Debevoise & Plimpton

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INSIDER TRADING & DISCLOSURE UPDATE

In this Issue:

From the Editors

Welcome to the Fall 2022 issue of the Insider Trading & Disclosure Update, Debevoise's periodic Update focusing on legal, compliance and enforcement developments in the areas of insider trading, the management of material nonpublic information and disclosure rules and enforcement.

The nature and extent of the developments highlighted in this Update, including a number of pending SEC rule proposals and the first insider trading case in the digital asset space, illustrate a significant uptick in securities regulatory and enforcement activity at the SEC under Chair Gensler and on the enforcement front at the DOJ.

We hope that you find this Update useful and informative, and we look forward to bringing you further news and analyses in future issues.

Sincerely,

The Editorial Board

Rulemaking Activity

An Active Rulemaking Period with Gary Gensler at the Helm of the SEC

Since taking office as the SEC Chair in April 2021, Gary Gensler's SEC has been busy publishing rule proposals, targeting current hot-button areas such as issuer share repurchases, insider trading and cybersecurity as well as topics such as clawback rules and pay-versus-performance disclosure, which have been a part of the SEC agenda since the Dodd-Frank Act was enacted in 2010.

Proposed Rule on Share Repurchase Disclosures

On December 15, 2021, the SEC released a new proposed rule that would significantly expand required disclosure concerning an issuer's repurchases of its equity securities listed on a U.S. stock exchange or otherwise registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). If adopted, the proposed rules would: (i) require daily repurchase disclosure on a new Form SR, furnished to the SEC one business day after execution of the issuer's share repurchase order; (ii) require additional detail regarding the structure of an issuer's repurchase program and its share repurchases to be disclosed in periodic reports by amending Item 703 of Regulation S-K ("Regulation S-K"); and (iii) require information disclosed on Form SR or pursuant to Item 703 of Regulation S-K to be tagged with inline eXtensible Business Reporting Language ("Inline XBRL"). The full text of these proposed amendments is available here.

The comment period closed April 1, 2022, but the SEC has yet to adopt final rules concerning share repurchase disclosures. The SEC's spring 2022 Regulatory Flexibility Agenda (the "SEC's Agenda") targets October 2022 as the date for final action on this proposal. If adopted, the new requirements will significantly impact the share repurchase regime and may impose a significant burden on issuers that decide to implement a share repurchase program. For more information about the SEC's proposed rule on share repurchase disclosure, please see our Debevoise Debrief here.[1]

Rule 10b5-1 Trading Plans and Augmented Trading-Related Disclosure Requirements

On December 15, 2021, the SEC proposed amendments to Rule 10b5-1 under the Exchange Act. The proposed amendments aim to address "real cracks in the insider trading regime," as cited by the SEC Chair, through enhanced disclosure relating to trading activity by corporate insiders and issuers and by placing new conditions on the use of Rule 10b5-1 trading plans.

If adopted, the proposed amendments would: (i) add significant new conditions to the availability of the Rule 10b5-1 affirmative defense to insider trading liability under Rule 10b-5 of the Exchange Act, including a cooling-off period for issuers and directors and officers subject to the beneficial ownership reporting requirements of Section 16 of the Exchange Act ("Section 16 officers") after the date of adoption or modification of a trading arrangement that satisfies the requirements of Rule 10b5-1(c)(1); (ii) create new disclosure requirements under Regulation S-K regarding the adoption, modification and termination of Rule 10b5-1 and other trading arrangements; insider trading policies and procedures of issuers; and the timing of equity compensation awards to named executive officers or directors made in close proximity to the issuer's release of material nonpublic information; and (iii) augment the reporting obligations under Section 16 of the Exchange Act for transactions made pursuant to a Rule 10b5-1 trading arrangement and gifts. The full text of these proposed amendments is available here.

The comment period closed April 1, 2022, but the SEC has yet to adopt final rules concerning Rule 10b5-1 trading plans and insider trading-related disclosure. All five SEC commissioners voted in favor of the proposed amendments, expressing particular support for cooling-off periods for directors and Section 16 officers. While the commissioners expressed differing views on certain aspects of the proposed amendments, the likelihood that they will be adopted in some form is high given the SEC Chair's focus on addressing perceived abuse and investor concerns in this area. The SEC's Agenda targets April 2023 as the date for final action on this proposal. For more information about the SEC's proposed rule on Rule 10b5-1 trading plans and augmented trading-related disclosure requirements, please see our Debevoise Update here.

Proposed Cybersecurity Rules

On March 9, 2022, the SEC released a series of proposed cybersecurity rules, which expand upon the SEC's 2018 guidance on cybersecurity disclosures[2] by promulgating a substantial new cybersecurity regulatory framework that creates significant new disclosure obligations for public companies. The proposed rules place particular emphasis on timely and detailed disclosures of material cybersecurity incidents, as well as on periodic disclosure about cybersecurity risk management and governance.

One of the key elements of the proposed rules is a new Form 8-K line item requirement to disclose certain information within four business days of determining that a cyber incident is material. To avoid delays in assessing materiality, proposed Form 8-K Item 1.05 requires the determination of materiality to be made "as soon as reasonably practicable after discovery of the incident." This new Form 8-K requirement was an area of particular concern expressed in a number of comment letters, including a letter submitted by Debevoise & Plimpton,[3] due to the burdens associated with current disclosure of an ongoing cybersecurity incident. Additionally, proposed Item 106(d)(1) of Regulation S-K would require an issuer to disclose any material changes from the disclosures made in the initially filed Form 8-K Item 1.05 in the issuer's Quarterly Report on Form 10-Q or Annual Report on Form 10-K, as applicable, and proposed Item 106(d)(2) of Regulation S-K would require periodic disclosure of immaterial cybersecurity incidents that become material in the aggregate. Lastly, proposed Item 106(b) and (c) of Regulation S-K would increase the scope and detail of issuer disclosures on cybersecurity risk management, strategy and governance. The full text of the proposed amendments is available here.

The comment period for this rule proposal closed on May 9, 2022, but the SEC has yet to adopt final rules. While the reporting requirements have drawn criticism, it is uncertain whether the SEC will implement any substantive changes in the final rules. The SEC's Agenda targets April 2023 as the date for final action on this proposal. For more information about the SEC proposed rule on cybersecurity risk management, strategy, governance and incident disclosure, please see our more detailed Debevoise In Depth here.

Proposed Clawback Policy Rule

On June 8, 2022, the SEC reopened the comment period for the clawback rules initially proposed in July 2015 to implement Section 954 of the Dodd-Frank Act.[4] The 2015 proposed rules would direct the national securities exchanges to establish listing standards requiring listed issuers to adopt and comply with policies to recover, on a pre-tax basis, excess incentive-based compensation paid to executive officers in the event of financial statement errors, regardless of fault. In addition, listed issuers would be required to publicly disclose, among other things, the substance of their clawback policies and the details of their implementation and recovery efforts. The SEC previously reopened the comment period for the proposed rules in October 2021. For more information on the SEC's October 2021 reopening of the comment period for the proposed rules, please see our Debevoise Debrief here.

The most recent reopening of the comment period was intended to allow for comment on the additional analysis and data provided in a memo from the SEC's Division of Economic and Risk Analysis ("DERA"). The SEC's DERA memo highlights several findings related to costs and benefits of the 2015 proposed rule. First, there has been an increase in the voluntary adoption of clawback policies by public companies, which the SEC concluded reduces the anticipated benefits and also mitigates the anticipated costs of the proposed rules. Second, the total number of accounting restatements that may potentially result in a clawback would be increased if the proposed rules were extended to apply to all required restatements made to correct an error in previously issued financial statements (known as "little r" restatements), rather than only those restatements that correct errors that result in a material misstatement in previously issued financial statements (known as "Big R" restatements). The SEC estimates that "little r" restatements may account for three times as many restatements as "Big R" restatements in a given year and may be less likely to trigger a potential clawback because they are less likely to be associated with a decline in previously reported net income and are accompanied by smaller stock price reactions. The SEC found that the potential inclusion of "little r" restatements may increase both the benefits and costs of the proposed rules. For more information on the June 2022 reopening of the comment period for the proposed rules, please see our more detailed Debevoise Update here.

The long-awaited clawback rules to implement provisions of Section 954 of the Dodd-Frank Act are expected to be promulgated by the end of the year, with October 2022 targeted as the date for final action by the SEC.

Final Rules on Pay-Versus-Performance Disclosure

On August 25, 2022, the SEC adopted final rules implementing the "pay-versus-performance" provisions of the Dodd-Frank Act. New Item 402(v) of Regulation S-K requires the disclosure of information that shows the relationship between executive compensation actually paid and the financial performance of the issuer, which includes: (i) a new pay-versus-performance table; (ii) accompanying narrative or graphical disclosures; and (iii) a tabular list of the three to seven most important performance measures used by the issuer to link company performance to executive compensation actually paid to its Chief Executive Officer ("CEO") and named executive officers during the most recently completed fiscal year. The full text of the final rules is available here.

The new pay-versus-performance table must include: (i) the summary compensation table total and the total "executive compensation actually paid" for the CEO and for the other named executive officers as an average; (ii) total shareholder return ("TSR") for both the issuer and its peer group; (iii) net income; and (iv) a company-selected measure, reported for up to five years (starting with three years for the first filing). In addition, the accompanying narrative or graphical disclosures must provide a clear description of: (i) the relationship between executive compensation actually paid to the CEO and other named executive officers (on average) and (1) the issuer's TSR, (2) the issuer's net income and (3) the company-selected measure, in each case over the period of time included in the pay-versus-performance table; and (ii) the relationship between the issuer's TSR and its peer-group TSR, over the same period of years.

The final rules apply to all reporting companies other than emerging growth companies, registered investment companies, foreign private issuers and companies with reporting obligations only under Section 15(d) of the Exchange Act. Companies subject to the new rules must include these disclosures in proxy and information statements for fiscal years ending on or after December 16, 2022. For more information on the final SEC pay-versus-performance rules, please see our Debevoise In Depth Q&A here.

Looking Ahead

There are also a number of rule makings at the proposed rule stage on the SEC's Agenda. One such item up for consideration by the SEC's Division of Corporation Finance is a set of proposed rule amendments intended to enhance issuer disclosures regarding the diversity of board members and nominees. In 2016, then-SEC Chair Mary Jo White initially raised the idea to require "more meaningful" disclosure in proxy statements about board members and nominees and announced that the Division of Corporation Finance was preparing a rule proposal to that effect, although the rule proposal was never publicly released. It appears that the SEC will revisit this issue in early 2023, aligning with the recent focus on diversity and racial equity at both state and national levels.[5]

In recent years, bodies such as U.S. stock exchanges and state legislatures have issued rules and laws relating to board diversity, subjecting a growing number of companies to a variety of quotas and disclosure requirements. In 2021, the SEC approved the new Nasdaq listing rules requiring listed companies to have, or explain why they do not have, at least two diverse directors and to publicly disclose certain diversity statistics about their boards on an annual basis. At the state level, California was the first state to adopt legislation regarding board diversity, which required that publicly listed companies in California have a certain number of female directors and directors from underrepresented communities and imposed a fine for noncompliance. However, earlier this year, California's laws were struck down as unconstitutional. Several other states, including New York, Maryland and Illinois, have implemented diversity-disclosure requirements without instituting a quota for diverse board members.

At this time, it is uncertain whether the SEC will adopt an approach similar to California's or Nasdaq's or a pure reporting approach without a quota for diverse directors. The SEC Chair has previously indicated that the SEC may stick to a disclosure-based regime rather than a "comply or explain" approach. We will continue to track this issue and other rules proposed by the SEC.

Proposed Climate Change Disclosure Rules

On March 21, 2022, the SEC released its much-anticipated proposed rules on the "Enhancement and Standardization of Climate-Related Disclosures for Investors" (the "Proposed Climate Disclosure Rules") that would require all SEC registrants to disclose extensive climate-related information in their SEC filings. If adopted, the Proposed Climate Disclosure Rules would require registrants to include the following information in registration statements and periodic filings:

- greenhouse gas emissions, including Scope 1, Scope 2 and Scope 3 emissions;
- impact of climate-related risks on business outlook;
- processes for identifying, assessing and managing climate-related risks;
- oversight and governance of climate-related risks;
- impact of climate-related risks on consolidated financial statements;
- financial statement metrics regarding the impact of climate-related risks on the registrant's business and financial statements;
- public climate goals (if any); and
- transition plans related to climate change.

The Proposed Climate Disclosure Rules come against a backdrop of increasing focus on climate disclosures at the SEC. In 2021, the SEC issued comments relating to climate disclosures to more than 40 registrants. Additionally, in September 2021, the SEC's Division of Corporation Finance published a "Sample Letter to Companies Regarding Climate Change Disclosures," which focused on ways in which the SEC's existing principles-based disclosure requirements elicit climate-related information. Since the release of the sample letter in September 2021, the SEC has issued comment letters relating to climate disclosures to many more registrants, with at least 17 such reviews public as of the publication of this Update. In particular, the SEC has focused its attention on the disparity between certain of these issuers' climate-related public disclosures—such as on websites or in sustainability reports—and disclosures in their filings made under the Exchange Act.

While some view the Proposed Climate Disclosure Rules as necessary to address climate change risk and impacts, others view it as regulatory overreach by the SEC and overly burdensome on company resources. There has been significant discourse relating to the proposal, and the SEC received over 14,645 comments on the Proposed Climate Disclosure Rules during the public comment period that closed on June 17, 2022. Further action by the SEC on the proposed rule is anticipated to be adopted as early as October 2022.

If the Proposed Climate Disclosure Rules are adopted as final rules in their current or a substantially similar form, it is widely expected that one or more groups may bring a legal challenge to halt the rules. For example, two potential bases on which legal challenges could be brought are: (1) the SEC lacks authority to stipulate rules requiring climate-related disclosures; and (2) the Proposed Climate Change Rules involve "major questions" that should be addressed by the Congress and not the SEC. In particular, the Supreme Court's recent decision in *West Virginia v. EPA* relating to the "major questions" could invigorate challenges to the Proposed Climate Disclosure Rules. Notwithstanding the October 2022 target in the SEC agenda, the anticipated legal challenges to the rule could delay implementation of the rule, in whole or in part, well beyond 2022 or 2023.

Looking ahead, we expect the SEC to continue to utilize its examination and review authority to press for additional climate disclosure in tandem with the rulemaking process for the Proposed Climate Disclosure Rules. As illustrated by the September 2021 sample letter, the SEC can be expected to use its examination and review authority to require registrants to make climate-related disclosures similar to may of the enhancements set forth in the Proposed Climate Disclosure Rules.

For more information about the Proposed Climate Disclosure Rules, please see our Debevoise In Depth here.

Enforcement Activity

Inaugural Insider Trading Cases in the Digital Asset Space

As the regulation of digital assets continues to evolve, including with regard to such fundamental questions as which regulator will have primary regulatory oversight of the landscape and whether and how digital assets are deemed securities, recent enforcement developments related to digital assets have raised additional key questions about the applicable regulatory framework and the government's theories in these cases.

Chastain—First Digital Asset Insider Trading Case

On June 1, 2022, the DOJ charged Nathaniel Chastain, a former products manager at the non-fungible tokens ("NFT") and crypto collectibles marketplace OpenSea, with one count each of wire fraud and money laundering for his alleged insider trading of NFTs.[6] As part of his role at OpenSea, Chastain was responsible for selecting the NFTs that would be featured on the OpenSea website.[7] Based on historical patterns, featured NFTs, along with other NFTs by the same creator, would be expected to substantially appreciate in price. According to the indictment, during a four-month period, Chastain "misappropriated OpenSea's confidential business information about what NFTs were going to be featured on its homepage" and used that information to purchase several NFTs before they were featured, in "violation of the duties of trust and confidence he owed to his employer[.]"[8] Chastain then sold the NFTs at a profit shortly after they were featured. In addition, Chastain allegedly tried to conceal his trading activity by using anonymous digital currency wallets and anonymous accounts on OpenSea.[9]

Chastain represents the federal government's first indictment relating to the insider trading of a digital asset. Significantly, the case was brought under the federal wire fraud statute, 18. U.S.C. § 1343, as opposed to the Securities Exchange Act of 1934 (the "Exchange Act") pursuant to 15 U.S.C. § 78j and 17 C.F.R. § 240.10b-5, which the government typically uses to charge insider trading. This decision appears to stem from the unsettled view as to whether an NFT is a security and indicates the government's likely preference to avoid litigating that issue in its first digital asset insider trading case. However, charging Chastain under the wire fraud statute may pose separate challenges for the government, especially in light of the Supreme Court's view that the wire fraud statute is "limited in scope to the protection of property rights" and that the object of the fraud must be money or property.[10] Although the Supreme Court has held that confidential business information is a property right,[11] the contours of "property" remains unclear in cases where the government uses the wire fraud statute to charge atypical insider trading schemes.[12] In addition, given that Chastain is not alleged to have disclosed information about the NFTs, the government's theory—which appears to be that Chastain's scheme deprived OpenSea of its exclusive property right in confidential business information regarding featured NFTs—will likely be scrutinized. Overall, Chastain offers useful insight into the government's approach to novel insider trading cases concerning digital assets. For more information about Chastain and its implications, please see our Debevoise FinTech Blog post here.

Wahi—First Cryptocurrency Insider Trading Tipping Case

The second case that made the headlines in the digital asset space over the summer was *United States v. Wahi et al*. On July 21, 2022, the DOJ and the SEC announced parallel actions against Ishan Wahi, a former product manager at Coinbase—one of the largest cryptocurrency exchanges in the world—along with his brother, Nikhil Wahi, and a friend for engaging in an insider trading scheme.[13] The alleged conduct in *Wahi* followed a somewhat similar pattern to that in Chastain. According to the charging documents, Ishan Wahi was involved in the confidential process of listing new digital assets on Coinbase's platforms and had knowledge of which digital assets Coinbase was planning to list, along with the timing of public announcements. The market value of assets typically significantly increased after a Coinbase listing announcement.[14] Ishan Wahi allegedly used the information obtained from his employment at Coinbase to tip Nikhil Wahi or his friend about the timing of listings so that they could acquire digital assets shortly before the public announcement and sell after listing. The indictment also alleged that Nikhil Wahi and the friend attempted to conceal their crypto asset transactions by using accounts at central exchanges held in the names of others, transferring assets through multiple anonymous Ethereum blockchain wallets, and creating and using new blockchain wallets without any prior transaction history.[15] According to the government, the defendants collectively generated at least $1.5 million as a result of the scheme.[16]

On September 12, 2022, Nikhil Wahi pled guilty to one count of conspiracy to commit wire fraud in connection with the scheme.[17] In a statement announcing the guilty plea, U.S. Attorney Damian Williams emphasized that "[f]or the first time ever, a defendant has admitted his guilt in an insider trading case involving the cryptocurrency markets" and warned that the guilty plea "should serve as a reminder to those who participate in the cryptocurrency markets that the Southern District of New York will continue to steadfastly police frauds of all stripes and will adapt as the technology evolves."[18]

The parallel DOJ and SEC actions in *Wahi* have important implications in the digital asset space. First, the DOJ's indictment in *Wahi*, as in *Chastain*, alleged insider trading under the wire fraud statute, 18 U.S.C. § 1343, rather than the more traditional Exchange Act provisions. With that decision, the DOJ again sidestepped the question of whether digital assets are securities. According to media reports, the issue came up at Nikhil Wahi's allocution, during which Wahi argued that while he "did not believe crypto was a security and [he] relied on the statements of Coinbase and others that cryptocurrency is not a security," he knew "it was wrong to receive Coinbase's confidential information and make trading decisions based on that confidential information[.]"[19] In response, the government noted that the question of whether certain crypto assets are securities is "not an issue before [the] court" nor "an element of the offense to which the defendant is pleading guilty."[20] In a likely attempt to secure the use of the wire fraud statute in digital asset insider trading actions independent from a challenging determination about the nature of assets, the government noted that its decision to resolve the case with a wire fraud plea should not be understood "as a statement about whether these crypto assets at issue were in fact securities or that the defendant needed to know that they were securities[.]"[21]

On the other hand, the SEC could not easily bypass the question, given that the agency may only pursue charges under the securities fraud statutes that presuppose the existence of a security.[22] For that reason, the SEC brought charges under Section 10(b) of the Exchange Act. The SEC thus was required to, and did, take the position that certain digital assets traded as part of the scheme in *Wahi* were securities. In particular, the SEC's complaint alleged that *Wahi* and his co-defendants traded in at least 25 digital assets, "at least nine" of which involved securities.[23] However, the agency did not provide guidance in the complaint as to how the assets deemed to be securities differed from the other traded assets. As the government's second digital asset insider trading case, *Wahi* provided further insight into the government's enforcement strategy but also left a number of significant questions unanswered. For more information about *Wahi* and its potential impact when considered alongside Chastain, please see our Debevoise FinTech Blog post here.

Takeaway

The different insider trading charging theories used by the DOJ and the SEC in the *Chastain* and *Wahi* matters demonstrate that conduct arising from trading in digital assets will continue to stir the debate on the characterization of those assets, with major implications on insider trading law. As part of his latest comments on the issue, SEC Chairman Gary Gensler reiterated his view during the SEC Speaks 2022 conference that "[o]f the nearly 10,000 tokens in the crypto market . . . the vast majority are securities."[24] However, regulatory guidance on the issue of where the line is being drawn between security and non-security tokens remains piecemeal. In the same SEC Speaks conference, SEC Commissioner Mark Uyeda discussed the shortcomings of regulation by enforcement and explained that it "fails to provide the nuanced and comprehensive guidance that allows market participants to tailor their practices."[25] In light of Commissioner Uyeda's statement that market participants should be able to "look at the Commission's rules rather than compare how their particular facts and circumstances may differ from those in a specific enforcement case,"[26] it is reasonable to expect that the nature and extent of insider trading actions involving digital assets will evolve and develop in parallel with further regulatory guidance on the issue.

SEC Charges Former Nine-Term Congressman with Insider Trading

On July 25, 2022, former Congressman Stephen Buyer, who represented Indiana in the U.S. House of Representatives between 1993 and 2011, was arrested as part of an insider trading probe involving four separate cases against nine individuals, including a former FBI agent trainee, a New York Investment banker and executives at Silicon Valley technology companies.[27] While Buyer is not a sitting member of Congress, the criminal case against him—alongside the parallel SEC action—demonstrates the government's continued interest in pursuing insider trading cases involving members of Congress, especially following the scrutiny over congressional trading activity during the height of the COVID-19 pandemic.[28]

According to the SEC's complaint, Buyer allegedly used inside information he obtained through his consulting firm in two separate instances between 2018 and 2019 to buy and sell stock and made more than $300,000 in profits from his trading activity. After leaving Congress in 2011, Buyer formed a consulting firm, where he leveraged his congressional experience to work on issues related to the U.S. Department of Veterans Affairs and the telecommunications industry.[29] At the end of March 2018, while consulting for T-Mobile US, Inc. ("T-Mobile"), Buyer learned about T-Mobile's plans to acquire Sprint Corporation ("Sprint") during a golf trip he attended with T-Mobile's Vice President of Federal Legislative Affairs.[30] Importantly, under the consulting agreement with T-Mobile, Buyer agreed to protect T-Mobile's confidential information. In addition, the SEC alleged that the T-Mobile VP expected Buyer to keep confidential the information about the contemplated acquisition and that by April 2018, T-Mobile had explained the confidentiality requirement to its consultants, including Buyer.[31] *Id.* at 23-24. However, Buyer allegedly began purchasing Sprint stock the day after he played golf with the T-Mobile VP and spread his purchases across four accounts, including retirement accounts of Buyer and his friend and a joint account owned by Buyer and his cousin. Interestingly, the SEC complaint noted that Buyer "attempted to cover up the fact that his purchases were based on material nonpublic information" by printing out a public document from an investment research company and making handwritten notes on the document "to create the false impression that his purchases were based on information in the [research document] and not on material nonpublic information." [32]When the planned Sprint acquisition was disclosed publicly in April 2018, Buyer's Sprint shares appreciated by approximately $107,000. Buyer eventually sold all of the Sprint shares, generating approximately $126,000 in actual profits.[33]

The SEC also alleged that Buyer engaged in a similar scheme involving another consulting client, Guidehouse LLP ("Guidehouse"), in 2019. According to the complaint, Buyer's consulting firm entered into an agreement with Guidehouse, under which Buyer agreed to keep Guidehouse's "business matters" confidential.[34] Between May and June 2019, Guidehouse and Navigant Consulting, Inc. ("Navigant") engaged in confidential discussions about a potential business combination. The SEC alleged that through several phone and text conversations, including with the then-Chief Counsel for the House Committee on Veterans' Affairs and a Guidehouse Managing Director, "combined with his extensive knowledge" of the industry, Buyer understood that Guidehouse planned to acquire Navigant.[35] The day after his discovery, Buyer began purchasing Navigant stock and spread purchases across six separate accounts, including his wife's account. Similar to the Sprint stock purchase, the SEC argued that Buyer attempted to hide the fact that his purchases were based on material nonpublic information by identifying an investment report recommending Navigant and e-mailing the report to himself and his son right before his purchases to create a false impression that his purchases were based on the investment report. Buyer sold all the shares within a two-month period after the Navigant acquisition was announced.[36] Buyer allegedly gained approximately $227,000 in profits.

As a result of the two separate schemes described above, the SEC sought disgorgement from both Buyer and his wife, civil penalties and a permanent prohibition banning Buyer from acting as an officer or director of an issuer.

Buyer's former role in Congress was called out in the SEC's announcement, as Gurbir Grewal, Director of the SEC Enforcement Division, noted that "[w]hen insiders like Buyer—an attorney, a former prosecutor, and a retired Congressman—monetize their access to material, nonpublic information . . . they . . . undermine public trust and confidence in the fairness of our markets[.]"[37] In addition, commenting on Buyer's arrest, Damian Williams, the U.S. Attorney for the Southern District of New York, said "My Office remains as committed as ever to rooting out insider trading in all forms."[38]

As previewed above, the parallel SEC and DOJ actions against Buyer follow increasing criticism of members of Congress for engaging in trades while they may possess nonpublic information. In addition to legislative developments, such as proposed legislation to ban members of Congress from trading individual stocks,[39] enforcement agencies have shown willingness to pursue cases involving members of Congress. For example, in November 2021, the SEC obtained a court order to enforce a subpoena for testimony issued to Gerald Fauth as part of the SEC's investigation into whether "certain individuals, including Mr. Fauth and his brother-in-law, U.S. Senator Richard Burr of North Carolina, may have violated the antifraud provisions of the federal securities laws, including the STOCK Act, by engaging in unlawful insider trading."[40] According to the SEC's litigation release, the SEC is investigating Senator Burr's sale of approximately $1.6 million worth of stock while in possession of "potentially material nonpublic information concerning COVID-19 and its potential impact on the U.S. and global economies."[41] As the cases against former Congressman Buyer and current Senator Burr develop, they will continue to evolve the framework for "congressional insider trading" and related enforcement.

SEC v. Nicholas Daniel: Family Conversations and MNPI

In a case demonstrating yet another example of family conversations drawing scrutiny from the SEC, on August 17, 2022 the Commission announced charges against Nicholas Daniel, a close relative of a senior employee at Cypress Semiconductor Corporation ("Cypress"), for trading Cypress stock based on nonpublic information obtained during a call between Daniel and his mother. According to the SEC's complaint, between February and June 2019, Daniel's mother lived with a relative whose work at Cypress involved nonpublic matters related to the potential acquisition of the company.[42] Daniel was aware that the relative was a senior employee at Cypress, and he communicated frequently with his mother and the relative.

In May 2019, a media article stated that Cypress was "exploring strategic options including a potential sale after receiving takeover interest," but "[n]o final decision has been made and it could opt to remain independent."[43] On the same day, Daniel had a phone call with his mother, who was at the relative's home, and learned during the call that the relative was "working on urgent issues . . . related to the article's publication and that an acquisition of Cypress would likely occur soon."[44] The SEC alleged that Daniel "understood that he was expected not to trade in Cypress securities" based on this material nonpublic information.[45] However, almost immediately after the phone call, Daniel—who had not used his brokerage account since 2009 and had a balance of around $34 in his account—called his brokerage firm to ensure that his account was active and able to trade and receive money. Daniel also borrowed $50,000 from his mother, explaining that he needed the money for a real estate transaction. The next day, Daniel bought 1,355 Cypress call option contracts, allegedly based on the material nonpublic information he had obtained during the phone call with his mother. When Cypress announced that it would be acquired by Infineon Technologies AG on June 3, 2019, Cypress's stock price increased by 27.9%. Daniel then sold all of his call option contracts and made a profit of approximately $350,000.[46]

As a result, Daniel agreed to settle the SEC's charges and pay more than $738,000, including the disgorgement of his entire profit and a penalty for the same profit amount. Aside from the cautionary tale concerning casual family conversations, the case against Daniel is helpful in demonstrating how the confirmed information Daniel obtained from his mother was materially different than the rumor-type information in the published article, leading to insider trading charges.

CEO and Former President of Cheetah Mobile Inc. Charged with Insider Trading Following Sales through Purported 10b5-1 Program

On September 21, 2022, the SEC charged a current and a former executive of Cheetah Mobile Inc. ("Cheetah Mobile") with insider trading of the company's American Depository Shares ("ADS") while in possession of material nonpublic information.[47]

According to the SEC's Order, Cheetah Mobile was a developer of mobile and computer applications and generated up to one third of its revenues from a single advertising partner.[48] In the summer of 2015, the advertising partner informed Cheetah Mobile that a change to its algorithm responsible for determining fees paid for ad placements could halve the revenues paid to Cheetah Mobile unless its placements improved.[49] From summer 2015 through March of 2016, Cheetah Mobile's advertising revenue did in fact decline materially due to lost revenues from the advertising partner, which respondent Fu attributed to "seasonality."[50] The company did not disclose on its Form 20-F the known negative trend in revenue for the year ended December 31, 2015.[51]

In spite of these issues, respondents Fu and Xu established a 10b5-1 trading plan for their holdings of Cheetah Mobile in March 2016. The SEC's Order notes that 96,000 Cheetah Mobile ADS were sold under the March trading plan. In May 2016, Cheetah Mobile disclosed lower-than-expected second-quarter revenue guidance, resulting in a stock price decline of approximately 18%.[52] The sales pursuant to the March plan meant that Fu and Xu avoided losses of approximately $203,290 and $100,127, respectively.[53]

In addition to forward-looking five-year undertakings regarding the maintenance and disclosure of 10b5-1 plans entered into by Fu, the SEC assessed Fu a civil money penalty of $556,590.[54] Xu was assessed a civil money penalty of $200,254.[55] The case shows that merely entering a 10b5-1 plan is not enough to protect executives from the antifraud provisions of the Exchange Act when combined with disclosure failures and materially misleading public statements to investors.

GE Agrees to Pay $200 Million to Settle Disclosure Failure Charges with the SEC

On December 9, 2020, the SEC announced settled charges against General Electric Co. ("GE") for multiple disclosure failures stemming from the company's financial reporting on its power and insurance businesses.[56] GE later disclosed its challenges with these key business segments in 2017 and 2018, which the SEC found contributed to a decline in the company's stock price of almost 75%.

The SEC found that from 2015 through 2017, GE failed to sufficiently disclose the nature of its financial reporting on its power and insurance businesses in three respects. First, the SEC found that GE failed to disclose that its power business generated earnings by reducing its cost projections for service contracts, which increased the contract profit margin that it then applied to recognize revenue on its service contracts under the percentage-of-completion method. Second, the SEC found that GE failed to disclose that it increased its industrial cash collections by changing its practices to "factor" long term receivables from GE Power's multi-year service agreements to GE's subsidiary, GE Capital, a practice referred to as "deferred monetization" that depleted future cash flows by moving them into the present. And third, the SEC found that GE failed to disclose its rising costs associated with a number of "badly underpriced" long-term care insurance policies that it insured, which the SEC characterized as a known trend and uncertainty that was required to be disclosed pursuant to Item 303 of Regulation S-K.

As part of its settlement with the SEC, GE agreed to pay a penalty of $200 million and report to the SEC for a one-year period on the status of its remediation, implementation, auditing and testing of internal accounting and disclosure controls and compliance measures related to its insurance and power businesses. The SEC did not bring charges against individuals, though its press release noted that its investigation was ongoing.

Under Armour Agrees to Pay $9 Million to Settle SEC Disclosure Charges Related to "Pull Forwards"

On May 3, 2021, Under Armour, Inc. ("Under Armour") agreed to settle SEC charges that it failed to disclose the negative impact of its practice of accelerating, or "pulling forward," sales expected for future quarters into current quarters in an effort to meet quarterly sales and earnings targets between the third quarter of 2015 and the fourth quarter of 2016.[57] Similar to its settlement with GE noted above, the SEC's charges against Under Armour focused solely on its disclosures and did not find that the company's practices violated generally accepted accounting principles ("GAAP"). This case is yet another example of how compliance with GAAP will not protect a company from claims of misleading financial disclosures.

The SEC found that Under Armour's senior management directed sales personnel to reach out to customers and offer sales incentives such as price discounts and extended payment terms so they would take delivery of products earlier than originally scheduled. While these practices led to increased sales volume at quarter-end, the company relied heavily on pull forwards to meet analysts' revenue estimates and they were unsustainable. Accordingly, the SEC found that Under Armour's use of pull forwards created known trends that the company failed to disclose as required by Item 303 of Regulation S-K. In addition to not disclosing these pull forwards, the SEC found that Under Armour made misleading statements on earnings calls by attributing its ability to meet analyst earnings estimates to growth in various product lines, which the company inaccurately said remained intact.

Under Armour agreed to a $9 million penalty relating to violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act and Section 13(a) of the Exchange Act and Rules 13a-1, 13a-11, 13a-12 and 12b-20 thereunder. No individuals were charged.

Boeing Pays $200 Million to Settle SEC Disclosure Charges Related to the 737 MAX

On September 22, 2022, the SEC settled a case with The Boeing Company ("Boeing") and its former CEO arising from public statements following two crashes involving Boeing's 737 MAX airplane in 2018 and 2019.[58] Boeing agreed to pay $200 million to settle the charges.

According to the SEC's Order, both crashes involved issues with the 737 MAX's Characteristics Augmentation System ("MCAS"), which was designed to help stabilize the airplane without input from the crew. The SEC's Order found that after the first crash, Boeing and its former CEO were aware of a "safety issue" involving MCAS—and that the company was already working to redesign the software to address the issue—but assured the public in a press release that the 737 MAX was "as safe as any airplane that has ever flown the skies" without specifically disclosing the "safety issue" or the contemplated software change. Similarly, after the second crash, Boeing's former CEO stated during an earnings call that "there was no surprise or gap or unknown … that somehow slipped through [the] certification process" for the 737 MAX. The SEC

Order found that, prior to this statement, Boeing had uncovered documents and had completed a compliance review that identified certain "documentation gaps and inconsistencies" in the certification process.

Accordingly, the SEC found that these statements violated Sections 17(a)(2) and 17(a)(3) of the Securities Act. Boeing settled without admitting or denying the findings in the SEC Order.

AT&T's Regulation FD Case Likely Headed for Trial as Judge Rejects Motions for Summary Judgment

On September 8, 2022, U.S. District Judge Paul Engelmayer rejected AT&T Inc's ("AT&T") motion for summary judgment in a suit filed by the SEC against AT&T and three executives alleging that the defendants selectively disclosed material nonpublic information ("MNPI") in private calls to research analysts in 2016. The SEC's complaint, filed in the U.S. District Court for the Southern District of New York on March 5, 2021, alleged that AT&T violated Regulation Fair Disclosure ("Regulation FD") and the reporting provisions of the Exchange Act and that the three Investor Relations executives who made the calls to analysts aided and abetted those violations.

As we wrote in our Debrief in March 2021, the SEC alleged that AT&T's CFO, hoping to avoid a third consecutive quarter of missing analysts' consensus revenue estimate, instructed the company's Investor Relations Director to "work the analysts who still have [revenue from smartphone sales] too high." The Director then asked his team to "walk the analysts down" from their initial estimates. During the six weeks before AT&T announced its quarterly results, the three Investor Relations executives named in the complaint made private phone calls to 20 equity stock analysts. In those calls, the executives purportedly disclosed MNPI including AT&T's projected and actual smartphone sale rates and its projected and actual revenue from wireless equipment. In some of those calls, the executives allegedly misrepresented AT&T's internal results as publicly available consensus estimates, conduct which the SEC pointed to as evidence that they understood the disclosures were prohibited. The SEC's complaint also noted that AT&T's Regulation FD training, as provided to the Investor Relations Department, labelled both revenue information and smartphone sales data as being material information.

As a result of those calls, the complaint alleged, each of the 20 analysts revised their initial revenue forecasts downward, many of them citing record-low smartphone sales and related declines in revenue. Many of the analysts reduced their estimates to the level that AT&T had internally forecasted or planned to report. The revised research reports decreased the overall consensus revenue estimate for AT&T, enabling the company's first-quarter earnings, announced at the end of April 2016, to beat the final consensus revenue estimate by less than $100 million.

AT&T and the SEC each moved for summary judgment, but each of their motions was denied. In his 129-page decision, Judge Engelmayer analyzed three key elements in dispute—whether the information in question was: (1) material; (2) nonpublic; and (3) selectively disclosed with the requisite intent (i.e., scienter or recklessness).

In concluding that the information was material, Judge Engelmayer noted that AT&T internally identified revenue and sales as key financial metrics both for the operation of its business and for its stockholders. In fact, AT&T's internal policies and training documents, including its Regulation FD training materials, specifically instructs employees that revenues and sales data were material to investors. Moreover, Judge Engelmayer cited evidence that AT&T's executive suite considered the company's total revenue, equipment revenue and upgrade rate metrics in Q1 2016 to be material, including numerous e-mail exchanges between executives, including the CFO and CEO, that emphasized the importance of these metrics and their impact on AT&T potentially making or missing analysts' consensus as to total revenue.

Judge Engemayer also concluded that the information was nonpublic. In support of this conclusion, he noted that it was undisputed that AT&T had not publicly revealed its Q1 2016 total revenue, equipment revenue and upgrade rate prior to its earnings release on April 26, 2016. Furthermore, the evidence showed that during the private phone calls between the Investor Relations executives and analysts, the analysts were provided updated metrics consistent with AT&T's unreleased internal numbers. Many analysts updated their models immediately after these private conversations, from which Judge Engelmayer inferred that new nonpublic information had been disclosed on the calls, whether explicitly or by indirect "guidance."

The only element on which Judge Engelmayer did not find clearly in favor of the SEC was intent. In fact, the only reason summary judgment was not granted in favor of the SEC was because Judge Engelmayer found that there was substantial evidence based upon which a jury could find for either side as to whether the named executives in fact knew, or were reckless in not knowing, that they were disclosing information that was both material and nonpublic. On one hand, there was a systematic campaign initiated by AT&T executives to lower analysts' estimates, which involved clear violations of internal policies relevant to Regulation FD, such as prohibitions on contacting analysts because their estimates were believed to be incorrect. On the other hand, there was an absence of evidence that any person at AT&T expressed any alarm or reservation about the legality of the ongoing selective disclosures, suggesting that there may not have been consciousness of wrongdoing on the part of any AT&T executives. Judge Engelmayer ultimately decided that a defendant's subjective state of mind, including whether he took action knowing it was a violation of a legal standard, is a determination that should be made by the jury.

This case provides a good reminder that although Regulation FD enforcement actions by the SEC are infrequent, and litigated cases even more so, the SEC remains committed to zealously pursuing Regulation FD violations when it believes enforcement action is necessary.

Former Bank Vice President and Friend Settle Insider Trading Charges

On June 30, 2021, the DOJ and the SEC announced settlements with Mounir Gad, a former Silicon Valley Bank executive, and his friend, Nathan Guido.[59] Gad agreed to plead guilty to securities fraud for tipping Guido about private equity transactions Gad learned about between 2015-2016, while Guido entered into a deferred prosecution agreement with the DOJ. In addition, both individuals agreed to settle charges with the SEC. Gad's case is noteworthy both because of Gad's level of knowledge relating to insider trading rules and his conduct following his guilty plea.

According to the SEC's Order, Gad worked for a California-based bank as vice president in a group that assisted private equity clients in financing acquisitions of companies.[60] According to the DOJ announcement, Gad "was a trained investment banking professional who repeatedly received training and guidance about the proper use of material nonpublic and confidential information."[61] He also had signed a confidentiality agreement with his employer in relation to information learned during his employment.

As part of his role, Gad had access to confidential information about potential acquisitions that the bank was working on, including those in which he was not directly involved.[62] On three occasions between 2015 and 2016, Gad tipped Guido with material, nonpublic information about upcoming acquisitions. Among the methods for conveying information to Guido about potential trades, the SEC Order highlighted that Gad: (1) texted Guido initials of the company whose stock Guido was to purchase; and (2) suggested that the two communicate using the WhatsApp messaging service because the application was "encrypted."[63] On at least one occasion, Guido conveyed his agreement to share the profits of his planned trades with Gad. Guido bought stock in three target companies based on Gad's tips and sold the stock after the acquisitions were announced, making $51,700 in profits and sharing $11,000 of that amount with Gad by giving him cash.

Gad and Guido consented to a cease-and-desist order with the SEC and agreed to pay $51,700 and $40,700 in civil penalties, respectively.[64] While Gad agreed to plead guilty to the two counts of securities fraud charged by the DOJ, new obstruction-related charges were filed against him on November 23, 2021, relating to document tampering, identity theft and criminal contempt.[65] According to the criminal complaint, Gad submitted 12 letters of support in advance of his sentencing, half of which were allegedly altered or entirely fabricated.[66] This came into light when one of Gad's references notified the court that her letter included statements not made by her.[67] If convicted, Gad faces a maximum statutory penalty of 20 years in prison and $250,000 fine for document tampering and five years in prison and $250,000 fine for identity theft.

Misleading Annuity Account Statement Disclosures Result in SEC Enforcement

On July 18, 2022, the SEC announced a $50 million settlement resulting from alleged fraud committed by Equitable Financial Life Insurance Company ("Equitable Financial") in providing account statements to 1.4 million investors that the SEC alleged included materially misleading statements and omissions concerning investor fees paid in connection with certain variable annuity products.[68]

The SEC concluded that Equitable Financial's presentation of fees in its account statements created a false impression that all fees paid by investors were being disclosed even though the account statements only listed certain administrative, transaction and plan operating fees. In fact, the fees disclosed in the account statements were only a small fraction of the overall fees being paid by investors due to the more significant Separate Account Expenses and Portfolio Operating Expenses that were not included within the "Fees and Expenses" line item on the account statements. For example, though quarterly account statements would often report "Fees and Expenses" as $0.00 for the quarter, significant Separate Account Expenses and Portfolio Operating Expenses were nonetheless incurred.

Notably, the SEC pointed to the fact that Equitable Financial was made aware of the misleading nature of its fee disclosures but chose to only selectively modify its statements. In May 2017, Equitable Financial was notified that its account statements were unclear by an advisory committee to one of the school districts with which Equitable Financial did most of its business for the annuity product at issue. As a result, Equitable Financial agreed to start listing the Separate Account Expenses and Portfolio Operating Expenses at the end of the account statements for all investors from that particular school district. With respect to all other investors, however, Equitable Financial made no corresponding updates to its account statements and continued reporting fees and expenses in the same allegedly misleading manner.

The SEC found that Equitable Financial violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, which prohibit any person in the offer or sale of securities from obtaining money or property by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make statements made not misleading and from engaging in any practice or course of business that operates or would operate as a fraud or deceit upon the purchaser.[69] To support these charges, the SEC noted that Equitable Financial would often include advertisements in the account statements encouraging investors to increase their investments, and investors often decided whether to continue their investments or whether to increase or decrease their periodic investment amounts based on the misleading account statements that Equitable Financial provided.

Equitable Financial settled without admitting or denying the SEC's findings and agreed to both modify applicable account statements and pay a civil monetary penalty of $50 million.

Notes

1 In addition, issuers considering a stock repurchase program should be aware of the implications of the Inflation Reduction Act signed into law on August 16, 2022, which imposes a non-deductible 1% excise tax on the fair market value of stock repurchased by publicly traded corporations or their specified affiliates. For more information about the Inflation Reduction Act, please *see* our Debevoise Update here.

2 For more information about the SEC's 2018 guidance on public company cybersecurity disclosure and governance, please *see* our Client Update here.

3 The full text of the comment letter submitted by Debevoise & Plimpton is available here.

4 For more information on the SEC's 2015 proposed rules, please *see* our Client Update here.

5 For more information about the Nasdaq board-diversity listing rule, please *see* our more detailed Governance Update here.

6 DOJ Press Release No. 22-180, *Former Employee of NFT Marketplace Charged in First Ever Digital Asset Insider Trading Scheme* (June 1, 2022), https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-charged-first-ever-digital-asset-insider-trading-scheme.

7 *See* Indictment at ¶ 2, United States v. Chastain, 22-cr-305 (2022), https://www.justice.gov/usao-sdny/press-release/file/1509701/download.

8 *Id*. at ¶¶ 1, 3.

9 *Id*. at ¶ 3.

10 *See* Kelly v. United States, 140 S. Ct. 1565, 1566 (2020) (citing McNally v. United States, 483 U.S. 350, 360 (1987)).

11 *See* Carpenter v. United States, 484 U.S. 19 (1987).

12 *See* Kelly, 140 S. Ct. at 1568–69; Blaszczak v. United States, 141 S. Ct. 1040, 1040 (2021).

13 DOJ Press Release No. 22-232, *Three Charged in First Ever Cryptocurrency Insider Trading Tipping Scheme* (July 22, 2022), https://www.justice.gov/usao-sdny/pr/three-charged-first-ever-cryptocurrency-insider-trading-tipping-scheme; SEC Press Release No. 2022-127, *SEC Charges Former Coinbase Manager, Two Others in Crypto Asset Insider Trading Action*, (July 21, 2022), https://www.sec.gov/news/press-release/2022-127.

14 *See* Indictment at ¶ 2, United States v. Wahi et al., 22-cr-392 (2022), https://www.justice.gov/usao-sdny/press-release/file/1521186/download.

15 *Id.* at ¶ 14.

16 *Id*. at ¶ 3.

17 DOJ Press Release No. 22-287, *Tippee Pleads Guilty in First Ever Cryptocurrency Insider Trading Case* (September 12, 2022), https://www.justice.gov/usao-sdny/pr/tippee-pleads-guilty-first-ever-cryptocurrency-insider-trading-case.

18 *Id.*

19 Jane Wester, *Brother of Ex-Coinbase Employee Pleads Guilty to Wire Fraud Conspiracy*, N.Y.L.J. (Sept. 12, 2022), https://www.law.com/newyorklawjournal/2022/09/12/brother-of-ex-coinbase-employee- pleads-guilty-to-wire-fraud-conspiracy/#:~:text=Nikhil%20Wahi%2C%20the%20brother%20of,conspiracy%20to%20commit%20wire%20fraud.

20 *Id.*

21 *Id.*

22 *See* Sections 10(b), 21, 21A and 27 of the Exchange Act, 15 U.S.C. §§ 78j(b), 78u, 78u-1 and 78aa (vesting the Commission with broad jurisdiction to regulate the securities markets and to bring actions for violations of the federal securities laws, including fraud and insider trading).

23 *See* Compl. at ¶¶ 7, 89–94, SEC v. Ishan Wahi et al., 22-cv-01009 (W.D. Wash. 2022).

24 SEC Speeches and Statements, *Kennedy and Crypto* (Sept. 9, 2022), https://www.sec.gov/news/speech/gensler-sec-speaks-090822.

25 SEC Speeches and Statements, Remarks at the "*SEC Speaks" Conference 2022* (Sept. 9, 2022), https://www.sec.gov/news/speech/uyeda-speech-sec-speaks-090922.

26 *Id*.

27 DOJ Press Release No. 22-238, *U.S. Attorney Announces Charges in Four Separate Insider Trading Cases Against Nine Individuals, Including Former U.S. Congressman, Former FBI Agent Trainee, Tech Company Executives, and Former Investment Banker* (July 25, 2022), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-charges-four-separate-insider-trading-cases-against-nine.

28 *See, e.g.*, Alice Miranda Ollstein, *Lawmakers Made Hundreds of Stock Transactions During Pandemic, Watchdog Finds*, Politico (Apr. 29, 2020), https://www.politico.com/news/2020/04/29/congress-stocks-coronavirus-221742 (reporting that Republican and Democratic lawmakers, some of whom received closed-door briefings on the pandemic from health and national security officials, bought and sold stocks throughout the COVID-19 pandemic).

29 *See* Compl. at ¶ 1, SEC v. Buyer, 22-cv-06279 (S.D.N.Y. 2022).

30 *Id*. at ¶¶ 22-23.

31 *Id*. at ¶¶ 23-24.

32 *Id*. at ¶ 29.

33 *Id*. at ¶ 33.
34 *Id*. at ¶ 36.
35 *Id*. at ¶ 44.
36 *Id*. at ¶ 54.
37 SEC Press Release No. 2022-128, SEC *Charges Former Indiana Congressman with Insider Trading* (July 25, 2022), https://www.sec.gov/news/press-release/2022-128.
38 *See* Matthew Goldstein, *Ex-Congressman, Banker and F.B.I. Trainee Are Charged with Insider Trading*, N.Y. Times (July 25, 2022), https://www.nytimes.com/2022/07/25/business/sec-insider-trading.html.
39 *See* Deirdre Walsh, *Bipartisan Duo Say Voters Want Congress to Stop Trading Stocks, Leaders Open to a Vote*, NPR (Feb. 9, 2022), https://www.npr.org/2022/02/09/1079364990/bipartisan-duo-say-voters-want-congress-to-stop-trading-stocks-leaders-open-to-a.
40 SEC Litigation Release No. 25261, *SEC Obtains Court Order to Enforce Investigative Subpoena for Testimony* (Nov. 10, 2021), https://www.sec.gov/litigation/litreleases/2021/lr25261.htm.
41 *Id*. According to news reports, a DOJ criminal investigation into Senator Burr's conduct was closed without charges in January 2021, while the SEC's investigation remained ongoing. *See* Josh Gerstein, *Appeals Court May Overturn Order Keeping Burr Search Warrant Secret*, Politico (Feb. 2, 2022), https://www.politico.com/news/2022/02/02/appeals-court-burr-search-warrant-00004739.
42 *See* Compl. at ¶ 15, SEC v. Nicholas Daniel, 22-cv-4711 (N.D. Cal. 2022).
43 *Id*. at ¶ 23.
44 *Id*. at ¶ 25.
45 *Id*.
46 *Id*. at ¶¶ 39-40.
47 *In re* Sheng Fu and Ming Xu, Exchange Act Rel. No. 95847 (Sept. 21, 2022), https://www.sec.gov/litigation/admin/2022/33-11104.pdf.
48 *Id*. at 2.
49 *Id*.
50 *Id*. at 3.
51 *Id*.
52 *Id*.
53 *Id*. at 4.
54 *Id*. at 12.
55 *Id*.
56 *In the Matter of General Electric Company*, Exchange Act Rel. No. 90620 (Dec. 9, 2020), https://www.sec.gov/litigation/admin/2020/33-10899.pdf.
57 *In the Matter of Under Armour, Inc*., Exchange Act Rel. No. 91741 (May 3, 2021), https://www.sec.gov/litigation/admin/2021/33-10940.pdf.
58 *In the Matter of The Boeing Company*, Securities Act Rel. No. 11105 (Sept. 22, 2022), https://www.sec.gov/litigation/admin/2022/33-11105.pdf.
59 *See* DOJ Press Release, *Former Bank Vice President and Friend Charged in Insider Trading Securities Fraud Scam* (June 30, 2021), https://www.justice.gov/usao-ndca/pr/former-bank-vice-president-and-friend-charged-insider-trading-securities-fraud-scam [hereinafter "Gad DOJ Press Release"]; SEC Press Release No. 2021-117, *SEC Charges San Francisco Bay Area Finance Employee and Friend With Insider Trading* (June 30, 2021), https://www.sec.gov/news/press-release/2021-117 [hereinafter "Gad SEC Press Release"].
60 *In re* Mounir N. Gad, Exchange Act Rel. No. 92305 (June 30, 2021), https://www.sec.gov/litigation/admin/2021/34-92305.pdf [hereinafter "Gad Order"].
61 *See* Gad DOJ Press Release.
62 Gad Order at ¶ 8.
63 Gad Order at ¶ 19.
64 *See* Gad SEC Press Release.
65 DOJ Press Release, *New Obstruction-Related Charges Filed against Former Bank Vice President Convicted in Insider Trading Securities Fraud Scam* (Nov. 23, 2021), https://www.justice.gov/usao-ndca/pr/new-obstruction-related-charges-filed-against-former-bank-vice-president-convicted.
66 *Id*.
67 *Id*.
68 *In the Matter of Equitable Financial Life Insurance Company*, Securities Act Rel. No. 11083 (July 18, 2022), https://www.sec.gov/litigation/admin/2022/33-11083.pdf.
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