Article

Securities Markets—A Place to Get Rich Quick or a Quicksand Going Straight to Jail? The "Mens Rea" Required for Insider Trading Criminal Liability

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ABSTRACT

Insider trading is a prototypical white collar crime which always captures public attention and the prohibition against insider trading is now a well-established international norm. The United States was the first country in the world to develop the prohibition of insider trading, and today the U.S. continues to lead international regulation and enforcement regarding the prevention of insider trading. The U.S. Securities and Exchange Commission ("SEC") has been granted various administrative and enforcement powers to investigate, pursue and punish insider trading cases, including through administrative sanction, civil proceedings, and criminal prosecutions charging insider trading as a felony under the Securities Exchange Act. While differences exist in the predicate elements establishing both civil and criminal liability in securities fraud cases, the elements supporting a criminal prosecution are broader than the elements for the civil cause of action.

As the scope of potential liability has expanded from the violations of fiduciary duties owed to one's own company in the traditional insider trading scenario to the duty owed to the "source of information" in "misappropriation" cases, the U.S. Supreme Court has declared that due process safeguards to imposing criminal liability for insider trading requires proof of a defendant's "willfulness" in respect to

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the alleged criminal insider trading acts. The prohibition of insider trading has become both broader and much more complicated. Unfortunately, there has been a little judicial consistency regarding the interpretation of the meaning of "willfulness" in alleged insider trading violations. This article will attempt to articulate and explain an appropriate standard for the mens rea, or criminal intent requirement for insider trading in the U.S.

Keywords: *Insider Trading, Mens Rea, Willfulness, Misappropriation Theory*

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I. INTRODUCTION

Every Insider trading prosecution inevitably catches public attention as the prototypical white collar crime, not only because the defendants often include famous businesspeople, but also because of the controversy surrounding every investigation and prosecution. Furthermore, the prohibition of insider trading now is an international norm. Most countries in the world devote substantial governmental resources to the detection of insider trading activities as one kind of securities fraud crime. By stopping insider trading, governments aim to protect the public and investors, while maintaining the health of and confidence in securities markets. However, because of human lust for monetary profits, preventing insiders from trading on nonpublic material information is very difficult.

The United States was the first country in the world to develop a prohibition on insider trading, and today the United States continues to lead international regulation and enforcement with respect to the prevention of insider trading. The U.S. Securities and Exchange Commission ("SEC") was granted various administrative and enforcement powers against insider trading cases, including authority for administrative sanctions, civil proceedings, and criminal prosecutions. When the SEC accuses someone of having committed insider trading, in addition to bring the case on complaint before a civil court or issuing an administrative sanction, the SEC also can prepare a formal referral to the U.S. Department of Justice ("USDOJ") and the DOJ may initiate a criminal action to prosecute the case. Under the Exchange Act the criminal liability provided for insider trading is a felony, so a criminal conviction can permanently change a person's life. Because criminal liability may cause more pervasive and harsher consequences than civil liability, it is a well-established rule that criminal liability should be imposed more narrowly than civil liability. However, according to one commentator, while differences exist between the elements for civil liability and criminal liability in securities fraud cases, oddly the elements supporting a criminal prosecution are broader than the elements of the civil cause of action.[1]

Even though the American insider trading regulations and enforcement guidelines are very influential to most emerging markets, including Taiwan and China, there are still some problems in the American system governing prohibition of insider trading. Besides the challenges of enforcing insider trading law, there is no definitive U.S. statute prohibiting insider trading and no clear interpretation about the criminal intent, or *mens rea* required for an

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1. Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 72 ALB. L. REV. 1, 21-24 (2009).

insider trading violation. According to the Supreme Court's opinion in *U.S. v. O'Hagan*, the drawing line between whether a civil and criminal penalty applies lies in the conscience of the lawmaker.[2] In order to qualify for a criminal penalty, the defendant's action must be expressly considered to constitute a "willful" violation of the securities crimes in the Section 32(a) of the Exchange Act.[3] However, although theories of insider trading have evolved vigorously in the U.S. over the past decades, the standard of "willfulness" for imposition of criminal liability for insider trading is still unclear and differs among the courts. Because the American experience has been largely viewed as the "gold standard" for many emerging markets and since most insider trading cases are punished by criminal prosecutions in Taiwan and China, there is a need to clarify the *mens rea* requirements for criminal liability for insider trading violations within the jurisdiction of the United States.

The U.S. Supreme Court confirmed the misappropriation theory for insider trading violation in the *U.S. v. O'Hagan* case, which departed from the traditional theory. By extending the fiduciary duty owed to one's own company in the "traditional" case to a fiduciary duty owed to "the source of information" in a "misappropriation" case, the U.S. Supreme Court declared the safeguards to criminal liability in misappropriation cases required proof of the defendant's "willfulness" to commit insider trading. The insider trading prohibition thus becomes much broader in scope and more complicated. However, there has been no consistency in court interpretations of the meaning of "willfulness" for insider trading violations. This article will detail and explain an appropriate standard for the mental state requirement for criminal insider trading violations in the U.S.

In part II, this article will analyze the rules and regulations governing insider trading. Part III of this article will demonstrate the failure of courts to provide a consistent standard of *mens rea* for insider trading cases. Faced with these incoherent legal decisions, part IV of this article will recommend a clear *mens rea* standard for insider trading violations.

II. STATUTORY INTERPRETATION OF THE SECURITIES EXCHANGE ACT

A. *The Definition of Insider Trading*

Although insider trading is a well-known crime, there is no statute specifically providing a definition of insider trading. Congress has regulated the securities market by enacting the Securities Act of 1933 ("1933 Act")

2. U.S. v. O'Hagan, 521 U.S. 642, 664-65 (1997).
3. 15 U.S.C. § 78ff(a) (2002).

and the Securities Exchange Act of 1934 ("1934 Act"), as amended, to ensure the maintenance of a fair and honest market.[4] Both the 1933 Act and the 1934 Act ban securities frauds. Section 10(b) of the 1934 Act provides the fundamental fraud-prohibition regulation:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. § 78j (2000). Pursuant to the authority provided by this section, the Securities and Exchange Commission promulgated SEC Rule 10b-5 which provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (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, in connection with the purchase or sale of any security."

17 C.F.R. § 240.10b-5 (2009). Rule 10b-5 is the most important anti-securities-fraud regulation governing fraud, manipulation, and insider trading. However, as pointed out by senior counsel in the Division of Enforcement of the SEC, "while Congress gave us the mandate to protect investors and keep our markets free from fraud, it has been our jurists, albeit at the urging of the Commission and the United States Department of Justice, who have played the largest role in defining the law of insider trading."[5] The meaning of insider trading has developed with impetus from

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4. *See* 15 U.S.C. § 78b (1975) (originally enacted as the Act of June 6, 1934, c. 404, Title I, § 2, 48 Stat. 881) (stating the purpose of securities law).

5. *See* Thomas C. Newkirk, Associate Director, Division of Enforcement & Melissa A.

the SEC as the prohibition of insider trading has been built by the efforts of the SEC, USDOJ, and the courts.

The SEC first constructed a rule proscribing insider trading in its decision in *In re Cady, Roberts & Co*., 40 S.E.C. 907 (1961). After a decade of the SEC's efforts, most federal courts had recognized the prohibition of insider trading and accepted the "disclose or abstain" rule.[6] Insiders who trade on the basis of material nonpublic information, either corporate insiders or their "tippees,"[7] will be viewed by the SEC and the courts as being in violation of Rule 10b-5. This traditional theory of insider trading does not mean corporate insiders have a duty to disclose all material information to the public; rather, the duty is either to disclose or to abstain from trading on the nonpublic material information until public disclosure has been made.[8] In 1980, although the U.S. Supreme Court upheld the prohibition of insider trading in *Chiarella v. U.S.*, it limited violations to a showing that a fiduciary duty was owing to the company whose stock was traded. In *Chiarella*, the Supreme Court announced "the necessity of preventing a corporate insider from . . . taking unfair advantage of the uninformed minority stockholders."[9] The Supreme Court also drew a line for insider trading by declaring that trading on material, nonpublic information in itself was not enough to trigger liability under the anti-fraud provisions. The court reasoned that because the defendant, a printer, owed no duty to the target shareholders, he did not violate Rule 10b-5.[10] Later, in *Dirks v. S.E.C.*, the Supreme Court also limited Tipper/Tippee liability to within the scope of fiduciary duty (violators must have owed a fiduciary duty to the company whose stock was traded) and a requirement that prosecutors show the insiders' personal benefit.[11] Thus, the prohibition of insider trading gained national recognition, but was construed narrowly by the courts.

Afterwards, the SEC maintained its efforts to develop the

Robertson, Senior Counsel, Division of Enforcement, Insider Trading: A U.S. Perspective, Address at 16th International Symposium on Economic Crime, Jesus College, Cambridge, England (Sept. 19, 1998).

6. *See* S.E.C. v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

7. A "tippee" is the person who has been "tipped" with secret information. *See* KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS 178 (3d ed. 2002).

8. *See Texas Gulf Sulphur Co.*, 401 F.2d at 848.

9. Chiarella v. U.S., 445 U.S. 222, 228-29 (1980).

10. *Id.* at 233-34.

11. Dirk v. S.E.C., 463 U.S. 646 (1983) (Dirk was an officer of a broker-dealer firm and specialized in investment analysis of insurance company securities to investors. When he received information that a corporation had vastly overstated assets, he "tipped" his clients. After Dirk discussed this information with his clients, some of those clients (tippee) sold holdings in the corporation. Dirk was found not guilty by Supreme Court because he owed no duty to the insurance company and he received no personal profit from tipping the information.).

groundbreaking misappropriation theory, which would impose liability for people who owed no fiduciary duty to the company in which stock was traded. In 1997, the Supreme Court in *U.S. v. O'Hagan* recognized the "misappropriation theory," which imposed liability to any person "who trades on the basis of material, nonpublic information, . . . gains his advantageous market position though deception" and "in breach of a duty owed to the source of the information."[12] The SEC enforcement sent out a strong signal to the market that the law prohibits misusing nonpublic market information for personal profit. The prohibition of insider trading and the misappropriation theory achieved wide acceptance in American case law.

Courts in the Unite States have recognized this prohibition against insider trading and shaped the definition of insider trading in decades of opinions. The SEC also expanded their prohibition of insider trading to include "tender offering," where the SEC would bring an insider trading case under Rule 14e-3, which provides:

> "(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is *in possession of material information relating to such tender offer which information* he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from: (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise."

17 C.F.R. § 240.14e-3 (2009). Thus, after a tender offeror has taken substantial steps to commence a tender offer, no other person may trade in the target company's stock while in possession of material information relating to the tender offer if he acquired the information, directly or indirectly, from the tender offeror, the target company, or any of their officers, directors, employees, or persons acting in their behalf.

12. U.S. v. O'Hagan, 521 U.S. 642, 652 (1997).

Regardless of debate over the efficiency of regulation or deregulation of insider trading,[13] the American experience with insider trading prohibition has been well-accepted by most regulators throughout the world.[14]

B. *Insider Trading Liability*

The 1934 Act imposed criminal liability for violation of Section 10(b), and in 1947, a federal court first recognized a private action to claim insider trading violated the Exchange Act Section 10(b) and Rule 10b-5.[15] Insider trading violations could lead to not only administrative sanctions from the SEC, but also criminal and civil liability.

After the federal courts' attempts to develop rules and to permit civil actions, Congress acted to impose statutory civil liability to deter insider trading. By enacting the Insider Trading Sanctions Act ("ITSA") in 1984, Congress increased the arsenal of remedies available in insider trading cases. In addition to earlier rulings from courts that forced violators to pay the difference between the average price and the actual purchase price of the share, the ITSA granted the SEC stronger power to seek a civil penalty of up to three times the profit gained or loss avoided thought a defendant's illegal insider trading.[16] Moreover, the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA") added Section 20A to the Exchange Act, a provision that establishes an express private right of action for violations of federal securities law involving illegal insider trading through tipping.[17] By enacting Section 20A, Congress granted "private rights of action based on contemporaneous trading," and also eliminated the need for private plaintiffs to show that the insider trader owed them a disclosure duty.

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13. Many scholars in the U.S. argue that insider trading is less expensive than traditional means of information disclosure and improves market efficiency. Henry G. Manne, *Insider Trading Hayek, Virtual Markets, and the Dog That Did Not Bark*, 31 J. CORP. L. 167 (2005); *see also* Thomas A. Lambert, *Overvalued Equity and the Case for an Asymmetric Insider Trading Regime*, 41 WAKE FOREST L. REV. 1045 (2006).

14. Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 837 (2006) ("Within roughly the past fifteen years, EU members, Japan, China, and other countries have prohibited insider trading in similar circumstances and on substantially the same grounds as the United States.").

15. *See* Karson v. Nat'l Gympsum Co., 73 F. Supp. 798 (Pa. D. & C. 1947) (the defendant-insiders were accused of buying the plaintiff's stock based on their possession of material, nonpublic information).

16. 15 U.S.C. § 78u-1 (2002).

17. 15 U.S.C. § 78t(d) (2000) ("Wherever communicating, or purchasing or selling a security while in possession of, material nonpublic information would violate, or result in liability to any purchaser or seller of the security . . . such conduct in connection with a purchase or sale of a put, call, straddle, option, privilege or security-based swap agreement . . . shall also violate and result in comparable liability to any purchaser or seller of that security under such provision, rule, or regulation.").

Unlike civil liability which was initially recognized by the courts,[18] Congress enacted Section 32(a) in the 1934 Act to impose criminal liability for willful violation of Section 10(b) and Rule 10b-5 from the beginning. Congress subsequently elevated the criminal liability involved by passing the ITSFEA. Finally, the criminal penalties were subsequently raised by the Sarbanes-Oxley Act in 2002, which raised the maximum prison sentence to twenty years and the maximum fine to $5 million dollars. Section 32(a) now provides:

> "Any person who *willfully* violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter . . . shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

15 U.S.C. § 78ff(a) (2002). Violations of insider trading law can trigger significant consequences. First, besides imposing administrative sanctions, the SEC can pursue criminal or civil remedies. Depending on its investigative results, the SEC may refer a matter to the DOJ for criminal prosecution.[19] And insider trading violations, if proven to have been done "willfully" can result in imposition of criminal liability that runs in the range of significant fines (up to $5 million for individuals, and $25 million for organizations) to substantial terms of imprisonment (up to twenty years).

C. *The Elements of Civil and Criminal Insider Trading Violations*

Insider trading, as prohibited under Rule 10b-5 and Section 10(b), can result in imposition of either civil or criminal liability, or both, as mentioned above. The U.S. Supreme Court upheld a private action to impose civil liability in a footnote in *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co*.[20] Through this backdrop of decades of civil litigation it has been

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18. In 1947, the federal court first recognized a private action to claim that insider trading violated the Exchange Act sec. 10(b) and Rule 10b-5. *See Karson*, 73 F. Supp. at 798.

19. 15 U.S.C. § 77t(b) (2002).

20. DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION & ENFORCEMENT: CASES AND MATERIALS 20 (Thomson 2d ed. 2008); Superintendent of Ins. of State of

established that, to sustain a securities fraud claim based on § 10(b) and Rule 10b-5, a plaintiff must show six elements in his civil case: (1) a material misrepresentation or omission; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.[21] The plaintiff also should provide proof of standing in a civil case because of "policy considerations."[22] However, if the civil action was brought by the SEC, there is no need to prove elements (4) (5) or (6).

Criminal prosecution under Section 10(b) and Rule 10b-5 also requires similar elements to those in a Rule 10b-5 civil action.[23] Although the theory of insider trading and the substantive law of insider trading violations have been developed through judicial precedent, the courts have not clearly distinguished the elements of insider trading cases as between civil or criminal actions. In *U.S. v. O'Hagan*, the Supreme Court addressed the elements of insider trading violations prohibited by Section 10(b), and indicated the prosecution must show that "a chargeable conduct involves a 'deceptive device or contrivance' used 'in connection with' the purchase or sale of securities."[24] Thus, under the "traditional theory" of insider trading liability, "when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information" this can qualify as the conduct of a "deceptive device" under Section 10(b).[25] Under the tipper/tippee theory, a tippee "trading on the basis of information for his own use and in violation of some fiduciary, contractual, or similar obligation to the owner or rightful possessor of the information" can constitute the requisite "deception."[26] Under the "misappropriation" theory, the misappropriator's "fraudulent means of capitalizing on such information through securities transactions" can constitute the deceptive conduct.[27] Furthermore, when an actor obtains confidential information for securities trading purposes, in breach of a duty owed to the source of the information, and he makes a trade thereon, he commits fraud "in connection with" a securities transaction, and thereby violates § 10(b) and Rule 10b-5. Furthermore, in a criminal case, there would be no need to prove the victim's reliance, economic loss, or the loss causation.

N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 (1971).

21. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 128 S. Ct. 761, 769 (2008).

22. *See* U.S. v. O'Hagan, 521 U.S. 642, 664 (1997) (to prevent the abuse of civil litigation of securities fraud cases, Congress also passed the Private Securities Litigation Reform Act of 1995 to heighten and exact the pleading scienter requirement in civil action).

23. Zathrina Perez, Eric Cochran & Christopher Sousa, *Securities Fraud*, 45 AM. CRIM. L. REV. 923, 926 (2008).

24. *O'Hagan*, 521 U.S. at 653.

25. *Id.* at 652-53.

26. *Id.* at 663.

27. *Id.* at 656.

Both civil and criminal insider trading cases can base their causes of action on traditional insider trading theory, tipper/tippee liability theory, or misappropriation theory to establish a violation of Rule 10b-5 and Section 10(b). If a defendant's conduct can be described under any of the three theories, his action would violate Rule 10b-5 and satisfy the requirements under Section 10(b) of Securities Act for "employment of deceptive device" and "in connection with" a securities transaction. However, in *O'Hagan*, the Supreme Court expressly demanded a showing of the traditional criminal law safeguard to imposition of criminal liability—a *mens rea* requirement evincing the actor's willfulness to sustain a criminal conviction.[28] To establish a criminal insider trading case, the prosecution must prove that a defendant "willfully" violated the provision. Also the "no knowledge" proviso under Section 32(a) can preclude a defendant who can prove he has no knowledge of the regulation from being sentenced to imprisonment.[29]

The core differences between a criminal insider trading case and a civil insider trading case (brought by SEC) would be the requirement of the presence of culpable intent as a necessary element of the offense, that is, the "willfulness." However, after the Supreme Courts' decision in *O'Hagan*, lower courts have provided different interpretations of this *mens rea* requirement because of the vagueness of "willfulness" in various criminal law contexts.

III. CASE ANALYSIS & EXPLANATION

According to the statutory requirements and Supreme Court opinions, to sustain a criminal charge of insider trading, the prosecution must prove a defendant's *mens rea*—"willfulness."

Although the Supreme Court accepted the misappropriation theory proposed by the SEC in *O'Hagan*, it remanded the case to the Eighth Circuit because the charges against "O'Hagan under the misappropriation theory were too indefinite to permit the imposition of criminal liability."[30] The Supreme Court also pointed out that the statutory "requirement of the presence of culpable intent as a necessary element of the offense [did] much to destroy any force in the argument that application of the [statute] in

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28. *Id.* at 665-66 ("[T]wo sturdy safeguards Congress has provided regarding scienter. To establish a criminal violation of Rule 10b-5, the Government must prove that a person 'willfully' violated the provision. . . . Furthermore, a defendant may not be imprisoned for violating Rule 10b-5 if he proves that he had no knowledge of the Rule.").

29. 15 U.S.C. § 78ff(a) (2002) ("[N]o person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."); *see also* BRICKEY, *supra* note 7, at 219.

30. U.S. v. O'Hagan, 521 U.S. 642, 666 (1997).

circumstances such as O'Hagan's is unjust."[31] The Supreme Court clearly required that the prosecution of insider trading must be able to prove the defendant's "culpable intent" in that he acted "willfully" to commit the insider trading violation.

The year before Congress passed the 1934 Act, the U.S. Supreme Court had decided the case of the *U.S. v. Murdock*, which interpreted the meaning of "willfulness." Many commentators have mentioned that when Congress enacted the 1934 Act and used "willfully" in its statutory language, they must have had the recent Supreme Court *Murdock* opinion in mind.[32] In its *Murdock* decision, the Supreme Court held that the word "willful" often "denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental" and "when used in a criminal statute it generally means an act done with a bad purpose" and "without justifiable excuse."[33] The Supreme Court required that the offender's willful act was done by his voluntarily undertaking, with a "bad purpose" or "evil intent."

However, the Supreme Court did not express its opinion on the standard of "willfulness" to be employed in any subsequent insider trading cases. Because of the vagueness of the term "willfulness" in criminal law and the uncertainty of the meaning of "bad purpose" and "evil intent," the Supreme Court has failed to provide a clear guideline, resulting in lower courts that are split in their opinions about the appropriate standard of willfulness for insider trading cases.

A. *The Approach of the Eighth Circuit*

Although in its decision to remand *O'Hagan* the Supreme Court seemed to suggest that *O'Hagan* did not satisfy the *mens rea* requirement, the Eighth Circuit still upheld *O'Hagan's* conviction. By declaiming that "[t]he meaning of the term 'willfully' varies with the context in which the term is used" the Eight Circuit interpreted the requirement of "willfulness" very loosely.[34] According to the Eighth Circuit, "the Supreme Court was simply explaining that the statute provides that a negligent or reckless violation of the securities law cannot result in criminal liability."[35] By pointing out the "no knowledge" proviso at 15 U.S.C. § 78ff(a), the Eighth Circuit illustrated that lack of knowledge is only an affirmative defense to "imprisonment" rather than "conviction" and concluded that no knowledge of law is required.

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31. *Id.*
32. *See* Brian J. Carr, *Culpable Intent Required for All Criminal Insider Trading Convictions After United States v. O'Hagan*, 40 B.C. L. REV. 1187, 1196 (1999).
33. *See* U.S. v. Murdock, 290 U.S. 389, 394 (1933).
34. U.S. v. O'Hagan, 139 F.3d 641, 647 (8th Cir. 1998).
35. *Id.*

Also, the court cited *U.S. v. Charney* in its decision that "[willfullness] simply requires the intentional doing of the wrongful acts."[36] Therefore, the court stated that "willfulness" for an insider trading violation only requires "the intentional doing of the wrongful act, no knowledge of the rule or regulation is required."[37]

However, the Eighth Circuit's interpretation was very vague and merely precluded the use of recklessness and negligence for meeting the *mens rea* requirement. While excluding recklessness and negligence from the meaning of "willfulness," the Eighth Circuit did not provide any further guidance. The *mens rea* requirement for insider trading can be very complex, for instance there may be plaintiffs whose *mens rea* is impaired by a mistake of law, or mistake of fact. The definition provided by the Eighth Circuit also fails to provide a guideline as to when and whether a defendant's "deliberate ignorance" would constitute "willfulness."

B. *The Second Circuit's Approach*

The opinion of Second Circuit is worth noting because it is the home of Wall Street and "[t]he most influential decisions involving § 32(a) of the Act were written in the Court of Appeals for the Second Circuit by Judge Henry Friendly."[38] In a very early case, the *U.S. v. Peltz*, by affirming conviction for the defendant's short sell activities,[39] Judge Friendly held that a defendant "willfully" violated the SEC rule despite the fact that he had no knowledge of the rule or regulation.[40] Following this decision, this approach for "no requirement of defendant's knowledge of the rule" was adopted by many different jurisdictions in insider trading cases.

In *United States v. Dixon*, a 1976 case, Judge Friendly held that an act is done willfully "if done intentionally and deliberately."[41] Furthermore, if the willful violation was not "the result of innocent mistake, negligence or inadvertence taken with his statement," the prosecution was not required "to prove a specific intent on (Dixon's) part to disregard or to disobey the law."[42] The Second Circuit excluded an "innocent mistake, negligence or inadvertence" from "willfulness." Further, in *U.S. v. Dixon*, Judge Friendly

36. *Id.*

37. *Id.*

38. *See* Carr, *supra* note 32, at 1198.

39. U.S. v. Peltz, 433 F.2d 48, 55 (2d Cir. 1970) (Peltz was convicted among other things of violating sec. 10(b) of the Exchange Act and Rule 10b-5 in instructing two brokerages house to sell portions of a purported long position whereas in reality he was short. He made several short sales of stock with the information that he knew about the SEC's impending action against the company. He was convicted of conspiring to defraud the U.S. and the SEC, and several other securities crimes.).

40. *Peltz*, 433 F.2d at 54.

41. *See* U.S. v. Dixon, 536 F.2d 1388, 1397 (2d Cir. 1976).

42. *Id.* at 1397.

also stated that “[a] person can willfully violate an SEC rule even if he does not know of its existence.”[43] The Eighth Circuit cited this case in its *O’Hagan* decision, and these two circuits seem to hold the same idea about the meaning of “willfulness.”

However, in *Dixon*, after the discussion about the meaning of “willfulness” in criminal law, the Second Circuit added that an act can be “wrongful under the securities laws and that the knowingly wrongful act *involving a significant risk of effecting the violation that has occurred.*”[44] Compared to the standard held by the Eighth Circuit, the Second Circuit in its opinion in *Dixon* upheld a definition of “willfulness” such that “knowing the wrongful act involves a significant risk,” would result in liability, thus this standard appears to be stricter than that just excluding, “innocent mistake, negligence or inadvertence” from willfulness. Under the Second Circuit’s standard, an actor who disregards or disobeys securities regulations and “is aware of the significant risk to violate the law” fulfills the standard of “willfulness.”

After *Dixon*, the Second Circuit kept the “willfulness” standard for insider trading as “knowing the wrongful act involve a significant risk” for decades.[45] In an insider trading case in 2005, the Second Circuit still stated that “[t]his Court has defined willfulness as a realization on the defendant’s part that he was doing a wrongful act” under the securities laws in a situation where “*the knowingly wrongful act involved a significant risk of effecting the violation that has occurred*.”[46] It is clear that the Second Circuit has held that the *mens rea* requirement for insider trading was a defendant knowingly doing a wrongful act that he knew involved a significant risk of violating the law.

Furthermore, in an insider trading prosecution under the tipper/tippee theory and misappropriation theory, the Second Circuit held that when the tipper “*willfully breached a fiduciary duty to his employer*” and leaked the information to the tippee, the situation would constitute insider trading.[47] In the well known case, *U.S. v. Libera*, the Second Circuit first upheld the elements of the misappropriation theory by stating that there must be “(i) a breach by the tipper of a duty owed to the owner of the nonpublic information; and (ii) the tippee’s knowledge that the tipper had breached the

43. *Id.* at 1395.

44. *Id.* (emphasis added).

45. *See id.*; Metromedia Co. v. Fugazy, 983 F.2d 350, 364 (2d Cir. 1992); U.S. v. Cassese, 428 F.3d 92, 98 (2d Cir. 2005).

46. *See Cassese*, 428 F.3d at 98 (although the Second Circuit still held this standard, it acquitted the President of Computer Horizons Corporation, John J. Casses, from an insider trading conviction because he had tried to cancelled the trade) (emphasis added).

47. U.S. v. Libera, 989 F.2d 596 (2d Cir. 1993) (emphasis added).

duty."[48] And in response to the defendant's *mens rea* challenge, the court held that "[t]he tipper's knowledge that he or she was breaching a duty to the owner of confidential information suffices to establish the tipper's expectation that the breach will lead to some kind of misuse of the information."[49] Thus, when the wife breached the confidential company policy by bringing the unpublished "*Business Week*" out of the plant and her husband subsequently traded stocks based on that information, *there was sufficient evidence that the employees willfully breached a fiduciary duty to McGraw-Hill and Donnelley*.[50] It was not necessary to prove that the tipper must have known that his breach of fiduciary obligation would lead to the tippee's trading on the misappropriated information.

Under the tipper/tippee theory and misappropriation theory the Second Circuit has negated any requirement for an actor's knowledge of the regulations, and has also negated the need to prove a tipper's knowledge about a tippee's trades. In the Second Circuit the standard of "willfulness" in regards to the tipper/tippee and misappropriation theory is similar to the standard in the traditional theory. Under the tipper/tippee and misappropriation theory, when the tipper is "breaching a duty to the owner of confidential information" the tipper can "expect that the breach will lead to some kind of misuse of the information."[51] Under the Second Circuit's approach, if the tipper can "expect that the breach will lead to some kind of misuse of the information," then the situation can constitute willful violation of insider trading regulation and is very close to meeting the standards this Circuit articulated for "knowing the act involved a significant risk to violate laws."

C. *The Ninth Circuit Approach*

There was a very early opinion enunciated in Judge William B. Herlands's article, *Criminal Law Aspects of the Securities Exchange Act of 1934* that tried to explain the meaning of "willfulness" for Section 32(a).[52] In his interpretation of the language, Judge Herlands excluded the need for the defendant to have prior knowledge of the particular statute or rule, and he suggested instead that the prosecution must establish a "*realization on the defendant's part that he was doing a wrongful act*."[53] His opinion was discussed widely by courts and his interpretation of willfulness is still

48. *Id.* at 600.
49. *Id.*
50. *Id.* at 601.
51. *Id.* at 600.
52. *See* William B. Herlands, *Criminal Law Aspects of the Securities Exchange Act of 1934*, 21 VA. L. REV. 139, 147-48 (1934).
53. *Id.* at 147 (emphasis added).

followed by the Ninth Circuit in securities fraud cases.

In *U.S. v. Tarallo*, the defendant participated in a fraudulent telemarketing scheme and made false representations to potential investors.[54] In its judgment, the Ninth Circuit reversed the defendant's convictions with respect to three vicarious liability counts for lack of evidence, but it affirmed the defendant's convictions on all other counts of securities fraud. The Ninth Circuit declared that "[u]nder our jurisprudence, then, 'willfully' as it is used in § 78ff(a) means intentionally undertaking an act that one knows to be wrongful."[55] The Ninth Circuit concluded that "'willfully' in this context does *not* require that the actor know specifically that the conduct was unlawful," and thus the court excluded the defendant's knowledge of the regulation or rule when making its decision.[56] However, confusion is readily apparent when the Ninth Circuit requires that the actor know his action is "wrongful" but not specifically know it to be "unlawful."

D. *The District of Columbia Circuit's Approach*

Not every court has expressly interpreted the meaning of "willfulness" in its judgments nor had a chance to postulate a circuit position about insider trading criminal liability.

Before the *O'Hagan* decision from the Supreme Court, the D.C. Circuit had held that federal securities regulations can be violated when "either the defendant must have known the risk of violation his action presented or his action posed a risk 'so obvious [he] must have been aware of it.'"[57] After *O'Hagan*, in a 2000 case in which the broker contested the SEC's suspension order on the ground that the SEC failed to prove the "willfulness" requirement under securities law, the D.C. Circuit expressed its opinion about "willfulness." The Court discussed the *O'Hagan* decision and stated that "[i]t is only in very few criminal cases that 'willful' means done with a bad purpose."[58] The Court also upheld the idea that, "if it can be shown that a defendant gazed upon a specific and obvious danger, a court can infer that the defendant was cognitively aware of the danger and therefore had the requisite subjective intent."[59] This decision imposed on the broker a higher burden of "reasonable inquiry," and lowered the standard of "willfulness" to "awareness of the danger." However, there might be a need for policy considerations to impose a higher obligation or a higher standard on brokers.

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54. *See* U.S. v. Tarallo, 380 F.3d 1174 (9th Cir. 2004).
55. *Id.* at 1188.
56. *Id.*
57. *See* S.E.C. v. Steadman, 967 F.2d 636, 641-42 (D.C. Cir. 1992).
58. *See* Wonsover v. S.E.C., 205 F.3d 408, 414 (D.C. Cir. 2000).
59. *Id.* at 415.

IV. A RECOMMENDED MENS REA STANDARD FOR INSIDER TRADING VIOLATIONS

"Willfulness" is the term being used for the mens rea requirement for imposing criminal liability for insider trading and is the statutory term of art found in the penal provisions of the principal federal securities statutes. However, "willfulness" is also a term that has different meanings in different contexts.[60] Courts have interpreted its meaning very differently by using the various indefinite terms mentioned above.

The Supreme Court used a malevolent semantic frame of reference and cognitive metaphor of the insider trader as a bad person or criminal when it used acting with "evil intent" and "bad purpose" to define willfulness. In the *O'Hagan* case, the Eighth Circuit only negated recklessness and negligence from constituting willfulness. The Second Circuit approach provided some guidance for other courts, such as through the rule that no knowledge of regulation is required to satisfy the *mens rea* requirement. However, the *mens rea* requirement for insider trading in the Second Circuit that the offender's "knowingly wrongful act involved a significant risk of effecting the violation that has occurred" seems too vague and broad. That standard seems to belie a vast gray area between recklessly and knowingly which is very uncertain and can be widely interpreted so as to impose criminal liability. The approach of the Ninth Circuit on willfulness means that the act must be intentional and the actor must know that his act is wrongful. However, in its judgments the Ninth Circuit did not clarify the difference between a "wrongful" act and an "unlawful" act. The D.C. Circuit upheld conviction for a failure to make reasonable inquiry, and this could indicate the creation of a definition of a "willful" violation that is very similar to a subjective reckless standard. Courts' opinions about "willfulness" vary from an action done with "bad purpose" to those committed with mere "awareness of risk." Compared to the *mens rea* standards in the Model Penal Code, these courts' standards would be ranked from the highest standard of "purposely" to the lower standard of "reckless."[61] Confusion reigns when courts interpret the requisite degree of "willfulness" in different languages and use various standards.

However, the line between civil and criminal liability for insider trading is drawn by a showing of the actor's *mens rea*, "willfulness." To bring coherence to the meaning of "willfulness" for insider trading cases is very important for public policy purposes so as to convey a consistent signal to the public and securities markets. Because of the higher costs and harsher

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60. Ratzlaf v. U.S., 510 U.S. 135, 141 (1994).

61. There are four *mens rea* standards under the Model Penal Code—purposely, knowingly, recklessly, and negligently.

sanctions from bringing a criminal action for insider trading cases and the complexity of securities regulation, this article recommends applying a higher standard to define "willfulness" for criminal insider trading cases. A "willful" violation of insider trading law should be a special intent crime that cannot be committed recklessly or negligently. The prosecution should be required to prove the "willfulness" of the defendant by showing that the defendant acted knowingly to commit insider trading and that he knew that his action was not allowed by law.

A Section 10(b) violation must include two elements confirming that the defendant made use of a "deceptive device or contrivance" and "in connection with" the purchase or sale of securities. In an insider trading case, just like a securities fraud case, the prosecution has to prove that the defendant traded securities to show the element "in connection with" the purchase or sale of securities. The prosecution also has to show the trade was based on the material, nonpublic information in violation of his fiduciary duty and to satisfy the use of a deceptive device element. Furthermore, the prosecution must also prove that the defendant traded specific securities and the trade was made voluntarily or purposely. Because there are processes and funds involved in any securities transaction, trading activity usually does not happen incidentally. The prosecution should be able to show the trade and also show that the defendant obtained the material and nonpublic information illegally even if through accumulated incremental circumstantial evidence.[62] In real litigation, the key to successful prosecution in many securities fraud cases is the cooperating witnesses' testimony given in return for greatly reduced sentences as against other participants.[63] The government must obtain enough evidence to prove the third element to establish defendant's criminal liability—the *mens rea* element—that the defendant "willfully" misappropriated the information and traded on it.

The *mens rea* element for insider trading ought to require a higher standard, showing an intentional violation of a known legal duty. The prosecution should have to show that the defendant acted knowingly in committing insider trading and that he knew his action was not allowed by

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62. For example, the SEC and prosecutors can obtain records of abnormal trades and phone records, and testimony of traders and insiders. *See* JAMES D. COX, ROBERT W. HILLMAN & DONALD C. LANGEVOORT, SECURITIES REGULATION: CASES AND MATERIALS (Aspen 5th ed. 2006).

63. In the WorldCom Cases, because of the testimony of the CFO, Scott Sullivan, and the controller, David Myers, the CEO of WorldCom, Bernard Ebbers, was convicted on securities fraud and sentenced to a twenty-five year term with an additional three years of supervised release. *See* U.S. v. Ebbers, 458 F.3d 110, 129 (2d Cir. 2006); also during the trial of the Enron case, most of the prosecutor's witnesses were Enron insiders who had plea bargained with the prosecutor in return for their testimony and relying on those insiders' testimony Jeffery K. Skilling, the former CEO was convicted on many counts of securities fraud, including one count of insider trading. *See* Brief of Defendant-Appellant Jeffrey K. Skilling, U.S. v. Skilling, 554 F.3d 529, No. 06-20885, 2007 WL 2804318 (5th Cir. 2009).

law. A "willful" violation of insider trading cannot be committed recklessly or negligently and culpable intent should be the basis to convict an actor. Congress mandated that the government must show that a person "willfully" committed a securities fraud by using "willful" in the statutory language in Section 32. It was Congress's intent to require a more culpable intent for the *mens rea*. Also the Supreme Court in the *O'Hagan* case expressly indicated that the showing of "willfulness" serve as a safeguard to imposing criminal liability. To fully abide by the legislative intent, a prosecution must prove the actor's knowledge about both his act and the culpability of his act.

Because the unfairness and profitability of insider trading can cause harms to market integrity, the SEC and courts should have the power to punish offending insider traders who misappropriate a corporation's secrets to their personal; pecuniary benefit. A CEO of a company can easily access a company's nonpublic and important information due to his position of trust. He should know that he owes a fiduciary duty to the company and its shareholders and he should have knowledge of the prohibition of insider trading. If he trades on this information for his personal profit, he should be exposed to criminal liability because the trade does not incidentally happen and he knowingly breaks the law. One cannot imagine that every insider can freely trade a company's nonpublic material information. Absence of deterrence to insider trading can create an incentive to withhold information and therefore harms the integrity of security markets. Those insiders who willfully trade on a company's nonpublic material information are very similar to persons embezzling a company's money because insider information can be as valued as money in securities markets. It is necessary to impose criminal liability for such conduct.

Congress expressly used "willfully" in its criminal liability provision, but not in any civil remedy context. To impose criminal liability, the SEC or the DOJ needs to bear a higher burden to prove a defendant's guilt beyond reasonable doubt, so courts should require a higher mental state showing that he acted "willfully" in committing the insider trading. The willfulness standard in which the Second Circuit held "knowingly wrongful act involved a significant risk of effecting the violation that has occurred" is too broad to apply fairly or consistently. Because the misappropriation theory can apply to anyone who is not an insider, it can result in being too harsh by imposing criminal liability upon a defendant who just traded on information he incidentally obtained even without understanding whether he owed any duty to the source of information. For example, a taxi driver may not understand if he can trade on the information he obtains from his clients or not. Even though he owes no duty to the company whose stock he trades, he might owe a duty to a client whom he serves under a long term contract. However, when he makes trades based on nonpublic material information it should be

important to show whether he did it with knowledge that he violated the law. If the prosecution can show he traded willfully, then we can criminalize his conduct. If not, there are still civil actions or administrative sanctions available which can stop him from trading on the nonpublic information. However, the historic balance has tended towards requiring that the pleading burdens in criminal prosecutions should be generally heavier than in civil enforcement.[64]

The reason for higher criminal *mens rea* standards is to distinguish criminal liability from civil liability. Several commentators have criticized the criminal prosecution of white collar crime as "overly rushed and insufficiently prescient."[65] And although criminal liability can cause higher deterrence against insider trading, the cost of criminal prosecution usually is much higher too. If there is no evidence to show the defendant knew his violation was against the law or the defendant had good faith to believe he did not violate the law, he should only face civil liability. The defendant still could be deprived of his personal profit from the insider trading activities through disgorgement in a civil action, but not labeled a criminal.

Furthermore, in a civil action, a plaintiff has to show the defendant's scienter to allege a violation of Section 10(b) and Rule 10b-5.[66] "Scienter," a Latin word for "knowingly," is a term used to describe a person's state of mind at the time he or she takes action or fails to take action.[67] Because of the seriousness of a criminal punishment, the standards regarding the requirement for a criminal's *mens rea* should be higher than the requirement of civil "scienter." In a civil action the plaintiff is required to show the scienter of the defendant's action namely that "an action taken with scienter is taken intentionally, or at least recklessly."[68] A criminal action to establish a defendant's liability should be required to show more than his civil "scienter." The prosecution ought to have to prove that a defendant intentionally traded on the material information and he knew the trade was prohibited by law.

Even though most courts have held that a prosecution does not have to prove that the defendant knew the law or rule, this standard is too low and too harsh, especially as articulated under the misappropriation theory. Firstly, misappropriation theory recognizes a fiduciary duty to the source of information, but nowadays social networking can be very complex and

64. Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 401 (2008).

65. James B. Comey, Jr., *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728 (2009); *see also* Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 672-74 (2002).

66. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

67. *See* NAGY ET AL., *supra* note 20, at 105.

68. *Id.*

information can be passed around effortlessly. An insider may not have any intent at all with respect to stating something about the company's nonpublic information to his brother-in-law, a bus driver. However, in a social occasion, he might mention what he was working on lately while genuinely believing that his brother in law could not possibly be trading in the securities markets. The brother-in-law may have had no idea that the misappropriation theory even exists or that he has a fiduciary duty owed to his source of information. He may have made this first trade of his life just like it was his first bet in a casino. If the SEC found the brother-in-law was engaged in insider trading, he should be punished by an administrative sanction or a civil penalty, but his conduct should not be criminalized because he did not act willfully to commit insider trading.

Although most courts have upheld convictions deciding that no knowledge of the law is required for an insider trading conviction, this standard is not consistent with the statutory definition of "willfulness" and the legislative intent. The "no knowledge proviso" under the 1934 Act clearly shows the congressional intent to ease criminal liability for a person who does not know the law. For an insider trading case, a prosecutor should prove the defendant knew he was very likely committing insider trading and knew his conduct violated his legal duty. Because insider trading is not a novel crime nor an under-developed concept, a defendant' knowledge of his legal duty can be easily inferred. This is especially so when the inside traders are well-educated persons or informed insiders, and there will be circumstantial evidence that can help to prove that the defendant should have known his legal duty not to trade on material nonpublic information. Although it is a criminal law tradition that ignorance of the law is no defense to criminal prosecution, insider trading cases should be one of the exceptions to the rule. When the misappropriation theory expanded fiduciary duty to everyone, the insider trading prohibition became very broad and complicated. Just as the Supreme Court's opinion in *Cheek v. U.S.* noted, special treatment of a criminal offense can be due because of the complexity of the law.[69] Thus, in a prosecution for insider trading the Government should be required to prove a defendant's knowledge of his legal duty. When there are still civil and administrative liabilities available, a bus driver who cannot be proven to have known the law should not be treated as a criminal.

According to the Black's Law Dictionary definition, willfulness is "[the] fact or quality of acting purposely or by design; deliberateness; intention;"

69. *See* Cheek v. U.S., 498 U.S. 192, 200 (1991) (Cheek was convicted for tax evasion because he did not file tax returns or pay taxes for several years. He claimed that he believed his wages were not a form of taxable income. The Supreme Court vacated and remanded the case, holding that petitioner was entitled to an instruction on good faith misunderstanding of the tax laws as to his belief that wages were not income, whether or not such a belief was objectively reasonable.).

and is "[t]he voluntary, intentional violation or disregard of a known legal duty."[70] According to this definition, willfulness should follow very strict standards. The Supreme Court used acting with "evil intent" and "bad purpose" to define willfulness in its 1933's decision. The final question after heightening the *mens rea* standard would be then whether the prosecution has to prove that the defendant acted for or from a bad purpose. However, this is a very high standard and many commentators have disagreed about whether to apply such a high standard in securities fraud cases.[71] Securities trades happen everyday and it is already too difficult to monitor every small trade. Many trades are not registered in the name of the true trader but on the broker or the "street name." It is a great enforcement challenge to control every suspicious transaction. Also, there are various "purposes" or "intents" for which a person might decide to make a security transaction. The reason to trade may not simply be to make profit or to avoid losses. However, it may be hard to prove whether an actor trades according to any material information with "evil intent" or "bad purpose" or just "a hunch." Furthermore, it is almost impossible to prove that a person traded a stock on purpose in order to commit an insider trading crime or to harm the integrity of the market. No one would claim that his trade was intended to harm other investors, either. Because of the difficulties in gathering evidence for securities crimes and the difficulties of proving the "bad purpose" behind an actor's trading, it is unrealistic to require an "evil intent"—type standard for the definition of "willfulness." The *mens rea* standard for insider trading should follow the second definition of Black's Law Dictionary, with willfulness defined as "[t]he voluntary, intentional violation or disregard of a known legal duty."

V. CONCLUSION

Congress passed the 1933 and 1934 Acts to regulate the securities markets and implanted a general criminal penalty provision that elevates "willful" violations to criminal liability. The conduct of insider trading can also be pursued under either or both civil liability and criminal liability. However, because the criminal liability is harsher than civil liability, to impose criminal liability should require the showing of a higher *mens rea* in a defendant's conduct. In order for criminal liability to attach, there should be a showing that the defendant acted "willfully" in violating Section 10(b)

70. BLACK'S LAW DICTIONARY 1630 (8th ed. 2004).

71. *See* Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1608 (2006) (stating that "[v]ery few crimes require *mens rea* in the form of '*purpose*,' and securities fraud should not be among them" and advocated that the default standard of Model Penal Code "knowingly" should apply).

and Rule 10b-5.

However, after the decision in the *O'Hagan* case by the Supreme Court, there is still no consistent standard for the meaning of "willfulness" in insider trading. It would be helpful to bring a coherent standard to give the market a clear signal—"particularly in the securities-law arena, where one presumably finds mostly rational actors who would be deterred by clear legal rules."[72] The standards of "willfulness" should indicate liability where the actions of the defendant were done with knowledge of his transaction and the culpability of his action. No person should have criminal liability imposed on them for insider trading without a showing of their "willfulness" by the prosecution proving that the defendant acted knowingly to commit insider trading and that he knew that his action was not allowed by law.

72. *Id.*

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