

Can Government Use Criminal Fraud Statute to Get Around “Personal Benefit” Requirement for Insider Trading?

May 09, 2024

The government prosecutes insider trading against insiders who convey material nonpublic information (“tippers”) and outsiders who acquire material nonpublic information (“tippees”) through two avenues: civil proceedings under 15 U.S.C. § 10(b) and criminal prosecution under 18 U.S.C. § 1348. Traditionally, insider trading cases have been brought under Section 10(b), which requires proof that a tipper received a “personal benefit” for conveying information to a tippee in breach of fiduciary duties. In recent years, however, prosecutors have turned to the criminal fraud statute, Section 1348, to prosecute insider trading cases in order to avoid being blocked out by the need to prove a personal benefit. This approach, however, has been cast into doubt by Judge John M. Walker’s concurring opinion in *United States v. Blaszczyk* (2022). In that case, the defendants were charged under both Section 10(b) and Section 1348 but were initially convicted only under the latter. The Second Circuit affirmed those initial convictions in a 2019 decision upholding the government’s use of Section 1348 to avoid proving that a tipper received a personal benefit. However, the U.S. Supreme Court ultimately vacated the convictions for other reasons and remanded the case without addressing whether the government must prove a personal benefit for a Section 1348 conviction. Upon remand, the Second Circuit vacated the convictions but still did not address the personal benefit question. This issue was instead addressed by the two majority judges in a separate concurring opinion authored by Judge Walker, where they found that “traditional notions of fair play are offended by the present incongruence in this circuit between civil and criminal deterrence.” The judges noted that “[i]t should not require fewer elements to prove a criminal conviction than to impose civil penalties for the same conduct.” Although this incongruence has not officially been decided by the courts, Judge Walker rightfully called upon the Second Circuit, the Supreme Court, and Congress to address the issue. Thus, whether the government may continue to use Section 1348 to circumvent the personal benefit requirement under Section 10(b) remains in doubt.

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