

WHITE COLLAR CRIMINAL AND SEC CASES – NEW ISSUES AND CHALLENGES



ANALYSIS GROUP
ECONOMIC, FINANCIAL and STRATEGY CONSULTANTS

JUNE 23, 2010

Agenda

- Introduction
- Presentation
 - Maureen M. Chakraborty, Managing Principal, Analysis Group
 - Michael C. Miller, Partner, Steptoe & Johnson LLP
 - Marnie A. Moore, Principal, Analysis Group (moderator)
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
 - www.securitiesdocket.com
- Wrap-up



Webcast Series

- Series of webcasts — every other week
- www.securitiesdocket.com/webcasts
- Next: Thurs., June 24—**FASB/IASB Path to Convergence: New Financial Instruments Proposals and What Audit Committees Need to Know**



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STEPTOE & JOHNSON LLP

White Collar Criminal and SEC Cases: New Issues and Challenges

June 23, 2010

Presenters:

- Maureen M. Chakraborty, Managing Principal, Analysis Group
- Michael C. Miller, Partner, Steptoe & Johnson LLP

Moderator:

- Marnie A. Moore, Principal, Analysis Group

Presenters



Maureen M. Chakraborty, Ph.D.
Managing Principal, Analysis Group



Michael C. Miller, Esq.
Partner, Steptoe & Johnson LLP

Moderator



Marnie A. Moore
Principal, Analysis Group

Agenda

- **SEC Enforcement Division Initiatives**
 - **The Goldman case**
 - **Insider trading**
- **White Collar Criminal Cases**
 - **Mortgage fraud**
 - **Ponzi schemes**
 - **Results of recent prosecutions**
 - **Investigations to watch**
 - **Honest services fraud**
- **Materiality: New Perspectives**
- **Making the Best Use of the Expert in White Collar Cases**

SEC Enforcement Division Initiatives

- **The Goldman Case**
 - **The SEC moves first**
 - **Allegations of fraud in the world of “sophisticated” investors**
 - **Risk allocation**
- **Insider Trading**
 - **Recent cases brought by the SEC**
 - **Rorech – Is a credit default swap a security?**
- **What Initiatives Can We Expect from the SEC**

White Collar Criminal Cases

- **Mortgage Fraud**
 - **Recent prosecutions**
 - **What is the government targeting?**
- **Ponzi Schemes**
 - **Update on prosecutions**
 - **Next steps?**

White Collar Criminal Cases

- **Honest Services Fraud**
 - **Overview of cases before the U.S. Supreme Court**
- **FCPA Prosecutions**
 - **Trends in number and scope of cases**
- **Overseas Tax Evasion Cases**
 - **UBS settlement back on track**

Materiality: New Perspectives

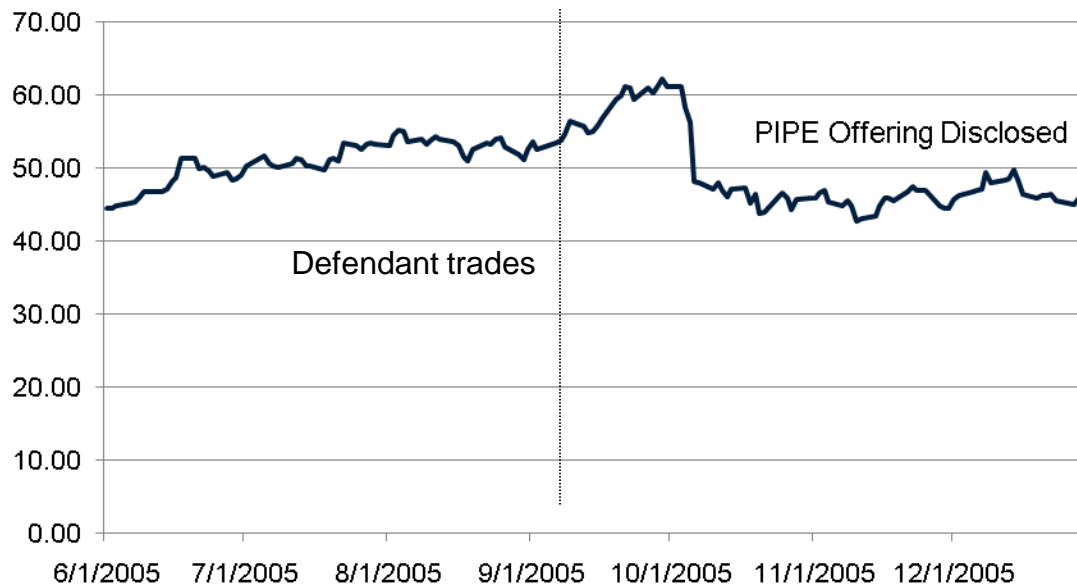
What Is Materiality? The Economists' View:

- **The conduct must be linked to the outcome (e.g., stock price drop, ill-gotten gain) resulting from the alleged act**
- **The outcome resulting from the alleged act must also be material to the “reasonable investor”**
 - **Information is economically material when it has the potential to affect value in a statistically meaningful way**
 - **Economists typically assess materiality by examining the reaction of the price of a security to the public disclosure of the information**
 - **“Statistical significance” matters**

Materiality: New Perspectives

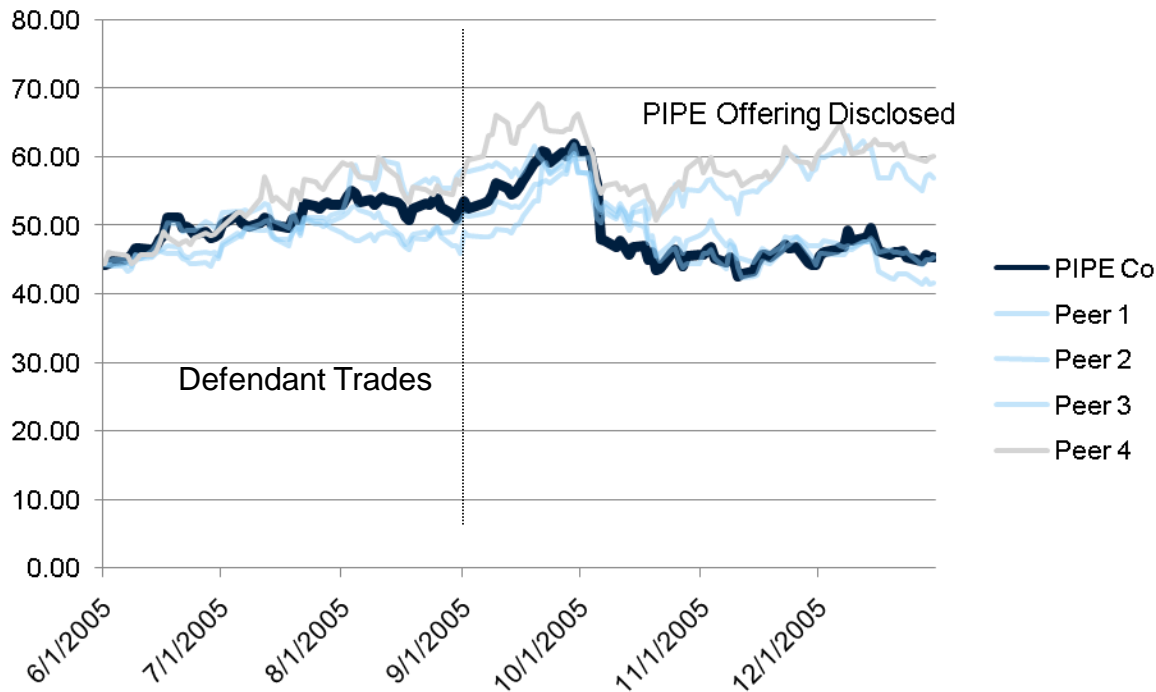
Quantification of the effect of information on value: Consider a claim of insider trading, where a defendant is accused of trading on non-public information about a private investment in public equity (PIPE) offering

- Perhaps Defendant sold holdings of the stock (e.g., Cuban Case)
- Perhaps Defendant sold the stock short (e.g., Mangan Case)



Materiality: New Perspectives

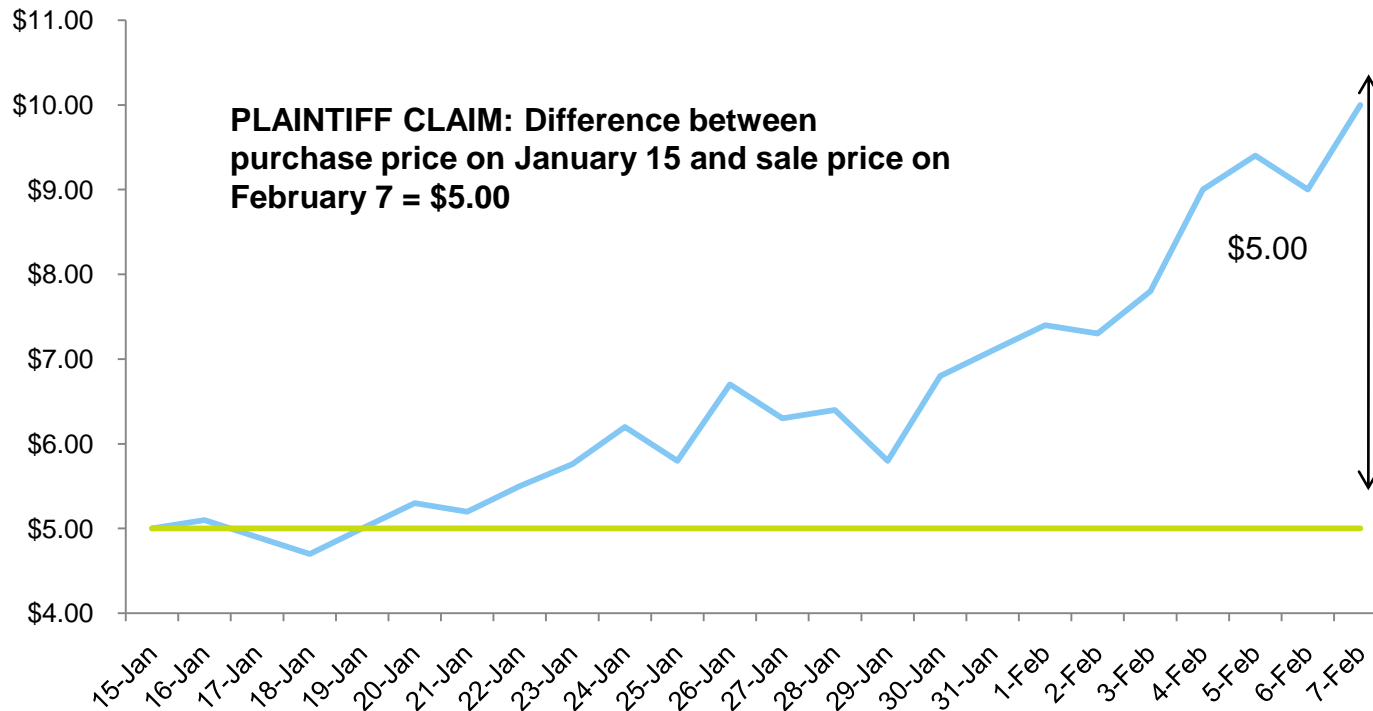
Using statistical methods, we can isolate the impact of the now public information on changes in the value of the security at issue, controlling for price movements caused by general market factors, relevant industry events, and other information that may have affected value



Materiality: New Perspectives

Statistical significant matters: Materiality may affect the quantification of gains from the defendants' trading activities in insider trading cases

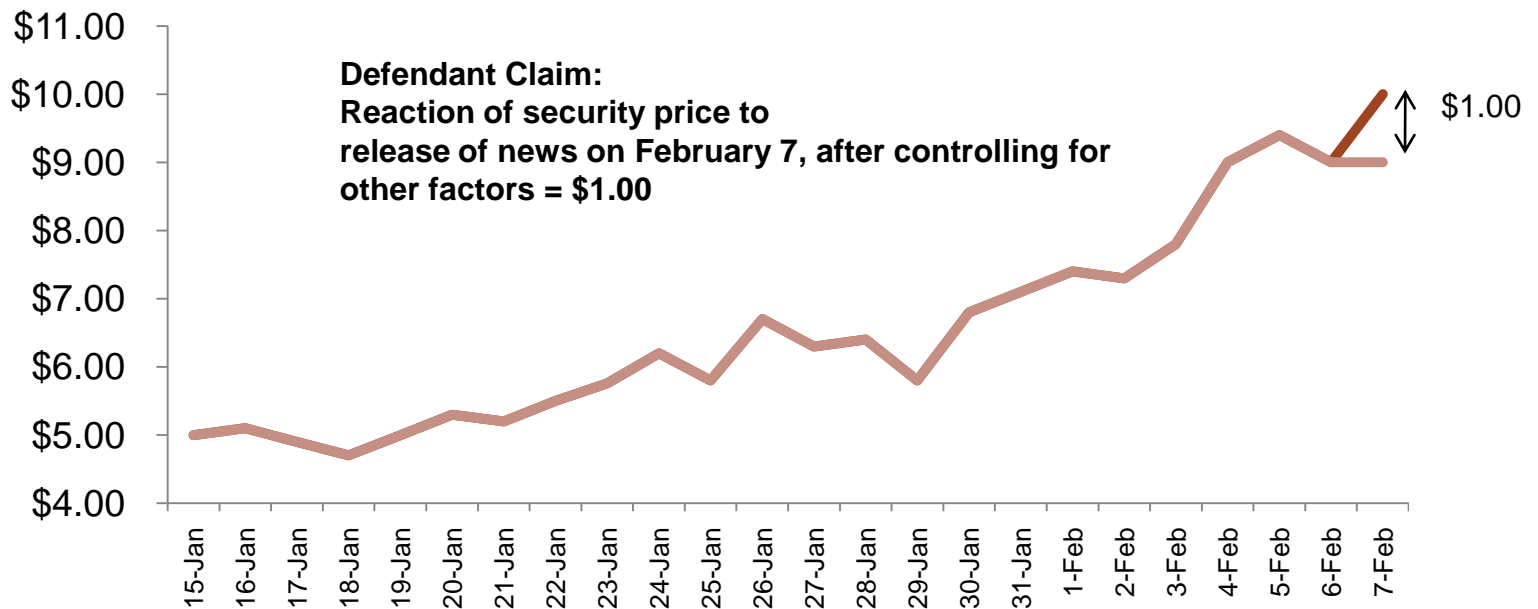
Gains From Trading on Non-Public Information: Plaintiff Perspective



Materiality: New Perspectives

Statistical significant matters: Materiality may affect the quantification of gains from the defendants trading activities in insider trading cases

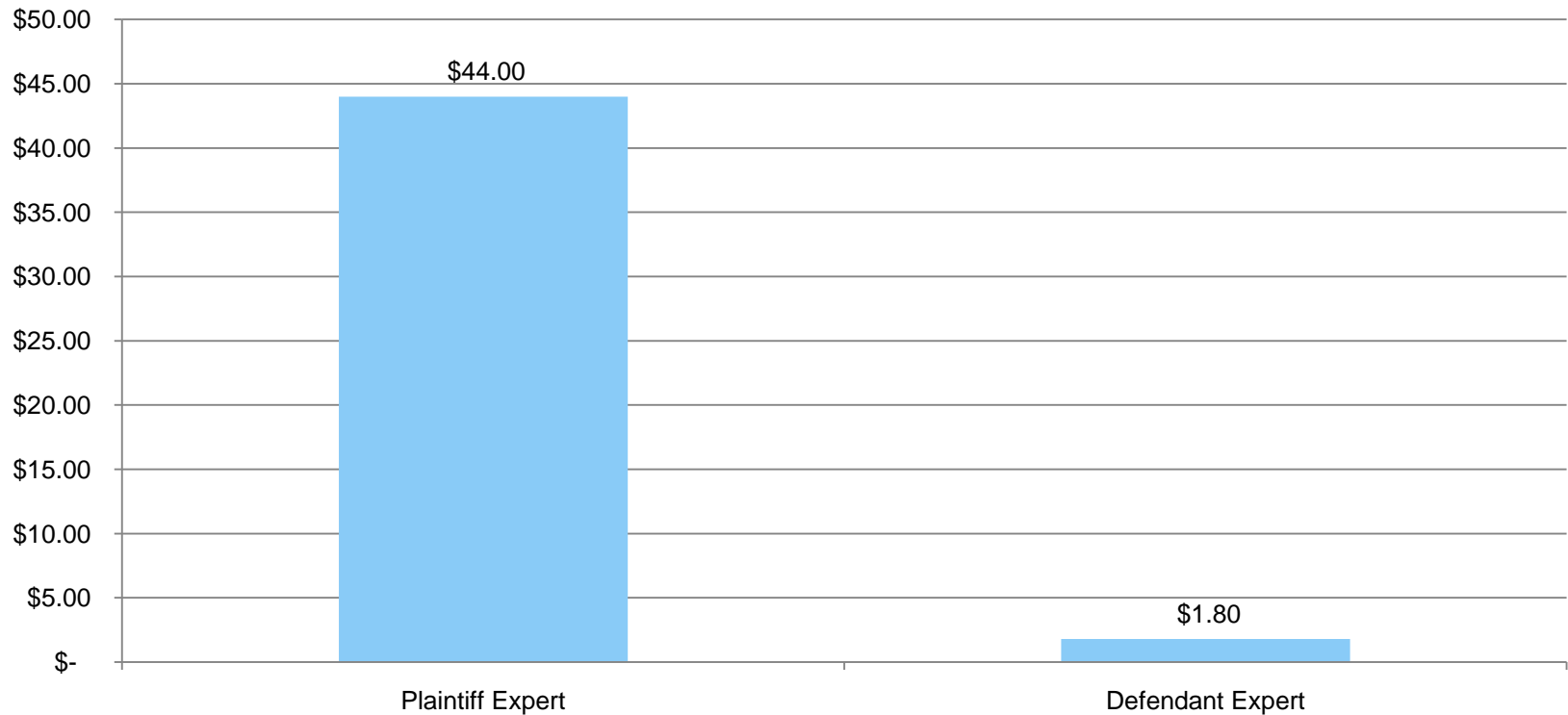
Gains From Trading on Positive Information: Defendant Perspective



Materiality: New Perspectives

Statistical significant matters: Nacchio case

Estimated Gain from Trade



Materiality: New Perspectives

Determining Materiality in the Current Economic Environment:

- **In recent cases, an increased complexity of financial instruments is at issue**
- **Experts must understand the limitations of applying traditional models in periods of financial crisis, and be able to unpack and explain sophisticated trades or trading strategies**
 - Securities are more volatile, making price movements more complicated to interpret
 - Instruments at issue are more complex, making prices more difficult to determine

Role of an Expert

A Successful and Effective Expert Will Be Able to:

- **Explain and relate the challenged conduct and the resulting outcome**
- **Determine the materiality of the outcome resulting from the alleged conduct under the judicial standards for materiality and how the “information” related to the challenged conduct is used by the “reasonable investor”**
- **Apply an extensive knowledge of the required subject matter including finance, statistics, and proper modeling techniques that can stand up to scrutiny and cross examination**
- **Explain complicated concepts and complicated models in simple, persuasive language**

Lessons Learned

The Inherently Complex Nature of Securities Matters Makes a Strong Case for Early Expert Involvement:

- **To maximize the expert's contributions and effectiveness, consider retaining an expert early in the process to allow ample preparation of opinions and to help inform the case strategy**
- **In addition to providing pivotal testimony at trial, experts can assist with discovery requests, and can aide in early settlement negotiations**



Questions



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Thank You

Thank you for attending this webcast.