action: (1) the tipper's duty of trust and confidence—a duty to disclose all material nonpublic information or abstain from trading in the issuer's securities; (2) a breach of that duty; (3) the tippee's knowledge of that duty; and (4) the tippee's knowledge that the duty was breached in conveying the information.[16] This is a tall order.

---

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

[12] *Id.* at 660-61.

[13] *Id.* at 660.

[14] *Dirks*, 463 U.S. at 661 (quoting *In re* Investors Management Co., 44 S.E.C. 633 (1971)).

[15] *See id.*

[16] *See id.* at 659-61.

Based on what we know today, what among these substantive elements relating to the essential breach of duty is troublesome in constructing an insider trading case against Cohen? Although I am sure defense attorneys would attack the sufficiency of evidence with respect to each substantive element of the claim, I fixate on whether, given published facts about Cohen and the way in which SAC conducts its business, Cohen ever knew or should have known the origin of the information on which trades were based. In other words, was Cohen aware that the people who shared information with Cohen's employees—even if not with Cohen himself—breached duties of trust and confidence to corporate shareholders by sharing the information? "Expert network" insider trading cases (legal actions alleging insider trading in securities trading firms built around interconnected relationships of industry and securities trading professionals—expert networks—that receive and use information[17]) tend to raise this question.[18] SAC, as a firm, reportedly uses expert networks in its operations.[19] Did Cohen know, or should he have known, the provenance of the information that supported SAC's trading decisions and profits?[20]

---

[17] Allyson Poulos et al., *Securities Fraud*, 50 AM. CRIM. L. REV. 1479, 1557-58 (2013) ("Recent insider trading prosecutions have also focused on the use of expert networks. Expert networks are consulting firms that connect large investors with industry executives, often in the technology or healthcare industries. These experts are paid to help money managers and investors understand a particular field.").

[18] *See* Rita Glavin et al., *The Expanding Scope of Insider Trading Liability*, SEC'S LITIG. INSIGHTS (Winter 2011), *available at* http://www.velaw.com/resources/ExpandingScopeInsiderTradingLiability.aspx.

> Research analysts at investment firms may be unaware of whether the information they are researching and obtaining is material, let alone whether the information originated from a source that was obligated to keep the information confidential. Likewise, investment professionals who rely on the information provided through the expert network firms—which can be several sources removed from the information—may be equally unaware about the source and import of the information. They may also consider the information they receive from consultants to be immaterial, or they may rely on representations by the expert-network firm that the information to be shared by consultants does not violate any confidentiality duties.

Id.

[19] *See* Andrew Ross Sorkin, *Knowledge Is Money, but the Peril Is Obvious*, N.Y. TIME'S DEALBOOK (Nov. 26, 2012, 9:32 PM), http://dealbook.nytimes.com/2012/11/26/knowledge-is-money-but-the-peril-is-obvious/.

[20] This same question is being asked about one of Cohen's colleagues, Michael Steinberg, a portfolio manager at SAC. *See* Christopher M. Matthews & James Sterngold, *High Stakes in Trial of SAC Manager*, WALL ST. J. (Nov. 14, 2013, 7:56 PM), http://online.wsj.com/news/articles/SB10001424052702303789604579198010436644946 ("'The

In terms of actual knowledge, SAC's business model may have kept Cohen purposefully in the dark about the origins of information possessed by his analysts and traders.[21] Information received by analysts in a securities trading firm may or may not be passed on to a principal of that firm in the same form in which it was received (since analysts are charged with synthesizing and otherwise processing information), and even if it is, facts about the source(s) of the information that would be relevant to insider trading liability may not be conveyed to the principal. Cohen may have had no actual knowledge of any informant's duty or breach of duty.

This still leaves open the possibility, however, that Cohen *should have known* that the information relevant to the trade was received from an insider who breached a duty of trust and confidence in conveying the information.[22] The content of this obligation or duty to know the origin of information and the circumstances in which the information is given and received is sketchy at best. But it is not a *fait accompli* that the law requires a trader to actually ask where information comes from. Cohen's portfolio managers and other employees were hired to ferret out information and suggest and make trades taking that information into account. Can the principal of a securities trading business turn a blind eye to the methods used to acquire information used in the business, especially if he or she has reason to suspect that disclosure of the information was improper, or is there a duty to inquire under the *Dirks* Court's legal standard?

Under current U.S. Supreme Court opinions, a principal may be able to remain ignorant about the source of information used in trading on his or her or its behalf and avoid liability for insider trading.[23] However, the opinion in a

central question,' Mr. Berke wrote in a court filing, 'is whether Mr. Steinberg knew that certain pieces of information provided by Mr. Horvath were obtained illegally.'"). Steinberg was being tried for insider trading when work on this essay was completed.

21 *See* Sorkin, *supra* note 19.

22 *Dirks*, 463 U.S. at 660 ("[A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when . . . the tippee knows or *should know* that there has been a breach." (emphasis added)).

23 A recent federal district court opinion acknowledged this possibility, noting specifically that it may be difficult to prove that a remote tippee knew of the tipper's breach of duty (shown by the receipt of a benefit by the tipper). *See* U.S. v. Whitman, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("[O]ne can imagine cases where a remote tippee's knowledge that the tipper was receiving some sort of benefit might be difficult to prove. If, however, this is an unfortunate "loophole," it is a

recent case from the U.S. Court of Appeals for the Second Circuit, *SEC v. Obus*,[24] casts doubt on the ability of a securities trading firm principal to effectively avoid insider trading liability on that basis. In *Obus*, the Second Circuit opined that a negligence standard guides the determination of whether an alleged tippee should have known that the conveyance of the information constituted a breach of fiduciary duty (making the conveyance "improper" and an appropriate basis for insider trading liability). The *Obus* court noted that the assessment of what a tippee should have known involves "a fact-specific inquiry turning on the tippee's own knowledge and sophistication, and on whether the tipper's conduct raised red flags that confidential information was being transmitted improperly."[25] Under a negligence standard, the receipt of specific kinds of information in certain factual contexts by an alleged secondary tippee like Cohen, who has significant knowledge and sophistication, is more likely to result in a determination that the secondary tippee should have known that the informant (tipper) breached a duty of trust and confidence by improperly conveying facts to an employee of the firm (primary tippee).

As a general matter, however, insider trading liability, a form of securities fraud liability, requires scienter—an intent to deceive, manipulate, or defraud; negligence alone is insufficient as a basis for liability.[26] Scienter may be based on reckless conduct as a form of intentional conduct.[27] The *Obus* court, mindful of the precedential value of *Ernst & Ernst*, reconciles the tension between its negligence standard and the scienter standard in *Ernst & Ernst*[28] by applying a negligence standard to the tippee's knowledge of a breach of duty and a scienter-based (knowledge or recklessness) standard to the tippee's engagement in trading or re-tipping while in possession of material nonpublic information. "Thus," the *Obus* court rules, "tippee liability can be established if a tippee knew or had reason

product of the topsy-turvy way the law of insider trading has developed in the courts and cannot be cured short of legislation.").

24 SEC v. Obus, 693 F.3d 276 (2d Cir. 2012).

25 *Id.* at 288.

26 Ernst & Ernst v. Hochfedler, 425 U.S. 185, 201 (1976) ("Although the extensive legislative history of the 1934 Act is bereft of any explicit explanation of Congress' intent, we think the relevant portions of that history support our conclusion that § 10(b) was addressed to practices that involve some element of scienter and cannot be read to impose liability for negligent conduct alone.").

27 *Id.* at 193 n.12.

28 *See* Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 448 (describing the root of this tension in the *Dirks* Court's use of "know or should have known" rather than a standard employing knowledge or recklessness).

to know that confidential information was initially obtained and transmitted improperly (and thus through deception), and if the tippee intentionally or recklessly traded while in knowing possession of that information."[29] A recent student-authored law review article appropriately questions whether this analytical separation is tenable in application, concluding that the *Obus* opinion, in effect, imposes a negligence standard on tippee liability (in contravention of the Court's opinion in *Dirks*).[30]

If the *Ernst & Ernst* opinion is to retain its original meaning, *Obus* cannot be right. In *Ernst & Ernst*, the Court makes clear that it is concerned about more than intentional or reckless *trading* in ascertaining the appropriate state of mind for an insider trading violation under § 10(b). At the heart of the *Ernst & Ernst* Court's concern is the deceptive, manipulative, or fraudulent intent of the alleged violator. "In this opinion," the Court writes, "the term 'scienter' refers to a mental state embracing intent to deceive, manipulate, or defraud."[31]

---

29 *Obus*, 693 F.3d at 288; *see also* Langevoort, *supra* note 28, at 455-58.

30 Allison M. Vissichelli, *Intent to Reconcile*: SEC v. Obus*, The Second Circuit's Edification of the Tippee Scienter Standard*, 62 AM. U. L. REV. 763, 776 (2013).

> [T]here is a degree of incongruity in the Second Circuit's approach, as it would seem that a tippee, who only negligently knew of the tipper's breach, could not then knowingly trade on the basis of improper information if the information is only made improper by the breach. In other words, the negligence standard annuls the actual or reckless knowledge standard in that a tippee may knowingly or recklessly trade on information without knowing that the information is of the type of which the Act and accompanying Rule prohibit trading. Such an effect would be contrary to insider trading regulation's foundation in common law fraud and to its purpose of protecting the stability of the securities market.

Id.

31 *Ernst & Ernst*, 425 U.S. at 193 n.12. The Court expressly ducks the question of whether recklessness is sufficient to constitute the requisite intentional behavior: "In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5." *Id.* Subsequent federal court decisions addressing the issue generally find recklessness sufficient as a standard of liability. *See*, *e.g.*, Sundstrand Corp. v. Sun Chemical Corp., 553 F.2d 1033, 1040 (7th Cir. 1977); *In re* Intelligroup Sec. Litig., 527 F. Supp. 2d 262, 282 (D.N.J. 2007); American General Ins. Co. v. Equitable General Corp., 493 F. Supp. 721, 745 n.51 (E.D. Va. 1980). The conception of recklessness varies from case to case, however. *See* Langevoort, *supra* note 28, at 436-37.

In point of fact, conduct must be manipulative or deceptive in order to violate § 10(b).[32] Accordingly, fraudulent conduct is only actionable under § 10(b) and Rule 10b-5 if manipulative or deceptive.[33] Insider trading violates § 10(b) because it is deceptive; the deception arises from the maintenance of silence in the face of a duty to disclose.[34] One can intentionally or recklessly trade while in knowing possession of information obtained from a person who breaches a duty to shareholders or others without having the intent to deceive shareholders or an information source.[35] Presumably, a person in Cohen's position—the principal of a securities trading firm—obtains information directly and indirectly from a variety of sources before making a trading decision. Who does Cohen deceive if he closes his eyes to the origin of some or all of the material nonpublic information he possesses at the time he authorizes or finances a related securities transaction?

Leaving *Obus* aside, it may be that fund principals like Cohen can construct an information gathering and trading operation that relies on the willful blindness of the principals, enabling them to avoid insider trading liability as tippees. Willful blindness is addressed under the criminal law doctrine of conscious avoidance, which may support a conviction on the basis of willful misconduct.[36] The applicable standard comes from a 2011 Supreme Court case, *Global-Tech Appliances Inc. v. SEB S.A.*[37] In that case, the Court articulates a standard (based on appellate court decisions) that has two component parts and

---

[32] *See* 15 U.S.C § 78j(b) (2012) (making it unlawful "[t]o use or employ, 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.").

[33] Santa Fe Indus. v. Green, 430 U.S. 462, 473 (1977). The *Santa Fe* Court, in a decision that followed *Ernst & Ernst* by just a year (and cited to *Ernst & Ernst*), was quite explicit on this point:

> The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception. Nor have we been cited to any evidence in the legislative history that would support a departure from the language of the statute. "When a statute speaks so specifically in terms of manipulation and deception, . . . and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute."

Id. (footnote and citation omitted).

[34] *See* United States v. O'Hagan, 521 U.S. 642, 654-55 (1997) (describing this "deception through nondisclosure").

[35] *See generally Santa Fe Indus.*, 430 U.S. at 473.

[36] *See, e.g.*, United States v. Goffer, 721 F.3d 113, 128 (2d Cir. 2013).

[37] Global-Tech Inc. v. SEB S.A., 131 S.Ct. 2060, 2070-71 (2011).

clarifies that, under the standard, negligent or reckless conduct is insufficient to support liability.

> While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts. By contrast, a reckless defendant is one who merely knows of a substantial and unjustified risk of such wrongdoing, and a negligent defendant is one who should have known of a similar risk but, in fact, did not[.][38]

Although insider trading liability may be civil or criminal in nature, the scienter requirement, which exists in both civil and criminal claims, relies on intentional behavior.[39] Accordingly, the willful blindness doctrine may be applied by a court in insider trading actions alleging that a tippee should have known of the germane breach of duty.[40]

---

[38] *Id.* (footnote and citations omitted). In *Global-Tech*, the Court explained the willful blindness doctrine as follows:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. The traditional rationale for this doctrine is that defendants who behave in this manner are just as culpable as those who have actual knowledge. It is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts.

Id. at 2068-69 (citation omitted).

[39] *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 216 (1976) (Blackmun, J. and Brennan, J., dissenting).

[40] A recent criminal insider trading case, citing to *Obus*, makes this point. *See* United States v. Whitman, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) ("[W]here appropriate . . . , the Government

In the event that the willful blindness doctrine is applied in the insider trading context (and perhaps even under other doctrines used to address when a tippee should have known of a relevant breach of duty), the court will have to address the circumstances under which an alleged violator "subjectively believe[s] that there is a high probability that a fact exists."[41] In other words, the court will have to assess the attributes of the factual context that may constitute the requisite subjective belief of the tippee that material nonpublic information has been received from an informant who has breached a duty of trust and confidence.[42] Among these attributes are the professional and personal background of the tippee, the type of information received, and the size and nature of the operations of the securities trading firm. Even assuming a court finds the required subjective belief, the court must then go on to find that the tippee has taken "deliberate actions to avoid learning of that fact"[43]—the fact that material nonpublic information has been received from an informant who has breached a duty of trust and confidence. In short, these elements may be difficult for public and private enforcement agents to prove. And the relevant facts may be easy to manipulate to the advantage of putative tippees.

Most would be surprised (if not scandalized) to learn that existing U.S. law may allow individuals to structure a securities trading businesses in a manner that shields them from individual, personal liability. To some extent, this (perhaps undesirable) result reflects the circumstances and policies at play in *Dirks*, a Supreme Court decision made in a different era—an era that preceded the information superhighway of today—applying insider trading law to an unusual set of facts (involving disclosure of fraudulent conduct within a corporation by a former officer and current employees of that corporation). The tippee liability rule in *Dirks* derives in large part from a desire to protect the entrepreneurial hunt for information in connection with securities trading transactions.[44] In formulating this rule, the Court explicitly credited this policy objective.

> Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the

---

is entitled to a 'willful blindness' or 'conscious avoidance' instruction to the jury on the issue of such knowledge.").

41 *See* Global-Tech, 131 S.Ct. at 2070.

42 *See id.*

43 *Id.*

44 *See* Dirks v. United States, 463 U.S. 658-59 (1983); *see also* Langevoort, *supra* note 28, at 433 (noting and critiquing this asserted policy).

> role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market. It is commonplace for analysts to "ferret out and analyze information," and this often is done by meeting with and questioning corporate officers and others who are insiders. And information that the analysts obtain normally may be the basis for judgments as to the market worth of a corporation's securities. The analyst's judgment in this respect is made available in market letters or otherwise to clients of the firm. It is the nature of this type of information, and indeed of the markets themselves, that such information cannot be made simultaneously available to all of the corporation's stockholders or the public generally.[45]

Although this reasoning lays the foundation for the rule in *Dirks*, the law on selective disclosure to analysts has changed since *Dirks* was decided. In 2000, the SEC adopted Regulation FD, which requires issuers to publicly disclose any material nonpublic information conveyed to market professionals and other specified people.[46] This required public disclosure must be simultaneous for intentional disclosures and prompt for unintentional disclosures.[47]

Regulation FD specifically addresses the potential interactions of its provisions with insider trading and other laws and regulations applicable to securities trading by corporate insiders. As a general matter, Regulation FD is not intended to change existing fraud and other misstatements liability or reporting requirements. For example, Regulation FD provides that "[n]o failure to make a public disclosure required solely by § 243.100 shall be deemed to be a violation of Rule 10b-5 (17 CFR 240.10b-5) under the Securities Exchange Act."[48] In addition, compliance with reporting obligations under the 1934 Act and public information requirements in Rule 144 under the Securities Act of 1933, as amended, are not affected by the failure to comply with the public disclosure requirements of Regulation FD.[49]

---

[45] *Id.* (footnotes and citations omitted).

[46] 17 C.F.R. § 243.100(a) (2013).

[47] *Id.*

[48] 17 C.F.R. § 243.102.

[49] *See* 17 C.F.R. § 243.103.

Notwithstanding the lack of a direct liability connection between Regulation FD and insider trading liability, the adoption of Regulation FD and the practices engendered by it over the past thirteen years have changed the nature of an analyst's work and curbed the information entrepreneurialism of market intermediaries. In light of this sea change (if it represents one) and the prevalence of expert network insider trading, is it right to allow securities trading firm principals like Cohen to avoid liability because they can plausibly deny the origins of material nonpublic information that underlies securities trading undertaken at their behest or for their financial benefit? The SAC prosecution and Cohen enforcement proceedings present an opportunity for us to take a new look at this old question and discuss where the law of insider trading should be—and why—as a matter of policy. If insider trading regulation and liability is to have any coherence in an era of expert networks, we must address and resolve this question.