Statement on *United States v. Newman et. al*[*]

The Committee on Capital Markets Regulation believes that it is premature for Congress to draft or introduce any legislative bills that relate to the yet unknown outcome of the case of *United States v. Newman et. al*, which addresses insider trading liability.[1] Drafting or introducing any legislative bills at this time would not allow legislators to compare that bill with the actual insider trading laws in effect, as this is not yet a settled matter of law. As a result, a bill could conflict with existing insider trading laws in a manner that complicates effective enforcement of insider trading laws and discourages legitimate market research.

Founded in 2006, the Committee on Capital Markets Regulation is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes thirty-seven leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and directed by Hal S. Scott (Nomura Professor and Director of the Program on International Financial Systems, Harvard Law School). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

The effective enforcement of insider trading laws is crucial to our capital markets, because it promotes both fairness and efficiency in the markets, thereby encouraging investment and reducing the cost of capital. Effective insider trading laws must also protect and encourage legitimate independent research by and for investors, as this enhances market efficiency in the pricing of securities. Indeed, the SEC and the Supreme Court have both acknowledged that, "market efficiency in pricing is significantly enhanced by analysts' initiatives to ferret out and analyze information, and thus the analyst's work redounds to the benefit of all investors."[2]

United States v. Newman involves "tipping" liability, where a "tipper" in possession of non-public information and a duty not to disclose that information passes it on to a "tippee," who then trades on that information or communicates it to someone else who trades on the tip.[3] In its recent decision in *United States v. Newman et. al* , the Second Circuit applied the Supreme Court precedent *Dirks v. SEC*[4] in holding that tippees must have *knowledge* that the tipper received a personal benefit for disclosing the information. The court also clarified what constitutes a tipper's personal benefit. This reversed a

[*] Professor B. Friedman is not associated with this statement.
[1] *United States v. Newman et al.*, __F.3d__, Nos. 13-1837-cr (L), 13-1917-cr (con), 2014 WL 6911278 (2d. Cir. Dec. 10, 2014)
[2] *Dirks v. SEC*, 463 US at 658 n.17
[3] Id.
[4] *Dirks v. SEC*, 463 U.S. 646 (1983)

decision in favor of the government in the U.S. District Court for the Southern District of New York.

However, the case is not final. The U.S. Attorney for the Southern District of New York has since petitioned the Second Circuit to either rehear the *Newman* case before the same three-judge panel that issued the opinion or to rehear the case *en banc*. An *en banc* hearing would be before the full active membership of Second Circuit judges. If the Second Circuit rejects the petition, then the U.S. Attorney has 90 days to petition the United States Supreme Court to issue a writ of certiorari. It typically takes the Supreme Court between two and three months to decide whether to grant certiorari. It is not clear that a legislative response is warranted in any case, however, any legislative response to *Newman* should not even be considered until the courts decide what existing law actually is.