Leon Cooperman Settlement

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By Jim Leahy

The Securities Exchange Commission ("SEC") reported that, subject to court approval, Leon Cooperman has settled insider trading and beneficial ownership reporting violations for just under $5 million and an agreement to be subject to outside compliance supervision for a period of five years. Mr. Cooperman is the CEO and sole owner of Omega Advisors, Inc. ("Omega"), a New York based registered investment adviser. Omega was formed in 1991 and had regulatory assets under management of approximately $3.4 billion as of end of 2016.

According to the civil complaint (the "Complaint") filed in September of 2016 in the United States District Court for the Eastern District of Pennsylvania, Mr. Cooperman, together with funds he managed at Omega, was a large (9%) investor in Atlas Pipeline Partners, L.P. ("APL"), a public company that provided natural gas gathering, processing and treating services. By mid-2010, APL had experienced financial difficulties and entertained a confidential offer to purchase APL's Elk City operating facilities ("Elk City"). Elk City was a substantial asset of APL. The prospective purchaser of Elk City was Enbridge Energy Partners, L.P. ("Enbridge").

During most of the first seven months of 2010, Mr. Cooperman concluded that APL was not a good investment and he was actively selling his APL position. After speaking with "APL Executive 1" on July 7, 2010, Mr. Cooperman abruptly changed course and started to buy APL securities including stock and call options. On the July 7th call as well as on calls on July 19 and 20, APL Executive 1 shared material nonpublic details of the impending sale of Elk City to Enbridge. APL Executive 1 believed that Mr. Cooperman had an obligation not to trade on the information he relayed about the impending asset sale. During one of those telephone calls Mr. Cooperman agreed that he could not and would not trade based on that information.

Despite his promise not to, Mr. Cooperman purchased millions of dollars of APL securities between July 8, 2010 and July 19, 2010. On July 28, 2010, APL publicly announced the sale of Elk City for $682 million and APL's stock price rose over 30%.

The SEC's insider trading charges were based on violations of Section 10(b) of the Securities Exchange Act of 1934 as well as Rule 10b-5 thereunder. The Complaint indicates that Mr. Cooperman and Omega misappropriated material nonpublic information from APL Executive 1 and traded based on that information in breach of a duty of trust or confidence that each had to APL Executive 1.

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There are two lines of insider trading cases based on two different theories: The first theory is referred to as the "classical" theory of insider trading liability which applies when a "corporate insider" or his tippee trades on the securities of the tipper's corporation on the basis of material, nonpublic information. Trading on such information is a deceptive device under Section 10(b) because the trading has occurred in violation of a duty of trust and confidence that exists between the corporation's shareholders and the corporate insider. The second is the "misappropriation" theory; in this case, Section 10(b) liability is the result of the misappropriation of material, nonpublic information and trading on that information in violation of a duty owed to the source of the information, such as an employer.

The recent Supreme Court decision in *Salman v. United States* highlights the need to consider "personal benefit" analysis regardless of the theory used in an insider trading case. The tippee acquires the tipper's duty to refrain from trading if the tippee knows the information was disclosed in breach of the tipper's duty. A tipper breaches his fiduciary duty when he discloses inside information for a personal benefit. A personal benefit may be inferred in cases where the tipper is either a close personal friend or trading relative of the tippee.

Missing from the Complaint is any detailed analysis of the nature of Mr. Cooperman's relationship with APL Executive 1. It is unlikely that Mr. Cooperman was anything other than a large and important shareholder of APL. There is also no indication that APL Executive 1 received any benefit. It appears that APL Executive 1 was willing to share material nonpublic information with one of APL's largest shareholders because the executive thought that the shareholder could not and would not trade APL securities until that information became public. Also, it is not discernable from the Complaint if APL Executive 1 secured an explicit agreement from Mr. Cooperman not to trade APL securities prior to revealing details of the Elk City sale on the first telephone call on July 7, 2010 or if that agreement was discussed on a subsequent date such as July 19 or 20 in 2010, after the disclosure of the Elk City sale.

The case raised interesting questions about the nature of the duty of trust and confidence that a large shareholder (but less than 10%) has to corporate executives with whom that shareholder is corresponding, as well as the timing of the origination of that obligation. The shareholder is not an employee of the corporation and is, therefore, not automatically subject to corporate confidentiality policies. This situation is distinguishable from cases where newspaper employees or lawyers learn about a merger or acquisition as part of their employment. In those cases, it is clear that the employee is subject to a duty of confidentiality and that information taken would be misappropriated from the employer.

In any event, this proposed settlement with the SEC is an interesting development in the application of the law of insider trading and is the culmination of over five years of investigative work and significant trial preparation. Not many firms would survive such regulatory scrutiny for such a lengthy period of time. Mr. Cooperman and Omega provide yet another cautionary tale for the fund industry.

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