

# TABLE OF CONTENTS

## PART ONE: THE LAW OF INSIDER TRADING

### CHAPTER 1

#### An Overview of Insider Trading

§ 1.01	Policy Rationales for the Prohibition . . . . .	1-2
§ 1.02	The Federal Securities Laws . . . . .	1-8
	[1] Exchange Act Section 16(b) . . . . .	1-8
	[2] Exchange Act Section 10(b) . . . . .	1-8
	[3] Exchange Act Section 14(e) . . . . .	1-10
	[4] Securities Act Section 17(a) . . . . .	1-10
	[5] Criminal Liability . . . . .	1-12
§ 1.03	Title 18 Mail Fraud and Wire Fraud . . . . .	1-13
§ 1.04	Title 18 Securities and Commodities Fraud . . . . .	1-14
§ 1.05	Elements of a Rule 10b-5 Action . . . . .	1-15
	[1] Who Can Be Liable for Insider Trading? . . . . .	1-15
	[2] What Is Nonpublic Information? . . . . .	1-20
	[3] What Is Material Information? . . . . .	1-24.2
	[4] <i>Scienter</i> : What Mental State Is Required? . . . . .	1-35
	[5] “Possession vs. Use” Debate . . . . .	1-37
	[a] Conflicting Positions . . . . .	1-38
	[b] Views of the Federal Circuits . . . . .	1-40
	[c] SEC Rule 10b5-1 . . . . .	1-49
	[6] Types of Securities Subject to the Federal Prohibition . . . . .	1-54.1
	[a] Stock . . . . .	1-56
	[b] Bonds and Other Debt Securities . . . . .	1-56
	[c] Options . . . . .	1-57

## INSIDER TRADING

	[d] Security-Based Swap Agreements . . . . .	1-58
	[7] The Requirement of Willfulness in Criminal Cases . . . . .	1-65
§ 1.06	Insider Trading in Commodities, Futures, and Non-Security Based Swaps . . . . .	1-72
	[1] Commodity Exchange Act Section 6(c)(1) and CFTC Rule 180.1(a) . . . . .	1-73
	[2] CFTC Enforcement Actions . . . . .	1-75
	[3] The Statutory Limitation on New Affirmative Disclosure Obligations . . . . .	1-79
§ 1.07	Insider Trading in Crypto Assets . . . . .	1-81
	[1] Introduction . . . . .	1-81
	[2] DOJ Prosecutions . . . . .	1-82
	[3] SEC Enforcement . . . . .	1-84

## CHAPTER 2

## The Developing Law

§ 2.01	Insider Trading Under the Common Law . . . . .	2-2
§ 2.02	The Early Case Law . . . . .	2-6
§ 2.03	The Parity-of-Information Approach . . . . .	2-8
§ 2.04	<i>Chiarella</i> : The Supreme Court Endorses the “Classical Theory” . . . . .	2-10
§ 2.05	<i>Dirks</i> : The Constructive or Temporary Insider . . . . .	2-13
§ 2.06	The Misappropriation Theory . . . . .	2-18
	[1] Introduction . . . . .	2-18
	[2] Seeds of the Theory in <i>Chiarella</i> . . . . .	2-18
	[3] Divisions Among Federal Circuits as to the Validity of the Misappropriation Theory . . . . .	2-19
	[4] <i>O’Hagan</i> : The Supreme Court Endorses a Misappropriation Theory Premised on “Fraud on the Information’s Source” . . . . .	2-23
	[5] Continuing Questions Relating to the Misappropriation Theory . . . . .	2-29
	[a] The Fiduciary-Like Relationship Requirement . . . . .	2-29
	[i] Employment Relationships . . . . .	2-31

**TABLE OF CONTENTS**

xvii

	[ii]	Family Relationships . . . . .	2-31
	[iii]	Doctor-Patients . . . . .	2-37
	[iv]	Fiduciary Equivalents . . . . .	2-38
	[b]	SEC Rule 10b5-2 . . . . .	2-44
	[i]	Agreements to Maintain Confidentiality . . . . .	2-47
	[ii]	History, Patterns or Practices of Sharing Confidences . . . . .	2-58
	[iii]	Rebuttable Presumption of a Fiduciary-Like Relationship Between Certain Family Members . . . . .	2-60
	[c]	Pre-Trading Disclosure to the Source of the Information . . . . .	2-62
§ 2.07		Joint Liability for Tippers and Tippees . . . . .	2-67
	[1]	The Policy Rationale . . . . .	2-67
	[2]	<i>Dirks</i> 's Personal Benefit Test . . . . .	2-68
	[a]	Broad Construction of Personal Benefit . . . . .	2-71
	[b]	The Narrow Approach in <i>Newman</i> . . . . .	2-74
	[c]	<i>Salman</i> 's Reaffirmation of <i>Dirks</i> 's Gift Analysis . . . . .	2-78
	[d]	Casual Friendships, Mere Acquaintances, and Strangers . . . . .	2-81
	[e]	Refocused Attention to Improper Purpose . . . . .	2-86
	[3]	Tippee's Awareness of the Tipper's Breach . . . . .	2-88
	[4]	Tipper's Knowledge of Tippee's Trading . . . . .	2-91
	[5]	Liability in Cases Involving Remote Tippees . . . . .	2-93
	[6]	Tippee Liability Absent Liability on the Part of the Tipper . . . . .	2-96
	[7]	Misappropriation through Tipping: Is a Personal Benefit a Necessary, or Simply a Sufficient, Condition for Rule 10b-5 Liability? . . . . .	2-97
§ 2.08		Trading Based on Deceptively Acquired Information . . . . .	2-103

## CHAPTER 2A

## Prohibitions Beyond Rule 10b-5

§ 2A.01	Insider Trading and Tender Offers . . . . .	2A-2
	[1] Rule 14e-3 . . . . .	2A-2
	[2] Initial Challenges to the Scope of Rule 14e-3 . . . . .	2A-3
	[3] <i>O’Hagan</i> and the Validity of Rule 14e-3 . . . . .	2A-4
	[4] Additional Issues Involving Rule 14e-3 Liability . . . . .	2A-9
	[a] The Substantial Step Requirement . . . . .	2A-9
	[b] What Knowledge Is Necessary for Rule 14e-3 Liability? . . . . .	2A-9
§ 2A.02	Criminal Statutes . . . . .	2A-13
	[1] Title 18 Mail Fraud and Wire Fraud . . . . .	2A-13
	[a] The Prohibitions in Section 1341 and Section 1343 . . . . .	2A-13
	[b] The Supreme Court’s Decisions in <i>Carpenter</i> and <i>O’Hagan</i> . . . . .	2A-14
	[2] Title 18 Securities and Commodities Fraud . . . . .	2A-17
	[a] The Prohibition in Section 1348 . . . . .	2A-17
	[b] Initial Interpretations of Section 1348 . . . . .	2A-19
	[c] The Second Circuit’s Decisions in <i>Blaszczak I and II</i> . . . . .	2A-21
	[3] Is Confidential Government Information Property Within the Meaning of Title 18? . . . . .	2A-26
	[4] Conversion of Federal Government Property . . . . .	2A-29
	[5] Conspiracy . . . . .	2A-30
	[a] Conspiracy to Commit Any Offense Against the United States . . . . .	2A-30
	[b] Conspiracy to Defraud the United States . . . . .	2A-32

**CHAPTER 2B**

**Spotlights on Wall Street and Hedge Funds**

§ 2B.01	Introduction . . . . .	2B-1
§ 2B.02	Wall Street Scandals in the 1980s . . . . .	2B-5
	[1] The <i>Levine</i> Case . . . . .	2B-5
	[2] The <i>Boesky</i> Case . . . . .	2B-6
	[3] Other Related SEC Investigations . . . . .	2B-7
	[4] The <i>Milken</i> Case . . . . .	2B-11
§ 2B.03	Hedge Funds and Insider Trading . . . . .	2B-15
	[1] Hedge Funds and Wall Street . . . . .	2B-18
	[a] Leakage About Trading Information . . . . .	2B-19
	[b] Leakage Involving Analysts’ Ratings and Upcoming Acquisitions . . . . .	2B-20
	[2] The Use of “Expert Networks” . . . . .	2B-21
	[3] Hedge Funds as Corporate Lenders . . . . .	2B-26
	[4] PIPE Transactions . . . . .	2B-28

**CHAPTER 3**

**Private Rights of Action**

§ 3.01	Introduction . . . . .	3-3
§ 3.02	Section 20A’s Express Action for Insider Trading . . . . .	3-6
	[1] Contemporaneous Trading in Securities of the Same Class . . . . .	3-8
	[2] Damages . . . . .	3-12
	[3] Controlling Person Liability and Joint-and-Several Liability for Tippers . . . . .	3-14
	[4] Statute of Limitations . . . . .	3-14
	[5] Nonexclusivity . . . . .	3-15
	[6] Heightened Pleading Requirements . . . . .	3-16
§ 3.03	Implied Private Rights of Action Under Rule 10b-5 . . . . .	3-21
	[1] Standing . . . . .	3-21
	[a] Zone of Interest . . . . .	3-21
	[b] The Purchaser or Seller Requirement . . . . .	3-22

## INSIDER TRADING

	[2]	Duty to Disclose or Abstain . . . . .	3-23
		[a] Liability Under the Classical Theory . . . . .	3-24
		[b] Liability Under the Misappropriation Theory. . . . .	3-25
		[i] Contemporaneous Traders. . . . .	3-25
		[ii] Sources of Information. . . . .	3-27
	[3]	Reliance and Causation . . . . .	3-27
		[a] Reliance . . . . .	3-28
		[b] Loss Causation. . . . .	3-32
	[4]	Damages. . . . .	3-34
	[5]	Two Year/Five Year Statute of Limitations. . . . .	3-35
	[6]	Who Is Liable in Rule 10b-5 Implied Actions? . . . . .	3-36
		[a] Contribution. . . . .	3-36
		[b] The PSLRA and Proportionate Liability . . . . .	3-37
		[c] No Implied Actions for Aiding and Abetting . . . . .	3-37
		[d] Respondeat Superior and Controlling Person Liability . . . . .	3-45
		[e] Making a Material Misstatement and the “Ultimate Authority” Test . . . . .	3-46
		[f] Primary Liability for Fraudulent Schemes or Practices. . . . .	3-48
	[7]	Implied Actions by Sources of Information That Traded Target Securities . . . . .	3-50
		[a] <i>FMC Corp. v. Boesky</i> . . . . .	3-51
		[b] <i>FMC Corp. v. Goldman, Sachs</i> . . . . .	3-53
		[c] Settlements. . . . .	3-54
		[i] <i>Maxus Energy v. Kidder, Peabody</i> . . . . .	3-54
		[ii] <i>Anheuser-Busch Co. v. Thayer</i> . . . . .	3-54.1
§ 3.04		Implied Private Actions Under Rule 14e-3 . . . . .	3-55
§ 3.05		Section 16(b). . . . .	3-56.4
	[1]	Beneficial Ownership . . . . .	3-56.4
	[2]	“Short Swing” Profits . . . . .	3-56.5
		[a] No <i>Scienter</i> Required . . . . .	3-56.5
		[b] Profit. . . . .	3-56.6
		[c] Timing . . . . .	3-56.6

**TABLE OF CONTENTS**

[d] “Purchase” and “Sale” . . . . . 3-56.6

[e] Short Sales and Sales Against  
the Box . . . . . 3-56.7

[f] Reporting Requirements . . . . . 3-56.7

§ 3.06 Insider Trading During Pension Fund  
Blackout Periods . . . . . 3-56.10

§ 3.07 [Reserved] . . . . . 3-57

§ 3.08 Shareholder Derivative Suits for Insider  
Trading . . . . . 3-58

[1] The Venerable Cases of *Diamond*  
and *Brophy* . . . . . 3-61

[2] The Delaware Supreme Court’s Ruling  
in *Kahn v. KKR* . . . . . 3-67

[3] State Versus Federal Actions for  
Insider Trading . . . . . 3-69

§ 3.09 Claims for Restitution and Damages . . . . . 3-71

[1] Restitution Under the Mandatory  
Victims Restitution Act (“MVRA”) . . . . . 3-71

[2] Civil Claims for Breaches of Fiduciary  
Duty and Fraud . . . . . 3-77

**CHAPTER 4**

**Enforcement Remedies and Authority:  
ITSA, ITSFEA, and Other Efforts  
by Congress to Sanction  
and Deter Insider Trading**

§ 4.01 Civil Remedies for Insider Trading . . . . . 4-3

[1] Injunctive Relief . . . . . 4-4

[2] Equitable Relief . . . . . 4-6

[a] Disgorgement . . . . . 4-6

[i] The Decision in *Liu* . . . . . 4-9

[ii] Calculating Disgorgement  
in the Wake of *Liu* . . . . . 4-12

[b] Other Equitable Remedies . . . . . 4-14

[3] Administrative Relief . . . . . 4-16

[4] Monetary Penalties . . . . . 4-19

[a] Section 21A Penalties for Insider  
Trading or Tipping . . . . . 4-20

[b] Section 21A Penalties for  
“Controlling Persons” . . . . . 4-20.6

[c] Other Monetary Penalties . . . . . 4-20.8

## INSIDER TRADING

	[i]	Monetary Penalties in Judicial Actions . . . . .	4-20.8
	[ii]	Monetary Penalties in Administrative Proceedings. . . . .	4-20.12
	[5]	Officer and Director Bar Orders. . . . .	4-20.17
	[6]	Insider Trading Enforcement Statistics . . .	4-20.20
§ 4.02		Criminal Remedies for Insider Trading. . . . .	4-20.22
	[1]	The Exchange Act and the Securities Act . . . . .	4-20.22
	[2]	Title 18 Mail Fraud, Wire Fraud, and Securities and Commodities Fraud. . .	4-21
	[3]	The Federal Sentencing Guidelines . . . . .	4-21
	[a]	Overview of the Guidelines . . . . .	4-21
	[b]	Insider Trading Under the Guidelines . . . . .	4-24
	[i]	Calculating and Adjusting the Base Offense . . . . .	4-24
	[ii]	Determining the Gain Resulting from the Offense . . . . .	4-30
	[c]	Federal Sentencing Guidelines for Organizations. . . . .	4-30.3
§ 4.03		Affirmative Defenses to Enforcement Actions and Prosecutions . . . . .	4-30.6
	[1]	Statutes of Limitations . . . . .	4-30.6
	[a]	Equitable Remedies. . . . .	4-30.6
	[b]	Disgorgement. . . . .	4-30.6
	[c]	Civil Monetary Penalties. . . . .	4-30.7
	[d]	Bar Orders and Suspensions: Equitable or Punitive?. . . . .	4-30.7
	[e]	Criminal Actions . . . . .	4-30.9
	[f]	The Supreme Court Decision in <i>Kokesh v. SEC</i> . . . . .	4-30.10
	[2]	Laches . . . . .	4-30.12
	[3]	Double Jeopardy . . . . .	4-30.12
§ 4.04		Additional Measures to Strengthen SEC Enforcement . . . . .	4-30.15
	[1]	Authority to Pursue Aiders and Abettors . . . . .	4-30.15
	[2]	Extraterritorial Application of the Antifraud Provisions of the Federal Securities Laws . . . . .	4-30.16
	[3]	Monetary Incentives for Whistleblowers . . . . .	4-30.20
§ 4.05		To Define (Or Not to Define) Insider Trading. . . . .	4-30.25



**TABLE OF CONTENTS**

xxiii

[1]	No Statutory Definition . . . . .	4-30.25
[2]	Arguments for Statutory Definition . . . .	4-30.25
	[a] Confusion . . . . .	4-30.25
	[b] Fairness . . . . .	4-30.25
	[c] Effect on Market Professionals. . . .	4-30.26
[3]	Arguments Against Statutory Definition . . . . .	4-30.26
	[a] Case Law . . . . .	4-30.26
	[b] Breadth . . . . .	4-30.26
	[c] Rulemaking . . . . .	4-30.26
	[d] Delay . . . . .	4-31
[4]	Proposals to Statutorily Define Insider Trading . . . . .	4-31
	[a] The Proposed Insider Trading Proscriptions Act of 1987 . . . . .	4-31
	[i] Specific Provisions . . . . .	4-31
	[ii] Potential Impact of the Draft Legislation . . . . .	4-32
	[iii] The SEC’s Response and Counter-Proposal . . . . .	4-36
	[iv] The Reconciliation Draft . . . . .	4-38
	[v] ITSFEA Proceeds Without a Statutory Definition . . . . .	4-39
	[b] The Proposed Insider Trading Prohibition Act of 2021 . . . . .	4-40
§ 4.06	The Stop Trading on Congressional Knowledge (“STOCK”) Act . . . . .	4-43
	[1] A Brief Legislative History of the STOCK Act . . . . .	4-43
	[2] The STOCK Act’s Principal Provisions . . . . .	4-47
	[3] Potential Misuses of Political Intelligence . . . . .	4-50

**CHAPTER 5**

**Exchange Surveillance Systems:  
Elements of the System to Detect Insider Trading**

§ 5.01	The Regulatory Pyramid . . . . .	5-2
	[1] The Member Firms . . . . .	5-2
	[2] Self-Regulatory Organizations . . . . .	5-2
	[3] The Securities and Exchange Commission . . . . .	5-4

**INSIDER TRADING**

	[4]	The Department of Justice . . . . .	5-7
	[5]	Congress . . . . .	5-8
§ 5.02		SRO Surveillance Systems . . . . .	5-11
	[1]	The 2008 Allocation Plan for Insider Trading Surveillance, Investigation and Enforcement . . . . .	5-11
	[2]	FINRA’s Surveillance . . . . .	5-14
	[3]	The Intermarket Surveillance Group (“ISG”) . . . . .	5-16
§ 5.03		Limitations Inherent in Computer Surveillance . . . . .	5-18
	[1]	The Human Element . . . . .	5-18
	[2]	The Internet . . . . .	5-20
§ 5.04		Global Efforts to Combat Illegal Insider Trading . . . . .	5-23
	[1]	IOSCO . . . . .	5-23
	[2]	SEC’s Office of International Affairs . . . . .	5-24
	[3]	Memoranda of Understanding . . . . .	5-25
	[4]	International Dialogues . . . . .	5-26
§ 5.05		High-Frequency Trading and Other Challenges in a Digital Age . . . . .	5-27
	[1]	Consolidated Audit Trail (“CAT”) . . . . .	5-27
	[2]	High-Frequency Trading Sweep Letter . . . . .	5-29
	[3]	SEC Rule 15b9-1 . . . . .	5-29

**PART TWO:  
CORPORATE COMPLIANCE PROGRAMS**

**CHAPTER 6**

**Legal and Practical Importance of  
Compliance and Ethics Programs**

§ 6.01		Designing an Effective Compliance and Ethics Program . . . . .	6-2
	[1]	Reasons for a Compliance and Ethics Program . . . . .	6-2
	[a]	Effect of Violations on Business . . . . .	6-2
	[b]	Protection of Shareholders and Employees . . . . .	6-4

**TABLE OF CONTENTS**

	[c]	Compliance Programs as a Factor in Charging and Sentencing . . . . .	6-4.1
	[d]	Defenses to Secondary Liability . . . . .	6-6
	[e]	Sarbanes-Oxley Section 406 . . . . .	6-6
	[2]	The Hallmarks of an Effective Compliance and Ethics Program . . . . .	6-7
§ 6.02		Controlling Person and Respondeat Superior Liability . . . . .	6-10
	[1]	Controlling Person Liability Under Section 20(a) . . . . .	6-10
	[a]	Definition of “Controlling” Person . . . . .	6-10
	[b]	Defenses to Section 20(a) Liability . . . . .	6-12
	[c]	SEC Standing . . . . .	6-14.1
	[2]	Liability for Civil Penalty Under Section 21A . . . . .	6-15
	[a]	Broker-Dealers and Investment Advisers as Control Persons . . . . .	6-16
	[b]	Securities Issuers as Control Persons . . . . .	6-16.3
	[3]	Respondeat Superior Liability . . . . .	6-16.4
	[4]	Compliance and Ethics Programs as a Defense to Secondary Liability . . . . .	6-16.6
§ 6.03		Insider Trading Compliance Programs Mandated by Federal Securities Law . . . . .	6-16.9
	[1]	Broker-Dealers and Investment Advisers—An Overview . . . . .	6-16.9
	[2]	Broker-Dealer Obligations . . . . .	6-17
	[a]	Section 15(g) of the Exchange Act . . . . .	6-17
	[b]	SEC Actions Against Broker-Dealers . . . . .	6-18
	[i]	Gabelli & Co. . . . .	6-18.1
	[ii]	Guy P. Wyser-Pratte . . . . .	6-20
	[iii]	Fox-Pitt, Kelton . . . . .	6-20
	[iv]	Goldman Sachs and Treasury Bonds . . . . .	6-22
	[v]	Merrill Lynch and the “Squawk Box” . . . . .	6-24
	[vi]	Wells Fargo . . . . .	6-27
	[3]	Investment Adviser Obligations . . . . .	6-29

**INSIDER TRADING**

	[a]	Section 204A of the Advisers Act . . . . .	6-29
	[b]	SEC Actions Against Investment Advisers . . . . .	6-29
		[i] Market Timing . . . . .	6-30
		[ii] Proxy Advisors . . . . .	6-30.1
	[c]	Additional Areas of Concern . . . . .	6-30.2
		[i] Expert Networks and Other Research Firms . . . . .	6-30.2
		[ii] Use of Alternative Data . . . . .	6-30.5
	[d]	Chief Compliance Officers and Codes of Conduct . . . . .	6-30.7
	[e]	Investment Advisers to Hedge Funds . . . . .	6-30.9
§ 6.04		Public Pension Funds . . . . .	6-31

**CHAPTER 7****Corporate Compliance Programs for Securities Issuers:  
Trading and Corporate Disclosure Issues**

§ 7.01		Introduction . . . . .	7-3
§ 7.02		Trading in the Securities of the Issuer . . . . .	7-5
	[1]	The NYSE Manual . . . . .	7-5
	[2]	Other Appropriate Procedures for Trading by Corporate Insiders in the Issuer's Securities . . . . .	7-6
	[a]	Educational Programs . . . . .	7-6
	[b]	Warnings Against Recommendations . . . . .	7-6
	[c]	Bar Short-Term Trading, Short Sales, Margin Purchases and Transactions in Derivative Securities . . . . .	7-6
	[d]	"Safe" Trading Windows . . . . .	7-7
	[e]	Restricted Trading Periods . . . . .	7-8
	[f]	Pre-Clearance or Post-Transaction Notification . . . . .	7-8
	[g]	Use of Knowledgeable Stockbroker . . . . .	7-8
	[h]	Restrictions on Trading in Affiliates and the Like . . . . .	7-9
	[i]	Compliance Officer . . . . .	7-10
	[j]	Rule 10b5-1 Trading Plans . . . . .	7-10

**TABLE OF CONTENTS**

xxvii

§ 7.03	Disclosure Requirements Imposed on Listed Companies by Self-Regulatory Organizations . . . . .	7-17
	[1] General SRO Requirements for Prompt Disclosure . . . . .	7-17
	[a] NYSE Requirements . . . . .	7-17
	[b] NASDAQ Requirements . . . . .	7-18
	[2] Specific SRO Requirements Regarding Rumors, Unusual Market Activity and Promotional Disclosure . . . . .	7-19
	[a] Clarification of Rumors . . . . .	7-19
	[b] Response to Unusual Market Activity . . . . .	7-19
	[c] No Unwarranted Promotional Disclosure . . . . .	7-20
	[3] SRO Enforcement of Disclosure Requirements . . . . .	7-20
§ 7.04	Periodic Disclosure Under the Federal Securities Laws . . . . .	7-22
	[1] The General Framework . . . . .	7-22
	[2] Issuer Disclosures Relating to Rule 10b5-1 Trading Plans, Stock Options, and Insider Trading Policies & Procedures . . . . .	7-26
§ 7.05	Section 10(b) and Rule 10b-5 . . . . .	7-26.2
	[1] Obligation to Speak Truthfully About Material Facts . . . . .	7-26.2
	[a] Determining Materiality . . . . .	7-27
	[b] Appropriate Responses to Rumors and Unusual Trading Activity . . . . .	7-30
	[i] Halt Trading . . . . .	7-30
	[ii] Generalized Disclosure . . . . .	7-30
	[iii] “No News” Release . . . . .	7-30
	[iv] Silence or “No Comment” . . . . .	7-31
	[2] No General Affirmative Duty to Disclose . . . . .	7-31
	[a] The Duty to Refrain from Half-Truths . . . . .	7-33
	[b] Issuer Trading in Own Securities . . . . .	7-33
	[c] Duty to Correct . . . . .	7-35
	[d] Duty to Update . . . . .	7-36
	[e] Information Leaks and Unusual Trading Activity . . . . .	7-38

**INSIDER TRADING**

	[3]	The Practical Implications of Corporate Disclosure Responsibilities . . . . .	7-40
§ 7.06		Projections, Forecasts and Other Forward-Looking Statements . . . . .	7-41
	[1]	“Bespeaks Caution” Doctrine . . . . .	7-41
	[2]	Securities Act Rule 175 and Exchange Act Rule 3b-6 . . . . .	7-42
	[3]	Statutory Safe Harbor for Forward-Looking Information . . . . .	7-42
§ 7.07		Insider Trading and Heightened Pleading Requirements . . . . .	7-46
§ 7.08		Selective Disclosure to Securities Analysts . . . . .	7-51
	[1]	The SEC’s Concerns Regarding Selective Disclosure . . . . .	7-52
	[2]	Selective Disclosure as Illegal Tipping . . . . .	7-54
§ 7.09		Regulation FD . . . . .	7-57
	[1]	Requirements and Prohibitions . . . . .	7-57
	[2]	Regulation FD Enforcement . . . . .	7-66
	[a]	Initial Settlements . . . . .	7-66
	[b]	<i>SEC v. Siebel Systems, Inc.</i> . . . . .	7-69
	[c]	Renewed Emphasis on SEC Enforcement . . . . .	7-74
	[3]	SEC Guidance . . . . .	7-76

**PART THREE:  
INSIDER TRADING AND ULTRA-MARTS**

**CHAPTER 8**

**Ultra-Marts and Insider Trading: The Law**

§ 8.01		The Multiple Roles of Ultra-Marts . . . . .	8-2
§ 8.02		Competing Duties and Priorities . . . . .	8-5
	[1]	Fiduciary Duties to Nontrading Clients . . . . .	8-5
	[2]	Duty to the Investing Public Not to Engage in Insider Trading . . . . .	8-6
	[3]	Potential Conflicts Manifest . . . . .	8-8
	[a]	Duties to Retail Customers Under Agency and Trust Law . . . . .	8-8
	[b]	Duty to Retail Customers Under the Shingle Theory and Regulation Best Interest . . . . .	8-9

## TABLE OF CONTENTS

xxix

	[c] The <i>Slade</i> Case . . . . .	8-10
	[d] <i>Cotton v. Merrill Lynch, Pierce, Fenner &amp; Smith</i> . . . . .	8-14
§ 8.03	Attribution of Knowledge Within Ultra-Marts in Establishing Securities Law Violations . . .	8-15
	[1] General Principles of Attribution . . . . .	8-15
	[a] Common Law Issues . . . . .	8-15
	[b] Statutory Issues . . . . .	8-16
	[2] The Entity Defense in Rule 10b5-1 . . . . .	8-18
§ 8.04	Contexts for Insider Trading Violations Within Ultra-Marts . . . . .	8-20
	[1] Various Contexts for Employee Liability . . . . .	8-20
	[a] Employees Acting as Insiders or Temporary Insiders . . . . .	8-20
	[b] Employees Acting as Brokers or Analysts. . . . .	8-21
	[c] Employees as Tippers . . . . .	8-23
	[2] Contexts for Institutional Liability . . . . .	8-24
	[a] Employee Trading for an Ultra-Mart's Benefit . . . . .	8-24
	[b] Employee Tipping for an Ultra-Mart's Benefit . . . . .	8-25
	[c] Employee Trading or Tipping for Personal Benefit . . . . .	8-27

## CHAPTER 9

### **Insulation Walls and Other Measures Designed to Segregate Material, Nonpublic Information Within Ultra-Marts**

§ 9.01	Introduction . . . . .	9-2
§ 9.02	Origins: The Rise of the Insulation Wall . . . . .	9-5
	[1] The <i>Merrill Lynch</i> Proceeding . . . . .	9-5
	[2] The <i>Slade</i> Case . . . . .	9-6
§ 9.03	Codification in SEC Rules . . . . .	9-7
	[1] Rule 14e-3 . . . . .	9-7
	[a] The Entity Defense to Rule 14e-3 Liability . . . . .	9-7
	[b] Important Features of the Entity Defense . . . . .	9-8
	[i] Flexibility . . . . .	9-8
	[ii] Proprietary Trading . . . . .	9-8

## INSIDER TRADING

	[2]	Rule 10b5-1 . . . . .	9-9
	[3]	Investment Companies and Investment Advisers: Rule 17j-1 and Rule 204A-1 . . . . .	9-10
	[4]	Trading Ahead of Research Reports . . . . .	9-11
§ 9.04		Statutory Codification . . . . .	9-13
	[1]	ITSA . . . . .	9-13
	[2]	ITSFEA: Mandatory Insulation Walls . . . . .	9-13
	[3]	The Sarbanes-Oxley Act of 2002 and Analysts' Conflicts of Interest . . . . .	9-14
§ 9.05		Examples of SEC Reliance on Insulation Walls in Settlement Proceedings . . . . .	9-17
	[1]	The <i>First Boston</i> Case . . . . .	9-17
	[2]	The <i>Kidder, Peabody</i> Case . . . . .	9-19
§ 9.06		Extension of Insulation Walls to Other Contexts . . . . .	9-21
	[1]	Rules Permitting Specialist Trading Activities by Broker-Dealers . . . . .	9-21
	[a]	The Basic Change . . . . .	9-21
	[b]	The New Context . . . . .	9-21
	[c]	The Important Provisions . . . . .	9-22
	[2]	Commercial Banks . . . . .	9-23
	[a]	Introduction . . . . .	9-23
	[b]	Cases . . . . .	9-24
	[i]	<i>American Medicorp, Inc. v. Continental Illinois National Bank and Trust Co.</i> . . . . .	9-24
	[ii]	<i>Humana v. American Medicorp.</i> . . . . .	9-25
	[iii]	<i>Washington Steel Corp. v. TW Corp.</i> . . . . .	9-25
	[3]	Creditor Committees . . . . .	9-26
	[a]	Fidelity's Request for Court Approval . . . . .	9-28
	[b]	<i>Barclays Bank</i> . . . . .	9-29
	[4]	Law Firms . . . . .	9-30
§ 9.07		Insulation Walls Designed to Reduce the Conflicts Facing Securities Analysts . . . . .	9-34
	[1]	Mounting Concerns About Conflicting Interests . . . . .	9-34
	[2]	Regulation AC . . . . .	9-36
	[3]	The Global Settlement . . . . .	9-37



**TABLE OF CONTENTS**

xxxi

[4] NYSE and NASD Rules to Separate  
Research Analysts from Investment  
Banking Activity . . . . . 9-38

**CHAPTER 10**

**Practical Measures Designed to Detect and  
Prevent Insider Trading Within Ultra-Marts**

§ 10.01 Compliance Officers . . . . . 10-3

§ 10.02 Insulation Walls . . . . . 10-6

[1] Rationales for Insulation Walls . . . . . 10-6

[a] Evidentiary Value . . . . . 10-6

[b] Productivity . . . . . 10-7

[c] Avoidance of Signaling . . . . . 10-7

[d] Minimizing Analysts' Conflicts  
of Interest . . . . . 10-7

[2] Techniques and Procedures . . . . . 10-8

[a] Communication . . . . . 10-8.1

[b] Memorialization . . . . . 10-9

[c] Continuing Education . . . . . 10-11

[d] Surveillance and Review of  
Trading . . . . . 10-12

[3] Practical Difficulties . . . . . 10-12

[a] Cost and Reliability . . . . . 10-12

[b] Permissible Trading . . . . . 10-13

[c] Distribution of Research . . . . . 10-13

[d] "Crossing the Wall" by Research  
Analysts . . . . . 10-14

[e] "Straddling the Wall" by  
Management . . . . . 10-16

[4] A Case Study in Information Control:  
A Law Firm's Policies and  
Procedures . . . . . 10-17

§ 10.03 Watch Lists . . . . . 10-20

[1] Rationales . . . . . 10-20

[a] Detection and Deterrence . . . . . 10-20

[b] Preservation of Business  
Opportunities . . . . . 10-20

[c] No Signaling Effect . . . . . 10-21

[2] Techniques and Procedures . . . . . 10-21

[a] What to Place on the Watch List  
and When . . . . . 10-21

[b] Responsibility and  
Dissemination . . . . . 10-22

## INSIDER TRADING

	[c] Daily Monitoring . . . . .	10-22
	[d] Responsiveness . . . . .	10-23
§ 10.04	Restricted Lists . . . . .	10-24
	[1] Techniques and Procedures . . . . .	10-24
	[a] Timing . . . . .	10-24
	[b] Documentation . . . . .	10-24
	[c] Distribution . . . . .	10-25
	[d] Scope and Discretion . . . . .	10-25
	[2] SEC Rules . . . . .	10-26
	[3] Practical Problems . . . . .	10-26
	[a] Signaling . . . . .	10-26
	[b] Limitation of Recommendations . . . . .	10-27
	[c] Removal of a Security from a Restricted List . . . . .	10-27
§ 10.05	Rumor Lists . . . . .	10-28
§ 10.06	Employee Trading Policies . . . . .	10-29
	[1] Trading Restrictions for Persons with Access to Material, Nonpublic Information . . . . .	10-29
	[2] Trading Restrictions for Securities Analysts . . . . .	10-30
	[3] Trading Restrictions for Investment Adviser Personnel . . . . .	10-31
§ 10.07	Conclusion . . . . .	10-33

### Appendices

<b>APPENDIX A:</b>	The Insider Trading Sanctions Act, Pub. L. No. 98-376, 98 Stat. 1264 (1984) . . . . .	App. A-1
<b>APPENDIX B:</b>	Insider Trading and Securities Fraud Reinforcement Act, Pub. L. No. 100-704, 102 Stat. 4677 (1988) . . . . .	App. B-1
<b>APPENDIX C:</b>	S. 1380, S. 1380, 100th Cong., 1st Sess. (1987) . . . . .	App. C-1
<b>APPENDIX D:</b>	Securities and Exchange Commission Proposed Legislation “The Insider Trading Act of 1987” and memorandum of Support, submitted to the Subcommittee on Securities, U.S. Senate, August 7, 1987 . . . . .	App. D-1

TABLE OF CONTENTS

xxxiii

**APPENDIX E:** Broker-Dealer Policies and Procedures  
Designed to Segment the Flow and  
Prevent the Misuse of Material  
Nonpublic Information, Division  
of Market Regulation, U.S. Securities  
and Exchange Commission,  
March 1990 ..... App. E-1

**APPENDIX F:** NASD and NYSE CHINESE WALL  
POLICIES AND PROCEDURES ..... App. F-1

**APPENDIX G:** MATERIALITY MATRIX ..... App. G-1

**APPENDIX H:** CASE STUDY: One Ultra-Mart’s  
Policies and Procedures Against  
Insider Trading ..... App. H-1

**APPENDIX I:** Excerpt from the New York Stock  
Exchange Listed Company Manual ..... App. I-1

**APPENDIX J:** Excerpt from the American Stock  
Exchange Company Guide ..... App. J-1

**APPENDIX K:** Excerpt from Report on Law Firm  
Policies Relating to Confidentiality  
and Safeguarding Inside Information,  
Special Committee of the Business  
Corporations Law Section of the  
Los Angeles County Bar  
Association (1985) ..... App. K-1

**APPENDIX L:** Final Rule: Selective Disclosure  
and Insider Trading, SEC,  
August 2000. .... App. L-1

**APPENDIX M:** Division of Corporate Finance:  
Manual of Publicly Available  
Telephone Interpretations,  
Regarding Regulation FD and  
Rule 10b5-1 (issued May 2001,  
December 2000 and October 2000) ..... App. M-1

**APPENDIX N:** NASD and NYSE Rulemaking: SEC  
(Release No. 34-48252; File No.  
SR-NASD-2002-154;  
SR-NYSE-2002-49) July 29, 2003 ..... App. N-1

**TABLE OF ABBREVIATIONS** ..... TA-1

**INDEX** ..... I-1