University of Zurich[UZH]

Institute of Law

Insider Dealing and Market Abuse

Principles of Corporate Law HS25

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17 November 2025

HSF Competition Law Moot

- New opportunity at UZH for FS 26
- 4 people per team
- ~8 pages and 15 min. of pleading per person
- Final in London
- 12 ECTS
- Completely in English

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HSF Competition Law Moot

Application → **Written Phase** → **Oral Phase**

- Motivational letter and CV
- Deadline: 23 December
- Short interview
- Decision: 24 January

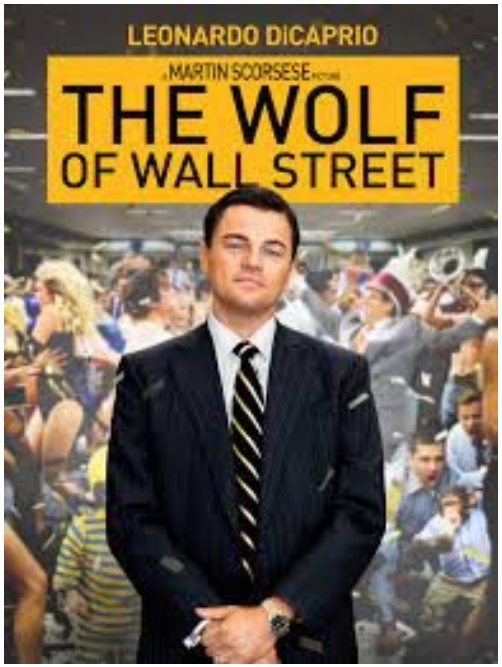
- Independent research & writing
- Meetings with teammates and coaches
- Hand-in in the mid-March

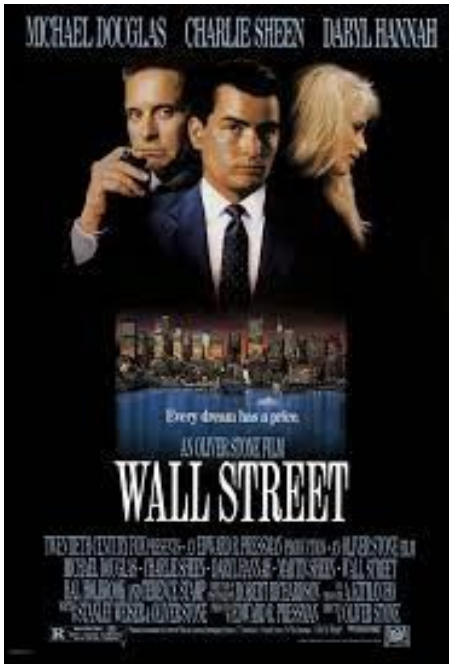
- Preparation in April/May
- Trial pleadings
- Final (if qualified) early June

Check the site of Lst. Heinemann

L1	Introduction, Theory of the Firm, Common Principles of Corporate Law across Jurisdictions, Role of Shareholders (KA)
L2	Management & Agency problems, Role of Board of Directors (KA)
L3	Corporate Personality, Formation, Separate Legal Entity Principle, Limited Liability (KA)
L4	Investor Protection, Shareholder Control Issues, and Minority Shareholders Rights (DR)
L5	EU Free Movement (KA)
L6	Insider Dealing, Market Abuse and Fraud (KA)
L7	Data Law (DR)
L8	Corporate Finance, Capital Raising and Maintenance – The Prospectus and related requirements (KA)
L9	Compensation and Bonuses (DR)
L10	Corporate Governance, Stakeholders and Corporate Social Responsibility (KA)
L11	Takeovers and Mergers (KA)
L12	Role of Gatekeepers – Accountants, Auditors and Rating Agencies - a 'True and Fair View' (KA)
L13	Multinational corporate groups, Ethics, and Corruption (DR)
L14	Selected Topics and Exam Review (KA)

Hollywood


LEONARDO DiCAPRIO
A MARTIN SCORSESE PICTURE
THE WOLF OF WALL STREET


MICHAEL DOUGLAS
CHARLIE SHEEN
DARYL HANNAH
Every dream has a price.
AN OLIVER STONE FILM
WALL STREET

Questions

- What is insider dealing?
- What is inside information?
- Who are the “insiders”?
- What are they prohibited from doing?
- What is the rationale for the prohibition? Is it justified?
- What are mechanisms used for preventing insider dealing?
- What are the enforcement mechanisms?
- Which are the remedies available for investors?
- What are the main differences between the EU and US approach?

Corporate (Inside) Information

Insider Trader

Outside Information

Outsider Trader

Approaches to Insider Trading

Misappropriation Theory

Rule 10b & 10b-5

Market Driven Approach

Market Abuse Regulation

Rationale for US Prohibiting Insider Dealing (ID)

Relationship-Based Rationale

It characterizes insider dealing (ID) as a breach of the fiduciary relationship of trust and confidence, where one can be established, between typically, the insider and the Company concerned

But what happens when someone trades on the basis of inside information but does not owe a fiduciary duty to his counterparty?

A creative adjustment of the parameters of fiduciary relationships allowed for bringing into the ID prohibition persons other than the traditional corporate insiders.

(This became the misappropriation theory, where the wrongdoer acts on the basis of information which is acquired through any fiduciary relationship and which is intended to be confidential. This theory is based on breach of a duty owed to the person from whom the information was obtained.)

Misappropration Theory – expanding rationale

Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the public to whom he sells, it is clearly not appropriate to introduce these into the broader anti-fraud concepts embodied in the securities acts.

The obligation [to disclose or abstain from trading] 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. (equal access to information theory)

US Law – (SEC) Rule 10b-5 Use of Manipulative and Deceptive Devices

It shall be unlawful for any person…

a. To employ any device, scheme, or artifice to defraud,
b. To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
c. To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Courts found an implied private right of action in the hands of injured investors (Kardon v National Gypsum Co.,1946) to recover damages for fraudulent conduct prohibited by Rule 10b-5. The law on insider trading was developed on the case law relating to this implied private right of action.

Section 10b vs Rule 10b5

Both relate to securities frauds under the Security Exchange Act of 1934

Rule 10b is a broad anti-fraud provision. It prohibits:

– manipulative and deceptive practices in connection with the purchase or sale of securities.

– General Fraudulent conduct in the securities markets, including Insider Trading

– Both mistatements or omissions of material fact, as well as other fraudulent or deceptice practices in connection with the purchase or sale of securities

Rule 10b-5 is a specific regulation (narrow in scope). It prohibits:

– Making any untrue statement of material fact or omitting material fact necessary to make a statement not misleading, in connection with the purchase or sale of securities.

– Engaging in any act, practice or course of business that would operae asa fraud or deceit in connection with the purchase or sale of securities.

United States v Newman – Supreme Court - 2015

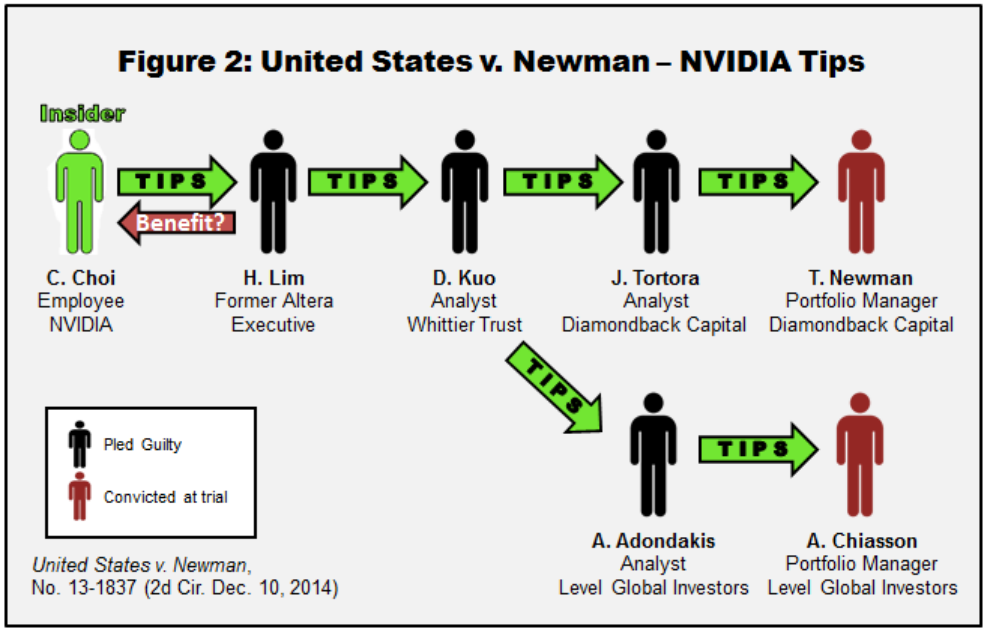
- Supreme Court refused to grant review of the Second Circuit's restrictive insider-trading decision in United States v. Newman.

- The US Government's prosecutors had asked the Supreme Court to clarify the nature of the "personal benefit" that a tipper must receive in order to create liability for insider trading. But the Supreme Court declined to take the case.

- This means that the lower court decision in Newman holds - that a successful insider dealing prosecution against either the 'tipper' or 'tippee' must show that the 'tipper' received a 'personal benefit' - monetary or non-monetary - for providing inside information to a tippee.

- The Newman court defined 'personal benefit' narrowly. (not friendship nor wider non-property benefit)

United States v Newman
Tipper-Tippee Liability



United States v O'Hagan (1997)

A person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, may be held liable for violating §10(b) Securities Exchange Act 1934 and Rule 10b-5.

A corporate "outsider" violates §10(b) and Rule 10b-5 when he misappropriates confidential information for securities trading purposes, in breach of a fiduciary duty owed to the source of the information, rather than to the persons with whom he trades.

Because undisclosed trading on the basis of misappropriated, nonpublic information both deceives the source of the information and harms members of the investing public, **the misappropriation theory is tuned to an animating purpose of the Exchange Act: to ensure honest markets, thereby promoting investor confidence.**

Liability Criteria - Overview

- For an insider to be guilty of sharing inside information, **his leak must breach a duty to keep the information confidential**
- **+** He must receive a **personal benefit**
- The Person who receives the information must generally know of that breach and benefit

Question:

- Does the insider receive a personal benefit by helping a family member?

Salman v United States – Supreme Court – 2016 No. 152-628

- Mr. Salman placed profitable stocks trades based on confidential information leaked by his future brother-in-law, Maher Kara
- Mr. Kara did not receive any benefit in exchange for the information
- Mr. Salman's argument for overturning his conviction hinges on the Newman decision, which **narrowed** the definition of a **personal benefit**
- The 9th circuit cited, however, a passage of the older Dirks Decision (Sup Court), that allowed liability **«when an insider makes a gift of confidential information to a trading relative or friend»**

EU LAW

Rationale for EU Prohibiting Insider Dealing

Market-Driven Approach

It looks at the wider securities markets and the impact that trading on the basis of Insider dealing/insider information (IDIF) may have on the efficiency of price formation, market liquidity and on market development.

ID is prohibited to preserve investor confidence about market egalitarianism, equal opportunity to access information. If investor confidence is compromised, goes the argument, liquidity can be damaged and the cost of capital will increase as investors price in the risk of trading against IDIF.

Market integrity and market integration

Market Abuse Regulation 2016

Market Abuse Regulation (MAR):

- Extends scope to cover other types of trading - instruments only traded on multilateral trading facilities, organised trading facilities & over the counter trading
- Ensures derivatives clearly in scope if used for manipulative purposes e.g. Credit Default Swaps
- Applies to emission allowances
- Insider dealing covers OTC/OTFs and MTFs derivatives trading
- **Clarifies application to high frequency trading**

Market Abuse Regulation 2016

- Provisions on commodity and related derivative markets and to ensure clarity and legal certainty
- clearly prohibits market manipulation on commodity markets using financial instruments and vice versa
- Introduces obligation on issuer to notify regulator *ex post* of a delay in disclosing inside information
- Grants regulators the power to permit a delay to disclosure of information of systemic importance e.g. emergency lending assistance
- Clarifies disclosure obligation for managers' transactions carried out by a portfolio manager
- Specifies more clearly the obligations on market operators to detect market abuse

Market Abuse Regulation (MAR) - Summary

Insider dealing prohibited

Market manipulation prohibited e.g.

- trades that give false or misleading signals
- trades that secure prices at an abnormal level
- dissemination of false information through the media including the internet

Issuers must disclose inside information to the public as soon as possible

Issuers must keep a list of persons with access to inside information
Managers of issuers must disclose when they trade in shares of the company

Firms must report suspicious transactions to their regulator

Inside information (MAR Art. 7)

The MAR defines 'inside information' as information which is

1) **‘of a precise nature’**

2) **has not been made public**

3) **relates to one or more issuers of financial instruments, and**

4) **if the information were made public, it would be likely to have a significant effect on the prices of those financial instruments.**

Insider Dealing

MAR Art. 8(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.**

- The use of inside information by
  - **cancelling or amending an order** concerning a financial instrument to which the information relates where the
  - order was placed **before the person concerned possessed the inside information**,
- shall **also be considered to be insider dealing**.

Market Manipulation (MAR art 12(1)(a))

- Entering into a transaction
- placing an order to trade
- Any other behavior

1. which gives or is likely to give **false or misleading signals**:
    - As to *supply* of, *demand of,* or for the price of:
        - A financial instrument,
        - A related spot commodity contract
        - an auctioned product based on emission allowances
2. Secures or is likely to secure, the price of one or several:
        - financial instruments
        - related spot commodity contracts
        - auctioned products based on emission allowances

At an **abnormal** or **artificial** level

Preventive Mechanisms

Ongoing duty of issuers to disclose - as soon as possible - IDIF which directly concerns the said issuer

Issuers' duty to draw up a list of insiders who have access to IDIF

Duty of persons discharging managerial responsibilities within an issuer of financial instruments (and persons closely associated with them) to notify the competent authority transactions conducted on their own account relating to shares of the said issuer (or to derivatives or other financial instruments linked to them). Duty of disclosure of members of board of directors to disclose inside information, even if they do not trade on basis of IF.

Duty of any person professionally arranging transactions in FIs who reasonably suspects that a transaction might constitute ID or market manipulation to notify the competent authority without delay

Criminal Sanctions

- Defines offences of insider dealing and market manipulation to be regarded as criminal offences by the Member States if committed intentionally
- Requires Member States to treat inciting, aiding and abetting these offences as criminal offences
- Attempts at insider dealing and market manipulation should also be criminal offences
- Criminal sanctions should be effective, proportionate and dissuasive
- Extends criminal iability to legal persons (MAD/2003 admin liability for legal persons)
- Report by Commission within 4 years on possibility of setting minimum types and levels of criminal sanctions

MAR Provision on Sanctions

Administrative Sanctions

- Sets out administrative offences which shall be sanctioned and the sanctions regulators shall have at their disposal
- Where profits or losses avoided can be determined, the maximum fine should be up to twice that amount
- Fixes a maximum administrative fine of not less than € 5 million, or 10% of annual turnover for a legal person
- Member States are free to set higher maximum fines
- Sets out criteria which regulators shall take into account in setting sanctions,
- Requires regulators to cooperate closely with each other and ESMA to ensure sanctions produce desired results and avoid overlaps

Criminal Sanctions

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Swiss Law

Supervisory procedures

- Competent authority: **FINMA**
- Competence for:
  - Insider Dealing (art. 142 FinfraG)
  - **Market** Manipulation (art. 143 FinfraG)

    Includes market manipulation by carrying out transactions or acquisitions
- Sanctions:
  - supervisory measures
  - Eg. Occupational ban in certain cases (art. 35a BEHG)

Criminal proceedings

- Competent authority: **Federal Prosecutor**
- Competence for:
  - Insider Dealing (art. 154 FinfraG)
  - **Price** Manipulation (art. 155 FinfraG)

    Does not include price manipulation by carrying out transactions or acquisitions
- Sanctions:
  - Criminal sanctions by the Federal Criminal Court
  - Eg. Custodial sentence up to 5 years
- **Additionally requirements:** Pecuniary advantage, intention of personal enrichment, culpability

Same notion of insider dealing

Criminal Sanctions for insider dealing under FinfraG (1)

- **Exploitation of insider Dealing:**

1) Primary insiders (art. 154(1) FinfraG)
   - ➢ Custodial sentence of max. three years;
   - ➢ Or a monetary penalty
   - ➢ Exceptionally: Custodial sentences of max. five years if the person gains more than 1 million SFr on the insider dealing
2) Secondary insiders (art. 154(3) FinfraG)
   - ➢ Custodial sentence of max. one year;
   - ➢ Or a monetary penalty
3) “Insiders by chance” (art. 154(4) FinfraG)
   - ➢ fine

Market Manipulation under Financial Market Infrastructure Act (FinfraG)

- **Market Manipulation** (Art. 143 FinfraG)

  "*A person behaves inadmissibly when he or she:*

  a. *publicly disseminates information which he or she knows or should know gives false or misleading signals regarding the supply, demand or price of securities admitted to trading on a trading venue in Switzerland;*

  b. *carries out transactions or acquisition or disposal orders which he or she knows or should know give false or misleading signals regarding the supply, demand or price of securities admitted to trading on a trading venue in Switzerland.*

- **Competent Authority:** FINMA in supervisory procedures

Criminal Sanctions for price manipulation under FinfraG

- Definition of Price Manipulation (art.155(1) FinfraG) :

  "any person who substantially influences the price of securities admitted to trading on a trading venue in Switzerland with the intention of gaining a pecuniary advantage for themselves or for another if they:

  a) *disseminate false or misleading information against their better knowledge;*

  b) *effect acquisitions and sales of such securities directly or indirectly for the benefit of the same person or persons connected for this purpose."*

- Sanctions:
  - Custodial sentence of max. three years;
  - Or a monetary penalty (art. 155(1) FinfraG)
  - Exceptionally: Custodial sentence of max. five years if the person gains more than one million SFr. from the price manipulation (art.155(2) FinfraG)

English/UK Law

Criminal Justice Act 1993, Part V (CJA)

Expands the basis of liability for the insider dealing offence – wider definition of ‘insider’ and ‘securities’

Prohibits three classes of conduct in certain circumstances:

- dealings in price-affected securities based on inside information
- encouraging another to deal in price-affected securities based on inside information
- Knowingly discloses inside information to another

Criminal Justice Act 1993, Part V (CJA)

To prove the offence, s. 52 required two elements:

- the person charged was an insider, and
- the type of information in its possession was inside information

Criminal Justice Act 1993, Part V (CJA)

Only individuals who have information as insiders are caught by the legislation

- Section 57 (1) 'a person has information as an insider if and only if –

  (a) it is *inside information,* and he *knows* that it is inside information; and

  (b) he has it, and he *knows* that he has it *from an inside source.* [*italics added*]

Enforcement UK – Insider Dealing & Market Abuse

Public Enforcement

- Information gathering and investigation powers
- Disciplinary powers
- Injunctions
  - Injunction orders (s. 380)
  - Injunction orders in case of market abuse (s. 381)
  - Injunction (asset-freezing) order on behalf of home state regulator (s. 198)
- Restitution
  - Restitution orders (s. 382)
  - Restitution orders in case of market abuse (s. 383)
  - Administrative power to require restitution in case of market abuse (s. 384)
- Prosecution of Criminal Offences
  - Insider Dealing (CJA 1993)

Financial Services Markets Act 2000 (updated FSMA 2023

Sec 118B Insiders - any person who has inside information

- **as a result of his membership of the administrative, management, or supervisory bodies of an issuer of qualifying investments**
- as a result of his holding in the capital of an issuer of qualifying investments,
- as a result of having access to the information through the exercise of his employment, profession or duties,
- as a result of his criminal activities, or
- obtained by other means and which he knows, or could reasonably expect to know, is inside information

Examples

- Executive director of an oil Co is informed about the discovery of new oil reserves and instructs his wife to purchase shares in the Co
- Production manager of a food industrial plant discovers a serious engineering breakdown on the assembly line which will undermine the Co's capacity to deliver pending orders and decides to sells his shares on the Co
- Partner in a law firm advising ABCplc on the acquisition of XYZplc purchases shares on XYZplc in advance of the deal
- Central bank officer sells shares in a heavily indebted company ahead the monetary policy committee's decision to increase interest rates sharply
- Waiter overhears a conversation between two CEOs dining in the restaurant that XYZplc has made huge profits which have not yet been reported to the market and tips the information to his employer who buy shares in that Co
- Employee of a patent office handling the application for the registration of a patent for a revolutionary drug purchase shares on the applicant Co
- Economist at an IFI buys shares in emerging markets' listed Cos ahead an economic report that forecasts an average 7% growth rate in the region

Conclusion

- Theory of insider dealing law – *fiduciary duty-based or misappropriation theory*
- Criminal law offence of insider dealing and market manipulation
- Civil law offence of market abuse
- Investigations & Enforcement
- Related issues and case studies

Appendix – Further slides based on the lecture

US Law

Section 10b

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—**(a)(1)**To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.**(2)**Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement [1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

William Speed et al v Transamerica Corporation et al (1956) (relationship-based theory)

The case involves three class actions brought by former and present stockholders of Axton-Fisher Tobacco Company against its majority stockholder, Transamerica Corporation.

The stockholders allege that Transamerica fraudulently deprived them of their rightful participation in the liquidation of Axton-Fisher in 1944. Axton-Fisher had three classes of stock: Preferred, Class A common, and Class B common.

The stockholders brought legal action, claiming that Transamerica, in acquiring the stock from public holders, did not disclose material facts affecting the stock's value, violating the Securities Exchange Act of 1934. Additionally, other stockholders sought participation rights in Axton-Fisher's liquidation, alleging that Transamerica planned to capture the increased value of Axton-Fisher's leaf tobacco inventory for itself.

In 1944 William S. Speed brought suit on behalf of Class A and Class B stockholders of Axton-Fisher who had sold their stock to Transamerica pursuant to a public offer made by Transamerica by letter dated November 12, 1942,[1] at $40 and $12 per share, respectively. **They alleged that by reason of the greatly increased value of the leaf tobacco inventory carried by Axton-Fisher the stock was actually worth many times the amount for which they were deceived into selling it to Transamerica and they sought the difference between the sale price and the alleged true value.** The first count of the complaint was based on a common law action of fraud and deceit. The other counts charged that **in acquiring the stock of public holders Transamerica did not make disclosure of facts materially affecting the value of such stock which were known to it as an insider and hence violated § 10(b) of the Securities Exchange Act of 1934, 15 U. S.C.A. § 78j(b), and Rule X-10B-5 promulgated by the Securities and Exchange Commission.**[2] About the same time in 1944 Jack Friedman and Philip Zahn brought actions on behalf of themselves and all other holders of Axton-Fisher Class A common stock whose stock had been called on April 30, 1943 by the board of directors of Axton-Fisher at Transamerica's instigation for redemption on July 1, 1943 at $60 per share plus accrued dividends of $20.80, amounting to a total of $80.80 a share. They alleged that **Transamerica had planned to capture exclusively for itself, upon the sale, liquidation or merger of Axton-Fisher, the profit resulting from the increased value of its large inventory of leaf tobacco and they sought the right to participate in the liquidation of Axton-Fisher, which had occurred in May, 1944.**

William Speed et al v Transamerica Corporation et al. (1956) (relationship-based theory)

"Defendant, by reason of its control over the board of directors of Axton-Fisher, was under a fiduciary obligation to the minority stockholders of Axton-Fisher to act with fairness towards them"

"The rule is clear. **It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock, known to the majority stockholder by virtue of his inside position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers."**

"**The duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the uninformed minority stockholders. It is an attempt to provide some degree of equalization of bargaining position in order that the minority may exercise an informed judgment in any such transaction.**"

"Defendant's breach of its duty of disclosure accordingly can be viewed as a violation of all three subparagraphs of the Rule 10b-5".

Expanding the Rationale - *Misappropriation*

Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the public to whom he sells, it is clearly not appropriate to introduce these into the broader anti-fraud concepts embodied in the securities acts.

The obligation [to disclose or abstain from trading] 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.

US SEC v Texas Gulf Sulphur Co et al.

$2B

US SEC v Texas Gulf Sulphur Co et al.

Not only directors or management officers, but anyone in possession of material inside information is an insider and must either disclose it to the investment public, or, if he chooses not to do so, must abstain from trading in or recommending securities concerned while such inside information remains undisclosed.

Basic test in determining whether inside information is “material”: whether a reasonable man would attach importance to information in determining his choice of action in transaction in question, and that encompasses any fact which in reasonable and objective contemplation might affect value of corporation's stock or securities

EU LAW

MAD's gaps/weaknesses – Market Abuse Regulation 2016

- Initial focus of MAD was on regulated markets
- Growth of over the counter trading, new platforms, high frequency trading and commodity derivatives.
- Hedge Funds
- High-frequency trading (flash orders) and algorithmic trading
- Dark pools
- Regulators required to impose more harmonised criminal and civil sanctions for market abuse/ manipulation.
- ESMA - need for single rulebook
- Also, should address administrative burdens, especially for SMEs: Negative impact on market integrity and investor protection, unlevel playing field and disincentives for SMEs to access securities markets

Insider Dealing

MAR Art. 8(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. The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing. In relation to auctions of emission allowances or other auctioned products based thereon that are held pursuant to Regulation (EU) No 1031/2010, the use of inside information shall also comprise submitting, modifying or withdrawing a bid by a person for its own account or for the account of a third party.

Insiders

Primary Insiders

Art. 2 Any person who possess inside information…

a) by virtue of his membership of the administrative, management or supervisory bodies of the issuer; or

b) by virtue of his holding in the capital of the issuer; or

c) by virtue of his having access to the information through the exercise of his employment, profession or duties; or

d) by virtue of his criminal activities.

Secondary Insiders

Art. 4 Any person, other than the persons referred to in those Articles, who possesses inside information while that person knows, or ought to have known, that it is inside information.

Information of a precise nature

The MAR defines what is meant by the term “information of a precise nature” in article 7 as follows:

‘[…] information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances.’
MAR 2014 Art. 7 (2).

Prohibitions

Art. 2 Member States must prohibit a primary insider who possesses IDIF from…

Dealing: using IDIF by acquiring or disposing of, or by trying to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, FIs to which that information relates

Disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties (*Grongaard case*)

Recommending or inducing another person, on the basis of IF, to acquire or dispose of financial instruments to which that information relate (i.e. “tipping”)

Art. 4 extends prohibitions to persons who possess IDIF and know or ought to have known that is IDIF

Market Manipulation (MAR art 12(2)(a-e))

Also, *inter alia*, considered market manipulation:

(a) Securing a **dominant position over supply and demand**, fixing or creating unfair trading conditions

(b) Buying and selling at the **opening or closing of the market** to **mislead** investors

(c) **placing, cancelling, modifying orders** placed by any available, including **electronic** means, to have the effects of **paragraphs 1(a) or 1(b),** including the use of **algorithmic and high-frequency trading strategies**.

(d) Taking advantage of **traditional or electronic media** while having previously **taken positions** on a financial instrument and **profiting subsequently from the impact of opinions** voiced on the **price** of the instrument, **without disclosing the conflict of interest** to the public in a proper and effective way.

(e) **Buying or selling emission allowances or related derivatives** on the secondary market prior to the auction held according to Regulation No 1031/2010 (on greenhouse gas emissions) with the effect of fixing auction clearing price at an abnormal or artificial level or misleading bidders

Criminal Justice Act 1993, Part V (CJA)

- Primary & secondary insiders. Sec. 57 (2) creates a distinction between a primary insider (a person who has direct knowledge of inside information) and a secondary insider (a person who learns inside information from an inside source)
- Creates *tippee* liability for secondary insiders
- *Imposes liability on brokers or analysts if they act on market intelligence that comes from a primary insider*

Criminal Justice Act 1993, Part V (CJA)

Inside information means information that:

- relates to particular securities or to a particular issuer of securities or to particular issuers of securities and not to securities generally or to issuers of securities generally
- is specific or precise
- has not been made public; and
- if it were made public, would be likely to have a significant effect on the price of any securities (s. 56 (1))

Determining what is inside information is an objective question of fact

Criminal Justice Act 1993, Part V (CJA)

Relating to particular securities or issuers

- information must relate to particular securities or to a particular issuer of securities *or* to particular issuers of securities (cannot relate to securities generally or to issuers of securities generally)
- Issuer defined as ‘any company’ (whether or not incorporated), ‘public sector body’, or ‘individual’ s. 60(2)
- ‘Security’ defined as any security in Schedule 2 (shares & debt securities) and the securities must be officially listed or admitted to trading on a regulated market s. 54 (1)

Criminal Justice Act 1993, Part V (CJA)

Information shall be treated as relating to an issuer of securities not only where it is about the company but also where it may affect the company's business prospects s. 60(4).

- Wide reach – information that may directly or indirectly impact the business, affect competitors, industry trends and the state of the economy generally. This draws investment analysts further into the legal net.
- Information about business prospects which is highly price sensitive for certain companies' securities, but does not have to relate to the companies themselves.

Criminal Justice Act 1993, Part V (CJA)

Specific or precise (s. 56 (1)(b))

- Precise could refer to a price, a date, event or a fact. (ie., the price at which a takeover bid would be made) (narrower)
- Specific - *knowledge of an impending takeover bid; forthcoming IPO (even if details not known); substantial losses (even if magnitude not known); attempt to buy a majority shareholder's stake; senior mgt shakeup; change in a fund's investment policy; a referral of a takeover bid to Competition and Markets Authority*

Criminal Justice Act 1993, Part V (CJA)

Specific or precise (s. 56 (1)(b))
Specific information need not be precise, but precise information will necessarily be specific.

Practically, the court is asked to evaluate the nature of the information and place it on a scale from *rumour, innuendo, hint [not precise or specific] to general information (possibly specific) up to specific or precise*

Significantly price-sensitive (specific or precise) information should not be disclosed between companies and analysts

Criminal Justice Act 1993, Part V (CJA)

The role of company directors – usually well-informed about the company, but may not have specific or precise information, and so the general knowledge they possess may not prevent them from dealing.

Their purchases are often shadowed by the press. Not a violation b/c not an abuse of specific or precise information, but certainly taking advantage of their knowledge of company and its prospects.

Nevertheless, US insider trading law requires that any profits earned by insiders (directors/officers) on the purchase/sale of securities in the company be reimbursed to the company if profits earned within 6 months of the trade.

Criminal Justice Act 1993, Part V (CJA)

- **Information not *made public***, s. 56 (1)(c)
- **Information is made public**, s. 58 (2), if -
  a) it is published in accordance with the rules of a regulated market for purpose of informing investors and advisors;
  b) it is contained in records which by virtue of any enactment are open to public inspection;
  c) it can be readily acquired by those likely to deal in any securities – (i) to which the information relates, or (ii) of an issuer to which the information relates; or
  d) it is derived from information which has been made public

(*These provisions are not exhaustive definitions of 'made public')*

Criminal Justice Act 1993, Part V (CJA)

Information that may be treated as 'made public'

- it can be acquired only by persons exercising diligence or expertise;
- it is communicated to a section of the public, not to the public at large
- it can be acquired only by observation;
- it is communicated only on payment of a fee; or
- it is published only outside the United Kingdom

Enforcement UK – Insider Dealing & Market Abuse continued

Private Remedies

- Statutory action for damages (s. 150 FSMA 2000)
- CJA 1993 s. 63(2) expressly provides that no contract is void or unenforceable by reason only that it contravenes the Act
- No implied statutory right of action is conferred on persons suffering loss as a result of having dealt with an insider (*Hall v Cable and Wireless plc*)
- Liability in tort or contract

Market Manipulation

Financial Services & Markets Act 2000 (as amended by Financial Services Act 2012)

1) Misleading Statement (section 89 of the 2012 Act) creates a broad offence of intentionally making misleading statements with a view to inducing a person to enter into an investment agreement, and engaging in misleading conduct for purpose of inducing another to acquire investments;
2) Misleading Impression (section 90 of the 2012 Act); refers to misleading impressions made recklessly in addition to those made intentionally; and
3) Misleading Statement in relation to benchmarks (section 91 of the 2012 Act).

1) See full texts: http://www.legislation.gov.uk/ukpga/2012/21/part/7/enacted

Market Manipulation

In each case, recklessness is sufficient *mens rea* . Unlike actual knowledge standard for insider dealing offence, recklessness is an objective test. Did the accused make the statement heedless of the risks. It criminalizes grossly negligent statements

Defences – to act in conformity with price stabilisation rules or control of information rules; or believed reasonably that conduct would not create false or misleading behaviour. *Requires active conduct*

Case Study

On 2 May 2002, AIT directors Rigby & Bailey issued a statement via Regulatory News Service that both turnover and profit were in line with expectations. The forecasted profit depended on revenue from three contracts worth £4.8 million. The announcement was rendered false because the contracts did not exist.

Rigby and Bailey were found guilty by a jury in August 2005 of one count of recklessly making a statement, promise or forecast which was misleading, false or deceptive. Rigby was chairman & CEO of AIT and Bailey was AIT's finance director.

Custodial prison sentence: Rigby (3.5yrs.) Bailey (2 yrs)

Swiss Law

Evolution of Insider Dealing & Market / Price Manipulation in Swiss Law

- 1988–2012: art. 161 Criminal Code: insider dealing ("*lex americana*")
- 1997–2012: art. 161[bis] Criminal Code: price manipulation ("*lex americana*")

- 2013–2015: art. 40 and Art. 40a BEHG: insider dealing & price manipulation
- 2013–2015: art. 33f BEHG: supervisory law prohibition of insider dealing and market manipulation
- **From 2016**: **art. 2j FinfraG :** Definition of insider dealing
  art. 142 FinfraG: Exploitation of insider information (FINMA)
  art. 143 FinfraG: Market manipulation (FINMA)
  art. 154 & 155 FinfraG: Sanctions for insider dealing and price manipulation (Federal Jurisdicion)

The former provisions that were laid down in BEHG were adopted into FinfraG with editorial amendments only

Insider Dealing under Financial Market Infrastructure Act (FinfraG)

- **Exploitation of insider information** (art. 142(1) FinFraG; art. 154 FinfraG)

  "*Any person who has insider information and who knows or should know that it is insider information or who has a recommendation that he or she knows or should know is based on insider information shall behave inadmissibly when he or she*:

  a. *exploits it to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use financial instruments derived from such securities*;

  b. *discloses it to another*;

  c. *exploits it to recommend to another to acquire or dispose of securities admitted to trading on a trading venue in Switzerland or to use financial instruments derived from such securities*."

- **Competent Authorities:** FINMA in supervisory procedures and the Federal Prosecutor in federal criminal proceedings; the authorities have to coordinate their investigations

Insider Classifications (2)

1) Primary insider
   = Person who has legitimate access to insider information
2) Secondary insider
   = Person who receives insider information or recommendation from a primary insider or who receives insider information through a felony or misdemeanour
3) “Insider by chance”:
   = Any insider who is neither a primary nor a secondary insider