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HOW INSTITUTIONAL DYNAMICS HAVE SHAPED INSIDER TRADING LAW

The past decade has brought multiple significant decisions in insider trading law, but has not substantially clarified the line between legal and illegal trading. The author addresses how some degree of this lack of clarity can be traced to certain institutional dynamics at play in the courts issuing the relevant decisions. In particular, the author looks at the Second Circuit's uniquely strong preference for avoiding en banc review, and the Supreme Court's general preference for narrow decisions, and assesses the ways in which these dynamics have shaped and may continue to shape insider trading jurisprudence.

By Brian A. Jacobs *

The past decade has been a tumultuous period in insider trading law, particularly with respect to tippee liability. Prosecutors have aggressively pursued cases against defendants removed from the original sources of material non-public inside information, defendants have pushed back against these efforts, and courts have attempted to draw lines in difficult cases separating legal from illegal trading. Other articles have carefully charted the movements in insider trading doctrine during this period.¹ But one theme that has emerged from the

commentary is the acknowledgement that, because insider trading law is not defined by any statute, the law's development has been seemingly "haphazard."² That very haphazard development, moreover, has made it difficult for "scholars . . . to explain" why "the law developed as it did,"³ as well as where the law may be heading.⁴

footnote continued from previous column...

¹ See, e.g., Peter J. Henning, *Making Up Insider Trading Law As You Go*, 56 WASH. U. J.L. & POL'Y 101, 102 (2018); Brian A. Jacobs & Priya Raghavan, *The Impact of Salman v. United States on Downstream Tippee Prosecutions*, 50 REV. SEC. COMMODITIES REG. 223, 224–27 (2017); Scott B. McBride, *Salman v. United States and its Impact on Insider Trading*

Enforcement, 50 REV. SEC. COMMODITIES REG. 125, 127–29 (2017).

² Henning, *supra* note 1, at 102.

³ *Id.*

⁴ Hervé Gouraige, *Do Federal Courts Have Constitutional Authority to Adjudicate Criminal Insider-Trading Cases?*, 69

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