Insider Trading by Advisory Personnel: What is it and How can it be Prevented?

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I. Introduction
Over the past 20 years, insider trading has received tremendous notoriety and heightened attention from the SEC. In the last five years alone, the SEC has brought more than 300 actions against more than 600 individuals and entities for insider trading violations, and has frozen millions of dollars in illicit trading proceeds. The type of fraud perpetrated in connection with insider trading has evolved in tandem with market trends. For example, in the mid-eighties, most of the insider trading cases arose out of the merger and acquisition boom, while during the recession of the late eighties and early nineties, most of the cases were what the SEC refers to as “bad news” selling cases — that is, insiders dumping shares before adverse corporate developments were disclosed. Since the early nineties, globalization, the technology boom and a renewal of merger activity have caused the SEC to shift its focus once again by looking closely at the potential for fraud involving specific types of financings (e.g., PIPEs offerings) and by certain market participants (e.g., hedge funds).

The most recent case brought by the SEC involving allegations of insider trading violations — and one of the most egregious in years — came to light in early March 2007. In SEC v. Guttenberg et al., the SEC brought insider trading charges against 14 defendants in connection with two related insider trading schemes in which Wall Street professionals allegedly traded on the basis of material, nonpublic information (“MNPI”) tipped, in exchange for kickbacks, by insiders at two major financial services firms. The complaint alleged that in the first scheme, which had been in operation since 2001, at least eight securities professionals, three hedge funds, two broker-dealers and a day-trading firm made thousands of illegal trades and millions of dollars in illicit profits using inside information misappropriated by Mitchell Guttenberg, the Executive Director of Equity Research at UBS Securities LLC, to trade ahead of the firm’s analyst recommendations. In the second scheme, which ran from 2004-2005, the complaint alleged that several securities industry professionals and a hedge fund made dozens of illegal trades and hundreds of thousands of dollars in illicit profits using inside information misappropriated by Randi Collotta, an attorney in the compliance department of Morgan Stanley, to trade ahead of corporate acquisition announcements. Collectively, the complaint alleged that the defendants made at least $15 million in illicit profits from the two insider trading schemes.

In light of the SEC’s continued focus on insider trading and the potential for abuse within advisory firms as a result of access to MNPI, investment advisers need to be aware of what constitutes insider trading, what special rules apply to them because of their unique role in the securities marketplace and how to structure an effective compliance program to ensure that advisory personnel steer clear of all forms of insider trading. The risk of having an ineffective compliance program — not only in terms of monetary and potential criminal penalties, but also in terms of reputational damage — is simply too great. As Linda Chatman Thomsen, the Director of the SEC’s Division of Enforcement, said after the charges in the Guttenberg case were made public, “no matter how clever you are, no matter how hard you try to avoid detection,” anyone who believes that illegal insider trading is a quick and easy way to get rich “underestimates [the SEC] at your risk.”

II. What is Insider Trading?

The concept of “insider trading” arises under Rule 10b-5 promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Liability for insider trading depends on (1) the existence of a disclosure duty, (2) the materiality of the undisclosed information and (3) the scienter of the defendant (i.e., the defendant’s intent to engage in fraudulent conduct).

The duty to disclose material information (or abstain from trading) has been traditionally imposed on corporate “insiders,” particularly officers, directors and controlling shareholders. However, the duty also extends to a person who receives and trades on inside (material) information (i.e., a tippee) that has been improperly divulged by a corporate insider (i.e., a tipper) who, by divulging such information, has breached a fiduciary duty to the corporation’s shareholders. Liability will result under these circumstances if the tipper personally benefits, directly or indirectly, from the disclosure and the tippee knew or should have known that the insider breached his or her fiduciary duty by disclosing the confidential information to the tippee. Another form of insider trading liability that has been recognized by the Supreme Court is known as the misappropriation theory of insider trading. This theory extends liability to non-insiders who possess MNPI and who use the information in violation of a duty owed to someone other than the shareholders of the corporation whose securities were traded.

Whether a fact is material for purposes of Rule 10b-5 will depend on whether there is a substantial likelihood that a reasonable investor would consider it important to his decision to buy or sell. As for scienter, the
Supreme Court has stated that to have this required state of mind, a person must have acted with the intent to deceive, manipulate or defraud.\textsuperscript{11}

**III. Special Rules Applicable to Investment Advisers**

Investment advisers and their personnel often become privy to MNPI. For example, an employee of an advisory firm who serves as a director of another company is a potential source of inside information to other personnel at the advisory firm.\textsuperscript{12} Advisory personnel may receive tips from contacts in the securities industry, consultants and others who are privy to such information.\textsuperscript{13} Alternatively, an employee could learn of inside information from a friend or relative employed by a public company.

In recognition of the access to inside information that advisory (and brokerage) firm personnel have, and the resultant temptation to trade on that information, Congress passed the Insider Trading and Securities Fraud Enforcement Act of 1988 (“ITSFEA”). ITSFEA added Section 204A to the Investment Advisers Act of 1940, as amended (the “Advisers Act”), which requires every investment adviser subject to Section 204 of the Advisers Act\textsuperscript{14} to establish, maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such investment adviser’s business, to prevent the misuse of MNPI in violation of the federal securities laws.\textsuperscript{15} Section 204A is designed to bolster the insider trading provisions found elsewhere in the federal securities laws, such as Rule 10b-5. While the statute does not specify the kind of policies and procedures required, the policies and procedures implemented by investment advisers should take into account the special circumstances of their particular businesses and organizations.\textsuperscript{16}

It should be noted that an investment adviser may be sanctioned for the absence of proper procedures under Section 204A even if the inadequacy has not resulted in an occurrence of insider trading. For example, in 2006, the SEC took enforcement action against Morgan Stanley for failure to maintain and enforce adequate written policies and procedures to prevent the misuse of MNPI, which resulted in substantial sanctions against the broker-dealer/investment adviser, notwithstanding the absence of any allegation by the SEC that illegal trading had actually occurred.\textsuperscript{17}

In that case, Morgan Stanley consented to an order censuring the firm, imposing a $10 million penalty and requiring it to cease-and-desist from further violations of Section 204A of the Advisers Act and Section 15(f) of the Exchange Act. The firm also agreed to undertake certain remedial actions, including retaining an independent consultant to review the firm’s policies for preventing and detecting insider trading and recommend additional procedures to be implemented. Morgan Stanley further undertook to review retrospectively the trading that had occurred at the firm during the more than four-year period at issue, and to report promptly to the SEC any information discovered during the review indicating that illegal trading may have occurred. Included among the items Morgan Stanley was cited for by the SEC were the firm’s failure to conduct any daily surveillance of trading in any accounts with respect to some or all of the securities that had been placed on the firm’s Watch List specifically so that trading in those securities could be monitored, and the firm’s failure to conduct any surveillance of trading in approximately 900 employee accounts held outside of Morgan Stanley and approximately 30,000 employee accounts held at Morgan Stanley that the firm failed to identify as held by employees.

In addition to Section 204A of the Advisers Act, ITSFEA added Section 21A to the Exchange Act which authorizes the SEC to seek civil monetary penalties in insider trading cases against “controlling persons.” While the term “controlling person” is not defined, if a person has the power to control the specific transaction upon which the primary violation is

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predicated, regardless of whether that power is actually exercised, then the person will be deemed a controlling person. Accordingly, it is safe to assume that an employer will be characterized as a controlling person of an employee.

Under Section 21A(b)(1)(A), a controlling person will be subject to liability if the SEC establishes that the controlling person knew or recklessly disregarded the fact that the controlled person, who committed the insider trading violation, was likely to do so and did nothing to prevent the violation. The statute does not define “knowing” or “reckless” behavior, but the legislative history suggests that the risk involved must be such that to disregard it would constitute a gross deviation from the standard of care that a reasonable person would exercise in such a situation. Moreover, under Section 21A(b)(1)(B), if the controlling person is an investment adviser (or broker-dealer), the controlling person will be subject to liability if the SEC establishes that the controlling person knowingly or recklessly failed to establish, maintain or enforce any policy or procedure required by Section 204A of the Advisers Act (or Section 15(f) under the Exchange Act), and such failure substantially contributed to or permitted the occurrence of the insider trading violation by the controlled person.

While the failure to establish, maintain or enforce a policy or procedure must be relevant to the conduct leading to the controlled person’s violations in order for the SEC to charge a controlling person under Section 21A(b)(1)(B), sanctions are not conditioned upon proof that, but for such failure, the violation would not have occurred. Rather, it is sufficient that the failure allowed the violation to occur, or that it provided assistance to the controlled person’s violations.

For insider trading violations, Section 21A grants the SEC authority to seek civil penalties from controlling persons of up to the greater of $1,275,000 or three times the amount of the profit gained or loss avoided by the insider trader. As a result, controlling persons face potentially massive liability exposure for each insider trading violation by their employees or associated persons. Given this liability exposure, the absence of an effective compliance program by investment advisory firms makes little sense.

IV. How to Structure an Effective Compliance Program

A. First Steps

As in designing any compliance program, investment advisers should take a risk-based approach in creating an effective insider trading program. When enacting ITSFEA, Congress acknowledged that appropriate policies will depend on the nature of a firm’s business “and the circumstances in which they conduct business and may differ from case to case.” Accordingly, the first step in designing an insider trading policy is to evaluate the firm’s business and the likelihood that advisory personnel will receive MNPI. This analysis may include evaluating the following questions:

1. How big is the firm?
   • Number of employees. Advisers with a small number of employees may be able to control the flow of information, educate their employees and police personal trading more effectively than larger firms. On the other hand, small firms may find it challenging to enact information barriers if employees work in close proximity to one another.
   • Assets under management/number of accounts. Firms that manage a moderate number of assets or client accounts may be better able to detect suspicious trades than larger firms. Advisory personnel of large firms may be able to mask suspicious trades due to the volume and frequency of firm trading. Further, small firms may be less likely to receive MNPI from Wall Street insiders than bigger shops due to the perceived economic clout of big firms.
2. What is the firm’s business?
   • Products. Advisers that manage a number of different products, such as mutual funds, hedge funds and separate accounts, need a more sophisticated program to address different trading platforms, types of issuers and additional points of contact with potential sources of MNPI. Like it or not, hedge funds are in the regulatory “hot seat,” and, therefore, firms that manage unregistered products should consider themselves high risk and take additional precautions in designing an insider trading policy.
   • Investment Style. Firms that focus on small-cap or thinly traded securities are more likely to have close contact with management of the company, other shareholders and market makers. Investment advisers or mutual funds that take an activist approach to investing will likely engage in frequent dialogue with company personnel. These types of investment approaches increase the likelihood that MNPI may be communicated to advisory personnel.
   Investment advisers that use consultants as part of their research process, may receive information that at the very least requires a determination as to materiality. Hedge funds that engage in corporate lending may receive MNPI during conference calls or meetings between company personnel and their lenders.
3. Is the firm affiliated with other financial services companies?
   Multi-service firms are more likely to come into contact with MNPI and may require additional protections against the misuse of MNPI, such as information barriers to separate trading, investment and research functions.
4. Does the firm have any past regulatory problems?
   Investment advisers that have previously been the subject of regulatory investigations or proceedings, even if unrelated to insider trading issues, will be considered higher risk and should take additional steps in designing an insider trading compliance program. Of course, if the past issues involved the firm’s insider trading program, the firm must ensure that the program is working effectively so that it does not become a “recidivist.”
5. Do any of the firm’s personnel have professional, family or other connections
to a public company?

Outside connections to public companies should be discouraged but at times may be unavoidable, such as if the firm itself is affiliated with a public company. In such a case, the firm’s insider trading policy must work in tandem with the public company’s own policy and include an oversight mechanism for trading by advisory personnel with other connections to a public company.  

B. Required Elements

Although any insider trading policy must be tailored to the firm, at a minimum, every policy should have the following elements:

1. Written insider trading policy covering the following topics:
   - Policy statement setting forth the prohibition against insider trading, the misappropriation of MNPI and tipping MNPI to others.
   - Legal consequences of violating the insider trading laws for traders, tippers, and the employing firm.
   - Definition of what constitutes “material” information.
   - Definition of when information should be considered “nonpublic,” including appropriate time lags when information is first publicly disseminated.
   - Steps to take if an employee thinks he or she is in possession of MNPI or is aware of a violation of the policy by others.
   - Identification of a “point person” for questions about or reports under the policy, which will likely be the Chief Compliance Officer.
   - Sanctions to be imposed for violations of the policy.
2. Education and training component that includes:
   - Distribution and acknowledgement of the policy.
   - Periodic training sessions to increase awareness and to learn about possible new sources of MNPI at the firm.
3. Procedures to protect confidential information, which may include:
   - Restricted access to departments or certain documents to authorized personnel.
   - Use of code names to describe pending acquisitions or other material events.
   - Computer safeguards, such as password protection and/or the use of encryption.
   - Information barriers, a.k.a. “Chinese Walls.”
   - Use of confidentiality agreements with third parties.
   - Encouraging a “clean desk” policy and other ways to secure confidential information, such as locked cabinets and file drawers.
   - Document destruction policies.

Registered investment advisers are likely to employ many of these practices under the privacy protection policies and procedures required by Regulation S-P.

4. Trade review:
   - Registered investment advisers are required to obtain quarterly transaction reports and periodic holdings reports from “access persons.” The Chief Compliance Officer or other designated person should review these reports to detect any unusual trading patterns, including transactions in close proximity to public announcements of corporate events, or transactions involving securities on the restricted or watch lists maintained by the firm.
   - The compliance department should “spot-check” client trades on a regular basis for the same purposes.
5. Documentation of steps taken to prepare, implement and review the insider trading program, including:
   - Dates of distribution of the policy.
   - Copies of acknowledgments of receipt and compliance with the policy.
   - Reviews of personal and client trades.
   - Dates and attendees at training sessions.
   - Steps taken to contain MNDI.
   - Actions taken in response to any violations of the policy.
   - Copies of non-disclosure agreements.
   - Reviews and amendments to the policy.
6. Review and update of program:
   - The insider trading program should be updated and revised periodically to address changes in the firm’s business and personnel, as well as technology and regulatory developments.

C. Other Recommended Practices

Depending on the firm profile, culture and other factors discussed in

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Part IV.A, above, investment advisers may wish to implement additional procedures to counter the risk of insider trading activity. These may include the following:

1. Restricted and/or Watch Lists: Investment advisers may wish to maintain a “restricted list” of companies about which the firm has received MNPI. Restricted lists are commonly used by broker-dealers and multi-service firms. The restricted list is typically available to all firm personnel and is maintained electronically by the Chief Compliance Officer or other designated person. Once a company is on the restricted list, no trading in client or personal accounts may take place until the company has been removed from the list.

2. Firms may also wish to maintain a “watch list” of companies which are sensitive for various reasons, such as industry rumors, third party contacts which do not rise to the level of MNPI, companies with whom firm personnel have business or personal relationships, companies which have been mentioned by firm personnel in public appearances or interviews. The watch list does not restrict personal or client trading, but is used by the compliance department to monitor trading. The list should be maintained in confidence by the compliance department.

3. Firms may wish to circulate an annual survey of firm employees to ensure all public company affiliations have been identified.

4. Firms may elect to have all personal trades of public companies submitted to the compliance department for pre-approval. In addition, firms may wish to require all employees, instead of only “access” persons as required by the Advisers Act, to be subject to personal trade pre-clearance and reporting procedures.

5. The Chief Compliance Officer may be designated as the “gatekeeper” for non-disclosure agreements and other communications that may involve the transmission of MNPI to advisory personnel.

6. Firms may wish to monitor email to pick up “chatter” that may indicate MNPI and to identify companies that should be added to the restricted and/or watch lists.

7. Firms may wish to employ outside consultants and/or internal auditors to review the effectiveness of the program.

8. Potential Pitfalls Drawn From Enforcement Cases

A review of selected SEC enforcement actions highlights some of the traps that advisers should seek to avoid in designing and implementing an insider trading policy.

1. Not tailoring the program to the firm’s business.

A registered investment adviser was sanctioned for failing to maintain effective insider trading policies. In particular, the firm’s policy was not tailored to its business because it did not address the receipt of MNPI from outside consultants and the potential misuse of MNPI regarding government-issued fixed income securities.

2. Reliance on self-reporting.

The SEC sanctioned an investment adviser and broker-dealer for insufficient insider trading policies and procedures. In particular, the policies “relied too heavily on self-reporting” in light of the fact that the firm’s chief investment officer was also the chairman and CEO of a publicly traded company. The SEC stated that in these circumstances, “objective, third-party review” was necessary to determine whether the employee possessed MNPI and whether a company should be added to the restricted list.

3. Control failures.

In the Morgan Stanley case (see discussion above in Section III), the firm’s process for placing a company on the Watch List lacked a “system of accountability” to ensure that required steps were in fact followed. Further, the determination of materiality was left in the hands of a single analyst, and was not subject to further review.

4. Oversight of compliance personnel.

The SEC cited violations of the Advisers Act, to be subject to personal trade pre-clearance and reporting procedures.

The defendants in Guttenberg included an attorney and compliance personnel, those responsible for overseeing the insider trading program. Firms with a higher risk profile or who wish to enhance their program may want to consider retaining an outside consultant or internal auditors to review the program.

V. Conclusion

As evident from public statements by SEC officials as well as recent enforcement actions, insider trading remains a hot button topic with the SEC. The focus has changed in recent years to address the growth of PIPE offerings, hedge funds and developments in technology, among other factors, but the basic allegation of trading on the basis of MNPI remains the same. Investment advisers are required to design and implement an effective insider trading policy, tailored to the needs and business of their firm. As the Morgan Stanley case demonstrates, the SEC is willing to take enforcement action regarding ineffective compliance programs even when there is no evidence of insider trading.


6. Chiarella v. United States, 445 U.S. 222 (1980). The term “insider” is not, however, limited to those persons. Insiders include anyone possessing MNPI concerning a security by virtue of the person’s relationship to the issuer. The term therefore covers corporate employees who possess material undisclosed information obtained in the course of their employment. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968).

7. Dirks v. SEC, 463 U.S. 646 (1983). The Dirks court also recognized that certain persons who receive corporate information legitimately for a particular purpose may become fiduciaries to the corporation’s shareholders as “temporary insiders,” and, accordingly, such persons are liable to the same extent as corporate insiders. Id. at 677 n.14. For example, a financial adviser who became a temporary insider with access to confidential information about a company’s tender offer plans committed securities fraud when, in breach of his fiduciary duty, he traded on information about an impending tender offer for personal gain. SEC v. Tome, 833 F.2d 1086 (2d Cir. 1987).

8. Dirks at 860-62. In Dirks, a former employee of a company whose books had been “cooked” disclosed the fraud to Dirks, a securities analyst, who in turn disclosed the information to his institutional clients who immediately disposed of the company’s stock. The Dirks court found that since the insider who disclosed the nonpublic information to Dirks did not do so for personal gain, there was no breach of fiduciary duty by the insider, and therefore Dirks had no duty to refrain from using the information even though he knew it was MNPI that came from an insider. The holding in Dirks served to limit the SEC’s ability to use enforcement as a means of limiting selective disclosure to analysts in the context of Rule 10b-5. Accordingly, in 2000, the SEC adopted Regulation FD as a means of outflanking Dirks by prohibiting issuers from making selective disclosure of MNPI to analysts and other enumerated persons. Selective Disclosure and Insider Trading, Securities Act Release No. 7881, Exchange Act Release No. 43,154, 65 Fed. Reg. 51, 716 (Aug. 15, 2000).

9. See U.S. v. O’Hagan, 521 U.S. 642 (1997) (a law firm partner misappropriated information about a tender offer by one of the firm’s clients and traded on the information, in breach of a confidentiality duty to his firm and the client). See also Rule 10b5-2 under the Exchange Act (this rule addresses the circumstances under which there is a duty based on a relationship of trust and confidence sufficient to find liability under the misappropriation theory as approved in O’Hagan).

The misappropriation theory is designed to protect the integrity of the securities markets against abuses by “outsiders” to a corporation who have access to confidential information that will affect the corporation’s security price when revealed, but who owe no fiduciary duty or other duty to that corporation’s shareholders.


11. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). However, some lower courts have accepted recklessness as equivalent to scienter. See e.g., Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1044-45 (7th Cir. 1977).

12. Given the rise in shareholder activism among hedge fund and mutual fund managers (e.g., requesting seats on boards of directors), the circumstances under which advisory personnel may have direct access to inside information seems likely to increase. See e.g., Joe Morris, Big Shops Flexing Activist Muscles, Ignites, Mar. 14, 2007, http://www.ignites.com/articles/20070314/shops_flexing_activist_muscles.

13. It has been reported recently that certain institutional investors and their investment advisers are seeking trading advantages through access to information gathered from unlikely sources. For example, lobbyists have been hired not to influence government but rather to tell these investors what Congress is going to do. Known as “political intelligence,” the SEC is currently investigating whether the passing of market-sensitive information by lobbyists to Wall Street could violate insider-trading laws. See e.g., Brody Mullins and Kara Scannell, Hedge Funds Hire Lobbyists to Gather Tips in Washington, Wall St. J., Dec. 8, 2006, at A1.

Another source of market-sensitive information is research firms that pay employees of public companies and others to serve as consultants to institutional investors. One such research firm is a firm that hired not to influence government but rather to access to information gathered from unlikely sources. For example, lobbyists have been hired not to influence government but rather to tell these investors what Congress is going to do. Known as “political intelligence,” the SEC is currently investigating whether the passing of market-sensitive information by lobbyists to Wall Street could violate insider-trading laws. See e.g., Brody Mullins and Kara Scannell, Hedge Funds Hire Lobbyists to Gather Tips in Washington, Wall St. J., Dec. 8, 2006, at A1.
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14. Advisers subject to Section 204 of the Advisers Act include advisers who engage in interstate commerce in connection with their business as investment advisers, other than advisers specifically exempted from registration pursuant to Section 203(b) of the Advisers Act. 15. ITSFEA also added Section 15(f) to the Exchange Act. Section 15(f) applies to registered broker-dealers and is virtually identical to Section 204A of the Advisers Act
20. In December 2003, the SEC adopted Rule 206(4)-7 under the Advisers Act which requires every SEC registered investment adviser to adopt and implement written policies and procedures reasonably designed to prevent violation of the federal securities laws, review those policies and procedures annually for their adequacy and the effectiveness of their implementation, and designate a chief compliance officer to be responsible for administering the policies and procedures. Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204, 68 Fed. Reg. 74,714 (Dec. 17, 2003). Such policies and procedures should encompass insider trading proscriptions. In May 2004, the SEC adopted Rule 204A-1 which requires SEC registered investment advisers to promulgate codes of ethics for their advisory personnel. Any such code must require certain supervised persons (known as access persons) to report their personal securities holdings and transactions, including transactions in mutual funds advised by the adviser or an affiliate, and to pre-clear any personal investments in initial public offerings and limited offerings. Investment Advisers Code of Ethics, Investment Advisers Act Release No. 2256, 69 Fed. Reg. 41,696 (July 2, 2004). Both of these rules were adopted in response to the mutual fund market timing scandal that emerged in the fall of 2003. See e.g., In re Alliance Capital Mgmt., LP, Investment Advisers Act Release No. 2205, Investment Company Act Release No. 26,312, 81 SEC Docket 2800-62 (Dec. 8, 2003). Interestingly, neither rule was adopted pursuant to the authority granted to the SEC under Section 204A of the Advisers Act, thus precluding controlling person liability for a violation of either rule premised upon Section 21A(b)(1)(B); however, controlling person liability may still be imposed under Section 21A(b)(1)(A).
22. Section 21A(a)(3) of the Exchange Act states that the maximum penalty for control persons shall not exceed the greater of $1 million or three times the profit gained or loss avoided. This dollar amount has been increased for inflation over the years, and currently stands at $1,275,000. See Adjustments to Civil Monetary Penalty Amounts, Securities Act Release No. 8530, Exchange Act Release No. 51,136, 70 Fed. Reg. 7,606 (Feb. 4, 2005).
In this case, a registered investment adviser and its affiliates engaged in merger arbitrage and changes in corporate governance as part of its investment strategy. The firms and their control person were sanctioned for inadequate policies and procedures. “The firms’ businesses, as practiced, have involved interaction with market participants who are in possession of material nonpublic information. . . Under these circumstances, the firms’ policies needed to be particularly sensitive to the possibility of misuse and to include safeguards tailored to the particular risks attending such interactions with market participants.” See also note 12, above. See also note 13, above; see also In the Matter of Massachusetts Financial Services Company, Investment Advisers Release No. 2165, 80 SEC Docket 2939-51 (Sept. 4, 2003) (registered investment adviser that regularly used paid outside consultants to provide market, political, budgetary and regulatory information was sanctioned in part because insider trading policy did not address information obtained from consultants) (hereinafter “MFSC”).
28. For example, in Gabelli, the firm was sanctioned because, among other things, its insider trading policy did not include written procedures to address routine access to insider information by the firm’s CIO, who was also the chairman and CEO of a public company.
31. See Rule 204A-1 under the Advisers Act.
32. For example, in Guttenberg, the defendants allegedly tipped MNPI through coded text messages on disposable cell phones. See Guttenberg complaint at page 11.
33. For more background on restricted lists, watch lists and other tools, see 6 Securities & Commodities Fraud, § 275; Insider Trading, § 13.5.3.
34. See SEC Broker-Dealer Report.
35. See MFSC.
36. See note 16, above.
37. See also In the Matter of Gintel Asset Management, Inc., Gintel & Co. LLC, Robert M. Gintel and Stephen G. Stavrides, Investment Advisers Release No. 2079, Investment Company Release No. 25,798, 78 SEC Docket 2580-60 (Nov. 08, 2002) (registered investment adviser was sanctioned because, among other things, the firm’s insider trading policy did not have any special procedures to address likely access to MNPI by owner and chairman and instead relied on self-reporting procedures that “were not reasonably designed to prevent the misuse of such information”).
38. See note 17, above.