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PROTECTING THE INTEGRITY OF THE SECURITIES MARKET: RECENT AMENDMENTS TO THE LAW RELATING TO INSIDER TRADING

Securities Industry (Amendment) Act No 2 of 2000

I. INTRODUCTION

ON 29 October 1998, the Corporate Finance Committee,[1] which had been formed by the Financial Sector Review Group to make recommendations with the view of making Singapore a key financial centre for international corporate fundraising activity, issued its report. In its report, the Corporate Finance Committee recommended, *inter alia*, that amendments be made to Singapore's insider trading[2] laws to strengthen the effectiveness of such laws.[3] In particular, the following suggestions were made:[4]

(a) A civil right of action for insider trading, which is independent of a criminal conviction, should be created to enable persons to obtain compensation for losses suffered as a result of insider trading.

(b) The plaintiff must show that the trading was contemporaneous with the insider trading, but not that the counterparty who dealt with the plaintiff's shares was the insider.

1 The Corporate Finance Committee was chaired by Mr Lim Yong Wah. The members of the committee were Mr Eric Ang, Mr Boon Swan Foo, Mr Charles Lim, Mr Ng Boon Yew, Mr Sum Soon Lim, Mr Tan Cheng Han, Mr Tan Keng Boon, Mr Tan Kim Kway, Dr Tommy Tan, Mr Teng Cheong Kwee, Mr Wong Nang Jang, Mr Wong Ngit Liong, and Mr Lucien Wong.

2 The terms 'insider trading' and 'insider dealing' are often used interchangeably and are so used in this article.

3 For a summary of the reasons why insider trading should be deterred, see M Chew, 'The Adequacy and Efficacy of Civil Remedies for Insider Trading: A Comparative Critique' [1998] SJLS 331, at 333-339.

4 Recommendation 10 of the Corporate Finance Committee's report.

(c) The securities regulator should be allowed to intervene in or commence civil actions for insider trading.

(d) The insider trader should be liable for all losses suffered by all contemporaneous counterparties, up to a certain maximum value. If the losses claimed are more than the maximum value claimable, the maximum value is to be distributed to the claimants on a *pro rata* basis. Where the civil action is pursued by the securities regulator, it should be allowed to retain the damages awarded unless and until valid claims are made against it by investors.

On 23 November 1999, the Securities Industry (Amendment) Bill[5] to amend the Securities Industry Act[6] was introduced in Parliament. The said Bill proposed, *inter alia*, amendments to the law relating to insider trading in Singapore. These amendments were passed by Parliament on 17 January 2000[7] and came into force on 6 March 2000. The amendments largely give effect to the above recommendations made by the Corporate Finance Committee.

II. Criminal and Civil Penalties

Previously, section 104 of the Act provided that a person who was convicted of an offence under Part IX of the Act[8] could be fined an amount not exceeding $50,000 or to imprisonment for a term not exceeding 7 years.[9] In the case of a body corporate convicted of such an offence, the body corporate would be liable on conviction to a fine not exceeding $100,000.[10] These amounts were relatively low compared to the profits that might be made by an insider trading on the basis of inside information.[11] Under the Amendment Act, section 104 of the Act is repealed and a new section 104 substituted in its place. The new section 104 provides that the maximum fines are $250,000 in the case of a person who is not a body corporate, and $500,000 for a body corporate. The maximum term of imprisonment for a person who is not a body corporate remains at 7 years.

5 Bill No 40/99.

6 Cap 289 (1985 Rev Ed) (hereinafter "the Act").

7 Securities Industry Amendment Act 2000 (No 2 of 2000) (hereinafter "the Amendment Act").

8 The offences under Part IX of the Act include false trading and market rigging transactions (s 97), and stock market manipulation (s 98), and are not limited to insider trading.

9 S 104(a).

10 S 104(b).

11 Generally, inside information is information that is not generally available but, if it was, would be likely materially to affect the price of a company's securities, see s 103 of the Act.

More significant though is the newly created civil penalty for insider dealing. Under the new section 104A(1), whenever it appears to the Authority[12] that any person has contravened section 103 of the Act,[13] the Authority may, with the consent of the Public Prosecutor, bring an action in a court against him to seek an order for a civil penalty in respect of that contravention.[14] If the court is satisfied on a balance of probabilities that the person has contravened section 103(1),[15] (2),[16] (3)[17] or (6),[18] the court may make an order against him for the payment of a civil penalty. The civil penalty shall comprise a sum not exceeding 3 times the amount of the profit that the person gained, or the amount of the loss that he avoided. Alternatively, if the 'triple damages' amounts to less than $50,000 in the case of a person that is not a body corporate, or is less than $100,000 in the case of a body corporate, these larger amounts will be imposed as the civil penalty.[19]

Where the court is satisfied on a balance of probabilities that section 103(4)[20] or (5)[21] has been contravened, the court may order the party concerned to pay a civil penalty of a sum not less than $50,000 and not more than $250,000.[22] The civil penalties which are imposed shall be paid to the Authority[23] and if the person fails to pay the amount imposed on him, the Authority may sue for and recover the civil penalty as though it was a judgment debt due to the Authority.[24]

12 The Monetary Authority of Singapore: see s 2 of the Act.

13 S 103 of the Act comprises the statutory provisions prohibiting insider trading.

14 S 26 of the Amendment Act also introduced a new s 39A to the Monetary Authority of Singapore Act (Cap 186, 1985 Rev Ed). This provision allows a legal officer of the Authority who has been admitted as an advocate and solicitor to appear in any civil proceedings on behalf of the Authority under the Futures Trading Act or the Securities Industry Act.

15 A contravention arises where a person who is, or at any time in the preceding 6 months has been, connected with a body corporate deals in securities of that body corporate when in possession of price sensitive information that is not generally available.

16 A contravention under this sub-section arises where a person in possession of price sensitive information that is not generally available about another company by virtue of being connected to a body corporate deals in the securities of the first-mentioned company.

17 This sub-section prevents certain persons who have received price sensitive information (known as 'tippees') from dealing in securities on the basis of such information.

18 This sub-section prohibits a body corporate from dealing in securities when any of its officers is precluded from doing so by virtue of sub-sections (1), (2) or (3).

19 S 104A(2).

20 This sub-section is contravened where a person prohibited from dealing in securities by virtue of s 103(1), (2) or (3) procures another person to do so.

21 This sub-section prohibits communication of price sensitive information in certain circumstances.

22 S 104A(3).

23 S 104A(4).

24 S 104A(5).

Section 104A is modelled on section 21A of the United States Securities Exchange Act of 1934[25] (hereinafter "the SEA"). This section provides that the Securities Exchange Commission (hereinafter "SEC") may bring an action for insider trading against a person who has traded in securities on the basis of "material, non-public information", or who has communicated such information, in breach of the provisions of the SEA.[26] The amount of the penalty shall be determined by the court in the light of the facts and circumstances, but shall not exceed three times the profit gained or loss avoided as a result of the unlawful dealing.[27] The penalty shall be payable to the Treasury of the United States.[28] No action may be brought more than 5 years after the date of the purchase or sale of the securities.[29]

Section 104A is a significant departure in legislative approach in Singapore. While compensation orders may be made under section 401 of the Criminal Procedure Code,[30] such orders will only be made against a person if he has been convicted of an offence. The compensation ordered is payable to a victim of the offence and not to the State. Another difference is that section 104A does not appear to be founded on the principle of compensation.[31] Rather, the rationale behind section 104A appears to be deterrence. Accordingly, 'triple damages' may be awarded to the Authority and this resembles a fine. In truth, the claim for a civil penalty is a quasi-criminal action that does not result in a conviction by virtue of the lower standard of proof. This is borne out by the fact that the new section 104B(2) provides that an action under section 104A shall not be commenced if the person has been convicted or acquitted in criminal proceedings for the contravention of section 103, except where he has been acquitted on the ground of the withdrawal of the charge against him.[32] An action under section 104A shall also be stayed after criminal proceedings under section 104 have been

[25] The text of s 21A of the SEA can be found at the following Internet site: The Center for Corporate Law, University of Cincinnati College of Law: http://www.law.uc.edu/CCL/34Act/sec21A.html (data at least current through 18 August 1999).

[26] S 21A (a)(1). It should be noted that the SEC may also bring an action against a person who, at the time of the violation, directly or indirectly controlled the person who committed such violation.

[27] S 21A (a)(2).

[28] S 21A (d)(1).

[29] S 21A (d)(5).

[30] Cap 68 (1985 Rev Ed).

[31] Although arguably, harm is done to the integrity of the market and the amount that may be awarded is intended to compensate for this.

[32] It should also be noted that an action under s 104A shall not be commenced after the expiration of 6 years from the date of the contravention of s 103, see the new s 104B(1).

commenced. The stayed proceedings may thereafter be continued only if the person has been discharged and the discharge does not amount to an acquittal, or the charge has been withdrawn.[33] In addition, the new section 104(2) provides that no criminal proceedings shall be instituted for a contravention of section 103 of the Act after a court has imposed a civil penalty under section 104A in respect of that contravention.[34]

III. Civil Liability for Insider Trading

Prior to the passing of the Amendment Act, section 105(1) and (2) of the Act provided that a person who has been convicted of an offence under Part IX of the Act shall be liable to pay compensation to any person who has purchased from, or sold securities to, the convicted person, and who has suffered a loss by reason of the difference in the price of the securities purchased or sold because of the contravention. This is different from the civil penalty discussed above as it is payable only to the person who dealt with the insider and who has therefore suffered a loss. The liability to compensate also only arose upon a conviction being secured. It is submitted respectfully that this was a most peculiar provision in that it made a civil claim conditional upon a successful criminal prosecution. If it is considered desirable for a victim to be able to obtain compensation, he should be able to do so regardless of whether there has been a criminal conviction.[35] There are, after all, numerous instances where a given set of facts gives rise to both civil and criminal actions[36] without making the former conditional upon the latter, although the standard of proof is different for each.

The potential claim for compensation was also impractical for two reasons. Firstly, an action by the person who had suffered the loss could not be commenced after the expiration of two years from the date of completion of the transaction in which the loss occurred. This 'limitation period' is extremely short. As the civil claim was conditional upon a criminal con-

[33] S 104B(3).

[34] Although the Amendment Act does not provide that no criminal proceedings may be instituted if an action brought under s 104A has been dismissed, it is suggested that this ought to be the case on a purposive interpretation of the proposed amendments. As a matter of practice, it will also be very difficult to secure a criminal conviction where a civil claim has been dismissed unless new evidence arises. As suggested, however, a subsequent criminal prosecution should not be possible as a matter of principle.

[35] The decision whether to commence a criminal prosecution is a matter for the Attorney-General.

[36] For example, assault and battery in tort and ss 319, 350 and 351 of the Penal Code (Cap 224, 1985 Rev Ed).

viction, the period within which the civil claim may be brought may have expired by the time a conviction was secured. Furthermore, a criminal prosecution may not have been commenced because the authorities were not confident of establishing the offence beyond reasonable doubt. This should not affect the ability of a potential claimant to commence a civil claim and to prove it on a balance of probabilities.[37] Secondly, where a transaction has taken place through a 'faceless' exchange, a person will not know if he was the counterparty to the transaction that the insider has been convicted of. This poses an intractable problem to a civil claim being brought.[38] It has therefore been described as a "dead letter".[39]

Under the Amendment Act, section 105(1) is to be amended to exclude a contravention under section 103 of the Act.[40] As section 103 of the Act comprises the statutory provisions prohibiting insider dealing, the right to commence a civil action for insider dealing will no longer be conditional upon a criminal conviction for insider dealing being obtained.[41]

The new section 104C(1) makes this explicit. It provides that a person who has acted in contravention of section 103(1), (2), (3), or (6) shall, whether or not he has been convicted or had a civil penalty imposed on him in respect of that contravention, be liable to pay compensation to certain persons. The persons who are entitled to make a claim for compensation[42] are those who contemporaneously with the insider dealing had either purchased or sold (as the case may be) securities of the same description as those comprised in the insider dealing in question. In addition, section 104C(1)(b) provides that the claimants must have suffered loss by reason of the difference between the price at which the securities were dealt in, and the price that they would have been likely to have been so dealt in if the contravention had not occurred.

The language used in section 104C(1)(b) gives rise to a problem in that on a literal interpretation, there is unlikely to be any difference in the price at which the securities were dealt in and the price at which the securities would have been likely to have been so dealt in if the contravention had not occurred. This is because the contravention does not arise merely from the failure to disclose price sensitive information. Indeed, companies are

[37] Also see the report of the Corporate Finance Committee, at para 3.5.1.

[38] *Ibid*, at para 3.5.2.

[39] Woon, *Company Law* (2nd ed, 1997), at 566; see also M Chew [1998] SJLS 331, at 346-347.

[40] The 'limitation period' will also be extended from 2 years to 6 years.

[41] The requirement for a criminal conviction is still a pre-condition for a civil action based on the other sections in Part IX of the Act. It is suggested that this pre-condition should be removed altogether eventually.

[42] Referred to in this section as well as the new ss 104D and 104E as claimants.

generally entitled not to disclose such information until such time as they may think is appropriate. The contravention of the insider trading provisions arises where there has been a dealing in securities by an insider in possession of non-public price sensitive information. This being the case, assuming the contravention had not occurred because the insider did not enter the market, other trades would have taken place and the price of these trades would both indicate the price at which the securities were dealt in, and the price if the contravention had not occurred. No loss can therefore be established as there would be no difference between both sets of prices. This would render the clear intention of the legislation otiose. Accordingly, it is suggested that section 104C(1)(b)(ii) be interpreted to mean the likely price at which the securities would have been traded if the price sensitive information had been disclosed to the public at the time the insider sold or purchased securities in the market.

The concept of contemporaneous dealing is borrowed from the United States as section 104C(1) is modelled after section 20A(a) of the SEA.[43] Although what amounts to contemporaneous dealing is not defined, the word "contemporaneous" means "[b]elonging to the same time or period; existing or occurring at the same time".[44] The adverb "contemporaneously" means "[a]t or during the same time".[45] Taken literally, therefore, this concept allows a claimant to claim compensation without having to show that the claimant was the counterparty to the securities purchased or sold by the insider. All that the claimant will need to establish is that he dealt in securities at the same time or during the same period as the insider. The Corporate Finance Committee had recommended that this concept be adopted to get around the problem of identification where the securities dealing was effected through a market where the identity of the other party is generally not known, as is the case with transactions effected on the Singapore Exchange.[46]

The amount of compensation that the insider is liable to pay the claimant is the amount of the loss suffered by the claimant.[47] However, as the amount of securities dealt in by persons who dealt during the same time or period that the insider dealt in may far outnumber the number of securities dealt in by the insider, there must be some limit to the insider's liability, particularly since the claim is civil in nature. Accordingly, the maximum amount which

[43] Internet: http://www.law.uc.edu./CCL/34Act/sec20A.html (data at least current through 18 August 1999).
[44] See *Oxford English Dictionary* (2nd ed), Vol 3, at 812.
[45] *Ibid*, at 813.
[46] Report of the Corporate Finance Committee, at para 3.5.2.
[47] The new s 104C(2).

may be recovered from the insider is limited to the profit gained or the loss avoided by the insider, after deducting all amounts of compensation that the insider had previously been ordered by a court to pay to other claimants under section 104C because of the same contravention.[48] While it is reasonable to set a limit, the practical effect of it is that a claimant who resorts to litigation more swiftly than other potential claimants derives a benefit.

No action under section 104C may be brought without the leave of the court after the commencement of criminal proceedings under section 104, or the commencement of an action under section 104A.[49] Where an action under section 104C is pending at the commencement of criminal proceedings under section 104, or at the commencement of a claim for a civil penalty under section 104A, the section 104C action shall be stayed.[50] Thereafter, it may not continue except with the leave of the court. Leave may not be granted in the circumstances set out in the new section 104D(3) and this will be discussed later in this article.

While section 104C is a significant improvement over the present section 105, its practical utility is uncertain. Although a claimant does not have to prove that he was the actual person that the insider traded in securities with, a more fundamental impediment exists. A person who has a potential claim will generally not even know that a contravention of the insider trading provisions has taken place. Notice of a potential contravention will probably only emerge if a criminal prosecution is brought, or a civil penalty is sought under section 104A.[51] However, as a result of the new section 104D(1) and (2), a civil action under section 104C cannot commence or continue without the leave of the court once criminal proceedings under section 104 have been commenced, or after the commencement of an action under section 104A. For reasons that will be discussed later in this article, it is unlikely that leave will be granted save in exceptional circumstances. It may also not be possible to commence a civil action after a criminal conviction has been secured, or a civil penalty imposed, if the circumstances set out in section 104D(3) exist. This will be discussed further after the new section 104E has been outlined.

48 S 104C(2) read with s 104C(5).

49 The new s 104D(1).

50 The new s 104D(2).

51 Notice of a potential contravention can also arise if there is sufficient publicity over an investigation of insider dealing although the authorities do not proceed with any action thereafter.

IV. Contemporaneous Dealing

While what amounts to a contemporaneous trading is not defined, section 104C(4) states that the court shall take into account the following matters:

(a) the volume of securities of the same description traded between the date and time of the insider dealing in securities and the date and time of the dealing in securities;

(b) the date and time the insider dealing in securities was cleared and settled;

(c) whether the dealing in securities took place before or after the insider dealing in securities;

(d) whether the dealing in securities took place before or after the information to which the contravention of section 103(1), (2), (3) or (6), as the case may be, relates became generally known;

(e) such other factors and developments, whether in Singapore or elsewhere, as the court may consider relevant.

These matters are very general. To better understand the concept of contemporaneous dealing, it is necessary to review the decisions in the United States on section 20A of the SEA on which the proposed section 104C(1) is based.

In the United States, the basis for prohibiting insider dealing is to be found in section 10(b) and Rule 10b-5 of the SEA.[52] Section 10(b) provides that it shall not be lawful for any person, directly or indirectly, 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 [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." Rule 10b-5(c) in turn provides that it shall be unlawful for a person to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." Cases in the United States have interpreted Rule 10b-5(c) as giving rise to the 'disclose or abstain' rule. This rule prohibits persons from trading on the basis of material non-public information unless the information in

[52] Generally, see TL Hazen, *The Law of Securities Regulation*, Vol 2 (3rd ed), at 598-629.

question has been disclosed prior to trading. If there has been no such disclosure, the person must abstain from trading.[53]

In *Shapiro* v *Merrill Lynch, Pierce, Fenner & Smith, Inc*, it was argued by the Defendants that the 'disclose or abstain' rule was inapplicable because the duty owed by them was to purchasers of the specific shares sold by the Defendants and the transactions involved there were not face-to-face sales to the Plaintiffs.[54] This argument was rejected. The United States Court of Appeals, Second Circuit, held that the Defendants owed a duty not only to the purchasers of actual shares sold by them (in the unlikely event that they could be identified) "but to all persons who during the same period purchased [the shares] in the open market without knowledge of the material inside information which was in the possession of defendants."[55]

The potential draconian liability that could arise under the *Shapiro* test led to the Sixth Circuit declining to follow it in *Fridrich* v *JC Bradford*.[56] However, in the concurring judgment of Celebrezze, Circuit Judge, he said that the duty of disclosure was owed to the class of investors trading contemporaneously with the insider.[57] He was nevertheless able to concur with the result because recovery should be limited to those who had sold the shares in question between the 21st and 27th of April 1972, that being the period when the Defendants were actively purchasing those shares. None of the Plaintiffs sold their shares during this period.[58]

One possibility to limit the draconian damages which can be imposed if all contemporaneous dealers were allowed to recover the full amount of the damages theoretically suffered by them[59] was suggested by the Second Circuit in *Elkind* v *Liggett & Myers, Inc* in the following terms:[60]

> "...(1) to allow any uninformed investor...to recover any post-purchase decline in market value of his shares up to a reasonable time after he learns of the tipped information or after there is public disclosure of it but (2) limit the recovery to the amount gained by the tippee

53 *SEC* v *Texas Gulf Sulphur Co*, 401 F 2d 833 (2d Cir 1968), *cert denied* 394 US 976 (1969); *Shapiro* v *Merrill Lynch, Pierce, Fenner & Smith, Inc,* 495 F 2d 228 (2d Cir 1974).

54 *Ibid*, at 236.

55 *Ibid*, at 237.

56 542 F 2d 307 (6th Cir 1976).

57 *Ibid*, at 326.

58 *Ibid*, at 327; see also *Wilson* v *Comtech Telecommunications Corp*, 648 F 2d 88 (2d Cir 1981), at 94-95.

59 This would mean that the insider would have to compensate every contemporaneous dealer the full amount of the profit made or the loss avoided, as the case may be, thereby multiplying his gain or loss by the number of contemporaneous dealers.

60 635 F 2d 156 (2d Cir 1980), at 172.

> as a result of his selling at the earlier date rather than delaying his sale until the parties could trade on an equal informational basis....Should the intervening buyers, because of the volume and price of their purchases, claim more than the tippee's gain, their recovery (limited to that gain) would be shared *pro rata*."

In 1988, the United States Congress supplemented Rule 10b-5 with an express statutory right of action.[61] Section 20A(a) of the SEA now provides that insiders who are in breach of the provisions or rules or regulations of the SEA shall be liable to persons who have traded contemporaneously with them. The total amount of damages that may be imposed shall not exceed the profit gained or loss avoided.[62] Section 20A does not define the term 'contemporaneous'. The drafters appear to have been content to leave the concept to the courts to develop as had been the case before the enactment of section 20A. In *in re Verifone Securities Litigation*, the court noted that:[63]

> "Section 20A also requires that the trading activity of plaintiffs and defendants occur 'contemporaneously.'...The meaning of the term 'contemporaneous' is not defined by statute. Instead, the drafters sought to adopt the definition of the term 'which has developed through the case law.' HR Rep No 910, 100th Cong, 2d Sess 27 (1988) *reprinted in* 1988 USCCAN 6043, 6064. The House Report cited *Wilson* v *Comtech Telecommunications Corp*, 648 F 2d 88 (2d Cir 1981); *Shapiro* v *Merrill, Lynch, Pierce Fenner & Smith, Inc*, 495 F 2d 228 (2d Cir 1974) and *O'Connor & Associates* v *Dean Witter Reynolds, Inc*, 559 F Supp 800 (SDNY 1983) as examples of three cases which have 'developed' the definition of 'contemporaneous.' HR Rep No 910 at 27 note 22. All three cases discuss the 'contemporaneous' trading in the context of an implied 10b-5 action against an insider."[64]

The Corporate Finance Committee had also proposed that what amounts to contemporaneous dealing could be left to the courts to interpret in the light of changing market practices and trading technology.[65] In view of our adoption of this test which originated from the United States, decisions

61 The Insider Trading and Securities Fraud Enforcement Act of 1988.
62 S 20A(b) of the SEA.
63 784 F Supp 1471 (ND Cal 1992), at 1488-1489.
64 See also *Neubronner* v *Milken*, 6 F 3d 666 (9th Cir 1993), at 669, note 5.
65 Report of the Corporate Finance Committee, at para 3.5.2.

from that jurisdiction may be helpful in the interpretation of the proposed section 104C(1).[66]

In *Shapiro* v *Merrill Lynch, Pierce, Fenner & Smith, Inc*,[67] the contemporaneous trading period was four days.[68] In *O'Connor & Associates* v *Dean Witter Reynolds, Inc*,[69] the trades by the Plaintiffs and Defendants occurred less than a week apart and it was held that the Plaintiffs had causes of action against the Defendants under Rule 10b-5. On the other hand, in *Wilson* v *Comtech Telecommunications Corp*[70] it was held that as Wilson purchased his Comtech stock approximately one month after the insiders' sales, he did not trade contemporaneously with them and had no standing to sue. In *in re Verifone Securities Litigation* the court said:[71]

> "By reference to these cases [*ie, Shapiro, O'Connor* and *Wilson*], the drafters of ITSFEA meant to protect and compensate investors who trade at the same time as the insider or for some short period thereafter, and that a reasonable period of liability could be as short as a few days, but no longer than a month."

A purchase within five days of an insider sale thus fulfils the contemporaneous requirement[72] and so too do trades "within a few days" of each other.[73] The contemporaneous requirement is not met if the Plaintiff's trade occurred "more than a few days apart" from the Defendant's transactions.[74]

66 It should be noted that an allegation of contemporaneous trading must be pleaded with particularity, *Neubronner* v *Milken*, 6 F 3d 666 (9th Cir 1993). In that case, an allegation of a three-year period of contemporaneous trading was held to be clearly insufficiently specific to establish contemporaneity. It is not, however, necessary to state how the Defendant obtained the non-public information, *HAB Associates* v *Hines*, [1990-1991 Transfer Binder] Fed Sec L Rep (CCH) 95,665 (SDNY 1990); see also *In re Silicon Graphics, Inc,* 970 F Supp (ND Cal 1997).

67 495 F 2d 228 (2d Cir 1974).

68 *Ibid*, at 237; see also *Wilson* v *Comtech Telecommunications Corp*, 648 F 2d 88 (2d Cir 1981), at 94; *Alfus* v *Pyramid Technology Corp*, 745 F Supp 1511 (ND Cal 1990), at 1523; *Neubronner* v *Milken*, 6 F 3d 666 (9th Cir 1993), at 670.

69 559 F Supp 800 (SDNY 1983); *cf* W Wang, 'The "Contemporaneous" Traders Who Can Sue an Inside Trader" (1987) 38 Hastings LJ 1175, at 1183-1184.

70 648 F 2d 88 (2d Cir 1981).

71 784 F Supp 1471 (ND Cal 1992), at 1489.

72 *In re Cypress Semiconductor Securities Litigation*, 836 F Supp 711 (ND Cal 1993). Note also *Elkind* v *Liggett & Myers, Inc*, 635 F 2d 156 (2d Cir 1980) (where the period in question was two days), and *Feldman* v *Motorola Inc*, [1993-1994 Transfer Binder] Fed Sec L Rep (CCH) 98,133 (ND Ill 1994) (where purchases made within one to four business days of improper sales were held to be sufficiently contemporaneous).

73 *Kumpis* v *Wetterau*, 586 F Supp 152 (1983).

74 *Alfus* v *Pyramid Technology Corp*, 754 F Supp 1511 (ND Cal 1990), at 1522.

In that case, it was held that a class of purchasers who purchased stock over a four-month period could not all be contemporaneous traders.[75] In some other cases, a more restrictive view of what is contemporaneous has been taken. It has, for example, been held that purchases 4 days (2 trading days)[76] and 8 trading days[77] after a sale were not sufficiently contemporaneous.[78]

The position therefore does not appear to have been settled in the United States.[79] It is suggested with some trepidation that trades within one week of the improper dealing are likely to be regarded as contemporaneous in the United States. Trades entered into more than a week after should not be so regarded in the absence of exceptional facts. This is also the observation made in one of the leading texts on Securities Regulation in the United States where it was said that "[p]laintiffs typically have been allowed to file claims as contemporaneous traders for up to one week after the defendant's wrongful trades or breach of fiduciary duty. At the same time plaintiffs have been consistently denied standing for trades later than that."[80]

Another possibility is to limit the period of contemporaneous dealing to the settlement period for trades. This possibility was mentioned in *Re Silicon Graphics, Inc*:[81]

> "Given that stock trades settle within three days, and allowing for the possibility of an intervening three-day weekend, only purchases within 6 days of insider sales are truly contemporaneous. Once an insider's sale settles, other traders are no longer in the market with that insider and risk no relative disadvantage from that insider's failure to disclose."

75 *Ibid*, at 1523.

76 *Backman* v *Polaroid Corp*, 540 F Supp 667 (1982).

77 *Colby* v *Hologic*, *Inc*, 817 F Supp 204 (D Mass 1993).

78 See also *Kriendler* v *Sambo's Restaurant, Inc*, [1981-1982 Transfer Binder] Fed Sec L Rep (CCH) 98,312 (SDNY 1981) where transactions 7 trading days apart were held not to be contemporaneous. Hazen, *supra*, at 624, suggests that the relevance of these cases is at best questionable. *Backman* and *Kriendler* are pre-ITSFEA cases while *Colby* relied on *Backman*. In Hazen's view, the ITSFEA, s 20A of the SEA is intended to prevent the insider from retaining his or her ill-gotten gains rather than upon the notion of compensation. As such, a more expansive view of what constitutes contemporaneous transactions is justified.

79 Also see W Wang, (1987) 38 Hastings LJ 1175.

80 L Loss & J Seligman, *Securities Regulation* (3rd ed), Vol 8, at 3724, cited in Hazen, *supra*, at 624, fn 140; *cf* W Wang, *ibid*, at 1179-1184 and 1191.

81 970 F Supp 746 (ND Cal 1997), at 761.

Currently, the settlement period for trades on the Singapore Exchange is three working days after the trade.[82] If the above test is adopted,[83] only transactions entered into after the insider's trade up to three working days thereafter will be regarded as contemporaneous.

While it is very possible that a Singapore court may adopt either of the above two periods to determine the period for contemporaneous dealings, it is suggested here that the better approach would be to confine contemporaneous dealings to trades entered into on the same day as the insider dealing, whether before or after the time that the insider dealing took place. Unlike the United States,[84] section 104C which imposes civil liability on the insider is clearly stated to be based on the notion of compensation. On this basis, the insider should ideally only be liable to the person he traded with. This was the position under the previous section 105 of the Act. The requirement of contemporaneous dealing was introduced primarily to mitigate the difficulties of privity and identification.[85] On this basis, the legislative policy does not require an expansive interpretation of contemporaneous dealing.[86] The persons most deserving of compensation are those who have dealt in securities on the same day that the insider did.[87]

Another possible, though less important reason, for the adoption of the contemporaneous dealing concept is to minimise the notion of a chance benefit. Insider dealing is sometimes referred to as a 'victimless' wrong, particularly for trades on an anonymous and faceless securities exchange. A purchaser or seller in such a market clearly intended to buy or sell at the transacted price. If he or she had not purchased from, or sold to, the

[82] This is commonly referred to as 'T + 3'.

[83] S 104C(4)(b) provides that one of the matters which the court shall take into account in determining whether a dealing in securities took place contemporaneously with the insider's dealing is "the date and time the insider dealing in securities was cleared and settled".

[84] See Hazen, *supra*, at 623-624.

[85] See the Corporate Finance Committee's report, at paras 3.5.2-3.5.3.

[86] W Wang, (1987) 38 Hastings LJ 1175, at 1191, makes the following point:

> "If the rationale underlying the 'contemporaneous' class of plaintiffs is the difficulty of ascertaining the party in privity, all those who *might* have been in privity would be allowed to sue. The 'contemporaneous' period would be quite short, perhaps within one hour or even a few minutes after the inside trade....Unfortunately, the pivotal Second Circuit decision, *Wilson*, does not mention as a rationale the possible difficulty of identifying the party in contractual privity."

[87] Arguably, where the insider traded in the same securities over a period of time referable to the same material non-public information, all persons trading during this period are contemporaneous dealers even though there may be intervening days where the insider did not deal in any of the said securities. Persons who trade after the last day on which the insider traded should not, however, be regarded as contemporaneous dealers.

insider, he or she would have done so with another person. The technology available today can allow for the identification of those whose trades have been matched with the insider.[88] However, if recovery were confined only to such persons, it would merely be a matter of chance that they were the counterparties to the insider. There may have been other trades done at the exact same time but which were matched to other parties. It would be an unwarranted windfall to confine compensation only to those who fortuitously had their trades matched with the insider. Yet again, there is no reason why the net should be cast expansively; limiting the class to contemporaneous dealings within the same day of the insider's trading strikes, it is submitted, the right balance. For this reason, it is also submitted that all trades within the same day should be considered contemporaneous even if they occurred at a time of the day before the insider traded.[89]

The courts in the United States have additionally held that Plaintiffs who traded prior to the time when the Defendant acquired or disposed of securities do not have a cause of action for insider trading.[90] In *O'Connor & Associates* v *Dean Witter Reynolds, Inc*, the court said that "liability does not extend to those who traded prior to the defendant's breach of his duty to 'disclose or abstain'–that is, prior to the date of the defendant's trades."[91] In that case, it was held that there was no claim by O'Connor against certain defendants who had traded "a few hours after O'Connor's last trade".[92] This requirement exists because persons who trade prior to the insider could not have suffered any disadvantage from the insider's failure to disclose as there is no absolute duty to disclose information. What is required is that a person who has material non-public information should not deal in securities without first making full disclosure. Until such a person begins dealing in securities, he commits no wrongdoing.[93] Accordingly, persons entering into transactions before the time when the insider did can have no claim against him. It is submitted that this general limitation found in

88 Such information would be within the possession of the securities exchange.

89 It should be noted that the position in the United States appears to be different, *see O'Connor & Associates* v *Dean Witter Reynolds, Inc*, 559 F Supp 800 (SDNY 1983) (discussed below).

90 *O'Connor & Associates* v *Dean Witter Reynolds, Inc*, *ibid*; *Alfus* v *Pyramid Technology Corp*, 745 F Supp 1511 (ND Cal 1990); *In re Verifone Securities Litigation*, 784 F Supp 1471 (ND Cal 1992); *In re Silicon Graphics, Inc Securities Litigation*, 970 F Supp 746 (ND Cal 1997).

91 *Ibid*, at 803.

92 *Ibid*, at 804.

93 *O'Connor & Associates* v *Dean Witter Reynolds, Inc*, *ibid*; *Fridrich* v *JC Bradford*, 542 F 2d 307 (6th Cir 1976).

94 Subject to the earlier suggestion that trades entered into on the same date but prior in time to the insider's trade should also be considered contemporaneous.

the cases in the United States should be followed in Singapore.[94]

It has also been held in the United States that section 20A of the SEA does not apply to "direct face-to-face transactions". In *Fujisawa Pharmaceutical Co Ltd* v *Kapoor*[95] the court said that at the time section 20A was passed, parties who had bought their stock in a face-to-face transaction already had a cause of action against the seller under Rule 10b-5. Therefore, Congress had to mean something different when it passed section 20A. In addition, the limitation period in section 20A is five years while that under Rule 10b-5 is shorter. It was therefore unlikely that Congress intended to include face-to-face transactions within the scope of section 20A.[96] "By 'contemporaneous' traders, Congress meant those individuals who, like the plaintiffs in *Shapiro*, purchased stock anonymously on the open market, rather than through face-to-face transactions."[97]

It is submitted that unlike the United States, the civil remedy in section 104C is applicable in face-to-face transactions. Unlike the United States, section 104C is intended to be the only provision giving rise to civil liability for insider dealing. It could not have been Parliament's intention to exclude face-to-face transactions from any civil liability whatsoever. Accordingly, for the purposes of section 104C(1), a contemporaneous dealing includes a face-to-face transaction.[98] It is submitted further that in such a transaction, the liability should only be incurred to the person that the insider dealt with and not to other persons trading 'contemporaneously'. It should not be the case that if *A*, being the insider, sold shares to *B*, and soon thereafter, *C* sold shares to *D*, *A* becomes liable to both *B* and *D*, even though *A* intended to sell to *B* and did so sell. While *D* is, on a literal interpretation, a contemporaneous purchaser, it would not make sense to include him in such a situation. The contemporaneous test was introduced to get around the difficulties of privity, identification and chance. None of these difficulties are present in a face-to-face transaction. It would also make nonsense of the principle of compensation if a person in the position of *D* could also recover. Accordingly, it is submitted that the contemporaneous test should be given a more restrictive interpretation in face-to-face transactions.

95 932 F Supp 208 (ND Ill 1996).

96 *Ibid*, at 209.

97 *Ibid*, at 210.

98 It was conceded in *Fujisawa*, *ibid,* at 209, that in face-to-face transactions, the securities are sold and purchased at the same time, and thus are certainly performed 'contemporaneously'. However, it was stated that the context of s 20A did not lend itself to such an interpretation.

V. Civil Liability in Event of Conviction or Imposition of Civil Penalty

The Amendment Act provides in the new section 104E(1) that notwithstanding section 104C, where an insider has been convicted or has had a civil penalty imposed against him, the court may fix a date on or before which all claimants have to file and prove their claims for compensation in respect of the contravention. The court shall not fix a date that is earlier than 3 months from the date the conviction or order imposing the civil penalty has been made final.[99] After the expiry of the date fixed by the court, it may make an order against the insider to pay to each claimant an amount equal to the amount of compensation which that claimant has proven to the satisfaction of the court that he would have been entitled to if he had brought an action under the proposed section 104C against the insider. However, because of the requirement of contemporaneity, the number of contemporaneous transactions may far exceed the insider's gain. As such, the court may alternatively order the insider to pay to each claimant an amount equal to the pro-rated portion of the maximum recoverable amount, calculated according to the amount which the claimant could have recovered in an action under section 104C brought by himself against all the amounts proved to the court.[100] Only the lesser amount of the two methods may be awarded.

For the purposes of section 104E, a conviction is made final if the conviction is upheld on appeal, the conviction is not subject to further appeal, no notice of appeal has been lodged within the time prescribed by section 247 of the Criminal Procedure Code, or any appeal against conviction is withdrawn.[101] An order imposing a civil penalty is made final if the order is not set aside on appeal, the order is not subject to further appeal, no notice of appeal is lodged within the time prescribed by the Rules of Court, or any appeal lodged has been withdrawn.[102]

In the Amendment Act, the proposed section 104D(3) provides that the court cannot grant leave to bring or continue an action under the proposed section 104C if a date has been fixed under section 104E(1) for the filing of claims. In such an event, the claimant to the proposed action or the action that has been stayed shall comply with such directions relating to the filing

[99] S 104E(2).
[100] S 104E(3). The phrase "maximum recoverable amount" bears the meaning found in s 104C(5).
[101] S 104E(4).
[102] S 104E(5).

and proof of his claim under section 104E as the court may issue in his case. It is submitted that the effect of section 104D is to build in a preference in favour of compensation under the section 104E scheme rather than the section 104C scheme.

As indicated above, civil actions under section 104C will benefit those who are swiftest in commencing an action as the amount payable by the insider is limited to the gain made, or the loss avoided. Subsequent claimants will only be able to recover any residual gain made, or loss avoided, that has not been recovered by earlier claimants. While it may be desirable to reward persons who do not delay in bringing a claim, the difficulties of identifying the wrongdoer in insider trading cases does not lend itself to such a policy. Furthermore, the issue of what is a contemporaneous dealing is not a clear-cut one. The average investor in securities cannot generally be expected to institute a section 104C claim to try his position. An investor with 'deep pockets' may be better able to do so. The proposed section 104C in effect favours such investors over the average investor.

Section 104D redresses this imbalance to some degree where a criminal prosecution is commenced or the Authority brings a claim for a civil penalty. Unless the leave of the court is obtained, a section 104C civil claim cannot be brought, or cannot continue, once proceedings under section 104 or section 104A have commenced.[103] It is submitted that leave should not generally be granted unless there is a danger that the 6 years 'limitation period' will expire.[104] In such a case, leave to commence may be granted but the action should then be stayed. If the alleged 'insider' is acquitted, the section 104C action could then be allowed to continue, and/or other civil actions under section 104C could be commenced.[105] If there is a conviction, or a civil penalty has been imposed, it is suggested that the court should as a general practice fix a date for claimants to file their claims. In such circumstances, a section 104C action cannot commence or continue, as the case may be. All claimants will be treated equally. It also has the merit of avoiding a multiplicity of civil claims.

VI. Miscellaneous Provisions

The Amendment Act also introduces a new section 104F that provides that

[103] S 104D(1) and (2).

[104] S 104C(3).

[105] This will be more likely if the acquittal was in respect of a criminal prosecution under s 104. It may not be practical to commence such an action if the claim for a civil penalty under s 104A has been dismissed as the standard of proof in actions under ss 104A and 104C should be similar.

a District Court shall have jurisdiction to try actions under sections 104A, 104C or 104E notwithstanding any limit to the civil jurisdiction of the District Courts. A new section 104G provides that Rules of Court may be made to regulate the practice and procedure for proceedings under sections 104A, 104C and 104E, and to provide for the costs and fees of such proceedings.

VII. Conclusion

On the whole, the proposed amendments are to be welcomed as they are a significant improvement over the existing provisions. It will be interesting to see if more insider trading cases are brought over time if the proposed amendments are enacted into law. There have been virtually no prosecutions under the existing provisions and no civil actions brought to the best of this author's knowledge. Yet it is very likely that insider dealing has taken place. If the proposed amendments are a sign of renewed willingness to tackle a difficult problem, let insiders beware as they rightly should.

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