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# Insider Trading Regulation - A Comparative Analysis

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# Insider Trading Regulation—A Comparative Analysis

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As evidenced by the enactment of the Sarbanes-Oxley Act,[1] the most extensive revision of the U.S. securities laws since the New Deal era,[2] the focus on corporate accountability and standards of conduct has become magnified.[3] Related to this development is the continued emphasis on insider trading regulation.[4] Tales of alleged insider trading abuse by Martha Stewart highlight this scrutiny in the United States.[5] To an increasing degree, other developed markets also are becoming more sensitized, as George Soros' predicament in France illustrates.[6]

From a comparative perspective, this article analyzes insider trading regulation in the United States and other developed markets. On a different level, the article also discusses the application of Jewish law principles to the propriety of insider trading. The article concludes by positing that, while the United States' insider trading regimen is less stringent than that of many other developed markets, the United States' markets remain preeminent largely due to the relatively effective enforcement of the prevailing statutory and regulatory mandates. Whether this status will remain intact in light of the challenging dilemmas confronting the U.S. capital markets and the U.S. Securities and Exchange Commission (SEC) is uncertain.[7]

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). *See generally* HAROLD S. BLOOMENTHAL, SARBANES-OXLEY ACT IN PERSPECTIVE (2002); JAMES HAMILTON & TED TRAUTMANN, SARBANES-OXLEY ACT OF 2002: LAW AND EXPLANATION (2002).

2. *See* Securities Act of 1933, 15 U.S.C. § 77 (2000); Securities Exchange Act of 1934, 15 U.S.C. § 78 (2000).

3. *See* John T. Bostelman et al., *Enactment of Broad Accounting, Corporate Governance Reform Act Brings New Prohibitions, Requirements for Executives and Auditors*, 34 Sec. Reg. & L. Rep. (BNA) 1281 (2002).

4. *See generally* WILLIAM K. S. WANG & MARC I. STEINBERG, INSIDER TRADING (1996 & Supp. 2002).

5. *See* Editorial, *Martha, Martha, Martha*, WALL ST. J., Oct. 24, 2002, at A16; Alessandra Stanley & Constance L. Hays, *Martha Stewart's To-Do List May Include Image Polishing*, N.Y. TIMES, June 23, 2002, § 1, at 1.

6. *See* Jo Wrighton, *Soros Awaits Verdict In Case in France On Insider Trading*, WALL ST. J., Dec. 2, 2002, at C1.

7. *See* Laura Saunders Egodigwe et al., *A Year of Scandals & Sorrow*, WALL ST. J., Jan. 2, 2003, at R10; Stephen Labaton, *In Stormy Time, S.E.C. Is Facing Deeper Trouble*, N.Y. TIMES, Dec. 1, 2002, § 1, at 1 (asserting,

## I. The U.S. Law of Insider Trading

### A. Federal Law as Fundamental Source

The following discussion addresses key principles of U.S. law relating to insider trading. In this area, federal law is the fundamental source of regulation.[8] Although a number of states, such as New York, permit derivative suits against alleged inside traders premised on unjust enrichment[9] and perceived harm to the corporation,[10] state law frequently is unavailable in this setting.[11] For example, some state courts decline to recognize that an insider has a disclosure obligation when a subject transaction is executed on an impersonal securities market.[12] Similarly, in the derivative suit context, these courts find no requisite injury to the corporation.[13] The effect of these state court decisions is that allegedly aggrieved investors must resort to federal law.[14]

Section 16 of the Securities Exchange Act of 1934[15] focuses on "short-swing" reporting and trading by officers, directors, and 10 percent equity holders of publicly-held enterprises. Under Section 16(b), these persons are held strictly liable, requiring disgorgement of all their gains if they purchase and sell (or sell and purchase) an equity security of a subject enterprise within a six-month period.[16] Section 16 raises several challenging issues,[17] including whether the provision has served its historical purposes and should be repealed.[18]

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inter alia, that the SEC enforcement division is understaffed, that the Commission has lost ground "to keep up with the growth of business," that its budget is "relatively small," and that the new accounting board is "beset by budget and staffing difficulties that threaten to undermine its effectiveness").

8. *See generally* Wang & Steinberg, *supra* note 4.

9. *See, e.g.*, Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969).

10. *Id.* at 913–15.

11. *See, e.g.*, Freeman v. Decio, 584 F.2d 186, 187–96 (7th Cir. 1978) (applying Indiana law); Schein v. Chasen, 313 So.2d 739, 746 (Fla. 1975); Wang & Steinberg, *supra* note 4, § 16.1, at 1106 ("State law is rarely applied to stock market insider trading.").

12. *See, e.g.*, Van Schaack Holdings, Ltd. v. Van Schaack, 867 P.2d 892 (Colo. 1994); Bailey v. Vaughan, 359 S.E.2d 599 (W. Va. 1987); Hotchkiss v. Fischer, 16 P.2d 531 (Kan. 1932).

13. *See supra* note 12. *See* Douglas M. Branson, *Choosing the Appropriate Default Rule—Insider Trading Under State Law*, 45 Ala. L. Rev. 753 (1994); Thomas Lee Hazen, *Corporate Insider Trading: Reawakening the Common Law*, 39 Wash. & Lee L. Rev. 845 (1982).

14. Note that certain state securities laws may allow government and/or private actions based on alleged insider trading violations. *See* Wang & Steinberg, *supra* note 4, § 16.4. *See generally* Marc I. Steinberg & Ralph C. Ferrara, Securities Practice: Federal and State Enforcement §§ 12:01–12:29 (2d ed. 2001).

15. 15 U.S.C. § 78p (2000).

16. *See, e.g.*, Whittaker v. Whittaker Corp., 639 F.2d 516 (9th Cir. 1981); Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943). *See generally* Peter Romeo & Alan Dye, Section 16 Reporting Guide (2002).

17. For example, these issues include the concepts of beneficial ownership and attribution, identifying which persons may be officers, and applying the objective versus the pragmatic approach. *See, e.g.*, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973); CBI Indus., Inc. v. Horton, 682 F.2d 643 (7th Cir. 1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston, 566 F.2d 1119 (9th Cir. 1978); Securities Exchange Act Release No. 28869, [1990–1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,709 (Feb. 8, 1991).

18. *See* Marleen A. O'Conner, *Toward a More Efficient Deterrence of Insider Trading: The Repeal of Section 16(b)*, 58 Fordham L. Rev. 309 (1989). *But see* Steve Thel, *The Genius of Section 16: Regulating the Management of Publicly Held Companies*, 42 Hastings L.J. 391 (1991). *See generally* Marc I. Steinberg & Daryl L. Landsdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 Notre Dame L. Rev. 33 (1992).

In light of the financial debacles that recently have occurred, the reporting provisions of Section 16(a)[19] enjoy strong congressional support and evidently will be subject to vigorous enforcement.[20]

### B. Rejection of Access and Parity Theories

Under the U.S. regimen, no statute codifies the parameters of the insider trading prohibition. Rather, the SEC and the federal courts are the leading actors. Prior to the U.S. Supreme Court handing down its decisions in the 1980s, lower courts adopted the parity of information[21] and equal access theories[22] when construing the "disclose or abstain" mandate of Section 10(b)[23] and SEC Rule 10b-5[24] in the insider trading setting. Under the parity of information approach, as set forth by the U.S. Court of Appeals for the Second Circuit, "anyone in possession of material inside information must either disclose it to the investing public, or . . . must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed."[25] The equal access approach, embodying a more narrow concept, holds that *"[a]nyone—*corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose."[26] With respect to tipper-tippee liability exposure, lower courts posited that a tippee stood in the shoes of her tipper.[27] Hence, a tippee, who knowingly received material nonpublic information from a tipper when the tipper could not legally trade on that information, likewise was obligated to adhere to the disclose or abstain mandate.[28] As will be explored in the article's next section, several countries follow a number of the foregoing principles through statute.[29]

Today, the parity of information and equal access theories for Section 10(b) objectives are "dead."[30] Rather, as interpreted by the U.S. Supreme Court, the scope of the insider trading prohibition under Section 10(b) is based on fiduciary duty, trust, and confidence principles.[31] Other key elements in this setting include whether the subject information is deemed "material"[32] and whether that information is "nonpublic" (namely, whether

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19. 15 U.S.C. § 78p(a) (2000).

20. Pursuant to Section 403 of the Sarbanes-Oxley Act of 2002, Section 16(a) was amended to require officers, directors, and 10 percent equity holders to report to the SEC their purchases and sales of subject securities more promptly, generally by the end of the second day after the transaction.

21. *See, e.g.*, SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc); *infra* note 25 and accompanying text.

22. *See, e.g.*, United States v. Chiarella, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980); *infra* note 26 and accompanying text.

23. 15 U.S.C. § 78j(b) (2000).

24. 17 C.F.R. § 240.10b-5 (2003). *See generally* Ralph C. Ferrara & Marc I. Steinberg, *A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism*, 129 U. Pa. L. Rev. 263 (1980).

25. *Texas Gulf Sulphur Co.*, 401 F.2d at 848.

26. *Chiarella*, 445 U.S. at 231.

27. *See, e.g.*, Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974).

28. *See, e.g.*, *Elkind*, 635 F.2d at 156; *Shapiro*, 495 F.2d at 228.

29. *See infra* notes 123–140 and accompanying text.

30. *See, e.g.*, Dirks v. SEC, 463 U.S. 646 (1983); *Chiarella*, 445 U.S. at 222.

31. *See, e.g.*, *Chiarella*, 445 U.S. at 230 (opining that such liability "is premised upon a duty to disclose arising from a relationship of trust and confidence").

32. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224, 232, 240, & n. 18 (1988); Ganino v. Citizens Utilities Company, 228 F.3d 154 (2d Cir. 2000); SEC v. Mayhew, 121 F.3d 44 (2d Cir. 1997).

such information has been adequately communicated to and absorbed by the investment community).[33]

Thus, as construed by the U.S. Supreme Court, trading in possession of material confidential information by an officer, director, or other insider (such as a controlling shareholder) in the subject enterprise's securities is illegal under Section 10(b) because, by so trading, such person breaches a fiduciary duty owed to the enterprise and to the trader(s) on the opposite side of the transaction(s), namely, the corporation's shareholders.[34] Accordingly, a disclosure obligation exists in this context due to a relationship of confidence and trust between the transacting parties.[35] Similarly, the subject enterprise's consultants, including its attorneys, bankers, and accountants, who become privy to material inside information and have the understanding that such information must remain confidential, are viewed as quasi-insiders and thereby are held to have a relationship of confidence and trust with the corporation and its shareholders.[36] Such persons thereby are subject to the disclose or abstain mandate, thus being obligated to adequately disseminate the material information to the securities markets or abstain from trading (and tipping) until such dissemination is successfully completed.[37] However, any insider who seeks to make sufficient disclosure prior to the subject trade(s) (or tip(s)) violates the company's need for confidentiality concerning such information and incurs liability exposure under state law.[38]

With respect to "outsiders," to wit, those persons who do not have a fiduciary duty to those who are on the opposite side of the subject transaction(s), the misappropriation theory may be available.[39] Under this approach, Section 10(b) is violated when the pertinent individual misappropriates material confidential information for securities trading purposes, thereby effecting the breach of a relationship of trust and confidence to the source of the information, regardless whether such source is (or is not) a party to the transaction.[40] For example, an employee who misappropriates material nonpublic information entrusted to his employer and who uses this information for trading in the subject securities breaches the trust and confidence owed to his employer and perhaps to the clients of his employer.[41]

33. *See, e.g.*, United States v. Libera, 989 F.2d 596, 601 (2d Cir. 1993); *In re* Faberge, Inc., 45 S.E.C. 244, 256 (1973). From a general perspective:

> [M]aterial information becomes public in either of two ways. The first view is that information that is disseminated and absorbed by the investment community is public. The second view is premised on the efficient market theory, and under this view, information is deemed public when the active investment community is aware of such information. Under the efficient market theory, information that is known by the investment community will be reflected in the price of an efficiently traded security.

MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 3.03 (2002). As used in this article, the words nonpublic, inside and confidential have an identical meaning.

34. *See, e.g.*, *Chiarella*, 445 U.S. at 230.

35. *Id.*

36. *Dirks*, 463 U.S. at 655 & n.14.

37. *Id.* ("The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.").

38. *See* WANG & STEINBERG, *supra* note 4, § 5.2.

39. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642 (1997).

40. *Id.* at 654–56. *See* United States v. Falcone, [2001 Transfer Binder] Fed. Sec.L. Rep. (CCH) ¶ 91,489 (July 20, 2001).

41. *O'Hagan*, 521 U.S. at 661–63. *See* United States v. Newman, 664 F.2d 12 (2d Cir. 1981). *See generally* WANG & STEINBERG, *supra* note 4, § 5.4; Alan R. Bromberg & Lewis D. Lowenfels, *Misappropriation in the Supreme Court*, 31 REV. SEC. & COMM. REG. 37 (1998); Donna M. Nagy, *Reframing the Misappropriation Theory*

The legality of "tipping" is treated in a similar fashion. Ascertaining whether "tipping" is permissible under Section 10(b), the critical determinants are whether the tipper breached her fiduciary duty (or a relationship of trust and confidence) by conveying the inside information to her tippee(s) and whether the tippee(s) knew or should have known of such breach.[42] Without the existence of a breach, a tippee may trade and tip in compliance with Section 10(b).[43] Under the Supreme Court's rationale, an insider breaches her fiduciary duty by tipping the material nonpublic information with the motivation of obtaining a personal benefit. Such personal benefit ordinarily is of a pecuniary nature, such as cash or enhancement of status impacting one's employment situation that will redound in future financial benefits.[44] The conveyance of a gift likewise is a sufficient personal benefit: the communication of the material confidential information is equated to trading by the insider herself with the presentation of the gift to the tippee-recipient of the profits gained from the trades.[45]

### C. Rule 14e-3—Insider Trading in the Tender Offer Context

SEC Rule 14e-3 applies only in the tender offer context.[46] In this limited setting, the prohibitions against trading on and tipping of material inside information are much broader than those applicable under Section 10(b). Under Rule 14e-3, a person who procures material nonpublic information concerning a tender offer directly or indirectly from the offeror (bidder), target company, or an intermediary cannot trade or tip until there is sufficient public disclosure (and absorption) of this information.[47] Moreover, a tippee of material nonpublic information concerning a tender offer who knows or should know that the applicable information comes directly or indirectly from an offeror, target company, or intermediary likewise can neither trade nor tip prior to sufficient public dissemination (and absorption) of the information.[48] Rule 14e-3 sets forth an exception to this broad disclose or abstain mandate for multi-service financial firms that adopt and institute adequate screening mechanisms that effectively prevent the communication of nonpublic information to those persons who execute or recommend transactions in the subject corporation's securities.[49]

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*of Insider Trading Liability: A Post-O'Hagan Suggestion*, 59 Ohio St. L.J. 1223 (1998); Steven A. Ramirez & Christopher M. Gilbert, *The Misappropriation Theory of Insider Trading Under United States v. O'Hagan: Why Its Bark is Worse Than Its Bite*, 26 Sec. Reg. L.J. 162 (1998); Elliott J. Weiss, *United States v. O'Hagan: Pragmatism Returns to the Law of Insider Trading*, 23 J. Corp. L. 395 (1998).

42. Dirks v. SEC, 463 U.S. 646 (1983).

43. *Id.* at 662.

44. *Id.* at 662–64.

45. *Id.* at 664 (opining that "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient"). *See* Bruce A. Hiler, *Dirks v. SEC—A Study in Cause and Effect*, 43 Md. L. Rev. 292 (1984).

46. 17 C.F.R. § 240.14e-3 (2003). Rule 14e-3 was adopted in Securities Exchange Act Release No. 17120, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,646 (Sept. 4, 1980).

47. *See* 17 C.F.R. § 240.14e-3(a), (d) (2003). The Supreme Court upheld Rule 14e-3's validity in United States v. O'Hagan, 521 U.S. 642 (1997).

48. 17 C.F.R. § 240.14e-3(d) (2003).

49. *Id.* § 240.14e-3(b). *See* SEC Division of Market Regulation, "Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information," [1989–1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,520 (1990); Theodore A. Levine et al., *Multiservice Securities Firms: Coping With Conflicts in a Tender Offer Context*, 23 Wake Forest L. Rev. 41 (1988); Marc I. Steinberg

D. Critique of the U.S. Insider Trading Prohibition

U.S. law on insider trading is subject to criticism. Today, due to Supreme Court decisions, principles focusing on fiduciary duty, financial benefit, and misappropriation define the legality of transactions effected or contemplated. The goal that ordinary investors play on a level playing field with market professionals, having equal access to material nonpublic information, no longer survives under Section 10(b) insider trading jurisprudence.[50] Irrespective that Congress designed the federal securities acts to provide greater investor safeguards than state law, the Supreme Court's heavy reliance on state law-based principles of fiduciary duty minimizes that congressional objective.[51]

Perhaps not surprisingly, the SEC, acting purportedly within its rulemaking authority, has expanded restrictive Supreme Court law. For example the SEC's adoption of Rule 14e-3 sets forth broad parity of information and anti-tipping proscriptions in the tender offer setting.[52] In the Section 10(b) context, the SEC has advanced a "flexible" construction of Supreme Court precedent,[53] even promulgating new rules that in practice "overturn" lower court authority.[54] In another regulatory development, the SEC's embracement of Regulation FD seeks to terminate the practice of selective disclosure of material nonpublic infor-

& John Fletcher, *Compliance Programs for Insider Trading*, 47 SMU L. Rev. 1783 (1994). *See also* Charles Gasparino, *Brokerage Firms Agree to Fix Stock Research*, Wall St. J., Dec. 20, 2002, at C1; Randall Smith, *Regulators Set Accord With Securities Firms But Some Issues Persist*, Wall St. J., Dec. 23, 2002, at C1.

50. *See supra* notes 21–45 and accompanying text.

51. *See Chiarella*, 445 U.S. at 245–52 (Blackmun, J., dissenting). As Justice Blackmun opined:

> By its narrow construction of § 10(b) and Rule 10b-5, the Court places the federal securities laws in the rearguard of this movement, a position opposite to the expectations of Congress at the time the securities laws were enacted . . . . I cannot agree that the statute and Rule are so limited. The Court has observed that the securities laws were not intended to replicate the law of fiduciary relations. Rather, their purpose is to ensure the fair and honest functioning of impersonal national securities markets where common-law protections have proved inadequate. As Congress itself has recognized, it is integral to this purpose to assure that dealing in securities is fair and without undue preferences or advantages among investors.

*Id.* at 248. *See also* Alison G. Anderson, *Fraud, Fiduciaries, and Insider Trading*, 10 Hofstra L. Rev. 341 (1982); Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties Into the Federal Insider Trading Prohibition*, 52 Wash. & Lee L. Rev. 1189 (1995).

52. *See supra* notes 46–49 and accompanying text.

53. Two such examples are the SEC's assertion that applicable Supreme Court decisions allow for broad interpretations of trading "on the basis of" inside information and the requisite "benefit" for tipping purposes. *See, e.g.*, SEC v. Adler, 137 F.3d 1325 (11th Cir. 1998) (rejecting SEC's assertion but adopting a presumption of use when one trades while knowingly possessing material nonpublic information); SEC v. Stevens, SEC Litigation Release No. 12813 (Mar. 19, 1991) (settlement where SEC alleged that insider received personal benefit under *Dirks* test by "tipping" inside information to securities analysts).

54. *See* 17 C.F.R. § 240.10b5-1, 10b5-2, adopted in, Securities Exchange Act Release No. 43154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319 (Aug. 15, 2000). By adopting in Rule 10b5-1 a broad "awareness" test rather than a "use" standard for determining when trading is "on the basis" of material nonpublic information, the SEC rejected the standards set forth in at least two appellate court decisions. *See* United States v. Smith, 55 F.3d 1051 (9th Cir. 1998); SEC v. Adler, 37 F.3d 1325 (11th Cir. 1998); *see also* Robert A. Horowitz & Karen Y. Bitar, *Insider Trading: New SEC Rules and an Important New Case*, 28 Sec. Reg. L.J. 364 (2000); Donna M. Nagy, *The "Possession vs. Use" Debate in the Context of Securities Trading By Traditional Insiders: Why Silence Can Never Be Golden*, 67 U. Cin. L. Rev. 1129 (1999); Stuart Sinai, *Rumors, Possession v. Use, Fiduciary Duty and Other Current Insider Trading Considerations*, 55 Bus. Law. 743 (2000). Moreover, by its promulgation of Rule 10b5-2, the SEC has "overturned" the Second Circuit's decision in *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc) (discussed *infra* notes 67–80 and accompanying text).

mation by company insiders to market professionals, institutional shareholders, and other favored constituents.[55] While such selective disclosure is illegal insider tipping under the laws of several countries[56] and indeed was proscribed in this country before the Supreme Court's decision in *Dirks*,[57] this conduct currently is prohibited under Section 10(b) jurisprudence only if the tipper seeks to gain personally from the selective disclosure.[58]

Some specific examples demonstrate the inconsistent treatment of U.S. insider trading law. One striking illustration involves the different treatment accorded to tender offers because of SEC Rule 14e-3.[59] Literally, a person can legally procure profits by trading on material inside information or be found liable solely due to the fortuity of whether the transaction involves a tender offer. For instance, Barry Switzer, who served as the football coach for the Dallas Cowboys and the University of Oklahoma, inadvertently was the recipient of material confidential information that derived from a reputable corporate executive concerning a forthcoming merger.[60] Aware that the information was reliable because of his relationship with the executive, Switzer (along with his friends) traded on the basis of such information, making a handsome profit.[61] Because the executive did not know that Switzer was privy to the subject communications, no unlawful tipping occurred.[62] In that a tippee's liability pursuant to Section 10(b) is derivative,[63] the holding that the insider-tipper had not breached his fiduciary duty meant that Switzer, as the tippee, had lawfully traded and, accordingly, was entitled to retain his profits.[64]

The result in *Switzer* would have been otherwise if the contemplated transaction was structured as a tender offer (and not a merger). In such event, Rule 14e-3 would have been invoked (as well as Section 10(b)). Although Switzer would have escaped liability under

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55. *See* Securities Exchange Act Release No. 43154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319 (Aug. 15, 2000). Generally, Regulation FD

> prohibits issuers or individuals acting on their behalf from selectively disclosing material nonpublic information to certain enumerated persons (generally securities market professionals and holders of the issuer's securities who may well trade on the basis of the information) without disclosing the information publicly. If the selective disclosure is intentional, then the issuer must publicly disclose the information simultaneously by filing or furnishing a Form 8-K to the SEC or in a manner reasonably designed to provide broad distribution of the information. If the selective disclosure is unintentional, then the issuer must disclose the information to the public promptly, but in no event after the later of 24 hours or the opening of the next day's trading on the New York Stock Exchange. Violating Regulation FD exposes the issuer to SEC administrative and civil enforcement action, but does not by itself impose any Rule 10b-5 antifraud liability on the issuer or establish a private right of action.

MARC I. STEINBERG, UNDERSTANDING SECURITIES LAW 428 (3d ed. 2001). In November 2002, the SEC instituted its first enforcement actions based on alleged violations of Regulation FD. Three administrative proceedings were settled and one section 21(a) Report was issued. These proceedings are discussed in 34 Sec. Reg. & Rep (BNA) 1934 (2002). *See generally* Marc I. Steinberg & Jason B. Myers, *Lurking in the Shadows: The Hidden Issues of the Securities and Exchange Commission's Regulation FD*, 27 IOWA J. CORP. L. 173 (2002).

56. See *infra* notes 134–140 and accompanying text.

57. *See, e.g.*, Elkind v. Liggett & Myers, Inc., 635 F.2d 156 (2d Cir. 1980), *supra* note 27 and accompanying text.

58. *See supra* notes 42–45 and accompanying text.

59. For a description of Rule 14e-3, see *supra* notes 46–49 and accompanying text.

60. SEC v. Switzer, 590 F. Supp. 756, 758, 762 (W.D. Okla. 1984).

61. *Id.* at 762–64.

62. *Id.* at 758, 766.

63. Dirks v. SEC, 463 U.S. 646, 660–64 (1983). *See supra* notes 42–45 and accompanying text.

64. *Switzer*, 590 F. Supp. at 764–66.

Section 10(b), he would have breached Rule 14e-3 by trading on material confidential information that he knew came from a reliable inside source.[65] Thus, pursuant to Rule 14e-3, regardless of the tipper's liability, a tippee has liability by knowingly trading on material confidential information that directly or indirectly comes from a subject corporation.[66] Hence, Switzer's avoidance of liability and permissible retention of large profits were due to the manner in which the subject transaction was structured.

This inconsistency becomes more pronounced when the *Chestman*[67] case, involving a criminal prosecution, is examined. There, the Second Circuit, en banc, ruled that Chestman avoided liability under Section 10(b) because his tipper did not breach a fiduciary duty by communicating material nonpublic information concerning a forthcoming tender offer.[68] Nonetheless, Chestman's criminal conviction that he violated Rule 14e-3 was affirmed because he knowingly traded while having material inside information regarding a tender offer that derived, directly or indirectly, from the bidder or target corporation.[69] Hence, although Chestman (like Switzer) escaped Section 10(b) liability because the subject tipper did not unlawfully tip,[70] Chestman (unlike Switzer) was found liable under Rule 14e-3 because, unfortunately for Chestman, the "deal" was structured as a tender offer rather than another viable acquisition alternative, such as a merger, exchange of shares, or sale of assets.[71] Such disparate treatment cannot be reconciled with investor protection, market integrity, or fundamental concepts of fair treatment among similarly-situated market participants.[72]

The *Chestman* decision has another troubling issue. In determining whether a fiduciary duty was present and gave rise to the disclose or abstain mandate,[73] the court ruled that marriage, considered alone, does not constitute a fiduciary relationship.[74] For such a relationship of trust and confidence to exist, other attributes must be present, such as an understanding to maintain the confidentiality of the material information or a pre-existing status of being a recipient of family business secrets.[75] Not only does the court's rationale minimize "family values," it also, in effect, gives greater sanctity to a stockholder's relationship with a director of a publicly-held corporation (with whom such stockholder has

65. *See* Rule 14e-3(a), 17 C.F.R. § 240.14e-3(a) (2002).

66. *Id. See* WANG & STEINBERG, *supra* note 4, at 686–91; *supra* notes 46–49 and accompanying text, *infra* note 69 and accompanying text.

67. United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc).

68. *Id.* at 570–571.

69. *Id.* at 556–64. Note, moreover, that "Rule 14e-3 does not require that a person charged with violating the rule have knowledge that the nonpublic information in his possession relates to a tender offer." SEC v. Sargent, 229 F.3d 68, 79 (1st Cir. 2000). *Accord*, United States v. O'Hagan, 139 F.3d 641, 650 (8th Cir. 1998); Securities Exchange Act Release No. 17120 (1980).

70. *Chestman*, 947 F.2d at 558.

71. *Id.*

72. *See, e.g.*, United States v. Naftalin, 441 U.S. 768, 775–76 (1979) (stating that purposes of Securities Act include "investor protection," achieving "a high standard of business ethics . . . in every facet of the securities industry," and observing that "the welfare of investors and financial intermediaries are inextricably linked—frauds perpetrated upon either business or investors can redound to the detriment of the other and to the economy as a whole").

73. *See supra* notes 34–41 and accompanying text.

74. *Chestman*, 947 F.2d at 571 (stating that "Keith's status as Susan's husband could not itself establish fiduciary status").

75. *Id.* at 568–71. *But see* SEC v. Lenfest, 949 F. Supp. 341 (E.D. Pa. 1996); United States v. Reed, 601 F. Supp. 685 (S.D.N.Y.), *rev'd on other grounds*, 773 F.2d 477 (2d Cir. 1985).

never spoken or met) than to his/her spouse, child, parent, or sibling. This result is due to the U.S. Supreme Court's focus on the presence of a fiduciary duty (or a relationship of trust and confidence) premised on state law principles. Without a concept based on equal access, state law principles of fiduciary duty can cause, as they did in *Chestman*, an illogical result.[76]

By promulgating Rule 10b5-2,[77] the SEC in practical effect has nullified this part of *Chestman*. The rule invokes the Section 10(b) misappropriation theory when a person is the recipient of material confidential information from a spouse, child, parent, or sibling, unless such person can show that, in light of the particular family relationship, no reasonable expectation of confidentiality existed.[78] It remains to be determined whether the SEC's rule adoption will be upheld.[79] After all, the Commission, in all practicality, has "overturned" a decision handed down by the U.S. Court of Appeals.[80]

The foregoing evidences that U.S. law, with respect to insider trading, is deficient. Statutes generally are silent on insider trading,[81] thus leaving this area largely to the courts. The U.S. Supreme Court, in declining to embrace the parity of information and equal access rationales, has adhered to traditional state law concepts of fiduciary duty.[82] This approach, in turn, as illustrated by the *Chestman* and *Switzer* decisions,[83] has led to absurd lower court precedent. On another level, the SEC, seeking to combat narrow Supreme Court decisions regarding the Section 10(b) law of insider trading, has enunciated expansive interpretations of those decisions.[84]

The SEC, frustrated with its confined authority under Section 10(b), has reacted by prescribing Rules 14e-3 and Regulation FD.[85] The effect is all too frequently the existence

76. In a separate opinion, Judge Winter reasoned:

> [F]amily members who have benefitted from the family's control of the corporation are under a duty not to disclose confidential corporate information that comes to them in the ordinary course of family affairs. In the case of family-controlled corporations, family and business affairs are necessarily intertwined, and it is inevitable that from time to time normal familial interactions will lead to the revelation of confidential corporate matters to various family members. Indeed, the very nature of familial relationships may cause the disclosure of corporate matters to avoid misunderstandings among family members or suggestions that a family member is unworthy of trust.

*Chestman*, 947 F.2d at 579 (Winter, J., concurring in part and dissenting in part).

77. 17 C.F.R. § 240.10b5-2 (2003).

78. *Id. See* Selective Disclosure and Insider Trading, Securities Exchange Act Release No. 43154, [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,319 (Aug. 15, 2000).

79. *Cf.* The Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (invalidating SEC Rule 19c-4).

80. *See* Selective Disclosure and Insider Trading, Securities Exchange Act Release No. 42259, [1999–2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,228, at 82,863–64 (Dec. 20, 1999) (release proposing Rule 10b5-2 and expressing dissatisfaction with *Chestman* as being too restrictive).

81. Statutory treatment exists with respect to certain issues relating to insider trading, such as "short-swing" trading, option traders, insider trades during specified "blackout" periods, the ability of contemporaneous traders to bring a private right of action, the levying of money penalties, and the adoption of specific mechanisms to be implemented by broker-dealers and investment advisers. *See, e.g.*, WANG & STEINBERG, *supra* note 4, §§ 6.2, 6.3, 6.8, 7.3.3 (discussing Sections 16, 20(d), 20A, 21A of the Securities Exchange Act); *supra* notes 15–20 and accompanying text.

82. *See supra* notes 31, 34–36, 51 and accompanying text.

83. *See supra* notes 60–76 and accompanying text.

84. *See supra* notes 53–54 and accompanying text.

85. *See* 17 C.F.R. § 243.101; [2000 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,683 (SEC 2000); discussion note 55 *supra*.

of inconsistent insider trading regulations that poorly serve the investing public. Thus, the U.S. framework on insider trading should not be emulated. Other countries apparently agree.[86]

## II. Regulation of Insider Trading in Other Developed Markets

Contrasted with the United States, where insider trading law generally has been formulated by the judiciary,[87] countries abroad have adopted detailed and specific legislation defining the parameters of the insider trading proscription.[88] Irrespective of this codification approach, ambiguities persist that await legislation or judicial resolution.[89]

### A. Use of Statutorily Defined Terms

Unlike the United States, key terms comprising the insider trading offense are delineated by statute.[90] For example, in the United Kingdom (U.K.), inside information is defined as information that "(1) relates to particular securities or their issuers; (2) is specific or precise; (3) has not been made public; and (4) if it were made public would be likely to have a significant effect on the price or value of any security."[91] Under German law, an "insider

86. *See infra* notes 88–140 and accompanying text.

87. *See supra* notes 21–49 and accompanying text.

88. *See* Marc I. Steinberg, International Securities Law: A Contemporary and Comparative Analysis 105–48 (1999); *infra* notes 90–140 and accompanying text.

89. *See infra* notes 95–96 and accompanying text.

90. *See infra* notes 91–107 and accompanying text.

91. Criminal Justice Act 1993 (CJA), 36, part V, §§ 56, 60(4) (Eng.), as set forth in Alistair Alcock, *United Kingdom, in* International Securities Regulation vol. 6, bklt. 1, 27 (Robert C. Rosen ed., 1994).

In 1989, the Council of the European Communities promulgated the European Economic Community Directive Coordinating Regulation on Insider Trading. Council Directive 89/592/EEC1989 O.J. (L 344) 30 [hereinafter *Directive*]. The Directive, for example, sets forth minimum standards for defining the concepts "inside information" and "insider" with respect to which Member States of the European Union must comply. *Id.* art. 5. Nonetheless, significant details regarding methods of enforcement are left principally to the Member States. *Id.* art. 8. *See* Isabelle Pingel, *The EC Directive of 1989, in* Insider Trading: The Laws of Europe, the United States and Japan 5, 5–6 (Emmanuel Gaillard ed. 1992).

Article I of the Directive provides that inside information is "information which has not been made public of a precise nature . . . which, if it were made public, would be likely to have a significant effect on the price of the . . . security." *Directive, supra*, art. 1. Article 2 sets forth that an insider is "any person who . . . by virtue of his membership of the administrative, management or supervisory bodies of the issuer, by virtue of his holding in the capital of the issuer, or because he has access . . . by virtue of the exercise of his employment, profession or duties, possesses inside information [and takes] advantage of that information with full knowledge of the facts by acquiring or disposing of for his own account or for the account of a third party, either directly or indirectly, transferable securities of the issuer . . . to which that information relates." *Directive, supra*, art. 2. Article 4 provides that a "secondary insider" is "any person [other than a primary insider] who with full knowledge of the facts possesses inside information, the direct or indirect source of which could not be other than a [primary insider]." *Directive, supra*, art. 4.

The Directive, providing minimum standards only, leaves to the judgment of the Member States whether to adhere to more stringent requirements than those promulgated in the Directive. *Directive, supra*, art. 6. The Directive mandates that each Member State designate competent authorities "to ensure that the provisions adopted pursuant to [the] Directive are applied [and that those authorities] be given all supervisory and investigatory powers that are necessary for the exercise of their functions." *Directive, supra*, art. 6. The Directive declines to require whether administrative, civil or criminal sanctions should be implemented by each Member State for enforcement purposes. Rather, Article thirteen provides that "[e]ach Member State shall determine

fact" is "knowledge of a fact not publicly known relating to one or more issuers of insider securities or to insider securities and which fact is capable of substantially influencing the price of the insider securities in the event of it becoming publicly known."[92] Other nations likewise define, pursuant to statute, the elements of privileged information or an inside fact.[93] Additional key concepts also are set forth by statute, including, for example, those persons who are defined as insiders, enjoying a "special relationship" with the enterprise or having "access" to nonpublic information.[94]

Not surprisingly, interpretive issues must be addressed under these statutes. Under the U.K. framework, for instance, when is information "specific or precise" (as contrasted to being general or not specific)? Is information of the subject company engaging in preliminary merger discussions with a prospective bidder precise or not sufficiently specific under the statute?[95] Pursuant to German law, when is a fact not publicly known so as to be deemed an "insider fact?"[96]

In contrast to the U.S. approach, the definition of materiality focuses on the information's impact on market price.[97] Hence, the U.S. standard, analyzing whether the affected information would assume significance to the mythical "reasonable" person in making her investment decision,[98] has not been accepted with frequency elsewhere.[99] For example, the laws of the following jurisdictions center their inquiry on the information's impact on the market price of the affected security: (Ontario) Canada,[100]

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the penalties to be applied for infringement of the measures taken pursuant to [the] Directive." *See* Pingel, *supra*, at 6–21; STEINBERG, *supra* note 88, at 122–23. *See also New Curbs on Insider Trading, Market Abuse Agreed to by EU Parliament*, 34 Sec. Reg. & L. Rep. (BNA) 432 (2002).

92. Securities Act § 13. *See* Tony Hickinbotham & Christoph Vaupel, *Germany*, *in* INTERNATIONAL INSIDER DEALING 129, 134 (Mark Stamp & Carson Welsh eds., 1996).

93. *See, e.g.*, France—Law No. 90–08, J.O., July 20, 1990; Italy—Consolidated Act on Financial Intermediation art. 180, para. 3, implemented by CONSOB Regulation No. 11520. *See also* STEINBERG, *supra* note 88, at 130–32, 138–39.

94. *See, e.g.*, *Directive*, *supra* note 91; Australia—Corporations Law § 1002G(1); Canada—Ontario Securities Act § 76(1), 76(5).

95. The ambiguity of the United Kingdom's definition of inside information has been criticized. *See* Hickinbotham & Vaupel, *supra* note 92, at 100. Note that the French judiciary has held that "privileged information" encompasses negotiations relating to a prospective takeover offer by a French company seeking to acquire the securities of a publicly held U.S. corporation. *See* CA Paris, 6 July 1994, *Les Petites Affiches (Petites Affiches)* No. 137, 16 Nov. 1994, p. 17, note Ducouloux-Favard, *discussed in* Patricia Peterson, *France*, *in* INTERNATIONAL INSIDER DEALING 152, 156 (Mark Stamp & Carson Welsh eds., 1996).

96. *See* Hartmut Krause, *The German Securities Trading Act (1994): A Ban on Insider Trading and an Issuer's Affirmative Duty to Disclose Material Nonpublic Information*, 30 INT'L LAW. 555, 562 (1996) ("Neither the German Act nor the EC Insider Trading Directive offer guidance as to when information should be considered known to the public.") *Cf.* Australian Corporations Law § 1002B(2) (setting forth that information is generally available if "(a) it consists of readily observable matter; or (b) without limiting the generality of paragraph (a), both the following subparagraphs apply: (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information; and (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed").

97. *See infra* notes 100–106 and accompanying text.

98. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

99. See *Directive*, *supra* note 91, art. I; *infra* notes 100–106 and accompanying text.

100. Ontario Securities Act § 1(1) (defining a material fact as a "fact that significantly affects or would reasonably be expected to have a significant effect on, the market price or value of securities [of the subject issuer]").

Note that there is no federal securities law in Canada. Rather, regulation is provided by each of that country's ten provinces and two territories. The Ontario securities legislation is viewed as the most significant and will

Mexico,[101] United Kingdom,[102] France,[103] Germany,[104] Italy,[105] and Australia.[106] Indeed, relatively few nations, such as Japan,[107] adopt the U.S. approach.

Thus, although in need of judicial clarification relating to unresolved issues, the insider trading statutes in non-U.S. developed markets set forth the essential terms and definitions that comprise the prohibition. As will be discussed below, the fiduciary relationship (or trust and confidence) analysis adhered to by the U.S. Supreme Court is rejected elsewhere.[108]

### B. General Adherence to the "Access" Standard

Other countries have rejected the U.S. fiduciary duty (or relationship of trust and confidence) standard to define the contours of illegal insider trading and tipping.[109] The U.S. approach is problematic. For example, the U.S. rationale focuses on the existence (or absence) of relatively difficult inquiries to determine whether the insider trading prohibition prevails in a specific setting: Does a fiduciary relationship exist?[110] What type of relationship is viewed as fiduciary or one of trust and confidence?[111] Which individuals are deemed quasi-insiders and under what circumstances?[112] What facts establish misappropriation of the subject information?[113] Must an "insider" indeed "use" or merely be "in possession of" the pertinent information at the time of the trade(s)?[114] What must be shown to prove that a tipper conveyed the subject information for "personal benefit"? What is deemed an "improper personal benefit"?[115] To leave these questions to *ad hoc* adjudication and SEC rulemaking[116] may be acceptable to the United States with its abundance of litigation and its plethora of lawyers, regulators, and judges. This approach, arguably representing the antithesis of cost-effectiveness, understandably garners little support elsewhere.[117]

be used as the exemplar in this article. *See generally* Philip Anisman, *The Proposals for a Securities Market Law for Canada: Purpose and Process*, 19 Osgoode Hall L.J. 330 (1981).

101. Securities Market Law art. 16 *bis* (Mex.).

102. Criminal Justice Act 1993, c. 36 (Eng.).

103. Law No. 90–08, J.O., July 20, 1990 (defining privileged information as "any precise non-public information . . . which, if made public, might affect the price of the security").

104. Securities Act § 13, *supra* note 92.

105. Consolidated Act on Financial Intermediation, art. 180, para. 3. *Cf.* former Law No. 157 art. 3. *See* Paolo Casella, *Italy*, *in* Insider Trading: The Laws of Europe, the United States and Japan 109, 112–113 (Emmanuel Gaillard ed., 1992). *See generally* Eugenio Ruggiero, *The Regulation of Insider Trading in Italy*, 22 Brook. J. Int'l L. 157 (1996).

106. Corporations Law § 1002G(1) (setting forth that the information, if it were generally available, "might have a material effect on the price or value of [the subject] securities").

107. Securities and Exchange Law art. 166, para. 2 (defining material facts as encompassing those facts "which may have significant influence on the investment decision of investors"). *See* Steinberg, *supra* note 88, at 146 (and sources cited therein).

108. *See infra* notes 109–140 and accompanying text.

109. *See infra* notes 123–140 and accompanying text.

110. *See* Chiarella v. United States, 445 U.S. 222 (1980); *supra* notes 34–38 and accompanying text.

111. *See* United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc); *supra* notes 67–73 and accompanying text.

112. *See* Dirks v. SEC, 463 U.S. 646, 655 n.14 (1983).

113. *See* United States v. O'Hagan, 521 U.S. 642 (1997); *Chestman*, 947 F.2d at 551.

114. *See* 17 C.F.R. § 240.10b5-1 (2003); *supra* notes 53–54, 84 and accompanying text.

115. *See* SEC v. Switzer, 590 F. Supp. 756 (W.D. Okla. 1984); *supra* notes 60–66 and accompanying text.

116. *See, e.g.*, 17 C.F.R. § 240.10b5-1, 240.10b5-2 (2003); *supra* notes 53–54, 77–80 and accompanying text.

117. *See infra* notes 123–140 and accompanying text.

Moreover, from a fairness perspective, the U.S. framework contains significant loopholes. For example, should the loose-lip executive and his tippees escape insider trading liability when those tippees intentionally trade on material inside information?[118] Should a person be criminally convicted or be entirely exonerated based on the distinction between a tender offer and a merger?[119] Should a relative or friend be able to trade legally on material inside information when she inadvertently learns of this information when visiting the insider's home or office?[120] By adopting a fiduciary relationship-like model (that is rejected by the SEC in the tender offer context[121]), the U.S. insider trading regime complicates an already confusing area and at times unfairly treats similarly situated market participants.[122] Contrasted with the United States, many countries opt for an insider trading prohibition based on the "access" doctrine.[123] Generally, this standard proscribes insider trading by those persons who have unequal access to the material confidential information. This standard may extend the insider trading proscription to tippees who receive the material information from traditional insiders or others who, because of their employment, office, or profession, have access to this information.[124] This general approach is followed in several jurisdictions, including the United Kingdom,[125] France,[126] Germany,[127] Italy,[128] (Ontario) Canada,[129] and Mexico.[130]

Significantly fewer jurisdictions elect a more expansive approach based on the parity of information principle.[131] For instance, Australia's prohibition against insider trading generally encompasses any person or entity who possesses nonpublic, price-sensitive information.[132] Under the Australian regimen, one is deemed an insider, hence becoming subject

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118. Such conduct today is governed by Regulation FD. *See supra* note 55 and accompanying text.

119. *See* United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc); *supra* notes 59–86 and accompanying text.

120. *Cf.* Trib. Corr. Paris, 15 Oct. 1976, JCP 1977, II 18543-D. 1978.381 (architect deemed insider due to his becoming privy to confidential information while visiting his client's office), discussed in Dominique Borde, *France*, *in* INSIDER TRADING IN WESTERN EUROPE: CURRENT STATUS 59, 65 (Gerard Wegen & Heinz-Dieter Assmann eds., 1994).

121. *See* 17 C.F.R. § 240.14e-3 (2003); *supra* notes 46–49 and accompanying text.

122. *See supra* notes 50–86 and accompanying text.

123. EC Directive on Insider Trading, *supra* note 91; *infra* notes 125–130 and accompanying text.

124. *See infra* notes 125–130 and accompanying text.

125. *See* Criminal Justice Act §§ 52, 57 (1994); *infra* note 135 and accompanying text.

126. Hence, under Regulation 90–08, the following are defined as insiders:

> (a) [P]ersons holding privileged information by reason of their capacity as members of management, board of directors of an issuer, or by reason of their functions which they exercise with respect to an issuer; (b) [p]ersons holding privileged information by reason of the planning and execution of a financial operation: (c) [p]ersons to whom privileged information is disclosed during the exercise of their professional activities or functions; and (d) [p]ersons who, with full knowledge of the facts, possess privileged information originating directly or indirectly from [any of the foregoing insiders].

*Id. See* STEINBERG, *supra* note 88, at 138.

127. Securities Act § 13(1). *See generally* Krause, *supra* note 96; Christof von Dryander, *The German Securities Trading Act: Insider Trading and Other Secondary Market Regulation*, 9 No. 1 INSIGHTS 26 (1995).

128. Consolidated Act on Financial Intermediation, art. 180, para. 3. *See* STEINBERG, *supra* note 88, at 132.

129. Ontario Securities Act, ch. S-5, § 76(5) (1990) (Can.).

130. *See Amendments to the Mexican Securities Law*, 465 INT'L FIN. L. REV. 83 (2001).

131. *See* SEC v. Texas Gulf Sulfur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc); *supra* note 25 and accompanying text.

132. *See* Corporations Law § 1002G (Austl.).

to the insider trading and tipping prohibitions, by "(a) possess[ing] information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and (b) . . . know[ing], or ought reasonably know[ing] that (i) the information is not generally available; and (ii) if it were generally available, it might have a material effect on the price or value of those securities."[133]

### C. Tipping Liability

In regard to "tipping," as with liability of insiders and access persons for trading, the U.S. standard has been rejected elsewhere. Adhering to an expansive approach, Australia, for example, prohibits any tippee (regardless how remote) who knowingly has material inside information from trading on or tipping that information.[134] Similarly, the United Kingdom has a broad proscription against trading and tipping for those persons who knowingly have obtained material confidential information, directly or indirectly, from an insider.[135]

A number of other nations adhere to approaches that are more straightforward than the U.S. standard but that may not be as encompassing. Under German law, for example, primary insiders are prohibited from trading and tipping.[136] However, recipients of material confidential information conveyed by a primary insider, while subject to the prohibition against trading, permissibly may tip the subject information to others.[137] France,[138] Italy,[139] and Japan[140] have adopted similar standards.

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133. *Id. See* Steinberg, *supra* note 88, at 142.

134. Corporations Law § 1002E (Austl.). *See* Roman Tomasic & Stephen Bottomley, Corporations Law in Australia 698–99 (1995). *See generally* Paul Redmond, Companies and Securities Law (2d ed. 1992).

135. Criminal Justice Act §§ 52, 57 (1994). *See* Tim Herrington & Jason Glover, *The United Kingdom*, *in* Insider Trading in Western Europe: Current Status 33, 43 (Gerard Wegen & Heinz-Dieter Assmann eds., 1994); Hickinbotham & Vaupel, *supra* note 92, at 109.

136. *See* Krause, *supra* note 96, at 562.

137. Securities Act § 14(1)–(2). *See* Steinberg, *supra* note 88, at 128–29:

> Primary insiders are prohibited from trading on inside information for their own account or for the account of others, conveying inside information to others without proper authorization, and making recommendations to a third party to trade based upon inside information (tipping). Secondary insiders are prohibited from trading for their own account or for the account of others. Unlike primary insiders, secondary insiders are neither prohibited from disclosing information to other people nor from tipping. However, the recipients of such information would then become secondary insiders (tippees) and thus would be prohibited from trading on the inside information for their own account or for the account of others. Nonetheless, tippees can continue to pass along inside information provided that they do not trade on it themselves or for the account of others. This result may be explained as a means of facilitating the free flow of information in order to more expeditiously transform non-public inside information into public information.

*Id. See supra* notes 96, 127.

138. Law No. 90–08, arts. 2–5, J.O., July 20, 1990; art. 10–1 of Ordinance No. 67–833. *See* Borde, *supra* note 120, at 66–69.

139. Consolidated Act on Financial Intermediation No. 58, art. 180, paras. 1, 2, discussed in Steinberg, *supra* note 88, at 132–33.

140. Securities and Exchange Law art. 166, paras. 1, 3. *See* Toshio Kobayashi, Hidetaka Mihara & Fumihide Sugimoto, *Japan*, *in* International Insider Dealing 321, 334–35 (Mark Stamp & Carson Welsh eds., 1996).

## III. Insider Trading Under Jewish Law

This article briefly will address Jewish law[141] in this comparative analysis of insider trading regulation. A number of examples seek to illustrate the application of Jewish law in this setting. For example, assume that three days before the subject corporation's public announcement of significantly increased earnings, the enterprise's chief executive officer is approached by the former wife of another insider regarding the purchase of her stock. Without communicating any information about the company's affairs, the chief executive officer purchases the stock (which increases in value after public disclosure is made of the company's earnings). In this situation, the parties are in contractual privity with one another, having engaged in a face-to-face transaction. Jewish law prohibits this conduct.

The vendor, according to Jewish law, must divulge to his prospective purchaser any defects in the product to be sold.[142] Although the insider is the purchaser and not the vendor when the corporate nonpublic information is positive, the same principle should apply. After all, in another scenario, if the inside information involved "bad" news, then the insider would be selling the securities and thus be the seller-vendor. Thus, in all practicality, whether the insider is the purchaser or seller of the subject securities should not be deemed relevant.[143]

The result under Jewish law should be the same even if the insider, rather than engaging in a face-to-face transaction, trades in an impersonal securities market, such as the New York Stock Exchange. An insider, particularly an executive officer, is an agent of the corporate enterprise. Under Jewish law, an agent is charged with acting in the principal's best interests.[144] Trading on inside information or tipping such information is contrary to the company's best interests. For example, due to investor lack of confidence in the integrity of the subject company's management, shareholders may dump their shares, causing a sharp decline in the stock price. A decreased stock price may render it more difficult for the company to raise needed capital and retain key personnel.[145] Hence, a director or executive officer violates Jewish law by trading on or tipping inside information.

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141. Generally, Jewish law (halakhah) has three components: "Laws between man and his fellow; Matters of Torah; [and] Performance of precepts . . . ." Menachum Elon, *The Legal System of Jewish Law*, 17 N.Y.U. J. INT'L L. & POL. 221 (1985). With respect to the structure of Jewish law literature, one source has stated:

> Jewish law is composed of several layers of literature. The most basic layers are the Mishna (compilation around 200 C.E.) and Gemara (compilation around 500 C.E.), which together compose the Talmud. The Talmud represents a vast system of laws and customs, written in a noncodified form. Referring to the Talmud, a great number of Jewish law scholars have written comprehensive and authoritative volumes of commentaries and responsa from the sixth century up to the contemporary time. Some writers integrated the massive literature into formal codes. The most distinct codes are those written by Maimonides (twelfth century; Spain, Egypt) and R. Joseph Karo (sixteenth century; Turkey, Eretz Israel).

Yehoshua Liebermann, *Economic Efficiency and Making of the Law: The Case of Transaction Costs in Jewish Law*, 15 J. LEGAL STUD. 387, 389 (1986).

142. *See* AARON LEVINE, FREE ENTERPRISE AND JEWISH LAW - ASPECTS OF JEWISH BUSINESS ETHICS 117 (1980).

143. *See* Chiarella v. United States, 445 U.S. 222, 227 n.8 (1980). *Cf.* Gratz v. Claughton, 187 F.2d 46, 49 (2d Cir. 1951) (Hand, Learned J.) (stating "the director or officer assumed a fiduciary relation to the buyer by the very sale: for it would be a sorry distinction to allow [the insider] to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one"). Moreover, the chief executive officer is an agent of the business enterprise, hence precluding unfair insider dealing in this context. *See infra* notes 144–146 and accompanying text.

144. *See* ISRAEL H. LEVINTHAL, THE JEWISH LAW OF AGENCY 66 (1922).

145. *See* Diamond v. Oreamuno, 248 N.E.2d 910, 912 (N.Y. 1969).

Similarly, a lawyer violates Jewish law if she is retained by the company, knowingly receives information that she knows is to be kept confidential, and elects to trade on or tip such information.[146] Under Jewish law, an attorney retained by a company should be deemed an agent as well as a fiduciary of that company.[147] Consequently, like the corporate director or executive officer, the attorney is obligated to act in the corporation's best interests and to carry out the directives of the insiders (so long as such directives are lawful and not unethical). Trading and/or tipping by the attorney are antithetical to the company's best interests and therefore should be proscribed under Jewish law.

The "typical" bartender example is a more difficult situation under Jewish law. By way of analogy, under U.S. law, if the bartender overheard a "confidential" discussion among corporate insiders, without such insiders benefiting from the selective disclosure (or intending to convey a gift to the bartender), and the information did not relate to a tender offer, the bartender could legally trade or tip.[148] Clearly, under Jewish law, the bartender is not an agent or fiduciary of the company. However, principles exist under Jewish law that may preclude the bartender from trading on the material inside information. Exodus 23:7 not only prohibits lying but also mandates that an individual "distance himself from falsehood."[149] Deuteronomy 19:14 states: "Do not move the border markers," signifying, among other things, that unfair competition should be proscribed, and more expansively, that market participants should perform on a level playing field.[150] Deuteronomy 16:20 directs that "Justice, justice, you shall pursue," suggesting that "the Torah is mandating a particular aggressiveness in performing this commandment."[151] These commandments arguably may prohibit any person in possession of material nonpublic information, including a complete stranger to the corporation (and its insiders), from trading on material inside information, irrespective whether that information was learned directly or indirectly from an inside source. An individual who is privy to material nonpublic information that is not available to the party on the other side of the transaction clearly is playing with a "stacked deck" and is the certain "winner" in this high stakes, financial contest. The "playing field" is anything but level, denying the uninformed trader any realistic possibility of success.[152] The conclusion thus may be reached that allowing those persons who are selectively privy to material inside information (regardless of how and from what source such information was obtained) to financially benefit at the expense of uninformed traders is an injustice that is contrary to Jewish law.[153]

146. *See* LEVINTHAL, *supra* note 144, at 66–77.

147. *See id.*

148. *See* Switzer v. SEC, 590 F. Supp. 756 (W.D. Okla. 1994).

149. As set forth in Steven H. Resnicoff, *Lying and Lawyering: Contrasting American and Jewish Law*, 77 NOTRE DAME L. REV. 937, 959 n.90 (2002).

150. As set forth in Rabbi Avi Geller, Lively Parsha Shoftims 5762, *available at* http://www.aish.com/torahportion/livelyparsha/Lively_Parsha_Shoftim_5762.asp(last visited Feb. 14, 2003).

151. As stated in JOSEPH TELUSHKIN, BIBLICAL LITERACY 492 (1997).

152. *See* AARON LEVINE, CASE STUDIES IN JEWISH BUSINESS ETHICS 172 (2000) (stating that selective disclosure or tipping of inside information "entails violations of various biblical prohibitions").

153. Note that insider trading is prohibited in certain circumstances under Israeli law. *See International Securities Regulation* Binder 3, at 40–42 (R. Rosen ed. 2002) (describing insider trading law of Israel and commenting that "the enforcement of the new rules, to date, has not been very effective"). In Israel, the United States, and other "countries where legislation exists forbidding the use of insider trading, its use becomes halakhically illegal." MEIR TAMARI, THE CHALLENGE OF WEALTH 101 (1995).

## IV. Comments Favoring U.S. Regulation

The preceding discussion illustrates that the U.S. approach regarding insider trading regulation lags behind other established jurisdictions in terms of facilitating investor protection and market integrity. Nevertheless, in practical reality, the U.S. regime remains preeminent regardless of its shortcomings. The succinct explanation is the existence of a relatively rigorous enforcement and remedial framework that has widespread acquiescence, if not support, among market participants and the general populace.[154] Whether this perception retains its vitality in the aftermath of the corporate debacles that have occurred in the United States awaits resolution.[155]

As seen by the experiences of several countries, statutes that apply strict standards (such as in regard to insider trading) are meaningful only to the degree that they are implemented with some regularity. The lack or insufficiency of effective government resources, personnel, and surveillance poses little deterrent to prospective perpetrators. Consequently, competent personnel must be procured by the applicable regulator, armed with appropriate resources to undertake meaningful surveillance and prosecution.[156] This commitment does not appear to be forthcoming with impressive vigor by many countries that have stricter legal standards than the United States.[157]

Along with more relaxed enforcement of statutorily rigorous standards in the subject country, often cultural attitudes are found that acquiesce in the propriety of insider trading.[158] Such practices traditionally have been viewed by affected participants as ingrained in the securities market and as the way that business relations have been carried on for decades (if not centuries).[159] This attitude may impede regulators from commencing actions against purportedly reputable business executives. Principal reliance on a criminal method of enforcement (in that many countries do not meaningfully allow for civil enforcement by either the government or allegedly injured private parties[160]) may accentuate this reluctance.[161] That "admired" executives may be faced with criminal prosecution in a culture

154. *See* Steinberg, *supra* note 88, at 259.

155. *See* Labaton, *supra* note 7.

156. Steinberg, *supra* note 88, at 261. *See New Curbs on Insider Trading, Market Abuse Agreed to by EU Parliament*, 34 Sec. Reg & L. Rep. (BNA) 432, 433 (2002) (stating that the U.S. SEC's budget is nearly fifty times larger than Germany's federal regulator).

157. *See, e.g.*, Roman Tomasic, *Insider Trading Law Reform in Australia*, 9 Comp. & Sec. L.J. 121 (1991).

158. For example, although having a relatively detailed insider trading proscription, South Africa has initiated few, if any, criminal prosecutions. *See* Zyl, *South Africa Insider Trading Regulation and Enforcement*, 15 Comp. Law. No. 3, at 92 (1994). Although viewed as doing more to combat insider trading than most jurisdictions, "prosecution of insider trading [in Canada] remains minimal." Ramzi Nasser, *The Morality of Insider Trading in the United States and Abroad*, 52 Okla. L. Rev. 377, 385 (1999). With respect to Japan, that country is perceived as an "'insider's heaven' where people rampantly profit from inside information with little detection or prosecution." *Id.* at 382, *quoting* Tomoko Akashi, *Regulation of Insider Trading in Japan*, 89 Colum. L. Rev. 1296, 1302 n.45 (1989).

159. *See* Andre Tunc, *A French Lawyer Looks at American Corporation Laws and Securities Regulation*, 130 U. Pa. L. Rev. 757, 762 (1982) (stating that in France tipping of material nonpublic information is perceived as "a social duty . . . expected of relatives and friends"); sources cited *supra* note 144. *But see* Wrighton, *supra* note 6.

160. *See, e.g.*, Steinberg, *supra* note 88, at 148 (Japan); Nasser, *supra* note 158, at 380–84; George F. Parker, *The Regulation of Insider Trading in Japan: Introducing a Private Right of Action*, 73 Wash. U. L.Q. 1399 (1995).

161. *See* Steinberg, *supra* note 88, at 264.

that has declined to embrace the evils of such "gentlemen" offenses frequently is an unlikely eventuality.[162] Courts also are a key part of this process, often refusing to convict an "insider" on the basis of circumstantial evidence[163] and levying relatively modest sanctions when guilt has been proven.[164] Although recent developments in certain countries signify that more vigorous surveillance and enforcement practices are being initiated,[165] a long journey must be made to approach the effectiveness of U.S. insider trading enforcement.[166]

Hence, regardless of its "loopholes," the U.S. law of insider trading remains preeminent. The SEC's key role as regulator, with its capable personnel, resources, and surveillance, facilitates the active enforcement of the U.S. securities laws.[167] Moreover, criminal prosecution for insider trading is now a recognized component of the enforcement landscape.[168] As an additional layer of enforcement, allegedly injured traders may bring civil actions seeking damages, under certain circumstances, against those who violated the insider trading prohibitions.[169]

In the United States, the impropriety of insider trading and similar offenses[170] is recognized by market participants, the public, and the courts. Hence, unlike several other countries, the U.S. cultural attitude generally favors relatively vigorous enforcement of these offenses.[171] The courts contribute to this process by upholding insider trading convictions premised on circumstantial evidence[172] and (under the federal sentencing guidelines[173]) ordering lengthy periods of imprisonment where circumstances warrant.[174] Thus, as com-

162. *Id.*

163. *See* Tomasic & Pentony, *The Prosecution of Insider Trading: Obstacles to Enforcement*, 22 AUST. & N.Z. CRIMIN. 65, 65–66 (1989); McDonald, *Australia*, *in* INTERNATIONAL INSIDER DEALING 439, 442 (Mark Stamp & Carson Welsh eds., 1996).

164. In Germany, the first conviction for insider trading was not procured until 1995; moreover, no prison sentence was ordered. *See Commerzbank Declines to Comment on Report of Insider-Trading Case*, WALL ST. J., Aug. 22, 1995, at A6. *See also Ex-Lawyer Gets Suspended Term for Insider Trading*, JAPAN WEEKLY MONITOR, Aug. 4, 1997.

165. *See* STEINBERG, *supra* note 88, at 121–40, 214–37; Wrighton, *supra* note 6.

166. *See New Curbs on Insider Trading, Market Abuse Agreed to by EU Parliament*, 34 Sec. Reg. & L. Rep. (BNA) 432, 433 (2002) (stating that from 1995 through 2000, there were "only 13 successful prosecutions leading to criminal penalties across the 17 nations of [the] European Union and its neighbors in the European Economic Area"); Nasser, *supra* note 158, at 377 (stating that in addition to Canada and Japan, "insider trading seems to go largely unpunished in Australia, France, Germany, and Mexico").

167. *See* DAVID A. VISE & STEVE COLL, EAGLE ON THE STREET (1991). *But see* Labaton, *supra* note 7.

168. *See, e.g.*, Securities Exchange Act § 32(a); United States v. O'Hagan, 521 U.S. 642 (1997).

169. *See, e.g.*, Securities Exchange Act §§ 10(b), 20A; Elkind v. Liggett *&* Myers, Inc., 635 F.2d 156 (2d Cir. 1980).

170. Such offenses include stock manipulation, parking of securities, and "scalping." *See generally* NORMAN S. POSER, BROKER-DEALER: LAW AND REGULATION (3d ed. 2001).

171. *See* Nasser, *supra* note 158, at 388–93. *See generally* WANG & STEINBERG, *supra* note 4.

172. *See, e.g.*, SEC v. Sargent, 229 F.3d 68, 75 (1st Cir. 2000) ("Circumstantial evidence, if it meets all the other criteria of admissibility, is just as appropriate as direct evidence . . . ." *quoting* United States v. Gamache, 156 F.3d 1, 8 (1st Cir. 1998). *Accord*, SEC v. Euro Security Fund, 2000 WL 1376246 (S.D.N.Y. 2000). *But see* Katherine Yung, *Judge Tosses Insider-Trading Verdict*, DALLAS MORNING NEWS, Dec. 20, 2002, at 1D (federal district judge overturning jury verdict against insider due to insufficient evidence).

173. 18 U.S.C. §§ 3551–59, 3561–66, 3571–74, 3581–86; 28 U.S.C. §§ 991–98. *See generally* Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231 (1997).

174. *See, e.g.*, United States v. O'Hagan, 139 F.3d 641, 653–56 (8th Cir. 1998); United States v. Cusimano, 123 F.3d 83, 90–91 (2d Cir. 1997).

pared to other countries, U.S. enforcement in this setting is relatively effective, thereby promoting law compliance[175] and facilitating market integrity.[176]

## IV. Summation

U.S. regulation of insider trading is far from perfect. Without sufficient justification, ambiguity, complexity, and disparate treatment of similarly situated market participants, at times, prevail. Perhaps cognizant of these shortcomings, nations with developed securities markets have declined to follow U.S. standards in the insider trading context. The approaches endorsed by these other countries seek to set forth clear statutory direction in regard to the insider trading prohibition. Focusing on the statutes, these nations may have largely achieved their objectives.[177] However, because of insufficient funding, resources, personnel and surveillance, inadequate enforcement has generally been prevalent in markets abroad. Laws ordinarily are as potent as their effective implementation. The deterrent effect of rigorous statutes lessens drastically as the likelihood of successful usage decreases. Hence, statutes designed to promote market integrity and investor protection have relatively minor impact if widespread noncompliance persists. The lack of successful enforcement accordingly may induce disobedience by market participants.[178]

This scenario helps to explain why the U.S. markets, although generating significant criticism in light of recent regulatory failures and financial frauds, are viewed as preeminent. As addressed above, the legal proscriptions concerning insider trading have their shortcomings. Although far from perfect, the standards adopted are viewed as acceptable and are embedded in the ethos of the U.S. capital markets. Significantly, these standards are adequately enforced by the U.S. SEC, the U.S. Department of Justice in criminal prosecutions, and private parties who seek damages from alleged violators. Thus, reasonably effective enforcement of judicial, statutory, and regulatory pronouncements that define specified conduct as being illegal promotes compliance with the rule of law and investor confidence in market integrity.

Several countries, including those that are members of the European Community, are expending greater resources toward successful implementation of their statutory mandates proscribing abusive practices such as insider trading. Effective allocation of resources, of course, entails successfully procuring sufficient personnel, funding, and technological surveillance mechanisms. Agendas also should address educational or "enlightenment" missions to emphasize the importance of these statutory mandates to affected constituencies, such as corporate insiders, bankers, brokers, judges, legislators, and the investing public.

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175. *See* WANG & STEINBERG, *supra* note 4, at 807–909.

176. *Id.* at 547–672; Nasser, *supra* note 158, at 388–94; Phelan, *Integrity Is A Necessity On Wall Street*, N.Y. L.J., Mar. 16, 1987, at 29. *But see The Epidemic of Insider Trading*, BUS. WK., Apr. 29, 1985, at 80–81. *See generally* JONATHAN R. MACEY, INSIDER TRADING: ECONOMICS, POLITICS AND POLICY (1991); Alan Strudler & Eric W. Orts, *Moral Principle in the Law of Insider Trading*, 78 TEX. L. REV. 375 (1999).

177. *See supra* notes 123–140 and accompanying text.

178. *See* Bernard Black, *The Core Institutions That Support Strong Securities Markets*, 55 BUS. LAW. 1565, 1576–78 (2000); Marc I. Steinberg, *Emerging Capital Markets: Proposals and Recommendations for Implementation*, 30 INT'L LAW. 715, 723-25 (1996).