"I'll Know It When I See It... I Think": *United States v. Newman* and Insider Trading Legislation

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ABSTRACT

The Second Circuit's decision in *United States v. Newman* has reinvigorated an important and longstanding debate about insider trading—whether insider trading should be explicitly prohibited by statute. In response to the Second Circuit's decision, Congress introduced three bills to codify insider trading liability. Each bill takes a different approach to codifying insider trading liability. Between the three bills, two general approaches emerged. One approach is to impose a broad prohibition on insider trading that arguably leaves the existing insider trading regime untouched. The second approach develops a narrower, carefully delineated standard of liability that departs from the current insider trading regime in important ways. Both approaches deserve careful scrutiny if Congress decides to move forward with codifying insider trading liability by statute.

First, to provide a foundation, this Comment briefly traces the judicial development of insider trading liability through the U.S. Supreme Court's previous decisions on insider trading. Next, this Comment discusses *United States v. Newman* and the executive and judicial responses to that decision. This Comment then discusses the need for codifying insider trading liability by statute and the potential benefits of codification. Next, a careful analysis of each bill identifies its strengths and weaknesses. Even small differences between bills impose vastly different standards of liability and provide varying levels of guidance for market actors, prosecutors, and the courts. Finally, this Comment proposes changes to the bills' established frameworks and

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outlines other considerations Congress should consider if it decides to codify insider trading liability by statute.

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I. INTRODUCTION

The United States Court of Appeals for the Second Circuit's decision in *United States v. Newman*[1] has reinvigorated the debate about insider trading. Specifically, *Newman* has revived one question of particular importance to the debate—should insider trading be explicitly prohibited by statute?

In *Newman*'s wake, Congress proposed three bills that would explicitly prohibit insider trading by statute.[2] All three bills draw substance from the judicial regime of insider trading liability, but also depart from judicial doctrine in significant ways that could substantially alter insider trading liability if enacted into law. Therefore, understanding how the proposed changes would transform insider trading liability is essential to determining if the changes would be good policy.

1. United States v. Newman, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137).
2. *See infra* Part III.

First, this Comment will explore the judicial development of insider trading liability, with particular emphasis on major U.S. Supreme Court decisions and the Second Circuit's decision in *Newman*.[3] Second, this Comment will discuss the judicial, executive, and legislative branches' responses to *Newman*.[4] Finally, after discussing the need for codifying insider trading liability by statute, this Comment will analyze the three bills' substance and propose possible changes.[5]

II. THE JUDICIAL AND REGULATORY INSIDER TRADING REGIME

A. *Insider Trading Before* Newman

1. Early Insider Trading Liability

In the aftermath of the stock market collapse that precipitated the Great Depression, Congress enacted the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").[6] The general purposes of these laws were to ensure fair markets for securities, prevent undue advantages among investors, and provide open and orderly markets.[7] Although there is some evidence that Congress was concerned about insider trading when it enacted the Exchange Act,[8] Congress did not, and has never, defined insider trading by statute.[9] However, § 10(b) of the Exchange Act provides that:

> [I]t shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe . . . .[10]

3. *Infra* Part II.
4. *Infra* Part II.C.
5. *Infra* Part III.
6. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2012); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78pp (2012).
7. *See* Robert Steinbuch, *Mere Thieves*, 67 MD. L. REV. 570, 572 n.16 (2008); Richard Painter et al., *Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 175 n.97 (1998).
8. *See* Matthew T.M. Feeks, *Turned Inside-Out: The Development of "Outsider Trading" and How Dorozhko May Expand the Scope of Insider Trading Liability*, 7 J.L. ECON. & POL'Y 61, 63 (2010) (noting concerns about insider trading expressed by Congress when developing the Exchange Act).
9. *See* Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1320–21, 1322–23 (2009) (noting that "no federal statute directly prohibits the offense of insider trading").
10. 15 U.S.C. § 78j(b) (2012).

The Securities and Exchange Commission (SEC) and courts, therefore, prohibit fraud in the securities market, including insider trading, through section 10(b).[11] Additionally, the SEC promulgated Rule 10b-5,[12] the primary enforcement tool prohibiting insider trading, which provides that:

> It shall be unlawful for any person, directly or indirectly . . . (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[13]

Additionally, § 32(a) of the Exchange Act[14] provides criminal penalties for willful violations of the Exchange Act or rules promulgated thereunder.[15] For decades after the Exchange Act was passed, the SEC ignored the practice of insider trading.[16] However, the SEC eventually concluded that insider trading violated Rule 10b-5's antifraud provisions and brought the seminal proceeding *In re Cady, Roberts & Co*.[17] The SEC held in this administrative proceeding that securities professionals who traded on undisclosed inside information violated § 10(b) and Rule 10b-5.[18] The SEC pursued a broad theory of liability, the so-called

11. *See* Thomas C. Newkirk, Assoc. Dir., Div. of Enf't & Melissa A. Robertson, Senior Counsel, Div. of Enf't, Speech at the 16th Int'l Symposium On Econ. Crime: Insider Trading—A U.S. Perspective (Sept. 19, 1998), http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm (explaining the development of insider trading law).

12. 17 C.F.R. § 240.10b-5 (2015).

13. *Id*. The SEC has also promulgated several other rules defining liability for insider trading under Rule 10b-5. In Rule 10b5-1, the SEC set forth a general rule that § 10(b) and Rule 10b-5 prohibit trading on the basis of material, nonpublic information "in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively to the issuer" of such securities, shareholders of the issuer, or the source of the information. *Id*. § 240.10b5-1(a). The Rule also broadly defines when a person trades "on the basis of" material, nonpublic information (essentially, when one is aware of the information when entering into a transaction), and provides affirmative defenses to liability. *Id*. § 240.10b5-1(b)–(c). Additionally, Rule 10b5-2 lists "non-exclusive" circumstances where a duty of trust or confidence exists that, if breached, can give rise to liability for misappropriation. *Id*. § 240.10b5-2 (2015). There are also other rules relevant to insider trading. *See, e.g*., 17 C.F.R. § 240.14e-3 (2015) (regulating the use of material, nonpublic information in tender offers).

14. 15 U.S.C. § 78ff(a) (2012).

15. *Id*.

16. STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 336 (4th ed. 2015).

17. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

18. *Id*. at 911.

"equal access theory," which courts initially accepted.[19] Under the equal access theory, also called the "parity-of-information theory," any insider who possesses inside information may not trade in the relevant security.[20] However, the parity-of-information theory's days were numbered.

2. "Classical Theory" and *Chiarella*

Eventually, the Supreme Court pushed back against the SEC's parity-of-information theory. In *United States v. Chiarella*,[21] the Supreme Court established the "classical theory" of insider trading liability.[22] In *Chiarella*, the defendant, who worked for a printer, was given documents announcing corporate takeovers.[23] Although the names of the companies were hidden, the defendant was able to deduce the identities of the target companies and purchased stock in those companies.[24] The defendant then sold the stock after the takeovers were publicly announced and pocketed over $30,000.[25]

The Supreme Court in *Chiarella* held that the defendant could not be held liable for insider trading under § 10(b), explaining that "[w]hen an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak."[26] The Court clarified that, for the purposes of insider trading liability, a duty to speak is created by a fiduciary duty between a corporate insider and the stockholders of a corporation—that is, a fiduciary duty between the insider and the person with whom he is trading.[27] Conversely, if a person is neither "an insider nor a fiduciary," then he or she "ha[s] no obligation to reveal material facts" to the person with whom he or she is trading.[28] Because the defendant in *Chiarella* was not an insider to the corporations, he had no duty to disclose information about the takeover to the party with whom he was trading, and, therefore, his conduct was not fraud under § 10(b).[29]

19. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 851–52 (2d Cir. 1968) ("Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions. It was the intent of Congress that all members of the investing public should be subject to identical market risks . . . ."), *abrogated by* United States v. Chiarella, 445 U.S. 222 (1980).

20. *See* Edward Greene & Olivia Schmid, *Duty-Free Insider Trading?*, 2013 COLUM. BUS. L. REV. 369, 386 (2013).

21. United States v. Chiarella, 445 U.S. 222 (1980).

22. *Id*. at 234–35.

23. *Id*. at 224.

24. *Id*.

25. *Id*.

26. *Id*. at 235.

27. *Id*. at 231–32.

28. *Id*. at 229.

29. *See id*. at 231–33, 235.

Importantly, the Court in *Chiarella* explicitly rejected the equal access/parity-of-information theory of liability advanced by the SEC.[30] The Court observed that "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)."[31] The Court held that the trial court and court of appeals' theory that the defendant had a "duty to everyone; to all sellers, indeed, to the market as a whole[,]" was incorrect, and there was no Congressional intent to impose such a "broad duty" under the securities laws.[32] *Chiarella* thus flat-out rejected the parity of information theory as inconsistent with existing securities laws. Furthermore, the case also established that the "classical theory" of insider trading liability is premised on the breach of a fiduciary duty owed by the insider to the other trading party.[33]

3. "Misappropriation Theory" and *O'Hagan*

In *Chiarella*, the Court would not address the government's alternative theory of liability—that the defendant breached a duty to the corporation who provided the information, rather than the other trading party—because that theory was not presented at trial.[34] Therefore, the Court avoided deciding the "misappropriation theory's" validity, leaving the issue for another day.

The Supreme Court gave the misappropriation theory its stamp of approval[35] in *United States v. O'Hagan*.[36] In *O'Hagan*, the defendant was a partner at a law firm representing Grand Met in a tender offer for Pillsbury Company stock.[37] Before the tender offer was public knowledge, O'Hagan began purchasing shares and call options of Pillsbury common stock.[38] Then, when the tender offer was announced, O'Hagan sold his options and stock.[39]

The Court upheld O'Hagan's convictions for mail fraud and Exchange Act violations.[40] Even though O'Hagan was not a Pillsbury insider and did not owe a duty to the shareholders he traded with, the Court found that O'Hagan breached a duty owed to his law firm and

30. *Id*.
31. *Chiarella*, 445 U.S. at 232.
32. *Id*. at 231, 233.
33. *Id*. at 231–33.
34. *Id*. at 235–36.
35. *But see* Carpenter v. United States, 484 U.S. 19, 24 (1987) (tying four to four on the question when raised previously).
36. United States v. O'Hagan, 521 U.S. 642 (1997).
37. *Id*. at 647.
38. *Id*. at 647–48.
39. *Id*. at 648.
40. *Id*. at 678.

Grand Met.[41] The Court explained that "the misappropriation theory outlaws trading on the basis of nonpublic information by a corporate 'outsider' in breach of a duty owed not to a trading party, but to the source of the information."[42] Thus, by premising liability on breaching a duty owed to the source of the information, the Court expanded the reach of insider trading liability to "outsiders."[43]

4. Tippee Liability and *Dirks*

While *Chiarella* and *O'Hagan* established standards of liability for those who directly obtained inside information, the Supreme Court has expanded liability even further. The Supreme Court, in *Dirks v. SEC,*[44] established liability for "tippees"—persons who receive material, nonpublic information from an insider, rather than from their own position of trust.[45] Dirks was an officer at a broker-dealer firm that provided investment analysis.[46] A former Equity Funding of America ("EFA") officer informed Dirks that EFA employees were claiming that the company had fraudulently overstated its assets, but regulatory agencies had declined to act on the allegations.[47] As Dirks investigated the accusations and received corroboration from other EFA company employees and officers, Dirks discussed his findings with his own clients and investors, some of whom then sold their EFA stock.[48]

Word of Dirks' investigation began to spread, and insurance authorities uncovered evidence of the fraud in their own investigation.[49] The SEC brought charges against EFA and Dirks, who allegedly aided and abetted securities law violations.[50] The SEC maintained that Dirks

41. *See id*. at 652, 653 n.5 (agreeing with the government's theory that O'Hagan breached a duty to his employer and their client, and explaining that O'Hagan could not escape liability simply because he was associated with, and gained inside information from, Grand Met (vis-à-vis his firm), not Pillsbury (whose stock he traded)).

42. *Id*. at 652–53. The Court also noted that the use of information was "in connection with" a transaction because the fraudulent use of the information occurred when, without disclosure to the source, the fiduciary used the information to trade. *Id*. at 656.

43. *Id*. at 653. *See also* Adam R. Nelson, Note, *Extending Outsider Trading Liability to Thieves*, 80 FORDHAM L. REV. 2157, 2192 (2012) (noting that the Court's decision in *O'Hagan*, *inter alia*, expanded "insider" trading liability to outsiders in some circumstances and arguing that extending liability to thieves of inside information is a "logical extension" of that principle).

44. Dirks v. SEC, 463 U.S. 646 (1983).

45. *Id*. at 656, 661.

46. *Id*. at 648.

47. *Id*. at 648–49.

48. *Id*. at 649.

49. *Id*. at 650.

50. *Id*.

was a tipper because Dirks repeated the allegations of fraud to investors, who then sold their stocks based on that inside information.[51]

On appeal, the Supreme Court held that Dirks was not liable as a tippee or as a tipper.[52] The Court explained that tippees assume the insider/tipper's duty to shareholders because the tippee is improperly given the information *in violation of a fiduciary duty*, not because the tipeee simply receives material, nonpublic information.[53] Thus, a tippee assumes liability "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."[54]

The Court then explained how to determine whether the insider/tipper violated his or her fiduciary duty. "[T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by the tippee]."[55] Thus, the court must determine whether the disclosure resulted in a personal benefit to the tipper, "such as a pecuniary gain or a reputational benefit that will translate into future earnings."[56] Furthermore, the Court explained that there could be a "relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient."[57] Finally, the Court stated that "the elements of fiduciary duty and exploitation . . . also exist when an insider makes a gift of confidential information to a trading relative or friend."[58] The Court, however, acknowledged that whether the tipper personally benefitted will not always be easy to determine.[59]

Turning to the facts at hand, the Court in *Dirks* found that no tipper gave Dirks information in breach of a fiduciary duty.[60] The Court reasoned that the tippers did not intend to receive a personal benefit, but rather, were attempting to expose wrongdoing within the company.[61] Because there was no benefit to the tippers, Dirks had not assumed a

51. *Id*. at 650–51.
52. *Id*. at 667.
53. *Id*. at 660.
54. *Dirks*, 463 U.S. at 660.
55. *Id*. at 662.
56. *Id*. at 663.
57. *Id*. at 664.
58. *Id*.
59. *Id*.
60. *Id*. at 666.
61. *Id*. at 666–67.

fiduciary duty, and, thus, Dirks could not be held liable as a tipper for disclosing the information to investors.[62]

B. United States v. Newman

Because the Second Circuit's decision in *Newman* was the impetus for the recent legislative fervor over insider trading, a brief discussion of the case is necessary to understand the proposed legislation.

1. Facts

In *Newman*, a group of securities analysts allegedly obtained material nonpublic information about technology companies, shared the information amongst themselves and others, and traded securities based on that information.[63] The two defendant-appellants were Todd Newman, a portfolio manager at Diamondback Capital Management, LLC ("Diamondback"), and Anthony Chiasson, a portfolio manager at Level Global Investors, L.P. ("Level").[64] Information related to Dell and NVIDIA stocks worked its way down a chain of tippers to both Newman and Chiasson, who traded on those tips.[65]

The Department of Justice brought charges against Newman and Chiasson for securities fraud in violation of § 10(b) and § 32 of the Exchange Act.[66] After the government rested its case, Newman and Chiasson moved for acquittal, arguing that there was no evidence that Newman or Chiasson knew about any personal benefit given to the insiders in exchange for the information.[67] After reserving judgment on the motions, the district court denied the defendants' requested jury instruction that the government had to prove the defendants knew of the

62. *Id*. at 667.
63. United States v. Newman, 773 F.3d 438, 442 (2d Cir. 2014), *cert. denied*, 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137).
64. *Id*.
65. *Id*. With respect to the Dell trades, Newman was three steps removed from the insider and Chiasson was four steps removed. *Id*. Specifically, Rob Ray, a Dell employee, tipped information about Dell's upcoming earnings to Sandy Goyal; Goyal then gave the information to a Diamondback analyst, Jesse Tortura; Tortura then gave the information to Newman and a Level analyst; the Level analyst then gave the information to Chiasson. *Id*. With respect to the NVIDIA trades, both Newman and Chiasson were four steps removed from the insiders. Specifically, Chris Choi of NVIDIA gave earnings information to Hyung Lim, whom he knew from church; Lim then gave the information to Danny Kuo, who gave the information to members of the analyst ring, including Tortura and Adondakis (a Level analyst), who, respectively, tipped the information to Newman and Chiasson. *Id*. at 442.
66. *Id*. at 443.
67. *Id*. at 444.

personal benefit the insiders received.[68] The jury found the defendants guilty on all counts and the district court sentenced both.[69]

2. Second Circuit Decision

On appeal in *Newman*, the defendants renewed their argument from the trial: the government had not shown that the defendants knew the inside information was given in breach of a fiduciary duty because there was no evidence the defendants knew what, if any, benefit the insiders received in exchange for the earnings information.[70] The defendants argued that such proof was necessary for tippee liability under *Dirks*.[71]

The Second Circuit panel agreed with the defendants.[72] The panel acknowledged that the Second Circuit had not always been clear about what was required for tippee liability, but stated that "the Supreme Court was quite clear in *Dirks*."[73] The panel interpreted *Dirks* to establish, *inter alia*, that "a tippee is liable only if he knows or should have known of the breach."[74] The breach of duty under *Dirks*, the panel explained, was divulging material, nonpublic information *in exchange for a personal benefit*.[75] Therefore, to "know of the breach" the tippee must know what personal benefit was received in exchange for the information.[76]

The Second Circuit also hinted at displeasure with the Government in *Newman*. The panel observed that the Government's "overreliance" on dicta "highlight[ed] the doctrinal novelty of its recent insider trading prosecutions."[77] The panel also noted that "[a]lthough the government might like the law to be different, nothing in the law requires a symmetry of information in the nation's securities markets."[78]

The panel then sifted through the evidence presented at trial to determine if denial of the defendants' proposed jury instruction was harmless. With respect to the Dell tips and trades, the panel observed that Ray and Goyal were not close friends, and the career advice Goyal gave Ray was something he would have given anyone.[79] With respect to the NVIDIA tips and trades, the evidence showed that Lim and Choi

68. *Id*.
69. *Id*.
70. *Id*. at 442, 444.
71. *Id*. at 444.
72. *Id*. at 450, 455.
73. *Newman*, 773 F.3d at 447.
74. *Id*. (citing to *Dirks* generally, but presumably with reference to 465 U.S. at 660).
75. *Id*.
76. *Id*. at 448.
77. *Id*.
78. *Id*. at 448–49.
79. *Id*. at 452.

were "family friends" who met through church and occasionally socialized, but Lim testified that he had not provided Choi with anything of value in exchange for earnings information.[80]

Ultimately, the panel held that these facts did not establish a benefit.[81] The panel noted that a personal benefit can include "not only pecuniary gain, but also, *inter alia*, any reputational benefit that will translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend."[82] The panel also acknowledged that *Dirks* suggests a personal benefit could be inferred based on the relationship between the tipper and tippee.[83] However, the panel held "that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a gain of a pecuniary or similarly valuable nature."[84] In addition, the personal benefit "must be of some consequence."[85] Therefore, the panel found the alleged benefits were insufficient to satisfy this standard and ultimately vacated the defendants' convictions.[86]

C. *The Aftermath of* Newman

The judiciary, the Manhattan U.S. Attorney's Office, high profile insider trading convicts, and the press all reacted with fervor to *Newman*. The Second Circuit denied the Government's petition for a rehearing en banc,[87] and Second Circuit panels and district courts began applying the *Newman* standard.[88] In *Newman*'s wake, a wave of high profile defendants have contested their insider trading convictions, arguing that

80. *Id*.
81. *Id*.
82. *Id*.
83. *Newman*, 773 F.3d at 452.
84. *Id*.
85. *Id*.
86. *Id*. at 452–55.
87. United States v. Newman, No. 13-1837(L), 2015 U.S. App. LEXIS 5788, at *4 (2d Cir. Apr. 3, 2015).
88. *See, e.g.*, Joseph Ax, *U.S. Court sees 'serious questions' in insider trading appeal*, RUETERS (June 23, 2015), http://www.reuters.com/article/2015/06/23/usa-crime-insidertrading-riley-idUSL1N0Z91XY20150623 (reporting that a Second Circuit panel ordered, without written opinion, that David Riley did not have to report to jail for his insider trading conviction pending his appeal based on *Newman*); *see also* United States v. Riley, 90 F. Supp. 3d 176, 181, 185–89 (S.D.N.Y. 2015) (applying *Newman* but refusing to reverse the appellant's conviction because the district court's instruction was not plain error).

there was insufficient evidence of knowledge of a personal benefit to sustain their convictions.[89]

The Ninth Circuit, however, expressed trepidation about following *Newman*. In *United States v. Salman*,[90] Maher Kara, the defendant's brother-in-law, gave insider information to his brother, Michael Kara, who then gave it to the defendant.[91] The defendant, Salman, then traded on that information.[92] On appeal, Salman argued that under *Newman* there was insufficient evidence that Maher received a personal benefit in exchange for the information or that Salman knew of such a benefit.[93] The Ninth Circuit panel[94] stated, however, that "[t]o the extent *Newman* can be read to go so far, we decline to follow it."[95] Rather, the panel concluded that, in accordance with *Dirks*, when an insider makes a gift of inside information to a trading relative or friend, tippee liability should follow.[96] Perhaps in an effort to avoid creating a circuit split, the Ninth Circuit panel observed that its decision might not conflict with *Newman*.[97] The Supreme Court granted certiorari, with oral arguments pending as this Comment goes to publication.[98]

After the Supreme Court granted certiorari in *Salman*, the First Circuit suggested a preference for *Salman*'s broader reading of *Dirks* in *United States v. Parigian*.[99] The First Circuit, comparing *Newman* and *Salman*, observed that "the Ninth Circuit seem[s] to align itself more closely with our [precedent]."[100] However, the panel was able to avoid

89. *See, e.g.*, Motion of Law in Support of Defendant Raj Rajaratnam's Motion Pursuant to 28 U.S.C. § 2255 to Vacate Convictions and Sentence at 13–14, United States v. Rajaratnam, No. 1:09-cr-01184-LAP (S.D.N.Y. June 6, 2015); Brief for Appellant at 19–25, United States v. Martoma, No. 14-3599 (2d Cir. Feb. 2, 2015); *see also* United States v. Whitman, 115 F. Supp. 3d 439, 441 (S.D.N.Y. 2015) (rejecting the defendant's "overbroad" reading of *Newman* and collecting other cases that were appealed on the same issue).

90. United States v. Salman, 792 F.3d 1087 (9th Cir. 2015), *cert. granted,* 84 U.S.L.W. 3401 (U.S. Jan. 19, 2016) (No. 15-628).

91. *Id.* at 1089.

92. *Id.* at 1088–89.

93. *Id.* at 1090.

94. Serendipitously, one of the Ninth Circuit panel judges (and the author of the opinion) was Southern District of New York Judge Jed Rakoff, sitting by designation pursuant to 28 U.S.C. § 292(a), which allows for the assignment of district court judges to appellate panels. 28 U.S.C. § 292(a) (2012); *see also* Peter J. Henning, *Judge Rakoff Ruling on Tips May Help Prosecution*, N.Y. TIMES: DEALBOOK (July 7, 2015), http://www.nytimes.com/2015/07/08/business/dealbook/judge-rakoff-ruling-on-tips-may-help-prosecution-on-insider-trading-cases.html?_r=1.

95. *Salman*, 792 F.3d at 1093.

96. *Id.* at 1093–94.

97. *See id.* at 1093–94 (observing that *Newman* recognized that *Dirks* suggests liability be imposed where information was gifted to a trading relative or friend).

98. 84 U.S.L.W. 3401 (U.S. Jan. 19, 2016) (No. 15-628).

99. United States v. Parigian, 824 F.3d 5, 16 (1st Cir. 2016).

100. *Id.*

the issue because the tipper and tippee were close golfing buddies and the tipper received promises of gifts in exchange for the inside information.[101] As such, under either *Newman* or *Salman*, the court found there was likely a sufficient personal benefit.[102] The court also acknowledged that insider trading law has been in a state of confusion since the Second Circuit decided *Newman*.[103] In a second opinion, addressing the appeal of the tipper from *Parigian*, the First Circuit explained that the personal benefit requirement could be satisfied by concrete benefits like wine or steak, or by "benefits as thin as" maintaining a relationship or a gift to a friend.[104] The First Circuit thus seems to have aligned itself with the Ninth Circuit's more relaxed reading of *Dirks*.

The executive branch's response to *Newman* was more forceful than the judiciary's. Preet Bharara, the U.S. Attorney for the Southern District of New York, called the *Newman* decision "dramatically wrong."[105] The press reported that *Newman* was a serious blow to Bharara[106] and that the panel's clear displeasure with the prosecution might be explained by tension between the U.S. Attorney's office and the federal bench.[107] Perhaps because some of its highest-profile convictions are now on the line, the U.S. Attorney's office has forcefully objected to appeals based on *Newman* and has urged courts to construe the case's holding as narrowly as possible.[108]

The Department of Justice ultimately appealed *Newman* to the Supreme Court.[109] The Government argued in its petition for certiorari

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101. *Id*. at 8–9, 16.

102. *Id*. at 16.

103. *Id*. at 16 ("How this will all play out, we do not venture to say . . . .").

104. United States v. McPhail, No. 15-2106, 2016 U.S. App. LEXIS 13581, at *22–23 (1st Cir. July 26, 2016).

105. James B. Stewart, *Some Fear Fallout From Preet Bharara's Tension With Judges*, N.Y. TIMES: DEALBOOK (Apr. 16, 2015), http://www.nytimes.com/2015/04/17/business/preet-bharara-and-federal-judges-trade-barbs-and-some-fear-consequences.html. Bharara has gained widespread media attention for his aggressive stance on insider trading and financial crime. *See, e.g*., Sally Jenkins, *The brash New York prosecutor who's indicting left and right*, WASH. POST (Mar. 24, 2015), https://www.washingtonpost.com/sports/the-brash-new-york-prosecutor-whos-indicting-left-and-right/2015/03/29/64472702-c412-11e4-9271-610273846239_story.html (giving a brief biography of Bharara and highlighting some of his more famous cases).

106. *See, e.g*., Michael Rothfeld & Susan Pulliam, *Did Preet Bharara Overreach?*, WALL STREET JOURNAL (Dec. 10, 2014), http://www.wsj.com/articles/did-preet-bharara-overreach-1418262707 (calling *Newman* a "big setback" to Bharara).

107. *See* Stewart, *supra* note 105.

108. *See, e.g*., Brief for the United States at 11–12, United States v. Martoma, No. 14-3599 (2d Cir. May 4, 2015) (arguing that *Newman* could not change the defendant's conviction because the evidence was stronger than that which was presented in *Newman*).

109. Petition for Certiorari at 1, United States v. Newman, 773 F.3d 438 (2d Cir. July 30, 2015) (No. 15-137).

that *Newman* was contrary to *Dirks* and raised serious policy concerns.[110] The Government also read the Ninth Circuit's opinion in *Salman* to directly conflict with *Newman* and urged the Supreme Court to settle the perceived circuit split.[111] The Supreme Court, however, denied the Government's petition without comment.[112]

Ostensibly in response to *Newman*, Congress introduced three bills: S. 702, The Stop Illegal Insider Trading Act ("Reed-Menendez Bill"),[113] H.R. 1625, the Insider Trading Prohibition Act ("Himes Bill"),[114] and H.R. 1173, the Ban Insider Trading Act of 2015 (rather unfortunately, "Lynch Bill").[115] Each bill takes steps to explicitly prohibit insider trading.[116]

III. AN ANALYSIS OF POST-*NEWMAN* INSIDER TRADING LEGISLATION

The remainder of this Comment will proceed on two assumptions. First, this Comment assumes that insider trading is harmful to the investing public and the market.[117] Second, this Comment assumes that insider trading should, in some contexts, be prohibited by law. Arguments to the contrary[118] will not be debated in this Comment.

This Comment will next discuss three issues. First, it will discuss the need for legislation codifying insider trading liability by statute.[119] Second, it will consider what factors are relevant in analyzing the legislation introduced in response to *Newman*.[120] Third, it will analyze each of the three bills to assess each one's potential impact on insider trading liability.[121]

110. *Id*. at 15–22.
111. *Id*. at 22–24, 33.
112. 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137).
113. Stop Illegal Insider Trading Act, S. 702, 114th Cong. (2015).
114. Insider Trading Prohibition Act, H.R. 1625, 114th Cong. (2015).
115. Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong. (2015).
116. S. 702 § 2; H.R. 1173 § 2; H.R. 1625 § 2.
117. *See Insider Trading*, SECURITIES AND EXCHANGE COMMISSION (last updated Jan. 15, 2013), http://www.sec.gov/answers/insider.htm (stating that insider trading "undermines investor confidence in the fairness and integrity of the markets").
118. *See, e.g.*, Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 864, 868, 871 (1982) (arguing, *inter alia*, that insider trading can be beneficial to firms and shareholders and could be prohibited by corporate charters or employment contracts); Stephen M. Bainbridge, *Is Insider Trading Bad? If so, Why?*, PROFESSORBAINBRIDGE.COM (Apr. 1, 2010, 10:47 AM), http://www.professorbainbridge.com/professorbainbridgecom/2010/04/is-insider-trading-bad-if-so-why.html (arguing that insider trading can result in more accurate pricing of securities); HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 138 (1st ed. 1966) (arguing that insider trading can be an efficient and appropriate means of compensation).
119. *See infra* Part III.A.
120. *See infra* Part III.B.
121. *See infra* Part III.C.

A. *The Need for Legislation*

Many scholars have discussed the need for a statutory codification of insider trading liability, or at least criticized the lack thereof.[122] While an explicit statutory codification would have many benefits, this Comment will discuss only a few.

First, codifying insider trading liability into statute would provide clarity and certainty.[123] Because insider trading liability spawned from a broad provision of the Exchange Act, the elements and theories of liability have evolved over time based on court opinions.[124] To demonstrate, the Second Circuit in *Newman* announced elements of liability which the court maintained did not need to be stated in their prior decisions that outlined other elements of liability.[125] Similarly, because courts, including the Supreme Court, have been willing to accept new theories of liability,[126] it can be difficult for actors in the securities markets to know if their conduct is lawful.[127] Such uncertainty also extends to prosecutors, who may believe their theory of liability is

122. *See, e.g.*, Richard M. Phillips & Larry R. Lavoie, *The SEC's Proposed Insider Trading Legislation: Insider Trading Controls, Corporate Secrecy, and Full Disclosure*, 39 ALA. L. REV. 439, 455 (1988) (arguing that codifying insider trading by statute would help maintain investor confidence in the securities markets); Greene & Schmid, *supra* note 20, at 425–28 (arguing that Congressional action could expand the scope of insider trading liability from its jurisprudential restraints, clarify the applicability of liability to certain conduct, and harmonize standards across nations); Painter, *supra* note 7, at 159, 198 (arguing that the legislative or administrative rulemaking process is better suited to considering the scholarly insider trading debate and that allowing judicial development of this law raises separation of powers concerns and the specter of retroactive imposition); Steinbuch, *supra* note 7, at 613–14 (observing that almost every other nation that prohibits insider trading defines the offense statutorily and claiming that Congress's "institutional paralysis" has left the field to judicial interpretation); Nagy, *supra* note 9, at 1320–21, 1366–69 (suggesting that the courts and SEC have developed a revisionist and/or results-oriented body of law and arguing that Congress's failure to act "has come at the cost of clarity, consistency, and legitimacy").

123. Phillips & Lavoie, *supra* note 122, at 456 (arguing that an insider trading statute would bring rationality to insider trading law, articulate a clear rationale of its undesirability, and provide guidance to market actors).

124. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 660–62 (1997) (holding that *Chiarella* left open the validity of the misappropriation theory).

125. *See* United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014), *cert. denied*, 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137) (rejecting the government's argument that *United States v. Jiau*, 734 F.3d 147 (2d Cir. 2013) implicitly held that a tippee need not know of the personal benefit because that issue was not reached in *Jiau*).

126. *See, e.g.*, United States v. Chiarella, 445 U.S. 222, 231–32 (1980) (establishing liability for insiders); *O'Hagan*, 521 U.S. at 660–62 (validating the misappropriation theory and expanding liability to outsiders).

127. *See* Phillips & Lavoie, *supra* note 122, at 456 (arguing that the judicial development of insider trading law does not establish a "rational, comprehensible definition" to which actors can conform to predictably avoid liability).

consistent with precedent only to have courts rebuff their argument.[128] Lower courts also face uncertainty under the current regime—a court may strive to adhere to precedent only to end up overruled on appeal.[129] By clearly articulating the elements and scope of liability, Congress could provide market actors, prosecutors, regulators, and the courts with greater certainty.

Congressional action would also have other benefits beyond clarity and certainty. More clearly articulated standards of liability would provide interpretational guidance for courts.[130] By defining the scope of insider trading liability and identifying specific conduct that will be considered criminal, Congress would provide courts with a clearer legislative background to assess whether the conduct at issue should be swept into the statutory prohibition.[131]

The benefits discussed above provide guidance for deciding which factors are relevant in analyzing potential legislation. Assuming that realizing these benefits are goals in crafting insider trading legislation, the way each bill achieves those benefits, or fails to achieve them, is critical to analyzing which proposal is best and how to improve each.

B. Factors in Analyzing the Bills

This Comment will focus on four factors in assessing the three bills proposed in *Newman*'s wake. The first factor is clarity, which this Comment will use to mean the extent to which the legislation provides an unambiguous articulation of the elements and boundaries of liability. Clear language is necessary because, as discussed above, it reduces uncertainty for relevant actors and allows Congress, rather than the courts, to establish liability, which is a key benefit.

The second factor is overcriminalization. Each bill will be analyzed for how far it allows liability to stretch. This factor is important because the judicial development of insider trading liability has been criticized

128. *See, e.g.*, *Chiarella*, 445 U.S. at 231–33. There, the government pursued its equal access theory, which had previously been approved by lower courts, only to have it firmly rejected by the Supreme Court. *Id*.

129. *See, e.g.*, SEC v. Dorozhko, 574 F.3d 42 (2d Cir. 2009). There, the district court interpreted the Supreme Court's insider trading rulings to require a breach of fiduciary duty, and, therefore, denied the SEC's request for a preliminary injunction. *Id*. at 49, 51. However, the Second Circuit held that a breach of a fiduciary duty was not required, vacated the district court's decision, and remanded. *Id*.

130. *See* Richard M. Phillips & Robert J. Zutz, *The Insider Trading Doctrine: A Need for Legislative Repair*, 13 HOFSTRA L. REV. 65, 69–71 (1984) (arguing that the judicial regime focuses on policing insider conduct rather than protecting investors (the original purpose of the securities laws)).

131. *See infra* Part III.C.2 (discussing the Himes Bill and its implications for trading on stolen, material, nonpublic information).

for reaching conduct better addressed by civil and regulatory action.[132] The term overcriminalization can have different meanings and connotations.[133] This Comment will consider overcriminalization in the context of what conduct the legislation would criminalize compared to the existing judicially created regime and how the legislation could be interpreted to encompass new or similar conduct.

The third factor is the extent to which each bill would disrupt the status quo. While many people are dissatisfied with the current insider trading regime, a substantial change in liability could cause at least temporary uncertainty in the law as market actors, prosecutors, and courts adapt to the new legislative regime. Thus, the extent of the changes from the existing regime should be considered in analyzing the proposed legislation.

The fourth factor is the extent to which the legislation responds to *Newman*. While the issues around codifying insider trading go well beyond the relatively narrow issue presented in *Newman*, these bills are, at least ostensibly, responding to *Newman*.[134] Furthermore, since the Supreme Court declined to review *Newman*, the Second Circuit's decision is binding on lower courts within the Second Circuit absent Congressional action to overrule it. Therefore, the means by which each bill responds to *Newman* and the bill's effectiveness in responding to *Newman* are important to consider.

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132. J. Kelly Strader, *(Re)Conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOKLYN L. REV. 1419, 1423 (2015).

133. *See* Kip Schlegal et al., *Are White Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 120–21, 140 (2001) (considering "overcriminalization" to include considerations of whether conduct should be regarded as criminal and how frequently the law punishes conduct, but suggesting that accusations of overcriminalization for securities law violations are not borne out by evidence). With respect to insider trading specifically, overcriminalization may even turn on whether insider trading is morally objectionable—if it is not, then *any* criminalization is theoretically overcriminalization. *Id*. at 120; *compare* Stephen M. Bainbridge, *Insider Trading*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 772, 777 (Boudewijn Boukaert & Gerrit De Gees eds., 2000) (recounting Henry Manne's arguments that insider trading is beneficial because it establishes price accuracy and is an efficient compensation scheme for managers), *with* *Insider Trading*, *supra* note 117 (stating that insider trading "undermines investor confidence in the fairness and integrity of the markets").

134. *See* Press Release, Office of Congressman Jim Himes, Himes Introduces Bipartisan Bill to Define and Prohibit Illegal Insider Trading (Mar. 25, 2015), http://himes.house.gov/press-release/himes-introduces-bipartisan-bill-define-and-prohibit-illegal-insider-trading [hereinafter Himes Release]; Press Release, Office of Senator Robert Menendez, Sens. Reed & Menendez Introduce Bill to Clearly Define and Ban Unlawful Insider Trading (Mar. 11, 2015), http://www.menendez.senate.gov/news-and-events/press/sens-reed-and-menendez-introduce-bill-to-clearly-define-and-ban-unlawful-insider-trading; Press Release, Office of Congressman Stephen Lynch, Lynch Introduces Bill to Ban Insider Trading (Mar. 2, 2015), http://lynch.house.gov/press-release/lynch-introduces-bill-ban-insider-trading [hereinafter Lynch Release].

C. Analyzing the Three Bills

1. The Reed-Menendez Bill

The Reed-Menendez Bill, introduced in the Senate, would amend § 10 of the Exchange Act to read:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national security exchange . . . [t]o purchase, sell or cause the purchase or sale of any security on the basis of material information that the person knows or has reason to know is not publicly available.[135]

The bill also prohibits recklessly communicating material, nonpublic information when it is reasonably foreseeable that the communication would result in a violation of the above prohibition.[136] Reed-Menendez appears to provide a safe harbor for securities analysts by exempting from "nonpublic information" any information developed from publicly available sources.[137] Finally, the bill permits the SEC to establish exemptions from the bill's prohibitions and disclaims any other effect on liability under § 10(b).[138]

The Reed-Menendez Bill's prohibition on insider trading could be read extremely broadly. It does not provide any limitations on liability except for its analyst safe harbor.[139] It does not enumerate certain situations that would constitute insider trading.[140] Therefore, the bill's sweeping language seems to impose a broader standard of liability than the judicial regime, prohibiting nearly all trading on the basis of material, nonpublic information.[141]

Because the Reed-Menendez Bill's language provides little guidance about the prohibition's breadth, the bill invites both the SEC and courts to revert to the practices leading to the need for Congressional intervention in the first place. First, such broad language could give the

135. Stop Illegal Insider Trading Act, S. 702, 114th Cong., § 2 (2015) (inserting § 10(d)(1)(A)).

136. *Id*. (inserting § 10(d)(1)(B)).

137. *Id*. (inserting § 10(d)(2)).

138. *Id*. (inserting §§ 10(d)(3)–(4)).

139. *Id*.

140. *Compare id*. § 2 (inserting § 10(d)(1)(A) and containing only a broad prohibition on trading based on material, nonpublic information), *with* Insider Trading Prohibition Act, H.R. 1625, 114th Cong., § 2 (2015) (inserting § 16A(c)(1) and providing an enumerated list of situations which make trading "wrongful" under the Act).

141. *See* Peter J. Henning, *What's So Bad About Insider Trading Law?*, 70 BUSINESS LAWYER 751, 767 (2015) (noting that the Senate and House bills would impose liability on "trading while in possession of almost all confidential information").

SEC and prosecutors the opportunity to pursue broad theories of liability. A ban on *any* trading "on the basis of material information that the person knows or has reason to know is not publicly available"[142] sounds strikingly like the parity-of-information theory of liability, which stated that "[anyone] who . . . receives material nonpublic information may not use that information to trade in securities . . . ."[143] It is thus possible that Reed-Menendez codifies the parity-of-information standard into law.

On the other hand, perhaps fearful of applying general, broad language too expansively (a la *Chiarella*[144]), courts might turn to the old judicial regime of insider trading liability to help give meaning and limits to Reed-Menendez's sweeping language. Because the Reed-Menendez Bill is broad and provides little guidance, courts might read the bill as merely codifying the previous judicial insider trading regime with its existing contours and problems. Nor would it be unreasonable to do so—it is an established tool of statutory interpretation that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."[145] Courts would then need to consider the bill's broad, general language against the Supreme Court's longstanding rejection of the parity-of-information theory.[146] Given the Court's strong rejection of that theory, this might persuade other courts that the bill's broad, general language does not clearly show Congressional intent to supplant the judicial regime of insider trading with a parity-of-information standard.

Because a parity-of-information regime sweeps in conduct that was not criminalized under the judicial regime, an argument to impose old judicial limits on liability would likely be amplified by rule of lenity concerns. As the Supreme Court has explained, "when choice has to be made between two readings of what Congress has made a crime, it is appropriate before [courts] choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[147]

142. S. 702 § 2 (inserting § 10 (d)(1)(A)).

143. United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980).

144. United States v. Chiarella, 445 U.S. 222, 233 (1980) ("Formulation of such a broad duty [as the parity-of-information theory] . . . should not be undertaken absent some explicit evidence of congressional intent.").

145. Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot., 474 U.S. 494, 501 (1986); *see also* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266–67 (1979) ("[S]ilence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.").

146. *Chiarella*, 445 U.S. at 233.

147. United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952); *see also* William Eskridge, Jr. & Phillip Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992) (noting that rule of lenity cases are an area where the Court has imposed "clear statement" rules).

Given the backdrop of the judicial regime, and that reading Reed-Menendez broadly results in a completely different liability standard, courts could find that the bill's broad language is ambiguous as to whether it imposes a parity-of-information standard.[148] However, courts might be wary of reading the bill as a Congressional endorsement of the parity-of-information theory because a broad reading of Reed-Menendez could criminalize so much previously legal conduct.

On the other hand, it is possible that Reed-Menendez is quite clear about what Congress wanted. One could argue that despite the judicial insider trading regime and the Supreme Court's rejection of the parity-of-information standard, Congress chose to go another way.[149] Under this argument, just because the language of Reed-Menendez is *broad* does not mean it is *ambiguous*.[150] If the statute is considered unambiguous, then the presumption in favor of continuing judge-made-law is likely overcome[151] and the rule of lenity is inapplicable.[152] Nevertheless, without something more in the legislative history or the legislation itself, courts might be unwilling to make such a sharp turn away from the existing standard to a parity-of-information standard.[153]

As the above discussion indicates, Reed-Menendez scores low marks for "clarity." The current language can be read several ways, with vastly divergent results for market participants, prosecutors, and courts. Without a clearer statement or guidance, Reed-Menendez's language could prompt a protracted struggle between prosecutors and the courts over how the bill should be interpreted and applied, creating more problems than it solves.

The Reed-Menendez Bill's ambiguity and uncertain breadth impacts the assessment of other factors considered in this Comment. With respect to overcriminalization, the bill at least provides a safe harbor for analysts and gives the SEC the power to create further exemptions.[154] However, beyond that, a broad reading of the bill's prohibition could

148. *See Universal C.I.T. Credit Corp.*, 344 U.S. at 221–22.

149. *See* Bruce W. Klaw, *Why Now is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory*, 7 WM. & MARY BUS. L. REV. 275, 343–44 (2016) (reading Reed-Menendez as consistent with the equal access theory and as rejecting the existing judicial regime).

150. *See* Moskal v. United States, 498 U.S. 103, 108 (1990) ("[W]e have declined to deem a statute 'ambiguous' for the purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government.").

151. Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot., 474 U.S. 494, 501 (1986).

152. Beecham v. United States, 511 U.S. 368, 374 (1994).

153. *But see* Klaw, *supra* note 149, at 342–44 (examining the statements of Senator Reed and concluding that the Bill was intended to implement the parity-of-information theory).

154. Stop Illegal Insider Trading Act, S. 702, 114th Cong., § 2 (2015) (inserting §§ 10(d)(2)–(3)).

vastly expand liability for insider trading, criminalizing a vast swath of previously legal conduct.[155] Similarly, it is difficult to determine the impact Reed-Menendez would have on the status quo. A broad reading would be extremely disruptive because so much conduct would become criminal, but a narrow reading might not create *any* disruption if the bill merely codifies the judicial regime.

Finally, one aspect that *is* clear about Reed-Menendez is that, at least on its face, it does nothing to respond to or overrule the Second Circuit's decision in *Newman*. Unlike the other bills, which both provide language clearly aimed at overruling *Newman*,[156] Reed-Menendez has no language that appears to respond to *Newman*.[157]

Overall, the Reed-Menendez Bill may raise more questions than it answers. Without clearer language, the bill either fundamentally changes the basis of insider trading liability compared to the judicial regime, or it imposes no change at all. More specific language will provide firmer ground to help market actors, prosecutors, and the courts make decisions.

2. The Himes Bill

Congressman Jim Himes of Connecticut proposed one of two bills introduced in the House of Representatives, the Insider Trading Prohibition Act.[158] The bill seems to take many cues from the Insider Trading Proscriptions Act ("S. 1380"), an earlier, but unsuccessful, attempt to codify insider trading liability by statute.[159] The two bills are similar in important aspects and take the same general approach to structuring a ban on insider trading.[160]

155. *Compare* United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014), *cert. denied*, 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137) ("[N]othing in the law requires a symmetry of information in the nation's securities markets."), *with* S. 702 § 2 (inserting § 10(d)(1)(A) and arguably requiring symmetry of information in the securities markets).

156. Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong., § 2(a) (2015) (inserting § 10(d)(2)(B)); Insider Trading Prohibition Act, H.R. 1625, 114th Cong., § 2 (2015) (inserting § 16A(c)(2)).

157. *See generally* S. 702.

158. Himes Release, *supra* note 134.

159. Insider Trading Proscriptions Act, S. 1380, 100th Cong. (1987). The bill was part of a larger attempt to codify insider trading in the late 1980s that incorporated proposals from the Senate, the SEC, and the NYSE Legal Advisory Committee. For a more thorough discussion and analysis of this debate and the competing bills, see generally Phillips & Lavoie, *supra* note 122.

160. *See* H.R. 1625 § 2; S. 1380 § 2 (adding § 16A to the Exchange Act defining insider trading, prohibiting insider trading based on whether the "use" or "communication" of material, nonpublic information would be "wrongful," providing criminal liability for tipping information, and providing limitations on liability for "control persons").

The Himes Bill opens with a general ban on trading material, nonpublic information about a security or the market for such security.[161] Importantly, however, such trading is criminal *only* if the person knows or recklessly disregards that the information was obtained "wrongfully," or that the use of such information would be "wrongful."[162] Thus, the lynchpin for criminal liability under the Himes Bill is what is "wrongful." The bill then defines "wrongful" as when information was *obtained by*, or whose *use would be*: theft, bribery, misrepresentation, espionage (by any means), a violation of federal laws protecting computer data or computer privacy, conversion, misappropriation (or other unauthorized and deceptive taking), or a breach of fiduciary duties or other relationships of trust and confidence.[163] Thus, the Himes bill attempts to restrict liability for insider trading by limiting the definition of "wrongful" to specific conduct and practices.

Next, the Himes Bill criminalizes tipping by criminalizing "wrongfully" communicating material, nonpublic information.[164] First, under the bill, a tippee is liable if the tippee trades on the basis of such information.[165] Additionally, a tippee may be liable if the tippee further tips such information and the next tippee trades on such information and the second tippee's trading was reasonably foreseeable.[166]

The Himes Bill also contains what this Comment refers to as an anti-*Newman* clause, attempting to respond to the Second Circuit's decision in *Newman*. The Himes Bill provides that liability is *not* predicated on the defendant "know[ing] the specific means by which the information was obtained or communicated, *or whether any personal benefit was paid or promised* . . . so long as the person [trading or tipping] was aware[] or recklessly disregarded that such information was wrongfully obtained or communicated."[167]

In addition, the Himes Bill leaves intact control person liability[168] under § 20(a) of the Exchange Act,[169] but precludes liability "if such

161. H.R. 1625 § 2 (inserting § 16A(a)).
162. *Id*.
163. *Id*. § 2 (inserting §§ 16A(c)(1)(A)–(C)); *see also* S. 1380 § 2 (inserting § 16A(b)(1) and defining "wrongful" use as including theft, conversion, misappropriation, or a breach of any fiduciary or other relationship of trust and confidence).
164. H.R. 1625 § 2 (inserting §§ 16A(b)(1)–(2)).
165. *Id*.
166. *Id*.
167. *Id*. (inserting § 16A(c)(2)) (emphasis added).
168. *See* CHOI & PRITCHARD, *supra* note 16, at 306 (explaining that control person liability is the idea that a person or entity which exercises control over a primary violator can be held vicariously liable for the primary violation).
169. 15 U.S.C. § 78t(a) (2012) (providing joint and several liability for control persons, who are liable "to the same extent" as primary violators if they "directly or

controlling person or employer did not participate in, profit from, or directly or indirectly induce the acts constituting [the primary violation]."[170] Finally, the Himes Bill provides that the SEC may exempt any person, security, or transaction, or classes thereof, from the prohibitions of the bill.[171] The prohibitions do not apply to persons acting at the direction of an individual who would not be prohibited from trading under the act.[172] Presumably, this exemption provides that, for example, a broker not permitted to trade under the Act could still trade for a client's account if directed to do so by a client who was not otherwise prohibited from trading under the bill.[173]

The Himes Bill, out of the three proposed bills, receives the highest marks for clarity. The bill provides clear lines of liability by prohibiting only "wrongful" use or communication of information, limited to a specifically enumerated list of circumstances.[174] Furthermore, because the conduct is wrongful "only" if it is included in this list of prohibited activities,[175] the Himes Bill appears to limit liability for insider trading only to those practices, giving clearer guidelines to market actors. This limitation also provides courts, prosecutors, and the SEC with clarity on how and when conduct is criminal or worthy of prosecution. Therefore, the Himes Bill provides greater clarity than the existing insider trading regime.

One concern, however, is that the Himes Bill incorporates concepts from the existing judicial and regulatory regime about which there is no definite consensus. Namely, the bill includes in its definition of wrongful "a breach of any fiduciary duty or any other personal or other relationship of trust and confidence."[176] However, there is not a consensus among scholars or courts about the fiduciary duty standard of liability, or whether that is the boundary of liability.[177] The fiduciary duty standard, in particular, has been somewhat amorphous and unpredictable.[178] The standard's inclusion in the Himes Bill, therefore, introduces some uncertainty and the potential for unclear standards of liability. Without some clarifying language, there would still be some

indirectly" controlled the primary violator, unless the control person "acted in good faith and did not directly or indirectly induce the acts").

170. H.R. 1625 § 2 (inserting § 16A(d)).

171. *Id*. (inserting § 16A(e)).

172. *Id*.

173. *See id*.

174. *Id*. (inserting §§ 16A(a), 16A(c)(1)(A)–(C)).

175. *Id*. (inserting § 16A(c)(1)).

176. *Id*. (inserting § 16A(c)(1)(C)).

177. *See, e.g*., Painter, *supra* note 7, at 190–91 (observing that the scope of fiduciary duties in the context of insider trading is unclear).

178. *See* Nagy, *supra* note 9, at 1340–48 (arguing that lower courts have ignored fiduciary principles when adherence would result in an acquittal).

continuing malleability for prosecutors and regulators to work with if the Himes Bill were to become law. However, the Himes Bill still provides the greatest clarity out of the three proposed bills.

With respect to overcriminalization, there are two considerations relevant to the Himes Bill. First, as discussed above, the Himes Bill limits liability exclusively to certain conduct that constitutes "wrongful" use or communication.[179] Therefore, the Himes Bill theoretically limits liability to a set universe of conduct and, unlike the Reed-Menendez Bill, does not impose an unduly broad standard of liability.

However, when compared to the judicial regime of insider trading, the Himes Bill *expands* the universe of conduct that constitutes insider trading. The judicial and regulatory regime of insider trading is, at least ostensibly, rooted in breaches of fiduciary or fiduciary-like duties.[180] The Himes Bill, however, lists other kinds of "wrongful" conduct beyond breaches of fiduciary or other duties.[181] Furthermore, the list of "wrongful" actions in the bill criminalizes conduct that is not insider trading under the current regime.[182] One example is the Himes Bill's inclusion of "theft" under its definition of "wrongful" conduct.[183]

It is not settled whether stealing information and then trading on the basis of that information is insider trading. At the outset, because many thieves are outsiders with no other relationship to the company about which the information pertains, there is generally no fiduciary duty owed by a thief to that company or the party with whom they are trading.[184]

However, the Second Circuit held in *SEC v. Dorozhko*[185] that a computer hacker who stole a company's earnings information and then purchased stock options based on that information could be held liable for insider trading.[186] In that case, the Second Circuit reasoned that, in order to give rise to liability, the method of theft had to be "deceptive"

179. H.R. 1625 § 2 (inserting §§ 16A(c)(1)(A)–(C)).

180. *Compare* United States v. Chiarella, 445 U.S. 222, 232–33 (1980) (premising liability on a breach of a fiduciary relationship), *with* United States v. O'Hagan, 521 U.S. 642, 652–53 (1997) (premising liability on a breach of a duty to the source of the information). *But see* Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1512 (1999) (considering some of the Supreme Court's other Rule 10b-5 jurisprudence and arguing that a breach of fiduciary duty is "neither necessary nor sufficient for Rule 10b-5 liability").

181. H.R. 1625 § 2 (inserting §§ 16A(c)(1)(A)–(C)).

182. *Id*.

183. *Id*. (inserting § 16A(c)(1)(A)).

184. *See, e.g.*, SEC v. Dorozhko, 606 F. Supp. 2d 321, 336 (S.D.N.Y. 2008) (holding that a hacker who traded on information he had stolen owed no fiduciary duty to the other parties to his securities transactions or the source of the information), *rev'd*, 574 F.3d 42 (2d Cir. 2009).

185. SEC v. Dorozhko, 574 F.3d 42 (2d Cir. 2009).

186. *Id*. at 44–45, 49–51.

within the meaning of § 10(b).[187] For example, the court suggested that misrepresenting one's identity in order to gain access to information and stealing that information would be "deceptive theft" giving rise to liability under § 10(b).[188] In contrast, the court suggested that some kinds of hacking would not be "deceptive," but only "mere theft," not giving rise to liability.[189] Thus, courts may allow some kinds of theft, but not others, to give rise to insider trading liability.

The Himes Bill, however, goes beyond *Dorozhko*'s holding. First, by listing breaches of fiduciary duty as separate from other kinds of "wrongful" conduct,[190] the Himes Bill implies that a breach of fiduciary duty is not necessary for insider trading liability. This provision seems to codify the Second Circuit's holding in *Dorozhko*.[191] However, in contrast to *Dorozhko*'s holding, the Himes Bill states that *all* theft, deceptive or otherwise, gives rise to liability for insider trading if the stolen information is then used in a trade.[192] The Himes Bill thus goes further than courts previously had, or were able to under § 10(b)'s jurisprudential limitations, and expands insider trading liability to previously legal conduct.

In sum, the Himes Bill attempts to expand insider trading liability to conduct that was not criminal under the judicial and regulatory regime of insider trading. Despite this expansion, however, the Himes Bill also limits liability by "only" attaching liability to the enumerated list of "wrongful" conduct.[193] Thus, the Himes Bill provides for some expansion of criminality while still providing clear limits and a clear scope, avoiding the kind of unclear scope that undercuts both the Reed-Menendez Bill and the Lynch Bill.[194] Although the Himes Bill incorporates some amorphous concepts like the breach of fiduciary duty standard, because the it attempts to establish definite contours of criminality, it avoids overcriminalization.

187. *Id*. at 51.

188. *Id*.

189. *Id*.

190. Insider Trading Prohibition Act, H.R. 1625, 114th Cong., § 2 (2015) (inserting § §§ 16A(c)(1)(A)–(C)).

191. *Dorozhko*, 574 F.3d at 49 (noting that a breach of a fiduciary duty satisfies the requirement of a "deceptive device or contrivance" under § 10(b), but that "what is sufficient is not always what is necessary").

192. H.R. 1625 § 2 (inserting § 16A(c)(1)(A)). Professor John Coffee observed that *Dorozhko*'s distinction was understandable given existing case law, but the line between "deceptive" theft and "mere" theft was a "questionable line" that only "doctrine-obsessed (but morally myopic) lawyers" could be satisfied with. John C. Coffee Jr., *Introduction: Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies*, 2013 COLUM. BUS. L. REV. 281, 295 (2013).

193. H.R. 1625 § 2 (inserting §§ 16A(c)(1)(A)–(C)).

194. *See infra* Parts III.C.1 and III.C.3.

Concerning the Himes Bill's impact on the status quo, similar concerns are relevant. Because the Himes Bill expands liability to new forms of conduct,[195] it would disrupt the status quo in some ways. However, because the Himes Bill also provides for limits on "wrongful" conduct,[196] the bill would likely provide for long-term stability by reducing the constant tug-of-war between prosecutors and courts over the outer limits of insider trading liability. Although there will likely be some debate over the Himes Bill's outer limits of liability, the bill's slight disruption to the status quo at the outset should be outweighed by its long-term stabilizing effects for market actors, prosecutors, regulators, and the courts.

Finally, the Himes Bill's anti-*Newman* clause essentially means that as long as a tippee knows generally that information was wrongfully obtained or communicated, the tippee is liable even if he or she was not aware of the specific personal benefit given to induce the initial tipper or latter tippee/tippers.[197] This clause seems to largely, but not entirely, undo the Second Circuit's decision in *Newman*.

Newman specifically held that, to be liable, a tippee must know the information was divulged for a personal benefit.[198] The Himes Bill still requires some evidence that the defendant knew or recklessly disregarded that the information was wrongfully obtained or communicated.[199] However, if information is only "wrongfully" communicated in breach of a fiduciary duty because it was communicated in exchange for a personal benefit, the defendant would still need to have some general knowledge that a benefit was received in order to know of the breach of fiduciary duty.[200] One could not know that the communication was wrongful without knowledge that a personal benefit was received. It seems, then, that the Himes Bill keeps alive threads of *Newman*'s holding by requiring some general knowledge or reckless disregard that *some* benefit was received, but does not require knowledge of what the *specific* benefit to the tipper was.

195. H.R. 1625 § 2 (inserting §§ 16A(c)(1)(A)–(C)).

196. *Id*.

197. *See id*. (inserting § 16A(c)(2)).

198. United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014), *cert. denied*, 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137).

199. H.R. 1625 § 2 (inserting § 16A(c)(2)). However, Professor John Coffee, the author of the Himes Bill, has argued that the personal benefit standard should be eliminated entirely and implies that the Himes Bill "does basically [that]." John C. Coffee, *How to Get Away With Insider Trading*, N.Y. TIMES, May 23, 2016, http://www.nytimes.com/2016/05/23/opinion/how-to-get-away-with-insider-trading.html?_r=0. However, for reasons explained below, this Comment disagrees with this implication.

200. *See Newman*, 773 F.3d at 447; United States v. Whitman, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012).

While the Himes Bill's anti-*Newman* clause would thus provide an important limit on *Newman*'s reach and the government's burden of proof, it is not clear that the Himes Bill would actually have produced a different result in *Newman* itself. The *Newman* decision does not clearly state whether the tippee must know of the specific benefit given to the tipper, or whether the tippee need only have general knowledge that a benefit was given to the tipper—the Second Circuit's language suggests it could be either.[201] Moreover, the *Newman* court's actual holding provides no additional guidance because the court held that the evidence did not establish the defendants had any knowledge of *any* personal benefit, specific or general, to the tippers.[202] As such, if the Himes Bill still requires some general knowledge that a benefit was conferred, Newman and Chiasson would likely still have been acquitted. Thus, although the Himes Bill's anti-*Newman* clause provides an important limitation on *Newman*'s holding, it would not appear to totally eradicate *Newman*.

Therefore, the Himes Bill would alter existing insider trading liability in important ways. By expanding liability to certain kinds of conduct not previously criminalized, the bill would make more conduct off-limits for market participants. However, by providing an exclusive list of conduct giving rise to liability, the bill would also provide greater stability and predictability for market participants, prosecutors, regulators, and the courts. Finally, the bill would take important steps to limit, if not entirely eliminate, the Second Circuit's holding in *Newman*.

3. The Lynch Bill

The third and final bill, the Lynch Bill, was introduced in the House of Representatives.[203] The Lynch Bill and the Himes Bill are similar in important ways—both attempt to outline the contours of insider trading liability by giving definitions to certain qualifying terms and both contain anti-*Newman* clauses.[204] However, the differences between the two bills, including their different approaches to mutual efforts, are crucial.

201. *Compare, e.g.*, *Newman*, 773 F.3d at 448 ("[W]ithout establishing that the tippee knows of *the* personal benefit received by the insider . . . the Government cannot meet its burden of showing that the tippee knew of a breach.") (emphasis added), *with id*. at 450–51 ("[T]he Government had to prove beyond a reasonable doubt that Newman and Chiasson knew that the tippers received *a* personal benefit . . .") (emphasis added). *But see Whitman*, 904 F. Supp. 2d at 371 (holding that the tippee need only have general knowledge of a benefit to the tipper).

202. *Newman*, 773 F.3d at 453.

203. Lynch Release, *supra* note 134.

204. Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong., § 2(a) (2015); H.R. 1625 § 2.

The Lynch Bill would add § 10(d) to the Exchange Act.[205] This bill prohibits any trading on the basis of information that the person knows, or should know, is "material information and inside information."[206] "Inside" information is defined as information that is either: 1) nonpublic and obtained "illegally;" 2) from an issuer with an "expectation of confidentiality" or for use only for legitimate business purposes; or 3) "in violation of a fiduciary duty."[207] "Material" information is information about the issuer or security that would likely impact the security's price.[208]

The Lynch Bill contains several other key clauses. First, the bill seems to make its provisions non-exclusive by explicitly stating that it does not affect liability under § 10(b) of the Exchange Act.[209] In the bill's anti-*Newman* clause, the bill states that for insider trading liability "a personal benefit to any party" is not necessary.[210] Finally, the bill takes aim at tipping by establishing liability for violating § 10(d) if a person "intentionally discloses without a legitimate business purpose" information that they know or should know is material and insider information.[211]

The Lynch Bill has two issues. First, the lynchpin of liability in the Lynch Bill is whether information is material and inside information. The Lynch Bill defines "inside" information as all information that is nonpublic and obtained "illegally."[212] However, "illegally" is nowhere defined or qualified, leading to unanswered questions. Does it mean obtained in violation of only criminal law, or civil law as well? Is it limited to federal law, or does it include state law too? Does the word mean statutes only, or also administrative regulations? These unanswered questions leave the scope of liability undefined and ambiguous.

The "illegally" clause's unclear scope seriously undercuts the Lynch Bill's clarity and breadth of criminality, which would likely lead to extensive litigation to determine its scope. In contrast to the Himes Bill, which provides for specific enumerated actions which give rise to liability,[213] the "illegally" clause could criminalize much more conduct, and its uncertain scope leaves market actors, prosecutors, regulators, and

205. H.R. 1173 § 2(a).
206. *Id*. (inserting § 10(d)(1)).
207. *Id*. (inserting § 10(d)(3)(A)).
208. *Id*. (inserting § 10(d)(3)(B)).
209. *Id*. (inserting § 10(d)(2)(A)).
210. *Id*. (inserting § 10(d)(2)(B)).
211. *Id*. § 2(b)(2) (inserting § 20(e)(2)).
212. *Id*. § 2(a) (inserting §§ 10(d)(3)(A)(i), 10(d)(3)(A)(ii)(I)).
213. Insider Trading Prohibition Act, H.R. 1625, 114th Cong., § 2 (2015) (inserting §§ 16A(c)(1)(A)–(C)).

courts to wonder what conduct is prohibited. Therefore, the clause is ambiguous, potentially very broad, and raises clarity and overcriminalization concerns.

Second, another key issue with the Lynch Bill's clarity is the bill's anti-*Newman* clause. The bill provides that, for insider trading liability, "a personal benefit to any person" is not required.[214] In contrast to the Himes Bill, which only provides that the tippee need not *know* of the personal benefit,[215] the Lynch Bill implies that there need not be any personal benefit at all for a tippee to be liable.[216] Moreover, as discussed below, it is unclear if the Lynch Bill removes the personal benefit requirement for tippers, which impacts both clarity and overcriminalization concerns.

The Lynch Bill's anti-*Newman* clause raises serious overcriminalization concerns by removing the personal benefit requirement for tippees who trade on the basis of material, inside information.[217] This standard stands in stark contrast to the tippee liability standard in *Dirks*, where the Court explained that the tippee's breach is derivative of the tipper's breach of fiduciary duty, and the tipper's breach is based on the receipt of a personal benefit.[218] The Lynch Bill appears to eliminate that requirement so that even without any personal benefit to the tipper, a tippee who trades on the basis of material, nonpublic information is liable.[219] However, this clause also raises a different question—does the bill eliminate the personal benefit requirement for *tipper* liability?

At first blush, based on the language of the clause, the answer seems to be "no." The Lynch Bill's elimination of the personal benefit requirement applies only to "this subsection," apparently meaning § 10(d).[220] However, liability for tippers in the Lynch Bill is not contained in § 10(d), but rather in an amendment to § 20(e) of the Exchange Act.[221] Thus, on its face, the removal of the personal benefit requirement does not appear to apply to tippers.

However, there is a strong opposing argument that the removal of the personal benefit requirement does apply to tipper liability. The plain text of the amendment to § 20(e) suggests there is no requirement.[222]

214. H.R. 1173 § 2(a) (inserting § 10(d)(2)(B)).
215. H.R. 1625 § 2 (inserting § 16A(c)(2)). *But see supra* note 199 (noting a broader reading of the Himes bill's Anti-*Newman* clause).
216. *See* H.R. 1173 § 2(a) (inserting § 10(d)(2)(B)).
217. *Id*.
218. Dirks v. SEC, 463 U.S. 646, 662 (1983).
219. H.R. 1173 § 2(a) (inserting § 10(d)(2)(B)).
220. *Id*.
221. *Id*. § 2(b) (inserting § 20(e)(2)).
222. *See* H.R. 1173 § 2(a) (inserting § 10(d)(2)(B)).

However, it implies that any disclosure of material, inside information without a "legitimate business purpose" gives rise to liability.[223] Nothing in the amendment suggests that there must be a personal benefit to establish a lack of a legitimate business purpose.[224] Second, the fact that the tipping ban references § 10(d) (in that a violation of its prohibition is a violation of § 10(d))[225] suggests an interrelation between the two provisions and that the anti-*Newman* clause should be read as applying to both provisions. These two considerations, coupled with Congress's apparent desire to eliminate the personal benefit requirement via the Lynch Bill's strong anti-*Newman* clause, suggest that the removal of the personal benefit standard also applies to tipper liability.

Removing the personal benefit requirement for tipper liability would constitute a vast departure from *Dirks*. The Court in *Dirks* held that the persons who gave Dirks information had not breached their duty because they received no personal benefit and acted only to expose the company's fraud.[226] Because no breach by the tippers occurred, there was no breach by Dirks when he communicated the information to others.[227] But if the Lynch Bill removes the personal benefit requirement for tippers, then Dirks' sources,[228] and Dirks himself as a tipper, would likely have been liable. Thus, the Lynch Bill's anti-*Newman* clause could potentially sweep vast amounts of conduct into the gamut of criminality by expanding liability to essentially all tippees who trade on the basis of material, inside information or who communicate material, inside information.

In addition to criminalizing a large amount of previously legal conduct, the Lynch Bill would have a huge impact on the status quo. Although, like the Himes Bill, the Lynch Bill attempts to expand liability to certain types of conduct, the scope of the bill's "illegally" clause is far less certain than the parallel clause in the Himes Bill. Furthermore, as discussed above, the anti-*Newman* clause could eliminate the *Dirks*' personal benefit requirement and drastically change the standards for tipper and tippee liability.[229] The Lynch Bill thus presents potentially huge changes to the current regime of insider trading liability.

223. *Id*.
224. *See id*.
225. *Id*.
226. Dirks v. SEC, 463 U.S. 646, 666–67 (1983).
227. *Id*. at 667.
228. However, there might be an argument that exposing fraud was a legitimate business purpose.
229. *See supra* pp. 249–50.

IV. MOVING FORWARD ON INSIDER TRADING LEGISLATION

Having dissected and criticized each post-*Newman* bill, this Comment would be remiss not to make a few recommendations for changes that Congress should consider if it moves forward with explicitly codifying insider trading liability. This Comment recommends that Congress use the Himes Bill as a building block because, as the analysis above[230] indicates, this Comment takes the position that the Himes Bill is the strongest proposal.

First, given the potential bill's importance to the definition of insider trading, the new bill should provide definitions of the terms "material" information and "nonpublic" information. Numerous definitions of materiality in the securities law context currently exist.[231] Congress could provide clarity by defining materiality, for example, to mean where "there is a substantial likelihood that the [information] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[232] In defining "nonpublic," the definition of "inside" information in the Lynch Bill provides a clear starting point.[233] Regardless of the formulations chosen, clear definitions of "material" and "nonpublic" would help market actors identify when they cannot act.

Next, a bill's articulation of specific instances where communicating material, nonpublic information would *not* give rise to tipping liability under the law would provide greater clarity. Although the Himes Bill's definition of tipping is not too broad, it would be prudent to define some protected communications that should not be criminalized even if they technically fall under the prohibition in some circumstances. For example, Congress could exempt communications made to lawyers for the purpose of obtaining legal advice when such communications would be protected by the attorney-client privilege. Clear exemptions for certain communications would provide greater certainty about what conduct would give rise to tipping liability.

Additionally, because the Himes Bill's anti-*Newman* clause has an uncertain scope,[234] its language needs clarification. For example, the language could be changed to "it shall not be necessary that the person know . . . whether a specific personal benefit was promised, offered, or received to or by any person in the chain of communications, so long as

230. *See supra* Part III.C.2 (analyzing the Himes Bill).

231. CHOI & PRITCHARD, *supra* note 16, at 47–94 (covering various definitions of materiality applied by courts).

232. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1978).

233. *See* Ban Insider Trading Act of 2015, H.R. 1173, 114th Cong., § 2(a) (2015) (inserting § 10(d)(3)(A)).

234. *See supra* Part III.C.2.

the trading person knew, or recklessly disregarded, the general facts making such communication wrongful . . . ." Such a change would explain that specific knowledge of the benefit is not necessary so long as there was general knowledge that there was a benefit, thus clarifying the clause's limitation in *Newman*.

On a related note, Congress could also take steps to define what is considered a "personal benefit" for the purposes of breaches of fiduciary duty giving rise to insider trading and tipper/tippee liability. Because courts are in disagreement about what constitutes a personal benefit,[235] a clearer definition of "personal benefit" would help market actors better conform their conduct to the law. The definition need not be narrow—Congress could include as many benefits as it wants in the scope of liability, limited only by what Congress considers an impermissible *quid pro quo*. Congress could include money; any object of potential pecuniary value; preferential treatment or status; other material, nonpublic information; or other information of potential pecuniary value in the definition of "personal benefit." By providing a specific definition, Congress would set clearer guidelines for market actors, prosecutors, and the courts to identify prohibited conduct.

The discussion above should not be taken as an exclusive list of changes Congress should consider. Even among the suggestions made, there is considerable latitude for Congress to provide more or less specificity for what conduct should be considered illegal insider trading. The final state of the bill will ultimately rely on policy judgments by Congress about what conduct it wants to criminalize. If Congress chooses a broad prohibition, then the final legislation will look much like the Reed-Menendez Bill.[236] On the other hand, choosing a narrower prohibition like the Himes Bill will require carefully chosen language to avoid confusion among market actors and distortion by the courts.

V. CONCLUSION

The Second Circuit's decision in *United States v. Newman* has triggered an important debate about insider trading in Congress and has created an opportunity to accomplish an as-yet elusive goal: the explicit statutory codification of insider trading liability. In *Newman*'s wake, three bills were introduced to codify insider trading liability. Each bill

235. *Compare* United States v. Newman, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, 84 U.S.L.W. 3170 (U.S. Oct. 5, 2015) (No. 15-137) (requiring a showing of some potential for gain), *with* United States v. Salman, 792 F.3d 1087, 1093 (9th Cir. 2015) *cert. granted*, 84 U.S.L.W. 3401 (U.S. Jan. 19, 2016) (No. 15-628) (holding that a relationship and gift of information is enough).

236. *See supra* Part III.C.1 (discussing the provisions of Reed-Menendez and its potentially broad scope).

takes a different approach to prohibiting insider trading and offers different responses to the Second Circuit's decision in *Newman*.

This Comment has examined each of these bills in turn, analyzing the different approaches each bill takes and considering each against the existing judicial and regulatory regime of insider trading liability. Each bill has its own strengths and weaknesses. Although the details and impact of each bill is important in its own right, particularly if one of the bills moves forward toward becoming law, an overarching point also becomes clear. If Congress finally takes the important step of codifying insider trading liability by statute then it must proceed carefully, clearly, and purposefully. Even small differences between the bills have profound consequences for each bill's scope and impact. Insider trading liability remains a fluid concept, the subject of extensive academic and legal debate, and an area of law where every minute detail is hotly contested. Any weakness in a statutory codification of liability will be litigated within an inch of its life and pried open to the widest extent possible by defense lawyers and prosecutors.

Therefore, if any of the proposed bills move forward, Congress must take steps to make the law clear and carefully outline the contours of liability. Congress must also consider the existing regime's failings and take affirmative steps to resolve current issues. Anything less would turn an opportunity long-awaited into an opportunity lost.