

Market Abuse and Insider Dealing

2nd Edition

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Preface

Concern about the harm to confidence in the integrity of the markets caused by those who take advantage of privileged information in their own dealings is nothing new. Indeed, it is not only in our own time that the markets and financial system has been traumatised by a crisis of confidence. Some of the earliest laws relating to trade outlaw attempts to artificially interfere with the proper function of the markets and ensure their fairness. While having better information and being better able to use it are factors which in most societies are considered not only acceptable but commendable, others come into play when the information in question could not have been obtained by the most diligent competitor or counterparty and, indeed, the information was taken in a manner or from a source that others would consider to be unfair. Those who appropriate for their own, or for that matter another's benefit, information belonging to someone else, have an unfair advantage and no matter whether as a matter of logic, let alone traditional legal analysis, this can reasonably be expected to justify remedies, it brings the fairness of the market as a whole into disrepute. It is the concern to promote and preserve public confidence in the expectation of fair dealing in the markets that has, at least in Britain, justified our attempts to control the abuse of inside information. Of course, in recent years the influence of various initiatives within the European Union has resulted in a wider concern to address the taking advantage of asymmetric access to information even where such has not been appropriated or misused.

The law that has developed to address these issues in a prohibitive and remedial manner is both complex and multi-layered. While the criminal law is most found in statute, the law relating to market abuse operates in what is to English jurisprudence a relatively new world between criminal law and the civil law. The specific laws and regulatory provisions also function within the context of the general law and other structures of regulation ranging from the Code on Takeovers and Mergers to in-firm compliance systems. The range of potential legal and regulatory responses to even a simple case of insider dealing is both complex and often uncertain. The perception that insider abuse is still a major issue in most markets and the traditional approach of the criminal law has not served as a significant deterrent and has led regulators such as the Financial Services Authority and the US Securities and Exchange Commission renewing their commitment to 'stamp out' insider dealing by whatever means are at their lawful disposal. Consequently it is important to consider the control of insider trading and related abuses in the rather wider context of financial crime and therefore in this edition we have addressed in more depth issues such as the new fraud law and money laundering.

There is another important dimension that this new edition seeks to focus upon. Earlier discussions of insider dealing law have understandably tended to

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concentrate on the legal and regulatory liabilities of those who engage in the abuse of inside information. However, today as in the case of money laundering, the impact of the law and especially the regulatory system is in practice rather greater for those who find themselves, innocently or otherwise, as facilitators of objectionable transactions. A serious and very real responsibility has been cast on financial intermediaries and professional advisers to assist in the maintenance of integrity in the markets. In the real world an authorised person and individuals such as those engaged in compliance, are more likely to find themselves subject to legal and regulatory sanctions than those who actually engage in the abuse of inside information or for that matter who engage in other profitable crimes. The obligations that anti-money laundering laws, anti-insider dealing regulations and increasingly anti-corruption laws impose on those who handle other people's financial transactions to conduct due diligence and operate effective controls to discourage and expose such activity are onerous and well policed. Therefore, the control of insider dealing and related abuses is a very real and topical concern for all those who operate in the financial sector. In this new edition we give particular emphasis to this and address in detail the role and responsibilities of compliance.

As we have seen only too well with the financial chaos stemming in part from the failure of banks to operate effective risk control systems, all financial markets are to a greater or lesser degree inter-dependent. Consequently, the laws and systems of one jurisdiction cannot be considered in isolation. Those engaged in objectionable or even merely facilitative activities may well be subject to the reach of other regulatory and legal systems. Most significantly in practical terms is the long arm reach of US securities law and in particular the concern of the US Securities and Exchange Commission to protect the integrity of its own national markets. Indeed, the criticism that has been made of the failure of the SEC to prevent and adequately control a series of recent scandals makes it more likely that it will adopt an even more robust enforcement stance. Therefore this edition attempts where relevant to address the legal and regulatory issues that may arise when other jurisdictions and in particular the USA seek to assert their authority.

The authors have attempted to draw upon their unique combination of expertise and practical experience in presenting in a clear and constructive manner an admittedly complex and dramatic body of law and regulation. In doing so they have had the benefit of advice from many involved in the day to day administration of the relevant law and in particular compliance systems. It would be invidious to name particular individuals who have been of such assistance, but their advice and support has always been much appreciated, albeit not always taken as gospel! The advice, however, of our publisher Mr Andy Hill, on the other hand is sacrosanct.

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