

THE REVIEW OF  
**SECURITIES & COMMODITIES  
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AN ANALYSIS OF CURRENT LAWS AND REGULATIONS  
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

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## HOW RECENT CRYPTO PROSECUTIONS MAY CRACK THE U.S. CODE

*Two recent prosecutions in the Southern District of New York have been called the first cryptocurrency insider trading cases, but neither case involved traditional securities fraud charges. Instead, both the OpenSea and Coinbase cases charged insider trading behavior as wire fraud, alleging that by trading in certain crypto assets, the defendants had misappropriated confidential business information. This theory of fraud, endorsed in *Carpenter v. United States*, 484 U.S. 19 (1987), let the government avoid the complexities of Title 15 insider trading law. Yet the Second Circuit has defined “confidential business information” in a variety of ways. A review of those cases and their application in the OpenSea prosecution shows how Carpenter-based theories may face legal challenges comparable to those that prosecutors sought to avoid. No matter how those challenges ultimately are resolved, prosecutors and practitioners may be in for yet another period of instability in insider trading law.*

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On August 2, 2021, Nathaniel Chastain purchased a digital drawing of an anthropomorphic Tyrannosaurus shooting a laser at a skateboarding rabbit. The illustration, entitled “The Brawl 2,” was tied to a digital asset known as a non-fungible token or “NFT”; NFTs use blockchain technology to prove ownership and transfer of property.<sup>1</sup> Hours later, Chastain sold his new

asset — at twice the price. A week later, he purchased another outlandish NFT, once more selling it soon afterward at a significant multiple. And a few weeks later, he did the same thing again, making a 400 percent profit. What happened between each purchase and sale? Chastain’s employer, the NFT exchange OpenSea, featured these NFTs on its home page. This event was no coincidence: Chastain was responsible for deciding which NFTs to feature and timed his sales to take advantage of the spike in value that accompanied an NFT’s placement on OpenSea’s home page.

<sup>1</sup> Indictment, *United States v. Chastain*, No. 22-cr-305 (JMF), Dkt. 1 (S.D.N.Y. May 31, 2022) at 5. Chastain’s appeal remains pending, and all facts concerning his conduct described in this article are as alleged.

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