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Texas Gulf Sulphur at Fifty—A Contemporary and Historical Perspective

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TEXAS GULF SULPHUR AT FIFTY—A CONTEMPORARY AND HISTORICAL PERSPECTIVE

Marc I. Steinberg*

ABSTRACT

Fifty years ago, the Second Circuit decided perhaps the most important case under the U.S. securities laws – Securities and Exchange Commission v. Texas Gulf Sulphur. This decision focused on several landmark issues, including insider trading, company disclosure obligations, and the concept of materiality. Although a number of its rulings subsequently were rejected by the U.S. Supreme Court, others remain good law today. Indeed, the significance of Texas Gulf Sulphur’s analysis in large measure is evidenced by its continued vitality in the federal courts and SEC enforcement practice. From a comparative law perspective, Texas Gulf Sulphur also is an important decision. Many of the principles enunciated in that decision today have been adopted by developed securities markets outside of the United States.

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Decided fifty years ago, *Securities and Exchange Commission v. Texas Gulf Sulphur Co.* (hereinafter referred to as *Texas Gulf Sulphur* or *TGS*)¹ constitutes one of the preeminent federal securities law decisions. Its significance remains vibrant today, impacting fundamental principles underlying the securities laws.² Indeed, a sound assertion may be proffered that *TGS* justifiably may be viewed as the most important federal securities law decision handed down to date.³

To commemorate the 50th Anniversary of this seminal decision,⁴ the SMU Law Review is honored to publish this Symposium Issue. The contributions in this Issue are authored by premier securities law academicians in this country. The participation of these outstanding academicians in this Symposium Issue reflects both the continued importance of *Texas Gulf Sulphur* and its ramifications. With its long tradition of excellence in the business associations and securities law fields, as reflected by the scholarship of Professor Alan R. Bromberg,⁵ the SMU Law Review is a superb forum to host this commemorative publication.

1. See generally *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc).

2. For example, these principles, discussed in this article, include those implicating insider trading, materiality, scienter, and affirmative disclosure.

3. Unquestionably, there have been several important U.S. Supreme Court decisions in the federal securities law area. As a generality, these decisions focused on a specific issue that had significant impact. See, e.g., *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398 (2014) (reaffirming the continued validity of the fraud-on-the-market theory for § 10(b) class actions); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (holding that in a private action, § 10(b) reaches only securities listed on a U.S. exchange and other purchases or sales made in the United States); *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (holding no aiding and abetting liability in private § 10(b) actions); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977) (holding that § 10(b) does not reach breach of fiduciary conduct absent deception or manipulation); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (holding that in a private § 10(b) action, a plaintiff must be a purchaser or seller of the subject securities in connection with the alleged misconduct in order to have standing to bring suit for damages); *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (interpreting the term investment contract in a flexible manner to bring the subject transaction within the scope of the federal securities laws).

4. An excellent article commemorating the 50th Anniversary of *Texas Gulf Sulphur* has been authored by Professor Alan M. Weinberger. See generally Alan M. Weinberger, *Forever Young: Texas Gulf Sulphur Rules at Fifty*, 45 SEC. REG. L. J. 23 (Spring 2017).

5. Joining the SMU Law School faculty in 1956, Professor Alan Bromberg was a member of our faculty for well over 50 years. His seminal treatises include: *SECURITIES LAW FRAUD: RULE 10B-5* (1967); *BROMBERG AND LOWENFELS ON SECURITIES FRAUD* (2d ed. 2012) (coauthored with Lewis D. Lowenfels and Michael J. Sullivan); *CRANE AND BROMBERG ON PARTNERSHIP* (1968) (coauthored with Professor Judson A. Crane); and *BROMBERG & RIBSTEIN ON PARTNERSHIP LAW* (2d ed. 2017) (coauthored with Professor Larry E. Ribstein). Note that the Second Circuit's opinion in *Texas Gulf Sulphur* cited Professor Bromberg's Rule 10b-5 treatise. See 401 F.2d at 859.

I. KEY ISSUES ADDRESSED BY *TEXAS GULF SULPHUR*

Texas Gulf Sulphur's focus on insider trading may well be the foremost subject that has generated attention throughout the decades. By applying the Securities Exchange Act's broad antifraud statute—§ 10(b)⁶ (and SEC Rule 10b-5⁷ promulgated thereunder)—to insider trading that occurred on stock exchanges,⁸ *TGS* federalized the proscription against improper insider trading.⁹ This aspect of *TGS*, which continues to have domestic as well as international impact, is discussed later in this article.¹⁰

Significantly, *TGS* addressed several other key principles. These principles include, for example: materiality, issuer liability exposure for misleading disclosure, requisite mental culpability, and the timing of insider trades. While a number of the case's holdings are no longer good law in this country, others remain applicable not only in the United States but have also been embraced by other countries.¹¹

A. MATERIALITY

As discussed later in this article, *TGS's* adoption of the access principle or parity of information principle prevails today in countries that have developed securities markets.¹² With respect to the concept of materiality, relying on the American Law Institute's Restatement of Torts,¹³ the Second Circuit focused on whether a reasonable person would attach importance to the information misstated or omitted in making an investment decision with respect to the subject transaction.¹⁴ Applying this

In 2015, the SMU Law Review published a Symposium Issue in honor of Professor Bromberg. The contributors to that Issue are the foremost academicians in the business associations and securities law fields in this country. See Symposium, *Tributes to Professor Alan R. Bromberg*, 68 SMU L. REV. 595 (2015).

6. 15 U.S.C. § 78j(b) (2012).

7. Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2017).

8. See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d at 847–57. See *id.* at 847–48 (citing *List v. Fashion Park, Inc.*, 340 F.2d 457, 461–62 (2d Cir. 1965); *Cochran v. Channing Corp.*, 211 F. Supp. 239, 243 (S.D.N.Y. 1962); 3 LOUIS LOSS, *SECURITIES REGULATION* 1455–56 (2d ed. 1961)) (stating that, pursuant to the Securities Exchange Act, Congress “purposed to prevent inequitable and unfair practices and to insure fairness in securities transactions generally, whether conducted face-to-face, over the counter, or on exchanges” and that “[t]he Act and the Rule apply to the transactions here, all of which were consummated on exchanges”).

9. See MARC I. STEINBERG, *THE FEDERALIZATION OF CORPORATE GOVERNANCE* 115–33 (Oxford Univ. Press 2018).

10. See *infra* notes 62–85 and accompanying text.

11. See *infra* notes 23, 55, 81–85 and accompanying text. Of course, that other countries have adopted a number of *TGS's* holdings does not necessarily signify that these countries explicitly focused on that decision and determined to embrace its principles. Nonetheless, such international approval supports the merit of the court's holdings.

12. Note that the access principle and parity of information principle are two different principles. Interpreting *Texas Gulf Sulphur's* language, each principle received the court's approval. See 401 F.2d at 848. See also discussion *infra* notes 70–72 and accompanying text.

13. 401 F.2d at 849, (citing RESTATEMENT (FIRST) OF TORTS § 538(2)(a) (Am. Law Inst. 1938)).

14. See 401 F.2d at 849.

standard, the court utilized the probability/magnitude test, stating: “whether facts are material within Rule 10b-5 when the facts relate to a particular event and are undisclosed by those persons who are knowledgeable thereof will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”¹⁵ Hence, pursuant to this standard, a contingent event of high magnitude may be material even if its likelihood of occurrence is relatively remote.¹⁶ This standard has been adopted by the U.S. Supreme Court in the contexts of alleged deficient disclosure with respect to merger negotiations¹⁷ and adverse drug reports.¹⁸

Nonetheless, more expansive language in *TGS* relating to materiality was subsequently rejected by the U.S. Supreme Court. In this regard, the *TGS* court referenced a fact as being material if it *might* reasonably affect the value of the subject company’s securities.¹⁹ Less than a decade later, the U.S. Supreme Court adhered to the “would” standard, concluding that the “might” standard was “too suggestive of mere possibility.”²⁰ Hence, today, the applicable inquiry examines whether a substantial likelihood exists that adequate disclosure of the misstated or omitted information would have been perceived by a reasonable investor as having significantly altered the total mix of information that was made available.²¹

15. *Id.* (quoting *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2d Cir. 1965)).

16. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (quoting *SEC v. Geon Industries, Inc.*, 531 F.2d 39, 47–48 (2d Cir. 1976)) (“Since a merger in which it is bought out is the most important event that can occur in a small corporation’s life, to wit, its death, we think that inside[r] information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions—and this even though the mortality rate of mergers in such formative stages is doubtless high.”).

17. *See Basic Inc.*, 485 U.S. at 238–39. Significantly, the U.S. Supreme Court in *Basic* addressed the materiality of the allegedly misstated information in a situation where the issuer elected to speak. The decision neither addressed the timing of disclosure nor a subject issuer’s duty to disclose. *See id.* at 235 (stating that “this case does not concern the *timing* of a disclosure; it concerns only its accuracy and completeness”) (emphasis added). For further discussion, see MARC I. STEINBERG, *SECURITIES REGULATION: LIABILITIES AND REMEDIES* § 2.03[5] (2017).

18. *See generally* *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011) (holding that the number of adverse drug reports received by a subject company need not reach the level of being statistically significant in order for such information to be deemed material under § 10(b) of the Securities Exchange Act).

19. *See* 401 F.2d at 849 (quoting *List v. Fashion Park, Inc.*, 340 F.2d at 462; *Kohler v. Kohler Co.*, 319 F.2d 634, 642 (7th Cir. 1963)) (stating that the test of materiality “encompasses any fact ‘which in reasonable and objective contemplation *might* affect the value of the corporation’s stock or securities.’”). *See also* *Texas Gulf Sulphur*, 401 F.2d at 850 (“might have affected the price of the stock”).

20. *See TSC Industries, Inc. v. Northway*, 426 U.S. 438, 449 (1976) (quoting *Gerstle v. Gamble–Skogmo, Inc.*, 478 F.2d 1281, 1302 (2d Cir. 1973) (Friendly, J.)). Although this case involved materiality under Section 14(a) and SEC Rule 14a-9 with respect to the adequacy of disclosure in the proxy statement context, the rationale has been applied in cases implicating § 10(b) and Rule 10b-5. *See* cases cited *supra* notes 17–18.

21. *See TSC Industries, Inc.*, 426 U.S. at 449 (holding that “[t]his standard . . . does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote [and that] [w]hat the standard does con-

B. PRICE IMPACT

Interestingly, with respect to ascertaining the materiality of the subject information, the Second Circuit in *TGS* focused on whether adequate disclosure of such information may be “reasonably certain to have a substantial effect on the market price of the security.”²² This correlation between price impact and materiality is contained in the securities laws of developed countries.²³ In this country, however, price impact frequently is not invoked when ascertaining the materiality of the subject information.²⁴ That is not to suggest that price impact is not an important criterion with respect to other elements of a securities cause of action. Indeed, price impact is a necessary condition for a class action based on an alleged violation of §10(b).²⁵ In this regard, to rebut the presumption of reliance in a § 10(b) action based on the premise that the subject securities traded in an efficient market,²⁶ a defendant can establish that the alleged misstatements did not in actuality affect the subject security’s market price.²⁷ Similarly, proving that a defendant corporation’s corrective disclosure negatively impacted the price of the subject security, is

template is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder”).

22. 401 F.2d at 848 (citing Arthur Fleischer, Jr., *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding*, 51 VA. L. REV. 1271, 1289 (1965)).

23. See, e.g., Regulation (EU) No. 596/2014, of the European Parliament and of the Council of 16 April 2014 on Market Abuse Regulation, art. 7, para. 1(a), O.J. (L 173) 1 (defining inside information to encompass “information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments”); *Corporations Act 2001*, (Cth) §§ 1042C, 1042D, 1043A (Austl.) (focusing on whether the information, if it were generally available, would have a material effect on the price or value of the subject securities); Province of Ontario Securities Act, R.S.O. 1990, c. S.5, §§ 1(1), 126.2(1)(b) (setting forth that information is material if it “would reasonably be expected to have a significant effect on the market price or value of the securities.”).

24. See, e.g., cases cited *supra* notes 16–21 and accompanying textual discussion. *But see* *Christine Asia Co. v. Ma*, No. 16-2519-CV, 2017 WL 6003340, at *2 (2d Cir. Dec. 5, 2017) (“The importance of this information to investors is illustrated by the fact that, when [the allegedly concealed information] was revealed four months subsequent to the IPO, Alibaba’s stock dropped 13% in two days, erasing \$33 billion in market capitalization.”).

25. See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S.Ct. 2398, 2414 (2014) (“In the absence of price impact, *Basic*’s fraud-on-the-market theory and presumption of reliance collapse.”).

26. As stated by the U.S. Supreme Court in *Halliburton*, “to invoke the *Basic* presumption, a plaintiff must prove that: (1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between when the misrepresentations were made and when the truth was revealed.” 134 S.Ct. at 2413 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988)).

27. See *Halliburton*, 134 S.Ct. at 2417 (holding that defendants “must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.”). See also *Waggoner v. Barclays PLC*, 875 F.3d 79, 99 (2d Cir. 2017) (concluding that “defendants must rebut the *Basic* presumption by disproving reliance by a preponderance of the evidence at the class certification stage.”).

employed by plaintiffs to show loss causation.²⁸ Accordingly, price impact is a key issue in U.S. securities litigation. Nonetheless, departing from the approach espoused in *TGS* and adopted by other countries, price impact ordinarily is not a principal inquiry under the U.S. securities laws when assessing the materiality of the alleged disclosure deficiency.²⁹

C. TIMING OF INSIDERS' TRADES

Related to the holding that the results of the *TGS* discovery hole were material³⁰ was the inquiry of when insiders and others subject to the insider trading prohibition legally could purchase TGS securities. Departing from the district court's holding that the company's announcement of the information was the point in time after which insiders could legally trade,³¹ the Second Circuit held that insider activity must await not only the formal announcement but also the adequate dissemination of such information.³² In this instance, dissemination of the announcement by TGS over the media of widest circulation—at that time, the Dow Jones broad tape—was required to be effected before insiders could have permissibly traded.³³ In an accompanying footnote, the court elaborated that, when the subject information is not readily translatable, a reasonable waiting period may be required to enable investors to absorb and evaluate such information.³⁴ This position's soundness remains applicable

28. See, e.g., *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (noting “the complaint’s failure to claim that Dura’s share price fell significantly after the truth became known”); *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 384–85 (6th Cir. 2016) (stating that loss causation can be shown by means of a corrective disclosure when “the market reacted negatively to a corrective disclosure of fraud.” (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010))).

29. See, e.g., cases cited *supra* notes 16–21 and accompanying textual discussion. See also Council Regulation 596/2014, *supra* note 23, at art. 7, para. 4 (providing that “information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments . . . shall mean information a reasonable investor would be likely to use as part of the basis of his or her investment decisions”).

30. See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 850 (2d Cir. 1968) (en banc) (“Our survey of the facts found below conclusively establishes that knowledge of the results of the discovery hole, K-55-1, would have been important to a reasonable investor and might have affected the price of the stock.”).

31. See *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262, 288–89 (S.D.N.Y. 1966), *aff’d and rev’d*, 401 F.2d 833 (2d Cir. 1968) (en banc). The district court reasoned that, if a waiting period after a material corporate announcement is to be required, that determination should be made by the SEC pursuant to its rulemaking authority or by Congress. See *id.* at 289.

32. See *Texas Gulf Sulphur*, 401 F.2d at 853–54.

33. See *id.* at 854 (“Assuming that the contents of the [TGS] official release could instantaneously be acted upon, at the minimum [the insider] should have waited until the news could reasonably have been expected to appear over the media of widest circulation, the Dow Jones broad tape, rather than hastening to insure an advantage to himself . . .”).

34. See *id.* at 854 n.18 (Explaining that although the issue was not before the court and therefore did “not discuss the necessity of considering the advisability of a ‘reasonable waiting period’ during which outsiders may absorb and evaluate disclosures, [the court] note[d] in passing that, where the news is of a sort which is not readily translatable into investment action, insiders may not take advantage of their advance opportunity to evaluate the information by acting immediately upon dissemination.”). In that footnote, the Second Circuit called for the SEC pursuant to its rulemaking power to provide “some

today, as evidenced by customary corporate insider trading policies that mandate a specified waiting period after the issuance of a quarterly earnings announcement,³⁵ as well as the pre-clearance of trades by Section 16 insiders (and members of their immediate families),³⁶ even if the contemplated transactions are to occur outside of a black-out period.³⁷

D. COMPANY LIABILITY FOR MISLEADING DISCLOSURE IN THE SECONDARY TRADING MARKETS

With respect to an alleged materially false press release issued by Texas Gulf Sulphur, the question was posed as to whether the company could be held liable under § 10(b) if it was not engaged in related securities transactions or had not acted with wrongful intent.³⁸ Disagreeing with the narrow construction adopted by the district court,³⁹ the Second Circuit interpreted the statute's "in connection with the purchase or sale of any security" language in a more flexible manner. Holding that a corporation may be subject to § 10(b) liability when it disseminates materially misleading information "in a manner reasonably calculated to influence the investing public"⁴⁰ and that such liability may be premised on negligence,⁴¹ the court greatly expanded a corporation's exposure in the sec-

predictability of certainty for the business community." *Id.* The Commission, however, has declined to alleviate this dilemma.

35. See MARC I. STEINBERG & WILLIAM K.S. WANG, *INSIDER TRADING* 807 n.3 (3d ed. Oxford Univ. Press 2010) (referencing the use by publicly-held companies of trading windows permitting trades by insiders, depending on the subject company's policy, of three to twelve trading days subsequent to a quarterly earnings announcement).

36. Section 16 insiders include a subject company's directors, officers, and shareholders who beneficially own more than ten percent of a class of a subject issuer's equity securities. See 15 U.S.C. § 78p(a)–(b) (2012). Pursuant to SEC rule, in determining whether a person is an officer, the key inquiry is whether such person performs significant policy-making functions (rather than being based on such person's title alone). See Rule 16a-1(f), 17 C.F.R. § 240.16a-1(f) (2017). See generally Marc I. Steinberg & Daryl L. Lansdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 NOTRE DAME L. REV. 33 (1992).

37. See, e.g., *Insider Trading and Confidentiality Policy*, NEWS CORP., at p. 5 (June 2016), <https://newscorp.com/corporate-governance/insider-trading-and-confidentiality-policy/> [<https://perma.cc/8SQY-5ED8>] ("If a Section 16 Reporting Person, Designated Individual or member of such person's immediate family or household is contemplating a transaction in the Company's securities, the proposed transaction must be pre-cleared with either the News Corporation General Counsel or his or her designee, even if the proposed transaction is to take place outside of the Black-Out Period."). Today, insiders may legally sell their securities pursuant to Rule 10b5-1 plans, provided that the requirements of the rule are satisfied. See Rule 10b5-1(c), 17 C.F.R. § 240.10b5-1(c) (2017). The rule has been met with criticism. See, e.g., Allan Horwich, *The Legality of Opportunistically Timing Public Company Disclosures in the Context of SEC Rule 10b5-1*, 71 BUS. LAW. 1113 (2016).

38. See *Texas Gulf Sulphur*, 401 F.2d at 857–64.

39. See *SEC v. Texas Gulf Sulphur Co.*, 258 F. Supp. 262, 293 (S.D.N.Y. 1966), *aff'd and rev'd*, 401 F.2d 833 (2d Cir. 1968) (en banc) (stating that "the issuance of a false and misleading press release may constitute a violation of § 10(b) and Rule 10b-5 if its purpose is to affect the market price of a company's stock to the advantage of the company or its insiders").

40. *Texas Gulf Sulphur*, 401 F.2d at 862.

41. See *id.* at 862–63 (holding that a violation of § 10(b) based on a company's materially misleading statement would be appropriate if such statement was the result of a lack of

ondary trading markets.⁴²

Subsequently, the Supreme Court rejected negligence as the requisite culpability level in § 10(b) actions, holding instead that intentional or knowing misconduct must be shown.⁴³ Nonetheless, the negligent dissemination of information to the securities markets by companies today may be addressed under other provisions by the SEC⁴⁴ and, to some extent, by private claimants.⁴⁵ More importantly, the “reasonably calculated to influence the investing public” standard enunciated in *Texas Gulf Sulphur* remains pertinent today when assessing a company’s liability exposure in its dissemination of alleged materially misleading information.⁴⁶

E. COMPANY AFFIRMATIVE DISCLOSURE OBLIGATIONS

Although not directly addressing the topic, language in *Texas Gulf Sulphur* may be interpreted to favor the implementation of affirmative disclosure obligations upon publicly-traded corporations. As stated by the court: “We do not suggest that material facts must be disclosed immediately; the timing of disclosure is a matter for the business judgment of the corporate officers entrusted with the management of the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC. . . .”⁴⁷ While the national securities exchanges today, absent the presence of a valid business reason, require a listed company to timely disclose material information,⁴⁸ the SEC lags behind.

due diligence). In this regard, the *TGS* court also applied a negligence standard when determining the liability of the individual defendants. *See id.* at 854–56.

42. In his concurring opinion, Judge Friendly expressed his concern with the application of a negligence standard: “The consequences of holding that negligence in the drafting of a press release . . . may impose civil liability on the corporation are frightening.” *Id.* at 866 (Friendly, J., concurring). *See* David S. Ruder, *Texas Gulf Sulphur—The Second Round: Privity and State of Mind in Rule 10b-5 Purchase and Sale Cases*, 63 *Nw. U.L. REV.* 423 (1968).

43. *See* *Aaron v. SEC*, 446 U.S. 680, 690–94 (1980) (holding that the SEC must prove scienter in its enforcement actions alleging violation of § 10(b)); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) (holding that scienter must be proven in private actions for damages alleging violation of § 10(b)).

44. For example, the SEC may seek recovery based on negligent violation of such provisions as Sections 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. 77q(a)(2)–(a)(3) (2012), and Section 13(a) of the Securities Exchange Act, 15 U.S.C. 78m(a) (2012).

45. With respect to material misrepresentations contained in a proxy statement, private claimants may seek relief against the company and its insiders based on negligence pursuant to Section 14(a) of the Securities Exchange Act, 15 U.S.C. § 78n(a), and SEC Rule 14a-9, 17 C.F.R. § 240.14a-9, promulgated thereunder. *See, e.g.*, *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761 (3d Cir. 1976); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973).

46. *See* Donald C. Langevoort, *From Texas Gulf Sulphur to Chiarella: A Tale of Two Duties*, 71 *SMU L. REV.* (2018) (stating that “the ‘reasonably calculated’ standard survived and flourished” and that cases subsequent to *TGS* have “insist[ed] only that reliance by investors be foreseeable given the medium of dissemination that was chosen”).

47. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 850 n.12 (2d Cir. 1968) (en banc).

48. *See, e.g.*, New York Stock Exch. (NYSE), Listed Company Manual §§ 202.01–.06, http://wallstreet.cch.com/LCMTTools/PlatformViewer.asp?selectednode=chp_1_3&manual=%2F1cm%2Fsections%2F1cm-sections%2F [https://perma.cc/HEW3-7TFW] (last accessed Feb. 23, 2018); Nasdaq Listing Rules, Disclosure of Material

Indeed, it was not until the enactment of the Sarbanes–Oxley Act of 2002⁴⁹ that Congress mandated that the Commission adopt “a rapid and current” reporting regime regarding material changes in a subject company’s financial condition or operations.⁵⁰ Prior to that time, except for certain clearly fundamental matters,⁵¹ the SEC declined to require that Exchange Act reporting companies disclose current material information during the time interval between the filing of their periodic reports.⁵² Over a year after receiving this mandate from Congress, the Commission amended Form 8-K to provide for the current reporting by subject companies of a far greater number of events.⁵³ Nonetheless, key deficiencies remain, such as the SEC’s failure to require a subject company to disclose the loss of a major contract until such company’s next quarterly report—even if no valid business purpose exists for justifying such delay.⁵⁴ The SEC’s approach departs from that of other developed securities markets

Information, Rule IM-5250(b)(1) <http://nasdaq.cchwallstreet.com/NASDAQ/> [https://perma.cc/R45B-RF84] (last accessed Feb. 23, 2018). For example, given certain exceptions, § 202.05 of the NYSE Manual (Timely Disclosure of Material News Developments) provides in part: “A listed company is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities. . . .” Likewise, Nasdaq Listing Rule IM-5250(b)(1) requires, with certain exceptions, that “Nasdaq Companies disclose promptly to the public through any Regulation FD compliant method (or combination of methods) of disclosure any material information that would reasonably be expected to affect the value of their securities or influence investors’ decisions.” While the self-regulatory organizations may initiate an enforcement action against a subject company for violation of SRO rules, no private right of action exists for allegedly aggrieved investors based on violation of such rules. *See, e.g.*, *Harris v. TD Ameritrade, Inc.*, 805 F.3d 664 (6th Cir. 2015); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980).

49. *See generally* Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745.

50. *See id.* § 409 (requiring that “[e]ach issuer reporting under Section 13(a) and 15(d) [of the Securities Exchange Act] shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest”).

51. *See* 17 C.F.R. § 249.308 (2017) (Form 8-K prior to the 2004 SEC amendments). Only the following items were mandatory under Form 8-K prior to the 2004 amendments: changes in control of registrant (item 1), acquisition or disposition of assets (item 2), bankruptcy or receivership (item 3), changes in registrant’s certifying accountant (item 4), and resignations of registrant’s directors (item 6).

52. Of course, provided a duty to correct or a duty to update disclosures previously made arose, then the company was required to make the requisite disclosure. *See, e.g.*, *Rubinstein v. Collins*, 20 F.3d 160, 170 n. 41 (5th Cir. 1994); *Backman v. Polaroid Corp.*, 910 F.2d 10, 16–17 (1st Cir. 1990) (en banc). *See also* Marc I. Steinberg, *Insider Trading, Selective Disclosure, and Prompt Disclosure: A Comparative Analysis*, 22 U. PA. J. INT’L ECON. L. 635, 657–58 (2001) (stating at that time that generally “U.S. law does not require companies to disclose material nonpublic information during the interval between the filing of periodic reports with the SEC”).

53. *See* Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Exchange Act Release No. 34-49424, 69 Fed. Reg. 58 (Mar. 25, 2004); 17 C.F.R. § 249.308 (2017).

54. *See* Exchange Act Release No. 34-49424 (reasoning that requiring a company to make such disclosure would present difficulties in ascertaining when the contract was in fact terminated and could give rise to customers engaging in negotiation ploys). *But see* MARC I. STEINBERG, *SECURITIES REGULATION* 857 (7th ed. 2017) (asserting that because “the irretrievable loss of a major contract presumptively is material to investors . . . inves-

that require, absent meritorious business reason, the prompt disclosure by a subject company of material information to investors and the securities markets.⁵⁵

F. TGS—FAR MORE THAN AN INSIDER TRADING CASE

The foregoing discussion highlights that *Texas Gulf Sulphur* is far more than an insider trading case. Coverage of such a large number of key subjects, particularly when several of these subjects were in their infancy, is rare in a single legal opinion. Addressing such fundamental concepts as materiality, the “in connection with” requirement of § 10(b), a company’s liability exposure for disseminating materially false information in the secondary trading markets, the timing of an insider’s securities trades, and the mental culpability standard, *TGS* has made an impressive contribution to the development of the securities laws. While some of the decision’s holdings are no longer good law, others have endured and flourished. Nonetheless, the legacy of *TGS* is largely based on its analysis of § 10(b)’s insider trading prohibition.

II. THE FEDERALIZATION OF INSIDER TRADING

A. THE SECURITIES EXCHANGE ACT—SECTION 16

Implicating the duties of care and loyalty, improper insider trading by corporate fiduciaries seemingly would comprise a fundamental component of state corporation law.⁵⁶ Yet, the states largely declined to address this practice, particularly in the impersonal stock market insider trading context.⁵⁷ Federal law has filled this void. Indeed, to some extent, Congress did so with the enactment of Section 16 of the Securities Exchange

tors ought to be promptly provided with this information in order to assess whether to purchase, hold, or sell the subject securities”).

55. See Steinberg, *supra* note 52, at 670 (stating that, in other developed securities markets, “absent sufficient business justification, publicly-held issuers on a continuous basis must promptly and timely disclose material matters to the securities marketplace”). For examples of such jurisdictions, see, e.g., *Corporations Act 2001* (Cth) S 674(2) (Austl.); Province of Ontario Securities Act, R.S.O. 1990, c. S. 5, § 75 (Can.); Council Regulation (EU) No. 596/2014, *supra* note 23, at art. 17. For example, pursuant to Regulation No. 596/2014, at Article 17, Paragraph 4, the subject company, in addition to having justifiable reason for delaying disclosure, must also show that such delay likely will not mislead the public and that the confidentiality of the specified information will be maintained.

Note that Canada has no federal securities law. Rather, each of that nation’s provinces and territories regulate its subject securities markets. Because the Ontario securities laws are viewed as the most significant in Canada, they are discussed where appropriate in this article.

56. See, e.g., *Kahn v. Kolberg Kravis Roberts & Co.*, 23 A.3d 831 (Del. 2011); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910 (1969).

57. See, e.g., *Freeman v. Decio*, 584 F.2d 186 (7th Cir. 1978) (applying Indiana law); *Van Schaack Holdings, Ltd. v. Van Schaack*, 867 P.2d 892 (Colo. 1994); *Schein v. Chasen*, 313 So.2d 739 (Fla. 1975). See also MARC I. STEINBERG & WILLIAM K.S. WANG, *INSIDER TRADING* 1023–60 (3d ed. Oxford Univ. Press 2010) (and cases discussed therein).

Act of 1934, which calls for insiders⁵⁸ to disgorge their profits made from purchases and sales or sales and purchases of equity securities within a six-month period.⁵⁹ Additionally, Section 16 prohibits these individuals from entering into short-sale transactions in their company's equity securities.⁶⁰ Going beyond disclosure and directly regulating corporate fiduciary conduct, Section 16 is significant as it illustrates Congress's receptiveness, dating back to 1934, to federalize a key aspect of corporate governance that was perceived to be within the sole realm of state company law.⁶¹

B. THE SEC SPEAKS—*IN RE CADY, ROBERTS*

Nonetheless, Section 16 is limited in its scope. A more far-reaching federal prohibition against insider trading was perceived as necessary by then SEC Chairman William Cary. On his agenda when he assumed the SEC Chairmanship in 1961 was for the Commission to pro-actively remedy the state law permissiveness regarding open-market insider trading by corporate fiduciaries.⁶² The opportunity to do so arose in an administrative proceeding, *In re Cady, Roberts & Company*.⁶³ In a decision authored by Chairman Cary, the Commission held that the exchange-based insider trading that transpired was violative of the federal securities

58. Under Section 16, 15 U.S.C. § 78p (2012), insiders include a subject company's directors, officers, and shareholders who beneficially own more than ten percent of a class of a subject issuer's equity securities. See note 36 *supra*.

59. See Section 16(b), 15 U.S.C. § 78p(b) (2012). The subject corporation or shareholder bringing suit on such corporation's behalf may recover irrespective of the insider's exercise of due diligence. Thus, an insider who engages in such transactions thus is held strictly liable and must disgorge his or her profits. See, e.g., *Whiting v. Dow Chem. Co.*, 523 F.2d 680 (2d Cir. 1975); *Bershad v. McDonough*, 428 F.2d 693 (7th Cir. 1970). Note that Section 16(a), 15 U.S.C. § 78p(a), requires these insiders to file reports with the SEC and with the applicable stock exchange reporting their stockholdings and transactions in the subject securities.

60. Section 16(c), 15 U.S.C. § 78p(c) (2012). Generally, short-selling may be defined as "the sale of a security that the seller does not own or that the seller owns but does not deliver." Ralph Janvey, *Short Selling*, 20 SEC. REG. L.J. 270, 271 (1992). For superb treatises examining Section 16, see ARNOLD S. JACOBS, SECTION 16 OF THE SECURITIES EXCHANGE ACT (2017); PETER J. ROMEO & ALAN L. DYE, SECTION 16 TREATISE AND REPORTING GUIDE, <https://www.section16treatise.net/home/> [https://perma.cc/36EL-RKDP] (last accessed Feb. 23, 2018).

61. As Section 16(b)'s language makes clear, the provision's objective is "preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer." 15 U.S.C. § 78p(b) (2012). See MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 119 (Oxford Univ. Press 2018).

62. As Chairman Cary asserted, it is "shocking for business executives to personally profit from their inside information about the corporations they managed [and] that those actions were likely to reduce public confidence . . . in the markets." *Fair to All People: The SEC and the Regulation of Insider Trading, The SEC Takes Command*, In the Matter of Cady, Roberts & Company, SEC HISTORICAL SOCIETY (Nov. 1, 2006), http://www.sechistorical.org/museum/galleries/it/takeCommand_b.php [https://perma.cc/QMH6-5CMN]. See Donald C. Langevoort, *Rereading Cady, Roberts: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319 (1999) (citing Joel Seligman, THE TRANSFORMATION OF WALL STREET 344–45 (2d ed. 1995)).

63. See generally 40 S.E.C. 907 (1961).

laws.⁶⁴ The importance of the proceeding was eminently clear to the Commission, as its opinion begins by reflecting: “This is a case of first impression and one of signal importance in our administration of the Federal securities acts.”⁶⁵ Applying the “access” theory, the SEC held that “insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment.”⁶⁶ Hence, by holding that the exchange-based trading that was transacted constituted securities fraud, the Commission sought to federalize the law of insider trading.⁶⁷

Being an administrative decision, uncertainty existed regarding the precedential value or impact of *Cady, Roberts*. Neither the language of § 10(b) nor any other provision of the federal securities laws mandated that a broad insider trading prohibition be recognized.⁶⁸ Approbation by an esteemed court was essential to provide adequate certainty to the SEC’s position. Hence, the importance of *Texas Gulf Sulphur* becomes clear.

64. *See id.* at 907–17. The Commission found that the defendants violated Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) (2012), and Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (2012).

65. *Cady, Roberts*, 40 S.E.C. at 907.

66. *Id.* at 911. According to the Commission: “[T]he obligation rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.” *Id.* at 912 (citing 3 LOUIS LOSS, SECURITIES REGULATION 1450–51 (2d ed. 1961)).

67. *See* STEINBERG, *supra* note 61, at 121. *See also Cady, Roberts*, 40 S.E.C. at 912 n. 15 (stating that “[a] significant purpose of the Exchange Act was to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office”).

In *Cady, Roberts*, the Commission asserted that “the securities acts may be said to have generated a wholly new and far-reaching body of Federal corporation law.” *Id.* at 910. For support, the SEC quoted from a federal appellate decision containing expansive language. As stated by the Third Circuit in *McClure v. Borne Chem. Co.*, 292 F.2d 824 (3d Cir. 1961):

In the present case we are construing two Sections [10, 29] of the Securities Exchange Act of 1934. That Act deals with the protection of investors, primarily stockholders. It creates many managerial duties and liabilities unknown to the common law. It expresses federal interest in management-stockholder relationships which theretofore had been almost exclusively the concern of the states. Section 10(b) imposes broad fiduciary duties on management vis-a-vis the corporation and its individual stockholders. As implemented by Rule 10b-5 and Section 29(b), Section 10(b) provides stockholders with a potent weapon for enforcement of many fiduciary duties. It can be said fairly that the Exchange Act, of which Sections 10(b) and 29(b) are parts, constitutes far reaching federal substantive corporation law.

Id. at 834 (quoted in *Cady, Roberts*, 40 S.E.C. at 910 n. 10).

68. *See* STEINBERG, *supra* note 61, at 122; Stephen M. Bainbridge, *Equal Access to Information: The Fraud at the Heart of Texas Gulf Sulphur*, 71 SMU L. REV. (2018); Stephen M. Bainbridge, *Who Was the First Person the SEC Found to Have Violated the Insider Trading Laws?*, PROFESSORBAINBRIDGE.COM (Nov. 5, 2014), <http://www.professorbainbridge.com/professorbainbridgecom/2014/11/who-was-the-first-person-the-sec-found-to-have-violated-the-insider-trading-laws.html> [https://perma.cc/4RTG-AJT9].

C. *TGS*—ADOPTION OF A BROAD INSIDER TRADING PROHIBITION

The Second Circuit's decision in *TGS* made eminently clear that an expansive federal insider trading prohibition was applicable in the impersonal securities market setting.⁶⁹ Adopting the SEC's position, the Second Circuit in *TGS* prescribed a broad "disclose or abstain" mandate. Interestingly, the decision's language leaves some uncertainty which standard the court in fact adopted: the parity of information standard, or the equal access test. Indeed, these two standards are enunciated in the same paragraph of the court's opinion. Advancing an expansive parity-of-information standard, the *TGS* court stated:

[A]nyone in *possession* of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such information remains undisclosed.⁷⁰

On the other hand, earlier in that same paragraph, quoting approvingly from the SEC's decision in *Cady, Roberts*, the *TGS* court set forth the access standard.⁷¹ Subsequent Second Circuit decisions clarified that the access standard prevailed, stating: "Anyone corporate insider or not who *regularly receives* material nonpublic information may not use this information to trade in securities without incurring an affirmative duty to disclose."⁷²

D. U.S. SUPREME COURT DECISIONS

Nonetheless, twelve years after *TGS*, the Supreme Court rejected both the parity of information and access standards, premising insider trading liability under § 10(b) on an insider's or other subject person's breach of fiduciary duty or relationship of trust and confidence.⁷³ Although the in-

69. See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 847–57 (2d Cir. 1968) (en banc); STEINBERG, *supra* note 61, at 122. Note that a few years earlier, the Second Circuit applied the disclose-or-abstain obligation under § 10(b) in the context of face-to-face securities transactions. See *List v. Fashion Park Inc.*, 340 F.2d 457, 461–62 (2d Cir. 1965). See generally William H. Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 COLUM. L. REV. 1361 (1965).

70. 401 F.2d at 848 (emphasis added).

71. The Second Circuit stated that the disclose-or-abstain rule:

[I]s based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information. . . . The essence of the Rule is that anyone who, trading for his own account in the securities of a corporation, has "access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone" may not take "advantage of such information knowing it is unavailable to those with whom he is dealing," i.[e]., the investing public.

Id. (quoting *Cady, Roberts*, 40 S.E.C. at 912).

72. *United States v. Chiarella*, 588 F.2d 1358, 1365 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980) (emphasis added).

73. See *Chiarella v. United States*, 445 U.S. 222, 222–23, 230 (1980) (holding that silence may incur § 10(b) liability where a duty to disclose exists arising from a fiduciary relationship or a relationship of trust and confidence). *Accord* *Salman v. United States*, 137

sider trading prohibition thus has been narrowed by the U.S. Supreme Court as compared to the standards set forth in *TGS*, the federalization of this prohibition today is firmly established. Hence, it should not be minimized that the proscription against insider trading has been recognized by the U.S. Supreme Court as coming within the purview of the federal securities laws and, more particularly, § 10(b) and Rule 10b-5. Although critics may be dismayed regarding the High Court's restrictive approach,⁷⁴ it should be kept in focus that federal, rather than state, law reigns supreme in this setting, and that this outcome in good measure is due to the Second Circuit's decision in *Texas Gulf Sulphur*.⁷⁵

E. CONTINUED VALIDITY OF PARITY AND ACCESS STANDARDS

With frequency, it is posited that the parity of information and access standards no longer survive. Such an assertion is misplaced. Certainly, these standards no longer apply with respect to insider trading liability under § 10(b) and Rule 10b-5. But what at times is overlooked is that, in promulgating Rule 14e-3⁷⁶ which governs insider trading in the tender offer context,⁷⁷ the SEC adopted the parity of information standard.⁷⁸ Limited to the tender offer setting, this rule contains no breach of fiduci-

S.Ct. 420 (2016) (premising tipper-tippee liability on a tipper's conveyance of material nonpublic information to the recipient as a gift, thereby breaching the tipper's fiduciary duty to his employer and his employer's clients and that the tippee knew of such breach); *United States v. O'Hagan*, 521 U.S. 642 (1997) (adopting the misappropriation theory and holding that § 10(b) applies to the misappropriation of material nonpublic information for securities trading purposes in breach of a fiduciary duty or relationship of trust and confidence that the violator owed to the source of the information); *Dirks v. SEC*, 463 U.S. 646 (1983) (holding that unlawful tipping occurs under § 10(b) when the tipper breaches his or her fiduciary duty by conveying the information to the recipient and that such breach is premised on the tipper communicating the material nonpublic information for his or her financial benefit or to provide a gift to the recipient and that the tippee knew or should have known of such breach). For further discussion, see generally MARC I. STEINBERG & WILLIAM K.S. WANG, *INSIDER TRADING* (3d ed. Oxford Univ. Press 2010).

74. This author is one such critic. See, e.g., Marc I. Steinberg, *The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation*, 70 NOTRE DAME L. REV. 489 (1995).

75. See *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 375 n. 35 (2d Cir. 1980) (stating that "a director's common law liability for trading on inside information has been largely mooted by the advent of a federal cause of action under § 10(b) and Rule 10b-5"); STEINBERG, *supra* note 61, at 123-25.

76. 17 C.F.R. § 240.14e-3 (2017). See Exchange Act Release No. 17120, 20 SEC Docket 1350 (Sept. 4, 1980). Rule 14e-3 was adopted pursuant to the authority granted to the SEC by Section 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e).

77. Generally, a tender offer may be defined as:

A means frequently used to acquire control of a corporation characterized by active solicitation to purchase a substantial percentage of the target's stock from the target's shareholders at a premium over the market price, offered for a limited period of time and that may be contingent upon the tender of a specific number of shares.

MARC I. STEINBERG, *UNDERSTANDING SECURITIES LAW* 500 (7th ed. 2018).

78. Hence, with certain exceptions, Rule 14e-3 prohibits:

[I]nsider and tippee trading in the tender offer context by applying the disclose-or-abstain provision where an individual is in possession of material information relating to a tender offer when he/she knows or has reason to know that such information is nonpublic and was obtained directly or indi-

ary duty element, and thus far, its validity has been upheld by the federal courts.⁷⁹ Hence, harkening back to the days of yesteryear—namely, its glorious triumph in *TGS*—the SEC reinvigorated the insider trading prohibition to the maximum degree feasible in the tender offer setting—perhaps the foremost setting in which huge insider trading profits are generated.⁸⁰

Indeed, another significant contribution that *Texas Gulf Sulphur* has made to the law of insider trading is its widespread acceptance in developed securities markets outside of the United States. For example, to some degree, the parity of information standard has been adopted by the European Union.⁸¹ Likewise, Australia adheres to the parity of informa-

rectly from the offeror, the subject corporation, any of their affiliated persons, or any person acting on behalf of either company.

Id. at 520.

79. See, e.g., *United States v. O'Hagan*, 521 U.S. 642, 672–73 (1997) (upholding Rule 14e-3 as applied to facts of case).

80. See generally *Fair to All People: The SEC and the Regulation of Insider Trading, Power of SEC Resilience, Rule 14e-3 and the Misappropriation Theory*, SEC HISTORICAL SOCIETY (2006), http://www.sechistorical.org/museum/galleries/it/resilience_a.php [https://perma.cc/P6T6-52GV]; STEINBERG, *supra* note 61, at 115–17.

81. See Council Regulation (EU) No. 596/2014, *supra* note 23, at arts. 7, 8, 10, 14, 17 (setting forth, *inter alia*, insider trading and tipper-tippee prohibitions as well as disclosure obligations). Article 8 (Insider Dealing) of that Regulation provides:

1. For the purposes of this Regulation, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates
2. For the purposes of this Regulation, recommending that another person engage in insider dealing, or inducing another person to engage in insider dealing, arises where the person possesses inside information and:
 - (a) recommends, on the basis of that information, that another person acquire or dispose of financial instruments to which that information relates, or induces that person to make such an acquisition or disposal, or
 - (b) recommends, on the basis of that information, that another person cancel or amend an order concerning a financial instrument to which that information relates, or induces that person to make such a cancellation or amendment.
3. The use of the recommendations or inducements referred to in paragraph 2 amounts to insider dealing within the meaning of this Article where the person using the recommendation or inducement knows or ought to know that it is based upon inside information.
4. This Article applies to any person who possesses inside information as a result of:
 - (a) being a member of the administrative, management or supervisory bodies of the issuer or emission allowance market participant;
 - (b) having a holding in the capital of the issuer or emission allowance market participant;
 - (c) having access to the information through the exercise of an employment, profession or duties; or
 - (d) being involved in criminal activities.

This Article also applies to any person who possesses inside information under circumstances other than those referred to in the first subparagraph where that person knows or ought to know that it is inside information.

5. Where the person is a legal person, this Article shall also apply, in accordance with national law, to the natural persons who participate in the decision to carry out the acquisition, disposal, cancellation or amendment of an order for the account of the legal person concerned.

tion approach.⁸² By comparison, the access test has been adopted by such jurisdictions as Canada (Ontario)⁸³ and China.⁸⁴ Not surprisingly, the restrictive and vague “fiduciary duty” approach adopted by the U.S. Supreme Court has not been accepted outside of this country.⁸⁵ Although one cannot state with assurance the extent that *TGS* has impacted the adoption of insider trading standards abroad, it is reasonable to conclude that, in view of that decision’s prominence, it has served as a persuasive source for effecting such implementation.

III. A TRULY SEMINAL DECISION

Texas Gulf Sulphur truly is a seminal decision. Its analysis and holdings continue to be pertinent today in this country and abroad. The presence of a continuous disclosure framework, with the attendant application of a flexible materiality standard, is firmly established in this country and other developed securities markets. The proscription against improper insider trading in the impersonal stock exchange market setting is within the purview of U.S. federal law—largely due to *TGS* and the widespread acceptance following that decision of such federalization. Although the Supreme Court rejected both the parity of information and access standards under § 10(b), the Court clearly recognized the propriety of such federalization.

Indeed, the SEC’s embracement of the parity of information approach under Rule 14e-3, as well as the acceptance of the *TGS* standards by countries abroad, evidence the continued vitality of this decision. Hence, it may well be accurate to identify the Second Circuit’s en banc decision

Id. at art. 8. See also Directive 2014/57/EU of the European Parliament and Council of 16 April 2014 on Criminal Sanctions for Market Abuse, art. 3, para. 3, 2014 O.J. (L 173) 179–89 (providing, *inter alia*, that a person engages in improper insider dealing when one has access to material nonpublic information by means of one’s profession, employment, or duties or otherwise “has obtained [such] inside information under [other] circumstances where that person knows that it is inside information”); *id.*, at art. 3, para. 1–8, art. 4, para. 1–5. See generally MARKET ABUSE REGULATION—COMMENTARY AND ANNOTATED GUIDE (Marco Ventoruzzo & Sebastian Mock eds. Oxford Univ. Press 2017).

82. See *Corporations Act 2001* (Cth) § 1043A (Austl.) (setting forth prohibited conduct for person in possession of material inside information).

83. See Province of Ontario Securities Act, R.S.O. 1990, c S. 5, § 76 (Can.). See also, note 55 *supra*.

84. See 中华人民共和国证券法 [Securities Law of the People’s Republic of China (2014 Amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 1998, rev’d Aug. 31, 2014, effective Aug. 31, 2014) art. 76 (China).

85. This lack of acceptance of U.S. Supreme Court standards in the insider trading context by countries abroad is addressed in a number of my other publications. See, e.g., MARC I. STEINBERG, INTERNATIONAL SECURITIES LAW—A CONTEMPORARY AND COMPARATIVE ANALYSIS 105–48 (Kluwer Law Int’l 1999); Marc I. Steinberg, *Insider Trading Regulation—A Comparative Analysis*, 37 INT’L LAW. 153, 162–71 (2003). As stated by this author:

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

37 INT’L LAW at 171.

in *Texas Gulf Sulphur* as the most important judicial decision in the history of the U.S. securities laws. Although it has certainly incurred some “hits” to its armor, *TGS* reigns supreme. Accordingly, it is fitting that we commemorate the 50th year anniversary of this seminal decision by the publication of this Symposium Issue. I thank the SMU Law Review and the esteemed academicians who have contributed to this Issue for bringing this worthwhile endeavor to fruition.