Comment on Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability

George Kuney

I'm George Kuney, and I am a professor here at The University of Tennessee College of Law. I've been asked to comment on Professor Anderson's presentation. I think it's a really interesting discussion, especially since one of my areas of concentration is the drafting of contracts and policy documents. So, the distinction between drawing something up that strictly complies with the law and prohibits only what the law prohibits as opposed to a provision which goes beyond that to prohibit additional conduct, which may be in the gray zone, is typically thought of by compliance departments to be a wise thing to do. It cuts a broad swath around illegal activity and says, don't even get close to illegal activity.

It also has the benefit for the company, as Professor Anderson pointed out, of keeping people's minds on their work and not dabbling around with stock trading on the side. Now, I'm a little dubious about that justification because most people, even highly motivated corporate executives and the like have free time on their hands. They're not working 24 hours, less eight or six or so hours for sleep. They have time to scour

the internet or stock trades, for horse tips, for football spreads, right? I mean, these people are normal people, so you're not really keeping them from being distracted in any way. So that's a bit dubious.

I do like defining trading broadly in order to ensure compliance. I do think I have to say that this additional language that is being proposed here tends to cut against that grain, right? And that is Professor Anderson's point. He's advocating that we should cut against that grain. I think my position is perhaps we ought to cut a little closer to the conduct and be overly expansive. This benefits the company, which as Professor Anderson pointed out, can be liable under 10(b), itself. And so, for employees to get close to the line and arguably engage in insider activity exposes the company to liability in the same way that we might have a HR policy which prohibits conduct, which is beyond the accepted definition of, say, workplace harassment, sexual harassment or the like. We say, don't even get close to the line because it could subject the company to supervisory liability for allowing and acquiescing in that conduct. And so we slap down employees at that level.

Now, you do have the additional point that the SEC here is acting as the enforcer, not the HR department of your company. That is a wrinkle. I'd also like to point out, just in light of recent Supreme Court of the United States decisions, that we are seeing a change to the administrative state. The SEC is, at bottom, an administrative agency. In

the recently decided EPA case, involving the so-called "major questions" doctrine,[1] in which the court said that as far as regulating emissions and solving climate change, you just can't rely upon the general language of an enabling statute in order to reach out and solve all the problems of the world. I'd like to point out that that's exactly what the SEC did with 10(b), right? There's no statute that prohibits insider trading specifically and is aimed at that. This whole house of cards was based upon an SEC chairman's expansion and drive to expand the regulations to embody that under the general language of 10(b). Following the language of the EPA decision and the major questions doctrine, we really ought to unwind all of the insider trading law that's out there. Now, that's not going to happen, but that's the implication of those sorts of decisions.

I'd also like to point out that in insider trading here is a really big deal, and it's a very big issue, and it's not just the employers and employees of companies in the marketplace, but it encompasses threats to decision makers whose actions and pending actions, while unannounced to the public, may drastically move stock prices. I'm speaking in particular about

[1] Under the major questions doctrine, the Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue. Util. Air Regul. Grp. (UARG) v. EPA, 573 U.S. 302, 324 (2014). In requiring agencies to point to clear congressional authorization for their actions in major questions cases, the Supreme Court has further explained that Congress rarely provides an extraordinary grant of regulatory authority through language that is modest, vague, subtle, or ambiguous.

members of the executive branch, members of the legislative branch, and members of the judiciary. Each of these entities have reporting requirements that are out there, but very few of them have anything in the way of substantive insider trading restrictions based upon a standard like this. Imagine if Congress-people and Senators were bound by a regulation like this and how many actions we might actually bring. I'm not going to speculate as to the number of them, but I think there's the liability is significant. That's a side point that Professor Anderson didn't get into, but I think it's a logical extension of this kind of a case. Thank you.