INSIDERS ANONYMOUS: THE THIRD CIRCUIT REHABILITATES SEC RULE 10B5-2(B)(2) AND EXTENDS LIABILITY FOR INSIDER TRADING TO NON-FIDUCIARIES IN *UNITED STATES V. MCGEE*

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Abstract

This Article examines the development of insider trading law under SEC Rule 10b-5, and the Third Circuit Court's decision in *United States v. McGee* to extend liability for securities fraud under Rule 10b5-(2)(b)(2) to corporate outsiders without a fiduciary relationship to the corporation in whose securities they trade.

> "Listen, we're selling the company . . . for three times book value. We are selling it for $61.50. There's a lot of pressure. There's just a lot of things going on, and I'm not dealing with it well."[1]

I. Introduction: Market Risk

Wall Street's addiction to insider trading has been well documented and much maligned.[2] As a practice used to gain an unfair advantage on the rest of the market—a so called "edge"—insider trading can be detrimental not only to the impartiality intended to exist in securities markets, but also to the average

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1. United States v. McGee, 763 F.3d 304, 309 (3rd Cir. 2014) (quoting material, non-public information "blurted out" by Christopher Maguire during Alcoholics Anonymous related meeting with Timothy McGee) (internal brackets omitted). This exasperated confession by Christopher Maguire, recounted in the facts of *McGee*, represents the material, non-public information central to the case. *Id.* (remarking on importance of information). Material, non-public information is defined as information that is not generally known by the investing public, but which is known by a corporate insider, and which would have a significant influence on the value of a company's publicly traded securities. *See* THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION, § 12.17 (defining material, non-public information). Such information may also be passed to, and used by an individual outside of the company. HAZEN, *supra* note 1.

2. *See e.g.*, Martin Smith, *To Catch A Trader*, FRONTLINE (Jan. 7, 2014), http://www.pbs.org/wgbh/pages/frontline/to-catch-a-trader/; *see also* Christopher M. Matthews, *Court Overturns Insider Trading Convictions, A Blow to Justice Department*, WALL ST. J. (Dec. 10, 2014), http://www.wsj.com/articles/appeals-court-overturns-two-insider-trading-convictions-1418224146?KEYWORDS=insider+trading; Landon Thomas, Jr., *Martha Stewart Settles Civil Insider-Trading Case*, N.Y. TIMES (Aug. 7, 2006), http://www.nytimes.com/2006/08/07/business/07cnd-martha.html?_r=2&.

investor's personal returns and, perhaps more importantly, to overall confidence in markets.[3] Insider trading threatens the fairness and integrity that is fundamentally required for the securities markets to operate as designed, and should be prosecuted aggressively.[4] The U.S. Securities and Exchange Commission (the "SEC") recognizes this fact, and has long made prosecution of insider trading a top priority.[5]

The legal history of insider trading is infamously complex and convoluted.[6] As a result, prosecuting corporate insiders for fraud violations has been exceedingly difficult.[7] While punishing actual corporate insiders presents a particular challenge, prosecuting corporate *outsiders* for fraud violations is even more problematic.[8] The fraudulent activity of corporate insiders and outsiders alike equally threatens the integrity and stability of the securities markets.[9] However, courts have historically been apprehensive to impose liability for securities fraud on corporate *outsiders*, mainly due to the fact that corporate outsiders do not owe fiduciary duties to the corporation or its shareholders.[10] Over time, this apprehension has led to an apparent loophole in the law, whereby corporate outsiders may trade on the basis of material, non-public information, to the detriment of corporations and ordinary investors, without fear of repercussions.[11]

In an attempt to remedy this imbalance between insiders and outsiders, the SEC promulgated Rule 10b5-2 over a decade ago to address the issue of when a breach of a "family or *other non-business relationship* may give rise to liability" for insider trading.[12] Although the rule was intended to provide a much-needed tool for fighting fraud, both prosecutors and courts have been reluctant to embrace

3. *See e.g.*, Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599 (Aug. 15, 2000) (detailing need for Rule 10b5-2 and effects of insider trading on market confidence).

4. *See* HAZEN, *supra* note 1 ("The SEC has repeatedly declared that the eradication of trading on inside information is one of its top priorities.").

5. *See id.*

6. *See id.* (outlining the history of insider trading law); *see generally* DONALD C. LANGEVORT, INSIDER TRADING REGULATION, ENFORCEMENT AND PREVENTION (last updated Apr. 2014) (restating the history and development of insider trading law).

7. *See e.g.*, Jill E. Fisch, Letter to the Editor, *The Muddle of Insider Trading Regulation*, N.Y. TIMES, Nov. 24, 1991, at F11 (articulating confusions caused by SEC Courts and Congress regarding enforcement and prosecution of insider trading).

8. *See* Michael G. Capeci, Note*, SEC Rule 10b5-2: A Call for Revitalizing The Commission's Efforts in the War on Insider Trading*, 37 HOFSTRA L. REV. 805, 811 (noting difficulty in pursuing prosecution of corporate outsiders prior to 10b5-2); *see also* HAZEN, *supra* note 1 (citing difficulty prosecuting "outsider trading" violations).

9. *See* Selective Disclosure and Insider Trading, 64 FR 72590-01, Proposed Rules, SEC, Release Nos. 33-7787, 34-42259, IC-24209, File No, S7-31-99 (Dec. 28, 1999) (stating impact of insider trading by both insiders and outsiders); *see also* Chiarella v. United States, 445 U.S. 222, 251 (1980) (Blackmun, J., dissenting) ("I would hold that persons having access to confidential information that is not legally available to others generally are prohibited by Rule 10b-5 from engaging in schemes to exploit their structural informational advantage through trading in affected securities. To hold otherwise, it seems to me, is to tolerate a wide range of manipulative and deceitful behavior.").

10. *See* Capeci, *supra* note 8, at 813 (articulating and emphasizing "Duty Problem" in both theories of insider trading).

11. *See id.*

12. *See* Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599 at 2 (Aug. 15, 2000) (stating purpose of Rule 10b5-2); 17 C.F.R. § 240.10b5-2.

it.[13] However, in its recent decision in *United States v. McGee*, the Third Circuit injected new capital into Rule 10b5-2, and presented the SEC with an opportunity to provide greater investor protection through more aggressive prosecution of outsiders who trade on the basis of material, non-public information.[14]

This Article discusses the Third Circuit's investment in SEC Rule 10b5-2(b)(2) and the implications of using the rule as a means to impose liability for insider trading on corporate outsiders. It also serves as a guide to litigators on both sides of insider trading cases, and corporate counsel seeking to inform their clients and prevent exposure to liability. Part II traces the jurisprudential history of insider trading law, from the development of the "classical" and "misappropriation" theories of insider trading, to the resulting "duty problem," and the need for clarification by the SEC. Part III discusses the Third Circuit's recent decision in *McGee*, focusing on the Court's application of the analysis used in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, for Rule 10b5-2(b)(2), and the Court's fact-specific application of the Rule. Part IV considers the implications of the Third Circuit's extension of liability to outsiders who have no fiduciary duty to the corporation or its shareholders. Part V provides recommendations for practitioners in light of the Court's decision in *McGee*. Ultimately, this Article highlights the Third Circuit's reluctance to change a policy set by the SEC under authority granted by Congress, as well as the higher standard of investor protection provided by Rule 10b5-2(b)(2). Although other circuits have recently demonstrated a relaxation of standards for insider trading, this Article recognizes the more rigorous approach adopted by the Third Circuit, and seeks to guide practitioners accordingly.

II. Background: The Inside Scoop on Insider Trading Law and SEC Rule 10b5-2

Federal securities laws have a clear goal: "to create and maintain an informed market and a level playing field in securities transactions" by requiring public companies to disclose certain material information (i.e., information that has an effect on the value of a company's securities).[15] Although restrictions on insider trading seem to fall within the scope of these goals, "the securities laws do not expressly prohibit trading on the basis of [material, non-public] information."[16] Consequently, the prohibition on insider trading developed under the ambiguous anti-fraud provisions of the Securities Exchange Act of 1934 (the "Exchange Act") which grant the SEC the authority to promulgate rules and regulations it believes necessary to protect investors from "manipulative or deceptive device[s]."[17]

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13. *See* Capeci, *supra* note 8, at 819–32 (summarizing the history of Rule 10b5-2 in courts and prosecutors' "troubling pattern" of inconsistent pleading of the rule).

14. *See* United States v. McGee, 763 F.3d 304, 316–18 (2014) (holding that Rule 10b5-2(b)(2) was within the SEC's authority to promulgate that individuals with "a history, pattern or practice of sharing confidences" with a corporate insider may be held liable under misappropriation theory).

15. *See* HAZEN, *supra* note 1, at § 12.17[1] ("The practice of insider trading is especially pernicious in light of the federal securities laws' thrust of full disclosure, which is designed to create and maintain an informed market and a level playing field in securities transaction.").

16. *See id.* (explaining the lack of express prohibition of insider trading in federal securities laws).

17. *See id.* ("Instead, the prohibition [on insider trading] has been crafted out of the Securities Exchange Act's antifraud provisions found in section 10(b) and SEC Rule 10b-5."); *see also* The Securities Exchange Act of 1934, 15 U.S.C.A. § 78(j) (1934) (prohibiting the use of manipulative or deceptive devices in contravention

As a result, "the federal law of insider trading has developed in the courts as a common law of federal securities."[18] This peculiar evolution of law has led one leading authority to state that, "Congress' failure to explicitly address when trading on [material non-public] information is permissible has led to a very uneven and in some instances incoherent set of rules."[19] This Part discusses the uneven history of insider trading law, and identifies the particularly "incoherent" set of rules that ultimately led the SEC to promulgate Rule 10b5-2(b)(2).

A. Initial Public Offering: The SEC Establishes Insider Trading Liability

Section 10(b) of the Exchange Act makes it unlawful for "any person" to "use or employ" any "manipulative or deceptive device" in connection with the purchase or sale of a security that is traded on any national exchange.[20] This section of the Act also authorizes the SEC to promulgate "rules and regulations [it believes] necessary or appropriate . . . for the protection of investors."[21] Under this authority, the SEC promulgated Rule 10b-5, which also makes it unlawful for any person "[t]o employ any device, scheme, or artifice to defraud" in relation to the purchase or sale of a security.[22] Although it does not address the problem directly, "the vast majority of the federal law on insider trading has developed under Rule 10b-5."[23] Given the convoluted formulation of these laws and regulations, it is easy to see why commentators have expressed frustration with the current state of insider trading law.[24]

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of rules promulgated by the SEC); *see infra* note 132 and accompanying text for a discussion of the Third Circuit's holding that section 10(b) is ambiguous under *Chevron*.

18. *See* HAZEN, *supra* note 1 (explaining the development of federal common law of insider trading).

19. *See id.* (expressing the author's displeasure with Congress' failure to expressly prohibit certain types of insider trading and the uneven development of prohibition as incoherent federal common law).

20. Section 10(b) is codified under 15 U.S.C.A. § 78(j) and is as follows:

> 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 securities exchange . . . (b) To use or employ, in connection with [the sale of a regulated security instrument] *any manipulative or deceptive device or contrivance of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.*

15 U.S.C.A. § 78(j) (1934) (emphasis added). Note section 10(b) does not provide an express prohibition on insider trading or fraud per se.

21. *See id.* (granting authority to the SEC to promulgate necessary or appropriate rules and regulations to prevent use of fraud for public interest or for protection of investors).

22. The full text of SEC Rule 10b-5 provides the following:

> 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 securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To 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) To 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.

17 C.F.R. § 240.10b-5 (2000).

23. *See* HAZEN, *supra* note 1 (stating the importance of Rule 10b-5 to the development of federal law on insider trading). "Since the vast majority of the federal law on insider trading has developed under Rule 10b-5, the courts have in essence created a federal common law of insider trading based on the judge made interpretations of Rule 10b-5 which does not even mention insider trading explicitly." *Id.*

24. *See id.* at § 12.17[2] (referring to "the hodge-podge haphazard development of the federal law of insider trading"); *see also* Fisch, *supra* note 7.

Nevertheless, the SEC articulated its most prominent proscription of insider trading in "the seminal decision of In re *Cady, Roberts & Co.*"[25] In *Cady, Roberts & Co.*, the directors of a large engine manufacturing company, the Curtiss-Wright Corporation, decided to reduce the quarterly dividend paid out to stockholders from $0.625 per share to $0.375 per share.[26] Before the dividend reduction was announced to the general public, one of the board members called a broker-dealer, whom he also represented, and informed him of the impending dividend cut.[27] The broker-dealer quickly sold the vast majority of his Curtiss-Wright stock.[28] When the dividend cut was eventually made public, the Dow Jones Exchange received so many sell orders that it was forced to suspend trading.[29]

In response, the SEC delivered its first disciplinary ruling under Rule 10b-5 for trading on the basis of material, non-public information.[30] The holding in *Cady, Roberts & Co.* serves as the first articulation of the "disclose or refrain" rule—which states that, before trading on the basis of material, non-public information, a corporate insider must either disclose the information, or refrain from trading altogether.[31] Here, the SEC held that corporate insiders have a duty to disclose not only to corporate shareholders, but also to any individual in the market with whom they intend to trade.[32] The "disclose or refrain" rule established

25. *See In re* Cady, Roberts & Co., 40 SEC 907, at *1 (1961) ("This is a case of first impression and one of signal importance in our administration of the Federal securities acts."); *see also* HAZEN, *supra* note 1 ("In the seminal decision of *Cady, Roberts & Co.*, the Securities and Exchange Commission imposed disciplinary sanctions against a registered broker-dealer who directed his customers to liquidate their holdings" based on material, non-public information).

26. *See Cady, Roberts & Co.*, 40 SEC at *2 (describing circumstances under which the directors of Curtiss-Wright Corporation "met to consider, among other things, the declaration of a quarterly dividend").

27. *See id.* at *1–2. The Board member in question, Mr. Cowdin, was a registered representative of Cady, Roberts & Co., the broker dealer under investigation in this case. *Id.* Following the meeting of Curtiss-Wright Directors, Mr. Cowdin placed a call to Mr. Gintel, the "selling broker" at Cady, Roberts & Co. *Id.* Between November 6 and November 23, 1959, Mr. Gintel had acquired a substantial amount of Curtiss-Wright stock—approximately 11,00 shares. *Id.* Due to the announcement of "a new type of internal combustion engine being developed by the company," the Curtiss-Wright stock purchased by Mr. Gintel had acquired significant value since its acquisition. *Id.*

28. *See id.* "Upon receiving this information, Gintel entered two sell orders for execution on the Exchange, one to sell 2,000 shares of Curtiss-Wright stock for 10 accounts, and the other to sell 5,000 shares for 11 accounts. Four hundred of the 5,000 shares were sold for three of Cowdin's customers." *Id.*

29. *See id.* at 3. "When the dividend announcement appeared on the Dow Jones tape at 11:48 a.m., the Exchanged was compelled to suspend trading in Curtiss-Wright because of the large number of sell orders. Trading in Curtiss-Wright was resumed at 1:59 p.m. at 36 ½ ranged [sic.] during the balance of the day between 34 1/8 and 37, closed at 34 7/8." *Id.*

30. *See id.* at 1 (stating this was a matter of first impression before SEC); *see also* Capeci, *supra* note 8, at 808–09 (noting the SEC's decision in *Cady, Roberts & Co.* "first outlawed trading on inside information as a violation of Rule 10b-5").

31. This proposition was stated in the following famous passage from *Cady, Roberts & Co.*:

> An affirmative duty to disclose material information has been traditionally imposed on corporate "insiders," particularly officers, directors, or controlling stockholders. We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment. Failure to make disclosure in these circumstances constitutes a violation of the anti-fraud provisions. If, on the other hand, disclosure prior to effecting a purchase or sale would be improper or unrealistic under the circumstances, we believe the alternative is to forego the transaction.

In re Cady, Roberts & Co., 40 SEC 907, at *3 (1961).

32. *See id.*

> Although the primary function of Rule 10b–5 was to extend a remedy to a defrauded seller, the courts and this Commission have held that it is also applicable to a defrauded buyer. There is no valid reason why

in *Cady, Roberts & Co.* remains the foundation of all subsequent insider-trading law.[33]

B. Emerging Markets: The Federal Courts Build on *Cady, Roberts & Co.* to Establish Two Theories of Insider Trading

In the post-*Cady, Roberts & Co.* era, the federal courts first recognized insider trading as a violation of Rule 10b-5 in *U.S. Securities and Exchange Commission v. Texas Gulf Sulphur*;[34] however, the most significant developments in this area of law occurred in the Supreme Court trilogy of *Chiarella v. United States*,[35] *Dirks v. U.S. Securities and Exchange Commission*,[36] and *United States v. O'Hagan*.[37] As mentioned earlier, because there is no express statutory prohibition on insider trading, the law "has developed in the courts as a common law of federal securities fraud."[38] Federal courts responded to the dearth of statutory guidance on insider trading by synthesizing Section 10(b) and Rule 10b-5 to produce two theories of insider trading—the "classical theory" and the "misappropriation theory."[39]

Both theories of insider trading revolve around the notion that individuals commit fraud when they trade on the basis of material, non-public information in breach of a *duty* to disclose—owed either to the corporation or to the source of their information. The misappropriation theory was developed to address "gaps" left open by the classical theory, which allowed outsiders to trade on the basis of inside information as long as no party to the resulting securities transaction violated a fiduciary duty to the corporation.[40] While the misappropriation theory expanded

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> persons who *purchase* stock from an officer, director or other person having the responsibilities of an "insider" should not have the same protection afforded by disclosure of special information as persons who *sell* stock to them. Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the public to whom he sells, it is clearly not appropriate to introduce these into the broader anti-fraud concepts embodied in the securities acts.

Id. at 5.

33. *See* Thomas M. Madden, *O'Hagan, 10b5-2, Relationships and Duties*, 4 HASTINGS BUS. L.J. 55, 56 (2008) (recognizing the importance of *Cady, Roberts & Co.* in "nascent" stages of development of insider trading law); *see also* LANGEVORT, *supra* note 6 (identifying the importance of *Cady, Roberts & Co.*).

34. *See generally* SEC v. Tex. Gulf Sulphur, Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *see generally* Alan R. Bromberg, *Corporate Information: Texas Gulf Sulphur and Its Implications,* 22 SW. L.J. 731 (1968) (discussing *SEC v. Texas Gulf Sulphur Co.*).

35. *See generally* Chiarella v. United States, 445 U.S. 222 (1980).

36. *See generally* Dirks v. SEC, 463 U.S. 646 (1983).

37. *See generally* United States v. O'Hagan, 521 U.S. 642 (1997).

38. *See* HAZEN, *supra* note 1 (remarking on the deficiencies in federal common law of insider trading leading to inconsistent and incoherent set of rules).

39. *See* Capeci, *supra* note 8, at 808 ("There is no federal statute in the United States explicitly prohibiting insider trading. Rather, insider trading regulation is a *synthesis* of section 10(b) of the Exchange Act and judicial decisions, acting in conjunction with one another. Pursuant to its authority under the Exchange Act, the Commission Enacted Rule 10b-5.") (emphasis added); *see* Randall W. Quinn, *The Misappropriation Theory of Insider Trading in the Supreme Court: A (Brief) Response to the (Many) Critics of* United States v. O'Hagan, 8 FORDHAM J. CORP. & FIN. L. 865, 868–69 (2003) ("'Theories' of insider trading exist because insider trading is not expressly prohibited in the securities statutes, except in the limited context of section 16(b) of the Exchange Act. . . . Two theories have been used to prosecute insider trading under section 10(b) and Rule 10b-5: the classical or traditional theory, and the misappropriation theory.").

40. *See* Quinn, *supra* note 39, at 869–71 (recounting the development of misappropriation theory of insider trading); Capeci, *supra* note 8, at 808–17 (explaining the development of both theories of insider trading law and "gaps" left open for outsider trading by classical theory); Ray J. Grzebielski, *Friend, Family, Fiduciaries: Personal Relationships as a Basis for Insider Trading Violations*, 51 CATH. U. L. REV. 467,

the scope of liability to include outsiders, it remained unclear exactly what kind of non-business relationships could create a duty to disclose.[41] To clarify this problem, the SEC promulgated Rule 10b5-2.[42]

1. The "Classical Theory" Under Chiarella *and* Dirks

The classical theory of insider trading was identified and defined in two principle Supreme Court Cases: *Chiarella* and *Dirks*.[43] This theory directly addresses the problem of corporate *insiders* who trade in the securities of their own company on the basis of material, non-public information.[44] Under the classical theory, an insider who trades on the basis of material, non-public information is deemed to have breached a fiduciary duty owed to the corporation and its shareholders.[45] The boundaries of the classical theory, established in *Chiarella* and *Dirks*, are the result of narrowly tailored decisions—both of which reversed convictions of insider trading.[46]

a. *Chiarella* Rejects the Parity-of-Information Rule

In *Chiarella*, the trial court convicted the defendant of fraud in violation of Section 10(b) and Rule 10b-5.[47] The defendant worked as a "markup man" for a financial printing services company.[48] As a result of his position, he came to know

469–88 (illustrating the evolution of Supreme Court jurisprudence on insider trading and development of two theories of insider trading as well as problems related to the classical theory that the misappropriation theory was intended to address); Madden, *supra* note 33, at 55–60 (discussing the development of insider trading law and Rule 10b5-2 relationships and duties).

41. *See infra* notes 95–99 and accompanying text for a further discussion of what has become known as the "Duty Problem".

42. *See infra* notes 101–05 and accompanying text for a further discussion the SEC's response to the "Duty Problem", as well as the need for, and promulgation of Rule 10b5-2.

43. *See generally* Chiarella v. United States, 445 U.S. 222 (1980); *see also* Dirks v. SEC, 463 U.S. 646 (1983).

44. *See* Quinn, *supra* note 39, at 869 ("Under the classical theory, a corporate insider violates section 10(b) and Rule 10b-5 by trading in the securities of his corporation on the basis of material, non-public information. In doing so, the insider breaches a duty of trust owed to the corporation's shareholders.") (citing United States v. O'Hagan, 521 U.S. 642, 651 (1997)) (internal quotation marks and citation omitted); *see also* Capeci, *supra* note 8, at 810 ("Under the classical theory, an investor is guilty of insider trading if he is a corporate insider who trades on the basis of material, non-public information in breach of a duty of trust and confidence—that is, a fiduciary duty—between the insider and shareholders of the harmed company.") (citing Dirks v. SEC, 463 U.S. 646, 654–55 (1983)) (noting that "[t]he Court identified, in addition to employees, directors and officers of a corporation, any professional working for the corporation in a temporary capacity, such as a lawyer, accountant, underwriter, or consultant, as being a corporate insider" as well); *see also* Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983).

45. *See* Capeci, *supra* note 8, at 811 (expressing that the duty owed by corporate insiders is to corporation and shareholders of corporation).

46. *See* Madden, *supra* note 33, at 56–57 (noting that the misappropriation theory developed in response to "Justice Powell's *narrowly tailored* majority decision in *Chiarella* finding that a fiduciary duty must exist and be breached and that that breach must touch the party to the transaction to whom the duty is owed; 'liability . . . is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction'"); *see also* Chiarella v. United States, 445 U.S. 222, 225 ("The Court of Appeals for the Second Circuit affirmed the petitioner's conviction. We granted certiorari, and now we reverse."); Dirks v. SEC, 463 U.S. 646, 652 (1983) ("The [Court of Appeals] entered judgment against Dirks . . . . In view of the importance to the SEC and to the securities industry . . . we granted writ of certiorari. We now reverse.").

47. *See Chiarella*, 445 U.S. at 225 (noting conviction at Appeals Court level on seventeen counts of fraud in violation of section 10(B) and Rule 10b-5).

48. *See id.* at 224 (recounting the facts of the case that led the defendant to obtain material, non-public information in dispute).

information regarding several companies who submitted announcements of corporate takeovers to the printer.[49] Although their documents were redacted, and the identities of the companies were not disclosed, the defendant was able to examine them and deduce which companies were involved in the upcoming transactions.[50] Based on this information, he "realized a gain of slightly more than $30,000 in the course of 14 months."[51]

Although the defendant in this case clearly traded on the basis of material, non-public information, the U.S. Supreme Court held that his actions did not amount to fraud because he did not owe any fiduciary duty to any of the corporations involved.[52] The Court also stated that its hesitancy to impose liability in this case stemmed from the fact that Section 10(b) did not expressly indicate whether an individual's silence may constitute fraud.[53] As a result, the Court formally adopted the "disclose or abstain" rule established in *Cady, Roberts & Co.*, but limited its application to corporate insiders.[54]

In addition, the *Chiarella* Court held that extending liability to outsiders with no fiduciary relationship to the corporation would be tantamount to creating a "parity-of-information" rule, or "a general duty between all participants in

49. Chiarella v. United States, 445 U.S. 222, 224 (1980).

50. *Id.* ("When these documents were delivered to the printer, the identities of the acquiring and target corporations were concealed by blank spaces or false names. . . . The petitioner, however, was able to deduce the names of the target companies before the final printing from other information contained in the documents.").

51. *See id.* Note, this case was decided in 1980—$30,000 in 1980 is equivalent to approximately $86,000 today. *See CPI Inflation Calculator*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 15, 2016).

52. *See Chiarella*, 445 U.S. at 225–26.

53. *See id.* at 226 ("Although the starting point of our inquiry is the language of the statute, § 10(b) does not state whether silence may constitute a manipulative or deceptive device. Section 10(b) was designed as a catch-all clause to prevent fraudulent practices. But neither the legislative history nor the statute itself affords specific guidance for the resolution of this case.") (internal citations omitted). This passage from *Chiarella* makes clear the fact that the Court relied on the supposed lack of Congressional intent to extend section 10(b) liability to corporate outsiders, who do not owe a fiduciary duty. *Id.* at 226–30 (discussing boundaries of the catch-all quality of section 10(b)).

54. *See id.* at 226–27 (pointing out that "disclose or abstain" rule was first enunciated in SEC's administrative decision in *Cady, Roberts & Co.*); *see also In re* Cady, Roberts & Co., 40 SEC 907 (1961). In referencing *Cady, Roberts & Co.*, the *Chiarella* Court established that the SEC's holding in that case was based on a supposed duty that, "arose from (i) the existence of a relationship affording access to inside information intended to be available only for corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure." *Chiarella*, 445 U.S. at 227; *see also supra* note 41 and accompanying text for a discussion implying that the SEC may not have taken as restrictive a view in *Cady, Roberts & Co.* as the Court held it to have in *Chiarella*.

Furthermore, the Court explained its common law basis for limiting duties to disclose to corporate insiders in the following passage:

> That the relationship between a corporate insider and the stockholders of his corporation gives rise to a disclosure obligation is not a novel twist of the law. At common law, misrepresentation made for the purpose of inducing reliance upon the false statement is fraudulent. But one who fails to disclose material information prior to the consummation of a transaction commits fraud only when he is under a duty to do so. And the duty to disclose arises when one party has information "that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." In its *Cady, Roberts* decision, the Commission recognized a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation. This relationship gives rise to a duty to disclose because of the "necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of the uninformed minority stockholders."

Chiarella, 445 U.S. at 227–28 (explaining the common law justifications for limiting insider trading violations to corporate insiders and others having fiduciary relationships with corporations).

market transactions."[55] The Court stated that such a rule would be inherently unreasonable.[56] However, the Court did not completely close the door on the idea that, under different circumstances, outsiders might be liable for trading on the basis of material, non-public information.[57] This possibility was most notably argued for in a fervent dissent written by Justice Blackmun.[58] Nonetheless, the *Chiarella* Court adopted a narrow approach that was restricted even further three years later in *Dirks*.[59]

b. *Dirks* Requires the Insider to Benefit

In *Dirks*, the Court applied the classical theory of insider trading to a quintessential tipper-tippee scenario, and overturned the defendant's conviction for aiding and abetting acts of fraud.[60] The defendant "was an officer of a New York broker-dealer firm" who received a tip from a corporate insider.[61] The inside tipper informed the defendant that the stock of a large equity funding company was vastly overvalued as the result of a massive cover-up of fraudulent corporate practices.[62] The defendant (the tippee) eventually went to great lengths to make the corporation's fraud known to the public.[63] But before doing so, he discussed the information with several clients and investors who proceeded to liquidate their holdings—more than $16 million worth.[64]

In overturning the trial court's conviction, the Supreme Court once again rejected the parity-of-information rule and held that "[a] duty [to disclose] arises from the relationship between parties . . . and not merely from one's ability to acquire information."[65] The Court stated that imposing an automatic duty to

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55. *See* Chiarella v. United States, 445 U.S. 222, 233 (1980) (declining to adopt a parity-of-information rule). The Court refused to impose a general duty to all market participants in the following passage (perhaps the most famous passage in the case):

> We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties . . . should not be undertaken absent some explicit evidence of congressional intent.

Id.

56. *See id.* (rejecting the parity-of-information rule).

57. *See id.* at 225–26 (overturning the conviction because of faulty jury instructions given at trial level but leaving open the possibility of what would become known as the misappropriation theory); *see* United States v. O'Hagan, 521 U.S. 642, 661–62 (1997) (reminding that in *Chiarella* "[t]he Court declined to reach [the misappropriation theory as a] potential basis for the printer's liability, because the theory had not been submitted to the jury. But four Justices found merit in it. And a fifth Justice stated that the Court wisely le[ft] the resolution of this issue for another day") (internal citations and quotation marks omitted).

58. *See Chiarella*, 445 U.S at 245–52 (Blackmun, J. dissenting).

59. *See id.* at 231 (adopting narrow approach and holding).

60. *See* Dirks v. SEC, 463 U.S. 646, 650–52 (1983) (recounting the procedural history).

61. *See id.* at 648–49.

62. *See id.*

63. *See id.*

64. *See id.* at 649 ("Neither Dirks nor his firm owned or traded any Equity Funding stock, but throughout his investigation he openly discussed the information he had obtained with a number of clients and investors. Some of these persons sold their holdings of Equity Funding securities, including five investment advisers who liquidated holdings of more than $16 million.").

65. *See id.* at 657–58 (quoting Chiarella v. United States, 445 U.S. 222, 232–33 (1980)) (internal citation omitted) (reaffirming the notion that a duty to "disclose or refrain" emanates from the nature of the relationship between the parties involved in a transaction).

disclose whenever an individual receives information from a corporate insider would have an "inhibiting influence" on the market.[66] Therefore, the Court held that liability for insider trading in the tipper-tippee context should only be imposed in limited circumstances—when the insider who provided the information personally benefitted from the resulting transactions, in breach of his duty to the corporation.[67]

Under the classical theory articulated in *Chiarella* and *Dirks*, outsiders could freely trade on the basis of inside information as long as they did not owe fiduciary duties to the company whose securities they traded, and as long as their inside source did not receive a personal benefit for disclosing the information.[68] These cases created substantial leeway for outsiders to take advantage of inside information unavailable to the rest of the market, and illustrate the significant "gaps" left open by the classical theory.[69] Fourteen years after *Dirks*, however, the Supreme Court addressed this problem in the landmark case of *United States v. O'Hagan*.[70]

2. The "Misappropriation Theory" Under O'Hagan

Although it was first alluded to in *Chiarella*, the Supreme Court officially adopted the misappropriation theory in *O'Hagan*.[71] The misappropriation theory of insider trading applies to cases where an outsider "who does not have a special relationship [with] the company acquires information about the company and improperly trades [on the basis of] that information"; in other words, when an outsider improperly takes information from an insider and uses the information for their own benefit.[72] While the misappropriation theory was intended to address some of the "gaps" left open by the classical theory, the *O'Hagan* Court still adopted a somewhat narrowly tailored approach that would require further clarification by the SEC.[73]

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66. *See* Dirks v. SEC, 463 U.S. 646, 658 (1983) ("Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market."). In this respect, the Court reasoned that, "It is commonplace for analysts to ferret out and analyze information, and this often is done by meeting with and questioning corporate officers and others who are insiders." *Id.* (internal quotation marks and citations omitted).

67. *See id.* at 659 (noting that although "recipients of insider information do not invariably acquire a duty to disclose or abstain" there are still certain circumstances under which liability may be imposed in the tipper-tippee context); *see also* United States v. O'Hagan, 521 U.S. 642, 663 (1997) (remarking that in *Dirks v. SEC*, "The insiders had acted not for personal profit, but to expose massive fraud within the corporation"). Further, the Court held that "[a]bsent any violation by the tippers, there could be no derivative liability for the tippee." *Id.* (citing *Dirks*, 463 U.S. at 666–67) (internal citations omitted).

68. *See* Chiarella v. United States, 445 U.S. 222, 231 (1980) (holding that corporate outsiders cannot be held liable for insider trading because they do not owe a fiduciary duty to the company); *see also Dirks*, 463 U.S. at 665–666 (holding that only insiders who receive personal benefit from disclosure of material, non-public information may be held liable for violations of 10(b) and 10b-5).

69. *See* Capeci, *supra* note 8, at 832 n.211 (noting gaps left open by classical theory allowing outsiders to take advantage of material, non-public information).

70. *See generally O'Hagan*, 521 U.S. 642.

71. *See* Capeci, *supra* note 8, at 814 (stating that "[a]lthough the [SEC] suffered setbacks . . . in 1997 it won an important victory in the Supreme Court by gaining recognition of the misappropriation theory" in *O'Hagan*) (internal citation omitted); *see* Quinn, *supra* note 39, at 869 (recognizing "[t]he misappropriation theory was first advanced by the government . . . [in *Chiarella*]").

72. *See* HAZEN, *supra* note 1, at § 12.17[2] (describing what some people refer to as "outsider trading" cases where misappropriation theory applies).

73. *See* Capeci, *supra* note 8, at 815.

In *O'Hagan*, the Supreme Court applied the misappropriation theory to an "outsider trading" scenario and reinstated the trial court's conviction.[74] In this case, the defendant was a partner at a large law firm that was consulted about the potential of providing representation for a tender offer of Pillsbury stock.[75] Although the firm provided representation for a short time, it was ultimately not involved in the tender offer.[76] Nonetheless, the defendant—an employee of the firm who had no personal involvement whatsoever in that particular matter—acquired information about the tender offer and purchased an enormous quantity of Pillsbury stock options.[77] When the offer was finally announced, the defendant traded his stock and made a profit of nearly $4.3 million dollars.[78] The trial court convicted the defendant for violating section 10(b) and Rule 10b-5, and the Appeals Court reversed.[79]

After granting certiorari, the Supreme Court utilized the misappropriation theory and held that, "a person commits fraud in connection with a securities transaction . . . when he misappropriates confidential information . . . in breach of a duty owed to the source of that information."[80] Therefore, the requisite deception in a misappropriation case occurs when the outsider "feigns fidelity" to an insider who reasonably believes that the shared information will remain confidential.[81] However, the Court limited its holding to instances where outsiders share a "fiduciary or *other similar relationship*" with the source of their information and, therefore, breach either a fiduciary or some other similar (but undefined) duty

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> The *O'Hagan* Court chose to adopt the misappropriation theory, but not the version discussed by the dissent in *Chiarella*. Instead, the Court adopted the more restricted version promulgated by the Second Circuit. "This version prohibits trading on the basis of information that the wrongdoer converted to his own use in violation of some *fiduciary, contractual, or similar obligation* to the owner or rightful possessor of the information."

Id. (emphasis added) (internal citations omitted).

74. *See* United States v. O'Hagan, 521 U.S. 642, 649 (1997) (recounting the procedural history in which a "divided panel for the Court of Appeals for the Eighth Circuit reversed all of O'Hagan's convictions" and the Supreme Court reversed); *see* HAZEN, *supra* note 1, at § 12.17[2] (stating that "there are those instances that some refer to as 'outsider' trading" cases to which the misappropriation theory applies).

75. *See O'Hagan*, 521 U.S. at 647.

76. *See id.* at 647–48 (noting that the defendant had no involvement in the Pillsbury matter but he heard of the tender offer by way of his position at the firm).

77. *See id.*

78. *See id.* ("By the end of September, [the defendant] owned 2,500 unexpired Pillsbury options, more than any other individual investor. . . . [When the tender offer was announced, the defendant] then sold his Pillsbury call options and common stock, making a profit of more than $4.3 million.").

79. *See id.* at 649–50 (noting the conviction at trial court).

80. United States v. O'Hagan, 521 U.S. 642, 652 (1997) (emphasis added) (holding that individuals breach their duty to the source of the information when they use the information intended to be confidential for trading purposes) (internal quotation marks omitted).

81. *See id.* at 655 (noting "the deception essential to the misappropriation theory involves feigning fidelity to the source of the information"). The Court further explained the deception involved in misappropriation cases in the following passage:

> A misappropriator who trades on the basis of material, nonpublic information, in short, gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public.

Id. at 656.

owed to that source.[82] Because the Court did not provide further guidance as to what types of "other similar relationships" should lead to a duty to disclose, this limited holding proved troublesome in the aftermath of *O'Hagan*.[83]

C. The Duty Problem and SEC Rule 10b5-2

Both the classical theory and the misappropriation theory present problems in cases where *outsiders* trade on the basis of material, non-public information.[84] Under the Supreme Court's guidelines for both theories, the liability of the outsider is inextricably linked with the nature of his or her relationship to the insider, as well as the insider's independent fiduciary duty to the corporation. Under the classical theory, an outsider's duty to disclose is merely a derivative of the duty owed by their inside counterpart; therefore, an outsider can only be convicted of fraud when the source of his information breaches a fiduciary duty owed to the corporation.[85] Likewise, under the misappropriation theory, an outsider only commits fraud when he breaches a "fiduciary or other similar" duty owed to the source of his information—a duty not defined by the Supreme Court. Although the misappropriation theory is intended to address the shortcomings of the classical theory, the theory still leaves ample room for outsiders to engage in questionable practices, as long as they do not breach a fiduciary (or "fiduciary-like") duty owed to the source of their information.[86] As a result, some commentators have noted that the law of insider trading suffers from a "duty problem."[87]

In order to address this problem, the SEC picked up where the Court left off in *O'Hagan* and promulgated Rule 10b5-2 to clarify "what types of family or other non-business relationships can give rise to liability under the misappropriation theory."[88] Rule 10b5-2 identifies three non-exclusive relationships that should create a duty to disclose under the misappropriation theory.[89] This rule was designed to close any remaining gaps in the law, and prevent *all* outsiders from trading on the basis of misappropriated information.[90] In particular, subsection 10b5-2(b)(2) created a duty to disclose in cases where the

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82. *See id.* at 653–59 (referring repeatedly and only to the fiduciary's duty to the source of information); *see also* Capeci, *supra* note 8, at 815 ("According to the *O'Hagan* Court, the breach of fiduciary duty only needs to be shown between the outsider and the source of his information.").

83. *See* Capeci, *supra* note 8, at 815 ("While *O'Hagan* was a victory for the [SEC], the decision perpetuated the duty problem because the Court failed to clearly define which types of relationships would satisfy the fiduciary duty requirement of the misappropriation theory.") (citing Robert Steinbuch, *Mere Thieves*, 67 MD. L. REV. 570, 588–89 (2008)).

84. *See* Capeci, *supra* note 8, at 813–17 (addressing the duty problem created by both theories of insider trading).

85. *See* Dirks v. SEC, 463 U.S. 646, 659 (1983) ("Thus, the tippee's duty to disclose or abstain is derivative from that of the insider's duty.").

86. *See supra* section II.B.2. (discussing the liability gaps left by both theories).

87. *See* Capeci, *supra* note 8, at 806 (referring to the "Duty Problem" created by Supreme Court holdings on classical and misappropriation theories).

88. *See* Selective Disclosure and Insider Trading, Securities Act Release Nos. 33-7787, 34-42259. IC 24209, File No. S7-31-99 (Dec. 28, 1999) (proposing a new Rule 10b5-2 to clarify the types of relationships that fall under the misappropriation theory) (emphasis added).

89. *See* Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599 (Aug. 15, 2000) (releasing information regarding the final rule).

90. *See id.* (describing the purpose and intent of the rule); *see also* Capeci, *supra* note 8, at 817 ("The Rule should in theory encompass all outsiders who misappropriate insider information.").

outsider shared a relationship of trust and confidence with the insider, evidenced by a "history, pattern, or practice of sharing confidences," such that the outsider should have known that the information was intended to remain confidential.[91] Following its promulgation, Rule 10b5-2 received extensive criticism and, until *McGee*, only limited application.[92]

III. The Road to Recovery: Analysis of the Third Circuit's Decision in *McGee*

The Third Circuit's decision in *McGee* represents one of the most significant affirmations of Rule 10b5-2 to date.[93] In *McGee*, the Court held that the SEC did

91. This particular subsection was the main issue in *McGee*. The three non-exclusive types of relationships that establish a duty of trust and confidence and a duty to disclose can be read in the full text of Rule 10b5-2 as follows:

> Preliminary Note to § 240.10b5–2: This section provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the "misappropriation" theory of insider trading under Section 10(b) of the Act and Rule 10b–5. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b–5, and Rule 10b5–2 does not modify the scope of insider trading law in any other respect.
> (a) Scope of Rule. This section shall apply to any violation of Section 10(b) of the Act (15 U.S.C. 78j(b)) and § 240.10b–5 thereunder that is based on the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence.
> (b) Enumerated "duties of trust or confidence." For purposes of this section, a "duty of trust or confidence" exists in the following circumstances, among others:
> (1) Whenever a person agrees to maintain information in confidence;
> (2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or
> (3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; provided, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.

17 C.F.R. § 240.10b5-2 (2000).

92. *See* Capeci, *supra* note 8, at 817–18 (noting the failure to consistently use Rule 10b5-2 in government pleadings as well as mixed reception from courts).

93. *See* HAZEN, *supra* note 1, at § 12.17[4][B] (citing to the district court decision in *McGee* which references the other court's rejection of challenges to Rule 10b5-2); *see also* United States v. McGee, 892 F.Supp.2d 726, 733–34 (E.D. Pa 2012) (citing approval of Rule 10b5-2 by other courts). In the Eastern District Court of Pennsylvania's decision in *McGee*, the Court cited to several other rejections of challenges to Rule 10b5-2, in the following passage:

> In holding that subsections (b)(1) and (2) of Rule 10b5–2 are not arbitrary, capricious or manifestly contrary to § 10(b), we join the numerous courts that have rejected challenges to the Rule and those that have held that a relationship of trust or confidence may be based on either an agreement or a history of sharing and maintaining confidential information. *See Yun,* 327 F.3d at 1273 and n. 23 (holding that "the existence of a duty of loyalty and confidentiality turn[ed] on whether [the insider-husband] granted his [allegedly misappropriating-wife] access to confidential information in reasonable reliance on a promise that she would safeguard the information" and noting that this interpretation of the duty was bolstered by the SEC's preliminary statement of Rule 10b5–2); *United States v. Falcone,* 257 F.3d 226, 234 (2d Cir.2001) (noting that an "explicit acceptance of a duty of confidentiality" could form the basis of the functional equivalent to a fiduciary relationship); *SEC v. Nothern,* 598 F.Supp.2d 167, 174 (D.Mass.2009) (relying on "persuasive caselaw holding that Rule 10b5–2(b) properly defines those circumstances under which misappropriation liability can arise" to reject the argument that the rule is invalid as an improper expansion of liability under § 10(b)) (citations omitted); *SEC v. Lyon,* 529 F.Supp.2d 444, 452 (S.D.N.Y.2008) (holding that the SEC alleged facts with requisite specificity to plausibly support its claim that a confidential relationship arose by agreement between the insider and the alleged misappropriator); *SEC v. Kornman,* 391 F.Supp.2d 477, 489–90 (N.D.Tex.2005) (denying motion to dismiss because the complaint contained allegations supporting the existence of a confidentiality agreement, thus bringing the case within Rule 10b5–2(b)(1)); *SEC v. Kirch*, 263 F.Supp.2d 1144, 1147, 1151 (N.D.Ill.2003) (finding

not exceed its rulemaking authority when it promulgated Rule 10b5-2(b)(2).[94] Moreover, the Court held that the defendant and the source of his information shared a relationship of trust and confidence based on their mutual involvement in Alcoholics Anonymous ("AA"), concluding that the defendant was liable for insider trading under the misappropriation theory and Rule 10b5-2(b)(2).[95]

A. Admitting the Problem: Facts and Procedural Background of *McGee*

Timothy McGee met Christopher Maguire at an AA meeting sometime between 1999 and 2001.[96] McGee was a financial advisor with over twenty years of experience; Maguire was an executive at Philadelphia Consolidated Housing Corporation ("PHLY").[97] They bonded over their shared interests, and eventually developed a relationship in which Maguire sought support and advice from McGee, who acted as his mentor for nearly ten years.[98] Throughout that time, the two men regularly shared highly personal, sensitive information regarding all aspects of their lives as part of the AA recovery process, and in order to "alleviate stress and prevent relapses."[99] Both men understood that they would abide by the general rule of confidentiality in AA, where "no newfound friends will violate confidences relating to [one another's] drinking problem."[100]

In early 2008, Maguire was actively involved in negotiations to sell PHLY, the overwhelming stress of which led to a relapse and several binge-drinking episodes.[101] Following his relapse, Maguire attended an AA meeting where, believing he could trust McGee, he "blurted out" sensitive information regarding the imminent sale of PHLY.[102] McGee comforted Maguire and told him that, "[he] knew everything about what he was going through from an alcohol perspective."[103] Although he told Maguire that he could be trusted, McGee took out a loan and purchased a large quantity of PHLY stock.[104] As a result of trading on the basis of

> the existence of a fiduciary-like relationship and attendant duty where the defendant traded on nonpublic information he gleaned as a member of a business roundtable, which had an express policy and understanding that such matters were to be kept confidential).

Id. None of the cases cited in the above passage expressly ruled on whether the SEC exceeded its rulemaking authority when it promulgated Rule 10b5-2. *See id.*

94. *See* United States v. McGee, 763 F.3d 304, 316 (3rd Cir. 2014) (holding the SEC did not exceed its rulemaking authority).

95. *See id.* at 317–18 (holding that McGee and Maguire did in fact share a relationship of trust and confidence and affirming McGee's conviction for securities fraud).

96. *See id.* at 308. In establishing the nature of their relationship, the Court states, "AA is a fellowship of recovering alcoholics who share a desire to stop drinking. AA members are encouraged to seek support from other members in their efforts to stay sober. As a newcomer to AA, Maguire sought support from McGee, who shared similar interests and had successfully achieved sobriety for many years." *Id.*

97. *See id.*

98. *See id.*

99. *See id.* at 309.

100. *See* United States v. McGee, 763 F.3d 304, 309 (3rd Cir. 2014) (stating "the general practice in AA" is one of confidentiality where "a newcomer can turn . . . with the assurance that no newfound friends will violate confidences relating to his or her drinking problem") (quoting ALCOHOLICS ANONYMOUS WORLD SERVS., INC., 44 QUESTIONS 11 (2008)) (internal quotation marks omitted).

101. *See McGee*, 763 F.3d at 309.

102. *See id.* at 309–10; *see also supra* n.1.

103. *See McGee*, 763 F.3d at 309–10.

104. *See id.*

Maguire's inside information, McGee made a profit of nearly $300,000.[105]

At trial, a jury found McGee guilty of securities fraud under the misappropriation theory in violation of section 10(b), Rule 10b-5, and 10b5-2(b)(2).[106] Principally, "the jury found that [McGee's] trades violated a relationship of trust or confidence with Maguire based on their 'history, pattern, or practice of sharing confidences' pursuant to Rule 10b5–2(b)(2)."[107]

B. Market Analysis: The Third Circuit Invests in Rule 10b5-2(b)(2)

On appeal to the Third Circuit, McGee challenged Rule 10b5-2(b)(2), claiming it exceeded the SEC's rulemaking authority.[108] Further, he argued there was not enough evidence to establish the requisite relationship of trust or confidence.[109] In response to McGee's claims, the Court first conducted a *Chevron* analysis of the challenged Rule, and held that the SEC did not exceed its authority.[110] The Court also reviewed the "facts and circumstances" and determined that McGee did, in fact, breach a duty of trust and confidence owed to Maguire.[111]

1. Chevron *Analysis*

Under *Chevron*, courts must follow a two-step process to determine the validity of an agency regulation.[112] First, the court must ask whether "the [enabling] statute is silent or ambiguous on the precise question at issue."[113] Second, if the enabling statute is silent or ambiguous, the court must determine whether the rule or regulation in question was "based on a permissible construction of the statute."[114] In this case, McGee's challenge to Rule 10b5-2(b)(2) was based on the contention that section 10(b) was *not* ambiguous on the issue of fraud.[115] Furthermore, he argued that Supreme Court precedent disallowed the extension of liability to non-fiduciaries; therefore, the rule was invalid.[116]

105. *See id.* at 308 ("Shortly after the public announcement of PHLY's sale, McGee sold his shares, resulting in a $292,128 profit.").

106. *See* United States v. McGee, 763 F.3d 304, 309–10 (3rd Cir. 2014) (referring to McGee's two-count indictment and conviction at trial).

107. *See id.* at 308 (citing 17 C.F.R. § 240.10b5-2(b)(2) (2000)).

108. *McGee*, 763 F.3d at 310.

109. *See id.*

> McGee renews his arguments on appeal, first contending that Rule 10b5–2(b)(2) exceeds the SEC's rulemaking authority under section 10(b). Second, he argues that there is insufficient evidence to support his convictions for securities fraud and perjury. Finally, he argues that the District Court exceeded its discretion in denying his motion for a new trial based on newly discovered evidence. We will address each argument in turn. Because we determine none to be persuasive, we will affirm.

Id.

110. *See id.* at 310–16 (conducting the *Chevron* analysis in favor of Rule 10b5-2(b)(2)).

111. *See id.* at 316–18 (holding that McGee misappropriated information in breach of duty of trust and confidence owed to Maguire).

112. *See* United States v. McGee, 763 F.3d 304, 312 (3rd Cir. 2014) (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

113. *See McGee*, 763 F.3d at 312 (citing *Chevron*, 467 U.S. at 842–43).

114. *See McGee*, 763 F.3d at 312.

115. *See id.*

116. *See id.*

In addressing the first prong of *Chevron*, the Third Circuit held that section 10(b) was ambiguous and expressly delegated broad rulemaking authority to the SEC.[117] In its holding, the Court reiterated some common frustrations regarding Congress' lack of express guidance on insider trading.[118] To that end, the Court held that, "[t]he statute [was] ambiguous because Congress declined to define the amorphous term 'deceptive device.'"[119] Furthermore, the Court stated that Congress did not "mention insider trading at all [in section 10(b)], much less misappropriation or relationships required for liability."[120] The court concluded its first prong analysis by stating that *O'Hagan* "simply [did] not [hold] that [the] misappropriation [theory] requires a fiduciary duty."[121]

In its second prong analysis, the Court addressed "whether the [SEC's] interpretation [was] reasonable in light of the language, policies, and legislative history" of section 10(b).[122] Here, the Court stated that the securities laws were intended to "insure the maintenance of fair and honest markets," and that section 10(b) was meant to target *any* manipulative practice relating to securities transactions.[123] As such, the Third Circuit held that Rule 10b5-2(b)(2) was an appropriate exercise of the SEC's rulemaking authority, because it was based on a permissible reading of section 10(b).[124]

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117. *See id.* at 313 ("At *Chevron* step one, we decide that § 10(b) is ambiguous and expressly delegates broad rulemaking authority to the SEC.").

118. *See* United States v. McGee, 763 F.3d 304, 313 (3rd Cir. 2014) (holding the enabling statute is ambiguous).

119. *See id.* (holding statute to be ambiguous).

120. *See id.*

121. *See id.* at 314–15 (concluding first prong analysis). In addition to the analysis included in the main text of this opinion, the Court stated that only a clear and unambiguous judicial precedent—one that completely "forecloses" the possibility of the agency's interpretation—can invalidate a regulation. *See id.* at 313 ("*Chevron's* premise is that it is for agencies, not courts, to fill statutory gaps. Hence, it bears reemphasis that only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction. Our review of insider trading case law reveals no such authority.") (internal citations omitted) (internal quotation marks omitted).

While the Court recognized that both *Chiarella* and *Dirks* often referred to fiduciary duties, the Third Circuit held that the misappropriation theory, under *O'Hagan*, did *not* limit liability for insider trading strictly to fiduciary relationships. *Id.* at 313–14 (stating that in *O'Hagan* "[t]he Court did not unambiguously define recognized duties or cabin such duties to fiduciary relationships" but rather that "the Court painted with a broader brush, referring to the requisite relationship as a 'fiduciary or other similar relationship,' an 'agency or other fiduciary relationship,' a 'duty of loyalty and confidentiality,' and a 'duty of trust and confidence'") (citing United States v. O'Hagan, 521 U.S. 642, 652–61 (1997)) (internal citations omitted).

Importantly, the Third Circuit did not concede the point that either *Chiarella* or *Dirks* limited fraud liability strictly to fiduciary relationships. *Id.* In fact, the Court argued that no Supreme Court holding strictly limited liability for insider trading to fiduciary relationships. *See id.* at 314 (stating that even though *Chiarella* and *Dirks* "often referred to fiduciaries, they spoke also in broader terms" and that "[e]ven assuming arguendo that *Chiarella* and *Dirks* require[d] a strict fiduciary duty for traditional insider trading, neither case considered the misappropriation theory" and furthermore that "[i]n *O'Hagan,* the Court examined these cases and opted to extend misappropriation beyond solely fiduciaries"). Rather, the Court stated that the *O'Hagan* court "painted with a broader brush," and "simply [did] not [hold] that [the] misappropriation [theory] requires a fiduciary duty." *See id.* at 314–15 (concluding first prong analysis).

122. *See McGee*, 763 F.3d at 315 (beginning second prong analysis).

123. *See* United States v. McGee, 763 F.3d 304, 315 (3rd Cir. 2014) ("Here, Congress implemented the Exchange Act to insure the maintenance of fair and honest markets in [securities] transactions. The legislative history demonstrates that § 10(b) was aimed at *any* . . . manipulative or deceptive practices which [the SEC] finds detrimental to the interests of the investor.") (internal citations omitted) (internal quotation marks omitted).

124. *See id.* at 316 (holding Rule 10b5-2(b)(2) to be a "valid exercise" of SEC authority and proper under section 10(b) of the Exchange Act).

2. History, Pattern, or Practice

Finally, the Third Circuit rejected McGee's contention that his relationship with Maguire did not exhibit a "history, pattern, or practice of sharing confidences," such that he (McGee) knew or reasonably should have known that Maguire expected the shared information to remain confidential.[125] Based on the party's involvement in AA (recounted in the facts stated above), the Court held that the relationship between McGee and Maguire clearly exhibited a "history, pattern, or practice" of sharing confidences, and that McGee breached his duty to disclose or refrain from trading.[126]

IV. Paying Dividends: Implications of the Third Circuit's Investment in Rule 10b5-2(b)(2)

The Third Circuit summarized its holding in McGee, and pointed towards the potential implications of its decision, in the following passage:

> We believe that Rule 10b5–2(b)(2) is based on a permissible reading of "deceptive device" under 10(b). Although we are not without reservations concerning the breadth of misappropriation under Rule 10b5–2(b)(2), it is for Congress to limit its delegation of authority to the SEC or to limit misappropriation by statute. It is not the role of our Court, even if the agency's reading differs from what the court believes is the best statutory interpretation.[127]

This passage acknowledges that outsiders who trade on the basis of material, non-public information will be held to a much higher standard in the Third Circuit following *McGee*.[128] However, the Court's "reservations" also allude to a concern that the far-reaching nature of Rule 10b5-2(b)(2) might lead to a potentially intrusive policy.[129]

Rule 10b5-2(b)(2) expands liability for insider trading to an almost unlimited assortment of personal relationships outside the corporation.[130] Although the Court expressed concern that this might lead to over-intrusiveness, the Third Circuit also suggested that Congressional action to specifically amend the securities laws could (and perhaps should) be taken to change post-*McGee* policy.[131] If the policy implications of *McGee* prove to be too burdensome on corporate actors, and practitioners yearn for change, they should take the Court's words to heart and lobby Congress to amend the securities laws.[132]

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125. *See id.* at 316–17 (rejecting the defendant's arguments relating to relationship with source of information).

126. *See id.* at 317–18 (analyzing the facts of the case to determine history pattern or practice of sharing confidential information). Here, the Court relied heavily on Alcoholics Anonymous publications and generally accepted procedures. *See id.* (citing ALCOHOLICS ANONYMOUS WORLD SERVS., INC., *supra* note 100.

127. *See McGee*, 763 F.3d at 316 (summarizing the holding and indicating a need for Congressional action if the public desires limitations of authority granted to the SEC) (quotations omitted).

128. *See id.*

129. *See* United States v. McGee, 763 F.3d 304, 316 (3rd Cir. 2014) (stating that the Court does have its reservations concerning the policy implications of Rule 10b5-2(b)(2)).

130. *See id.* (noting the "breadth of misappropriation" under Rule 10b5-2(b)(2) and recognizing the vast expansion of liability under the Rule).

131. *See id.*

132. *See id.* (noting that the Court's place is not to set policy but rather to recommend Congressional action if a change in policy is desired).

As mentioned earlier, both the misappropriation theory and Rule 10b5-2 have received extensive and wide-ranging criticism. [133] Some commentators have critiqued Rule 10b5-2 as exceeding the SEC's authority, while others have criticized the same rule for being too lenient on insider trading.[134] Following the Court's decision in *McGee*, the legal community promptly took note of the expansion of insider trading liability in the Third Circuit.[135] One commentator even suggested that Supreme Court review of the validity of Rule 10b5-2 might be appropriate in the future.[136] Regardless of the response to *McGee*, it appears that the overall climate for insider trading in the Third Circuit will remain hostile for potential defendants.[137]

Other circuits have moved towards relaxing standards for defendants in insider trading cases.[138] Recently, in a high profile decision, the Second Circuit overturned fraud convictions for two notorious investors.[139] However, *McGee* demonstrates that the Third Circuit will remain a jurisdiction that places a premium on investor protection over corporate flexibility.[140] Furthermore, based on the Court's adoption of Rule 10b5-2(b)(2), it is likely that misappropriation by corporate outsiders will be prosecuted even more aggressively in the Third Circuit moving forward.[141]

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133. *See generally* Grzebielski, *supra* note 40 (criticizing Rule 10b5-2 as exceeding SEC's authority); Capeci, *supra* note 8 (criticizing the SEC's prosecution of Rule 10b5-2 cases and calling for greater vigilance on the part of the SEC); Madden, *supra* note 33 (examining critiques of misappropriation theory and Rule 10b5-2); Quinn, *supra* note 39 (responding to a variety of critiques of the misappropriation theory and Rule 10b5-2).

134. *See* Grzebielski, *supra* note 40, at 492 (criticizing Rule 10b5-2 as probably exceeding the SEC's authority but also as not clear enough to make meaningful difference in prosecutions under misappropriation theory); *see also* Quinn, *supra* note 39, at 867 (responding to a variety of critiques about the misappropriation theory and Rule 10b5-2).

135. *See e.g.*, Justin J. Roberts, *Some Umpires Strike Back: A Swing, A Miss and the Changing Rules of the Insider Trading Game*, CRAIN'S CLEVELAND BUS. (Feb. 12, 2015), http://www.crainscleveland.com/article/20150212/BLOGS05/302129998/some-umpires-strike-back-a-swing-a-miss-and-the-changing-rules-of; Saranac Hale Spencer, *AA Insider-Trading Conviction Upheld in Third Circuit*, LEGAL INTELLIGENCER (Aug. 15, 2014), http://www.thelegalintelligencer.com/id=1202666876147/AA-InsiderTrading-Conviction-Upheld-in-Third-Circuit?slreturn=20150114114116.

136. *See* Roberts, *supra* note 135 (suggesting the Supreme Court review could have helped defendant in *McGee*).

137. *See id.*

138. *See* United States v. Newman, 773 F.3d 438, 442–43 (2d Cir. 2014) (overturning fraud convictions of former hedge fund traders Todd Newman and Anthony Chiasson); *see also* Thomas O. Gorman, *Third Circuit Rejects Claim That Fiduciary Duty Required For Insider Trading*, LEXOLOGY BLOG (Aug. 17 2014), http://www.lexology.com/library/detail.aspx?g=c24ff234-a87d-408e-b0f3-08d8d4e7184a; Christopher M. Matthews, *Court Overturns Insider-Trading Convictions, a Blow to Justice Department*, WALL ST. J. (Dec. 10, 2104), http://www.wsj.com/articles/appeals-court-overturns-two-insider-trading-convictions-1418224146 (reporting the Second Circuit's decision in *Newman*).

139. *See generally Newman*, 773 F.3d 438; Mary P. Hansen & Richard J.L. Lomuscio, *Second Circuit Limits Criminal Insider Trading Actions Against Tippees*, SEC. LAW PERSPECTIVES (Dec. 11, 2014), http://securitieslawperspectives.com/second-circuit-limits-criminal-insider-trading-actions-tippees/.

140. *See* Ben Protess & Matthew Goldstein, *Appeals Court Deals Setback to Crackdown on Insider Trading*, N.Y. TIMES (Dec. 10, 2014, 10:19 a.m.), http://dealbook.nytimes.com/2014/12/10/appeals-court-overturns-2-insider-trading-convictions/?_r=0.

141. *See e.g.*, William Peacock, *Alcoholics Anonymous Confidant's Insider Trading Conviction Upheld*, FINDLAW 3RD CIRCUIT NEWS & INFO. BLOG (Aug. 26, 2014), http://blogs.findlaw.com/third_circuit/2014/08/alcoholics-anonymous-confidants-insider-trading-conviction-upheld.html (indicating strict enforcement of Rule 10b5-2 in the Third Circuit); *see also* Spencer, *supra* note 135 (remarking on the strict enforcement policy adopted by the Third Circuit).

V. Investment Advice: Recommendations For Practitioners Post-*McGee*

In light of the Third Circuit's expansion of liability in *McGee*, practitioners will face a new set of challenges in the securities fraud arena.[142] While Rule 10b5-2(b)(2) provides prosecutors with a useful tool for pursuing misappropriation by outsiders, potential defendants will need to pay closer attention to—and be more creative in defining—the nature of their non-business relationships.[143] Ultimately, it will be incumbent on prosecutors to utilize Rule 10b5-2(b)(2) in pleading their cases.[144] On the other hand, corporate and in-house counsel will have the important role of advising clients regarding the implications of Rule 10b5-2(b)(2) and *McGee* in order to avoid potential liability for insider trading.[145]

A. Bull Fighting: Recommendations For Prosecutors

Prosecutors are positioned to benefit the most from the *McGee* decision.[146] However, in the past, the greatest obstacle to implementation of Rule 10b5-2 has been the reluctance of prosecutors to plead the Rule.[147] Not all insider trading, or even all misappropriation cases, require Rule 10b5-2 to obtain a conviction.[148] Nevertheless, prosecutors should be more inclined to use the Rule in the Third Circuit in light of its acceptance in *McGee*.[149] The Third Circuit has given prosecutors a tool that can be effectively put to use to combat manipulative activity by outsiders privy to material, non-public information; they should take advantage of their newfound position by consistently pleading Rule 10b5-2(b)(2).[150]

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142. *See* Grzebielski, *supra* note 40, at 491–93 (examining the SEC's new Rule 10b5-2 and stating some new challenges presented by Rule 10b5-2).

143. *See* HAZEN, *supra* note 11, at § 12.17[4][B] ("Notwithstanding the questions that have been raised, Rule 10b5–2 has not been invalidated. Unless the rule is struck down, people conducting transactions with access to nonpublic information must be mindful of the three situations in which a duty of confidentiality is presumed under the rule.").

144. *See* Capeci, *supra* note 8, at 821 (addressing concerns regarding the prosecutor's refusal to consistently plead Rule 10b5-2(b)(2) and instead relying on common law notions of fraud).

145. *See* Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates, *Court Dismisses Insider Trading Case Against Mark Cuban, Narrowing SEC Misappropriation Rule and Raising Issues Regarding the Protection of Confidential Information*, BLOOMBERG LAW (July 21, 2009), https://www.bloomberglaw.com/s/legal/a5c1dd69e59a062ce11adc2afa2955f2/document/X5VSB3G5GVG0?search32=C9P6UQR5E9FN6PB1E9HMGNRKCLP6QF9848OJ0OHL5KP2GOH950P2I8H97CTMSRQVD5MN0NRGD1P62SR5ECUJ2EPRCPKNGNR2DTNMONRHELIN4U9T64 (analyzing implications of Rule 10b5-2 after the SEC imposed charges against Mark Cuban and addressing concerns similar to those that corporate and in-house counsel will have to address after *McGee*).

146. *See* Peacock, *supra* note 141 (summarizing issues decided in *McGee* and implying that the Third Circuit holding will create a harsher climate for misappropriators).

147. *See* Capeci, *supra* note 8, at (noting that prosecutors had failed to consistently plead Rule 10b5-2).

148. *See* HAZEN, *supra* note 1, at § 12.17[4] (discussing the evolution of misappropriation theory and mentioning the use of common law fraud elements in pre-10b5-2 cases); *see generally* United States v. O'Hagan, 521 U.S. 642 (1997) (illustrating that convictions under the misappropriation theory existed prior to Rule 10b5-2).

149. *See* Capeci, *supra* note 8 (urging prosecutors to use Rule 10b5-2 on a more consistent basis and extolling usefulness of the rule in misappropriation cases).

150. *See* United States v. McGee, 763 F.3d 304, 316 (2014) (holding Rule 10b5-2(b)(2) as legitimate use of SEC power and presenting prosecutors with the opportunity to consistently use the Rule in misappropriation cases).

B. Bear Baiting: Recommendations For Corporate Counsel

Although *McGee* offers prosecutors the tactical advantage in misappropriation cases, there are still definitive steps corporate counsel can take to help avoid problems with insider trading.[151] Rule 10b5-2(b)(2) creates a duty to disclose for almost all outsiders who receive information from insiders, with whom they have a fairly ordinary relationship.[152] For in-house and corporate counsel practicing in the Third Circuit, explaining to clients the far-reaching scope of the Rule will be of paramount importance.[153]

In the past, duties to disclose have been based on relationships defined by golf, sports, friendship, familial ties, and professional affiliation.[154] In order to prevent potential liability, counsel should impress upon clients the fact that, after *McGee*, liability for insider trading can arise out of almost any relationship where confidential information has been shared in the past.[155] Counsel should advise clients that any information learned on the golf course, or even from an old college acquaintance, might potentially lead to an insider trading violation if disclosure is not made.[156] As such, counsel should advise clients to err on the side of disclosure to avoid any potential problems.[157]

In the unfortunate event that a client is prosecuted for insider trading under the misappropriation theory, defense counsel should establish a thorough factual record to clearly define the relationship between their client and the source of information.[158] Because courts conduct a review of the "facts and circumstances" under Rule 10b5-2, the best defense will necessarily include a comprehensive and detailed record to rebut any claim of a "history, pattern, or practice" of sharing confidences.[159] In such cases, a meticulous record that clearly limits the scope and nature of the relationship will be invaluable.[160]

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151. *See* HAZEN, *supra* note 1 (explaining that individuals with access to material, non-public information will need to be aware of three non-exclusive bases for liability under Rule 10b5-2 and indicating that counsel will need to instruct clients on this issue).

152. *See* 17 C.F.R. § 240.10b5-2 (2000); *see also* Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, Investment Company Act Release No. 24,599 (Aug. 15, 2000) (releasing final rule and explaining broad scope of three non-exclusive bases for misappropriation liability).

153. *See* HAZEN, *supra* note 1.

154. *See id.* at §21.17[1] (citing cases involving "psychiatrists, football coaches, former athletes, other high profile sports figures, adult film stars, newspaper columnists, printers, leading arbitrageurs, golfing partners, and most unfortunately, lawyers and, other professional relationships").

155. *Id*; *see also* United States v. McGee, 763 F.3d 304, 316 (3rd Cir. 2014) (expressing reservations regarding the broad scope of Rule 10b5-2(b)(2) but upholding it nonetheless); Peacock, *supra* note 141 (outlining the *McGee* holding and providing information for counsel to inform clients).

156. *See* HAZEN, *supra* note 1.

157. *See* Grzebielski, *supra* note 40, at 484–85 (citing *Santa Fe Industries, Inc. v. Green* for the proposition that "Full disclosure forecloses liability under the misappropriation theory: Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no § 10(b) violation"); *see generally* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

158. *See McGee*, 763 F.3d at 309–17 (citing ALCOHOLICS ANONYMOUS WORLD SERVS., INC., *supra* note 100 (noting the Appellants Brief established an insufficient record so as to avoid conviction). In *McGee*, the defendant did not establish a substantial enough record, whereas the government was able to bring in evidence of AA policy to prove the necessary "history, pattern, or practice." *McGee*, 763 F.3d at 309–17.

159. *See McGee*, 763 F.3d at 317 (recognizing "the SEC instead favored a facts-and-circumstances" approach).

160. *See id.*

VI. Conclusion: It Works If You Work It

Since the Rule was promulgated nearly fifteen years ago, prosecutors and courts have approached the extension of liability to corporate outsiders under Rule 10b5-2 with moderate apprehension.[161] *McGee* changed the market for misappropriation and insider trading cases by providing a decisive acceptance of Rule 10b5-2(b)(2), and officially extending liability to non-fiduciary corporate outsiders.[162] The legal community's reaction to *McGee*, so far, has displayed further hesitancy to accept the Rule.[163] However, prosecutors have an opportunity to take advantage of the Third Circuit's decision by consistently pleading Rule 10b5-2(b)(2) in insider trading cases.[164] At the same time, corporate counsel has the responsibility of preventing fraud claims by informing their clients of the broad scope of misappropriation liability after *McGee*.[165]

The Third Circuit acknowledged the possibility that Rule 10b5-2(b)(2) might not strike the best policy balance between investor protection and corporate flexibility.[166] However, the Court held that the SEC acted within its authority when it promulgated the Rule.[167] Thus, if practitioners are dissatisfied with the rule or the policy that follows from it, they should seek Congressional action to amend the securities laws in order to directly address insider trading.[168]

161. *See* Capeci, *supra* note 8 (noting the reluctant use of Rule 10b5-2 by prosecutors).

162. *See* United States v. McGee, 763 F.3d 304, 321–22 (3rd Cir. 2014) (rendering final holding and upholding Rule 10b5-2(b)(2) as a legitimate use of SEC authority).

163. *See* Peacock, *supra* note 141 (exhibiting apprehensive approach to new rule); Spencer, *supra* note 135 (adding to skeptical review of *McGee*); Gorman, *supra* note 138 (providing information for corporate counsel to share with clients).

164. *See* Capeci, *supra* note 8 (urging prosecutors to use Rule 10b5-2 more consistently).

165. *See* Gorman, *supra* note 176.

166. *See McGee*, 763 F.3d at 316 (expressing reservations over policy implications of Rule 10b5-2(b)(2)).

167. *See id.* (holding nonetheless that the SEC did not exceed its rulemaking authority).

168. *See id.* (noting that the Court's place is not to set policy and that Congressional action to amend securities laws or reign in SEC power might affect potentially desired change).