UNSW SYDNEY

The Insider Trading "Possession versus Use" Debate: An International Analysis

Author/Contributor:
Huang, Hui

Publication details:
Securities Regulation Law Journal
v. 33
Chapter No. 2
pp. 130-151
0097-9554 (ISSN)

Publication Date:
2006

License:
https://creativecommons.org/licenses/by-nc-nd/3.0/au/
Link to license to see what you are allowed to do with this resource.

Downloaded from http://hdl.handle.net/1959.4/33436 in https://unsworks.unsw.edu.au on 2022-06-25

The Insider Trading "Possession Versus Use" Debate: An International Analysis

By Hui Huang*

I. Introduction

It is well settled that possession of inside information is a necessary condition for insider trading liability to attach. However, it is less clear whether *mere* possession of inside information at the time of trading is sufficient for one to invite liability, or more specifically, whether the imposition of liability presupposes a further showing that the insider actually *used* the information. In other words, is it required to prove a causal connection between the possessed inside information and the defendant's trading? This issue has been known as the "possession versus use" debate in the US.[1]

It appears that the debate has largely occurred in the US with little research examining the positions of other jurisdictions. This article therefore aims to canvas the issue from an international perspective, adding some comparative insights into the debate. To this end, four jurisdictions will be looked at, including the US, the UK, Australia, and Canada. They all have common law background, influential securities market, and more importantly, they adopt different approaches to the issue, presenting a relatively complete picture of the international developments in this area. Indeed, the US debate traditionally lists only two approaches, namely, the use standard and the possession standard.[2] However, at the international level, the treatment of the issue can be more appropriately categorized into four different approaches, including the strict possession, the strict use, the modified use, and the modified possession standards.

The remainder of the article proceeds as follows. Part II will first discuss the various approaches to the "possession vs. use" issue. Then, a critical examination of these approaches will be carried out on a comparative basis, with a view towards identifying which one is most appropriate. Specifically, Part III will look at the strict possession and the strict

* Lecturer, Law Faculty, the University of New South Wales (Australia). B. Eng., LLB, LLM, Tsinghua University (China); PhD, the University of New South Wales. I gratefully thank Angus Corbett and Paul Redmond for their expert comments on an earlier draft.

use standards. This is followed by a comparison of the modified possession and modified use standard in Part IV. Part V will contain a concluding remark.

II. Various Approaches to the Debate

A. The Strict Possession Standard

The first approach to the debate is the "strict possession standard," which merely requires proof that a person knowingly possessed inside information at the time of trading, no matter whether he or she had actually used the information. In the US the Securities and Exchange Commission ("SEC") adopted this standard in *In re Sterling Drug, Inc*,[3] where several directors sold stocks after being informed of decreasing sales before such information was released to the public.

There at the board of directors meeting on 1 November 1974, the directors were given the detailed breakdown of the operating performance for the first months of 1974. The breakdown showed that although Sterling's overall sales were up by 13.3% and overall net income was up by 10.5%, the source of Sterling's earnings had shifted during this accounting period from recent patterns as a result of below average performance by two major domestic divisions and above average performance by other divisions. Two directors sold shares after the meeting.[4]

In defense, the directors argued that the inside information and the sale of the shares were not connected.[5] The SEC determined that it was *irrelevant* whether the two were connected and possession of material inside information at the time of trading was sufficient to sustain a violation of securities laws, noting that:

> Rule 10b-5 does not require a showing that an insider sold his securities for the purpose of taking advantage of material non-public information. Purchases of securities in the public market should be able to rely upon information available to the public at the time of the transaction. If an insider sells his securities while in possession of material adverse non-public information, such an insider is taking advantage of his position to the detriment of the public.[6]

In 1993, the Court of Appeals for the Second Circuit also appeared to uphold the strict possession standard. In *United States v. Teicher*,[7] two defendants convicted of securities fraud appealed, claiming that the district court incorrectly instructed the jury that proof of mere possession was

enough to support a guilty verdict.[8] While the Second Circuit avoided a direct ruling on the knowing possession test,[9] the court broadly discussed the issue by listing several factors that favor the application of the knowing possession test.

Firstly, the court noted that the "in connection with" language as contained in Section 10(b) and Rule 10b-5 had been interpreted flexibly.[10] Secondly, the court stated that a knowing possession test best comported with the "disclose or abstain rule."[11] Thirdly, it was held that by definition an insider trader had an informational advantage over other traders.[12] Finally, the court contended that it would be extremely difficult for the SEC to prosecute under a use test.[13]

Further, this standard also seems to have been endorsed by two insider trading statutes in the US, namely, the Insider Trading Sanctions Act of 1984 and the Insider Trading and Securities Fraud Enforcement Act of 1988, which added Sections 21A and 20A of the Securities Exchange Act, respectively.[14] Both Sections 21A(a)(1) and 20A(a) refer to "any person who violates [or has violated] any provision of this title or the rules or regulation thereunder by purchasing or selling a security while in possession of material, nonpublic information…." This choice of language has led one commentator to argue that it was "an endorsement of the broader ["possession"] test for insider trading liability."[15]

B. The Strict Use Standard

The second approach is the "strict use standard." Under this approach, the prosecution must prove that insiders actually used the information. For example, before 1996, the Canadian federal legislation imposed liability on an insider only if that person "makes use of any specific confidential information for his own benefit or advantage."[16] Thus, prosecutors or private plaintiffs would have to bear the two-fold burdens of proving not only that the defendant possessed material nonpublic information, but also that the trade was prompted by the information.

C. The Modified Use Standard

In order to alleviate the evidentiary difficulty associated with the strict use standard, the US Court of Appeals for the Eleventh Circuit introduced the "strong reference rule" to amend the strict use standard in *SEC v. Adler*,[17] and thus the "modified use standard" was born. Because this case took place in 1998, later than the above-mentioned Second Circuit 1993

case *United States v. Teicher*, it may well represent the recent US judicial attitude towards the "possession vs. use" debate.

The court in *Adler* recognized that the choice between possession and use was difficult, but eventually chose to basically adopt the use standard.[18] Meanwhile, acknowledging the difficulty the SEC would have under a strict use standard, the court held that *the strong inference of use* that arises from the fact that an insider traded whilst in possession of information could allay the evidential problem.[19] In particular, the court stated:

> When an insider trades while in possession of material non-public information, a strong inference arises that such information was used by the insider in trading. The insider can attempt to rebut the inference by adducing evidence…that the information was not used.[20]

With this inference rule, the court rejected the proof concern expressed by the SEC, and concluded that the use test "best comports with" the applicable statutes.[21] Thus, the *Alder* decision is the mixture of the inference rule and the strict use standard.

It is interesting to note that some other jurisdictions have chosen to amend the strict possession standard, rather than the strict use standard, to achieve virtually the same effect as *Adler* in the US. This is done by adding a general nonuse defense into the strict possession standard which is in turn transformed into the modified use standard for the following two reasons. Firstly, the nonuse defenses effectively put focus on the actual use of inside information in the sense that no liability will occur as long as the defendant can prove the nonuse of information for trading. Secondly, the evidentiary problem is solved by shifting the onus of proof onto the defendant.

The UK provides a good example. It has no requirement for the prosecution to show that an accused used inside information, merely providing that "an individual, who has information as an insider" will violate the law if "he deals in securities that are price-affected securities in relation to the information."[22] However, this ostensible possession standard is then transformed into the modified use standard by providing a general defense of nonuse, namely, that the insider can argue that he or she did not use the information in the trading. Hence a person is not guilty of insider trading by virtue of trading in securities "if he shows that he would have done what he did even if he had not had the information."[23] This approach is essentially the modified use standard, because it demands that the actual use of inside information be a requisite element of liability.

D. The Modified Possession Standard

In the US, Rule 10b5-1 was passed in August 2000 to resolve a long-standing debate on whether the "possession" or "use" of material non-public information is the proper standard for courts to use in cases of insider trading.[24] The approach of Rule 10b5-1 can be called the "modified possession standard," in that it is based on the possession standard but at the same time embraces some defenses to overcome the over-breadth of the strict possession standard.[25]

Rule 10b5-1 makes its clear that insider trading liability arises when a person is "aware" of the material nonpublic information when they engage in a securities trade.[26] At the same time, in order to avoid the overreach of a simple-minded standard based on awareness, Rule 10b5-1 also provides several affirmative defenses under which a person could avoid liability. These defenses permit persons to structure securities trading plans and strategies, which may be implemented at any future time, provided that those persons are not aware of material nonpublic information at the time of devising the plan, entering into a binding contract to trade securities or instructing an agent to do so, and have no discretion over the previously determined trading plan if they later become aware of any inside information.[27]

It should be noted that Rule 10b5-1 uses the term "aware" instead of either the term "possession" or "use" as the proper standard for insider trading liability. This does not mean however that Rule 10b5-1 invents a totally new awareness standard. Rather, it appears that this is in fact the SEC's tactical linguistic trick. The terms "aware" and "possession" are used interchangeably by the SEC and mean the same thing in the SEC's lexicon.[28] There is an interesting reason behind the SEC's choice of the term "awareness" rather than "possession."

It has been said that the introduction of Rule 10b5-1 was in fact the SEC's counterattacking response to the recent unfavorable judicial decisions in *SEC v. Adler* and *United States v. Smith* where, as mentioned before, the courts were clearly opposed to adopting the possession standard and the prosecution was defeated as a result.[29] Understandably, in the face of these defeats, the SEC had to finesse its plan by some strategy to reintroduce its long-favored possession standard, facilitating its regulatory mission. Therefore, the SEC wisely chose a new term "awareness" out of the consideration that it could be more likely to be accepted by the courts who have expressly discarded the "possession" standard before,

although this seemingly new "awareness" standard is virtually the previous "possession" standard.[30]

The recent comprehensive review of insider trading law in Australia has essentially followed this modified possession approach. In Australia, the literal reading of Section 1043A of the Corporations Act seems to favor the possession standard, under which the prosecution is not required to show that a person holding inside information actually used the information when trading in affected securities.[31] However, the Australian government at the time of introducing 1991 amendments to its insider trading law took the view that, once the prosecution has proved that the person was in possession of the inside information and traded in the relevant securities, it was reasonable to *assume* that the person was motivated to trade by possession of that information.[32] This governmental view was in nature the modified use standard, as opposed to the possession standard as adopted by the legislation, because it suggests that the defendant could be exonerated by adducing evidence to show nonuse of inside information in the trade. Unfortunately, there is no case law concerning this issue available to provide more guidance.

In order to dispel the above confusion, the issue has been examined in a recent review of insider trading law in Australia.[33] The final review report made a recommendation similar to Rule 10b5-1:

> …recommends an exemption for informed persons trading pursuant to a pre-existing non-discretionary trading plan…Subject to this limited exception, the insider trading legislation should not have a use requirement or a defense of nonuse. [34]

III. The Unsuitability of the Strict Possession and Strict Use Standard

A. Arguments Against the Strict Possession Standard

The strict possession standard is too wide and is therefore inappropriate. In the US, considering whether Congressional intent required the use test, the *Adler* court noted that Section 10(b) and Rule 10b-5 prohibit deception, manipulation and fraud,[35] and then expressed its fear that convictions based on mere possession of material non-public information would "prohibit actions that are not themselves fraudulent."[36] The *Smith* court subsequently shared the concern of *Alder* that liabilities based upon a strict possession test "would not be…limited to those situations actually involving intentional fraud."[37]

The potential overreaching of the standard would likely frustrate legitimate commercial activities. Under this standard, even bona fide market participants may be unable to trade because of information that comes to their attention after they have made their trading decisions. As an example, the *Smith* court pointed out that an investor who engaged in a pre-existing plan to trade even after coming into possession of inside information, might be prosecuted under a strict possession test despite the fact that he or she did not "intend to defraud or deceive."[38] This problem would likely become much worse in Australia, given that the scope of the Australian insider trading prohibition is very broad, extending beyond the traditional securities and equity-related futures products to a wide range of other financial products such as commodity products, reciprocal purchase agreements, negotiable instruments, interest rate swaps and options and so on.[39] The transactions of some of these additional products would be significantly affected or even paralyzed by the difficulty arising where an investor is unable to undertake a preplanned trade after coming into possession of inside information.

Conceptually, the mere possession of inside information is in itself not wrong; it is the further act of using inside information to trade that constitutes fraud. As the *Smith* court stated:

> [P]ersons with whom a hypothetical insider trades are not at a "disadvantage" at all provided the insider does not "use" the information to which he is privy. That is to say, if the insider merely possesses and does not use, the two parties are trading on a level playing field; if the insider possesses and does not use, both individuals are making their decision on the basis of incomplete information.

There can be little doubt that a person would not feel deceived if they were *convinced* that the person with whom they were trading merely possessed but did not actually use inside information for the purpose of trading. However, it can be very difficult, if not impossible, to know whether the insider used or benefited from the inside information. As will be discussed, this problem demonstrates exactly the advantage of the modified possession standard.[40]

The over-breadth of the strict possession standard also raises due process concerns. Some commentators have argued that the use standard safeguards due process rights by prohibiting prosecution without proof of fraud.[41] Due process implies the constitutional right of an individual to controvert with the proof of every material fact which bears on the ques-

tion of right in the matter involved, and "if any question of fact or liability [is] *conclusively presumed* against him, this is not due process of law."[42] The strict possession standard may not ensure due process protection, because it could be satisfied merely by proving that an individual possessed inside information and traded, without any further proof of fraud. In other words, the strict possession standard would invite due process concerns because it *conclusively presumes* liability of fraudulent activity against an individual in possession of inside information.[43]

B. Arguments Against the Strict Use Standard

As previously discussed, insiders cannot do any harm if they have not used inside information. This makes the use standard more theoretically acceptable. However, the use standard has an insurmountable evidential problem which prevents it from being a suitable choice. Before looking at this point in greater detail, employment of the word "use" in judicial decisions which has been argued as authority to support the use standard, will be discussed.

1. Doubtful Reliance on Choice of Language in Previous Cases

In the US, the Eleventh Circuit Court in *SEC v. Adler* was the first court to expressly advocate the use standard.[44] Shortly after this case, the Ninth Circuit Court also chose to apply the use standard in *United States v. Smith*.[45] These two courts regarded the employment of the word "use" in previous insider trading cases as direct support for the use standard. Some commentators agreed, holding that the choice of language suggests that traders must have actually used the information to be liable for insider trading.[46]

The *Adler* court held that the use standard "best comports with the *language* of § 10(b) and rule 10b-5, and with Supreme Court precedent."[47] The court first stated that the word "use" was employed throughout the US Supreme Court's opinions in *Chirarella v. United States*,[48] *Dirks v. SEC*,[49] and *United States v. O'Hagan*.[50] For example, in *Chierella*, the US Supreme Court stated that "a duty to disclose under § 10(b) does not arise from the mere possession of non-public market information";[51] in *Dirks*, that "insiders [are] forbidden…from personally *using* undisclosed corporate information to their advantage";[52] in *O'Hagan*, that "the fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principle, he *uses* the information to purchase or sell securities."[53] Then, the court argued that the Supreme Court's use of language in those opinions "repeatedly em-

phasized [a] focus on fraud and deception,"[54] and that the possession standard fails to embody such a focus.[55] Similarly, the Ninth Circuit in *Smith* also concluded that "the weight of authority supports a use requirement" by citing the Supreme Court's employment of the word "use" in *O'Hagan*, *Dirks,* and *Chiarella*.[56]

At first glance, those examples of the employment of the word "use" seem to suggest that the US Supreme Court is in favor of the use standard. However, upon closer examination, it is revealed that reliance on the literal reading of those sentences in previous cases is doubtful and misplaced.

First of all, the specific issue of the "possession vs. use" debate was not put before the US Supreme Court in any of those cases, and thus the Court might not have carefully employed the word "use" when addressing other aspects of insider trading. Indeed, it may be that because the "possession vs. use" question was not at issue in these cases, the Court was not careful about, and thus imprecise in, its use of language.[57] Thus, the employment of the word "use" outside the "possession versus use" context is barely meaningful as to the stance taken by the Court towards the debate.

Further, because the same language could be used for different purposes in different contexts, we must put language into the context in which it appears when determining its exact implication.[58] Indeed, we cannot take a fragment of language out of context to understand its meaning. For example, when the Court declared that "a duty to disclose under §10(b) does not arise form the mere possession of non-public market information,"[59] the Court was actually referring to the notion that there is no fraud under Section 10(b) and Rule 10b-5, absent a fiduciary duty to disclose information before trading.[60] In other words, this statement should be read as stressing the requisite duty to disclose for the imposition of liability on a person for trading while in possession of inside information, rather than upholding the use standard.

Finally, the common feature of *Chiarella*, *Dirks* and *O'Hagan* is that all the defendants had *clearly* used the information they possessed,[61] and thus it was natural for the Court to employ the word "use" which was intended to state nothing more than what the defendants had done in those cases. Because the use standard is higher than the possession standard, the Court's employment of the word "use" could mean that insiders would be undoubtedly liable *if* using inside information to trade, and we cannot go further to argue that the Court has held that liability arises *only if* insiders actually used the information. Thus, the employment of the

word "use" would by no means indicate that the Court favored the use standard in the "possession vs. use" debate.[62]

In sum, reliance on the employment of the word "use" in previous cases seems to be misplaced, because the "possession vs. use" issue was not specifically discussed in those cases and the US Supreme Court might not have been careful with the choice of language. Thus, those examples of the employment of the word "use" do not shed light on the Court's view of the "possession vs. use" debate.

2. The Difficulty in Establishing Actual Use

The foregoing section has discussed the doubtful reliance on the out-of-context reading of some sentences in previous cases decided by the US Supreme Court. Having made it clear that the US Supreme Court did not lend any meaningful support to the use standard, I will examine the strict use standard on merits here, and conclude that the fundamental problem with this standard is the difficulty in establishing actual use. Indeed, the use standard creates such an insuperable evidentiary problem that insiders could never be held liable.

Under the use standard, prosecutors or private plaintiffs are required to establish not only that the defendant possessed material nonpublic information, but also that the trade was proximately caused by the information. This burden of proof is far too heavy to bear. As the *Adler* court conceded, "the motivation for the trader's decision to trade is difficult to prove and peculiarly within the trader's knowledge."[63] The SEC Enforcement Director William McLucas also pointed out that the government "cannot metaphysically get into someone's head and discern what factors within their state of mind were directly causal."[64]

The stringent two-fold evidential burden is so onerous that prosecutors rarely overcome, thus inhibiting the prosecution of insider traders and impeding the effective enforcement of insider trading law. It has been argued that, due to the difficulty of proving actual use of information, the prosecutors' ability and incentive to prosecute those who may have committed insider trading could be drastically reduced, inevitably creating significant social costs by undermining judicial efficiency and the deterrence of insider trading law.[65] Indeed, the strict use standard would effectively paralyze insider trading laws. As the recent review of insider trading law in Australia stated,

> [a]ny requirement to prove that the non-public information, and not some other reason, was the predominant motivation for a trade

> would be unproductive. It would create a significant additional hurdle to effective enforcement of the insider trading law and be contrary to at least the appearance of fairness in the capital markets. [66]

In fact, the strict use standard seems to have lost its appeal even to those countries that adopt it. As noted before, the Canadian federal law applied the strict use standard, and in the 1996 insider trading law review, serious concern was expressed that it has created an insurmountable evidentiary obstacle and frustrated efforts to crack down on insider trading.[67] In response to this, the relevant law has been amended in favor of the possession standard.[68]

IV. The Modified Possession Standard vs. the Modified Use Standard

As discussed above, neither the strict use standard nor the strict possession standard is suitable. In this section, I will examine both the modified possession standard and the modified use standard in search of a more suitable one. At first sight, they may look confusingly similar, because both are intended to solve the evidentiary problem of the strict use standard and the over-breadth of the strict possession standard. It has thus been argued that the two approaches achieve the same effect in practice.[69] However, a closer examination reveals that the two approaches are in fact substantially different in two ways. One is the proof burden shifting effect; the other is the application of defenses. After a careful analysis, it is submitted that the modified possession standard is preferable to the modified use standard.

A. Unclear Proof-Burden-Shifting Effect Under the Modified Use Standard

In the US the modified use standard relies on the strong reference rule to shift the proof burden to defendants and thus alleviate evidentiary concerns. Recognizing the evidentiary difficulty of the strict use standard, the *Alder* court introduced the strong inference rule, under which the defendant is presumed to have used the information he/she possessed, but can attempt to rebut the presumption. Thus, as the *Adler* court stated, "the inference allows the SEC to make out its prima facie case without having to prove the causal connection with more direct evidence."[70] Clearly, the proof-concern alleviating mechanism of the inference rule is to shift the burden of proving nonuse of inside information to the defendant. However, there are two serious questions about the proof burden shifting effect of the inference rule.

Firstly, it is unclear whether the modified use standard really embraces the proof burden shifting mechanism. Even advocates of the modified use standard conceded that the *Adler* court only *arguably* supported shifting the burden of proof to the extent that the court did not explicitly shift the burden of proving nonuse of information to the defendant once the prosecution satisfied the knowing possession element.[71] Because the court failed to give a clear opinion as to whether the burden of proof should be shifted, the effect of the strong inference rule remains in doubt.

In fact, even the court was not sure whether the strong inference would substantially reinforce the SEC's ability to prosecute insider trading cases, and suggested that, if the SEC found the actual use standard "unduly frustrating," it could simply promulgate a rule adopting a knowing possession standard.[72] This has led some commentators to worry about the future of the *Adler* judgment.[73]

Perhaps more importantly, the other problem is that the inference rule cannot be applied in the criminal context. In *Smith*, the court adopted the actual use standard presented in *Adler*.[74] However, the court refused to apply the strong inference rule put forward by the *Adler* court because such a presumption in a criminal case would trigger due process concerns.[75] Specifically, the court stated that:

> We deal here with a criminal prosecution, not a civil enforcement proceeding, as was the situation in *Adler*. We are therefore not at liberty…to establish an evidentiary presumption that gives rise to an inference of use.[76]

Thus, despite acknowledging that an actual use standard would render "criminal prosecutions marginally more difficult for the government to prove," the court discarded the effort of the *Alder* court to establish the strong inference rule.

In sum, the proof burden shifting effect of the strong inference rule is largely uncertain in the civil context, and simply unavailable in the criminal context. Thus, the role of the rule in alleviating evidentiary concerns is rather limited. In contrast, the modified possession standard has no such problems.

B. Problems with the Defenses Under the Modified Use Standard

1. Scope of Defense

As discussed above, the proof burden shifting effect of the strong inference rule is frustratingly unclear. Considered alone, such a problem might suggest that if the burden shifting effect had been clearly prescribed, the modified use standard would be fine. However, this is not the case because the modified use standard also suffers from other serious problems with its defensive mechanisms. Under the modified use standard, after the use of information is presumed, the defendants can try to defend themselves by proving otherwise. The scope of the defenses offered by the modified use standard is significantly different from that of the modified possession standard, which is a decisive factor in judging the superiority of the two standards.

The UK legislation is a good example to look at. It adopts the modified use standard, but unlike *Adler* in the US, it unambiguously shifts the burden of proving nonuse of information to the defendant. More specifically, it provides a general defense of nonuse of inside information, providing that the defendants can avoid liability by showing that they would have acted in the same manner even without the information.[77] Thus, the defendants can try their best to prove nonuse of information in their possession. In contrast, the US Rule 10b5-1 only provides specific statutory defenses with strict limits.[78] The scope of the defenses under the UK legislation is broader than that of Rule10b5-1 in a number of ways.

The first is the time range of when defenses are available. Rule10b5-1 requires that in order to be an effective defense, a written trading plan must be adopted before the defendant becomes aware of inside information. In other words, if the defendant formulated the plan *after* being in possession of the inside information, the plan can not effectively protect the defendant from liability, even if the defendant did not actually use the information to make the plan. Thus, once the defendant comes into possession of inside information, whether he or she actually used the information for trading purposes is irrelevant; there are simply no defenses available under Rule 10b5-1. This explains why Rule 10b5-1 is essentially the modified possession standard.

Under the UK legislation, however, defendants can defend themselves by arguing that they did not actually use the inside information, regardless of whether the trading plan was made before, or after they came into possession of the information. Put differently, defendants can invoke the defensive mechanisms *at any time*, and be exonerated if the court is suc-

cessfully convinced that they did not actually use the possessed information to draft the trading plan. Thus, the benchmark here is solely whether the defendant actually used the information, and this is the reason why the UK legislation is in nature the modified use standard. In short, the defense under the modified use standard (the UK legislation) is broader than that under the modified possession standard (Rule 10b5-1), because the latter is available *only* when defendants made the trading plan before their possession of inside information.

Secondly, the types of effective defenses vary between the modified use standard and the modified possession standard. More specifically, compared to the modified use standard, the modified possession standard is more stringent on what constitutes as an effective defense.

Rule 10b5-1 enumerates several specific situations under which defenses might be available, including entering into a binding contract, instructing another person and adopting a written plan before becoming aware of the information.[79] Further, the Rule imposes a requirement that the amount of securities to be traded and the price at which and the date on which the securities were to be traded must be specified or determined in the contract, instruction or plan.[80] Moreover, it also requires that the insider has no discretion over the previously determined trading plan if she later became aware of any inside information.[81]

In contrast, the UK legislation contains no such restrictive provisions, but provides the defendant with a broad right to prove that she did not actually use the information. It follows that under this standard, the defendants can do the best they can to defend themselves by proving that there was no actual use of the inside information in their trading. Then, it is totally up to the court to consider the evidence in front of it and draw its conclusion at its discretion. There is no need for the court to look at whether the situation meets some specific requirements as prescribed in Rule 10b5-1. In practice, the defense of nonuse may be available to an insider who transacted in order to meet a pressing financial need or contractual obligation[82] or who simply followed independent professional advice[83] or a general trading strategy.[84]

2. Problems with a General Nonuse Defense

As discussed above, the scope of defenses under the modified use standard is broader than that under the modified possession standard. This does not tell us, however, which one, the broader or the narrower, is better. Thus, we need to go further to answer the question. It is submitted

that the broader defense system under the modified use standard is problematic for the following two reasons.

Firstly, a general defense would lead to a huge loophole because insiders could easily argue that they did not use the information, even if they actually had used it. Indeed, a broad nonuse defense may enable the suspected insiders to erect plausible screens to disguise their real motivation for trading. As the SEC stated, "individuals who have actually traded on the basis of inside information frequently attempt to invent arguments that they traded for other reasons."[85] Thus, this general defense would open the floodgates on efforts to fabricate defensive pretexts in advance of trading on the basis of inside information.

For example, as *Adler* has shown, a defendant could easily rebut the presumption of the use of information by showing that he or she only traded a small portion of his/her holdings in the affected security, because this trading pattern would be considered a move counterintuitive to an individual seeking to save their fortune by dumping shares that were about to drop drastically.[86] It is quite possible however that the defendant *intentionally* traded a small portion of his/her holdings on the basis of inside information so as to prepare a defense and reduce the risk of liability. Thus, it would be contrary to the intention and spirit of insider trading law if the defendant can get away with such tricks, because the defendant actually benefited from the information, even if this benefit was small. This is particularly so when the defendant's holding is so great that even its relatively small portion can be a considerable amount. Further, the defendant may tip the information to other people who in turn take the same trick to trade only a small portion of the subject securities they hold and thus also get away with their trading. The aggregate of the trades would be considerable even though each of them is small, and the overall damage to the market would be substantial.

For this reason, the recent review of insider trading law in Australia has soundly rejected the general defense of nonuse after careful deliberation, arguing that

> It may be a simple matter for a trader, with the benefit of hindsight, to suggest numerous reasons for trading other than the possession of inside information. This defense may also create unjustified anomalies, for instance, two persons selling when armed with the same inside information, with one of them arguing that, unlike the other, he or she was obliged to sell in any event because of, say, pressing fi-

nancial commitments and therefore had not "used" the inside information in trading.[87]

The other important reason is that the modified use standard also allows the defendant to benefit more or less from the possessed information, even if the main reason behind the defendant's trading was not based on the information. It seems that the modified use standard equates "use of information" with the "decisive reason for the transaction."[88] Thus, under the modified use standard, the defendant can unfairly benefit from the information, as long as the information was not used as the decisive reason for the trading.

It is very difficult, if not impossible, to precisely assess the role information plays in a defendant's trading. As the *Teicher* court observed, "[u]nlike a loaded weapon which may stand ready but unused, material information cannot lay idle in the human brain."[89] This has lead one commentator to argue that, even if the defendants can successfully prove that their transaction was basically motivated by legitimate reasons rather than the possessed information, it is highly likely, or even inevitable, that the possessed information would in some way influence their trades.[90]

Suppose that a person has tentatively made a pre-existing plan to sell shares to pay for his/her daughter's college tuition which could have also come from an alternative source of funds. There is a real probability that after coming into possession of inside information, he or she might become more determined to implement the plan to liquidate his or her shares for the money which might otherwise have been collected in other ways. He or she might even sell more shares than initially planned. This person could readily argue that his/her trading was based on the need for his/her daughter's tuition and not the information, therefore keeping the profits that were actually derived from the informational advantage to some degree. It can thus be argued that the person unfairly benefited from the information, even though the information did not play a decisive role in the transaction.

In contrast, the above two problems with the modified use standard could be eliminated under the modified possession standard. Under Rule 10b5-1, it is required that the plan should be adopted before the person came into possession of inside information. Because the defendant did not possess the information when drafting the trading plan, it is safe to say that the defendant did not truly use the information, and did not benefit from the information in any way. Meanwhile, Rule 10b5-1 prevents the defendant from having the chance to invent plausible pretexts to argue

that after possessing inside information, he or she did not actually use it to trade. Nor does Rule 10b5-1 permit the defendant to benefit from the information in any way, even though the information was not the decisive reason for the defendant's trading.

Moreover, Rule 10b5-1 imposes strict conditions on the mechanisms which can be considered effective defenses, and thus further ensures that the defensive mechanisms are applied for genuinely legitimate business purposes. In fact, when the SEC requested comments on the proposed Rule 10b5-1, some people expressed concern that the affirmative defenses were too narrow.[91] However, the SEC refused to broaden the affirmative defenses in the final version because doing so would damage the clarity Rule 10b5-1 was meant to instill.[92] Indeed, it is the clarity of Rule 10b5-1 that closes the loopholes of the modified use standard. For instance, Rule 10b5-1 requires that the trading plan should specify the amount of securities to be traded and the price at which and the date on which the securities were to be traded.[93] This means that later on the defendant cannot revise the plan on the basis of inside information.

V. Conclusion

This article has investigated the "possession versus use" issue in the context of insider trading from an international perspective. A comparative analysis is conducted to examine the legal responses to this issue in various jurisdictions, including the US, the UK, Australia and Canada. The conventional treatment of the issue, as suggested by the US debate, lists only two standards, namely, the use standard and the possession standards. In contrast, this article categorizes international approaches into four different standards, namely, the strict possession, the strict use, the modified use, and the modified possession standards. After a careful comparison of these four standards, it is submitted that the modified possession standard is most appropriate.

NOTES

1. See e.g., United States v. Smith, 155 F.3d 1051, 1066 (9th Cir. 1998) (discussing the "use-possession debate"); Donna M. Nagy, "The 'Possession vs. Use' Debate in the Context of Securities Trading by Traditional Insiders: Why Silence Can Never be Golden" (1999) 67 *U. Cin. L. Rev.* 1129; Jennifer L. Neumann, "Insider Trading: Does 'Aware' Really Resolve the 'Possession' Versus 'Use' Debate?" (2001) 7 *Washington University Journal of Law & Policy* 189; Allan Horwich, "Possession Versus Use: Is There a Causation Element in the Prohibition on Insider Trading?" (1997) 52 *Bus. Law.* 1235; Karen Schoen, "Insider Trading: The "Possession versus Use" Debate" (1999) 148 *University of Pennsylvania Law Review* 239; John H. Sture & Catharine W. Cummer, "Possession vs. Use for Insider Trading Liability" (1998) 12 No.6 *Insights* 3; Bryan C. Smith, Note, "Possession versus Use: Reconciling the Letter and the Spirit of Insider Trading Regulation Under Rule 10b-5" (1999) 35 *Cal. W. L. Rev.* 371.

2. The US "possession vs. use" debate by definition contains these two standards. See e.g., Jennifer L. Neumann, "Insider Trading: Does 'Aware' Really Resolve the 'Possession' Versus 'Use' Debate?" (2001) 7 *Washington University Journal of Law & Policy* 189; Ryan D. Adams, "'Where there is a will, there is a way': the Securities and Exchange Commission's adoption of Rule 10b-5" (2001) 47 *Loyola Law Review* 1133, 1149.

3. In re Sterling Drug, Inc., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,570, at 80, 295 (Apr. 18, 1978).

4. In re Sterling Drug, Inc., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,570, at 80, 297 (Apr. 18, 1978).

5. n re Sterling Drug, Inc., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,570, at 80, 298 (Apr. 18, 1978). ("The three directors also maintain that their reasons for selling their Sterling stock were based on considerations completely independent of the performance of [the company].")

6. In re Sterling Drug, Inc., [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,570, at 80, 298 (Apr. 18, 1978).

7. United States v. Teicher, 987 F.2d 112 (2d Cir. 1993).

8. United States v. Teicher, 987 F.2d 112, 114 (2d Cir. 1993). The defendants contended that "the district court's jury charge erroneously instructed the jury that the defendants could be found guilty of securities fraud based upon the mere possession of fraudulently obtained material non-public information without regard to whether this information was the actual cause of the sale or purchase of securities." Ibid.

9. United States v. Teicher, 987 F.2d 112, 120-21 (2d Cir. 1993). It is worth noting that the "possession versus use" discussion in *Teicher* was purely dicta. Specifically, the court stated that "[v]iewing the jury in its entirety and based upon the record, we find that it is unnecessary to determine whether proof of securities fraud requires a causal connection, because any alleged defect in the instruction was harmless beyond a doubt." Ibid 120.

10. United States v. Teicher, 987 F.2d 112, 120-121 (2d Cir. 1993).

11. United States v. Teicher, 987 F.2d 112, 120-121 (2d Cir. 1993). The so-called "disclose or abstain" rule was established in an SEC ruling, dictating that corporate insiders are required to either disclose material non-public information they have or to abstain from trading on the information. Cady, Roberts & Co. 40 S.E.C. 907 (1961). This rule was upheld by subsequent judicial opinion on the grounds that all investors trading on impersonal exchanges should be entitled to equal access to material information. SEC v Texas Gulf Sulphur Co. 401 F.2d 833 (2nd Cir. 1968).

12. United States v. Teicher, 987 F.2d 112, 120-121 (2d Cir. 1993).

13. United States v. Teicher, 987 F.2d 112, 120-121 (2d Cir. 1993).

14. 15 U.S.C.A §78u-1, §78t-1.

15. Donald C. Langevoort, *Insider Trading: Regulation, Enforcement and Prevention* (West Group) (looseleaf) §3.04, at 3-23. However, Professor Wang thought that the "while in possession of " language might not reveal the statutory attitude towards the "possession vs. use" debate because it was open to different interpretations. See William K.S. Wang and Marc I. Steinberg, *Insider Trading* (1997) §4.4.5, at 182-184 (arguing that "choice of the phrase 'while in possession of' could be either an endorsement of the broader standard or a refusal to choose between the two standards [possession and use standards]"). Ibid 184.

16. Industry Canada, "Insider Trading Discussion Paper" (February 1996), paras [131]-[135]. In Canada, insider trading provisions were first introduced at the federal level in 1970 as part of the *Canada Corporations Act* and subsequently carried over into the *Canada Business Corporations Act* in 1975.

17. SEC v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998).

18. SEC v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998) ("we believe that Supreme Court dicta and the lower court precedent suggest that the use test is the appropriate test"). This adjudi-

cation enjoyed the support of another circuit court in a subsequent case. See United States v. Smith, 155 F.3d 1051 (9th Cir. 1998).

19. SEC v. Adler, 137 F.3d 1325, 1340 (11th Cir. 1998).

20. SEC v. Adler, 137 F.3d 1325 (11th Cir. 1998).

21. SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998).

22. Criminal Justice Act 1993 (UK) s 52(1).

23. Criminal Justice Act 1993 (UK) s 53(1)(c).

24. 17 C.F.R §240.10b5-1 (2000); also see Final Rule: Selective Disclosure and Insider Trading, Release No. 33-7881, available at http://www.sec.gov/rules/final/33-7881.htm [hereinafter Final Rule].

25. For more analysis of why Rule 10b5-1 can be dubbed the modified possession standard, see infra Part IV.B.1.

26. 17 C.F.R §240.10b5-1(b). "[A] purchase or sale of a security of an issuer is 'on the basis of' material non-public information about that that security or issuer if the person making the purchase or sale was *aware* of the material non-public information when the person made the purchase or sale." Ibid. (emphasis added).

27. 17 C.F.R §240.10b5-1(c).

28. Selective Disclosure and Insider Trading, Sec. Act Rel. 33-7787, 71 SEC Docket 7 (CCH) ¶7, at 746 (20 December 1999). Specifically, the Commission noted, "[w]e recognize that an absolute standard based on *knowing possession*, or *awareness*, could be overboard in some respects."(emphasis added) Ibid.

29. Ryan D. Adams, "'Where there is a will, there is a way': the Securities and Exchange Commission's adoption of Rule 10b-5" (2001) 47 *Loyola Law Review* 1133, 1150 (arguing that rule 10b5-1's "awareness" standard is virtually the court-rejected "possession" standard, and "how this standard functions in an area that historically has developed through case law remains to be seen").

30. Jennifer L. Neumann, "Insider Trading: Does 'Aware' Really Resolve the 'Possession' Versus 'Use' Debate?" (2001) 7 *Washington University Journal of Law & Policy* 189 (concluding that rule 10b5-1 successful resolves the circuit split regarding the "possession" versus "use" debate). Of course, the defenses introduced by Rule 10b5-1 turns the possession standard into the neo-possession standard. It seems premature to predict whether Rule 10b5-1 will end the "possession vs. use" debate in the US, and only time can tell whether the SEC's trick will work well in gaining the judiciary support.

31. Corporations Act 2001 (Australia) s 1043A(1)(a) (prohibiting a person from trading if he or she "possesses inside information" without further "use" requirement).

32. Government response to Report of the House of Representative Standing Committee on Legal and Constitutional Affairs, "Fair Shares for All: Insider Trading in Australia" (11 October 1990) (Australia).

33. See Corporations and Markets Advisory Committee (Australia), "Insider Trading Discussion Paper (June 2001)" s 2.142-152.

34. Corporations and Markets Advisory Committee (Australia), "Insider Trading Report (November 2003)" s 3.8 (Recommendation 23).

35. SEC v. Adler, 137 F.3d 1325, 1333 (11th Cir. 1998). The court determined that "the language [of Section 10(b) and Rule 10b-5] suggests a focus on fraud, deception, and manipulation." Ibid.

36. SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998).

37. United States v. Smith, 155 F.3d 1051, 1067-68 (9th Cir. 1998). See also SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998) (stating that " we do not believe that the SEC's knowing possession test would always and inevitably be limited to situations involving fraud").

38. United States v. Smith, 155 F.3d 1051, 1068 (9th Cir. 1998).

39. Corporations Act 2001 (Australia) s 1042A.

40. See infra notes 88-93 and accompanying text.

41. David W. Jolly, "Knowing Possession vs. Actual Use: Due Process and Social Costs in Civil Insider Trading Actions" (1999) 8 *George Mason Law Review* 233, 251-253.

42. TRM, Inc. v. United States, 52 F.3d 941, 943 (11th Cir. 1995) (citing Black's Law Dictionary 500 (6th ed. 1990)) (emphasis added).

43. As discussed before, the neo-possession standard provides defences to the defendant and thus eliminates this due process concern.

44. SEC v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998) ("we believe that Supreme Court dicta and the lower court precedent suggest that the use test is the appropriate test.").

45. United States v. Smith, 155 F.3d 1051, 1051 (9th Cir. 1998). ("we believe that the weight of authority supports a 'use' requirement").

46. Denis J.Block & Jonathan M.Hoff, "Insider Trading Liability: 'Use v. Possession,'" *N.Y.L.J.* Oct. 29, 1998, 5; Harvey L. Pitt & Karl A. Groskqufmanis, "The Supreme Court Has Upheld the Misappropriation Theory, But How Far the SEC Will Take the Ruling Is Anything But Clear," *Nat'l L.J.* Aug. 4, 1997, B4.

47. SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998) (emphasis added).

48. Chiarella v. United States, 445 U.S. 222 (1980).

49. Dirks v. SEC, 463 U.S. 646 (1983).

50. United States v. O'Hagan, 521 U.S. 642 (1997).

51. Chiarella v. United States, 445 U.S. 222, 235 (1980). Moreover, the word "use" can be also found in many other places throughout the case. See e.g., ibid, at 229 ("The federal courts have found violations of §10(b) where corporate insiders *used* undisclosed information for their own benefit."(emphasis added)); ibid, at 230 ("duty to disclose prior to trading guarantees that corporate insiders…will not benefit personally through fraudulent *use* of material, non-public information"(emphasis added)); ibid, at 231 ("petitioner's *use* of that information was not a fraud under §10(b) unless he was subject to an affirmative duty to disclose it before trading."(emphasis added)).

52. Dirks v. SEC, 463 U.S. 646, 659 (1983) (emphasis added). The court also employed similar language in the opinion. See e.g., ibid, at 656 ("requirement of a specific relationship between the shareholders and the individual trading *on* inside information" (emphasis added)); ibid. (discussing "how a tippee acquires the Cady, Roberts duty to refrain form trading *on* inside information" (emphasis added)).

53. United States v. O'Hagan, 521 U.S. 642, 656 (1997). (emphasis added). There are many other places involving the "use" language. See e.g., ibid at 655-656 (examining "the §10(b) requirement that the misappropriator's deceptive use of information be 'in connection with the purchase or sale of [a] security'"(emphasis added)); ibid at 656 (referring to a "misappropriator who trades on the basis of material non-public information" (emphasis added)).

54. SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998).

55. SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998) (stating that "we do not believe that the SEC's knowing possession test would always and inevitably be limited to situations involving fraud").

56. United States v. Smith, 155 F.3d 1051, 1067 (9th Cir. 1998).

57. Even the *Adler* and *Smith* courts acknowledged that the Supreme Court's use of such language is merely dicta. See SEC v. Adler, 137 F.3d 1325, 1334 (11th Cir. 1998); United States v. Smith, 155 F.3d 1051, 1067 (9th Cir. 1998).

58. Karen Schoen, "Insider Trading: The 'Possession versus Use' Debate" (1999) 148 *University of Pennsylvania Law Review* 239, 267 ("when analysing the language of the Supreme Court, one must also examine carefully the context of the Court's statements and the point the Court was attempting to make").

59. Chiarella v. United States, 445 U.S. 222, 235 (1980).

60. Chiarella v. United States, 445 U.S. 222, 235 (1980) ("when an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak").

61. See Chiarella v. United States, 445 U.S. 222, 245 (1980) (referring to Chiarella's testimony that he "use the information as a basis for purchasing stock"); Dirks v. SEC, 463 U.S. 646, 648 (1983) (asserting that Dirks "disclosed information to investors who relied on it in trading in the shares of the corporation"); United States v. O'Hagan, 521 U.S. 642, 648 (1997) (stating that O'Hagan "us[ed] for his own trading purposes material, nonpublic information regarding Grand Met's planned tender offer").

62. Louis Loss and Joel Seligman, *Securities Regulation* (3rd, 1991) vol.7, 3504-05 (arguing that "when there is no question that the inside information was actually used in trading—which is normally the case—it seems natural to speak in terms of not trading 'on' or 'on basis of' the information without necessarily implying that possession alone would not suffice").

63. SEC v. Adler, 137 F.3d 1325, 1337 (11th Cir. 1998).

64. Phyllis Diamond, "Mclucas Hails O'Hagan Ruling, But Says Issuers over Reach of Theory Remain," (1997) 29 *Sec. Reg. & L. Rep.* 1097, 1098.

65. David W. Jolly, "Knowing Possession vs. Actual Use: Due Process and Social Costs in Civil Insider Trading Actions" (1999) 8 *George Mason Law Review* 233, 254.

66. Corporations and Markets Advisory Committee (Australia), "Insider Trading Report (November 2003)" s 3.8.2.

67. See Industry Canada, "Insider Trading Discussion Paper" (February 1996), paras [131]-[135]. In February 1996, Industry Canada released a Discussion Paper on insider trading. The paper looked at whether the federal insider trading provisions were still needed and, if so, what changes could be made.

68. Canada Business Corporations Act (Canada) s 131(4) (stating that "An insider who purchases or sells a security of the corporation *with knowledge of* confidential information…is liable") (emphasis added).

69. David W. Jolly, "Knowing Possession vs. Actual Use: Due Process and Social Costs in Civil Insider Trading Actions" (1999) 8 *George Mason Law Review* 233, 220 (arguing that "the [*Adler*] court's ultimate ruling, although the court did advocate the use standard within its discussion, correlates with Rule 10b5-1… The *Adler* court's concerns are met and resolved by Rule 10b5-1"). This observer concluded that "Rule 10b5-1 resolves the circuit split regarding the 'possession' versus 'use' debate." Ibid 221.

70. SEC v. Adler, 137 F.3d 1325, 1338 (11th Cir. 1998). Some commentators also gave complimentary commentary to the role of the inference rule. See e.g., Allan Horwich, "Possession Versus Use: Is There a Causation Element in the Prohibition on Insider Trading?" (1997) 52 *Bus. Law.* 1235, 1270; David W. Jolly, 'Knowing Possession vs. Actual Use: Due Process and Social Costs in Civil Insider Trading Actions' (1999) 8 *George Mason Law Review* 233, 255.

71. David W. Jolly, "Knowing Possession vs. Actual Use: Due Process and Social Costs in Civil Insider Trading Actions" (1999) 8 *George Mason Law Review* 233, 256.

72. SEC v. Adler, 137 F.3d 1325, 1337 n.33 (11th Cir. 1998). This suggestion might have played an important role in the SEC adopting Rule10b5-1.

73. David W. Jolly, "Knowing Possession vs. Actual Use: Due Process and Social Costs in Civil Insider Trading Actions" (1999) 8 *George Mason Law Review* 233, 258 (stating that "Without the benefit of a canvas of litigation following the *Adler* rulings, it is difficult to say whether the *Adler* rule will be adopted swiftly").

74. United States v. Smith, 155 F.3d 1051, 1067 (9th Cir. 1998). ("we believe that the weight of authority supports a 'use' requirement.")

75. United States v. Smith, 155 F.3d 1051, 1069 (9th Cir. 1998).

76. United States v. Smith, 155 F.3d 1051, 1069 (9th Cir. 1998).

77. Criminal Justice Act 1993 (UK) s 53(1)(c).

78. Rule 10b5-1.

79. Rule 10b5-1 (c)(1)(i)(A).

80. Rule 10b5-1 (c)(1)(i)(B).

81. Rule 10b5-1 (c)(1)(i)(B)(3).

82. *Gower's Principles of Modern Company Law* (6th ed. 1997) (Sweet & Maxwell) 470.

83. Barry Rider and Michael Ashe Qc, *Guide to Financial Services Regulation* (3rd ed. 1997) 234-5.

84. P Mitchell, *Insider Dealing* in UK Butterworths Corporate Law Service: Corporate Transactions, Chapter 8, para 8.14 gives the following examples:

X decides on strategic investment grounds to increase his portfolio exposure in European recovery stocks and selects shares in Y GmbH which are rising in value. X also has price-sensitive information about Y GmbH but does not buy the shares for that reason. The "lack of intention" defence should apply…X decides that his property securities holdings are declining in value and that he must liquidate the entire portfolio. He has information about Z plc, which will cause its shares to fall even faster than the remainder of the market sector. The "inevitable transaction" defence ought to apply here.

85. Proposed Language for Inclusion in Committee Report on Insider Trading Definition, 20 *Sec. Reg. & L. Rep.* 279, 280 (1998).

86. In *Adler*, the defendant argued that he only sold 20,000 of his 869,897 shares. See SEC v. Adler, 137 F.3d 1325, 1329 (11th Cir. 1998).

87. Corporations and Markets Advisory Committee (Australia), "Insider Trading Report (November 2003)" s 3.8.3.

88. Criminal Justice Act 1993 (UK) s 53 (1)(c) (stating that "[insiders] would have done what he did even if he had not had the information").

89. United States v. Teicher, 987 F.2d 112 (2d Cir. 1993).

90. Karen Schoen, "Insider Trading: The 'Possession versus Use' Debate" (1999) 148 *University of Pennsylvania Law Review* 239, 281.

91. Selective Disclosure and Insider Trading, Securities Act of 1933 No. 7881 [August 11, 2000- August 17, 2000 Releases] 73 SEC Docket (CCH) ¶1, at 19 (September 18, 2000).

92. Selective Disclosure and Insider Trading, Securities Act of 1933 No. 7881 [August 11, 2000- August 17, 2000 Releases] 73 SEC Docket (CCH) ¶1, at 19 (September 18, 2000).

93. Rule 10b5-1 (c)(1)(i)(B).