Trading on the Edge: Insider Trading Regulations in Singapore & in U.S. [1]

I. Introduction

1. In the fast-paced world of trading, everything revolves around gaining an edge. The challenge lies in striving to use information faster than others.[2] If information fresh off the press is great, then *a fortiori*, information that has yet to hit the press is even better. This gives rise to the issue of insider trading, where parties attempt to take advantage of confidential information to gain an edge.

2. The term insider trading comprises both legal and illegal trading activity. The term used in this article refers to illegal insider trading only. Both Singapore and the United States of America ("**U.S.**") seek to curb insider trading but their regulations differ because of the different underlying theories behind the respective regulations. Singapore adopts an information-connected approach[3] while the US adopts a fiduciary-duty approach[4] towards insider trading. Both the Singaporean and American regulations have strengths and limitations. This article strives to be a useful point of reference for the implementation of new insider trading regulations, or the review of existing ones.

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[2] Alan Tovey, "High-frequency trading: when milliseconds mean millions" *The Telegraph* (2 April 2014) <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/10736960/High-frequency-trading-when-milliseconds-mean-millions.html> (accessed 1 September 2017).

[3] *Lew Chee Fai Kevin v Monetary Authority of Singapore* [2012] 2 SLR 913 ("***Lew Chee Fai Kevin***") at [51].

[4] *Ibid*.

II. Insider Trading Regulations in Singapore and in the U.S.

A. Regulations in Singapore

3. Insider trading in Singapore is a statutory offence under the Securities and Futures Act ("SFA").[5] Section 218 deals with insider trading involving connected persons in possession of inside information[6] while s 219 deals with insider trading by other persons in possession of inside information.[7] The elements required for s 218 are:[8]

    (a) a "person who is connected to a corporation";
    (b) who possesses "information concerning that corporation" that is not generally available;
    (c) a reasonable person would, if that information were generally available, expect it to have a "material effect on the price or value of securities of that corporation";
    (e) the connected person knows or ought reasonably to know that the information is not generally available; and
    (f) the connected person knows or ought reasonably to know that if the information were generally available, it might have a material effect on the price or value of those securities of that corporation.

4. It is an offence under s 219 if a person:

    (a) possesses and knows that he has generally unavailable information;
    (b) which would have a material effect on the price or value of securities and he
        (i) trades
        (ii) procures another to trade, or
        (iii) communicates the information to another who would, or would likely trade on it.[9]

[5] Securities and Futures Act (Cap 289, 2006 Rev Ed) ("**SFA**").
[6] *Id*, s 218.
[7] *Id*, s 219.
[8] *Id*, s 218.
[9] *Id*, s 219.

5. Under ss 218(1) and 219(1) of the SFA, it is the possession of the generally unavailable information, which would have a material effect on the price or value of the securities, which creates the offence.

6. The defendant may raise a defence if he falls within one of the exceptions in ss 222 to 229 of the SFA.[10] Alternatively, it is also a defence if the defendant satisfies the court that (i) the information was made known in a manner that would likely bring it to the attention of investors, who invest in securities that would be affected by the information[11] or (ii) that his counterparty knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.[12]

7. Otherwise, liability for insider trading in Singapore attracts civil or criminal penalties. Criminal penalties include a fine of up to S$250,000 or to imprisonment not exceeding 7 years or to both.[13] Civil penalties include the greater of either (i) the payment of a sum not exceeding 3 times the profit gained or the loss avoided,[14] or (ii) a fine of S$50,000 for a person who is not a corporation, or S$100,000 if the person is a corporation.[15] The civil penalty is a sum not less than S$50,000 and not exceeding S$2 million if no profit was gained and no loss avoided,[16] and can be imposed even absent any admission of liability.[17] Section 234 of the SFA allows for the imposition of compensatory payments to parties who suffered loss due to the insider trading activity[18] in addition to civil and criminal penalties, but the maximum compensation amount is capped at the amount of profit gained or loss avoided.[19]

[10] SFA, *supra* n 5, ss 222–229.
[11] SFA, *supra* n 5, s 215(b)(i).
[12] SFA, *supra* n 5, ss 231(1)(b) and 231(2)(b).
[13] SFA, *supra* n 5, s 221.
[14] SFA, *supra* n 5, s 232(a).
[15] SFA, *supra* n 5, s 232(b).
[16] SFA, *supra* n 5, s 232(3).
[17] SFA, *supra* n 5, s 232(5).
[18] SFA, *supra* n 5, s 234.
[19] SFA, *supra* n 5, s 234(1).

8. Civil actions are subjected to a limitation period of 6 years.[20] While the SFA does not indicate any limitation period for criminal penalties,[21] s 6(1) of the Limitation Act[22] imposes a limitation period of 6 years for recovery of actions such as a sum by way of a penalty.[23]

B. Regulations in the U.S.

9. In the U.S., the governing provisions are § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), which proscribes the use of any deceptive device, scheme, or artifice in connection with the purchase or sale of any security,[24] and Rule 10b–5 of the Securities and Exchange Commission ("**SEC**") which states that it is unlawful:[25]

> (a) to employ any device, scheme, or artifice to defraud;
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;
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> in connection with the purchase or sale of any security [bullets added].

10. Unlike Singapore, insider trading regulation in the U.S. is predominantly found in case law due to the lack of clear statutory guidelines defining insider trading.[26] Liability for insider trading must arise out of fraud, in order to rely on the element of deceit in Rule 10b-5.[27]

11. In the U.S., the defendant is not liable if there was no fiduciary duty,[28] or, that either the tipper did not gain a benefit,[29] or the defendant did not know that the tipper gained a

[20] SFA, *supra* n 5, ss 233(1) and 234(4).
[21] SFA, *supra* n 5, s 221.
[22] Limitation Act (Cap 163, 1996 Rev Ed).
[23] *Id*, s 6(1).
[24] *U.S. v O'Hagan* 521 U.S. (1997) 642 ("***O'Hagan***").
[25] Securities Exchange Act of 1934 § 240.10b–5, 15 U.S.C. 78j (2011) ("**US Securities Exchange Act**").
[26] J. Kelly Strader, "(Re)Conceptualizing Insider Trading" (2015) 80 Brook. L. Rev 1419 at 1427.
[27] *O'Hagan*, *supra* n 24, at 653.
[28] *Dirks v SEC* 463 U.S. 646 (1983) ("***Dirks***") at 665.
[29] *Id*, at 662.

benefit.[30] Without the tippee's knowledge of a benefit gained by the tipper, there is no tippee liability as it is impossible to prove knowledge of a breach of fiduciary duty.[31]

12. Liability for insider trading in U.S. can attract either civil or criminal penalties. Criminal penalties for individuals include fines up to $5 million and/or imprisonment up to 20 years for each violation, while businesses may be fined up to $25 million for each violation.[32] Civil penalties for an individual include an amount up to 3 times the profit gained or the loss avoided.[33] If a company knew or recklessly disregarded the fact that an insider trading violation was likely to be engaged in but fail to prevent it, it may be liable for a civil penalty not exceeding the greater of US$1 million or 3 times the profit gained or loss avoided.[34] Compensatory damages may also be payable to those who traded "contemporaneously with, and on the other side of" a person convicted of insider trading.[35]

13. The statute of limitations concerning civil penalties for insider trading is 5 years.[36] For criminal charges, the limitation period is 6 years.[37]

III. Underlying Theories

A. Singapore

14. The underlying theory behind Singapore's insider trading regulations is that of parity-of-information: to level the playing field.[38] To achieve that, Singapore has some of the broadest and strictest insider trading regulations in the world.[39] For example, where it concerns persons connected to a corporation, the onus is on the defendant to rebut the

[30] *Dirks*, *supra* n 28, at 660.
[31] *Dirks*, *supra* n 28, at 660.
[32] US Securities Exchange Act, *supra* n 25, 78FF.
[33] Michael V. Seitzinger, CONG. RESEARCH SERV., RS21127, Federal Securities Law: Insider Trading (2016).
[34] Securities Exchange Act of 1934 § 240.10b–5, 15 U.S.C. 78U-1 (2011).
[35] SEC, Exhibit 14.02, Insider Trading Policy, <https://www.sec.gov/Archives/edgar/data/25743/000138713113000737/ex14_02.htm> (accessed 1 September 2017).
[36] Securities Exchange Act of 1934 § 240.10b–5, 15 U.S.C. 78U-1 (2011).
[37] Charles Doyle, CONG. RESEARCH SERV., RL31253, Statutes Of Limitations In Federal Criminal Cases: An Overview (2012).
[38] *Singapore Parliamentary Debates*, Official Report (5 October 2001) vol 73 at col 2136 (BG Lee Hsien Loong, Deputy Prime Minister).
[39] *Lew Chee Fai Kevin*, *supra* n 3, at [51], where the court stated that Singapore's regulations are stricter than those in Australia, which is considered one of the broadest.

presumption he knew the information was generally unavailable, and would have had a material effect on the price and value of a security.[40] In this regard, the Court of Appeal in *Lee Chee Fai Kevin v MAS*[41] held that it was unnecessary to prove the *mens rea* for an offence under the SFA to be made out.[42]

B. U.S.

15. The central theme in the U.S. is that of fiduciary duty.[43] Insider trading regulations are geared towards the prevention of a breach of fiduciary duty together with an additional element of manipulation or deception.[44] Without fraud, Rule 10b-5 cannot be satisfied and there is no liability for insider trading. Three key theories which arise in the U.S. approach are (i) the Classical theory; (ii) the Misappropriation theory; and (iii) the Tipper-Tippee[45] liability theory.[46]

16. Under the classical theory, liability arises from a breach of a fiduciary duty to disclose or refrain from trading based on confidential information.[47] Such a breach defrauds shareholders, whose trust in the breaching party have been betrayed.[48]

17. In the misappropriation theory, liability attaches when a "corporate 'outsider' violates § 10(b) and Rule 10b–5 "by misappropriating confidential information for his own trading, breaching "a fiduciary duty owed to the source of the information".[49] Tippees who knowingly receive the misappropriated information and trade on it are similarly adjudged to have misappropriated the information. The act of "pretending fidelity to the source" while depriving the source of exclusive use of the information constitutes the deception and fraud.[50]

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[40] SFA, *supra* n 5, s 218(4).
[41] *Lew Chee Fai Kevin*, *supra* n 3.
[42] *Lew Chee Fai Kevin*, *supra* n 3, at [59].
[43] Laura Palk, "Ignorance Is Bliss: Should Lack Of Personal Benefit Knowledge Immunize Insider Trading?" (2016) 13 Berkeley Bus. L.J. 101 at 111.
[44] *Dirks*, *supra* n 28, at 654.
[45] Persons in the first instance are called tippees, subsequent recipients are remote tippees.
[46] Laura Palk, *supra* n 43, at 112–117.
[47] *U.S v Newman*, 773 F.3d 438, 445 (2d Cir. 2014), cert. denied, 577 U.S. —— (2015) ("***Newman***").
[48] *Ibid*.
[49] *O'Hagan*, *supra* n 24, at 643.
[50] Laura Palk, *supra* n 43, at 116.

18. Under the Tipper-Tippee liability theory, tippee liability derives from tipper liability.[51] A tippee is required to disclose or abstain from trading if the tipper's tip was a breach of fiduciary duty and the tippee knew of the breach.[52] Both are required before a tippee is liable for insider trading. In *Dirks*, the court held that the test for the tipper's breach of fiduciary duty "is whether the insider personally will benefit, directly or indirectly, from his disclosures. Absent personal gain, there is no breach of duty to stockholders".[53]

IV. Implications & Recent Developments

A. Singapore

19. The type of inference drawn from information in one's possession also determines if insider trading liability is attracted.[54] In *Lew Chee Fai Kevin v Monetary Authority of Singapore* ("*Lew*"),[55] Lew attended an internal meeting and obtained information that the company would be taking a significant overall loss.[56] He then sold 90,000 shares while in possession of the said information.[57] The court convicted him of insider trading as the inference that could be drawn from his information was of a better quality than that which a common investor could draw.[58]

20. It is submitted that the quality of the inference required by the court is pitched at a low threshold of being simply 'better' than a common investor's inference from generally available information. One disadvantage of such a broad approach is the uncertainty arising from situations that fall within the wide parameters of the approach, but might not result in conviction and liability. The court in *Lew* acknowledged this,[59] stating that the use of a negative formulation risked capturing transactions outside of Parliament's intended area of regulation.[60] The court stated that "fortuitously gained information and that gained through diligence or analytical prowess" are not within the scope of information which would attract

[51] *Dirks*, *supra* n 28, at 647.
[52] *Dirks*, *supra* n 28, at 647.
[53] *Dirks*, *supra* n 28, at 647.
[54] SFA, *supra* n 5, s 215(c).
[55] *Lew Chee Fai Kevin*, *supra* n 3.
[56] *Lew Chee Fai Kevin*, *supra* n 3, at [2].
[57] *Lew Chee Fai Kevin*, *supra* n 3, at [16].
[58] *Lew Chee Fai Kevin*, *supra* n 3, at [91].
[59] *Lew Chee Fai Kevin*, *supra* n 3, at [55].
[60] *Lew Chee Fai Kevin*, *supra* n 3, at [55].

insider trading liability.[61] Thus, while the parameters are broad, the court suggests that it would tread carefully when determining if the conduct fell within Parliament's intended area of regulation. This is certainly reassuring.

B. U.S.

21. In contrast, the U.S. approach is arguably narrower, requiring both a breach of fiduciary duty for personal benefit, and deception. Without fiduciary duty, there can be no liability for insider trading.[62] Even if a fiduciary duty is breached, but the tipper does not derive a personal benefit, there is no liability.[63] Although this approach is narrower, the reliance on case law results in multiple points of contention.

22. The definition of a fiduciary duty is a duty, owed to shareholders of a corporation, not to trade or disclose material non-public information.[64] This duty arises from a relationship of trust and confidence between parties to a transaction.[65] In the context of insider trading, this duty is only breached when the attainment of a personal benefit is the desired outcome. Thus, an insider may disclose material non-public information but will not be held to have breached his or her fiduciary duty if there was no intention for personal benefit.

23. As to what constitutes "personal benefit", the Second Circuit Court of Appeals ("Second Circuit") in *US v Newman* ("*Newman*"),[66] held that a mere casual friendship or acquaintance is insufficient, stating that "the personal benefit received in exchange for confidential information must be of some consequence"[67] This is to say that it should eventually result in a pecuniary gain for the tipper. However, the Supreme Court in *Salman v US* (*"Salman"*) held that a gift of inside information to a trading relative or friend would suffice as a personal benefit,[68] but did not clarify the level of closeness of a relationship which would suffice as friendship. Thus, because mere acquaintance does not satisfy the

[61] *Lew Chee Fai Kevin*, *supra* n 3, at [62].
[62] *Chiarella v U.S.*, 445 U.S. 222, 232 (1980).
[63] *SEC v Obus*, 693 F3d 276, 289 (2d Cir. 2012).
[64] *Dirks v SEC* 463 US at 646 (1983) ("*Dirks*") at 659.
[65] *Chiarella v U.S.*, 445 US 222, 222 (1980) at 1112.
[66] *Newman*, *supra* n 47, at 438.
[67] *Newman*, *supra* n 47, at 452.
[68] *Salman v U.S.*, 137 S.Ct. 420, 422 (2016) ("***Salman***").

requirement of a benefit obtained by the tipper, the tippee may ward off potential insider trading liability so long as he does not know of any other benefit received by the tipper.

C. Convicting the Remote Tippee

24. One drawback from the U.S. approach is that it is almost impossible to impute liability for remote tippees, as it is extremely onerous for the regulator to prove that the defendant knew that the tipper received a benefit. In *Newman*, the defendant was "three [or] four levels removed from the tipper".[69] Given the remoteness of the tippee from the tipper, the regulator was unable to prove that the defendant knew of a benefit received by the tipper. In *U.S. v Steinberg*, the defendant was convicted of insider trading in Dell and NVIDIA stock.[70] The court concluded that knowledge of tipper benefit was subsumed under knowledge of a breach by the tipper.[71] Although the defendant was four levels removed from both inside sources of the Dell and NVIDIA information,[72] knowledge was presumed by inferring that the defendant knew there was "no such thing as a free lunch".[73] However, the court in *Newman* held that the government had to prove beyond reasonable doubt that the defendant knew the tippers received a benefit.[74] The defendant's appeal in *Steinberg* was thereafter dropped by prosecutors,[75] which again showed the challenges that U.S. prosecutors face when dealing with remote tippees.

25. On the other hand, Singapore's approach, with its presumption of knowledge[76] and the lack of requirement to prove intention to benefit,[77] makes it relatively easier to convict even remote tippees. Thus, the Monetary Association of Singapore ("MAS") is often able to bring action against defendants,[78] while in the U.S., both the SEC and the Federal Bureau of Investigation ("FBI") are involved.[79] Tactics include FBI surveillance, wiretaps, and

[69] *Newman*, *supra* n 47, at 443.
[70] *U.S. v Steinberg*, 21 F.Supp.3d 309 (2014).
[71] *Id*, at 318.
[72] *Id*, at 312.
[73] *Id*, at 317.
[74] *Newman*, *supra* n 47, at 453.
[75] David Ingram, Nate Raymond, "U.S. abandons insider trading case against SAC's Steinberg" *Reuters* (22 October 2015) <http://www.reuters.com/article/us-usa-crime-insidertrading-idUSKCN0SG2JZ20151022> (accessed 1 September 2017).
[76] SFA, *supra* n 5, s 218.
[77] SFA, *supra* n 5, s 220.
[78] SFA, *supra* n 5, s 232(1).
[79] Patrick Radden Keefe, *The Empire Of Edge*, The New Yorker (13 October 2014) <http://www.newyorker.com/magazine/2014/10/13/empire-edge> (accessed 1 September 2017).

informants.[80] However, the sophisticated investigative tools in the U.S. result in a stronger case for liability, if and when a conviction is successful.

26. Notwithstanding the differences in Singapore and U.S., uncertainties arise in both approaches, Singapore's approach results in uncertainty due to its broad parameters while the U.S. approach results in uncertainty concerning the threshold which constitutes a personal benefit. However, it is submitted that these uncertainties are temporary as subsequent court decisions should resolve them.

27. If the desire is to curb insider trading at all levels, then Singapore's information-connected approach is the best fit for the job. The U.S. approach is emasculated when confronting cases involving remote tippees while the Singapore approach has no such issues.

28. Should heavy penalties be sought, reference should be taken from the U.S. approach. In terms of investigation and enforcement, the U.S. approach taps the expertise of various law enforcement agencies, allowing for a stronger case to be brought, allowing regulators to justify the imposition of heavier penalties.

D. Recent Developments

29. The recent case of *Salman* was granted certiorari where the Supreme Court of the United States held that a gift of inside information to relatives or friends was sufficient to create liability for insider trading,[81] abrogating the *Newman* holding that the tipper should also receive something of a "pecuniary or similarly valuable nature" in exchange for a gift to family or friends.[82] More clarity will be provided when the court decides Martoma's appeal.

30. Even if *Salman* sets the standard interpretation of a benefit, it is argued that this only extends to tippees with a closer relationship to the tipper, such as relatives and friends. The outcome in cases such as *Newman*, concerning remote tippees 3-4 levels away, will be unchanged. Thus, it remains difficult, to prove under the U.S. approach that a remote tippee knew of any benefit gained by the tipper.

[80] *Ibid*.
[81] *Salman*, *supra* n 68, at 427.
[82] *Salman*, *supra* n 68, at 428.

V. Conclusion

31. It is submitted that a combination of both the Singapore and the U.S. approaches would result in an ideal outcome and deter insider trading at various tipper and tippee levels.

32. Singapore's information-connected approach, supported by the investigative tools used in the U.S. approach, enables liability to be imputed on tippers and tippees at all levels of the information chain. Coupled with the heavy penalties imposed under the U.S. approach, it would deter insider trading as the potential penalties would far outweigh any potential profits.