Shadow Trading: Another Arrow in the SEC's Enforcement Quiver?

*By Kathryn Faulk**

I. Introduction

The illegality of insider trading is common knowledge in the United States, as regular citizens, powerful executives, and even beloved celebrities fall on their swords because of the far-reaching ban.[1] Recently, the SEC made its first attempts to extend the misappropriation theory of insider trading to include shadow trading, which involves an employee using inside information relating to one's affiliated company, to trade the stock of a separate, but comparable, company.[2] This theory of shadow trading sparked much commentary, confusion and debate, as it (1) is premised upon a "duty" to source, which informs the trader's company's corporate policy, rather than from any legally recognized fiduciary duty or principal/agent relationship and (2) takes a step toward punishing mere unethical conduct, essentially precluding trading based on all material nonpublic information, regardless of its source—similar to the parity-of-information and equal access frameworks, repeatedly rejected by the Supreme Court.[3] At the same time, the shadow trading theory cracks down on corporate conduct, which may offer a route of enforcement that the Supreme Court finds attractive, as it is in keeping with prior articulated SCOTUS policy rationale for the prohibition against insider trading.[4] This article aims to offer insight into the challenges of a shadow trading regime and to provide a perspective against endorsement of the theory because overall, shadow trading goes too far to federally punish unethical conduct, and is an unnecessary stretch of the misappropriation theory's reach. However, because the shadow trading theory is in keeping with the overarching goals of the ban, as articulated by the Supreme Court, this article argues the SEC has high chances of succeeding in its attempt to add the shadow trading arrow to its enforcement quiver.

This article proceeds as follows. In Part II, I discuss the law of insider trading generally, focusing mainly on the development of the classical, tipping and misappropriation theories. In Part III, I set forth the "shadow trading" theory, as introduced in 2019 by

*The author is an associate at Akin Gump Strauss Hauer & Feld LLP.

SEC v. Panuwat. I then devote Part IV to revisiting the misappropriation theory, in light of recent recognition of the "shadow trading" basis for insider trading liability. In Part V, I dive into the differing rationales behind insider trading law, the policies used to justify it, and discuss whether the way the law stands today achieves those policy goals. I ultimately offer a prediction as to the trajectory the shadow trading theory might take in future proceedings. Finally, Part VI presents my conclusion.

II. The Law of Insider Trading, Generally

A. Brief History

While insider trading is a hot topic among many groups—spanning from fans of the Dallas Mavericks, to those of Shark Tank, and even to cooking television show lovers[5]—the federal regime "enjoys a somewhat murky legal pedigree."[6] Different from other countries, in the U.S., no singular federal statute or regulation explicitly sets forth an express ban on insider trading.[7] In the absence of express congressional mandate, the prohibition developed—and continues to develop—out of the courts and the SEC, through elaboration over time by judges and administrative regulation.[8] Consequently, instead of presiding in one place, the law is scattered. Neither Section 10(b) of the Securities Exchange Act of 1934 nor Rule 10b-5 expressly forbids insider trading.[9] While Rule 14e-3 explicitly regulates trading on material, nonpublic information, this is only in the tender offer context.[10] Similarly limited, Section 10(b) of the Exchange Act "regulates trading by corporate insiders, but restricts the use of material, non-public information only indirectly and only within a very narrow time horizon."[11] Further, the Title 18 securities fraud criminal statutes allow the Department of Justice a hand in enforcing the insider trading prohibition.[12] Because of its scattered nature, insider trading law has expanded, contracted, twisted and bent over backwards throughout the years in a way that is difficult to follow, even for those who keep a close eye on the subject.[13]

Congress passed the Securities Exchange Act in 1934, containing the key provision Section 10(b).[14] Intended as a general antifraud provision, Section 10(b) never actually mentions or defines insider trading—in fact, insider trading does not technically even involve "fraud" as the word is typically understood in the securities realm (i.e., a material misrepresentation or at common law, omission when there is a duty).[15] Rather, insider trading requires a person or insider possessing and using material nonpublic information to trade securities without disclosing that information to their trading counterpart.[16] Still, in 1942, the SEC promulgated

Rule 10b-5 based on Section 10(b), further protecting purchases and sales of securities from fraudulent schemes.[17] Afterwards, Section 10(b) and Rule 10b-5 became the key provisions used to prosecute insider trading.[18] Despite this advancement in standards guiding federal insider trading law, state insider trading common law remained divided,[19] and no state imposed civil fines or criminal liability for insider trading until the second third of the twentieth century.[20]

Beginning in 1961, SEC Commissioner William Cary led a crusade to bring insider trading actions under Section 10(b), hoping to herald the start of criminal and civil liability for illegal insider trading.[21] With the landmark case of *In re Cady, Roberts & Company*, Comm'r Cary offered the first articulation of the disclose-or-abstain rule, whereby persons

> 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. Failure to make disclosure in these circumstances constitutes a violation of the anti-fraud provisions. If, on the other hand, disclosure prior to effecting a purchase or sale would be improper or unrealistic under the circumstances, [the SEC] believes the alternative is to forego the transaction.[22]

This disclose-or-abstain regime proved controversial from the beginning, lacking clear statutory definition and relying on neither historical nor common law precedent.[23] Still, the rule gained traction, and enjoyed its broadest expansion in *SEC v. Texas Gulf Sulphur Co.*, where the Second Circuit emphasized the disclose-or-abstain rule allows equal footing for all traders—insider or not—applying to anyone in possession of material inside information.[24] The demands of *Cady, Roberts* and *Texas Gulf Sulphur* resemble the equal access theory, which along with the parity-of-information theory, is the foundation of the insider trading prohibition in the European Union.[25] The equal access theory follows a disclose or abstain framework, requiring one who obtains or misappropriates material non-public information by virtue of their profession to either disclose it (if allowed) or abstain from trading.[26] An equal access or parity-of-information regime forbids trading based on all material nonpublic information, regardless of its source.[27] Despite the straightforwardness and ease of enforcement offered by a disclose-or-abstain regime, the Supreme Court later rejected its use in favor of the current fiduciary duty based approach articulated in *Chiarella v. U.S.*[28]

B. The Classical Theory

In *Chiarella,* the Supreme Court abandoned previously accepted insider trading theories and set forth the basis for insider

trading liability, as it is known today. There, Vincent Chiarella, a "markup man" for a financial printer, sifted through corporate takeover bid announcements, which were delivered to his employer for printing, and deduced the names of the target companies before the final printing.[29] Chiarella then, without disclosing his knowledge, purchased stock in the target companies and sold the shares immediately after the takeover attempts went public, profiting more than $30,000 over the span of 14 months.[30] Using the *Texas Gulf Sulphur* rationale, the Second Circuit held that Chiarella's access to and subsequent use of the material nonpublic information to trade in securities rendered him liable, despite his outsider status as an employee of a financial printer.[31] After, the Supreme Court reversed Chiarella's conviction, reasoning that his conviction was not premised on any jury finding that he had a duty to disclose the information.[32] In doing this, the Supreme Court rejected the Second Circuit's use of the "equal-access" or "parity-of-information" theory, formulating the classical theory instead.[33]

Generally, per the classical theory, a fiduciary or agent (in this articulation, "A") who owes duties of loyalty and confidentiality to the corporation ("C") and collectively, its shareholders, perpetrates a fraud upon C when A converts nonpublic information entrusted to A by C, for A's own benefit, to trade in the securities of C.[34] The classical theory applies to "officers, directors, and other permanent insiders of a corporation" as well as to temporary insiders—"attorneys, accountants, consultants, and others" who become temporary fiduciaries of a corporation.[35] Corporate insiders (i.e., directors and officers) owe a fiduciary duty to their shareholders, which creates an obligation to disclose material information affecting the stock price before entering a transaction with current or future shareholders.[36] When a director or officer trades company stock based on material nonpublic information, her or his fiduciary obligation to the shareholders gives rise to a duty to disclose, which the director or officer violates when she or he fails to do so.[37] In summary, the classical theory of the prohibition against insider trading equates silence, coupled with a special duty, to fraud. In *Chiarella's* case, because he made his trades over anonymous exchanges, he never made false representations to his counterparties.[38] Therefore, absent a fiduciary or other similar relation of trust and confidence, liability could not attach to Chiarella.[39] However, as I will discuss later, this outcome would differ today under the Misappropriation Theory.[40]

In replacing the parity-of-information rule, the *Chiarella* Court showed no restraint in condemning its rationale. In an opinion written by Justice Powell, the Court held that despite Section 10(b)'s characterization as a catchall provision, it must actually

catch *fraud*.[41] Thus, the Court found a duty of disclosure to the market as a whole would radically depart from the "fiduciary-fraud-based model . . . and 'should not be undertaken absent some explicit evidence of congressional intent.' "[42] While the Court acknowledged the inherent unfairness in allowing some market participants to trade on material nonpublic information, it effectively killed the equal-access model in one fell swoop by holding the SEC may not utilize Section 10(b) to categorize every single instance of financial unfairness as fraud.[43]

C. Tipper-Tippee Liability

Another great concern to the SEC is the occurrence of tipping—where one (the tipper) communicates information to a recipient of that information (the tippee).[44] Both a tipper *and* a tippee may emerge where one person both communicates and receives certain information.[45] Before *Dirks v. SEC*, a tippee stood in the shoes of their tipper—"if the tipper could not trade, the tippee, upon receiving that information from the tipper and knowing of the tipper's situation, also could not trade."[46] However, only three years post-*Chiarella*, the Supreme Court once again attempted to provide clarity to insider trading law by setting a different standard for tipper-tippee liability, premised on a motivational requirement.[47]

In *Dirks*, Raymond Dirks, an officer of a New York broker-dealer firm, received material nonpublic information from an insider of a corporation with which Dirks had no connection.[48] While performing his own investigation as to the validity of the information he received, Dirks shared the information openly with several investors and clients.[49] Prior to public disclosure of the information shared, Dirks's five institutional clients sold the corporation's stock and profited millions.[50] Despite the SEC's insistence on Dirks's liability premised on the theory that the "tippee 'inherits' a *Cady, Roberts* obligation[51] to shareholders whenever [she or] he receives inside information from an insider," the Court reaffirmed its *Chiarella* holding that a duty to disclose must arise from a relationship between parties, not merely from someone's ability to acquire information because of her or his market position.[52] By once again rejecting elimination of the fiduciary requirement, the Court prioritized market efficiency over regulation of outsider informational abuses.[53]

Instead of sanctioning tipper-tippee trading, the Court adopted the "participant after the fact" theory of tippee liability—the tippee's obligation arises from their role as a "participant after the fact" in the insider's fiduciary duty breach.[54] Accordingly, an insider must breach a fiduciary duty owed to her or his corporation and her or his shareholders *before* a tippee can be held liable

under Rule 10b-5.[55] This ruling effectively established a two-fold test for tippee liability under Rule 10b-5.[56] First, an insider must breach her or his fiduciary duty by disclosing material nonpublic information to a tippee.[57] The existence of a breach turns on whether the insider derived some type of personal gain from the disclosure or intended to make a gift of the valuable information, which would show the insider communicated the information for the improper purpose of obtaining some sort of personal benefit from corporate information.[58] Second, a tippee must trade on the basis of that disclosure with actual or constructive knowledge of the insider's breach—making the tippee a "participant after the fact."[59]

Ultimately, the majority of the Court agreed upon Dirks's innocence, because as a stranger to the corporation of the tipper, he held no pre-existing duty to its shareholders.[60] Further, because Dirks's informant received no monetary or personal gain from the disclosure and did not intend the information as a gift to Dirks, he breached no duty to the corporation.[61] Absent a primary breach by the corporation's insiders, Dirks could not commit a derivative breach, and thus could not be a "participant after the fact" in an insider's breach of a fiduciary duty.[62]

In contrast to the majority's focus on the lack of personal gain obtained by Dirks and his tipper, Justice Blackmun's dissent focused on the harm done to the uninformed corporation's shareholders—the resulting injury to the shareholders remains the same, regardless of an improper motive and personal gain by the insider.[63] Thus, in Blackmun's view, tipper-tippee insider trading law requires evidence of neither. Although the Court did not ultimately adopt Blackmun's view, the SEC adopted Rule 14e-3 after the Court's *Chiarella* decision, implementing a framework adhering to the principles Blackmun outlined in his *Dirks* dissent.[64] By promulgating Rule 14e-3, the SEC attempted to regulate insider and tippee trading in the tender offer context.[65] With certain exceptions, Rule 14e-3 applies the disclose-or-abstain framework to the "possession of material information relating to a tender offer where the person knows or has reason to know the information is nonpublic and was received directly or indirectly from the offeror, the subject corporation, any of their affiliated persons, or any person acting on behalf of either company."[66] The rule also includes a broad anti-tipping provision, which likewise does away with the personal benefit requirement of *Dirks* for tipper-tippee liability.[67]

Chiarella and *Dirks* both affirmed the Supreme Court's resistance to a parity-of-information or equal-access regime, limiting the application of the insider trading prohibition to circumstances where a fiduciary duty is owed or relationship of trust and

confidence exists. However, the SEC, through its promulgation of Rule 14e-3, still found a way to keep the disclose-or-abstain regime alive, at least in the context of tender offers. The Supreme Court later upheld the rule in *O'Hagan*, finding persuasive the SEC's argument that in the tender offer context, an evidentiary issue exists as to breach of fiduciary duty and the tippee's knowledge of that breach because in most cases, the only parties to the information transfer are the insider and alleged tippee.[68] This proof problem, if left unchecked, enabled sophisticated traders to escape responsibility.[69] Therefore, the disclose-or-abstain command of Rule 14e-3 provided a means reasonably designed to prevent fraudulent trading, at least in the tender offer context.[70] The *Chiarella* and *Dirks* outcomes reaffirmed the Court's reluctance to further a parity regime, but its sanctioning of Rule 14e-3 suggested the Court is not entirely closed off to keeping the regime alive, if the circumstances require.[71] This apparent contradiction is important to note, especially in considering a potential shadow trading regime, as I will discuss in Part III.

D. The Misappropriation Theory

Despite the prosecutorial setback advanced by *Chiarella*, the SEC continued to press for expansion of Section 10(b) insider trading liability for the next decade. The misappropriation theory found its roots in the *Chiarella* briefs, where prosecutors argued that Chiarella breached his duty to the *acquiring corporation* and his employer when he traded using information obtained by virtue of his employment.[72] Still, the Supreme Court did not accept a fraud-based theory extending to corporate outsiders until the 1997 case of *United States v. O'Hagan*.[73] There, James O'Hagan, a partner at a law firm, learned confidential details regarding a tender offer his colleagues actively worked on, where they represented Grand Metropolitan PLC in its tender offer for Pillsbury Company.[74] While O'Hagan himself did not work on the deal, he still took the information, traded Pillsbury stock before the transaction went through, and profited more than $4.3 million.[75]

In prosecuting O'Hagan, the SEC could not rely upon the classical theory because he breached no duty of trust or confidence to his counterparties—he was not a temporary insider of Pillsbury, therefore he owed no duties to the company or its shareholders.[76] Instead, the prosecutors argued for—and the Supreme Court embraced—the misappropriation theory, whereby Section 10(b) and Rule 10b-5 liability incurs whenever one uses material, nonpublic information for securities trading in a manner deceitful to the source of that information.[77] A non-insider such as O'Hagan satisfies the "deceptive device or contrivance" require-

ment of Section 10(b) by duping his principals (i.e., his law firm and its clients) out of the exclusive use of their confidential information by trading on it.[78]

With the adoption of the misappropriation theory in *O'Hagan*, SCOTUS recognized each basic element of insider trading liability. Specifically, the Court found Section 10(b) liability arises where a person, seeking personal benefit,[79] trades on material nonpublic information in breach of some fiduciary or similar duty of trust and confidence to the counterparty to either the trade[80] or the source of the information.[81] However, room for confusion still exists because of ambiguity within Section 10(b) and judicial rulings on the subject. For example, uncertainties exist regarding what constitutes a personal benefit as required in *Dirks*; when trading is considered on the basis of material nonpublic information; when information is material or nonpublic; what type of fiduciary relation triggers the duty to disclose; and whether that relation must be one of trust *and* confidence (*Chiarella*) or trust *or* confidence (SEC Rule).[82] As I discuss in Part III, the ambiguity and breadth of resolutions to these uncertainties may significantly expand or contract insider trading liability.[83]

Perhaps one of the most pressing and controversial questions deriving from the adoption of the misappropriation theory in *O'Hagan* is how courts should define the bounds of fiduciary-esque relationships for the purposes of the misappropriation theory. Despite lack of one clear definition for a relationship that should be treated as fiduciary, courts mostly agreed on the essential characteristic of agency—the fact that one party is relying on the other party to act in his or her interest.[84] Trust alone is not enough to create a fiduciary relationship, and neither is vulnerability—something more is needed, in the form of reliance.[85] Qualifying relationships are not between peers or equals, but are rather characterized by reliance and control, leaving "one party in a position of domination, inferiority, or vulnerability."[86]

Despite best judicial efforts to create an agency-centric definition, in 2000 the SEC promulgated Rule 10b5-2 to settle the issue and define certain fiduciary-esque relationships, such as personal, social and familial relationships, which would impose a duty of trust or confidence required under the misappropriation theory.[87] Rule 10b5-2 defined the test for misappropriation as a breach of trust *or* confidence[88] and created the possibility of owing such a duty to any 'source' of material nonpublic information.[89] Applying both to personal and business relationships,[90] Rule 10b5-2 enumerated a non-exhaustive list of situations where such a relationship may be presumed, and in effect, a trader would owe a legal duty to the source of the information:

(1) Whenever a person agrees to maintain information in confidence;

(2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating . . . expects that the recipient will maintain its confidentiality; or

(3) Whenever a person receives . . . information from his or her spouse, parent, child, or sibling . . ..[91]

Despite the misappropriation theory's well-established application in the business setting prior to Rule 10b5-2,[92] its applicability to personal and family relationships remained uncertain prior to the rule's adoption.[93] Understandably, courts grappled with the question of whether to find a fiduciary duty within intimate relationships. For example, in 1991, the second circuit rejected application of the misappropriation theory in the case of a wife entrusting inside information to her husband.[94] The court found that marriage did not create a fiduciary relationship, and no duty arose where one spouse unilaterally entrusted the other spouse with confidential information without the promise of confidentiality.[95] With the subsequent SEC adoption of Rule 10b5-2, however, the misappropriation theory's applicability became more accepted in the context of family and other personal relationships, but the outcomes of this line of cases remain unpredictable.[96]

Despite the SEC's persistence in targeting deceitful and fraudulent practices within existing fiduciary relationships, adoption of Rule 10b5-2 gave the SEC leeway to target communications between friends and social acquaintances—notably, conduct not based on a preexisting legal duty and that is not criminal, tortious, or fraudulent.[97] In this subset of cases, no direct relationship existed between defendants and the owners of the nonpublic information—rather, the defendants committed legal violations by using information shared by a friend for their own personal gain.[98] In enforcing the right to honest family and friends, adoption of Rule 10b5-2 served as a large expansion of insider trading liability by giving the SEC clearance to focus on personal communications and relationships.[99] Even with this clearance, however, only roughly one-third of misappropriation actions are premised based on family relationships, friendships, and breaches of confidentiality agreements—and these outcomes are far less certain than the outcomes of misappropriation cases in the business setting.[100] As I discuss in Parts IV and V, the SEC's recent enforcement action in *Panuwat* is in keeping with the SEC's focus on relationships within the business setting, but still advances a focus on unethical conduct, rather than duties arising out of

traditional fiduciary relationships, much like the old parity-of-information and equal access theories.

III. Shadow Trading: Another Arrow in the SEC's Enforcement Quiver?

As discussed above, the judicial versus regulatory view of illicit insider trading may differ, depending on the time period and context during which the trader's conduct takes place. In 2021, the SEC filed a complaint in California federal court, premised on a new and novel legal theory, shadow trading.[101] Prior to *SEC v. Panuwat*, the theory had never been tested in court; however, on January 14, 2022, Judge William H. Orrick denied Matthew Panuwat's motion to dismiss,[102] which effectively signaled potential for upcoming expansion of the bounds of insider trading law, specifically in terms of the ever-expanding misappropriation theory. As of April 14, 2023, the most recent docket entry in the *Panuwat* case is an order setting a settlement conference, scheduled for September 7, 2023 in San Francisco.[103] Depending upon the outcome of that conference and any proceedings afterwards, if the SEC prevails in its prosecution of Panuwat, this expansion might signal a new era of insider trading enforcement actions.

Shadow trading's alleged illegality derives from the misappropriation theory, where an insider's trading breaches a duty to the source of the material nonpublic information because it "defrauds the principal of the exclusive use of [its] information."[104] The shadow trading theory involves an individual associated with one entity (Entity A) trading "in another public company's securities (Entity B), typically a competitor entity or supply chain partner, based on material nonpublic information obtained during their employment or from another relationship with Entity A."[105] In other words, shadow trading occurs where two companies are allegedly correlated in some way (i.e., a peer company in the same relatively small industry) and an insider uses confidential information pertaining to the business of the company she or he is affiliated with, to trade in the securities of another company.[106] If the shadow trading theory is to prevail in courts, the expansion of insider trading liability advanced by adoption of the misappropriation theory continues to live up to the breadth concerns of many. Further, this new regime indicates the SEC's prosecutorial efforts turning back toward a focus on unethical corporate conduct, instead of on dishonesty and deceit within social and business relationships.

A. *SEC v. Panuwat*

Matthew Panuwat served as a senior officer for Medivation, Inc., a mid-sized oncology biopharmaceutical company located in

San Francisco, California.[107] In August 2016, Panuwat, through the course of his employment, received confidential nonpublic information that Pfizer, Inc. intended to acquire Medivation.[108] Within minutes of receiving this confidential information, Panuwat purchased short-term out-of-the-money call options[109] in the common stock of Incyte Corporation, another mid-sized oncology-focused biopharmaceutical company.[110] Panuwat anticipated the value of Incyte would materially increase upon public announcement of the Medivation acquisition.[111] By trading ahead of the acquisition announcement, Panuwat profited $107,066.[112] Importantly, the SEC's complaint against Panuwat noted that at the start of his employment at Medivation, Panuwat agreed to keep information that he learned during his employment confidential and not to make use of that information, except for the benefit of Medivation.[113] He also signed Medivation's insider trading policy, prohibiting employees such as himself "from personally profiting from material nonpublic information concerning Medivation by trading securities issued by Medivation or the securities of another publicly traded company."[114] Although Rule 10b5-2(1) specifies a legal duty exists "whenever a person agrees to maintain information in confidence," Panuwat argued he did not breach his duty to Medivation because the company's insider trading policy did not prohibit trading in Incyte securities.[115]

In bringing its complaint against Panuwat, the SEC set forth multiple allegations, including (1) Panuwat's conduct breached his company agreements and/or policies because Panuwat agreed to keep information learned during his employment confidential and not to make use of it;[116] and (2) in violation of Section 10(b) and Rule 10b-5 thereunder, Panuwat, a non-insider of Incyte, misappropriated the confidential information of his own company by engaging in trading Incyte shares, even though his employer, Medivation, had no confidential business arrangements with Incyte.[117] Panuwat argued in his *Reply in Support of his Motion to Dismiss* that his was the first case the SEC brought against someone who traded in the securities of an issuer about which he had no material nonpublic information, and that the SEC engaged in legal gymnastics because it knew full well that the conduct in this case was outside the scope of existing insider trading laws and the SEC's enforcement authority.[118] In furtherance of this argument, Panuwat's attorneys referenced the fact that in every misappropriation case cited by the SEC in opposition to Panuwat's motion to dismiss, the defendant misappropriated information *about the company in which he traded*—a key element missing in Panuwat's case.[119] Still, Judge Orrick denied Panuwat's motion to dismiss, allowing the case to move forward, signaling opportunity for a huge SEC victory.[120]

Despite the uncertainty that lies ahead in terms of trial and post-trial rulings, the SEC likely perceives the most recent *Panuwat* ruling as a win. Emboldened by this win, the SEC may very well pursue other related or novel theories of insider trading liability, such as extension of the shadow trading theory to the tipping context. As I discuss below, a crusade against shadow trading may take flight in the next decade, and many unexpected challenges and uncertainties will accompany this new regime if the courts allow it to flourish.

B. Challenges of a Shadow Trading Regime

Judge Orrick's order denying Panuwat's motion to dismiss indicates preliminary federal court validation of the shadow trading theory—at least on the basis of the facts alleged in the SEC's *Panuwat* complaint. Questions arise, however, regarding the potential scope of the theory. The *Panuwat* case presented the perfect fact storm for the SEC to bring action pursuant to a theory it had been itching to test in court[121]—(a) trading in securities of a "closely correlated" company to the insider's company; (b) a defendant who, in the course of his employment, signed a broadly worded corporate insider trading policy, capturing trading in any other public company; and (c) the use of highly confidential information to one company, clearly material to the stock price of another company.[122] However, not every future shadow trading case promises to present such positive facts for the government's case. Further, to ensure safety from this new basis of insider trading liability, corporate insiders must know where to draw the line—something that at the moment, with so much uncertainty surrounding the theory, proves difficult to do. Lastly, the misappropriation theory's expansion in *Panuwat* paves the way for a huge jump toward a parity-of-information regime—previously rejected by SCOTUS—where anyone in possession of material nonpublic information must either disclose it or abstain from trading. Considering the preceding points, the challenges of a shadow trading regime are categorized into three categories: the question of context, an increased need for clarity, and the movement closer to a de facto parity-of-information regime.[123]

1. What Contexts Allow for Shadow Trading Liability?

One pressing question stemming from the most recent *Panuwat* ruling is whether the theory will survive when some of the specific *Panuwat* factors are missing. Conveniently, in *Panuwat*, the SEC relied on certain unique circumstances that may not exist in future cases, thus the U.S. district court's validation of the theory begs certain questions.[124] For example, will the shadow trading

theory prevail in the absence of a corporate insider trading policy provision as specific as the one in *Panuwat*? Although Panuwat signed Medivation's insider trading policy—an agreement not to trade under Rule 10b5-2(1)—no confidentiality agreement existed between Medivation and Incyte—in fact, Panuwat possessed no confidential information regarding Incyte, period.[125] Rather, Panuwat on his own deduced the likelihood of Incyte's stock value increasing in the wake of Medivation's acquisition announcement. Regardless, the court determined the scope of Panuwat's duty based on the language of Medivation's insider trading policy.[126] This duty issue, although relatively clear cut within the specific facts of *Panuwat*, has potential to make or break a shadow trading enforcement action, depending on how courts choose to interpret corporate policies, and how far they are willing to go to support the SEC in this new and novel regime.

In *Panuwat*, the text of Medivation's policy, although broad, did not technically include Incyte in its enumerated list of companies its employees could not use material nonpublic information about Medivation to trade securities in—the list included Medivation itself, and other "publicly traded compan[ies], including all significant collaborators, customers, partners, suppliers, or competitors" of Medivation.[127] Despite Panuwat's argument that Incyte constituted a peer company of Medivation, rather than a collaborator, customer, partner, supplier or competitor, the court interpreted the enumerated categories as "mere examples," rather than an exhaustive list.[128] Three Milbank attorneys, in their assessment of Panuwat in NYU's Compliance and Enforcement publication, expect the reach of *Panuwat* to go far.[129] Notably, the district court in *Panuwat* excluded from its analysis what would happen if the policy did not include a trading prohibition, or if the prohibition were drafted narrowly (i.e., only prohibiting trading in suppliers and purchasers, or customers and collaborators).[130] Would this mean the insider is free to trade as he or she pleases? Because the district court in *Panuwat* did not go so far as to address these questions, but chose instead to interpret the Medivation policy broadly, these issues will likely arise once again in future SEC litigation premised on the shadow trading theory.

Another concern is whether the shadow trading theory may expand in terms of the situations in which it will apply, and the type of charges that may be brought (i.e., civil versus criminal). First, is it possible that future enforcement actions will involve allegations of tipping based on the shadow trading theory? Because of its "win" thus far in prosecuting *Panuwat*, the SEC may feel emboldened to pursue a shadow trading regime with tipper-tippee enforcement actions against public company insiders or investment advisers and asset managers that may receive

information from public companies.[131] Another important question is whether the U.S. Department of Justice will one day bring a criminal case based on the shadow trading theory. As noted by Robert Barron in the Securities Regulation Law Journal, the DOJ and SEC sometimes bring parallel enforcement cases in connection with the same alleged illicit insider trading activity,[132] and it is more likely than not that the DOJ will eventually bring a criminal shadow trading case.[133] In fact, in line with the preceding points, it is entirely likely that in an appropriate fact situation, the SEC and DOJ might allege acts of 'tipping' in the shadow trading context.[134] In effect, the context which opens the door to civil and criminal insider trading liability is likely to expand farther than those initial parameters set by *SEC v. Panuwat* through present and future judicial validation of the shadow insider trading theory.

2. An Increased Need for Clarity

Because uncertainty breeds opportunity for both intentional and unintentional noncompliance and opens the door to endless litigation, certain issues require clearing up by courts and the SEC before companies and employees can fully feel protected from potential shadow trading liability.

First, a potential source of confusion is whether the *Panuwat* case might change the definition of "materiality" in misappropriation cases. In defending his trade, Panuwat argued that material nonpublic information concerning the Medivation acquisition, obviously material to Medivation, could not be material to Incyte because the information was not *about* Incyte.[135] In response, the SEC accused Panuwat of attempting to "improperly narrow the meaning of materiality."[136] Ultimately, the court sided with the SEC in finding that "Section 10(b) and Rule 10b-5 cast a wide net, prohibiting insider trading of 'any security' using 'any manipulative or deceptive device.' "[137] Further, it noted that Rule 10b5-1(a) "does not state that the information 'about that security or issuer' must come from the security or issuer itself to be material."[138] Moreover, it held that Rule 10b5-1(a)'s list of manipulative and deceptive devices is not exhaustive given the language that "manipulative and deceptive devices include, *among other things* . . . ."[139] The court ultimately found it plausible that the Medivation acquisition constituted material nonpublic information to Incyte because "a reasonable Incyte investor would consider it important in deciding whether to buy or sell Incyte stock."[140] The court's conclusion that information about one company may be material to investments in a separate company carries important implications.[141] In the Panuwat context, information a reasonable investor would consider

important in making a stock trade decision likely includes the "two companies' historic stock price movement, financial projections, drug pipeline, and corporate strategy."[142] A question remaining, to potentially be answered at trial, is how a defendant may persuade a fact finder that information about one company is not material to investments in a separate company, and more broadly, where courts will draw the materiality line in shadow trading cases.

Second, it is possible that corporate insiders will find it difficult determining what companies the SEC may deem "comparable" to their own in prosecuting shadow trading cases. Similarly, corporate insiders and/or tippees might find themselves at risk any time they trade in securities of *any* company within their own "industry," especially if their company's corporate insider trading policy language is broad in scope.[143] In *Panuwat*, the SEC had the advantage of prosecuting an insider from a company in a smaller market, with a scarcity of companies in the same market position—this made the SEC's materiality argument far easier than if the companies were publicly traded players in the oil and gas industry, for example. In the shadow trading context, materiality may be determined by how the SEC "defines the companies to include as peers in the supposedly relevant industry or sector—essentially adding a kind of market definition component to its already uncertain market analysis."[144] Regardless of how the answer to this question plays out in future proceedings, issuers, broker dealers, banks, asset managers, and investment advisors should stay on guard when making informed trading decisions, and must be prepared to adapt to the implications following *Panuwat*.[145]

3. Movement Closer to a Parity Regime

As discussed above in Part II, the equal access theory or parity-of-information theory requires "anyone who obtains material nonpublic information concerning an issuer or a security because of [her or his] professional activity, or misappropriates it, should either disclose it (when allowed) or abstain from trading."[146] In practice, a parity-of-information regime would disregard the source consideration, precluding trading based on all material nonpublic information.[147] Although the Supreme Court has repeatedly rejected the parity-of-information theory—with the exception of Rule 14e-3[148]—in the wake of *Panuwat*, the state of the law now inches closer to a *de facto* parity regime.[149] This is the effect of unpredictability involved in expanding insider trader liability—no one knows where the line is, and traders may, without any predictability or forewarning, find themselves subject to SEC or DOJ scrutiny, which will attempt to connect the individual's

trading success to an announcement made by another company in the same industry.[150] In summation, furtherance of the shadow trading theory may invite SCOTUS review of a regime closely resembling the parity-of-information world—a world the Supreme Court has expressly indicated it does not condone.

IV. Misappropriation Theory Revisited, in the Wake of *Panuwat*

As discussed above in Part II, the promulgation of Rule 10b-5, specifically Rule 10b5-2, served as an extreme expansion of insider trading liability. The scope of the Rule expanded the law's applicability even further in the business setting, covering confidentiality agreements or NDAs, and for the first time, expanded the scope of the Rule in the context of intimate personal and familial relationships.[151] Before the Rule, the law focused mostly on business communications and relationships, the duty stemming from insiders' status as fiduciaries to their employers. There, misappropriation occurred in the context of legally-recognized relationships of trust and confidence—fiduciary and an enumerated group of functionally-equivalent relationships—and disclosures made in the context of professional dealings.[152] Before the adoption of Rule 10b5-2, intimate and familial relationships did not necessarily give rise to insider trading liability. For example, in *United States v. Chestman*, a pre-*O'Hagan* case, the Second Circuit held that misappropriation of information between spouses could not give rise to insider trading liability.[153] This rejection of liability based solely on kinship or intimate personal relationships was not unusual for the time—no other circuit court accepted the notion, and courts similarly rejected the idea that the requisite fiduciary-like relationship could exist merely by one entrusting another with confidential information.[154] In contrast, in *SEC v. Yun*—after adoption of Rule 10b5-2—the Eleventh Circuit defined the spousal duty of loyalty and confidentiality more broadly than the Second Circuit.[155] There, the court found a duty between spouses may exist if the spouses have a history or practice of sharing and maintaining business confidences or if they breached an agreement to maintain each other's business confidences.[156]

After the year 2000 and the SEC's promulgation of Rule 10b5-2, insider trading law embraced the SEC's targeting communications within and between friendships, social acquaintances and personal relationships.[157] The Rule also likened the signing of a confidentiality agreement to owing a duty of trust or confidence, although the Rule does not specify a particular setting or context for prosecuting the breach of these agreements.[158] SEC enforcement began to encapsulate insider trading as a form of cheating

or personal corruption that prevents securities markets from being a level playing field.[159] Because this realm of enforcement abandoned the requirement of a pre-existing legal duty, Rule 10b5-2 premises insider trading liability on conduct that is not criminal, tortious or fraudulent (i.e., betraying the confidence of a family member or friend).[160] In essence, post-adoption of Rule 10b5-2, the misappropriation theory has taken great strides to develop "the federal crime of 'unethical conduct.' "[161]

Now, in the most recent decade, considering the *Panuwat* decision, it appears the SEC's efforts pull the misappropriation theory simultaneously in two directions at once. On one hand, it appears the theory may stretch to encompass broadly unethical conduct (i.e., situations such as that in *Panuwat*, where no real fiduciary duty or principal/agent relationship existed between the insider and the company whose securities are traded). This stretch reflects the SEC's mindset that "trading on nonpublic information 'has the same impact on the market and investor confidence' regardless of how traders acquire the information."[162] In line with this stretch is the idea that the *Panuwat* decision takes the insider trading prohibition further in the direction of an equal access or parity-of-information regime, at least in the context of the misappropriation theory. On the other hand, *Panuwat* also reflects the preference toward a prosecutorial focus on corporate behavior, and less of a preference for deceit within intimate, social and personal relationships, which has been a less-than-successful focus of the Commission in the past few decades.[163] As I will discuss in Part V, these two directions, although seemingly incongruent, are reconcilable through examination of the policy rationale behind the insider trading theory, as articulated by the SEC, compared to prior SCOTUS articulation. This reconciliation advances the case for why the shadow trading theory should not prevail in future litigation, but at the same time, why the SEC may believe it will.

V. The Differing Policy Rationales Behind the Insider Trading Prohibition

In keeping with the convoluted statutory, regulatory and judicial origins of the substance of the insider trading prohibition, the rationale behind the prohibition remains just as unclear. In short, the stated or implied policy rationale may differ depending upon where one looks for the answer. Broadly, is the prohibition conduct-based (akin to a parity-of-information or equal access regime) or is it relationship-based (akin to the modern day classical theory)? Is the purpose behind the ban to further overall market integrity and fairness, or is the ban intended to protect ownership interests in information? Alternatively, does the ban

serve mainly a disclosure interest, or is it tied to the larger theme of corporate governance? To track the trajectory of *Panuwat* and the misappropriation theory more broadly, the devil is in the details to understand where the shadow trading theory comes from, and how—or if—it will fit within insider trading jurisprudence.

As endorsed by the Supreme Court, the purpose of the insider trading ban is in keeping with the business property rationale—it is an owner's right to protect the use of its material nonpublic information through the mechanisms of agency and contract law (i.e., insider trading policy).[164] The SCOTUS rationale indicates the prohibition is not about fairness or fraud, but rather about conversion and theft.[165] In contrast to the SCOTUS articulation, the SEC looks at the insider trading prohibition in a different light, as evidenced by its attempt to expand the law using the shadow trading theory. The SEC views insider trading as a form of cheating or personal corruption that prevents securities markets from existing as a level playing field.[166] In context, then, Rule 10b5-2 specifically does not fit within the perceived SCOTUS insider trading narrative. Namely, the SEC's view toward communications within and between friends, social acquaintances and personal relationships wholly encapsulates ideals of fairness and prevention of fraud, not conversion or theft. Instead, Rule 10b5-2, at least in large part, focuses on enforcing the "right" to honest family and friends.[167]

In line with the SEC's policy goals and its focus on personal relationships is its movement ever closer to a parity-of-information regime, as discussed above.[168] As discussed above, SCOTUS repeatedly rejected a parity-of-information regime, and although it has endorsed the misappropriation theory and Rule 10b-5 in its own jurisprudence,[169] the Supreme Court has also been wary in recent years of attempts to expand application of insider trading liability.[170] However, as evidenced by its endorsement of Rule 14e-3 in *O'Hagan*, it is possible that the Court is not entirely closed off to a disclose-or-abstain regime, if the circumstances so require.[171] Considering these preceding points, if the *Panuwat* case were to proceed to the Supreme Court, the Court might take the opportunity to dial back its previous insider trading decisions and reject the shadow trading theory because of its movement ever closer to a parity regime, its premise upon no real fiduciary or principal/agent duty, and its inconsistency with the SCOTUS policy business property rationale for the insider trading prohibition.

Despite the preceding argument, *Panuwat* does indicate a promising path when looking at prosecutorial focus. By applying the misappropriation theory in the shadow trading context to

corporate conduct, rather than toward family and friends, the SEC makes moves toward compliance with the SCOTUS policy rationale, creating potential for an ultimate Commission win. In the recent years, one great criticism of the insider trading prohibition is that it reaches a point where trading is likely to receive different treatment, depending on whether it is conducted by professionals or nonprofessionals.[172] Instead of protecting the market from unfair advantages, including conversion and theft, the prohibition protects and promotes "the special advantages enjoyed by securities analysts and other professional investors, while increasingly penalizing the use of inside information by others."[173] One way to look at the shadow trading theory, in rebuttal to these recent criticisms, is that it forces focus to corporate conduct in a very significant way, imploring companies to reshape and regulate insider conduct through corporate policy. This is evidenced by the duty owed by Panuwat to Medivation, which stemmed from his signing of the corporate insider trading policy, characterizable as an agreement to maintain information in confidence under Rule 10b5-2(b)(1).[174] This shift in focus could itself serve as a driving force for endorsement of the shadow trading theory as it moves through the courts, because the SEC craftily ensured that while on one hand, the theory leans toward a parity regime and is premised on a pseudo-duty, it also, on the other hand, furthers articulated SCOTUS policy goals for the insider trading prohibition.

VI. Conclusion

As of now, the future of the shadow trading theory of insider trading liability remains up in the air. A shadow trading regime presents countless challenges, including delineating the contexts it will apply in, the need for clarity, and a movement toward a parity-of-information regime. However, arguments may be made on both sides of the debate as to whether the theory will survive further judicial scrutiny. While insider trading jurisprudence is no stranger to expansion of the misappropriation theory, never before has the SEC taken such great strides to recognize a pseudo-duty based upon a relationship between unrelated parties with no real connection to one another, other than the industry they work in. Further, in practice, this theory punishes merely unethical conduct, precluding trading based on all material nonpublic information, regardless of its source. However, the theory's focus on corporate conduct may prove attractive to the courts, as it falls in line with the SCOTUS business property rationale behind insider trading prohibition and furthers a focus on enforcement of corporate insider trading policies. Only time will tell whether the shadow trading theory will gain traction, signaling a new era of insider trading enforcement actions.

NOTES:

[1]See, e.g., Associated Press, *Timeline of Events in Stewart Stock Scandal*, CHICAGO TRIB. https://www.chicagotribune.com/sns-ap-martha-stewart-chronology-story.html (Mar. 4, 2005) (Martha Stewart); *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010) (Mark Cuban); *Notorious Insider Trading Cases*, CNBC (June 2, 2014) https://www.cnbc.com/2010/11/23/famous-insider-trading-cases.html (R. Foster Winans-The Wall Street Journal columnist; Ivan Boesky-arbitrageur; William Jackson and Brian Callahan-Business Week magazine; Jeffrey Skilling-Enron, among others).

[2]*SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022).

[3]See *Chiarella v. U.S.*, 445 U.S. 222, 233 (1980) ("neither the Congress nor the Commission has ever adopted a parity-of-information rule."). One exception, however, is Rule 14e-3, where the parity-of-information regime lives on only in the tender offer context. See 17 C.F.R. § 240.14e-3(a) (1998). See also Part II(C), infra.

[4]Which is, in summary, the business property rationale—it is an owner's right to protect the use of its material nonpublic information through the mechanisms of agency and contract law (i.e., insider trading policy). Baumgartel, Privileging Professional Insider Trading, 51 Ga. L. Rev. 71, 86 (2016).

[5]Referencing, of course, Mark Cuban and Martha Stewart. See *supra* note 1.

[6]Prakash, Our Dysfunctional Insider Trading Regime, 99 Colum. L. Rev. 1491, 1499 (1999).

[7]One arguable exception to this statement is the Section 16(b) short-swing profit rule, which prevents insiders from taking advantage of information of making short-term profits. 15 U.S.C.A. § 78p. In contrast to the U.S., in the United Kingdom, Germany, Canada, France, Italy and Australia, "key terms comprising the insider trading offense are delineated by statute." See Steinberg, Insider Trading Regulation — A Comparative Analysis, 37 Int'l L. 153, 163–64 (2003).

[8]Yadav, Insider Information and the Limits of Insider Trading, 56 Wash. U. J.L. & Pol'y 135, 138 (2018).

[9]See 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b-5. This is surprising because Section 10(b) authorizes the SEC's regulation of securities fraud, the code section which the SEC promulgated Rule 10b-5 thereunder.

[10]See 17 C.F.R. § 240.14e-3(a) (1998) (prohibiting, during tender offers, trading by anybody (other than bidder) who has material, non-public information that she knows (or has reason to know) came from bidder or target). See also Prakash, *supra* note 6, at 1499.

[11]Prakash, *supra* note 6, at 1499. See also 15 U.S.C.A. § 78p(b) (1994).

[12]See 18 U.S.C.A. §§ 1343, 1348, 641.

[13]As one scholar notes, two problematic theories—the classical and misappropriation theories—"arise out of the SEC's ongoing efforts to mitigate unfair informational asymmetries through the manipulation of a statute that prohibits deceptions. By cramming its goals into a statute that does not speak to its regulatory concerns, the SEC has created a regime that is nothing short of dysfunctional." Prakash, *supra* note 6, at 1491. See also Anderson, Kidd & Mocsary, Public Perceptions of Insider Trading, 51 Seton Hall L. Rev. 1035, 1037 (2021) (popular criticisms of the U.S. insider trading regime include its

characterization as a "theoretical mess," "seriously flawed," "extraordinarily vague and ill-formed," "arbitrary and incomplete," a "scandal," and even "astonishingly dysfunctional.") (quoting Henning, What's So Bad About Insider Trading Law?, 70 Bus. Law. 751, 751 (2015)).

[14]Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") provides "[i]t shall be unlawful . . . by the use of any means or instrumentality of interstate commerce or of the mails . . . 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, 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." 15 U.S.C.A. § 78j(b). Rule 10b5-1(a) defines Section 10(b)'s "manipulative or deceptive device or contrivance" to "include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information." See 17 C.F.R. § 241.10b5-1.

[15]See Baumgartel, *supra* note 4, at 74. See also *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275, 282 (2d Cir. 1975) ("[t]he party charged with failing to disclose market information must be under a duty to disclose it."); *General Time Corp. v. Talley Industries, Inc.*, 403 F.2d 159, 164 (2d Cir. 1968) (a purchaser of stock without a duty to a prospective seller has no obligation to reveal material facts.).

[16]See Baumgartel, *supra* note 4, at 74.

[17]Rule 10b-5 provides that "[i]t 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) [t]o employ any device, scheme, or artifice to defraud, [or] . . . (c) [t]o 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." 17 C.F.R. § 240.10b-5.

[18]See *Timeline: A History of Insider Trading*, N.Y. Times, https://www.nytimes.com/interactive/2016/12/06/business/dealbook/insider-trading-timeline.html (Dec. 6, 2016).

[19]Many of these common law cases either do not recognize any wrongdoing by the inside trader or find the trader liable based upon some other legal theory. See, e.g., *Iowa Lillooet Gold Mining Co. v. Bliss*, 144 F. 446, 446–48 (N.D. Iowa 1906) (finding no liability toward Mrs. Hamilton, a stenographer who had used insider information to sell her company's stock short); *Hotchkiss v. Fischer*, 136 Kan. 530 (1932) (applying fraud liability to a director who failed to inform shareholders regarding all material facts bearing on the transaction); *Brophy v. Cities Services Co.*, 31 Del. Ch. 241 (1949) (relying on restitutionary principles and the law of trusts to hold accountable a secretary of an officer and director who traded based on insider information).

[20]See Anderson, Kidd & Mocsary, *supra* note 13, at 1040–41; Bhattacharya & Daouk, The World Price of Insider Trading, 57 J. Fin. 75, 89–90 (2002) (in the first third of the 20th century, insider trading laws existed nowhere; in the second third of the century, these laws only existed in the U.S.).

[21]Anderson, Kidd & Mocsary, *supra* note 13, at 1042.

[22]40 S.E.C. 907, 911 (1961).

[23]See Anderson, Kidd & Mocsary, *supra* note 13, at 1044. See also Bainbridge,

Equal Access to Information: The Fraud at the Heart of Texas Gulf Sulphur, 71 SMU L. Rev. (2018).

[24]See Anderson, Kidd & Mocsary, *supra* note 13, at 1044 (citing 401 F.2d 833, 851 (2d Cir. 1968)).

[25]Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), 2003 O.J. (L 96) 16. See Marco Ventoruzzo, *Comparing Insider Trading in the United States and in the European Union: History and Recent Developments*, 11 ECFR 554, 556 (2014).

[26]*Id.*

[27]This includes situations as unassuming as a person picking up a draft earnings report that someone misplaced on a bus. See Anderson, Kidd & Mocsary, *supra* note 13, at 1044.

[28]See *Chiarella v. U.S.*, 445 U.S. 222 (1980).

[29]*Id.* at 224.

[30]*Id.*

[31]See *United States v. Chiarella*, 588 F.2d 1358, 1356 (2d Cir. 1978).

[32]See *id.* at 231, 233 ("the Court of Appeals, like the trial court, failed to identify a relationship between petitioner and the sellers that could give rise to a duty"—he was "a complete stranger who dealt with the sellers only through impersonal market transactions").

[33]See *Chiarella v. United States*, 445 U.S. 222 (1980).

[34]See Baumgartel, *supra* note 4, at 75.

[35]*Dirks v. SEC*, 463 U.S. 646, 655, n. 14 (1983).

[36]See Baumgartel, *supra* note 4, at 75–76.

[37]*Id.* at 76.

[38]See Anderson, Kidd & Mocsary, *supra* note 13, at 1045.

[39]*Chiarella*, 445 U.S. at 230. However, liability could attach now through Chiarella's duty to the source of the information, i.e., his employer. See *United States v. O'Hagan*, 521 U.S. 642, 651–52 (1997) ("the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.").

[40]See Part II(D), infra.

[41]See *Chiarella*, 445 U.S. at 234–35; Anderson, Kidd & Mocsary, *supra* note 13, at 1045.

[42]*Chiarella*, 445 U.S. at 233; Anderson, Kidd & Mocsary, *supra* note 13, at 1045.

[43]*Chiarella*, 445 U.S. at 232; Anderson, Kidd & Mocsary, *supra* note 13, at 1045–46.

[44]Marc I. Steinberg, Securities Regulation 819 (Carolina Academic Press, 8th ed. 2022). See also *Dirks v. SEC*, 463 U.S. 646 (1983).

[45]Steinberg, *supra* note 44.

[46]*Id.* This approach remains valid in the context of Rule 14e-3, applying only to tender offers. *Id.* The "stand in the shoes" approach also reflects that of most developed countries. *Id.* See also Steinberg, *supra* note 7, at 157.

[47]*Dirks v. SEC*, 463 U.S. 646 (1983); Steinberg, *supra* note 44, at 819.

[48]*Dirks*, 463 U.S. at 648.

[49]*Id.* at 649–50.

[50]*Id.* at 649.

[51]Which is, as discussed in Part II(A) *supra*, the "disclose or abstain" framework.

[52]*Dirks*, 463 U.S. at 655, 657–58.

[53]See Harp, Outside Trading after *Dirks v. SEC*, 18 Ga. L. Rev. 593, 613 (1984).

[54]*Dirks*, 463 U.S. at 659 (quoting *Chiarella v. United States*, 445 U.S. 222, 230, n. 12 (1980)).

[55]Harp, *supra* note 53, at 613.

[56]*Id.* at 614.

[57]*Id.*; *Dirks*, 463 U.S. at 662–63.

[58]*Dirks*, 463 U.S. at 662–65. A direct or indirect personal benefit from the disclosure, such as a reputational benefit that will translate into future earnings, is akin to "selling the information to its recipient for cash, reciprocal information, or other things of value for himself." Brudney, Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws, 93 Harv. L. Rev. 324, 348 (1979).

[59]*Dirks*, 463 U.S. at 659.

[60]*Id.* at 665; Harp, *supra* note 53, at 615.

[61]*Dirks*, 463 U.S. at 665–67; Harp, *supra* note 53, at 615.

[62]*Dirks*, 463 U.S. at 667; Harp, *supra* note 53, at 615.

[63]*Dirks*, 463 U.S. at 670–71 (Blackmun, J., dissenting).

[64]*Id.*

[65]17 C.F.R. § 240.14e-3 (2003); Steinberg, *supra* note 44, at 833. Rule 14e-3 was adopted in Securities Exchange Act Release No. 17120, Fed. Sec. L. Rep. (CCH) ¶ 82,646 (Sept. 4, 1980). The Supreme Court affirmed Rule 14e-3's validity in *United States v. O'Hagan*, 521 U.S. 642 (1997).

[66]Steinberg, *supra* note 44, at 833–34; 17 C.F.R. § 240.14e-3(a), (d) (2003); Steinberg, *supra* note 7, at 157.

[67]Steinberg, *supra* note 44, at 833–34; 17 C.F.R. § 240.14e-3(d) (2003); Steinberg, *supra* note 7, at 157.

[68]*United States v. O'Hagan*, 521 U.S. 642, 675 (1997).

[69]*Id.* at 676.

[70]*Id.*

[71]Importantly, however, the composition of today's Court is different than the Court that sanctioned Rule 14e-3 in *United States v. O'Hagan* (authored by Justice Ginsburg). See *O'Hagan*, 521 U.S. at 646. It is also important to note the inequity of Rule 14e-3 with other areas of insider trading law. Two individuals may engage in identical conduct, but where one subject transaction takes the form of a merger, that individual may retain their profits legally, whereas the other would be subject to imprisonment if that transaction were structured as a tender offer. Steinberg, *supra* note 44, at 810, 836.

[72]*Chiarella v. United States*, 445 U.S. 222, 235 (1980); Anderson, Kidd & Mocsary, *supra* note 13, at 1048. At that time, the Court did not rule on the

merits of this argument. *Chiarella*, 445 U.S. at 236.

[73]*United States v. O'Hagan*, 521 U.S. 642 (1997).

[74]*Id.* at 647.

[75]*Id.* at 648.

[76]The classical theory applies to "officers, directors, and other permanent insiders of a corporation" as well as to "attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation." *Dirks v. SEC*, 463 U.S. 646, 655, n. 14 (1983). See also Anderson, Kidd & Mocsary, *supra* note 13, at 1050.

[77]*O'Hagan*, 521 U.S. at 652; Prakash, *supra* note 6, at 1492.

[78]*O'Hagan*, 521 U.S. at 653–54; Anderson, Kidd & Mocsary, *supra* note 13, at 1050.

[79]See Tipper-Tippee Liability, *supra* Part II(C); *Dirks v. SEC*, 463 U.S. 646 (1983) (adopting a "personal benefit" requirement in the insider trading analysis). But see 17 C.F.R. § 240.14e-3 (2003); Steinberg, *supra* note 44, at 833 (discussing the SEC's adoption of Rule 14e-3, which does away with the "personal benefit" requirement in the tender offer context). See also Anderson, Kidd & Mocsary, *supra* note 13, at 1051.

[80]See Classical Theory, *supra* Part II(B); *Chiarella v. United States*, 445 U.S. 222 (1980). See also Anderson, Kidd & Mocsary, *supra* note 13, at 1051.

[81]See Misappropriation Theory, *supra* Part II(D); *United States v. O'Hagan*, 521 U.S. 642 (1997). See also Anderson, Kidd & Mocsary, *supra* note 13, at 1051.

[82]See Anderson, Kidd & Mocsary, *supra* note 13, at 1051–52.

[83]*Id.* at 1052.

[84]See, e.g., Leib, Friends as Fiduciaries, 86 Wash. U. L. Rev. 665, 672 (2009) (summarizing cases where a fiduciary-like relationship is implied as those where "one party dominates, is superior to, or is especially vulnerable to another party").

[85]See Smith, The Critical Resource Theory of Fiduciary Duty, 55 Vand. L. Rev. 1399, 1413–14 (2002). See e.g., *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176–77 (Tex. 1997) ("An informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another . . . but not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship."); *H-B Ltd. P'ship v. Wimmer*, 257 S.E.2d 770, 773 (Va. 1979) ("A fiduciary relationship exists . . . when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.").

[86]Leib, *supra* note 84, at 672. For example, in 2001 then-Judge Sotomayor explained qualifying relationships are "marked by the fact that the party in whom confidence is reposed has entered into a relationship in which he or she acts to serve the interests of the party entrusting him or her with such information." See *United States v. Falcone*, 257 F.3d 226, 234–35 (2d Cir. 2001).

[87]See 17 C.F.R. § 240.10b5-2 (2016); Steinberg, *supra* note 44, at 810.

[88]As opposed to a duty of "trust *and* confidence" required by the Supreme Court. See *United States v. Chiarella*, 445 U.S. 222, 228 (1980).

[89]Baumgartel, *supra* note 4, at 94.

[90]See, e.g., *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010) (recognizing applicability of Rule 10b5-2 in a business setting); *United States v. Chow*, 933 F.3d 125 (2d Cir. 2021) (applying Rule 10b5-2 to characterize Chow as a temporary insider because he entered into a confidentiality agreement with a company his fund planned to acquire). See also infra note 95.

[91]See 17 C.F.R. § 240.10b5-2 (2016); Steinberg, *supra* note 44, at 810. Note that while the SEC does not use the word "friendship," the nature of the relationship described in Rule 10b5-2(b)(2) is that of friends, who over the course of time, voluntarily associate, sharing interests, activities, and confidences, with certain reciprocal expectations. See Leib, Friendship & the Law, 54 UCLA L. Rev. 631, 642–45 (2007).

[92]See *United States v. O'Hagan*, 521 U.S. 642 (1997).

[93]Steinberg, *supra* note 44, at 816.

[94]*United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991).

[95]*Id.* at 567–68.

[96]Steinberg, *supra* note 44, at 816 (highlighting the alleged absurdity of the law's "giving greater sanctity to a shareholder's relationship with a director of a publicly held company . . . than to one's spouse" prior to adoption of Rule 10b5-2.); Perino, Real Insider Trading, 77 Wash. & Lee L. Rev. 1647, 1713 (2020) (asserting evidence in relationship-based misappropriation cases is often thin and allegations conclusory).

[97]See Baumgartel, *supra* note 4, at 95–97, 99. See, e.g., *United States v. McGee*, 763 F.3d 304, 308–09 (3d Cir. 2014) (alleged misappropriation after confidences shared between two friends attending Alcoholics Anonymous meetings together); United States v. Durant, No. 12 Cr. 887 (S.D.N.Y. Nov. 19, 2014); *SEC v. Conradt*, 947 F. Supp. 2d 406, 411 (S.D.N.Y. 2013) (sensitive information revealed between two friends who bonded over shared common interests, a common cultural background, and living far from their home countries); United States v. Valvani, No. 16 Cr. 412 (S.D.N.Y. June 14, 2016) (individual allegedly misappropriated information from a former colleague with whom he exchanged confidences relating to "careers, families, relationships, and plans for the future"); *SEC V. McPhail, No. 14-12958-RWZ*, 2015 WL 5749449, at *1 (D. Mass. Sept. 30, 2015) (information misappropriated by defendant from a "social acquaintance" with whom he shared a "love of golfing").

[98]Baumgartel, *supra* note 4, at 97.

[99]*Id.*

[100]See Perino, *supra* note 96, at 1713–15.

[101]See SEC v. Panuwat, No. 4:21-cv-06322 (N.D. Cal. Aug. 17, 2021); *SEC Charges Biopharmaceutical Company Employee with Insider Trading*, SEC Press Release No. 2021-155 (Aug. 17, 2021).

[102]SEC v. Panuwat, No. 21-cv-06322-WHO, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022).

[103]See *U.S. District Court California Northern District (San Francisco) Civil Docket for Case #: 3:21-cv-06322-WHO* (last visited May 5, 2023).

[104]See Brian Jacobs, *Jumping at Shadows: The Implications of SEC v. Panuwat*, Forbes, https://www.forbes.com/sites/insider/2022/01/26/jumping-at-shadows-the-implications-of-sec-v-panuwat/ (Jan. 26, 2022) (quoting *United States v. O'Hagan*, 521 U.S. 642, 652 (1997)).

[105]Jay A. Dubow, Ghillaine A. Reid & Meredith Sherman, *Securities &*

Exchange Commission Tests New Insider Trading Theory, Troutman Pepper, https://www.troutman.com/insights/securities-and-exchange-commission-tests-new-insider-trading-theory.html (Aug. 26, 2021).

[106]See Jason M. Daniel et al., New "Shadow Insider Trading" SEC Enforcement Action—Four Lessons for Private Fund Managers, Akin Gump, https://www.akingump.com/en/news-insights/new-shadow-insider-trading-sec-enforcement-action-four-lessons-for-private-fund-managers.html (Aug. 23, 2021).

[107]See Complaint at ¶ 1, *SEC v. Matthew Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022) (No. 4:21-cv-06322) (Aug. 17, 2021).

[108]*Id.* at ¶ 2.

[109]The benefit of short-term out-of-the-money call options is that they "were cheaper than other options that didn't require a significant share price jump to substantially increase in value." Dubow, Reid & Sherman, *supra* note 105.

[110]Complaint at ¶ 4, *SEC v. Matthew Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022) (No. 4:21-cv-06322) (Aug. 17, 2021).

[111]*Id.*

[112]*Id.* at ¶ 5.

[113]*Id.* at ¶ 20.

[114]*Id.*

[115]See 17 C.F.R. § 240.10b5-2(1) (2016); *SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306, at *6 (N.D. Cal. Jan. 14, 2022).

[116]With respect to this breach of duty claim, the court examined the language of the company's insider trading policy, which prohibited trading in "the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers or competitors." *SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306, at *6 (N.D. Cal. Jan. 14, 2022). The court interpreted the provision to the effect that "including" did not limit the policy's applicability to only the types of companies listed, but instead illustrated the types of companies it covered. *Id.* See also Caitlyn Campbell & Paul Helms, *SEC Survives Initial Challenge in First Enforcement Action Alleging "Shadow Trading,"* Harvard Law School Forum on Corporate Governance, https://corpgov.law.harvard.edu/2022/02/23/sec-survives-initial-challenge-in-first-enforcement-action-alleging-shadow-trading/ (Feb. 23, 2022).

[117]Complaint at ¶¶ 39–41, *SEC v. Matthew Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022) (No. 4:21-cv-06322) (Aug. 17, 2021).

[118]Defendant's Reply in Support of his Motion to Dismiss at *3, *SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022) (No. 3:21-cv-06322-WHO) (Dec. 20, 2021).

[119]*Id.*

[120]See *SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306 (N.D. Cal. Jan. 14, 2022). However, surviving a motion to dismiss is not the most accurate procedural mechanism to indicate the long-term viability of a novel, fact-dependent theory of liability such as shadow trading. See Jacobs, *supra* note 104. As of April 14, 2023, the most recent docket entry in the *Panuwat* case is an order setting a settlement conference, scheduled for September 7, 2023 in San Francisco. See *U.S. District Court California Northern District (San Francisco) Civil Docket for Case #: 3:21-cv-06322-WHO* (last visited May 5, 2023).

[121]See Antonia Apps, George Canellos & Isabel Pitaro, *SEC v. Panuwat: Shadow Trading Under Insider Trading Law*, NYU Program on Corporate Compliance and Enforcement, https://wp.nyu.edu/compliance_enforcement/2022/01/19/sec-v-panuwat-shadow-trading-under-insider-trading-law/ (last visited March 20, 2023); "Shadow Trading" was discussed first in a law review article, claiming that this type of trading had gained prominence in recent years. See Mehta, Reeb & Zhao, Shadow Trading, 96 The Acct. Rev. 367 (2021).

[122]See Barron, Some Validation of the "Shadow Insider Trading" Theory, 50 Sec. Reg. L. J. 2 (Summer 2022).

[123]As categorized by Stephen J. Crimmins, *"Shadow Trading" Becomes Insider Trading*, CLS Blue Sky Blog (Mar. 28, 2022).

[124]Miller, Horowitz & Berk, 'Shadow Trading' and *'SEC v. Panuwat'*: An Expansive Trend in Insider Trading Enforcement?, N.Y. L. J., https://www.gtlaw.com/en/insights/2022/3/published-articles/shadow-trading-and-sec-v-panuwat-an-expansive-trend-in-insider-trading-enforcement (Mar. 2, 2022).

[125]In this aspect, compare *Panuwat* to the expert-networking cases of the 2010s, where "company insiders, who moonlighted as consultants for expert-networking firms, were prosecuted for tipping confidential information about their companies' suppliers or purchasers to hedge fund traders who used the information to trade in the securities of the other companies." See Apps, Canellos & Pitaro, *supra* note 121. However, "a critical difference between the expert-networking cases and the shadow trading in *SEC* v. *Panuwat* is that the companies in the expert-networking cases had entered into confidentiality agreements with their suppliers or purchasers." *Id.* This differs from Medivation's broad insider trading policy because of the degree of deniability—Medivation's policy did not specifically list Incyte, whereas the company insiders of the expert-networking cases entered into confidentiality agreements with specific suppliers and purchasers.

[126]*Id.*

[127]*SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306, at *6 (N.D. Cal. Jan. 14, 2022).

[128]See *id.*

[129]See Apps, Canellos & Pitaro, *supra* note 121. For example, just-announced financial results of one company are often predictors of soon-to-be-announced results of other companies in the same industry, serving as a trigger to investors that the stock value of any particular company might increase. *Id.* The question then is whether "anyone with knowledge of unannounced financial performance of one company thereby prohibited from transacting in the securities of other companies in the same industry or ETFs that track all stocks in the industry?" *Id.*

[130]The court excluded this analysis because in the court's view, these hypotheticals were foreclosed by Medivation's express policy. See *Panuwat*, 2022 WL 633306, at *5–6; Apps, Canellos & Pitaro, *supra* note 121.

[131]*Id.* See also Part II(C), discussing *Dirks v. SEC*, 463 U.S. 646 (1983) and tipper-tippee liability.

[132]For example, the Title 18 securities fraud criminal statutes, discussed above in Part II(A). See 18 U.S.C.A. §§ 1343, 1348, 641.

[133]See Barron, The SEC Attacks *"Shadow Insider Trading,"* 50 Sec. Reg. L. J. (Spring 2022); *Some Validation of the "Shadow Insider Trading" Theory*, *supra* note 122.

[134]*Some Validation of the "Shadow Insider Trading" Theory*, *supra* note 122.

[135]*SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306, at *4 (N.D. Cal. Jan. 14, 2022).

[136]*Id.*

[137]*Id.* at *7 (citing § 240.10b-5).

[138]See discussion of Rule 10b5-1(a), *supra* note 14. See also *id.* at *4; 17 C.F.R. § 240.10b5-1(a). It only requires that the information be material and nonpublic. See Panuwat, WL 633306 at *4; § 240.10b5-1(a).

[139]See Miller, Horowitz & Berk, *supra* note 124 (citing Panuwat, WL 633306 at *4 (emphasis added)).

[140]Panuwat, WL 633306 at *8.

[141]Jacobs, *supra* note 104.

[142]*Id.*

[143]See Miller, Horowitz & Berk, *supra* note 124.

[144]See Crimmins, *supra* note 123.

[145]Although Panuwat traded based on key information (that Pfizer, Inc. planned to acquire Medivation) as discussed above in note 126, just-announced financial results of one company are often predictors of soon-to-be-announced results of other companies in the same industry, serving as a trigger to investors that the stock value of any particular company might increase. See Apps, Canellos & Pitaro, *supra* note 121. This triggers considerations for issuers, broker dealers, banks, asset managers, and investment advisors beyond what existed pre-*Panuwat*.

[146]*Id.*

[147]See Anderson, Kidd & Mocsary, *supra* note 13, at 1044.

[148]As mentioned above, the parity-of-information regime lives on in Rule 14e-3 specifically in the tender offer context. See Part II(C), *supra*. See also Steinberg, *supra* note 44, at 833–34. *Chiarella v. U.S.*, 445 U.S. 222, 233 (1980) ("neither the Congress nor the Commission has ever adopted a parity-of-information rule.").

[149]See Crimmins, *supra* note 123.

[150]*Id.*

[151]See 17 C.F.R. § 240.10b5-2(b)(1) to (3) (2016).

[152]See Baumgartel, *supra* note 4, at 90–91.

[153]*Id.* at 91; 947 F.2d 551, 567 (2d Cir. 1991).

[154]Baumgartel, *supra* note 4, at 92; *Chestman*, 947 F.2d at 567; *Walton v. Morgan Stanley & Co.*, 623 F.2d 797, 799 (2d Cir. 1980).

[155]327 F.3d 1263 (11th Cir. 2003).

[156]*Id.* at 1273.

[157]See Part II(D), *supra*.

[158]See 17 C.F.R. § 240.10b5-2(b)(1) (2016). Note, however, that the SEC has heavily used Rule 10b5-2(b)(1) in the business setting. See, e.g., *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010); *United States v. Chow*, 933 F.3d 125 (2d Cir. 2021). As seen in the *Panuwat* case, an agreement to maintain information in confidence is analogous to a corporate insider trading policy. See *SEC v. Panuwat, No. 21-cv-06322-WHO*, 2022 WL 633306, at *5 (N.D. Cal. Jan. 14, 2022).

[159]See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (indicating that the SEC perceives the desire of investors as being on a level playing field with market insiders).

[160]See Baumgartel, *supra* note 4, at 99.

[161]*Id.* at 100 (citing *Sorich v. United States*, 555 U.S. 1204, 1205–06) (2009) (Scalia, J., dissenting from denial of certiorari).

[162]*Id.* at 101 (citing Selective Disclosure and Insider Trading, Exchange Act Release Nos. 33-7787, 34-42259, 64 Fed. Reg. 72,590, 72,603 (Dec. 28, 1999)).

[163]Also as evidenced by Rule10b5-2(b)(1), specifying a duty of trust or confidence exists whenever a person agrees to maintain information in confidence (i.e., a NDA or corporate insider trading policy). See 17 C.F.R. § 240.10b5-2(b)(1) (2016). See also *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010); *United States v. Chow*, 933 F.3d 125 (2d Cir. 2021).

[164]Baumgartel, *supra* note 4, at 86.

[165]See, e.g., *United States v. Chestman*, 947 F.2d 551, 576–78 (2d Cir. 1991) (Winter, J., dissenting in part and concurring in part) (explaining the business property rationale for the insider trading prohibition . . . "theft rather than fraud or deceit, seems the gravamen of the prohibition"); *Carpenter v. United States*, 484 U.S. 19, 26 (1987) ("Confidential business information has long been recognized as property."); Bainbridge, Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud, 52 SMU L. Rev. 1589, 1606–08 (1999) (there is a "growing consensus that the federal insider trading prohibition is more easily justified as a means of protecting property rights in information").

[166]See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716 (Aug. 24, 2000) (indicating that the SEC perceives the desire of investors as being on a level playing field with market insiders).

[167]As discussed above, this statement generally excludes Rule 10b5-2(b)(1), which protects an agreement not to trade. See 17 C.F.R. § 240.10b5-2(b)(1) (2016); *SEC v. Cuban*, 620 F.3d 551 (5th Cir. 2010); *United States v. Chow*, 933 F.3d 125 (2d Cir. 2021).

[168]See Part III(B)(3), *supra*.

[169]See *United States v. O'Hagan*, 521 U.S. 642 (1997).

[170]See *U.S. v. Blaszczak*, 56 F.4th 230 (2d Cir. 2022) (rev'd on other grounds) (denying the application of insider trading laws to certain government information). For more information, see Altman, et al., *Blaszczak II: 2nd Circuit Reverses Course and Overturns Insider Trading Convictions*, Akin Gump, https://www.akingump.com/en/insights/alerts/blaszczak-ii-2nd-circuit-reverses-course-and-overturns-insider-trading-convictions#authors (Feb. 1, 2023).

[171]See 17 C.F.R. § 240.14e-3 (2003); *United States v. O'Hagan*, 521 U.S. 642, 675 (1997). See also Part II(C) *supra* for further discussion on Rule 14e-3.

[172]See Baumgartel, *supra* note 4, at 115.

[173]*Id.* at 116. One form of permissible insider trading in the corporate realm includes structural insider trading—a seemingly analogous practice to corporate insider trading, with the one difference being that it is entirely legal. Yadav, *supra* note 8, at 136. "Structural insiders" refers to those actors within institutions serving as the mechanisms by which securities are bought and sold, who enjoy "first sight of information coming from exchanges and the ability to react to and change prices before others on the 'outside' " can. *Id.* See also Yadav, Insider Trading and Market Structure, 63 UCLA L. Rev. 968, 992–1002 (2016)

for a more in-depth discussion.

[174]See 17 C.F.R. § 240.10b5-2(b)(1) (2016).

© 2023 Thomson Reuters