

12-1-1989

Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain

Mark A. Spitz

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Mark A. Spitz, *Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain*, 12 B.C. Int'l & Comp. L. Rev. 265 (1989), <http://lawdigitalcommons.bc.edu/iclr/vol12/iss1/10>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

Recent Developments in Insider Trading Laws and Problems of Enforcement in Great Britain

I. INTRODUCTION

In November 1986, two insider trading scandals stunned the financial world. The first, in the United States, involved charges by the Securities and Exchange Commission (SEC) against Dennis Levine and Ivan Boesky.¹ A similar scandal shocked the financial services industry in Great Britain when Geoffrey Collier, director of the securities group at the merchant bank and brokerage house of Morgan Grenfell, was arrested on charges of violating Great Britain's laws against insider trading.² The arrest of Collier resulted in an outcry from the British public and the financial services industry for more effective enforcement of the laws on insider trading.³ In response, the government quickly implemented new laws strengthening the investigative powers of the government regarding the detection of insider trading law violations.⁴

Insider trading is the buying and selling of securities on the basis of privileged information not available to the public and which, if known generally, would be likely to materially affect the price of those securities.⁵ Commentators have criticized insider trading as unethical and injurious to investor confidence in the fairness of securities markets.⁶ In Great Britain, a combination of statutory oversight and industry self-regulation of the financial services industry provides

¹ 8 Sec. Reg. & L. Rep. (BNA) 1669 (Nov. 21, 1986).

² "Bang Goes a Scandal," *The Sunday Times* (London), Nov. 16, 1986, at 73, col. 1. Collier, director of the securities group at Morgan Grenfell, was charged with making a profit of \$22,000 by trading on the basis of inside information. "The Case for an S.E.C. in Britain," *N.Y. Times*, Nov. 23, 1986, at D4, col. 1.

³ "U.K. Shocker: Insiders Lose Right to Remain Silent," *Barron's*, Nov. 24, 1986, at 70, col. 2.

⁴ *Wall St. J.*, Nov. 17, 1986, at 29, col. 1.

⁵ CHARLESWORTH & CAIN, *COMPANY LAW* 442 (1983). Insider trading can occur in a variety of ways: a company officer or employee may buy or sell his or her company's stock, or those of another company with whom his or her company has dealings, on the basis of information not generally available to the public, or such a person can divulge such information to another (a "tippee") who trades in the company's shares. *Id.* In addition, insider trading can occur when a government employee, who comes into contact with privileged information concerning companies in the course of his or her duties, trades shares on the basis of such information, or counsels others to do so. *Id.*

⁶ B. RIDER, *INSIDER TRADING* 2-5 (1983) [hereinafter B. RIDER I]. Some authors use economic theory to argue that there are certain benefits to the corporation, the stockholders, the investors, and the market derived from insider trading. See H. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966); Carlton and Fischel, *The Regulation of Insider Trading*, 35 *STAN. L. REV.* 857 (1983); King and Roell, *Insider Trading*, 6 *ECON. POL.* 165 (1988).

a framework for regulating insider trading.⁷ In recent years, as the role of the government in regulating the industry has grown, the nature of this arrangement has gradually evolved.⁸ The most recent and far-reaching changes came with the implementation of the Financial Services Act 1986 (1986 Act).⁹ This Act delegates governmental regulatory powers to a private agency, the Securities and Investment Board (SIB), to regulate the entire investment industry through a network of authorized self-regulating institutions and other semi-public bodies.¹⁰

⁷ B. RIDER I, *supra* note 6, at 111.

⁸ B. RIDER, D. CHAIKIN AND C. ABRAMS, GUIDE TO THE FINANCIAL SERVICES ACT 1986 ¶¶ 210, 213.

⁹ Financial Services Act, 1986, ch. 60, §§ 173–78. Barnard, *The United Kingdom Financial Services Act 1986: A New Regulatory Framework*, 21 INT'L LAW. 343 (1987). The provisions on insider trading became effective in November, 1986 following the arrest of Collier. *The Times* (London), Nov. 15, 1986, at 1, col. 1.

¹⁰ The Financial Services Act 1986 provides a revised statutory framework for regulating and authorizing the conduct of the investment business. B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 301. The Act authorizes the Secretary of State for Trade to delegate his authority over the financial services industry to a private sector body, the Securities and Investment Board (SIB). *Id.* at ¶ 302. The SIB may authorize investment businesses which the Act requires as a condition of doing business. *Id.* at ¶ 304. In 1987 and 1988, the SIB issued an initial set of Rules and Regulations which are currently undergoing comment and revision. *British investors' bill of rights*, THE ECONOMIST, Apr. 30, 1988, at 80. The Rules and Regulations govern the authorization of industry members, as well as the conduct of business, including disclosure of material information, advertising, security of information within investment houses, record keeping, and capitalization. B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 303. The SIB can also discipline authorized persons for breaches of its rules. *Id.* The available sanctions include prohibiting the conduct of certain types of investment business or suspending the authorized person temporarily or permanently from carrying on investment business altogether. *Id.* at ¶¶ 1201–11.

The Act also established a number of Self-Regulating Organizations (SROs). *Id.* at ¶ 301. The SIB will recognize and regulate the SROs, which are themselves empowered to authorize investment businesses and are expected to do most of this work. *Id.* at ¶¶ 306, 308. The SROs will regulate the investment businesses within their purview and will have rules quite similar to those of the SIB. *Id.* at ¶ 308. The SROs which are expected to receive SIB authorization are The Securities Association (which includes the Stock Exchange), organizations of financial advisers and brokers, investment managers, futures brokers, and life insurance companies. *Id.* at ¶ 307. The Act also provides for Recognized Investment Exchanges (RIEs), which the SIB will authorize if it is satisfied that the exchange is a fair and efficient market and is adequately capitalized. *Id.* at ¶ 313. The Stock Exchange is part of such an RIE. *Id.* The SIB is not itself directly involved in the enforcement of laws against insider trading; the Department of Trade and Industry (DTI) will continue that function. Nor will it supplant the Stock Exchange in the self-regulatory aspects of deterring insider trading. The Conduct of Business Rules of the SIB do address insider trading, calling on member firms to use their "best endeavours" to ensure that no officers or employees take any action in violation of the 1985 Act. SECURITIES AND INVESTMENT BOARD, RULES AND REGULATIONS, Conduct of Business Rules, Rule 5.21 (1987). This rule, while indirect, finds effect through the various sanctions the SIB may impose on violators of its rules. It also leaves violators open to possible restitution orders under § 61 of the 1986 Act or civil suit under § 62. *See infra* notes 267–80 and accompanying text. There appears to be a good deal of overlap and conflicting authority created under the Act, and it will become clear only with time the extent to which the entire apparatus functions smoothly. *Id.*

One function which the government will retain, however, is the enforcement of laws against insider trading. The British government did not regulate insider trading until 1980; before that time the financial services industry monitored such activity.¹¹ In 1980, the Companies Act 1980¹² made insider trading a criminal offense for the first time. The Company Securities (Insider Dealing) Act 1985 (1985 Act)¹³ re-enacted the insider trading provisions of the Companies Act 1980. The Financial Services Act 1986 amended the 1985 Act and also created new powers to investigate and enforce insider trading laws.¹⁴

Under the 1986 Act, the government, through the Department of Trade and Industry (DTI), retains the power to investigate suspected insider trading law violations and enforce the laws against insiders.¹⁵ In addition, the self-regulatory organizations, most notably the International Stock Exchange of Great Britain and Northern Ireland (Stock Exchange) and the Panel on Take-overs and Mergers (Panel), continue to play an important, if non-statutory, role in the detection and punishment of insider trading violations.¹⁶ Since 1980 the record of enforcement has been uneven, and it is still unclear what level of success the government will enjoy in enforcement, given its new powers of investigation and the enhanced surveillance capabilities of the Stock Exchange.¹⁷

This Comment will first examine the continuing structure of self-regulation of insider trading in the British financial services industry, popularly referred to as "the City,"¹⁸ and the role self-regulation plays in the evolving statutory framework.¹⁹ Next, the Comment will briefly survey the development of insider trading as a criminal offense in Great Britain.²⁰ The Comment will then examine the record of enforcement since 1980, looking specifically at the problems of effective detection, investigation, and enforcement.²¹ More specifically, this section will look at the commitment of the government and the courts to vigorous enforcement, problems of statutory interpretation, coordination between the Stock Exchange and the Department of Trade and Industry on detection and investigation, and the lack of civil remedies which can serve as a deterrent to

¹¹ B. RIDER I, *supra* note 6, at 111.

¹² Companies Act, 1980, ch. 22, §§ 68–74.

¹³ Company Securities (Insider Dealing) Act, 1985, ch. 8.

¹⁴ Financial Services Act 1986, *supra* note 9, at §§ 177–78.

¹⁵ *Id.*

¹⁶ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 702.

¹⁷ See *infra* notes 159–83 and accompanying text.

¹⁸ The colloquial term for the financial services industry in Great Britain is "the City," so named because much of the industry is physically located within the City of London. B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 115.

¹⁹ See *infra* notes 23–98 and accompanying text.

²⁰ See *infra* notes 99–183 and accompanying text.

²¹ See *infra* notes 184–280 and accompanying text.

insider traders. Finally, the Comment concludes with an assessment of current detection and enforcement capabilities and makes recommendations concerning improved enforcement of insider trading laws in Great Britain.²²

II. SELF-REGULATION IN GREAT BRITAIN

Prior to 1980, the financial services industry was solely responsible for the regulation of insider trading.²³ Traditionally, the City, an intimate and homogeneous community, had always governed its own affairs with minimal government interference.²⁴ In times of financial scandal or panic, the government threatened intervention, but the financial services industry reformed its rules and regulations in order to limit the extent of potential government regulation.²⁵ The primary organizations involved in overseeing insider trading have always been the Stock Exchange²⁶ and the Panel on Take-overs and Mergers.²⁷ In addition, companies active in the financial services industry maintain in-house rules and disciplinary codes relating to stock trading and the handling of sensitive information; these rules apply to the activities of directors, officers, and employees.²⁸

This section will first examine the roles of the Stock Exchange and the Panel in regulating insider trading.²⁹ Next, the section will discuss the means of investigation available to the Stock Exchange and the Panel and the sanctions they can impose.³⁰ Finally, the section will describe the regulatory role of financial services companies' in-house rules.³¹

²² See *infra* notes 281–317 and accompanying text.

²³ See *supra* note 11 and accompanying text.

²⁴ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 114.

²⁵ *Id.* at ¶ 203. Government regulation has encroached on the traditional independence of the City, beginning as early as the seventeenth century. *Id.* at ¶ 106.

²⁶ The Stock Exchange is located in London with affiliated provincial exchanges located in several other cities. H. BLOOMENTHAL, INTERNATIONAL CAPITAL MARKETS AND SECURITIES REGULATION, § 6.01[3][a] (1987) [hereinafter H. BLOOMENTHAL I].

²⁷ B. RIDER I, *supra* note 6, at 8. A number of other professional associations also regulate their members with respect to trading in securities. *Id.* at 111–25. These include the Law Society which regulates solicitors, the Institutes of Chartered Accountants, the Association of Certified Accountants, the Society of Investment Analysts, and the Institute of Directors. *Id.* at 113–25. All of these associations maintain codes—some quite detailed—which address insider trading and other activities dealing with the use of confidential information since the early 1970s. *Id.* Other associations have made only general pronouncements regarding the use of confidential information, or have condemned insider trading on principle without promulgating guidelines or sanctions with respect to their membership. *Id.* at 115–16. After the passage of the Companies Act 1980, many of the codes were revised to bring them into conformance with the law. *Id.* at 111.

²⁸ B. RIDER AND H. FFRENCH, REGULATION OF INSIDER TRADING 173 (1979).

²⁹ See *infra* notes 32–52 and accompanying text.

³⁰ See *infra* notes 53–89 and accompanying text.

³¹ See *infra* notes 90–98 and accompanying text.

A. *Industry Measures and Enforcement*

1. Structure

a. *The Stock Exchange*

The Stock Exchange is the primary market for the purchase and sale of securities in Great Britain.³² In order for its stock to be traded on the Stock Exchange, a company must be listed with the Exchange and agree to abide by its listing rules.³³ The 1986 Act sets forth the minimum requirements for the listing rules³⁴ and provides the Stock Exchange with the authority to issue specific rules pertaining to the listing and disclosure of material information.³⁵ Prior to the 1986 Act, companies had to agree to abide by a formal Listing Agreement to qualify for listing on the Stock Exchange.³⁶ The new listing rules, which for the most part are identical to the rules of the old Listing Agreement,³⁷ primarily govern the procedures for disclosure of information likely to have a material effect on stock prices; this helps to ensure timely and equal access to information affecting investment decisions.³⁸

The Stock Exchange regulates the conduct of its corporate and individual members, that is, the companies and brokers who buy and sell stocks on behalf of clients.³⁹ As a condition of membership, members agree to abide by the Exchange's Rules and Regulations, a formal Code of Dealing, and periodically issued Notes of Guidance.⁴⁰ One of the requirements of the Exchange's rules is

³² THE INTERNATIONAL STOCK EXCHANGE OF GREAT BRITAIN, 1987 ANNUAL REPORT 7-8 (1987) [hereinafter STOCK EXCHANGE 1987 ANNUAL REPORT]. Other markets trade the securities of companies unable or unwilling to meet the stricter requirements for listing on the Stock Exchange. These other markets include the Unlisted Securities Market, the Over the Counter Market, and the Third Market. *Id.*

³³ P. MITCHELL, DIRECTORS' DUTIES AND INSIDER TRADING 138 (1982).

³⁴ Financial Services Act 1986, *supra* note 9, at §§ 142-48.

³⁵ *Id.* at § 142. Prior to the implementation of the Financial Services Act 1986, companies desiring to be listed on the Stock Exchange agreed to abide by the Exchange's Listing Agreement which obligated the company to follow certain rules regarding the timely disclosure of material information to the public. B. RIDER I, *supra* note 6, at 153. The Listing Agreement also required the company seeking listing status to institute in-house rules no less exacting than the Stock Exchange's Model Code for Securities Transactions by Directors of Listed Companies. *Id.* at 169. This agreement was contractual, not self-regulating in a strict sense, as the Stock Exchange applied it to outside companies rather than to its own members. Page, *Self-Regulation: The Constitutional Dimension*, 49 MOD. L. REV. 141, 146 (1986). This practice was a means of protecting the Exchange's members. *Id.*

³⁶ STOCK EXCHANGE 1987 ANNUAL REPORT, *supra* note 32, at 10.

³⁷ *Id.*

³⁸ Financial Services Act 1986, *supra* note 9, at § 146.

³⁹ Page, *supra* note 19, at 146.

⁴⁰ *Id.* The Rules and Regulations are supplemented by a Code of Dealing and by periodically issued Notes of Guidance which are meant to assist members in devising effective in-house codes of conduct. B. RIDER I, *supra* note 6, at 175-76. The Notes of Guidance address issues arising when members find themselves in conflict of interest situations. This occurs when they acquire during the course of business confidential information from one client which could be used to the profit of another client, to whom the member has a duty to maximize returns on investments. *Id.*

that member firms institute measures to prevent leaks of privileged information from the corporate finance department to the trading or other departments of the firm.⁴¹ The Rules and Regulations also prohibit employees of a member firm from speculating for personal profit on the basis of confidential information in the stock of companies for whom the member firm acts as broker.⁴²

b. *The Panel on Take-overs and Mergers*

Following a period of insider trading abuse in merger activities during the late 1950s and 1960s, the Bank of England and several associations of investment industry firms considered creating an industry watchdog to curb these practices.⁴³ This merger activity had led to calls for government regulation of the industry and the creation of a British counterpart to the United States Securities and Exchange Commission.⁴⁴ In response to these threats, the financial services industry created the Panel in 1968 to set standards governing commercial conduct during takeovers.⁴⁵ The Panel, whose chairman is appointed by the Governor of the Bank of England, consists of representatives of the Council of the Stock Exchange⁴⁶ as well as representatives of other financial, banking, brokerage, and insurance industry professional associations.⁴⁷ The Panel issues, interprets, and enforces the City Code on Take-overs and Mergers (City Code).⁴⁸ The City Code applies to employees of companies which are members of the industry associations comprising the Panel, when those companies are engaged in takeover and merger activities.⁴⁹

When a takeover or merger offer is underway, the City Code prohibits persons other than the offeror, who have "confidential price-sensitive information" relating to the offer, from dealing in the stock or stocks involved.⁵⁰ The City Code also prohibits anyone possessing such confidential information from disclosing it or counseling another to purchase securities on the basis of the information.⁵¹

⁴¹ B. RIDER I, *supra* note 6, at 175.

⁴² *Id.* at 176.

⁴³ H. BLOOMENTHAL I, *supra* note 26, at § 6.01[3][b].

⁴⁴ B. RIDER & H. FFRENCH, *supra* note 28, at 160.

⁴⁵ *Id.*

⁴⁶ The Council of the Stock Exchange is the governing body of the Exchange. STOCK EXCHANGE 1987 ANNUAL REPORT, *supra* note 32, at 2. It is comprised of representatives of member firms, lay members not associated with the Exchange or its members, and members ex officio, such as the Chairman and Deputy Chairman of the Stock Exchange. *Id.*

⁴⁷ CITY CODE ON TAKE-OVERS AND MERGERS, at para. 1(a) (Panel on Take-overs and Mergers, London, 1985) [hereinafter CITY CODE].

⁴⁸ A. JOHNSON, CITY CODE ON TAKE-OVERS AND MERGERS 158-59 (1980).

⁴⁹ CITY CODE, *supra* note 47, at 2.

⁵⁰ *Id.* at Rule 4.1(a).

⁵¹ *Id.* at Rule 4.1(b).

Hence, the City Code addresses the problems of insider trading, but only applies to such activities which occur during takeover and merger activities.⁵²

2. Enforcement: Investigations and Sanctions

a. *Investigations*

The Stock Exchange conducts investigations of suspicious stock price movements to determine whether anyone has breached the statutory law, the listing rules, or Stock Exchange Rules and Regulations.⁵³ While most price movements are attributable to normal market forces, a small number merit further inquiry.⁵⁴ If a violation is suspected, the Council of the Stock Exchange sets up an ad hoc committee comprised of a Council member and two Exchange members to conduct a preliminary investigation.⁵⁵ As part of the investigation, the committee requests information from brokers and other Stock Exchange members to reconstruct the events of the transaction under inquiry and to determine who played what role.⁵⁶ The Stock Exchange's Rules and Regulations require its members to assist the committee and give the Stock Exchange the power to discipline members who fail to comply with requests for information.⁵⁷ On several occasions, the Stock Exchange has suspended and even expelled members for noncompliance with investigators' requests.⁵⁸ The Stock Exchange's inability to compel nonmembers to provide information has hindered committee investigations.⁵⁹ This problem becomes evident when company insiders or other insider traders use foreign, nonmember nominees to trade stocks on their behalf.⁶⁰

Prior to 1980, the Stock Exchange had limited success in detecting and investigating suspected cases of insider trading.⁶¹ This was in part due to its poor detection capabilities and limited investigatory resources.⁶² The lack of any authority to compel the disclosure of information to investigators was also an obstacle.⁶³ In addition, the Stock Exchange was reluctant to publicize the names of insider traders, a practice which might have had significant deterrent effect.

⁵² See *supra* notes 43–48 and accompanying text.

⁵³ B. RIDER I, *supra* note 6, at 150.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 151.

⁵⁸ *Id.*

⁵⁹ D. Hawes, T. Lee, and M.-C. Robert, *Insider Trading Law Developments: An International Analysis*, 14 LAW. & POL'Y INT'L BUS. 335, 378–79 (1985) [hereinafter Hawes].

⁶⁰ B. RIDER I, *supra* note 6, at 151.

⁶¹ B. RIDER AND H. FRENCH, *supra* note 28, at 164–65.

⁶² *Id.*

⁶³ *Id.*

The Stock Exchange was reluctant to do this because it had no immunity against defamation actions brought by those named.⁶⁴ Hence, there were relatively few investigations of suspected insider traders prior to 1980 and even fewer publicized inquiries.⁶⁵ Since insider trading became a crime in 1980, the Stock Exchange has agreed to refer to the Department of Trade and Industry the results of investigations indicating a potential violation of the law.⁶⁶

The Panel on Take-overs and Mergers relies primarily on the Stock Exchange to inquire into suspected breaches of the City Code.⁶⁷ The Panel relies on the Stock Exchange's greater surveillance and investigatory resources.⁶⁸ The Stock Exchange turns over to the Panel the results of inquiries conducted at the request of the Panel, as well as the results of its own inquiries if a breach of the City Code has occurred.⁶⁹ The Panel may also conduct its own inquiries into suspected breaches of the City Code.⁷⁰ The Panel Executive, which is headed by the Director General, can interview the parties involved in the takeover activity in question.⁷¹ The Panel may interview brokers, jobbers, investment bankers and advisors, company officials, and members of the public.⁷²

The Panel, like the Stock Exchange, is hampered by its lack of power to compel, subject to its sanctions, all potential witnesses to provide information.⁷³ Since 1980, the Panel has referred suspected violations of the statute to the Department of Trade and Industry for further investigation.⁷⁴ The Panel has, however, retained the prohibition against insider trading in the versions of the City Code published since 1980.⁷⁵ The Panel believes that the City Code will continue to be an effective means of uncovering insider trading violations which

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ B. RIDER I, *supra* note 6, at 150. The nature of the agreement between the Stock Exchange and the DTI is unclear; it may be a formal agreement setting forth the circumstances under which the Stock Exchange will refer investigations to the DTI, or it may be a less formal arrangement leaving the Stock Exchange a certain amount of discretion. Whatever its nature, the Stock Exchange has a strong interest in curbing insider trading, and it is not likely to shield members from the authorities, as the potential cost to its reputation and continued autonomy would be great. See Goodison, "A Better Chance Now of Prosecuting the Crooks," *The Times* (London), Feb. 24, 1987, at 23, col. 2. See also FINANCIAL SERVICES IN THE UNITED KINGDOM, CMND. 9432, at para. 15.15 (1985) [hereinafter FINANCIAL SERVICES WHITE PAPER].

⁶⁷ B. RIDER I, *supra* note 6, at 222.

⁶⁸ *Id.*

⁶⁹ A. JOHNSON, *supra* note 48, at 160.

⁷⁰ CITY CODE, *supra* note 47, at para. 6.

⁷¹ *Id.*

⁷² A. JOHNSON, *supra* note 48, at 160.

⁷³ *Id.* at 162. The City Code's investigatory proceedings are informal, with no rules or evidence or requirement of representation by counsel. CITY CODE, *supra* note 47, at para. 7. The Panel has no power to subpoena witnesses or documents, but can impose its sanctions on witnesses it feels are uncooperative. *Id.*

⁷⁴ Lee, *The New Take-over Code—A Clarification*, 2 COMPANY LAW, 99, 102 (1981).

⁷⁵ CITY CODE, *supra* note 47, at Rule 4.

the statutory law does not cover.⁷⁶ The practical effect of this prohibition is that the Panel can continue to impose its disciplinary measures, including forcing violators of its rules to pay over their profits from insider trading to charity.⁷⁷

In 1987, following criticism of the Panel's inability to detect breaches of the City Code, the DTI announced measures designed to strengthen the Panel.⁷⁸ These included granting the Stock Exchange, the SIB, and other self-regulatory organizations the authority to provide the Panel with confidential information on stock transactions directly, rather than waiting until the Stock Exchange conducted an investigation and referred the results to the Panel.⁷⁹ Moreover, the DTI announced that the SIB and the Stock Exchange will promulgate new rules requiring their members to cooperate with Panel inquiries; these organizations will then be able to impose their own sanctions for violations of the City Code.⁸⁰

b. *Sanctions*

The Stock Exchange can impose sanctions for breaches of its listing rules. It can suspend trading in a company's securities and, in extreme cases, remove the offending company's stock from listing on the Exchange.⁸¹ Suspension from trading is, however, used more as a means of maintaining orderly markets than as a sanction for insider trading activity.⁸² The Stock Exchange uses delisting as punishment for the most severe violations by a company, rather than as punishment because a company's employee has engaged in insider trading.⁸³ The Stock Exchange can also suspend or expel member firms or individual members for breaches of its Rules.⁸⁴ While the Stock Exchange has referred the results of its insider trading inquiries to the Department of Trade and Industry since 1980, it has retained its own sanctions and can impose them against members or listed companies even if there is no criminal violation.⁸⁵

The Panel on Take-overs and Mergers has available its own set of sanctions, but these apply only within the narrow context of takeover and merger activities.⁸⁶ The Panel can censure an offender publicly and privately, express public

⁷⁶ Lee, *supra* note 74, at 102.

⁷⁷ *Id.*

⁷⁸ Carey, *Shoring up the Takeover Panel*, 137 *NEW. L.J.* 511 (1987).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ B. RIDER I, *supra* note 6, at 174.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 178-79. In 1987 the Stock Exchange expelled Geoffrey Collier from membership following his conviction for insider trading. *The Times* (London), Oct. 12, 1987, at 25, col. 2. The Stock Exchange stated that Collier's actions had brought the Exchange into "disrepute." *Id.*

⁸⁵ B. RIDER I, *supra* note 6, at 178.

⁸⁶ A. JOHNSON, *supra* note 48, at 160-61.

opinions about the fitness of named offenders for directorship of companies, and compel the individual offender to pay profits from insider trading activities to charity.⁸⁷ After the passage of the Companies Act 1980, the Panel, like the Stock Exchange, agreed to refer suspected criminal violations to the Department of Trade and Industry.⁸⁸ The Panel will, however, retain authority to investigate and sanction violators of the City Code.⁸⁹

B. *In-House Rules of Financial Services Companies*

By the 1970s, most companies in the financial services industry had developed and promulgated in-house codes which generally governed confidentiality and employee stock trading and which specifically prohibited insider trading.⁹⁰ The first companies to institute such codes considered them primarily public relations exercises rather than serious, effective means of self-regulation.⁹¹ Also during this period, the Stock Exchange's Listing Agreement contained no specific prohibitions against insider trading.⁹² In 1977, to remedy this omission and bolster investor confidence, the Stock Exchange issued a Model Code for Securities Transactions by Directors of Listed Companies (Model Code).⁹³ As a requirement of listing, companies had to institute internal codes no less strict than the Model Code.⁹⁴ Since 1977, listed companies have strengthened their internal codes in an effort to maintain public confidence in the markets and avoid increased governmental intervention.⁹⁵

The Model Code prohibits directors from dealing in their own company's securities on the basis of inside information not available to the public generally, or under other circumstances in which the disclosure of material information is pending.⁹⁶ The Model Code also requires directors to ensure that employees of the company, as well as directors and employees of subsidiary companies, adhere to the Model Code's principles.⁹⁷ The companies' sanctions range from a reprimand to dismissal, and are a more immediate and effective deterrent

⁸⁷ B. RIDER AND H. FFRENCH, *supra* note 28, at 165.

⁸⁸ Lee, *supra* note 74, at 102.

⁸⁹ *Id.*

⁹⁰ B. RIDER I, *supra* note 6, at 127.

⁹¹ *Id.*

⁹² B. RIDER AND H. FFRENCH, *supra* note 28, at 167.

⁹³ MODEL CODE FOR SECURITIES TRANSACTIONS BY DIRECTORS OF LISTED COMPANIES. (The International Stock Exchange of Great Britain, 1977) [hereinafter MODEL CODE]. See generally P. MITCHELL, DIRECTORS' DUTIES, *supra* note 33, at 141.

⁹⁴ B. RIDER I, *supra* note 6, at 127-28.

⁹⁵ *Id.* See *supra* note 25.

⁹⁶ MODEL CODE, *supra* note 93.

⁹⁷ *Id.*

than criminal penalties; criminal penalties are far less certain to be imposed due to the time and expense involved in DTI investigations.⁹⁸

III. STATUTORY PROHIBITIONS AGAINST INSIDER TRADING

A. *Early Attempts to Prohibit Insider Trading*

The financial services industry has regulated its members for decades. The government supports the role of self-regulation⁹⁹ and has encouraged day-to-day oversight by existing professional and industry organizations.¹⁰⁰ The government recognizes that self-regulation contributes to the "maintenance of high standards as a matter of integrity and principle, not because they are imposed from outside."¹⁰¹ The role of government regulation in the financial services sector has, however, increased steadily over time.¹⁰²

On various occasions prior to 1980, segments of the financial community and the government called for statutory prohibitions on insider trading. A succession of governments responded with several abortive attempts to enact legislation.¹⁰³ In 1962, a study committee of the Board of Trade (the predecessor agency of the Department of Trade and Industry)¹⁰⁴ submitted a report calling for directors to avoid trading their companies' shares on the basis of privileged information.¹⁰⁵ This committee recommended revision of existing company law to protect investors injured by insider trading involving company directors.¹⁰⁶ Parliament, however, failed to enact the committee's recommendation in the Companies Bill 1967.¹⁰⁷ In 1973 the Conservative government proposed a Companies Bill that included provisions outlawing insider trading; this bill failed

⁹⁸ B. RIDER I, *supra* note 6, at 127.

⁹⁹ FINANCIAL SERVICES WHITE PAPER, *supra* note 66, at para. 3.2.

¹⁰⁰ *Id.* at para. 2.16.

¹⁰¹ *Id.* at para. 3.2.

¹⁰² See B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶¶ 105-13.

¹⁰³ Hawes, *supra* note 59, at 337-38. As early as 1945, the Committee on Company Law Amendment, known as the Cohen Committee, concluded that it was improper for company directors to act on the basis of information not available to shareholders. The Cohen Committee concluded that it was similarly improper for directors to divulge such information to outsiders. REPORT OF THE COMMITTEE ON COMPANY LAW AMENDMENT, CMND. 6659 at para. 86 (1945). The Committee recommended mandatory disclosure of directors' stock holdings as a means of curbing the practice of insider trading. *Id.* at 50. Parliament enacted this recommendation as part of the Companies Act 1948 but did not explicitly prohibit insider trading. B. RIDER AND H. FFRENCH, *supra* note 28, at 191.

¹⁰⁴ REPORT OF THE COMPANY LAW COMMITTEE, CMND. 1749 (1962), also known as the Jenkins Committee.

¹⁰⁵ *Id.* at para. 88.

¹⁰⁶ *Id.* at para. 89.

¹⁰⁷ B. RIDER AND H. FFRENCH, *supra* note 28, at 192.

when the government resigned in 1974.¹⁰⁸ During consideration of the bill, the opposition Labour Party also favored making insider trading a criminal offense.¹⁰⁹ In addition, the Labour Party sharply criticized the record of the self-regulatory bodies.¹¹⁰ The Labour opposition proposed a statutory body modeled on the Securities and Exchange Commission, which was an unpopular idea in the City.¹¹¹ In 1977 the Labour Government proposed making insider trading a criminal offense in a Companies Bill.¹¹² The government noted the obstacles to detection and enforcement and stated that it offered the proposed legislation primarily for its deterrent effect.¹¹³ While the Stock Exchange and the Panel voiced reservations about the bill's effect on self-regulation, they supported its passage.¹¹⁴ The bill failed, however, when the Labour government resigned in 1979.¹¹⁵

B. *Statutory Prohibitions Against Insider Trading*

In 1980 Parliament enacted the Companies Act 1980¹¹⁶ which, for the first time, made insider trading a statutory violation.¹¹⁷ In 1985, Parliament consolidated the insider trading provisions of the Companies Act 1980 with relevant provisions of other company legislation¹¹⁸ in enacting the Company Securities (Insider Dealing) Act 1985.¹¹⁹ The Financial Services Act 1986 amended the 1985 Act and added provisions enhancing the investigatory powers of government inspectors.¹²⁰

1. Prohibitions

Under the 1985 Act, an individual who is or during the previous six months has been knowingly connected with a company may not trade in that company's

¹⁰⁸ Hawes, *supra* note 59, at 337-38. In 1973 the Panel and the Stock Exchange issued a joint statement admitting that they lacked the authority to conduct fully effective investigations into insider trading, and they urged the government to enact criminal sanctions to supplement their own role and to act as a deterrent. Hull, *Insider Trading: An End to the Debate in Britain?*, 17 AM. BUS. L.J. 85, 90 (1979).

¹⁰⁹ Hull, *supra* note 108, at 92.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² THE CONDUCT OF COMPANY DIRECTORS, CMND. 7037 at para. 1 (1977).

¹¹³ *Id.* at para. 23.

¹¹⁴ B. RIDER AND H. FRENCH, *supra* note 28, at 454-55.

¹¹⁵ *Id.* at 338.

¹¹⁶ Companies Act, 1980, ch. 22.

¹¹⁷ *Id.* at §§ 68-73. When the Conservative Government first introduced the bill which became the Companies Act 1980 it did not contain provisions prohibiting insider trading despite pressure from the opposition Labour Party to include such a ban. B. RIDER I, *supra* note 6, at 13. The government later relented and amended the bill to include provisions on insider trading. *Id.*

¹¹⁸ Companies Act, 1948, ch. 38, at § 455; Companies Act, 1981, ch. 62, at § 112, Sched. 3.

¹¹⁹ Company Securities (Insider Dealing) Act, 1985, *supra* note 13.

¹²⁰ Financial Services Act, 1986, *supra* note 9, at §§ 173-78.

stock if in possession of inside information.¹²¹ The 1985 Act defines inside information as information that (1) an individual possesses through his or her connection with the company, (2) he or she would reasonably be expected to know but not to disclose, and (3) he or she knows to be "unpublished price-sensitive information."¹²² A knowing connection with a company arises from having either a position as a director, officer, or employee of such a company, or a professional relationship with the company such as a lawyer, auditor, or broker.¹²³ The Act also prohibits such an individual from trading in the securities of any other company if the information relates to either an actual or contemplated transaction (such as a takeover) between the individual's company and the other company.¹²⁴ This prohibition operates solely on the basis of possession of the proscribed type of information. The prohibition does not take into account the individual's motive for trading, nor does it require that the individual actually used the information in trading the securities; it is sufficient merely that he or she was in possession of unpublished price-sensitive information.¹²⁵

The 1985 Act also prohibits secondary, or tippee, insider trading. A person who knowingly acquires information from an insider whom he or she knows would not normally disclose such information by virtue of the insider's position may not trade the stock of the insider's company.¹²⁶ Moreover, the tippee may not trade in the stock of any other company with which the insider's company is involved in an actual or potential transaction.¹²⁷ Unlike the case of insider trading by a primary insider, it is not necessary that the information a tippee uses be unpublished price-sensitive information, but only that it was knowingly obtained from an insider as defined under the 1985 Act.¹²⁸

It is also an offense to act as a "tipper," that is, to divulge confidential information to a person whom the tipper knows or has reason to believe will use the information in trading securities.¹²⁹ In addition, insiders may not "counsel or procure" any other person to trade stock based on the insider's possession

¹²¹ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1.

¹²² *Id.* at § 1(1). The Act does not precisely define the meaning of "unpublished price sensitive information," but emphasizes that it relates to specific matters concerning the company that would, if generally known to investors, be likely to materially affect the price of the company's stock. Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 10. The language of the 1985 Act implies that an insider need not use inside information in his or her decision to trade a particular stock; mere possession of the information at the time of the trade is sufficient to constitute an offense. *Id.* at § 1.

¹²³ P. MITCHELL, *supra* note 33, at 153-54.

¹²⁴ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1(2).

¹²⁵ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 704.

¹²⁶ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1(3)-(4).

¹²⁷ *Id.* at § 1(6).

¹²⁸ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 715.

¹²⁹ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1(7).

of privileged information, if the insider knows or has reason to believe that the person so counseled or procured would trade in the stock of the company.¹³⁰ This provision appears quite similar to the prohibition on tipping, but is designed to cover the gray area of subtle references and hints that fall short of an outright disclosure to a tippee.¹³¹

In the takeover context, an individual planning a takeover offer may buy the stock of the target company in order to effect the takeover, but may not trade in the stock in any other capacity in the knowledge that the offer is unpublished price-sensitive information.¹³² In addition, an individual who knowingly learns of such an offer from the one making the offer may not trade in the stock of the target company if he or she also knows the fact of the offer to be unpublished price-sensitive information.¹³³ The practical effect of these takeover related provisions is to bring the insider trading provisions of the City Code within the 1985 Act's prohibitions.¹³⁴

The prohibitions against insider trading in the 1985 Act also apply to Crown servants,¹³⁵ (that is, employees of government agencies) in possession of unpublished price-sensitive information.¹³⁶ Such individuals may not trade securities on the basis of such information on their own behalf, nor may they advise or hire others to do so.¹³⁷ In addition, they may not communicate privileged information to other persons they reasonably believe may use it in trading securities.¹³⁸ The 1986 Act extends these prohibitions to public servants generally.¹³⁹ This category is broader than that of Crown servants, and includes employees of other public bodies, employees of agencies which are delegated

¹³⁰ *Id.* at § 1(8).

¹³¹ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 718.

¹³² Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1(5).

¹³³ *Id.* at § 1(6).

¹³⁴ GORE-BROWNE ON COMPANIES § 12.25 (1986).

¹³⁵ Crown servants are individuals who hold office under, or are employed by, the Crown. This includes government ministries and agencies but not employees of nationalized industries or local authorities, who are public but not Crown servants. OXFORD COMPANION TO LAW 324 (1980).

¹³⁶ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 2.

¹³⁷ *Id.* at § 2(1)-(2).

¹³⁸ *Id.* at § 2(3). Beginning in 1987 the DTI conducted a year-long investigation into allegations that civil servants of the Office of Fair Trading, which reviews merger applications, had disclosed price-sensitive information to outsiders, who traded stock on the basis of the information. The Times (London), Mar. 5, 1988, at 25, col. 2. In 1988 the government charged Sarah Coren, a civil servant with the Office of Fair Trading, with violating §§ 1-2 of the 1985 Act, which prevent Crown servants from disclosing inside information to anyone they know or have reason to believe will use it to trade in stocks. *Id.* In this case, Coren was charged with passing the information to her brother, Jonathan Greenwood, a former stockbroker. The Times (London), Apr. 23, 1988, at 3, col. 1. Greenwood was himself charged with acting as a tippee. *Id.*

¹³⁹ Financial Services Act 1986, *supra* note 9, at § 173(1).

powers under the 1986 Act, such as the Securities and Investment Board, and employees of self-regulating organizations, such as the Stock Exchange.¹⁴⁰

The 1985 Act, however, excludes a number of persons from its prohibitions. Individuals acting as liquidators,¹⁴¹ receivers,¹⁴² or trustees in bankruptcy,¹⁴³ who by virtue of their position have access to privileged information, are exempt to the extent that they act in "good faith."¹⁴⁴ Stock jobbers¹⁴⁵ who obtain information that they would reasonably acquire as part of their duties as intermediaries on the trading floor are likewise exempt from the Act's prohibitions to the extent that they act in good faith.¹⁴⁶ The 1985 Act also prohibits insider trading on foreign exchanges to the same extent as on British exchanges.¹⁴⁷ This is designed to curb the practice by which insiders in Great Britain purchase the stock of British companies on overseas exchanges where those companies' stock is traded through overseas brokers or nominees.¹⁴⁸

2. Defenses

Persons charged with violations of insider trading law can assert several defenses. A person can defend a charge that he or she has acted while in possession of, but not on the basis of, unpublished price-sensitive information by proving that his or her purpose was other than that of making a profit or avoiding a loss.¹⁴⁹ This defense applies to individuals forced to trade securities for the purpose of paying debts or for other long-term motives.¹⁵⁰ These individuals will have to prove such motives, as they will be presumed to have acted on the basis of inside information in their possession.¹⁵¹ An individual can also

¹⁴⁰ *Id.* at § 173(2).

¹⁴¹ OXFORD COMPANION TO LAW, *supra* note 135, at 772.

¹⁴² *Id.* at 1040-41.

¹⁴³ *Id.* at 1242.

¹⁴⁴ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 3(1)(b). This provision, as well as the exception for jobbers in § 3(1)(c), are the only exemptions which include good faith as an element.

¹⁴⁵ A jobber is a dealer who buys and sells stocks on a stock exchange, both for brokers and for his own account, but he is not a stock broker who places orders on behalf of clients. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2247 (1981).

¹⁴⁶ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 3(1)(c).

¹⁴⁷ *Id.* at § 5.

¹⁴⁸ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 729. This practice is very difficult to detect without the ability to obtain evidence from authorities in other countries. *See infra* note 170.

¹⁴⁹ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 3(1)(a).

¹⁵⁰ *Id.* at § 3(1).

¹⁵¹ *Id.* Rider, Chaikin and Abrams note that it is difficult to imagine a situation where such a transaction would not be for the purpose of either making a profit or avoiding a loss, and hence this provision seems to offer little protection. B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 720. The notes to this particular section of the 1985 Act refer to § 7 of the Act. This section permits trustees and personal representatives to deal in stock when otherwise prohibited from doing so if they act

defend a charge by establishing that he or she traded securities on the basis of inside information in order to facilitate the completion or the carrying out of a transaction.¹⁵² This defense applies to an employee of a listed company or of a brokerage who must carry out orders to buy stock as part of a takeover plan, and is in possession of inside information for that purpose alone.¹⁵³

3. Penalties and Enforcement

The maximum penalties for violation of the 1985 Act are imprisonment for up to two years, a fine, or both.¹⁵⁴ If convicted on the basis of a summary trial,¹⁵⁵ the maximum penalty is imprisonment for up to six months, a fine, or both.¹⁵⁶ The 1985 Act also provides that no transaction made in violation of the Act is void or voidable as a result of the violation.¹⁵⁷ There are no civil remedies under the 1985 Act or the 1986 Act.¹⁵⁸

Neither the Companies Act 1980 nor the 1985 Act provided for a separate office within the Department of Trade and Industry for investigating suspected cases of insider trading. Prior to introducing the Companies Act 1980, the government rejected suggestions that a specially trained unit of investigators was necessary to combat insider trading.¹⁵⁹ The government stated that the bill's general enforcement provisions would be sufficient to enforce the new prohibitions against insider trading.¹⁶⁰ The 1985 Act similarly included no such enhanced powers.

"with propriety" on the advice of a person who appeared to be "an appropriate person from whom to seek such advice" and did not himself appear prohibited under §§ 1, 2, 4, or 5 from dealing in the stock. Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 7.

¹⁵² Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 3(2).

¹⁵³ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 722.

¹⁵⁴ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 8(1)(a).

¹⁵⁵ A summary trial is conducted by the judge with no jury and is used when an offense is considered not to be "serious." Magistrates' Courts Act, 1980, ch. 43, §§ 19-20. If a summary trial is indicated, the accused may request a jury trial. *Id.* at § 20(2).

¹⁵⁶ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 8(1)(b).

¹⁵⁷ *Id.* at § 8(3).

¹⁵⁸ See *infra* notes 238-80 and accompanying text.

¹⁵⁹ B. RIDER I, *supra* note 6, at 284-85.

¹⁶⁰ *Id.* These provisions, contained in §§ 164-75 of the Companies Act 1948, ch. 38 and reenacted at §§ 431-53 of the Companies Act 1985, are wide ranging and rarely used by the Department of Trade and Industry to investigate potential cases of insider trading due to the expense and time involved in conducting an investigation. B. RIDER I, *supra* note 6, at 302-03. DTI investigations were traditionally conducted by Queen's Counsel and senior partners of chartered accounting firms. *Id.* at 303. These outside inspectors were only able to devote part of their time to investigation, which caused delays and often resulted in the trail of an investigation going cold. *Id.* DTI has suggested that it will appoint its own inspectors in the future, which may lead to quicker and more efficient investigations. *Id.*

In a 1985 Financial Services White Paper,¹⁶¹ the government noted the need for vigorous enforcement of securities laws, in order to deter "fraud and malpractice."¹⁶² The White Paper stated that there was a need to strengthen the powers of Department of Trade and Industry investigators in order to improve enforcement capabilities.¹⁶³ The 1986 Act accordingly gives DTI investigators wide powers to obtain information about suspected cases of insider trading. The Secretary of State for Trade may, if he or she suspects a violation, appoint inspectors to investigate a possible insider trading violation.¹⁶⁴ The inspectors have the authority to compel any person to provide information, to produce documents considered relevant, to appear and be examined under oath, and to "give any assistance that he or she is reasonably able to give."¹⁶⁵ Any statement made under oath as part of an investigation can later be used in evidence against the person making it.¹⁶⁶

Individuals from whom DTI inspectors request information may be able to assert several statutory excuses for declining to comply, but there are several limitations on the ability to assert such excuses. An individual may decline to disclose information on the grounds of the attorney-client privilege.¹⁶⁷ A bank may refuse to disclose information to inspectors if the information relates to the affairs of a customer, and the inspectors cannot establish that the customer can provide information deemed important to the inquiry.¹⁶⁸ In limiting the right to refuse compliance with inspectors' requests, the 1986 Act does not allow ignorance of a customer's identity to constitute a reasonable excuse.¹⁶⁹ This provision is designed to ferret out the principals instigating transactions; many past Stock Exchange and government investigations have proved unsuccessful because insider traders use a network of foreign nominees and shell corporations to shield their identity.¹⁷⁰ In addition, a person refusing to divulge a

¹⁶¹ FINANCIAL SERVICES WHITE PAPER, *supra* note 66.

¹⁶² *Id.* at para. 3.2.

¹⁶³ *Id.* at para. 14.3.

¹⁶⁴ Financial Services Act 1986, *supra* note 9, at § 177(1). The nature of the Secretary of State's "suspicion" that a violation has occurred is unclear; in most cases the Secretary will presumably act on referrals from the Stock Exchange, which monitors trading activity and conducts preliminary inquiries. See B. RIDER I, *supra* note 6, at 285.

¹⁶⁵ Financial Services Act 1986, *supra* note 9, at § 177(3)-(4).

¹⁶⁶ *Id.* at § 177(6).

¹⁶⁷ *Id.* at § 177(7).

¹⁶⁸ *Id.* at § 177(8). It is unclear what standard the DTI inspectors will use in deciding whether information a bank can provide about a customer is important to an investigation and therefore subject to production. B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 731.

¹⁶⁹ *Id.* at § 178(6).

¹⁷⁰ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 732. In 1986 the Department of Trade and Industry, the United States Securities Exchange Commission, and the United States Commodity Futures Trading Commission signed a joint Memorandum of Understanding pledging the signatory agencies to furnish information requested by their foreign counterparts needed to enforce securities and/or commodities trading laws. Memorandum of Understanding on Exchange of Information

customer's identity may not use another country's client secrecy laws as an excuse, if he or she might have obtained the customer's initial consent to disclose the customer's identity to investigators.¹⁷¹ Brokers and traders have on occasion frustrated inspectors by claiming that foreign secrecy laws prohibit them from divulging the identity of their customers.¹⁷² Under this particular provision a broker will have to show that he or she attempted to obtain approval to disclose the client's identity to inspectors before claiming a reasonable excuse for not complying with the investigators.¹⁷³ Thus, investigations may become more efficient, and more successful, as inspectors are able to trace more details of transactions.¹⁷⁴

The 1986 Act imposes penalties for noncompliance with requests for information by DTI investigators.¹⁷⁵ Investigators may ask a court to hold a person in contempt who refuses to comply with lawful requests for information, or refuses to answer investigators' questions if the court finds no reasonable basis for the refusal to comply.¹⁷⁶ As an alternative, the court may refer the matter to the Secretary of State for Trade.¹⁷⁷ The Secretary may impose a number of sanctions including suspending the right to carry on investment business¹⁷⁸ or prohibiting participation in certain categories of transactions or types of business.¹⁷⁹ These sanctions may remain in force until the Secretary is satisfied that the person is in compliance with the investigators' request.¹⁸⁰

Between the SEC, CFTC, and the United Kingdom Department of Trade and Industry on Matters Relating to Securities and Futures [hereinafter MOU], [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 84,245 (Sept. 23, 1986). The MOU provides that the signatory agencies may request information "reasonably relevant" to securing compliance with securities laws and may be used in investigations and litigation. *Id.* at 86,246. This mechanism could be useful to DTI investigators, who in the past have had trouble obtaining evidence from abroad. B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 731. In addition, the MOU could provide a useful model for similar MOUs with other nations, especially those with strict bank secrecy laws, such as Switzerland. This would be of great assistance to DTI inspectors.

¹⁷¹ Financial Services Act 1986, *supra* note 9, at § 178(6)(b).

¹⁷² B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 732.

¹⁷³ *Id.*

¹⁷⁴ A judge's ruling in a 1988 insider trading case sharply limited the scope of DTI investigators. See *The Times* (London), Aug. 1, 1988, at 19, col. 2. In a case involving Brian Fisher, who was charged with buying stock during 1985 as a tippee, a drafting error in the 1986 Act came to light which appears to limit the scope of DTI investigations. See *infra* notes 230-31 and accompanying text. Section 177 of the 1986 Act sets forth the powers of DTI investigators appointed when the Secretary of the DTI suspects a violation of the 1985 Act. By failing to include any mention of the Companies Act 1980, which first made insider trading a crime, DTI investigative powers are limited to actions occurring after the 1985 Act took effect in mid-1985. *The Times* (London), Aug. 1, 1988, at 19, col. 2. This development will serve mainly to limit the extent of historical investigation by DTI inspectors using the powers granted under the 1986 Act.

¹⁷⁵ Financial Services Act 1986, *supra* note 9, at § 178.

¹⁷⁶ *Id.* at § 178(1)-(2).

¹⁷⁷ *Id.* at § 178(2).

¹⁷⁸ *Id.* at § 178(3)(a)-(c).

¹⁷⁹ *Id.* at § 178(3)(d)-(f).

¹⁸⁰ *Id.* at § 178(7).

If the DTI investigation indicates a violation of the prohibitions on insider trading, it refers the matter to the Secretary of State.¹⁸¹ The Secretary may either initiate a prosecution, or refer the matter to the Director of Public Prosecutions who may also initiate a criminal prosecution.¹⁸² The DTI may be reluctant, however, to bring to court any case not having a high likelihood of success, as the enforcement record since 1980 reflects.¹⁸³

IV. RECORD OF ENFORCEMENT

From 1980, the time insider trading became a crime, through 1985, the Stock Exchange investigated 251 cases of suspected insider trading, and referred over one hundred to the Department of Trade and Industry.¹⁸⁴ Through mid-1988, the DTI has brought only ten prosecutions, of which seven have been successful.¹⁸⁵ By contrast, the SEC in the United States has brought over one hundred successful prosecutions since 1981.¹⁸⁶ Critics have charged that the government has not devoted sufficient resources to effective enforcement, that the courts have not taken the offense seriously enough, and that adequate detection has been a problem.¹⁸⁷ In contrast to the United States, the laws in Britain provide no express civil remedies to combat or deter insider trading, and the indirect means which do exist are not an effective alternative.¹⁸⁸ Thus, the added enforcement mechanism of damage suits brought by injured parties is not present. This section will examine the level of commitment to enforcement on the part of the courts, some of the problems of statutory interpretation, the lack of a civil remedy, and the need for more effective surveillance and detection.

¹⁸¹ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 8(2). The Director of Public Prosecutions is the official responsible for instituting and prosecuting criminal proceedings under the authority of the Attorney General. The Prosecution of Offences Act, 1979, ch. 31, sets out the authority of the Director of Public Prosecutions.

¹⁸² Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 8(2).

¹⁸³ B. RIDER I, *supra* note 6 at 287.

¹⁸⁴ King and Roell, *supra* note 6, at 184.

¹⁸⁵ *Insider trading in London: The odds move*, THE ECONOMIST, Feb, 7, 1987, at 76. The conviction of Geoffrey Collier in July, 1987 was the latest under the law prohibiting insider trading. The Times (London), July 2, 1987, at 1, col. 8. An unsuccessful case brought in 1988 involved Brian Fisher, who was charged under the 1985 Act with acting as a tippee but was acquitted at trial. See *infra* notes 230-31 and accompanying text.

¹⁸⁶ *Insider trading in London: The odds move*, THE ECONOMIST, Feb, 7, 1987, at 76.

¹⁸⁷ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 731. See also Tridimas, *The Financial Services Act and the Detection of Insider Trading*, 8 COMPANY LAW. 162, 166 (1987).

¹⁸⁸ See *infra* notes 238-80 and accompanying text.

A. *Government and Judicial Commitment*

1. Successful Prosecutions Under the Companies Act 1980, the Company Securities (Insider Dealing) Act 1985, and the Financial Services Act 1986

The insider trading prosecutions brought since 1980 reflect, to some extent, the lukewarm commitment and slender resources of the DTI devoted to pursuing violators of the insider trading laws. These cases have generally involved prosecutions of small-scale insider traders who acted on a casual or opportunistic basis, rather than those City insiders widely believed to operate sophisticated, ongoing networks of informants and foreign nominees.¹⁸⁹ It is this type of insider, such as Geoffrey Collier, that attracts wide publicity and diminishes public confidence in the integrity of the financial services industry. The cases brought so far demonstrate a reluctance to prosecute cases that are not obvious violations of the law, and a preference for defendants who plead guilty.¹⁹⁰ Moreover, these cases represent the difficulty of uncovering the sophisticated inside trader without special resources.¹⁹¹

The first cases brought also reflect the lack of gravity with which British courts may have initially viewed the offense of insider trading.¹⁹² As the DTI brought more cases, however, the courts imposed stiffer penalties. Overly narrow interpretation in light of the newness of the statute has, however, presented a problem.¹⁹³

The first insider trading case, brought in 1981, involved one Bryce, a partner of a Scottish investment management firm.¹⁹⁴ Bryce admitted placing an order to buy stock in a trust that his firm managed, knowing that the announcement of a restructuring of the trust was imminent.¹⁹⁵ Bryce pleaded guilty, but claimed

¹⁸⁹ B. RIDER I, *supra* note 6, at 47. In 1988 the Stock Exchange announced that it had uncovered evidence of a ring of over twenty of its members who had been involved in an insider trading scheme for a number of years. *The Times* (London), Mar. 4, 1988, at 1, col. 7. The Stock Exchange stated that the group had carried out its trades through a string of offshore corporations which Exchange inspectors had been unable to penetrate. *Id.* The Stock Exchange has referred its findings to the DTI. With its new investigatory powers under the 1986 Act, the DTI should in theory be able to uncover more evidence than the Stock Exchange. *Id.*

¹⁹⁰ B. RIDER I, *supra* note 6, at 47. Only one case brought under the laws against insider trading has been tried before a jury. *See infra* notes 230-31 and accompanying text.

¹⁹¹ *Id.*

¹⁹² Tridimas, *supra* note 187, at 166.

¹⁹³ *See infra* notes 224-31 and accompanying text.

¹⁹⁴ *See* Rider, *Where now after a prosecution and absolute discharge?*, 2 *COMPANY LAW* 278 (1981) [hereinafter Rider II] (citing *Lord Advocate v. Bryce*, (August 21, 1981) Edinburgh Sheriff Summary Court (unreported)). *See id.* Most of the cases brought so far involving insider trading regulations are generally unreported. *See* Huss, *Insider Trading Regulations: A Comparison of Judicial and Statutory Sanctions*, 25 *AM. BUS. L.J.* 301, 316-21 (1987).

¹⁹⁵ *See* Rider II, *supra* note 194, at 278.

that he was unaware of the relevant provisions of the Companies Act 1980. In addition, he argued that he had made no attempt to conceal his actions, had undertaken them on behalf of others, and had taken measures to compensate the stock jobber he used to make the trade for the latter's loss in the transaction. The court discharged Bryce without imposing any fine or sentence and noted that Bryce's efforts to make restitution had influenced this decision.¹⁹⁶ The court reached this conclusion in spite of the stated purpose of the law to maintain investor confidence by imposing criminal penalties and not to provide for restitution or compensation as a defense.¹⁹⁷ In addition, Bryce's employer did not consider his actions sufficiently serious to warrant punishment under its own in-house code.¹⁹⁸

In 1982, the DTI brought a successful case against John Allen Crump Dickenson for insider trading.¹⁹⁹ Dickenson was managing director of a subsidiary of the Harris and Sheldon Company and knew that another company was planning to take over a division of the parent company. Dickenson purchased an option contract on stock in the parent using his solicitors as nominees. The chairman of Harris and Sheldon learned of the option contract and notified the Stock Exchange. The Stock Exchange stopped trading in the stock and initiated an investigation. The Department of Trade and Industry brought charges against Dickenson, who admitted his action and received a suspended sentence but no fine. Dickenson did lose the amount he spent purchasing the option as well as his job. This court viewed Dickenson's violation of the law more seriously than did the court in the Bryce case.²⁰⁰

The Department of Trade and Industry brought another successful case in 1982, which resulted in the convictions of John and Joyce Titheridge, a husband and wife team of insiders.²⁰¹ This case involved the first instance of secondary insider trading, that is, by a tippee, and the first case of counseling and procuring another to deal based on privileged information.²⁰² The prosecution charged Joyce Titheridge, a secretary at a London merchant bank, with learning about a corporate takeover involving her employer, and passing this information

¹⁹⁶ *See id.*

¹⁹⁷ THE CONDUCT OF COMPANY DIRECTORS, CMND. 7037, *supra* note 112, at para. 31 (1977).

¹⁹⁸ *See* Rider II, *supra* note 194, at 278.

¹⁹⁹ *See* Rider, *Determined efforts being made to enforce law on insider dealing*, 3 COMPANY LAW. 185 (1982) [hereinafter Rider III]. This unreported case was heard in the Sutton Coldfield Magistrates' Court. *Id.*

²⁰⁰ *See id.*

²⁰¹ *See* Rider, *The first case of secondary insider dealing*, 4 COMPANY LAW. 117 (1983) [hereinafter Rider IV]. This unreported case was heard in the Croydon Crown Court, December 17, 1982. *Id.*

²⁰² *See id.* Counseling or procuring another was prohibited by the Companies Act 1980 at § 68(6) and reenacted in the Company Securities (Insider Dealing) Act 1985 at § 1(7). Secondary insider trading, or acting as a tippee, was prohibited in the Companies Act 1980 at § 68(7) and reenacted in the Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1(6).

to her husband, who worked for another merchant bank.²⁰³ John Titheridge bought stock in the takeover target for himself and for a client, resulting in a personal profit of over six thousand pounds.²⁰⁴ Joyce Titheridge was charged with counseling and procuring another to buy stock based on inside information. John Titheridge was charged with acting as a tippee. Both pleaded guilty; the judge fined them heavily to deter others and maintain public confidence in the financial services industry.²⁰⁵ Both subsequently resigned from their jobs.²⁰⁶

In 1987, Geoffrey Collier, the stockbroker whose arrest had hastened the implementation of the 1986 Act's investigatory powers, was convicted of insider trading.²⁰⁷ Collier had bought stock on behalf of Hollis PLC, which was attempting a takeover of another company, AE.²⁰⁸ Collier also bought stock in AE for himself based on his knowledge of the takeover attempt, placing the purchase order through a stockbroker friend in the United States, one Cassell. Cassell purchased the stock through a London brokerage before the public announcement of the takeover attempt, and ordered them sold after the announcement, which had driven up the price of the stock.²⁰⁹ The stock was purchased in the name of a Cayman Islands holding company.²¹⁰ These actions attracted the attention of Cassell's superiors, who queried him about the transactions.²¹¹ Cassell tried to cancel the transaction, but the London brokerage refused and referred the matter to Cassell's superiors. Cassell's superiors questioned him on the transaction, and Cassell informed Collier of this. Collier realized he would be discovered, and informed the chairman of his own company before tendering his resignation.²¹² Collier cooperated with the DTI investigation which followed.²¹³ Collier later pleaded guilty, and received a one year suspended sen-

²⁰³ Huss, *supra* note 194, at 318-19.

²⁰⁴ Rider IV, *supra* note 201, at 117.

²⁰⁵ *Id.*

²⁰⁶ B. RIDER I, *supra* note 6, at 47. In 1986 Maurice Naerger, a former director of WH Smith, was convicted of insider trading. *The Times* (London), Apr. 29, 1986, at 21, col. 6. Naerger, who pleaded guilty, admitted to buying stock in a potential takeover target at the same time that WH Smith began considering the target company. *Id.* While the takeover later fell through, Naerger was able to sell his stock at a profit of nearly £3,000. *Id.* The court in this unreported case fined Naerger £800 plus £100 in court costs. *Id.*

²⁰⁷ *The Times* (London), July 2, 1987, at 1, col. 8.

²⁰⁸ Lever, "Fall of an Insider," *The Times* (London), July 2, 1987, at 21, col. 5. While the news reports of this unreported case do not specify the exact provisions of the 1985 Act Collier was charged with violating, the facts of the case imply that he acted as a tippee in violation of §§ 1(3)-(4) of the 1985 Act, which prohibits trading on the basis of inside information knowingly obtained from insiders. *See id.* Alternatively, Collier may have been charged with trading in stock on the basis of inside information knowingly obtained from an individual making a takeover offer, which is prohibited under § 1(6) of the 1985 Act. *See id.*

²⁰⁹ Lever, *supra* note 208, at 21.

²¹⁰ King and Roell, *supra* note 6, at 167.

²¹¹ Lever, *supra* note 208, at 21.

²¹² *Id.*

²¹³ *The Times* (London), July 2, 1987, at 20, col. 8.

tence and a twenty-five thousand pound fine.²¹⁴ In sentencing Collier, the court noted the damage he had done to the reputation of the City and hinted that future offenders might not be so fortunate as to have their prison sentences suspended.²¹⁵

In *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985*,²¹⁶ the first case interpreting provisions of the 1986 Act relating to the powers of DTI inspectors, the Court of Appeal balanced the authority of the investigators against the statutory protection of journalistic confidentiality.²¹⁷ This case involved a journalist, Jeremy Warner, who refused to reveal to DTI investigators his sources for two articles about the role of a government agency under investigation by the DTI for allegedly divulging inside information.²¹⁸ The court ruled that Warner had violated the 1986 Act's prohibition on refusal to comply by not identifying his sources.²¹⁹ The court found that, if DTI investigators establish that disclosure of a journalist's confidential sources is necessary for the investigation and prevention of a crime, there is no reasonable excuse for nondisclosure.²²⁰ In order to show necessity, government inspectors must show that the information sought is of "substantial assistance"²²¹ to the inspectors, or that refusal to disclose will substantially impede the investigation.²²² The Court of Appeal's decision in this case, and the trend evident in cases brought under the Companies Act 1980, are encouraging signs that the courts, as well as the government, recognize the need for strong support of the DTI's new investigatory powers to ensure more effective enforcement of the laws on insider trading.²²³

2. Interpretation Problems Facing the Courts and the Government in Pursuing Cases Under the Insider Trading Laws

Two cases brought under the 1985 Act demonstrate the difficulty of interpreting a relatively new statute when there is little precedent to rely upon in

²¹⁴ *Id.* at 1, col. 8.

²¹⁵ *Id.* at 20, col. 8.

²¹⁶ *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985*, [1988] 2 W.L.R. 33 [hereinafter Warner case].

²¹⁷ See Tridimas, *supra* note 187, at 164–65. Journalistic confidentiality is protected by the Contempt of Court Act, 1981, ch. 49.

²¹⁸ See Tridimas, *supra* note 187, at 162.

²¹⁹ See *id.*

²²⁰ See *id.* at 164.

²²¹ Warner case, *supra* note 216, at 49.

²²² See Tridimas, *supra* note 187, at 164.

²²³ *Id.* at 166. In 1988, the High Court Chancery Division, following the decision in the Warner case, fined Warner £20,000 but declined to impose any prison sentence (which could have been for up to two years) because Warner had written his articles in 1985, before the DTI investigatory powers came into effect under the 1986 Act. See *The Financial Times*, Jan. 27, 1988, at 1, col. 3.

reaching a decision.²²⁴ In an unreported 1985 case, the first in which the accused did not plead guilty, the prosecution charged one Kettle, an employee of a brokerage house, with buying stock in a company based on unpublished price-sensitive information received from a client.²²⁵ He was also charged with divulging the information to a colleague, the second defendant Thorneywork, who bought stock for clients based on that information.²²⁶ Thorneywork was charged with acting as a tippee.²²⁷ At trial the primary issue was whether the defendants knew the information which they used was unpublished and price-sensitive at the time they acted on it.²²⁸ The presiding magistrate held that he could not be sure that they did know the information was of this nature at the time they acted, as required by law, and he accordingly dismissed all charges.²²⁹ The facts of this unreported case are not complete, and it is therefore not clear what standard of knowledge the court applied to the defendants. One could argue, however, that stockbrokers should be held capable of recognizing information that might be privileged or price-sensitive or of making reasonable inquiries into its nature before acting upon it.

In a 1988 case, a trial court acquitted Brian Fisher after the judge ruled that Fisher had not "obtained" unpublished price-sensitive information as required by the 1985 Act.²³⁰ In the first insider trading case to come before a jury, Fisher was charged with acting as a tippee in buying shares in a company after receiving inside information concerning its affairs from the company's merchant bank. In acquitting Fisher the judge based his ruling on a dictionary definition of the word "obtain," as requiring the active seeking out or procuring of information.

²²⁴ Huss, *supra* note 194, at 320.

²²⁵ Chaikin, *Unsuccessful insider trading prosecution*, 6 COMPANY LAW, 97, 98 (1985).

²²⁶ *Id.* at 97. Kettle was charged under § 68(7) of the Companies Act 1980, which prohibits individuals in possession of inside information to pass on that information to another when he knows, or has reason to know, that the other person will use the information in trading stocks. Huss, *supra* note 194, at 321. Section 68(7) of the Companies Act 1980 was reenacted at § 1(8) of the Company Securities (Insider Dealing) Act 1985.

²²⁷ Chaikin, *supra* note 225, at 97.

²²⁸ *Id.* "Unpublished price sensitive information" is described in the 1985 Act as including specific matters concerning a company that are not generally known to investors but would, if made public, be likely to materially influence the price of that company's securities. Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 10.

²²⁹ Chaikin, *supra* note 225, at 97. The Companies Act 1980 required at § 68(3) (reenacted in the Company Securities (Insider Dealing) Act 1985 at § 1(4)) that the accused know the information upon which he or she is acting was "unpublished price sensitive information" in relation to those securities.

²³⁰ See *The Times* (London), May 14, 1988, at 27, col. 3. Sections 1(3)-(4) of the 1985 Act apply to an individual who "has information which he knowingly obtained (directly or indirectly) from an insider whom he knows or has reasonable cause to believe would not" disclose it by virtue of the insider's status as defined in section 1(1). If the individual who obtains this information knows it to be unpublished and price sensitive, that individual may not trade in the stock of the company to which it relates, nor trade in the stock of any other company with which the first company has an actual or contemplated transaction. Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 1(4).

Apparently Fisher received the inside information without any effort on his part to gain knowledge of it. The DTI announced that it would appeal the trial court ruling to the Court of Appeal to clarify the legal definition of "obtain" in the context of the 1985 Act.²³¹ These two cases demonstrate some of the difficulties of interpreting new, untested statutory language. Courts will have to eschew narrow definitions and constructions if the law is to be effective against insider trading. Over time, as more cases come before the courts, a body of interpretation and construction will grow. Until that time, it is uncertain how these trial court results will affect future cases.

B. *Detection Capabilities*

The Stock Exchange's detection methods have posed a continuing obstacle to the investigation of insider trading. The Department of Trade and Industry has no market surveillance or detection capabilities of its own and relies instead almost entirely on the Stock Exchange to monitor trading activity and detect possible cases of insider trading.²³² The DTI also receives complaints and reports of suspicious trading activity from jobbers, brokers, investors, and others, as does the Stock Exchange.

Until 1974, the Stock Exchange had no effective means of monitoring stock price movements and could monitor only a fraction of the listed securities, and even then only with a substantial time lag.²³³ In 1986, the Stock Exchange installed a more sophisticated system for monitoring the market, one which tracks price movements and records all trades in a centralized database.²³⁴ The time required for determining the details of a particular transaction has dropped from six weeks to a matter of hours, and Stock Exchange inspectors are now able to examine fifteen trades per day rather than four per week under the earlier system.²³⁵ The detection and surveillance capabilities of the Stock Exchange are approaching those of the New York Stock Exchange and the SEC, which maintain extremely sophisticated computer systems.²³⁶ This will

²³¹ See *id.* Soon after the acquittal in this case, the prosecution in two pending insider trading cases requested temporary delays in the cases. While the DTI denied that the Fisher case was the cause, it is possible that the DTI wished to await the results of the appeal in that case to clarify the meaning of the word "obtain" under the 1985 Act. *The Times* (London), May 6, 1988, at 23, col. 6.

²³² B. RIDER I, *supra* note 6, at 285.

²³³ *Id.* at 149.

²³⁴ *Insider trading in London: The odds move*, *THE ECONOMIST*, Feb. 7, 1987, at 74. See also STOCK EXCHANGE 1987 ANNUAL REPORT, *supra* note 32, at 3, 11.

²³⁵ *Insider trading in London: The odds move*, *THE ECONOMIST*, Feb. 7, 1987, at 74.

²³⁶ *Id.* The New York Stock Exchange maintains a computerized monitoring entity, called the Stock Watch Group. Hawes, *supra* note 59, at 382. This group monitors trading activity and conducts investigations into suspicious movements in stock prices which cannot be attributed to market forces. *Id.* at 383. The Stock Watch Group coordinates its activities closely with the SEC and has made use of the SEC's subpoena and jurisdictional powers in conducting its own internal investigations. *Id.* at 384-

allow for more thorough and efficient Stock Exchange investigations, which in turn should make DTI investigations more effective.²³⁷

C. *Civil Remedies*

In the United States the existence of civil remedies against insider trading has proven an effective means of enforcement.²³⁸ These remedies provide economic incentives which encourage both companies and individuals to bring suits.²³⁹ Section 16(b) of the Securities Exchange Act of 1934 (1934 Act)²⁴⁰ allows corporations or shareholders to bring actions against specified insiders who, if found liable, must disgorge short term profits to the company in whose shares they have traded.²⁴¹ In addition, the courts have created implied private rights of action for injured investors under section 10(b) of the 1934 Act and Rule 10b-5, a regulation issued under the 1934 Act.²⁴² Under recent legislation, the SEC can also recover from insiders up to three times the amount of profits gained or losses avoided in an illegal transaction.²⁴³ In Great Britain there are no comparable civil remedies open to the government, to injured investors, or to companies whose shares have been traded by insider traders.²⁴⁴ The government has long resisted express civil remedies for insider trading; it has maintained that since stocks are traded in a largely anonymous market, civil remedies are unworkable since it is impossible to identify the injured party with any

85. The New York Stock Exchange informs the SEC as to the results of all of its investigations, even if it has not uncovered a statutory violation. *Id.* at 385.

²³⁷ *Insider trading in London: The odds move*, THE ECONOMIST, Feb. 7, 1987, at 74.

²³⁸ Huss, *supra* note 194, at 302-12. For a fuller description of the civil remedies available against insider trading in the United States, see H. BLOOMENTHAL, SECURITIES LAW HANDBOOK (1987) [hereinafter BLOOMENTHAL II]. For a description of some recent civil cases brought by the Securities Exchange Commission, see H. PITT, INSIDER TRADING: COPING WITH THE USE AND ABUSE OF MARKET SENSITIVE INFORMATION (1985), and S. ARKIN, TRADING ON INSIDE INFORMATION (1984).

²³⁹ Durham, *The Companies Act 1980: Its Effects on British Corporate Law*, 4 NW. J. INT'L L. & BUS. 551, 579 (1982).

²⁴⁰ 15 U.S.C. § 78(a), *et seq.* (1982).

²⁴¹ 15 U.S.C. § 78p(b).

²⁴² 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. See *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). In this case a federal district court implied a private right of action against violators of section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, which implements it. *Id.* at 513-14. Since *Kardon*, this implied remedy has become an important means of curbing insider trading in the United States. H. BLOOMENTHAL II, *supra* note 238, at § 16.02.

²⁴³ 15 U.S.C. § 78u(d)(2)(A) (1985). The Insider Trading Sanctions Act of 1984, Pub. L. 98-376, 98th Cong. 2d sess. (1984), was enacted in response to what Congress perceived as the need for increased deterrence through stronger civil penalties. H. BLOOMENTHAL, *supra* note 238, at 418-19. Under the Act, the SEC can force an insider trader to disgorge up to three times the amount of profit made or loss avoided. *Id.* In addition, the maximum fine that can be imposed on convicted insider traders is raised from \$10,000 to \$100,000. *Id.* at 422.

²⁴⁴ The Company Securities (Insider Dealing) Act 1985 provides at § 8(3) that no transaction is either void or voidable if performed in contravention of the applicable provisions of the Act. See *supra* notes 157-58 and accompanying text.

certainty.²⁴⁵ There are likewise no statutory provisions to force disgorgement of profits from insider trading activities, and the 1985 Act states expressly that no transaction is void or voidable as a result of violations of the law.²⁴⁶ In practice, therefore, the insider trader is able to keep his or her profits, even after a conviction under the 1985 Act. The Panel on Take-overs and Mergers has, through moral suasion, forced violators of its rules against insider trading to pay over their profits to charity, but this non-statutory body operates only within the relatively narrow area of takeovers.²⁴⁷

Existing criminal law does not require insider traders to give up their profits, and the lack of an alternative set of civil remedies removes a further disincentive to violate the law. There are several indirect forms of civil remedies. It is unclear, however, how effective these methods are against insider trading, nor is it certain that the courts will be receptive to attempts to extend these remedies into this area. This section will examine these indirect civil remedies and a new provision under the 1986 Act which may hold promise as a tool against insider traders.

In instances where both parties to a stock transaction are in direct face-to-face communication, the injured party may be able to obtain recovery from the insider in the wake of a criminal conviction.²⁴⁸ Under the Powers of Criminal Courts Act 1973, after convicting a person for insider trading, a court may order compensation to be paid to the injured party.²⁴⁹ Such an order requires a certain determination of the identity of the injured party, since the court may not issue a compensation order where the payor's identity is in question.²⁵⁰ This limits the widespread use of such orders, as most stock transactions are anonymous. In addition, the use of compensation orders is limited in that they are generally a means of enforcing an already existing civil liability.²⁵¹ A compensation order is therefore designed to obviate the need for additional, civil litigation following the criminal proceedings.²⁵² A compensation order may be

²⁴⁵ THE CONDUCT OF COMPANY DIRECTORS, CMND. 7037, *supra* note 112, at para. 31. (1977). In this White Paper the Government stated that "[w]here insider dealing takes place in market transactions in quoted securities there are substantial problems in linking buyers and sellers which seem to rule out civil actions by those who claim to have made losses through buying or selling shares at a critical time. Indeed one of the main arguments for creating the criminal offence [sic] of insider dealing is precisely that there is usually no effective civil remedy." *Id.* The White Paper went on to say that allowing companies to sue for disgorgement of the insider's profits would bring the company a "windfall profit." *Id.* The White Paper added that the Government had not as yet reached any conclusion on whether to provide a means of forcing disgorgement of insiders' profits. *Id.* As of this date there are no such remedies available in Britain.

²⁴⁶ Company Securities (Insider Dealing) Act 1985, *supra* note 13, at § 8(3).

²⁴⁷ See *supra* notes 87-88 and accompanying text.

²⁴⁸ B. RIDER I, *supra* note 6, at 43.

²⁴⁹ Powers of Criminal Courts Act, 1973, ch. 62, § 35.

²⁵⁰ RIDER I, *supra* note 6, at 43.

²⁵¹ R. v. Chappell, (1985) 80 Cr. App. R. 31, 33.

²⁵² *Id.*

unjustified in most instances, because transactions by insider traders are neither void nor voidable under law and there exists no express civil claim.²⁵³ Therefore, the use of compensation orders will most likely be limited solely to face-to-face transactions.²⁵⁴

Another related civil remedy involves the violation of directors' fiduciary duties. Under the common law, directors have a fiduciary duty to their company.²⁵⁵ As a result of this duty, directors may not derive a "secret profit" by virtue of their position.²⁵⁶ In particular, a director may not profit from inside information that he or she is obligated to use on behalf of the company and not for personal benefit.²⁵⁷ In equity, a court can require a fiduciary to pay restitution to the company of those profits the fiduciary earned by breach of this duty.²⁵⁸ This duty also extends to officers and employees of the company in their capacity as agents.²⁵⁹ British courts have in the past ordered restitution in cases where directors or officers derived personal profit based on their knowledge of privileged information.²⁶⁰ These cases did not involve insider trading of stock, but instead concerned profits from other aspects of a company's business dealings.²⁶¹ It is thus not clear that courts will accept an extension of this principle to instances of insider trading.²⁶² In addition, this principle may be limited to those people having a fiduciary relationship with the company whose stock is traded.²⁶³ If a fiduciary enables a non-fiduciary to profit by disclosing privileged information, it is uncertain that a court could order either the fiduciary, who has personally made no profit, or the outsider, who owes no duty to the company, to pay restitution.²⁶⁴ Moreover, a director who trades on inside information in the stock of another company, with which his or her own company contemplates some transaction, owes no duty to that company and could not be ordered to pay restitution.²⁶⁵ While some commentators have suggested that it may be possible to obtain restitution by arguing that corporate "property" in the form of information has been misappropriated, it is uncertain that courts would view inside information as corporate property.²⁶⁶

²⁵³ *Id.*

²⁵⁴ B. RIDER I, *supra* note 6, at 43-44.

²⁵⁵ *Id.* at 69.

²⁵⁶ GORE-BROWNE ON COMPANIES, *supra* note 134, at § 12.21.1.

²⁵⁷ *Id.*

²⁵⁸ *See, e.g.*, *Bray v. Ford*, (1896) C.A. 44; *Boardman v. Phipps*, [1967] 2 A.C. 46.

²⁵⁹ B. RIDER I, *supra* note 6, at 83.

²⁶⁰ *See, e.g.*, *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378; *Industrial Development Consultants Ltd. v. Cooley*, [1972] 2 All E.R. 162.

²⁶¹ *Id.*

²⁶² B. RIDER I, *supra* note 6, at 71.

²⁶³ GORE-BROWNE ON COMPANIES, *supra* note 134, at § 12.21.2.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

The 1986 Act provides a potential means for obtaining restitution orders against insider traders. Section 61 of the 1986 Act provides for restitution orders to be issued by courts for violations of the rules of the SIB or any of the self-regulating organizations or other bodies it authorizes.²⁶⁷ The Securities and Investment Board or the Department of Trade and Industry may make a request to the court on behalf of investors to issue a restitution order against an insider trader.²⁶⁸ This insider trader must have violated the rules of the SIB, a recognized investment exchange, such as the Stock Exchange, or a self-regulating organization, such as the Securities Association, which includes the Stock Exchange.²⁶⁹ The court may order the insider, on the basis of such a violation, to pay the profits that the court determines were derived from the prohibited transactions.²⁷⁰ The court can then order that these sums be paid to those persons whom the court determines entered into transactions with the insider.²⁷¹ If utilized in this way, this provision may prove an effective means of obtaining civil relief.²⁷² The provision is new, however, and the mechanics of issuing a request to the court for an order, as well as the means for determining who is entitled to receive compensation, remain to be worked out.²⁷³ For example, it is not clear whether a person who believes he or she has traded with an insider who had the benefit of privileged information can initiate proceedings by making a request to the SIB or the DTI to apply for a restitution order. Nor is it clear what criteria these agencies will require before they agree to make an application. Finally, as in the case of compensation orders, which require certain identification of the injured party, it is uncertain how the courts will undertake to make such an identification for purposes of applying this provision.

Section 62 of the 1986 Act allows persons who suffer a loss as the result of any violation of regulations made pursuant to the Act to sue the violators in a civil action.²⁷⁴ Hence, if a firm or individual subject to SIB rules and regulations violates those rules, whoever suffers a loss as a result has a right of action for

²⁶⁷ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 734.

²⁶⁸ Financial Services Act 1986, *supra* note 9, at § 61. Rule 5.21 of the SIB Conduct of Business Rules of the Rules and Regulations provides that a firm shall use its "best endeavours" to ensure that none of its officers or employees deals in stock in violation of the 1985 Act. SECURITIES AND INVESTMENTS BOARD, RULES AND REGULATIONS Conduct of Business Rules (1987). This rule also prohibits the firm from effecting a transaction prohibited under the 1985 Act for its own benefit, subject to certain limited exceptions. *Id.* The rules also require an investment firm to establish arrangements whereby sensitive information is compartmentalized within departments and kept from the trading personnel. *Id.* at Rule 5.20. See *supra* note 41 and accompanying text. These are presumably the types of violations that could give rise to a right of action under § 62 or a restitution order under § 61 of the 1986 Act.

²⁶⁹ Financial Services Act 1986, *supra* note 9, at § 61.

²⁷⁰ *Id.* at § 61(5)–(6).

²⁷¹ *Id.* at § 61(6).

²⁷² See generally B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 734.

²⁷³ *Id.*

²⁷⁴ Financial Services Act 1986, *supra* note 9, at § 62.

breach of statutory duty.²⁷⁵ This right of action also arises where a member of a self-regulating organization or recognized investment exchange, such as the Stock Exchange, violates that body's existing rules, or rules that could have been made concerning a given matter within its purview.²⁷⁶ Hence, it may now be possible for an investor who suffers a loss to bring a civil suit for a violation of either SIB or Stock Exchange rules prohibiting insider trading, even where the government has not brought a criminal action. The SIB's enactment of section 62 of the 1986 Act in its Rules and Regulations has come under strong criticism and opposition from the financial services industry and securities firms' lawyers.²⁷⁷ The industry fears a rash of lawsuits arising from any and every breach of the SIB's lengthy and complicated rules.²⁷⁸ The investment industry and its lawyers have therefore insisted on precise rules, which detail every obligation of the industry and its members.²⁷⁹ This has delayed both the implementation of a revised set of SIB rules and the use of section 62 of the 1986 Act as a weapon against insider traders.²⁸⁰

V. RECOMMENDATIONS AND OUTLOOK

Since 1980, the enforcement record of the Department of Trade and Industry has been good, but not remarkable; of the ten cases brought to trial, seven have resulted in convictions.²⁸¹ It is not apparent, however, whether the DTI has done all that it can to enforce insider trading laws, or whether it is possible at this time to enforce the law more effectively. The new investigatory powers enacted under the Financial Services Act 1986 will help improve this record. In order to use such powers effectively, DTI inspectors must have an adequate commitment of will and resources from their superiors.²⁸² Such commitment was not apparent prior to the enactment of the 1986 Act.²⁸³ It is too early to tell how effectively the DTI will be able to exploit its new investigatory powers.²⁸⁴ It is likewise too early to predict how useful the newly updated detection capabilities of the Stock Exchange will be in uncovering the more sophisticated insider traders operating in the City.²⁸⁵ Finally, it may prove necessary to provide

²⁷⁵ *Id.* at § 62(1).

²⁷⁶ *Id.* at § 62(2).

²⁷⁷ *British investors' bill of rights*, THE ECONOMIST, Apr. 30, 1988, at 80.

²⁷⁸ *Can the SIB survive 1992?*, THE ECONOMIST, July 16, 1988, at 71, 72.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *supra* note 185.

²⁸² B. RIDER I, *supra* note 6, at 286-87.

²⁸³ Tridimas, *supra* note 187, at 168.

²⁸⁴ See *supra* notes 159-83 and accompanying text.

²⁸⁵ See *supra* notes 232-36 and accompanying text.

meaningful civil remedies as an additional means of enforcement and deterrence.²⁸⁶

This section will first assess the effectiveness of the DTI's enforcement record since 1980.²⁸⁷ Second, this section will assess the future prospects for enforcement given DTI investigators' new powers and the enhanced detection capabilities of the Stock Exchange.²⁸⁸ Third, the section will examine the quality of liaison between the Stock Exchange and the DTI.²⁸⁹ Finally, this section will discuss the need for effective civil remedies as an enforcement tool and as a deterrent to potential insider traders.²⁹⁰

A. *Past and Future Enforcement*

Since 1980, the DTI has investigated over one hundred potential violations that the Stock Exchange has referred to it²⁹¹ and brought ten prosecutions and obtained seven convictions.²⁹² In the United States during the same period the Securities and Exchange Commission has brought over one hundred successful prosecutions.²⁹³ The relative paucity of cases in Britain might be due to the newness of the statutory prohibitions on insider trading. It may take time to develop adequate internal administrative expertise and mechanisms for investigation and enforcement within an agency. It appears that until only quite recently the DTI has not committed itself to vigorous enforcement and has not made available the resources of money and personnel necessary to conduct thorough investigations.²⁹⁴ Until 1986, the government refused to acknowledge the need for specialized investigatory capabilities and relied on part-time, outside appointees to conduct inquiries.²⁹⁵ In addition, the government had originally viewed the prohibitions on insider trading as more in the nature of a deterrent than as a law to actively enforce.²⁹⁶ Indeed, the few cases brought since 1980, most of which involved easily detected instances of small scale opportunists who pleaded guilty, may have represented more than just inadequate resources and investigatory authority. These cases may well have been intended more as merely an occasional reminder to potential insider traders that they, too, could be prosecuted: deterrence by way of example. In other

²⁸⁶ See *supra* notes 238–80 and accompanying text.

²⁸⁷ See *infra* notes 291–97 and accompanying text.

²⁸⁸ See *infra* notes 298–304 and accompanying text.

²⁸⁹ See *infra* notes 305–10 and accompanying text.

²⁹⁰ See *infra* notes 311–17 and accompanying text.

²⁹¹ *Insider trading in London: The odds move*, THE ECONOMIST, Feb. 7, 1987, at 76.

²⁹² See *supra* note 185.

²⁹³ *Insider trading in London: The odds move*, THE ECONOMIST, Feb. 7, 1987, at 76.

²⁹⁴ See B. RIDER I, *supra* note 6, at 286–87.

²⁹⁵ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 731.

²⁹⁶ Hull, *supra* note 108, at 93.

words, the cases may not have represented a strong commitment to a comprehensive, ongoing enforcement of the law.²⁹⁷

The lack of effective means to conduct a thorough investigation and produce sufficient evidence to bring a prosecution has been another obstacle to enforcement.²⁹⁸ The use of outside investigators has been an obstacle to the development of institutional expertise in this area. In addition, inspectors had insufficient power to uncover all but the most blatant cases of insider trading; more sophisticated violators, using foreign nominees to shield their identity, were able to remain undetected.²⁹⁹ The new powers accorded DTI inspectors under the 1986 Act will enable them to conduct more thorough, efficient, and successful investigations.³⁰⁰ Both the government and the courts are apparently willing to support the investigators' new powers, as the Warner case in 1987 indicates.³⁰¹ In addition, the Secretary of State for Trade has indicated a willingness to use DTI civil servants rather than outside appointees as inspectors, which will help the Department develop institutional expertise in conducting investigations and eventually improve the DTI's success rate.³⁰² The recent Memoranda of Understanding completed with the United States, Japan, and Switzerland will also help DTI inspectors to uncover insider traders who use overseas corporations and agents.³⁰³

The much improved surveillance and detection capabilities of the Stock Exchange will also be of great assistance, both to the Exchange's own investigators who conduct preliminary inquiries and to DTI investigators. Investigators can now reconstruct the details of a given transaction within hours rather than days or weeks, which helps make investigations more thorough and efficient.³⁰⁴ This may enable Stock Exchange investigators to uncover more data than in the past, which will make both their investigations and those of DTI inspectors more thorough and effective.

B. *Public-Private Liaison*

While the DTI's new powers of investigation and the Stock Exchange's enhanced surveillance capabilities each augur well for future enforcement, a po-

²⁹⁷ See *supra* notes 189-91 and accompanying text.

²⁹⁸ See *supra* notes 159-83 and accompanying text.

²⁹⁹ See *supra* notes 168-71 and accompanying text.

³⁰⁰ See *supra* notes 159-83 and accompanying text.

³⁰¹ See *supra* notes 216-23 and accompanying text.

³⁰² B. RIDER I, *supra* note 6, at 302. Despite the stated willingness of the Secretary of State for Trade to appoint DTI inspectors to conduct the Department's investigations, outside inspectors are still appointed in almost every investigation. The Times (London), Nov. 16, 1987, at 29, col 2. Of the eleven official DTI investigations underway in November 1987, outside inspectors were conducting ten. *Id.*

³⁰³ See *supra* note 170.

³⁰⁴ See *supra* notes 232-37 and accompanying text.

tentially troublesome problem of liaison remains. Since 1980, the Stock Exchange has agreed to refer suspected cases of insider trading to the DTI, and indeed has referred over one hundred cases.³⁰⁵ But the nature of the liaison between the Stock Exchange, a private, self-regulatory (albeit statutorily recognized) body, and the DTI is not clear.³⁰⁶ It is not clear how the Stock Exchange decides that a given investigation either is not a potential violation of the law and should be dropped or that it is and should be referred to the DTI. Thus, Stock Exchange investigators may, given their more limited powers of investigation, be unable even to uncover enough information during their initial inquiry to determine whether there is sufficient likelihood of an insider trading violation to refer the matter to the DTI for further investigation.³⁰⁷ To the extent the DTI depends on the Stock Exchange with its limited investigatory authority, cases could remain undetected and might be lost for want of power to obtain the necessary evidence at an early stage.³⁰⁸ To ensure against this, a higher degree of cooperation may be necessary between the DTI and the Stock Exchange, perhaps modeled on the coordination between the Securities and Exchange Commission's investigators and the major U.S. exchanges.³⁰⁹ Short of this, the DTI might attempt to devise some means of monitoring the progress of Stock Exchange investigations, or of requiring the Stock Exchange to notify the DTI when the Stock Exchange initiates an inquiry, rather than after it has finished its investigation and refers the matter to the DTI. It may be possible to institute a more formal relationship without unduly increasing government regulation of or interference with the Stock Exchange.³¹⁰

C. *The Need for Effective Civil Remedies*

The lack of effective civil or private remedies in Great Britain against insider trading presents another obstacle to enforcement and deterrence. The use of civil remedies specifically intended to combat securities fraud has proven an effective deterrent and penalty in the United States.³¹¹ In Great Britain, on the

³⁰⁵ Goodison, *supra* note 66, at 23, col. 2.

³⁰⁶ See *supra* note 66 and accompanying text.

³⁰⁷ See *supra* notes 53–65 and accompanying text.

³⁰⁸ *Id.*

³⁰⁹ See *supra* notes 233–36 and accompanying text.

³¹⁰ The Rules and Regulations of the SIB require Self-Regulating Organisations (one of which is the Securities Association, which includes as a member the Stock Exchange) and Recognised Investment Exchanges (one of which is the Stock Exchange) to notify the SIB when they initiate the investigation of any member, and to notify the SIB of the findings and sanctions following an investigation. SECURITIES AND INVESTMENT BOARD, RULES AND REGULATIONS, The Financial Services (Notification by Recognised Self-Regulating Organisations) Regulations, Regulation 3.04 (1987); The Financial Services (Notification by Recognised Investment Exchanges) Regulations, Regulation 3.03 (1988).

³¹¹ B. RIDER, D. CHAIKIN AND C. ABRAMS, *supra* note 8, at ¶ 734. See also A. JOHNSON, *supra* note 43, at 155–57.

other hand, the government has opposed express civil remedies against insider trading as unworkable in practice.³¹² In addition, the common law civil remedies which do exist are not well suited and do not apply specifically to insider trading. Hence, it is uncertain whether the courts will be receptive to attempts to adapt the available common law remedies to insider trading cases.³¹³ The fact that Parliament expressly intended no civil remedies for violating the prohibitions against insider trading may act to restrain the courts from issuing compensation orders or restitution orders.³¹⁴

To improve enforcement, it may become necessary for the government to introduce express civil remedies against insider trading. Section 61 of the 1986 Act, which allows the SIB or the DTI to apply for restitution orders, is a potential remedy, but it is not specifically aimed at insider trading.³¹⁵ Section 62, which allows a civil right of action for violation of SIB or Stock Exchange rules, has encountered resistance and may not be implemented in an effective form for some time.³¹⁶ The government may find it useful to introduce some form of civil action whereby either the DTI, the SIB, or the company whose shares were traded by the insider might bring an action to recover the insider's profits. A civil remedy open specifically to individual investors with whom an insider trader has dealt in the Stock Exchange is less likely to be enacted, given the government's expressed misgivings about the ability to identify such individuals.³¹⁷ The government may find, however, that some form of civil liability aimed at insider traders could be an effective means of punishment and deterrence.

VI. CONCLUSION

The regulation of insider trading in Great Britain was for many years solely the province of the private, self-regulating bodies involved in the financial services industry. Even after the imposition of criminal penalties in 1980, it remains a mix of self-regulation and statutory oversight. The self-regulatory bodies, including the Stock Exchange, have a continuing interest in curbing this practice: the continued level of autonomy of the financial services sector is highly dependent on public confidence in its integrity and its ability to maintain fair and efficient markets. The Stock Exchange has an important role to play in the detection and investigation of insider trading, a role not established by statute but a necessary one given the reluctance of the government to play a larger regulatory role. The more sophisticated surveillance capabilities that the

³¹² See *supra* notes 159–61 and accompanying text.

³¹³ GORE-BROWNE ON COMPANIES, *supra* note 134, at § 12.21.4.

³¹⁴ *Id.* at § 12.32.

³¹⁵ See *supra* notes 267–73 and accompanying text.

³¹⁶ See *supra* notes 274–80 and accompanying text.

³¹⁷ See B. RIDER I, *supra* note 6, at 44.

Stock Exchange has recently installed should enable it to play its part more effectively in the future.

The criminal prohibitions against insider trading are designed to prevent the abuse of inside information. Prior to the Financial Services Act 1986, however, the government was not able to enforce these prohibitions effectively, and the law was in danger of coming into disrepute. The new powers given DTI investigators under the 1986 Act should lead to more effective investigation and enforcement, if the DTI is willing to commit itself to this end. It is important that the DTI also build up in-house expertise in this area, rather than rely as it has until now on part-time outside inspectors. Events occurring since the implementation of the 1986 Act indicate that the DTI is gradually building the commitment and expertise necessary for vigorous enforcement.

If the DTI is serious about enforcing insider trading violations, however, it must work to achieve a high level of coordination with the Stock Exchange, on which it relies completely to monitor trading and perform preliminary investigations. There is a danger that potential violations will be lost at this stage, violations which the DTI with its greater authority could successfully investigate. As in the United States, the Stock Exchange may be willing to draw on the powers of the statutory authorities in conducting its investigations. In addition, the use of civil remedies aimed at insider traders' profits could be a useful tool of enforcement and deterrence. While their effectiveness is subject to some criticism, the civil remedies available in the United States could provide a model for Britain.

Given the relatively recent history of government involvement in the regulation of insider trading in Britain, it appears that the record of detection and enforcement will continue to improve. To ensure this, however, the Department of Trade and Industry must make an active commitment to enforcement and improve its working relationship with the Stock Exchange. This, along with meaningful civil remedies aimed at insider trading, will make for an effective enforcement regime.

Mark A. Spitz