Resurrecting Deference to the Securities and Exchange Commission: Mark Cuban Trading on Inside information

Steven J. Cleveland

Follow this and additional works at: http://scholarship.law.ufl.edu/flr

Part of the Commercial Law Commons, Corporation and Enterprise Law Commons, and the Securities Law Commons

Recommended Citation
Available at: http://scholarship.law.ufl.edu/flr/vol65/iss1/2

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized administrator of UF Law Scholarship Repository. For more information, please contact outlier@law.ufl.edu.
RESURRECTING DEFFERENCE TO THE SECURITIES AND EXCHANGE COMMISSION: MARK CUBAN AND TRADING ON INSIDE INFORMATION

Steven J. Cleveland*

Abstract

By applying the Supreme Court’s administrative law jurisprudence to the examination of the validity of Rule 10b5-2(b)(1)—a rule recently adopted by the Securities and Exchange Commission (Commission)—this Article fills a significant gap in the existing literature. To date, commentators have argued against the rule’s validity by applying the Supreme Court’s securities law jurisprudence without considering the role of administrative law—despite the Court’s comments that the pertinent statute is ambiguous, despite express delegation of rulemaking authority by Congress to the Commission, and despite developments in administrative law subsequent to the Court’s relevant securities law decisions. By not considering the role of administrative law, commentators have approached the rule with undue skepticism. Administrative law principles dictate judicial deference to the Commission’s rule. The Commission once commanded deference from courts. The time has come to resurrect that deference.

INTRODUCTION ................................................................. 74

I. THE REGULATION OF INSIDER TRADING GENERALLY .......... 78

II. THE COMMISSION’S REGULATION OF SILENCE AS DECEPTION ........................................................................ 84
A. Congressional Delegation to the Commission ................. 86
B. Statutory Ambiguity ....................................................... 88
  1. Consideration of the Court’s Administrative Law Precedent ................................................................. 89
  2. Consideration of the Court’s Securities Law Precedent ................................................................. 91
C. Reasonable Interpretation of Statutory Ambiguity ......... 94
  1. Consistency ................................................................ 94
  2. Consideration of Regulatory Alternatives ................. 97
  3. Internal Inconsistency .............................................. 102
  4. Relative Institutional Expertise .............................. 105

CONCLUSION ........................................................................ 109

* Professor of Law, University of Oklahoma College of Law; J.D., Georgetown University Law Center; B.A., UCLA.
INTRODUCTION

Mark Cuban earned billions during the Internet boom of the late 1990s; in the year 2000, he used some of those earnings to purchase a majority interest in the Dallas Mavericks, a member of the National Basketball Association (NBA). Not content to watch his team from a luxury box high above the court, Cuban regularly sits courtside and, like other fans, enthusiastically comments on the action. Perhaps his enthusiasm has gotten the better of him; he has repeatedly and publicly criticized NBA referees and league officials. Perhaps not surprisingly, the NBA has fined Cuban multiple times for flouting its authority. Cuban’s run-ins with authority, however, have not been limited to the sporting realm.

In 2008, the Securities and Exchange Commission (Commission) accused Cuban of violating federal securities laws. According to the allegations of the Commission, the Chief Executive Officer of Mamma.com Inc. (MCI) contacted Cuban—who owned approximately 6% of the outstanding shares of MCI—and offered to share material, nonpublic information if Cuban agreed to maintain its confidentiality. Cuban allegedly accepted those terms; after learning the information, however, he promptly sold his entire stake in the company. Cuban sold his stock for approximately $13.30 per share on June 28 and 29, 2004—before the information became known publicly. After the markets closed on June 29, 2004, MCI publicly disclosed the information; trading in the company’s stock opened the following day at $11.89 per share, and ultimately closed that day at $11.99 per share. By trading in advance of the disclosure of that material, nonpublic information, Cuban avoided the loss of more than $750,000.

4. Complaint, supra note 3, at 5.
5. Id.
6. Id. at 5–6.
7. Id. at 6.
accused Cuban of committing securities fraud by engaging in illegal insider trading. The district court dismissed the Commission’s complaint, reasoning that even if Cuban agreed to maintain the company’s confidences, he did not agree to forgo any securities trade based on the confidential information. The Fifth Circuit determined that the allegations provided a plausible basis to conclude that Cuban understood that he was not to trade and that his agreement with the company was more than a simple confidentiality agreement. Consequently, the Fifth Circuit found it unnecessary to identify the contours of a relationship of “trust and confidence,” or to speak to the validity of Rule 10b5-2(b)(1), promulgated under § 10(b) of the Securities Exchange Act of 1934 (Exchange Act). Some of the leading business law scholars (BLS)—Professors Stephen Bainbridge, Alan Bromberg, Allen Ferrell, M. Todd Henderson, and Jonathan R. Macey—believe that, based upon Supreme Court precedent, illegal insider trading requires the breach of a fiduciary duty (or a similar duty of trust and confidence) when silence serves as the basis for the fraud. Applying this rationale to the Cuban case, they conclude that Cuban could not have engaged in illegal insider trading, because a confidentiality agreement alone does not suffice to establish a fiduciary (or similar) relationship. From their perspective, the Commission exceeded its authority by promulgating a rule imposing

8. Id. at 6–8.
12. Id. at 558 & n.40.
insider-trading liability based upon the breach of a confidentiality agreement.15

This Article argues that the Commission did not exceed its authority.16 Part I introduces background on the Commission’s regulation of insider trading. Part II then challenges the underlying premise of the BLS that silence cannot be deceptive absent the breach of a fiduciary (or similar) duty. The BLS premise their argument on Supreme Court precedent interpreting the statute in cases involving insider trading, but they ignore the Court’s precedent concerning administrative law. This Article fills a gap in the literature by considering the role of administrative law when addressing the validity of Rule 10b5-2(b)(1).

Contrary to the BLS’ premise, the Supreme Court defines the scope of insider-trading liability only until the Commission offers an alternative, reasonable interpretation of statutory ambiguity.17 In

---

15. See BLS’ Appellate Brief, supra note 13, at 21–27; BLS’ Trial Brief, supra note 13, at 2–3. See generally Roberta S. Karmel, Outsider Trading on Confidential Information—A Breach in Search of a Duty, 20 CARDOZO L. REV. 83, 95 (1998) (“There is little justification for making the breach of an agency or fiduciary duty to an employer, client, or similar beneficiary a federal, rather than a state law, claim unless a national economic interest is implicated.”).


17. See infra Subsection II.B.1. This Article focuses on civil enforcement actions by the Commission, not private causes of actions implied by the courts. Private causes of action may subject defendants to abuse, see Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995), and may be subject to limitations inapplicable to civil enforcement actions by the Commission. See United States v. Naftalin, 441 U.S. 768, 774 n.6 (1979) (distinguishing between governmental enforcement actions and potentially frivolous private litigation). Greater specificity might be required for purposes of criminal enforcement. See Crandon v. United States, 494 U.S. 152, 158 (1990) (“[I]t is appropriate to apply the rule of leniency in resolving any ambiguity in the ambit of the statute’s coverage.”); United States v. Chestman, 947 F.2d 551, 570 (2d Cir. 1991) (en banc) (“Useful as such an elastic and expedient definition of confidential relations, i.e., relations of trust and confidence, may be in the civil context, it has no place in the criminal law.”); United States v. Cassese, 273 F. Supp. 2d 481, 486 n.1, 488 (S.D.N.Y. 2003) (granting defendant’s motion to dismiss criminal charges, noting that the Commission refused to bring civil enforcement action); Stephen Joyce, Lawyers Say High Court Honest Services Case Will Hamper Prosecution of Corporate Fraud, 42 Sec. Reg. & L. Rep. (BNA) 1824 (Sept. 27, 2010) (criticizing “controversial prosecutions in which the line between civil and criminal conduct was blurred” and in which “wrongdoing by breaching…fiduciary duties…might [be]…transformed into federal criminal fraud cases”); Yin Wilczek, Judge, Attorneys Debate Vagueness of Standard for Securities Fraud Liability, 42 Sec. Reg. & L. Rep. (BNA) 1541 (Aug 16, 2010) (discussing dismissal with
National Cable & Telecommunications Ass’n v. Brand X Internet Services, the Supreme Court held that a court’s interpretation of an ambiguous statute does not prevent an administering agency from interpreting the statute differently, and the agency’s interpretation, so long as it is reasonable, displaces that of the court. So while the BLS may be correct that, when interpreting a statutory ambiguity, the Supreme Court has emphasized the violation of a fiduciary (or similar) duty before silence could constitute deception under § 10(b), the Supreme Court’s emphasis does not prohibit the Commission from interpreting that ambiguity differently. Moreover, in § 10(b), Congress expressly delegated rulemaking authority to the Commission. Consequently, courts should defer to the agency’s reasonable interpretation regarding the party deceived, which interpretation the Commission forged in Rule 10b5-2(b)(1). In light of the text of § 10(b), its ambiguity regarding deception, and the Supreme Court’s administrative law jurisprudence, courts should defer to the reasonable policy interpretations made by the Commission that result from notice-and-comment rulemaking. The Commission once commanded deference from the Court. The time has come for resurrecting that deference.

18. See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 983–84 (2005) (“Since Chevron teaches that a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong. Instead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes.”).

19. See infra notes 37–40 and accompanying text.

20. Compare Int’l Blvd. of Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979) (“It is a commonplace in our jurisprudence that an administrative agency’s consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight.”), United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858 n.25 (1975) (“Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight.”), and SEC v. W.J. Howey Co., 328 U.S. 293, 299 n.5 (1946) (“The Commission has followed the same definition in its own administrative proceedings.”), with Lampf v. Gilbertson, 501 U.S. 350, 354–55 (1991) (rejecting, without any reference to Chevron, the Commission’s proposed limitations period for a private action under § 10(b)), Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197–99 (1976) (rejecting, without any reference to Skidmore, the Commission’s interpretation regarding the defendant’s mental state), and Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 738–39, 746 n.10 (1975) (rejecting, without any reference to Skidmore, the Commission’s interpretation regarding the plaintiff’s standing). Though the Court largely accepted the Solicitor General’s position in Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008), the Commission articulated a contrary position in the lower courts; the Solicitor General prohibited the Commission from presenting that contrary position to the Court. See Linda Greenhouse, Supreme Court Limits Lawsuits by Shareholders, N.Y. TIMES, Jan. 16, 2008, at C1 (“The Securities and Exchange Commission supported the
I. THE REGULATION OF INSIDER TRADING GENERALLY

In 1934, Congress enacted the Securities Exchange Act, which created the Commission to administer the federal securities laws and included § 10(b).21 Section 10(b) provides:

It shall be unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.22

Though it prohibited deceptive devices and contrivances,23 Congress did not define any of those terms and it provided no specificity regarding the identification of the deceived party. By prohibiting deception “in connection with” the purchase or sale of a security, Congress intended to prohibit deception beyond that which occurs “in” or “during” a purchase or sale of securities.24 That is, the statute prohibits more than a purchaser’s deception of a seller and a seller’s deception of a purchaser.25 Consequently, the “in connection with” language certainly broadens the pool of persons who may have been deceived contrary to the statute, but Congress left ambiguous whose deception can constitute a violation.

In § 10(b), Congress prohibited nothing except that which contravenes rules that the Commission may promulgate. Thereby, Congress expressly delegated rulemaking authority to the Commission. Congress intentionally left a gap for the agency to fill.26 Moreover, the

plaintiffs . . . [T]he S.E.C. was denied authority to file a brief. Justice Kennedy’s opinion on Tuesday closely tracked the brief that Solicitor General Paul D. Clement eventually filed.”

22. Id. § 78j(b).
23. “Manipulative” is a term of art that has been defined narrowly. See Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 476 (1977).
25. See id. at 658 (“The misappropriation theory comports with § 10(b)’s language, which requires deception ‘in connection with the purchase or sale of any security,’ not deception of an identifiable purchaser or seller.”); United States v. Newman, 664 F.2d 12, 17 (2d Cir. 1981) (“[T]he language of Rule 10b-5 . . . contains no specific requirement that fraud be perpetrated upon the seller or buyer of securities.”).

[T]he ultimate question is whether Congress would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of ‘gap-filling’ authority. Where an agency rule sets forth important . . . duties, where the agency focuses fully and directly upon the issue, where the agency uses full
citational language—“as necessary or appropriate in the public interest or for the protection of investors”—makes plain the general policy making authority that Congress delegated to the Commission.

An episode of insider trading reportedly prompted the Commission to exercise the authority granted by Congress under § 10(b) and to promulgate Rule 10b-5, which generally prohibits securities fraud. During the 1940s, a business executive falsely presented to his investors a bleak future for the company. The false news prompted investors to sell their shares in the company, and the price of the company’s securities consequently fell. Knowing that the company actually had a rosy future, the business executive then purchased shares of the company at a depressed price, which rebounded when the true state of affairs came to light. Because neither the federal statutes nor existing Commission rules clearly prohibited fraud in the purchase of shares (as opposed to fraud in the sale of shares), and because such behavior may be “contrary to the public interest” and may evidence a need for investor protection, the Commission promulgated Rule 10b-5.

notice-and-comment procedures to promulgate a rule, where the resulting rule falls within the statutory grant of authority, and where the rule itself is reasonable, then a court ordinarily assumes that Congress intended it to defer to the agency’s determination.

Id. at 173–174.

27. For the factual background of this episode, see Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212 n.32 (1976).

28. As of this writing, Rule 10b-5 provides:

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.

Although each references “any person,” neither § 10(b) nor Rule 10b-5 specifically references insiders or insider trading. Section 10(b) speaks of “deceptive devices and contrivances.” Rule 10b-5 speaks of “fraud, deceit, and materially misleading misstatements or omissions.” Since enacting § 10(b), Congress has spoken of the evils of insider trading, but it has consciously avoided attempts to define insider trading. Similarly, the Commission generally has eschewed defining insider trading for fear of providing a blueprint for mischief. The Commission generally has utilized enforcement actions to establish the parameters of prohibited conduct on a case-by-case basis. Consequently, the Commission, the courts, and the parties struggle to identify the parameters of legal conduct.

Affirmative misrepresentations yield relatively straightforward analysis. Misleading omissions that give rise to liability, however, have proved perplexing. If an outsider of the company works diligently


30. See H.R. Rep. No. 100-910 (1988), reprinted in 1988 U.S.C.C.A.N. 6043, 6048 (“While cognizant of the importance of providing clear guidelines for behavior [involving insider trading] which may be subject to stiff criminal and civil penalties, the Committee nevertheless declined to include a statutory definition in this bill . . .”); H.R. REP. No. 98-355 (1984), reprinted in 1984 U.S.C.C.A.N. 2274, 2287 (“Evidence seems to show that any effort to define insider trading would result in, at best, a slightly less generalized rule than 10b-5 and, at worst, a rule that leaves gaping holes . . .”).

31. See Karmel, supra note 15, at 127 (“[T]he SEC is a prosecutorial agency that has long articulated the view that detailed regulations will be a blueprint for fraud and therefore it is better to rely upon general antifraud concepts to police the securities markets.”).

32. See Roberta S. Karmel, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VERSUS CORPORATE AMERICA 106 (1982) (suggesting that the SEC looks and thinks like a legal adversary of the securities industry); Karmel, supra note 15, at 126 (“[T]he SEC has developed its insider trading policies through ad hoc enforcement cases . . .”).

33. See Donald C. Langevoort, The SEC as a Lawmaker: Choices about Investor Protection in the Face of Uncertainty, 84 Wash. U. L. Rev. 1591, 1622 (2006) (“While its motivations connect closely to historic values, insider trading doctrine itself is messy, incoherent, and result-oriented . . .”). As is the case with other complicated areas of law, the analytical approach applicable to one area of regulated conduct may not apply with full force to a different area of that regulated conduct. See generally United States v. Stevens, 130 S. Ct. 1577, 1580 (2010) (rejecting the argument that courts should employ a balancing test to determine the applicability of First Amendment protection to animal cruelty videos, despite precedent calling for a balancing test to determine the applicability of First Amendment protection to other categories of speech).

34. For example, if Cuban intended to trade on the information at the time that he entered into the confidentiality agreement, then he would have affirmatively misrepresented his intent to maintain the information’s confidentiality. Cf. SEC v. Dorozhko, 574 F.3d 42, 49–50 (2d Cir. 2009) (distinguishing between silence and affirmative misrepresentation to gain access to information); SEC v. Cherif, 933 F.2d 403, 406 (7th Cir. 1991) (describing a former employee who, despite his termination, misrepresented his ongoing employment with the source to continue access to material, nonpublic information).
and (legally) unearths information that enables her to trade profitably in
the company’s securities, then she should retain the profits from the
trade as the fruits of her labor. Requiring her to disclose the information
to others before allowing her to trade would decrease or eliminate her
profit and discourage her diligent quest for valuable information. Such
diligence, however, should be encouraged, not discouraged.35 Though it
may have been advocated in individual cases, neither the Commission
nor the Supreme Court has supported the parity of information rationale,
which would require one who discovers information either to abstain
from trading or disclose the information to others before trading.36

Rejecting the parity of information rationale, however, does nothing
to provide a coherent rationale for imposing liability stemming from
one’s silence. Typically, silence is not troubling in a transaction. Caveat
emptor frequently provides the rule of thumb. Caveat emptor applies
more easily when tangible property, as opposed to stock, changes hands.
Further complicating the analysis, stock is routinely traded
impersonally. Without personal interaction, silence is what one expects
to hear from the counterparty, so silence generally does not mislead.

Given Congress’s and the Commission’s prior unwillingness to
provide the requisite guidance, courts have filled the void. As to
whether silence may constitute the deception required by § 10(b) and
Rule 10b-5, the judiciary has premised insider-trading liability on a
breach of fiduciary duty.37 The Supreme Court described the principal
theories of liability for such insider trading to include the following: (1)
when an insider breaches a fiduciary duty by trading on the basis of
material, nonpublic information;38 (2) when an insider, in breach of a
fiduciary duty, tips a third party who knows or should know of the
breach and who trades on the basis of material, nonpublic information;39

(discussing the entrepreneur’s compensation).
36. See Karmel, supra note 15, at 89 (“[T]he parity of information theory has not been
accepted by the Supreme Court or the SEC itself.”).
37. See Stephen M. Bainbridge, Insider Trading Regulation: The Path Dependent Choice
Between Property Rights and Securities Fraud, 52 SMU L. Rev. 1589, 1590 (1999). Aside from
Section 10(b) and Rule 10b-5, the federal government otherwise relegates insider trading. See,
e.g., 15 U.S.C. § 78p(b) (2006) (requiring disgorgement of short-swing profits obtained by
certain directors and officers).
of a duty to disclose prior to trading guarantees that corporate insiders, who have an obligation
to place the shareholder’s welfare before their own, will not benefit personally through
fraudulent use of material, nonpublic information.”). The prohibition extends to temporary
insiders. See Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983) (“Under certain circumstances, such
as where corporate information is revealed legitimately to an underwriter, accountant, lawyer, or
consultant working for the corporation, these outsiders may become fiduciaries of the
shareholders.”).
39. See Dirks, 463 U.S. at 660 (“[A] tippee assumes a fiduciary duty to the shareholders
and (3) when an outsider trades on the basis of material, nonpublic information misappropriated in breach of a fiduciary duty to the source of that information.40

Long advocated by the Commission, the third theory—the misappropriation theory—was most recently accepted by the Supreme Court, and it is the misappropriation theory that gave rise to Rule 10b5-2(b)(1), the rule at issue in the case against Mark Cuban. But first, a few words on the Supreme Court’s decision to embrace the misappropriation theory, according to which the deceived party is not the counterparty to the trade.

In United States v. O’Hagan, Grand Metropolitan PLC (Grand Met) formed a secret plan to acquire the Pillsbury Company.41 Such an acquisition, on a per-share basis, would not occur at the price listed on a stock exchange. An exchange lists the price for one share, a relatively inconsequential amount. Grant Met did not want to purchase a relatively inconsequential amount; it wanted to buy control of Pillsbury. To acquire control, one must pay a premium above the price listed on an exchange.42 Grand Met maintained the secrecy of its plan, because if news of its plan leaked to the public, then the price for Pillsbury would have risen and jeopardized the success of the planned acquisition.43

To facilitate its plan, Grand Met retained counsel in Minnesota, where Pillsbury was headquartered.44 James Herman O’Hagan—who was an attorney at the Minnesota law firm, but was not personally representing Grand Met—learned of the planned acquisition from an attorney at his law firm who was representing Grand Met.45 O’Hagan then acquired securities issued by Pillsbury, knowing that their value would increase when Grand Met eventually announced its plan to the

---


41. For the factual background of the case, see O’Hagan, 521 U.S. at 647–48.

42. See Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994) (“The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.”); JESSE H. CHEOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 1137 (6th ed. 2004) (“Of course, stock market value represented the value of minority shares because controlling shares do not trade.”).

43. See Macey, supra note 10, at 25.

44. O’Hagan, 521 U.S. at 647.

45. Id. at 647, 649 n.1.
Following Grand Met’s public announcement, O’Hagan profited on the sales of his Pillsbury securities. O’Hagan appealed criminal convictions on numerous counts of violating, among other federal securities laws and regulations, § 10(b) and Rule 10b-5.

Then-existing Supreme Court precedent interpreting § 10(b) and Rule 10b-5 may not have sufficed to discipline O’Hagan. O’Hagan was not a fiduciary or insider of Pillsbury, in whose securities he traded. Shareholders of Pillsbury had not placed their trust in him. No one at Pillsbury, in whose securities O’Hagan traded, had tipped him about the acquisition. Pillsbury—like the market at large—was ignorant of Grand Met’s secret plan at the time of O’Hagan’s trades.

The Commission had long pursued defendants under a theory of misappropriation, which had divided the circuit courts of appeals. Twice before, the Supreme Court had been presented with the question whether liability under § 10(b) could be based upon the misappropriation theory, but in one case, the theory had not been presented to the jury, and in the other case, the Court divided evenly on the issue. Given a third opportunity, the Court upheld the validity of the misappropriation theory. “[T]he misappropriation theory outlaws trading on the basis of nonpublic information by a corporate ‘outsider’ in breach of a duty owed not to a trading party, but to the source of the information.”

“Although the Court... approved the misappropriation theory in... O’Hagan, it did not develop a broad doctrine or policy rationale [to]... assist the lower courts in distinguishing between lawful and unlawful outsider trading.” Though it may be advisable for the Court

46. Id. at 647.
47. Id. at 648.
48. Id. at 648–49.
49. See id. at 653 n.5.
50. Id.
54. Id. at 655; see id. at 652 (“[A] fiduciary’s undisclosed, self-serving use of a principal’s information... defrauds the principal of the exclusive use of that information.”).
55. Karmel, supra note 15, at 84.
to issue narrow rulings, the Commission has been criticized for regulating on a case-by-case basis, instead of promulgating broad rules that facilitate transaction planning and dispute resolution. Following the Court’s decision in United States v. O’Hagan, the Commission promulgated a new rule. Rule 10b5-2(b) provides a nonexclusive basis for liability under the misappropriation theory; the requisite duty exists “[w]henever a person agrees to maintain information in confidence.”

II. THE COMMISSION’S REGULATION OF SILENCE AS DECEPTION

According to the BLS, Supreme Court precedent requires the breach of a fiduciary (or similar) duty before silence can be deceptive in a securities trade. And, the argument continues, because a simple confidentiality agreement alone does not give rise to a fiduciary (or similar) relationship, the Commission exceeded its authority in...
promulgating Rule 10b5-2(b)(1). The BLS, however, misperceive congressional allocation of interpretive authority between the courts and the Commission. Contrary to the position espoused in the writings of the BLS, the Commission, in promulgating Rule 10b5-2(b)(1), acted consistent with § 10(b) and with the Supreme Court’s administrative law and securities law precedent.

Congress unquestionably wields the power to legislate,59 but it inevitably enacts ambiguous statutes.60 Consequently, the resolution of statutory ambiguity is a pervasive problem. In the absence of congressional clarification, who should resolve the ambiguity—a court, or the agency charged by Congress to administer the ambiguous statute? In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,61 the Supreme Court formalized its practice of according weight to the position articulated by an administering agency: If Congress did not squarely address the issue and if the administering agency’s interpretation of the statutory ambiguity is reasonable, then a court should defer to the agency’s interpretation, even if the court might have interpreted the ambiguity differently.62

Consequently, analysis under *Chevron* generally involves a two-step inquiry. Step One involves the determination of whether the statute is ambiguous. Step Two involves the determination of whether the agency’s interpretation is reasonable. Because the Court has not always applied *Chevron* analysis, despite its apparent applicability, some conclude that the Court undertakes a preliminary determination before applying *Chevron*’s two steps, with the preliminary determination termed “Step Zero.”63 So, for example, some matters might be deemed too significant for Congress to have delegated their resolution to an agency, such as the regulation of physician-assisted suicide.64 Congress,

60. See generally Muscarello v. United States, 524 U.S. 125 (1998) (interpreting the phrase “carries a firearm”); id. at 144 n.6 (Ginsburg, J., dissenting) (“And in the television series ‘M*A*S*H,’ Hawkeye Pierce (played by Alan Alda) presciently proclaims: ‘I will not carry a gun. . . . I’ll carry your books, I’ll carry a torch, I’ll carry a tune, I’ll carry on, carry over, carry forward, Cary Grant, cash and carry, carry me back to Old Virginia, I’ll even hari-kari if you show me how, but I will not carry a gun!’”) (citation omitted).
63. Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 873 (2001); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006) (discussing considerations that might arise prior to *Chevron Step One*). Congress, however, delegated to the Commission rulemaking authority in § 10(b), empowering the Commission to identify those deceptive practices that will be prohibited.
however, delegated significant authority to the Commission, including interpretative authority regarding § 10(b).

A. Congressional Delegation to the Commission

A statutory ambiguity leaves room for an agency to fill the gap, but Congress must have charged the agency with administering the ambiguous statute.65 Congress created the Commission to administer the Exchange Act.66 Congress granted the Commission rulemaking authority generally and, in particular, with respect to § 10(b).67 Congress empowered the Commission to investigate statutory and rules violations.68 Congress empowered the Commission to conduct administrative cease-and-desist proceedings for present, past, or future statutory and rules violations,69 as well as general administrative proceedings.70 In addition to administrative proceedings, the Commission may pursue injunctions, fines, and penalties in federal court.71 In light of these far-ranging delegated powers, and in particular

of physician-assisted suicide, which has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect.


66. See 15 U.S.C. § 78d(a) (2006); Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 173 (1994) ("[Congress] envisioned that the SEC would enforce the statutory prohibition [of Section 10(b)] through administrative and injunctive actions.").

67. See 15 U.S.C. § 78j(b) (2006) ("[I]t shall be unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."); id. § 78w(a)(1) ("The Commission . . . shall . . . have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which [it is] responsible or for the execution of the functions vested in [it] by this chapter . . . ").

68. See id. §§ 78u(a), (c).

69. See id. § 78u-3.


the rulemaking authority granted under § 10(b), Congress intended the Commission to fill statutory gaps and, in particular, gaps in § 10(b).72

Concluding that the Commission has the authority to fill a statutory gap does not end the inquiry. Deference follows agency positions that have the force of law. A position has the force of law if it results from formal adjudication or notice-and-comment rulemaking.73 The Court previously has deferred to the Commission’s interpretation of an ambiguity of § 10(b) in the context of a formal adjudication.74 Rule

72. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202–03 (1975) (stating that § 10(b) was intended as a “catch-all” and that the “Commission should have the authority to deal with new manipulative devices”) (quoting Thomas G. Corcoran, who is credited as a coauthor of federal securities regulation of the 1930s, see Robert A. Caro, The Years of Lyndon Johnson: The Path to Power 322, 326 (1982)); see also Cox, supra note 3 (“The Exchange Act is in large part a laundry list of problems for which Congress articulated neither the means nor the end objective. Instead, Congress . . . created the Securities and Exchange Commission and delegated to it the task of grappling with the problem areas.”); cf. Gonzales v. Oregon, 546 U.S. 243, 259–60 (2006) (according less deference to an agency position when Congress delegated only limited powers to be exercised in limited ways). The statutory ambiguities that gave rise to Rule 10b-5-2(b)(1) fall within the Commission’s domain, but there may be certain ambiguities regarding § 10(b) that Congress intended the courts—not the Commission—to resolve. For example, Congress may have intended the courts—not the Commission—to determine the scope of private causes of action. See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 152–53 (2008); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 746 n.10 (1975); Lisa Schultz Bressman, Chevron’s Mistake, 58 Duke L.J. 549, 579 (2009) (“Congress likely intended courts to interpret the PSLRA or at least knew that they would. The explanation is straightforward: courts have been the primary interpreters of securities law in the context of private class actions.”). When private parties litigate, the Commission may play a diminished role. Given the potential abuse posed by private plaintiffs, the scope of private causes of action might be a matter deemed too significant for Congress to have delegated its resolution to an agency, such that Chevron deference may not be appropriate. See Gonzales, 546 U.S. at 267 (“The importance of the issue . . . , which has been the subject of an earnest and profound debate across the country, makes the oblique form of the claimed delegation all the more suspect.”) (citation omitted) (internal quotation marks omitted); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (“We are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”). However, misappropriation principally arises in public enforcement actions, rather than private lawsuits, see Matthew A. Aufman, Note, Civil Liability under Exchange Act Rule 10b-5 for Misappropriators of Nonpublic Information: An Argument for Consistency, 40 B.C. L. Rev. 829, 849 (1999) (“Few lawsuits have been brought to date under the misappropriation theory of Rule 10b-5 . . . .”), because the deceived source may have neither purchased nor sold securities, see Blue Chip Stamps, 421 U.S. at 738–39, and because of the difficulty faced by third-party traders in establishing causation and reliance. See Stoneridge, 552 U.S. at 152–53.

73. Compare United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (“[Congressionally] delegated authority . . . carrying the force of law . . . may be shown . . . by an agency’s power to engage in adjudication or notice-and-comment rulemaking . . . .”), with Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (“Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.”).

10b5-2(b)(1) resulted from formal notice-and-comment rulemaking, \(^{75}\) and should command judicial deference so long as the statute is ambiguous and the Commission’s rule reasonably resolves the ambiguity.

B. Statutory Ambiguity

A court owes no deference to an administrative agency regarding an issue on which the statute is unambiguous. \(^{76}\) The Exchange Act, however, is ambiguous regarding the points for which the Commission promulgated Rule 10b5-2(b)(1). In § 10(b) of the Exchange Act, Congress prohibited deception in connection with the purchase or sale of a security. Congress provided no guidance regarding what parties might be deceived. \(^{77}\) Moreover, Congress did not prohibit deception “in” or “during” the purchase or sale of a security; it prohibited deception “in connection with” the purchase or sale of a security. The language “in connection with” makes it plain that Congress intended to protect parties beyond a deceived seller or a deceived purchaser. Congress, however, gave no additional guidance. Consequently, the Commission could promulgate a rule regarding the deception of a source of confidential nonpublic information. \(^{78}\)

To the extent that one finds legislative history persuasive, \(^{79}\) Congress has contemplated imposing liability under the securities laws for misappropriating information in violation of contractual

---


\(^{76}\) See Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (“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.”).

\(^{77}\) See United States v. O’Hagan, 521 U.S. 642, 660 (1997) (noting that the statute does not refer to “identifiable purchasers or sellers of securities”).

\(^{78}\) See generally In re Cady, Roberts & Co., 40 S.E.C. 907, 915 (1961) (“The absence of a remedy by the private litigant because of lack of privity does not absolve an insider from responsibility for fraudulent conduct.”); Donald C. Langevoort, Words from on High about Rule 10b-5: Chiarella’s History, Central Bank’s Future, 20 Del. J. Corp. L. 865, 881 n.89 (1995) (implying that the misappropriation theory is not precluded by the text of the statute).

obligations. 80 Reportedly, Congress never acted on such proposals—not because the bills would have imposed liability based on a breach of contract, but because of disagreement regarding the imposition of liability based on mere possession of inside information coincident to the troubling trade, as opposed to actual use of inside information in effecting a trade. 81 Though the evidence does not incontrovertibly establish that Congress actually approves of a contractually imposed duty underlying a violation of § 10(b), 82 the evidence hardly suggests that Congress precluded the Commission from promulgating such a rule.

Confronted with a statute that prohibited deception but did not state whether silence could be deceptive, 83 the Court reasonably determined that silence could not be deceptive absent a duty to disclose. 84 The BLS conclude that the Court’s interpretation eliminates any statutory ambiguity and precludes any interpretive role for the Commission. 85 The Commission, however, acted within its rights in promulgating Rule 10b5-2(b)(1); the BLS ignore the Court’s administrative law precedent, and interpret the Court’s securities law precedent too narrowly.

1. Consideration of the Court’s Administrative Law Precedent

The BLS entitled the third section of their amicus brief filed with the Fifth Circuit as “The SEC’s justification for expanding liability under § 10(b) and Rule 10b-5 cannot overturn Supreme Court precedent.” 86 The premise that an agency overrules a court’s decision is faulty, as the Court noted in Brand X:

The dissent [argues] that allowing an agency to override what a court believes to be the best interpretation of a statute makes “judicial decisions subject to reversal by executive officers.” It does not. Since Chevron teaches that

80. See S. 1380, 100th Cong. §2 (1987) (“[I]nformation shall have been used or obtained wrongfully only if . . . by . . . misappropriation or a breach of any fiduciary, contractual, employment, personal, or other relationship of trust and confidence.”) (emphasis added).
81. See Karmel, supra note 15, at 100. See generally 17 C.F.R. § 240.10b5-1 (2012).
83. See Chiarella v. United States, 445 U.S. 222, 226 (1980) (“[Section] 10(b) does not state whether silence may constitute a manipulative or deceptive device.”).
84. See Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988) (“Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”).
85. BLS’ Appellate Brief, supra note 13, at 23.
86. Id. at 22.
a court’s opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative, the agency’s decision to construe that statute differently from a court does not say that the court’s holding was legally wrong. Instead, the agency may, consistent with the court’s holding, choose a different construction, since the agency remains the authoritative interpreter (within the limits of reason) of such statutes. In all other respects, the court’s prior ruling remains binding law (for example, as to agency interpretations to which Chevron is inapplicable). The precedent has not been “reversed” by the agency, any more than a federal court’s interpretation of a State’s law can be said to have been “reversed” by a state court that adopts a conflicting (yet authoritative) interpretation of state law.  

Consequently, the Commission’s adoption of a rule that interprets an ambiguous statute differently than had a court on a prior occasion does not amount to the agency’s overturning a judicial decision. Deference to the agency is due, despite a court’s interpretation of the ambiguity that precedes and differs from the agency’s interpretation. Thus, a court’s holding that silence could not constitute a violation of § 10(b) absent the breach of a fiduciary (or similar) duty does not preclude the Commission from promulgating a differing, but reasonable, rule resolving the statutory ambiguity.

The logic undergirding the Court’s analysis in Brand X applies to a situation involving a prior interpretation of statutory ambiguity by the Court that conflicts with an agency’s subsequent reasonable interpretation. That is, earlier Court precedent that interprets statutory ambiguity and requires the breach of a fiduciary (or similar) duty for a violation of § 10(b) should not preclude the Commission from interpreting the ambiguity differently. Some, however, might distinguish Brand X, because the subsequent agency decision conflicted with a lower court’s decision, not Supreme Court precedent. Therefore, one should examine whether Supreme Court precedent


88. See id. at 982–83; Morrison v. Nat’l Austl. Bank, LTD, 130 S. Ct. 2869, 2889 (2010) (Stevens, J., concurring) (noting that the Commission never acted to change court-created common law); Tellabs, Inc. v. Makor Issues & Rights, LTD, 551 U.S. 308, 332 (2007) (Scalia, J. concurring in the judgment) (noting that discretion is “conferred upon administrative agencies, which need not adopt what courts would consider the interpretation most faithful to the text of the statute, but may choose some other interpretation, so long as it is within the bounds of the reasonable”).

89. Brand X, 545 U.S. at 979.
precludes the Commission’s interpretation as forged in Rule 10b5-2(b)(1).

2. Consideration of the Court’s Securities Law Precedent

Despite Supreme Court precedent repeatedly describing the breach of a fiduciary (or similar) duty before silence can be deceptive under § 10(b), the precedent does not preclude the Commission from promulgating Rule 10b5-2(b)(1). Because the Court repeatedly resolved cases involving fiduciaries, it repeatedly described a fiduciary duty as the source of the duty to disclose. In Basic, Inc. v. Levinson, the culpable defendants were insiders of the corporation (who tipped outsiders), and thus, fiduciaries of the deceived selling shareholders. In O’Hagan, the culpable defendant was an attorney associated with the law firm representing the deceived party, and thus, a fiduciary. In Chiarella v. United States, the culpable defendant was an agent associated with the printer working on behalf of the deceived party, and thus, a fiduciary. In Affiliated Ute Citizens v. United States, the culpable defendants were broker-dealers, who, in certain circumstances, are subject to fiduciary duties. In Dirks v. SEC, the defendant was neither culpable nor a fiduciary, but the Court emphasized that he did not enter a confidentiality agreement with the source, nor did he misappropriate information. Despite the Court’s repeated descriptions of the breach of fiduciary duty as the source of the

93. See, e.g., RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (“Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.”); Macey, supra note 10, at 41 (“The presence or absence of a fiduciary duty should be viewed as a consequence of a contractual relationship between the firm and another party.”).
95. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 913, 124 Stat. 1376, 1828 (2010); THOMAS LEE HAZEN, BROKER–DEALER REGULATION IN A NUTSHELL § 53, at 154–55 (2003); Langevoort, supra note 75, at 442 (stating that courts, regulators, and broker–dealers themselves have been “working hard to try to turn the brokerage industry into something better than the retail mattress or shoe business”). But see Dirks v. SEC, 463 U.S. 646, 665 n.26 (1983).
96. See Dirks, 463 U.S. at 654 (noting that a duty to disclose arises from a fiduciary relationship); id. at 648 (noting that the defendant had no contractual or other relationship with the corporate source); id. at 665 (“[The defendant] took no action, directly or indirectly, that induced the shareholders or officers of Equity Funding to repose trust or confidence in him. There was no expectation by [his] sources that he would keep their information in confidence. Nor did [the defendant] misappropriate or illegally obtain the information about Equity Funding.”).
duty to disclose, “such descriptions are just that—descriptive.”97 Section 10(b) says nothing about fiduciary duty, so requiring a breach thereof misses the mark.98 “Fiduciary duties” are a questionable basis on which to distinguish insiders from others.99

Nothing in Dirks, or any other Supreme Court precedent, precludes the requisite duty from being imposed by contract. To the contrary, when discussing the breach of a fiduciary duty, the Court has employed language applicable—without stretch or strain—to the breach of a confidentiality agreement. Regarding the obligations of corporate outsiders, the Court wrote:

The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes. . . . For such a duty to be imposed, however, the corporation must expect the outsider to keep the disclosed nonpublic information confidential, and the relationship at least must imply such a duty.100

A corporate source agrees to disclose confidential information under a confidentiality agreement “for corporate purposes,” not for altruistic reasons benefitting the confidant to the detriment of the source. What better way to set forth the corporation’s “expectations” regarding confidentiality than an express agreement? If the relationship “at least must imply” a duty of confidentiality, then why could an agreement not expressly impose such a duty? Although the Court also referenced “special” relationships, perhaps suggesting that simple contractual relationships are not special, the Court dealt with implied obligations. So, while it may be inappropriate to imply the requisite duty in a simple contractual relationship, neither § 10(b) nor Court precedent precludes the breach of a contractually imposed duty as forming the basis for a § 10(b) violation.

98. See SEC v. Dorozhko, 574 F.3d 42, 48–49 (2nd Cir. 2009); see also United States v. Chestman, 947 F.2d 551, 557 (2nd Cir. 1991) (“[SEC’s] Rule 14e-3(a) . . . creates a duty in those traders who fall within its ambit to abstain or disclose, without regard to whether the trader owes a pre-existing fiduciary duty to respect the confidentiality of the information.”).
100. D irks, 463 U.S. at 655 n.14; see Chiarella v. United States, 445 U.S. 222, 227 (1980) (embracing the position that the requisite duty underlying § 10(b) culpability could arise from “the existence of a relationship affording access to inside information intended to be available only for a corporate purpose”).
Deception is what § 10(b) requires, and the breach of a fiduciary duty is simply one means of establishing deception; it is not the exclusive means of doing so. Counseling against the requirement of a fiduciary duty as the exclusive source of a duty to disclose is the Court’s own caution against using “rigid classifications” with respect to securities fraud. It merits mention that, in this setting, the Court refers to a fiduciary or similar duty, indicating that silence could be deceptive in nonfiduciary settings. Additionally, the Court cited the Restatement (Second) of Torts as authority for its position that a defendant’s silence, while subject to a fiduciary duty, can constitute deception in a securities trade; but the Restatement also provides that silence can be deceptive in nonfiduciary settings. Because the Court has dealt with fiduciaries, it has not been required to address silence-as-deception by nonfiduciaries, which hardly precludes the Commission from filling the statutory gap. One is “feigning fidelity” to the source when, after agreeing to safeguard information and without disclosure of the breach, one breaches either an implied fiduciary duty of confidence or a contractually imposed duty of confidence.

102. See id. at 474–75 (holding that an alleged fiduciary breach that is not coupled with an alleged omission or misstatement cannot constitute deception or manipulation); Dorozhko, 574 F.3d at 49 (“What is sufficient is not always what is necessary . . . .”); id. at 50 (“In its ordinary meaning, ‘deceptive’ covers a wide spectrum of conduct involving . . . trading in falsehoods.”); United States v. Carpenter, 791 F.2d 1024, 1029 (2d Cir. 1986) (“Although Dirks disapproved of certain trading by insiders or quasi-insiders who owe a fiduciary duty to investors, courts are not thereby constrained from recognizing other misconduct. To give Dirks such preclusive effect would suggest that one application of a statute cannot admit of another application not raised in the first case.”); Karmel, supra note 15, at 97 (“There is a difference between interpreting a broad or ambiguous statute or rule by referring to the common law, and holding . . . that a statute and rule is limited by the common law. Congress passed broad, remedial securities legislation, like the Exchange Act, in order to make the public securities markets fair and equitable because of the inadequacies in the common law.”).
104. Chiarella, 445 U.S. at 228 (“[F]iduciary or other similar relation of trust and confidence . . . .”).
105. See id. at 247–48 (Blackmun, J., dissenting); Langevoort, supra note 78, at 872 n.30 (“The Court’s [Chiarella] opinion reads as if the Restatement (Second) of Torts supports its restriction of the duty to disclose to fiduciary relationships. In fact, as Justice Blackmun’s dissent discusses, the Restatement (Second) of Torts (and the common law generally) support a broader duty to disclose.”) (citations omitted).
107. For example, when interpreting the mail fraud statute, the Court determined that misappropriation of information contrary to a confidentiality agreement constitutes deception.
C. Reasonable Interpretation of Statutory Ambiguity

Courts enforce reasonable agency-promulgated rules, not those that are arbitrary and capricious.\textsuperscript{108} The litigant who challenges the validity of an agency’s rule bears the burden of establishing that the rule is arbitrary and capricious.\textsuperscript{109} Because portions of the forgoing analysis suggest that Rule 10b5-2(b)(1) is reasonable, the following subsections highlight a few areas emphasized by the Court.

1. Consistency

Courts accord deference to consistently applied, long-standing agency positions.\textsuperscript{110} The Commission’s position regarding Rule 10b5-2(b)(1) has been consistent. No evidence has been located that the Commission previously claimed that the breach of a confidentiality agreement could not constitute deception under § 10(b). For decades, the Commission has advocated that the breach of a confidentiality agreement could constitute deception. Moreover, the Commission’s long-standing position is consistent with long-standing common law.\textsuperscript{111}

In a 1961 administrative action, the Commission disciplined a corporate insider, who was subject to fiduciary duties, for insider

---

\textsuperscript{108} See Carpenter v. United States, 484 U.S. 19, 27 (1987) (“The concept of ‘fraud’ includes the act of embezzlement, which is ‘the fraudulent appropriation to one’s own use of the money or goods entrusted to one’s care by another.’”) (citing Grin v. Shine, 187 U.S. 181, 189 (1902)); Carpenter, 484 U.S. at 28 (holding that conduct is fraudulent when, contrary to a duty of confidentiality, one appropriates confidential information “all the while pretending to perform his duty of safeguarding it”).


\textsuperscript{111} See Reply Brief of the SEC, Appellant, with Citations to Deferred Joint Appendix at 14, SEC v. Sargent, 229 F.3d 68 (1st Cir. 2000) [hereinafter SEC Brief] (“This is merely in keeping with the long-standing common law doctrine that a person may assume a fiduciary duty by voluntarily accepting the confidence of another.”) (collecting cases). See \textit{generally} 4 George E. Palmer, \textit{The Law of Restitution} § 19.2, at 104–05 (1978) (“In the oral trust situation, . . . the grantee usually was guilty of no wrong in accepting title to hold in trust for the grantor . . . . His wrong occurs after the transfer and consists of his breach of the confidence reposed in him.”).
trading; however, in so doing, the Commission specifically stated that its position applied beyond corporate insiders.\textsuperscript{112} Relationships that could give rise to culpability include those “giving access . . . to information intended to be available only for a corporate purpose and not for the personal benefit”\textsuperscript{113} of the confidant. Though the Commission did not expressly reference confidentiality agreements, its stated position would apply to such agreements, and presaged a position that would more fully develop over time. In the 1980s, 1990s, and 2000s, prior to the adoption of Rule 10b5-2(b)(1), the Commission articulated its position that the breach of a confidentiality agreement could constitute deception that violated § 10(b).

In 1985, the Commission—as amicus in a criminal prosecution—supported the position that “[t]he origin of the confidence . . . [is] immaterial.”\textsuperscript{114} In United States v. Reed, a son betrayed his father by trading on material, nonpublic information that the father disclosed to the son. Despite the absence of any reliance by the father on the son as a fiduciary, and despite the absence of an agreement between the two, the court accepted the Commission’s position that the requisite deception could be inferred due to the pair’s history of shared confidences.\textsuperscript{115} In Reed, the court recognized an obligation owed to the source of information that was not embodied in an express agreement, and accepted the Commission’s position that the obligation that the defendant owed to the source could be based upon “an agreement . . . of confidentiality, express or implied.”\textsuperscript{116} The Commission has long advocated that the defendant may voluntarily subject himself to the requisite duty through a confidentiality agreement, in light of the uncertainty that attends a court’s ex post, ad hoc implication of the requisite duty. The Court has referenced the value of certainty in the regulation of securities.\textsuperscript{117}

In a criminal prosecution from the 1990s, where the Commission and the Department of Justice jointly signed a brief, the Commission repeated its position that a confidentiality agreement could impose the requisite duty of confidentiality that, if breached, could result in a violation of § 10(b) for insider trading.\textsuperscript{118} The Commission’s brief

\begin{flushleft}
\textsuperscript{113} Id.
\textsuperscript{115} See id. at 709. No dominance or superiority is required when there is an express promise of fidelity. See id. (citing PALMER, supra note 111, §§ 19.2–.4, at 95–134).
\textsuperscript{116} Reed, 601 F. Supp. at 718; id. at 717 (“[E]ven in the absence of an express agreement, it properly may be determined that a confidential relationship existed . . . .”).
\textsuperscript{117} See Dirks v. SEC, 463 U.S. 646, 658 n.17 (1983) (“Unless the parties have some guidance as to where the line is between permissible and impermissible disclosures and uses, neither corporate insiders nor analysts can be sure when the line is crossed.”).
\textsuperscript{118} Brief for the United States at 27, United States v. Chestman, 947 F.2d 551 (2d Cir.)
\end{flushleft}
phrased the issue as “[whether the defendant was] bound by an agreement or understanding of confidentiality, express or implied, . . . that . . . generated . . . a justifiable expectation of confidentiality and fidelity.”119 The en banc court accepted the Commission’s position that breaching a confidentiality agreement could constitute deception and form the basis of an enforcement action under § 10(b).120

In a 1990 enforcement action, the Commission set forth its position that the requisite deception in a misappropriation case could be founded upon the breach of an agreement between occupants of neighboring businesses regarding the handling of mail.121 According to the Commission, Bruce Warren breached a duty of trust and confidence to his neighbor when he opened a letter addressed to the neighbor that was marked “personal and confidential,” then provided a tip to an individual who traded on the basis of the material, nonpublic information contained therein.122

In 2000, shortly before the adoption of Rule 10b5-2(b)(1), the Commission again advocated its position that a confidentiality agreement could impose the requisite duty to the source of material, nonpublic information.123 In the Commission’s enforcement action against Michael Sargent, Dennis Shephard, and Robert Scharn, the source had informed a confidant that the information should not be disclosed to anyone else, and the confidant had assured the source that he would not disclose it.124 The court accepted the Commission’s position that the defendant’s culpability could rest upon “a promise by the misappropriator that the information would be safeguarded.”125

The Commission’s long-standing consistency in its position supports an inference of congressional acceptance of that position. When Congress repeatedly amends a statute, in the face of a long-standing agency position, without upsetting the agency’s position, such

119. Id. (quoting Reed, 601 F. Supp. at 718).
120. See Chestman, 947 F.2d at 571 (“Keith’s status as Susan’s husband could not itself establish fiduciary status. Nor, absent a pre-existing fiduciary relation or an express agreement of confidentiality, could the coda—‘Don’t tell.’”) (emphasis added).
123. See SEC Brief, supra note 111, at 21.
124. See id.; SEC v. Sargent, 229 F.3d 68, 71 (1st Cir. 2000) (“Aldrich told Shepard that this fact needed to be kept confidential and Shepard agreed not to disclose the information.”).
125. Sargent, 229 F.3d at 75 (“[T]he existence of a fiduciary relationship turns on whether the source of the misappropriated information granted the misappropriator access to confidential information in reliance on a promise by the misappropriator that the information would be safeguarded.”).
congressional inaction regarding the agency’s position lends credence to that position, and favors judicial deference. Congress has amended the Exchange Act both since the Commission set forth its position informally, and since the Commission formally promulgated Rule 10b5-2(b)(1). That rule commands judicial deference.

2. Consideration of Regulatory Alternatives

Chevron deference also hinges on the importance of the issue being administratively enforced. The Commission relies heavily upon § 10(b) (including Rule 10b-5 promulgated thereunder), leading some to refer to that tandem as the “workhorse for securities fraud prevention.” Enforcement by the Commission may be critical in misappropriation cases because viable alternatives are scarce. Although courts link Chevron deference to the thoroughness of the agency’s deliberation, and an agency’s thorough deliberation would include consideration of alternatives to its chosen regulatory rule, courts should be mindful of their limited role. Otherwise, courts run the risk, when examining regulatory alternatives, of undertaking inquiries like “whether the agency should regulate at all” and “whether the agency should have chosen a different means of regulation,” which are not for the court, and which are beyond the scope of this Article.

Despite the court’s limited role, some alternatives to Rule 10b5-2(b)(1) are addressed here. For example, criminal prosecution presents one alternative, but many prefer civil public enforcement to criminal public enforcement.


129. See Barnhart, 535 U.S. at 222; Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (noting that an agency has a “duty to consider responsible alternatives”).


132. See supra note 16 and accompanying text.

133. See generally Larry E. Ribstein, The Perils of Criminalizing Agency Costs, 2 J. Bus. & Tech. L. 59 (2007) (discussing the negative ramifications of subjecting corporate agents to criminal penalties); Christine Hurt, The Undercivilization of Corporate Law, 33 J. Corp. L. 361,
certainty, the general uncertainty that attends the regulation of insider trading may counsel against criminal prosecution. 134

Some prefer the states to the federal government when it comes to regulating securities, 135 but Congress has acted contrary to such preferences by creating a federal regulatory regime, 136 by preempting state regulation in certain areas, 137 and going so far as to use the federal regulation of securities to encroach on matters of corporate law, which traditionally has been an area of state regulation. 138 Congress emphasized the applicability of federal law to insider trading and enhanced the Commission’s authority regarding insider trading. 139 Moreover, Congress has suggested that its regulations apply to the misappropriation theory of insider trading. 140


134. See Langevoort, supra note 33, at 1622 (noting the incoherence of insider-trading law and attributing that incoherence, in part, to its development over time through individual enforcement actions). See generally Crandon v. United States, 494 U.S. 152, 158 (1990) (“[I]t is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute’s coverage.”).


137. See id. § 77(r)(a). But see id. §§ 78bb(a), (b).


140. See H.R. REP. No. 100-910, at 10 (1988), reprinted in 1988 U.S.C.C.A.N. 6043, 6047 (“Under current case law, the SEC must establish that the person misusing the information has breached either a fiduciary duty to shareholders or some other duty not to misappropriate insider information.”); H.R. REP. No. 100-910, at 26 (1988), reprinted in 1988 U.S.C.C.A.N. 6043, 6063 (“[T]he codification of a right of action for contemporaneous traders is specifically intended to overturn court cases which have precluded recovery for plaintiffs where the defendant’s violation is premised upon the misappropriation theory.”); H.R. REP. No. 98-355, at 4–5 (1984), reprinted in 1984 U.S.C.C.A.N. 2274, 2277–78 (“[C]onversion for personal gain of information lawfully obtained abuses relationships of trust and confidence and is no less reprehensible than the outright theft of nonpublic information. In other areas of the law, deceitful misappropriation of confidential information by a fiduciary . . . has consistently been held to be [criminal]. The Congress has not sanctioned a less rigorous code of conduct [for civil matters] under the federal securities laws.”) (citation omitted).
We commonly turn to public enforcement when private enforcement is lacking.\(^{141}\) So, does private enforcement suffer from any shortcomings? Private enforcement of misappropriation cases under § 10(b) of the Exchange Act will frequently fail. The deceived source often will not have purchased or sold securities, and would therefore lack standing under § 10(b).\(^{142}\) Private misappropriation actions by third-party traders under § 10(b) may also be doomed for failure to establish reliance and causation.\(^{143}\) Private enforcement by a class under state law may be precluded,\(^{144}\) and individual actions may be cost-prohibitive.\(^{145}\)

Instead of securities-based litigation, what about a simple contract claim for breaching the confidentiality agreement?\(^{146}\) Proving a breach may be problematic; even if done, remedies may be lacking. The source of information faces tremendous difficulty in identifying how the confidential information entered the market or who is responsible for the leak. The one entrusted with information may have disguised her trades or surreptitiously tipped others about the information.\(^{147}\) Such difficulties of detection lessen private enforcement, and counsel in favor of public enforcement, as the federal government possesses greater detection tools.\(^{148}\) Multiple private parties—such as the source and a


\(^{145}\) See Cox, supra note 3, at 747 (“[B]ecause most purchasers or sellers have relatively small amounts at stake . . . , the class action device is often the only economically viable means of achieving the compensatory and deterrent goals underlying the private action.”).

\(^{146}\) See Easterbrook & Fischel, supra note 99, at 263 (“That no uniform rule is optimal implies that the subject is best left to negotiations between insiders (and others) and the firm. Courts would enforce actual contracts . . . .”).

\(^{147}\) See James B. Stewart, Den of Thieves 68 (1991) (“Using codes was fun; it gave their insider-trading scheme the aura of a Hardy Boys escapade. Soon they were engaged in conversations so riddled with codes they would have seemed ludicrous to any listener.”); Kara Scannell, SEC Loss Shows Difficulty of Insider Cases, WALL ST. J., June 28, 2010, at C1 (showing that insider trading is notoriously difficult to detect when intelligent individuals attempt to shield their actions).

\(^{148}\) See Easterbrook & Fischel, supra note 99, at 263 (“[T]he difficulty of enforcing such contracts makes it impossible for firms to achieve optimal allocations of the rights. Insiders’ trades are notoriously hard to detect . . . . If firms seeking to curtail inside trading by contract cannot enforce their choices, then the benefits are lost . . . . If the probability of detecting improper trades is low, public enforcement may be best.”); Macey, supra note 10, at 46 n.185 (“[T]he cost to the firm of insuring that managers do not abuse their right to trade may
self-regulatory organization, such as a stock exchange—may monitor the same subject. Duplicative private enforcement may contribute to underenforcement, as each monitor allocates fewer resources to monitoring the confidant on the mistaken belief that another monitor will continue its vigilance. A single public enforcer may be superior.

Remedies for breach may be inadequate. The potential for profit may incentivize contract breaches, which, if detected, may be underdeterred by a simple damages claim. The risk of reputational harm may prevent some parties from breaching a confidentiality agreement, but reputational harm provides far less discipline for nonrepeat players. Although the public eventually would have learned of Cuban’s trades, the public might not have learned of the confidentiality agreement (which was an oral agreement) or its breach. For some, such as Cuban, reputational harm may not jeopardize future opportunities to a degree that adequately disciplines them for their breaches. Mark Cuban has billions of dollars to invest, and he earned his money through his technological savvy. Because of his money and experience, Cuban probably would be presented with opportunities, even if he were known to have breached a confidentiality agreement. Recognizing that private remedies may be inadequate, Congress bolstered the remedies that the government may seek.

It is no secret that post-disclosure private remedies are inadequate for the breach of a confidentiality agreement. A confidentiality agreement itself reflects the shortcomings of post-disclosure remedies. Confidentiality agreements typically provide for specific performance because of the difficulty of determining damages. Moreover, confidentiality agreements also require that the confidant provide notice prior to any potential compelled disclosure. The notice provision allows for the possibility of the source obtaining a protective raise the cost of transacting, thereby making it more efficient for the firm to ban such trading.

149. Cf. Macey, supra note 10, at 59 (noting that reliance on private enforcement “may result in a suboptimal level of enforcement”).


151. See Macey, supra note 10, at 59. See generally EASTERBROOK & FISCHEL, supra note 99, at 260. Moreover, the expected gain may exceed the expected loss, due to the low likelihood of detection. By allegedly trading on inside information, Martha Stewart risked millions and incarceration to avoid the loss of a relatively nominal sum. See Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1044 (Del. 2004) (referencing plaintiff’s claim that Stewart’s illegal trades jeopardized the company’s financial future); Litigation Release No. 18169, SEC v. Stewart, 80 SEC Docket 1244 (June 4, 2003) (discussing allegations against Stewart, whose trades avoided the loss of less than $50,000).

152. See Complaint, supra note 3, at 4.

order. Post-disclosure remedies may prove inadequate to discipline the breaching party.

A final alternative might be no regulation at all, as the market may discipline insider trading. First, in support of this alternative, long-term considerations might deter any potential improper short-term focus by insiders. Second, a rule that allows insiders to trade might permit the source to compensate the insider more efficiently, by, for example, lowering annual salary in light of the insider’s ability to trade profitably on material nonpublic information. Counterarguments exist. Even if the threat of long-term costs commonly deters an individual from engaging in short-term misconduct, some individuals sacrifice long-term benefits for short-term gain. A general truth need not prevent the promulgation of a rule designed to address uncommon behavior. (And, of course, such uncommon behavior may be far more common than realized.) Aware of the consequences of such long-term trade-offs, the government may regulate private parties’ compensation schemes. One recent example follows. In the Sarbanes–Oxley Act of 2002, Congress prohibited businesses from compensating their accountants in certain ways because of externalities. Accountants at Arthur Andersen LLP helped fell the firm because their compensation scheme led them to compare their personal benefits and costs, ignoring third-party costs, even though those costs were leviathan. The impact of the accountants’ misdeeds reached well beyond themselves,

155. See id. at 138.
158. See Jeffrey N. Gordon, What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections, 69 U. Chi. L. Rev. 1233, 1239 (2002) (“The previous paragraphs addressed the independence of Andersen as a firm, but of course services were delivered by specific agents of the firm, its Houston partners. It now seems that the compensation of the Houston partners was significantly tied to their client billings both for auditing services and for consulting services. Enron might have been a relatively small client for Andersen, the firm, but it was the largest client for its Houston office, and, for the Enron relationship partners, perhaps their only significant client. . . . The disparity between the value of the Houston partners’ share of Andersen’s reputation and the value to them of a continued (or more lucrative) Enron client relationship sets up an obvious moral hazard problem.”).
impacting the credibility of the entire firm, and placing in question the imprimatur of other accounting firms.\footnote{159} Allowing insider trading could incentivize valuable innovation, but such a rule need not yield an efficient compensation scheme, as insiders could profit on the innovations of others.\footnote{160} This scenario was precisely the case in \textit{O’Hagan}, where the Court embraced the misappropriation theory. O’Hagan exhibited no entrepreneurial skill in creating the valuable, nonpublic information on which he traded.\footnote{161}

Though some reasonably prefer alternatives to federal regulation of the misappropriation theory, those alternatives face reasonable criticisms. The Commission can choose among reasonable regulatory alternatives.

3. Internal Inconsistency

Courts have struck down agency-promulgated rules as arbitrary and capricious when those rules are internally inconsistent.\footnote{162} Perhaps Rule 10b5-2(b)(1) should fall, as the rationale underlying the misappropriation theory is internally inconsistent. The misappropriation theory serves, in part, to protect market integrity, but the theory allows that protection to be circumvented as next described. To protect the integrity of the secondary markets, we will not allow a misappropriating confidant to trade on misappropriated information, because other traders in the market could not, by the sweat of their brow, have obtained the same information.\footnote{163} The misappropriation theory, however, permits the confidant to trade on that information if he admits to the source his intention to trade, because the source would, in that instance, not be deceived.\footnote{164} Even if the source is not deceived, other traders in the market will continue to be unaware of the material, nonpublic information, and those other traders still could not have gathered the information by expending their best efforts. The misappropriation theory, designed to enhance market integrity, can operate to undermine

\footnotesize{160}. See MANNE, supra note 16, at 156–58.
\footnotesize{163}. See O’Hagan, 521 U.S. at 652–53, 658–59; Selective Disclosure and Insider Trading, 65 Fed. Reg. 51716, 51727 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 240 (2012)) (“We have long recognized that the fundamental unfairness of insider trading harms not only individual investors but also the very foundations of our markets, by undermining investor confidence in the integrity of the markets.”); id. at 51729 (“[T]he trader’s informational advantage stems from contrivance, not luck, and the informational disadvantage to other investors cannot be overcome with research or skill.”) (citation omitted) (internal quotation marks omitted).
\footnotesize{164}. See O’Hagan, 521 U.S. at 655.
Such internal inconsistency could undermine the validity of Rule 10b5-2(b)(1).

Another internal inconsistency of the misappropriation theory is its foundation in property law. The theory is supported by the source’s property rights in the information misappropriated by the confidant. The misappropriation theory prohibits the confidant from exploiting the property of the source to the source’s detriment. If the source truly has a property right in that information, then the source should be free not to protect that right; that is, the source should be free to opt out of the Commission’s regulation of its property. This, however, the source cannot do.

While these are sound arguments, they may not persuade the reader. The alternative to agency resolution of such disputes is resolution by the courts. In O’Hagan, the Supreme Court adopted the misappropriation theory; it was not persuaded that the theory was doomed by the aforementioned internal inconsistencies. Given the Court’s adoption of the theory, the Commission need not abandon it.

Congress has suggested its support for the misappropriation theory, indicating again that the Commission need not abandon it. Additionally, Congress has charged the Commission with balancing potentially competing interests. At some level, the charge to protect investors may conflict with the charge to protect businesses’ ability to raise capital. Given Congress’ (potentially) internally inconsistent mandate, the Commission’s rules may be internally inconsistent at some level, which should not doom deference.

165. See id. at 689–90 (Thomas, J., dissenting).

166. See id. at 653–54; EASTERBROOK & FISCHEL, supra note 99, at 254 (“Better, then, to identify property rights in information.”); Bainbridge, supra note 37, at 1644–50; Macey, supra note 10, at 18 n.47 (“Liability for 10b-5 violations is now founded on a theory . . . that finds its own roots in a ‘business property theory’ of insider trading liability.”); see also Manne, supra note 150, at 549–51 (criticizing the property rights theory).


170. See 15 U.S.C. § 78c(f) (2006) (“Whenever pursuant to this chapter the Commission is engaged in rulemaking . . . the Commission shall also consider, in addition to the protection of investors, whether the action will promote . . . capital formation.”).

171. See Golden State Bottling Co. v. NLRB, 414 U.S. 168, 181 (1973) (deferring to the agency when required to “strik[e] a balance between . . . conflicting legitimate interests”
Other attacks, not limited to the misappropriation theory, have been launched against the coherence of the theory prohibiting insider trading. For example, federal securities laws generally, and the Commission’s rules in particular, are designed to enhance efficiency. A general attack on the prohibition of insider trading has been that information does not enter the market through insiders’ trades, so that the share price does not accurately reflect material, nonpublic information; this distorts the cost of capital, and results in the inefficient allocation of resources. This broad conception of efficiency suggests that insider trading should be permitted, so that material, nonpublic information enters the market more quickly. Although this broad conception of efficiency (taking into account the interests of third parties) counsels in favor of permitting insider trading, a narrow conception of efficiency counsels against insider trading (taking into account the interests of the parties to a confidentiality agreement). Contracts evidence the parties’ values. A confidentiality agreement that prohibits the confidant’s use of information for trading may be the best evidence of the efficient allocation of the source’s information. Rule 10b5-2(b)(1) embraces the efficient allocation by the parties to the confidentiality agreement (possibly at the expense of the market’s overall efficient allocation of resources), and in furtherance of the Commission’s market-integrity argument. Even those who disfavor

because that balance is “often a difficult and delicate responsibility, which the Congress committed primarily” to the agency) (internal quotation marks omitted); EASTERBROOK & FISCHEL, supra note 99, at 283 (“[A] rule against fraud is not . . . essential . . . [but] certification methods [are] costly . . . . A rule against fraud can reduce these costs . . . .”).

172. See Langevevoort, supra note 33, at 1622 (attributing the incoherence of insider-trading law, in part, to its development over time through individual enforcement actions). See generally id. at 1610 (noting the internally inconsistent premises of securities regulation that (1) the typical investors are unsophisticated, and (2) those same investors will comprehend any mandated disclosure).

173. See 15 U.S.C. § 78c(f) (2006) (“Whenever pursuant to this chapter the Commission is engaged in rulemaking . . . the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency . . . .”).


175. See EASTERBROOK & FISCHEL, supra note 99, at 257; Manne, supra note 150, at 565–66.

176. See Manne, supra note 150, at 566 (“The gains from efficiency are diffuse and often specifically unidentifiable.”).

177. EASTERBROOK & FISCHEL, supra note 99, at 259; Macey, supra note 10, at 46 n.185 (“[I]t may be . . . more efficient for the firm to ban such trading.”).

178. 17 C.F.R. § 240.10b5-2(b)(1) (2012) (including agreements to maintain information in
the Commission’s prohibition of insider trading acknowledge the benefit of the parties’ private, efficient allocation regarding the information: “[W]hy . . . assume that anyone advocating no government rule against insider trading is necessarily saying that it may not be banned in a private contract?” 179 “[I]f . . . a corporation properly indicates that its rule is no insider trading, that should be the business of that corporation and its shareholders and the courts if a violation is alleged.” 180

4. Relative Institutional Expertise

Besides the standard arguments that favor judicial deference to an agency—such as a national rule that is uniform across all court jurisdictions 181 and the avoidance of regulatory ossification traceable to the stare decisis principle employed by courts 182—courts defer to agencies due to their relative expertise. 183 Whereas courts generally resolve legal dilemmas lacking in precision—for example, reasonable search or totality of the circumstances—an agency may bring science to bear on certain dilemmas and offer precision ordinarily lacking in legal disputes, justifying judicial deference to the agency. We might prefer that, before a court defers to an agency, the agency undertake rigorous empirical analysis of the expected benefits of contemplated regulation in light of expected costs of that regulation. 184 Some contend that the

179. Manne, supra note 150, at 580.
180. Id. at 581.
182. See SEC v. Capital Gains Res. Bureau, Inc., 375 U.S. 180, 194 (1963) (“[G]rowing recognition by common-law courts that the doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue.”).
183. See Chevron, 467 U.S. at 865–66; Langevoort, supra note 78, at 868 (“[T]he Supreme Court speaks with very little expertise, and hence relatively less subject-matter authority, on intricate matters of federal regulation such as securities law.”); see also SEC v. Zandford, 535 U.S. 813, 819–20 (2002) (“[T]he SEC’s interpretation of the ambiguous text of § 10(b), in the context of formal adjudication, is entitled to deference if it is reasonable, see United States v. Mead Corp., 533 U.S. 218, 229–30, and n. 12 (2001).”); United States v. O’Hagan, 521 U.S. 642, 673 (“[Section] 14(e)’s rulemaking authorization gives the Commission ‘latitude,’ even in the context of a term of art . . . . [W]e must accord the Commission’s assessment ‘controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute.’”).
184. See Business Roundtable v. SEC, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (“[T]he Commission relied upon insufficient empirical data . . . .”); Manne, supra note 150, at 548 (“The debatable aspects of insider trading are capable of resolution through tools of economic analysis.”); id. at 568 (“We must either utilize hard, accurate data or we should proceed on the assumptions dictated by the most logical economic doctrines.”); Henry G. Manne, Insider Trading and the Administrative Process, 35 GEO. WASH. L. REV. 473, 510 (1967) [hereinafter
Commission’s regulation of insider trading is not reasonable, and is perhaps arbitrary and capricious, because empirical analyses do not support—or worse, undermine—the rationales offered by the Commission. Some contend that the Commission frequently accords little weight to such empirical evidence, and instead runs to fuzzy notions of fairness, investor protection, and market integrity to justify its regulatory efforts.

Despite the strength of these arguments, the Commission’s rule is reasonable. First, although the Commission may rely on fuzzy notions, those same fuzzy notions motivated Congress to increase the Commission’s powers to deter insider trading. Additionally, those same fuzzy notions have motivated decisions by the Court.

Second,
the onus is not on the agency to support its regulation with empirical analysis.190 The party challenging the regulation bears that burden.

Critics of the Commission commonly offer logical arguments lacking in empirical support.191 For example, critics of the Commission note that investors seemed to exhibit confidence in the U.S. securities markets for decades prior to the Commission’s concerted efforts to stamp out insider trading in the 1980s.192 The presence of investor confidence, however, does not address the underlying issue: What is the appropriate baseline for enforcement? What if pre-1980s investors exhibited confidence in the U.S. markets due to an absence of viable alternatives? What if non-U.S. markets during those decades were riddled with fraud, relative to U.S. markets?193 Though investors may have exhibited confidence in the U.S. markets prior to the Commission’s rigorous enforcement against insider trading, rigorous enforcement may enhance investor confidence such that the benefits of enforcement exceed the costs of enforcement.

Allowing Mr. O’Hagan or Mr. Cuban to trade may enhance the efficiency of the markets, which is valuable—but how valuable?194 On the other side of the ledger, allowing insiders to trade creates moral hazards for insiders,195 which imposes costs. What is the magnitude of those costs?196 Reliable measures of the benefits and costs may not be

---

190. See Chamber of Commerce v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005) (“[W]e are acutely aware that an agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem, an agency may be ‘entitled to conduct . . . a general analysis based on informed conjecture.’ . . . The Commission’s decision not to do an empirical study does not make that an unreasoned decision.”).

191. See Manne, supra note 150, at 570 (shifting the burden to the government to quantify the benefits of its regulation).

192. See Choi & Pritchard, supra note 109, at 35; Manne, supra note 150, at 577 (“[T]he public has never shown any signs of losing confidence in the stock market because of the existence of insider trading.”); see also id. at 564 (noting the “scarcity” of SEC enforcement actions for insider trading during the 1960s); Langevoort, supra note 33, at 1620 (discussing the Commission’s high-profile enforcement campaign against insider trading during the 1980s).

193. See Laura Nyantung Beny, Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence, 7 AM. L. & ECON. REV. 144, 144 (2005) (“[C]ountries with more prohibitive insider trading laws have . . . more accurate stock prices, and more liquid stock markets. These findings are generally robust to controlling for measures of disclosure and enforceability and suggest that formal insider trading laws (especially their deterrence components) matter to stock market development.”).

194. See Manne, supra note 150, at 566 (“The gains from efficiency are . . . often specifically unidentifiable.”).


easily obtained.\textsuperscript{197} Even if obtained, “empirical evidence . . . can quickly go stale.”\textsuperscript{198}

Many economists disagree with the Commission’s regulation of insider trading,\textsuperscript{199} but other widely respected economists believe that insider trading should be prohibited.\textsuperscript{200} Given disagreement among economists, why must the Commission accept the position of some economists (allow insider trading) rather than other economists (prohibit insider trading), particularly when Congress and the public favor the latter group?\textsuperscript{201} The values emphasized by certain economists may not be the values emphasized by members of Congress, the Commission, or the public.

Congress entrusted the Commission to exercise its discretion in balancing competing evidence and viewpoints.\textsuperscript{202} Sometimes scientific precision drives an agency’s regulation, but sometimes an agency simply makes policy.\textsuperscript{203} In § 10(b), Congress authorized the Commission—not the courts—to make policy. That an agency makes policy based upon political considerations should not strip the agency’s discretion of deference by the courts.\textsuperscript{204} Congress delegated the policy

\textsuperscript{197} See MANNE, supra note 16, at 59, 70–71 (noting the lack of reliable data); Beny, supra note 193, at 145 (expressing a preference for empiricism but noting that the insider-trading debate has largely been theoretical); Langevoort, supra note 33, at 1623 (“[C]lean tests are often hard to come by.”).

\textsuperscript{198} Langevoort, supra note 33, at 1606.

\textsuperscript{199} See, e.g., Dennis W. Carlton & Daniel R. Fischel, The Regulation of Insider Trading, 35 STAN. L. REV. 857, 895 (1983); Meulbroek, supra note 174, at 1661–63. See generally Manne, supra note 150, at 547 (expressing gratification at the reception of his work by economists).

\textsuperscript{200} See Fama & French, supra note 195; see also Beny, supra note 193, at 144; Bhattacharya, supra note 174, at 76–78.

\textsuperscript{201} See Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, § 2, 98 Stat. 1264 (1984); H.R. REP. No. 98-355, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 2274, 2275 (“This legislation provides increased sanctions against insider trading in order to increase deterrence of violations.”); Langevoort, supra note 33, at 1620 (“The routine of insider trading enforcement . . . cases . . . probably reflects the perception that these are the SEC’s most reliable public relations tools.”).

\textsuperscript{202} See Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989) (“When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.”).

\textsuperscript{203} See BellSouth Corp. v. FCC, 162 F.3d 1215, 1221 (D.C. Cir. 1999) (“When . . . an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, our role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive.”); Emily Hammond Meazell, Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science, 109 MICH. L. REV. 733, 751–52 (2011) (discussing the science charade).

\textsuperscript{204} See Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 YALE L. J. 2, 66–68 (2009).
making function to the Commission, and courts should defer to the Commission’s reasonable exercise of its discretion.205 “[I]t is interesting how frequently economists find ex post that, notwithstanding the guesswork, the [Commission’s] lawmaking predictions turn out reasonably well.”206

The insightful criticisms of the ban on insider trading are not new,207 but Congress has repeatedly enacted statutes that implicitly reject such criticisms.208 The Commission has repeatedly rejected those criticisms through adjudication and rulemaking. When promulgating Rule 10b5-2(b)(1), the Commission indicated that the benefits of the rule included eliminating some of the uncertainty attendant to the regulation of insider trading209 and that it attributed no appreciable costs to the rule, and no commentator suggested otherwise.210 Courts should defer to the Commission’s considered judgment.

CONCLUSION

Commentators who have examined the validity of Rule 10b5-2(b)(1) have considered the Court’s securities law jurisprudence, but in the process, they have paid little or no attention to the Court’s developing administrative law jurisprudence. By not considering the role of administrative law, those commentators have approached the Commission’s rule with undue skepticism. Deference to the Commission, however, is due.

205. Manne, Administrative Process, supra note 184, at 510 (“[Insider trading] is not an area where we can condone the courts making policy because they are comparatively as well qualified as the agency.”).

206. Langevoort, supra note 33, at 1626.

207. See, e.g., MANNE, supra note 16; Manne, supra note 150, at 548 (noting warmer reception of his 1966 book by economists than by lawyers).


209. The Court has emphasized the need for certainty in the regulation of securities fraud. See Dirks v. SEC, 463 U.S. 646, 658 n.17 (1983) (“Unless the parties have some guidance as to where the line is between permissible and impermissible disclosures and uses, neither corporate insiders nor analysts can be sure when the line is crossed.”).
