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# "Big Boy" Letters Revisited: The SEC's Division of Enforcement Weighs In

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"Big Boy" letters continue to evoke considerable debate. Within the past month, two senior officials with the staff of the U.S. Securities and Exchange Commission have said that, regardless of their effectiveness as a defense in private securities litigation, "Big Boy" letters are no defense to an SEC enforcement action.[1]

As we discussed in our Alert Memorandum of June 7, 2007, securities traders sometimes use "Big Boy" letters to document a potential defense against later allegations of insider trading. *See "Big Boy" Letters and the Enforcement Implications of SEC v. Barclays*, No. 43-2007 (June 7, 2007). Where one party possesses material non-public information, a "Big Boy" letter allows the parties to acknowledge that information disparity and then, assuming the counterparty agrees to waive any claim of detrimental reliance, proceed with the trade. Afterwards, should the counterparty bring a private lawsuit for securities fraud, claiming to be the victim of insider trading, the insider can present the "Big Boy" letter to show that there was (1) no deception of the counterparty and (2) no reasonable reliance.

The issues become thornier in the context of an SEC enforcement action based on a "misappropriation" theory of insider trading. Unlike a private litigant, the SEC is not required to prove reliance or damages in an enforcement proceeding. Moreover, cases under the "misappropriation" theory are premised on a deception against the source of the

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[1] Rachel McTague, '*Big Boy' Letter Not a Defense to SEC Insider Trading Charge, Official Says*, BNA Sec. L. Daily, Nov. 19, 2007, *available at* http://pubs.bna.com/ip/BNA/sld.nsf/125731d8816a84d385256297005f336a/672fac662d8411bb852573960004f4f2?OpenDocument (comments of Fredric Firestone, Associate Director, SEC); Rachel McTague, *In Insider Trading Case, Big Boy Letter Signatory Need Not Have Been Deceived, Official Says*, BNA Sec. L. Daily, Dec. 4, 2007, *available at* http://pubs.bna.com/ip/BNA/sld.nsf/125731d8816a84d385256297005f336a/28d852cb9ca4dc15852573a700024b22?OpenDocument (comments of David Rosenfeld, Associate Regional Director, SEC).

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information, not against the counterparty. That deception would seem to be unaffected by a "Big Boy" letter signed by the counterparty.[2]

Adopting that analysis, it is not surprising that senior officials within the SEC's Division of Enforcement have opined that, in the enforcement context, "Big Boy" letters are ineffectual. Yet following that logic would also mean that *any* trader in *any* misappropriation case – even one who provided complete disclosure of all non-public information to his or her counterparty – could theoretically be held liable based on the continued unremedied deception against the source of the information. The point is certainly debatable: it is not clear whether Section 10(b) of the Securities Exchange Act can fairly be read to vindicate a federal interest in preventing sources of information from being deceived, where the party engaged in the deception obtains no information advantage in a private securities transaction as a result.

While the statements of individual staff members do not necessarily represent the views of the Commissioners or the official position of the SEC, these comments are noteworthy, since the staff has considerable discretion over the initiation and direction of enforcement investigations. It remains to be seen whether these comments are purely academic or presage a new direction for insider trading enforcement.

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[2] As the Supreme Court has noted, the proper "remedy" would be disclosure by the trader to his or her source, advising that the trader intends to breach his or her duty of trust or confidence and trade on the misappropriated information. *See United States v. O'Hagan*, 521 U.S. 642, 655 (1997). Scholars have commented on this peculiarity of U.S. securities law – that the faithless but "brazen" fiduciary could trade on inside information and technically not be liable for securities fraud (although other laws might still apply).

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