

# REGULATORY RITUALISM AND OTHER LESSONS FROM THE GLOBAL EXPERIENCE OF INSIDER TRADING LAW

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## INTRODUCTION

There is growing consensus for the conclusion that the insider trading enforcement regime in the United States, the oldest in the world, is in need of reform. As one commentator puts it, the U.S. regime has been criticized as “a ‘theoretical mess,’ ‘seriously flawed,’ ‘extraordinarily vague and ill-informed,’ ‘arbitrary and incomplete,’ a ‘scandal,’ and even ‘astonishingly dysfunctional.’”<sup>1</sup> Indeed this near-uniform recognition of the “shoddy state of American insider-trading law” recently led current Commissioner of the U.S. Securities and Exchange Commission (SEC), Robert J. Jackson, and former U.S. attorney for Manhattan, Preet Bharara, to announce the creation of the “Bharara Task Force on Insider Trading” to propose new reforms to the law.<sup>2</sup>

Of course, even those who agree that reform is needed often disagree about the nature of the current regime’s problems and about how to solve them. There are, however, two concerns that have gained persistent attention among jurists, scholars, and market participants. First, the current insider trading enforcement regime in the U.S. imposes stiff penalties<sup>3</sup> for a crime that has never been defined by statute or by rule.<sup>4</sup> This lack of statutory definition has led to vagueness in the law that is both inefficient and unjust. As Bharara and Jackson explain, the lack of statutory definition has resulted in “a legal haziness that leaves both investors and defendants unclear about what sorts of information-sharing or other activities by investors would be

1. Peter Henning, *What’s So Bad About Insider Trading?*, 70 *BUS. LAW.* 751, 751 (2015).

2. Preet Bharara & Robert J. Jackson, Jr., *Insider Trading Laws Haven’t Kept Up with the Crooks*, *N.Y. TIMES* (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/opinion/sec-insider-trading-united-states.html> [<https://perma.cc/BB7Z-PNBE>]. The Bharara Task Force published its findings in January 2020. See PREET BHARARA ET AL., *REPORT OF THE BHARARA TASK FORCE* (2020), <https://www.bhararataskforce.com/s/Report-of-the-Bharara-Task-Force-on-Insider-Trading.pdf> [<https://perma.cc/4CKU-URV5>].

3. See, e.g., Stephen Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 *WASH. & LEE L. REV.* 1189, 1191 (1995) (“[I]nsider trading . . . carries penalties that can only be described as draconian.”). With the passage of the Sarbanes-Oxley Act of 2002, the individual criminal penalty was raised to a fine of up to \$5 million and imprisonment up to 20 years per violation. Non-natural persons (i.e. firms) are subject to fines of up to \$25 million. 15 U.S.C. § 78ff(a) (2018). As one author points out, under “the federal guidelines, the maximum sentence for insider trading is nineteen to twenty-four years, while a rapist could get fifteen years to life in prison.” CHARLES GASPARINO, *CIRCLE OF FRIENDS* 155 (2013).

4. As Professor Stephen Bainbridge explains, “[t]he modern insider trading prohibition . . . is a creature of SEC administrative actions and judicial opinions, only loosely tied to the statutory language and its legislative history.” STEPHEN BAINBRIDGE, *INSIDER TRADING: LAW AND POLICY* 29 (2014).

considered insider trading.”<sup>5</sup> Such vagueness is *economically inefficient* because, combined with the threat of severe civil and criminal sanctions, it leads many conscientious traders to refrain from wealth-producing trades for fear that those trades are too close to the undefined line of legal permissibility.<sup>6</sup> Vagueness in the law is also *unjust* because it fails to give traders fair notice of when their trades will incur civil or criminal sanctions.

Another concern raised by critics of the current insider trading enforcement regime in the U.S. is that it is overbroad. Vagueness aside, even its core application proscribes conduct that is not obviously morally wrong or economically harmful. For example, most prosecutors and regulators would agree that an insider would be criminally liable under U.S. law for trading on her company’s material nonpublic information, even where (1) the insider submitted a written plan to the issuer that detailed the proposed trade(s); (2) the issuer authorized the plan; (3) the issuer previously made a general disclosure to the investing public that it would permit its employees to trade on its material nonpublic information through these plans when it is in the interest of the firm; and (4) the issuer disclosed *ex post facto* all trading profits resulting from the execution of these plans.<sup>7</sup> This author has, however, argued that such “issuer-licensed” insider trading is not deceptive, unfair, or economically harmful, and that the law should be reformed to permit it.<sup>8</sup> Other scholars have argued for some similar liberalization of the law for many of the same reasons.<sup>9</sup>

Even those who agree that the current U.S. regime should be reformed to address the problem of vagueness may, however, resist its liberalization.

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5. Bharara & Jackson, *supra* note 2.

6. See BHARARA ET AL., *supra* note 2, at 1 (noting that vagueness in the law “has left market participants without sufficient guidance on how to comport themselves”). It stands to reason that such uncertainty over which trades will incur civil or criminal sanctions will have a chilling effect on trading.

7. See JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 243–44 (2018) (arguing that the law should be reformed to carve out a safe harbor for such trading). Under the current law, insiders’ use of a trading plan can only be a defense against insider trading liability if the insider is not aware of material nonpublic information when the plan is formed. See also Securities Exchange Act Rule 10b5-1(c), 17 C.F.R. § 240.10b5-1(C) (2020).

8. See, e.g., John P. Anderson, *Anticipating a Sea Change for Insider Trading Law: From Trading Plan Crisis to Rational Reform*, 2015 UTAH L. REV. 339, 380–81 (2015) (arguing that the law should be reformed); ANDERSON, *supra* note 7, at 3–8 (arguing for “issuer-licensed” trading).

9. See, e.g., Thomas A. Lambert, *Decision Theory and the Case for an Optional Disclosure-Based Regime for Regulating Insider Trading*, RESEARCH HANDBOOK ON INSIDER TRADING 145–47 (Stephen M. Bainbridge ed., 2014) (arguing for liberalization of the law); HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET 138–41 (1966) (arguing that insider trading can be an effective form of compensation); Ian Ayres & Stephen Choi, *Internalizing Outsider Trading*, 101 MICH. L. REV. 313, 322 (2002) (arguing for liberalization of the law).

One concern may be that permitting issuer-licensed insider trading would be regressive and contrary to the march of history. As proof of this, one might point to the meteoric rise of insider trading regulation around the world in the latter third of the twentieth century, and the fact that most global enforcement regimes are *more* expansive in scope than the current U.S. regime.<sup>10</sup>

As the U.S. considers paths to insider trading reform at home, it is therefore wise to consider the global experience as a potential source of guidance both as to the form and substance of such reform. Indeed, it would be remiss to ignore potential lessons from global experimentation and innovation, particularly because so many insider trading regimes have been recently adopted around the world.

Any such comparative study should, however, be cautious in drawing its conclusions. Attention should be paid to the political, social, and economic motivations that might explain the recent trend toward near-universal adoption of insider trading regulations around the world. For, as recent scholarship in the area of international human rights has shown, signing a treaty or even putting a law on the books does not always reflect a nation's commitment to the stated policies behind the treaty or law, nor does it always reflect a commitment to its enforcement.<sup>11</sup> Indeed, the experience of human rights law has shown that laws are often adopted only *ritualistically*.<sup>12</sup> If, for example, countries have only adopted insider trading laws due to U.S. influence (to receive geopolitical carrots or to avoid geopolitical sticks), and they do not enforce those laws, then the recent global trend toward universal and expansive insider trading laws is less compelling as an argument against liberalization of the regime here at home.

The goal of this Article is to aid ongoing efforts at reforming our insider trading law here in the United States by considering lessons that can be learned from the global experience. This article proceeds as follows. Part I makes the case that the insider trading laws in the U.S. are in need of reform, and it concludes that any proposed reform should at least be informed by recent global trends. Part II charts the global rise of insider trading regulation in the twentieth century. Part III summarizes important features of some representative regimes around the globe. Part IV notes the trend toward universality in insider trading regulation and considers some of the moral and economic conclusions scholars and regulators have drawn from this trend.

Part V identifies the problem of regulatory ritualism. Regulatory

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10. See *infra* Parts II., III.

11. See *infra* Part V. (introducing the phenomenon of regulatory ritualism).

12. See *infra* Part V. (comparing countries' reluctant adoption of human rights agreements to their adoption of insider trading regulation).

ritualism occurs where great attention is paid to the institutionalization of a regulatory regime without commitment to or acceptance of the normative goals that those institutions are designed to achieve.<sup>13</sup> This part considers the lessons of ritualism in the field of international human rights and cautions against rushing to strong conclusions from the appearance of international consensus in the context of insider trading.

Part VI then turns to the constructive exercise of determining what can be learned from the global experience of regulating insider trading with an eye to reforming the U.S. regime. It is argued that evidence of ritualism elsewhere around the world should encourage us to focus our deliberation first on the moral and economic purposes behind insider trading regulation. It is not enough to simply fall back on the claim that everyone is doing it, so it must be right. We must be certain that insider trading enforcement makes normative sense for us, and why. Finally, recent global experimentation with insider trading regulation has yielded a number of innovations; it is suggested that, regardless of whether they were adopted only ritualistically abroad, some of these innovations could prove useful as part of genuine reform here in the United States.

#### I. THE U.S. INSIDER TRADING REGIME AND NEED FOR REFORM

Historically, insider trading enforcement regimes can be grouped roughly along the following spectrum:

- (1) *laissez-faire* or *caveat emptor* regimes, which permit all trading on material nonpublic information, so long as there is no affirmative fraud (actual misrepresentations or concealment);
- (2) *fiduciary-cum-fraud* regimes, which recognize a duty to disclose or abstain from trading, but only for those who share a recognized duty of trust and confidence (with either the counterparty to the trade or with the source of the information, or both);
- (3) *equal-access* regimes, which preclude trading by those who have acquired information advantages from sources that are closed to other market participants (regardless of whether such trading violates a duty of trust and confidence); and
- (4) *parity-of-information* regimes, which strive to prohibit all trading on information asymmetries (regardless of the source).<sup>14</sup>

The preceding regimes are listed from least to most restrictive. While the *laissez-faire* regime would permit the corporate insider to avail herself of

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13. See Hilary Charlesworth, *Swimming to Cambodia: Justice and Ritual in Human Rights After Conflict*, 29 AUSTRIAN YEAR BOOK OF INT'L L. 1, 12 (2010).

14. ANDERSON, *supra* note 7, at 118.

inside information to trade against current or prospective shareholders so long as she does not lie about or actively conceal this information, the fiduciary-cum-fraud regime would restrict such trading. And while the fiduciary-cum-fraud regime must permit trading based on material nonpublic information acquired by means not available to all market participants yet not acquired through the breach of a fiduciary duty (e.g., where a tipper does not personally benefit from the disclosure, or even where the trader acquires it by outright theft), the equal-access regime will restrict such trading. And, finally, while the equal-access regime must permit trading based on material nonpublic information that is unintentionally disclosed (e.g., due to an overheard conversation on the street, or a draft earnings release left on a bus), the parity-of-information regime would preclude even this trading.

Prior to 1961, most scholars agree that the U.S. functioned under a *laissez-faire* regime.<sup>15</sup> In that year, the SEC brought its first insider trading enforcement action, *In the Matter of Cady, Roberts & Co.*<sup>16</sup> This action was brought pursuant to Section 10(b) of the Securities Exchange Act of 1934, which itself makes no mention of insider trading. Section 10(b) prohibits the employment of “any manipulative or deceptive device or contrivance” in “connection with the purchase or sale, of any security.”<sup>17</sup> In the two decades following *Cady, Roberts*, U.S. insider trading enforcement actions under Section 10(b) reflected a broad equal-access or even parity-of-information regime.<sup>18</sup> The SEC pushed a theory of enforcement whereby effectively any trading based on material nonpublic information violated the law, and the federal courts affirmed it.<sup>19</sup> Everything changed, however, when the Supreme Court first addressed the problem of insider trading in the 1980 case of *Chiarella v. United States*.<sup>20</sup>

Though Section 10(b) was designed by Congress as a catchall provision, the *Chiarella* Court held that “what it catches must be fraud.”<sup>21</sup> Insider trading is not an obvious fit for this general fraud statute because insiders typically gain their trading advantage by *withholding* their truthful and accurate material nonpublic information while trading over anonymous

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15. See ANDERSON, *supra* note 7, at 118 (arguing that the U.S. functioned effectively under a *laissez-faire* regime).

16. *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

17. 15 U.S.C. § 78j(b) (2012).

18. See, e.g., *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (demonstrating a broad equal-access regime).

19. In 1968, the Second Circuit adopted the SEC’s preferred equal access model for insider trading liability. See *id.* at 848 (noting that section 10(b) is based “on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information”).

20. *Chiarella v. United States*, 445 U.S. 222 (1980).

21. *Id.* at 234-35.

exchanges—not by making misrepresentations.<sup>22</sup> The common law only regards such silence with respect to an information asymmetry to be fraudulent where there is an independent duty to disclose.<sup>23</sup> The Supreme Court has recognized such a duty to disclose in the context of insider trading under two theories: the “classical theory” (*Chiarella*, 1980) and the “misappropriation theory” (*United States v. O’Hagan*, 1997).<sup>24</sup>

Under the classical theory, insider trading liability arises where the issuer, its employee, or someone otherwise affiliated with the issuer seeks to benefit from trading (or tipping others who trade) that firm’s shares based on material nonpublic information.<sup>25</sup> In such cases, the insider (or constructive insider) violates a fiduciary or similar duty of trust and confidence by failing to disclose her information advantage to the firm’s shareholder (or prospective shareholder) on the other side of the trade.<sup>26</sup>

Under the misappropriation theory, insider trading liability arises where one misappropriates material nonpublic information and then trades on it without first disclosing the intent to trade to the source of the information.<sup>27</sup> The “misappropriation theory premises liability on a fiduciary-turned-trader’s deception of those who entrusted him with access to confidential information” by cheating them out of “the exclusive use of that information.”<sup>28</sup>

Thus, the Supreme Court’s recognition of the duty to disclose under, first, the classical theory and, second, the misappropriation theory completed the United States’ historical transition, by common-law development, from (1) a laissez-faire regime to (2) an equal-access or parity-of-information model to (3) a fiduciary-cum-fraud insider trading enforcement regime. So, by this circuitous route, the “judicial oak” of the first and most aggressively enforced insider trading regime in the world sprung from the “legislative acorn”<sup>29</sup> of Section 10(b)’s general anti-fraud provisions and their

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22. See, e.g., Restatement (Second) of Torts § 551 (1977) (explaining that nondisclosure or withholding information only incurs liability under special circumstances in which one has a duty to disclose).

23. *Chiarella*, 455 U.S. at 230 (noting that silence as fraud “is premised upon a duty to disclose”).

24. See *United States v. O’Hagan*, 521 U.S. 642, 651–53 (1997) (explaining the misappropriation theory); *Chiarella*, 445 U.S. at 225–30 (highlighting the classical theory of insider trading).

25. *O’Hagan*, 521 U.S. at 651–52.

26. See *Chiarella*, 445 U.S. at 228 (demonstrating a failure to disclose information).

27. *O’Hagan*, 521 U.S. at 652.

28. *Id.*

29. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (Then Justice Rehnquist referred to the current state of private actions under SEC Rule 10b-5 as “a judicial oak which has grown from little more than a legislative acorn.” He went on to explain that such

implementation through SEC Rule 10b-5.<sup>30</sup>

There is, however, something quite concerning about the common-law development of the crime of insider trading in the United States. Western liberal jurisprudence warns against common-law crimes in general as violating the principle of legality, which provides that “there must be no crime or punishment except in accordance with fixed, reasonably specific, and fairly ascertainable preestablished law.”<sup>31</sup> This principle gives expression to our shared moral intuition that it is unjust to punish persons (by depriving them of their lives, freedom, or property) without having first offered clear advance notice that their conduct would be criminal. It is also reflected in the due process clause of the U.S. Constitution.<sup>32</sup> The Supreme Court has held that a criminal “conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>33</sup>

Yet, as the history of the law’s development demonstrates, absent a statutory definition, insider trading law has been far from fixed, reasonably specific, and fairly ascertainable. Each time a creative prosecutor or regulator advances a new, more expansive theory of insider trading liability before the courts, an unsuspecting trader may be surprised to find herself behind bars for conduct she thought was perfectly legal. And when creative theories of liability are rejected by the courts at the close of costly litigation, this offers little consolation for others who have already settled or served their time under the discredited theory. Recall that the SEC and prosecutors saw fit to prosecute insider trading cases under the broader equal-access and parity-of-information theories of liability for two decades before the Supreme Court rejected those theories as *ultra vires*, recognizing instead the narrower fiduciary-cum-fraud model outlined above. In addition, despite the fact that the Supreme Court’s decision in *Chiarella v. United States* rendered the legal status of the misappropriation theory of insider trading liability dubious,<sup>34</sup> regulators continued to bring actions and prosecute individuals

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growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, . . . but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b-5.

This claim can be made with equal accuracy about the common-law development of insider trading jurisprudence pursuant to Section 10(b) and its implementation through Rule 10b-5.)

30. 17 C.F.R. § 240.10b-5 (2020).

31. DAVID A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* 195 (1977).

32. U.S. CONST. amends. V, XIV.

33. *United States v. Williams*, 553 U.S. 285, 286 (2008).

34. Indeed, even the SEC admits Justice Powell fought to grant certiorari in *Carpenter v. United States*, 484 U.S. 19 (1987), just to lead the Court in declaring the misappropriation

under it for the next seventeen years before the Supreme Court finally recognized it over dissenting opinions in *United States v. O'Hagan*.<sup>35</sup> The SEC has since continued to press for still broader insider trading enforcement authority through its rule making and enforcement actions.<sup>36</sup>

For the foregoing reasons, fealty to the ethics of legal certainty and fair notice presses for an end to the “jurisprudential scandal that insider trading is largely a federal common-law offense.”<sup>37</sup> The most obvious path forward would be for Congress to take action and promulgate a new insider trading statute. And, indeed, a number of such bills have been recently introduced.<sup>38</sup> When considering the merits of these bills, however, it is important to note that merely codifying the two Supreme Court-sanctioned theories of insider trading liability would not solve the problems of uncertainty and absence of notice. This is due to the fact that while both the classical and misappropriation theories impose liability on those who seek to “benefit” from trading “on the basis of” “material” “nonpublic” information in violation of a “fiduciary or other similar relation of trust and confidence,” neither scholars nor regulators nor the courts have been able to agree on a clear definition of any one of these crucial terms.<sup>39</sup> Justice therefore requires that any future codification of the law of insider trading include clearly defined elements that reflect the goals to be furthered by the law and the moral wrongs it looks to punish.

In addition to the notice and due process concerns raised by vagueness

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theory invalid. See *Fair To All People: The SEC and the Regulation of Insider Trading, Counterattack From the Supreme Court*, SEC. & EXCHANGE COMMISSION HIST. SOC'Y, [http://sechistorical.org/museum/galleries/it/counterAttack\\_d.php#ftn42](http://sechistorical.org/museum/galleries/it/counterAttack_d.php#ftn42) [<https://perma.cc/M7L-TLYL>] (last visited Oct. 9, 2021) (analyzing *Carpenter v. United States*). Powell, however, retired from the Court just before the case was heard and the Court split four to four on the legality of the misappropriation theory.

35. *O'Hagan*, 521 U.S. at 652–53. Justices Scalia, Thomas, and Chief Justice Rehnquist all dissented from the majority holding that Section 10(b) of the Exchange Act supports the misappropriation theory of insider trading liability. See *id.* at 679–701, dissenting opinions (arguing that Section 10(b) does not support the misappropriation theory).

36. Enforcement actions against increasingly more remote tippees accompanied by expansive interpretations of the material benefit test for insider trading liability offer perhaps the most recent example of the SEC's attempts at increasing its regulatory authority through creative enforcement actions. See, e.g., *United States v. Newman*, 773 F.3d 438, 448 (2d Cir. 2014) (The Second Circuit rejected the SEC's theory of material benefit and noted that “the Government has not cited, nor have we found, a single case in which tippees as remote as [the defendants] . . . have been held criminally liable for insider trading.”).

37. Jeanne Schroeder, *Taking Stock: Insider and Outsider Trading by Congress*, 5 WM. & MARY BUS. L. REV. 159, 163 (2014).

38. See, e.g., The Insider Trading Prohibition Act, H.R. 2534, 116<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2019) (demonstrating a new insider trading statute). See also ANDERSON, *supra* note 7, at 236–241 (summarizing a number of recently proposed insider trading reform bills).

39. See, e.g., ANDERSON, *supra* note 7, at 59–87 (arguing no clear definitions of critical terms exist).

in the law, there is also the problem that this same vagueness makes it difficult for issuers and other impacted firms to adopt and implement effective insider trading compliance programs.<sup>40</sup> The result has been that these firms tend to adopt “play-it-safe” insider trading compliance programs that err on the side of precluding some trades (that might otherwise be permitted under clearer guidance) in order to remain above suspicion from regulators.<sup>41</sup> But such overbroad compliance programs can come at a heavy price to issuers in terms of corporate culture,<sup>42</sup> cost of compensation,<sup>43</sup> share liquidity,<sup>44</sup> and cost of capital.<sup>45</sup> I have referred to this conundrum as the “paradox of insider trading compliance” whereby “ambiguity in the law combined with the threat of stiff reputational and legal sanctions creates a perverse incentive to adopt compliance programs that are highly inefficient and ultimately costly to shareholders.”<sup>46</sup> This paradox exposes the irony and irrationality of an insider trading regime that, though purporting to increase value for shareholders, may be yielding the opposite of its intended effects due to the vagueness in its articulation.<sup>47</sup>

To this point it has been suggested that the problem of uncertainty in the law renders the current insider trading enforcement regime in the U.S. unjust, irrational, and in need of reform regardless of one’s position concerning the morality or economics of insider trading. But, of course, there is a great deal of scholarly debate over the question of whether insider trading is immoral or inefficient.

Most regulators, legislators, and prosecutors take it for granted that insider trading is “unfair” and undermines the integrity of securities markets.<sup>48</sup> For example, this author has argued that one form of insider

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40. See John P. Anderson, *Solving the Paradox of Insider Trading Compliance for Issuers*, 88 TEMP. L. REV. 273, 287 (2016) (noting vagueness in the law).

41. See *id.* at 295 (discussing “play-it-safe” insider trading compliance programs).

42. See *id.* at 292 (noting that vagueness in the law forces compliance officers to treat employee claims that they are not trading on material nonpublic information with skepticism—and this can lead to ill will among the employees).

43. See *id.* (noting that if equity issued to corporate insiders as compensation is rendered less liquid to employees due to highly restrictive insider trading compliance programs, then issuers will have to offer more shares as compensation to achieve the same remunerative effect).

44. See *id.* at 293 (noting that, with one study showing that insiders own an average of twenty-four to thirty-two percent of a given firm’s equity, heavy restrictions on their trading can be expected to reduce the liquidity of that firm’s shares).

45. See *id.* (citing Yakov Amihud & Haim Mendelson, *Asset Pricing and the Bid-Ask Spread*, 17 J. FIN. ECON. 223, 249 (1986) for the conclusion that a decrease in share liquidity can lead to an increase in that firm’s cost of capital).

46. *Id.* at 296.

47. See *id.* (discussing vagueness of insider trading regimes).

48. See, e.g., BHARARA ET AL., *supra* note 2, at 3 (explaining that:

trading currently proscribed in the United States is morally permissible, namely where the issuer approves the trade in advance and has disclosed that it permits such trading pursuant to published guidelines.<sup>49</sup> And the net economic impact of all forms of insider trading has been hotly contested since Professor Henry Manne published his seminal book on the subject in 1966.<sup>50</sup> Some remain convinced that, under the right conditions, insider trading can improve market efficiency by increasing price accuracy,<sup>51</sup> speeding information to markets<sup>52</sup> and management,<sup>53</sup> decreasing volatility,<sup>54</sup> and providing an efficient means of compensation to an issuer's employees.<sup>55</sup> If these scholars and economists are correct, then any reform project to codify the law of insider trading must take into account the possibility that even the "heartland" of the current theories of insider trading liability in the

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[T]he rationale for prohibiting insider trading is straightforward—protecting the fairness and integrity of our securities markets and holding wrongdoers accountable. Most agree that there is something fundamentally unfair about insiders with special access to secret corporate information making a profit from trading on such information at the expense of the rest of the market.

49. See, e.g., John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 27–53 (2014) (arguing that issuer-approved insider trading is morally permissible); Anderson, *supra* note 8, at 379–88; John P. Anderson, *What's the Harm in Issuer-Licensed Insider Trading*, 69 U. MIA. L. REV. 795, 797–802 (2015); Anderson, *supra* note 40, at 300–304; John P. Anderson, *The Final Step to Insider Trading Reform: Answering the "It's Just Not Right" Objection*, 12 J.L. ECON. & POL'Y 279, 293–95 (2016).

50. MANNE, *supra* note 9, at 77–158.

51. See, e.g., Dennis Carlton & Daniel Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, 868 (1983) ("If insiders trade, the share price will move closer to what it would have been had the information been disclosed.").

52. See *id.* Insider trading allows a company's insider's assessments of endogenous information to be reflected in its market price on a daily basis without the costs and delays associated with public filings and releases.

53. See Henry G. Manne, *Insider Trading: Hayek, Virtual Markets, and the Dog that Did Not Bark*, 31 J. CORP. L. 167, 174–83 (2005). Manne argued that insiders often trade on nonpublic information concerning their company problems (fraud or other issues) that have not yet been brought to the attention of management. Any corresponding change in the stock price may raise a "red flag" to management and allow them to address the problem before it worsens.

54. See, e.g., STEPHEN BAINBRIDGE, *ENCYCLOPEDIA OF LAW AND ECONOMICS* 777–78 (Boudewijn Boukaert & Gerrit De Gees eds., 2000) ("Accurate pricing benefits society by improving the economy's allocation of capital investment and by decreasing the volatility of security prices. This dampening of price fluctuations decreases the likelihood of individual windfall gains and increases the attractiveness of investing in securities for risk-averse investors.").

55. See, e.g., Henry G. Manne, *Entrepreneurship, Compensation, and the Corporation*, 14 Q.J. AUSTRIAN ECON. 3, 17–18 (2011). As Manne explains, if a "service performed is or can be one which gives access to valuable information [that can be monetized], less of other forms of compensation must be paid in order to secure the same amount of the service." Henry G. Manne, *Insider Trading and the Law Professors*, 23 VAND. L. REV. 547, 579 (1970).

United States is overbroad.

In light of the preceding, if we assume agreement over the proposition that the U.S. insider trading enforcement regime must be reformed, then the most responsible approach to such reform would be to step back and consider the overarching moral and economic purposes of the new regime, along with how best to structure it. Most of that work will be done by searching our own moral, cultural, and market experiences in the United States. But it would be myopic and remiss to consider only our own experience. Surely something can also be learned from the experiences of other countries. For example, an expected response to calls for the legalization of insider trading in the U.S. is that such liberalization would be inconsistent with recent global trends.<sup>56</sup> Recent decades have witnessed rapid global expansion of insider trading regulation.<sup>57</sup> Some would argue that this emerging global consensus is proof of the moral and economic necessity of broad and rigorous insider trading enforcement. Moreover, these recently implemented regimes are varied. Certainly, much can be learned from a comparative study of the shapes these various insider trading enforcement regimes have taken, their scope, and the language they adopt in defining their elements.

## II. THE GLOBAL RISE OF INSIDER TRADING REGULATION

Most of the world adopted the laissez-faire approach to insider trading regulation until the 1980s. As one journalist put it in the mid-1980s, “[t]he rest of the world doesn’t share American revulsion to insider trading, nor do other countries give their regulators strong powers or resources to ferret out” violations.<sup>58</sup> Recall that around this time, the SEC’s push for expanded insider trading enforcement power in the U.S. first met resistance from the Supreme Court in *Chiarella* and *Dirks*. While the SEC had assumed enforcement power under an equal-access or even a parity-of-information regime, the Supreme Court insisted that the statutory authority for insider

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56. See *infra* Part II. See also Thomas C. Newkirk, Associate Director, Division of Enforcement & Melissa A. Robertson, Senior Couns., Division of Enforcement, Speech by SEC Staff – Insider Trading – A US Perspective at the 16th International Symposium on Economic Crime, Jesus College, Cambridge, England (Sept. 19, 1998) (transcript available at <http://www.sec.gov/news/speech/speecharchive/1998/spch221.htm>) [<https://perma.cc/DT2P-54W2>] (lauding the European Economic Community’s formal recognition of the “importance of insider trading prohibitions by passing a directive requiring its members to adopt insider trading legislation”).

57. See *infra* Part II. (discussing the proliferation of insider trading legislation and regulation around the world).

58. Gary Putka, *Insider Trading Raises Fewer Hackles Abroad*, WALL ST. J., Dec. 2, 1986, at 36, col. 1.

trading regulation extended only to a fiduciary-cum-fraud regime.<sup>59</sup> In the wake of these setbacks, the SEC began to explore new strategies for expanding their insider trading enforcement power, whether by rule change or by seeking expanded statutory authority from Congress. Perhaps as a coordinated aspect of this effort, the SEC also began using its considerable international clout to “prod” other countries to adopt new laws as part of a “global crusade against insider trading.”<sup>60</sup> As one commentator explained around this time:

[T]he SEC’s continued ability to assert the primacy of its views on market regulation, and to defend and expand upon the successes of those views in the U.S. courts, would be furthered by foreign countries adopting the American model of insider trading prohibition. The SEC has brought considerable pressure to bear on foreign countries and their citizens in an attempt to achieve that result. . . . Although these attempts have generated criticism, the SEC’s ability to use its enforcement power to impose costs on foreign actors has generated more success in harmonizing regulatory approaches with respect to insider trading than in any other field.<sup>61</sup>

Whatever the motivation, the SEC’s international crusade against insider trading appears to have been wildly successful. Since the early 1980s, there has been an explosion in adoptions of diverse insider trading regimes around the globe.

The European markets crashed alongside the U.S. markets in 1929, but no European countries thought to respond with insider trading regulation. It simply was not on their radar. France was the first European country to address insider trading. In 1967, it adopted an ordinance (1967 Ordinance) requiring that insiders disclose any trading in their company’s shares to the French Commission de Operations de Bourse (COB) within six days; this ordinance did not, however, prohibit insider trading itself.<sup>62</sup> Indeed, up to

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59. See *Chiarella*, 445 U.S. at 231–35 (noting the statutory authority for insider trading regulation is a fiduciary-cum-fraud regime); see also *Dirks v. SEC*, 463 U.S. 646, 660–68 (1983) (noting the fiduciary-cum-fraud regime).

60. See Joan MacLeod Heminway, *Disparate Notions of Fairness: Comparative Insider Trading Regulation in an Evolving Global Landscape*, in *INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS* 119 (Stanford R. Silverburg ed., 2011) (“[T]he SEC has executed [a] global crusade against insider trading.”); Amir Licht, *The Mother of All Path Dependencies Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 *DEL. J. CORP. L.* 147, 198 (2001) (describing the adoption of insider trading laws in the European Union as largely a product of U.S. “prodding”).

61. Paul G. Mahoney, *Securities Regulation by Enforcement: An International Perspective*, 7 *YALE J. ON REG.* 305, 314–15 (1990).

62. Robert B. Irving, *French Insider Trading Law: A Survey*, 22 *U. MIAMI INTER-AM. L. REV.* 41, 47–48 (1990); Ordonnance 67-833 du 28 septembre 1967 instituant une commission

this point, insider trading was “virtually an accepted practice” in France.<sup>63</sup> Only after the COB admitted that it was incapable of investigating those who ignored the reporting obligations under the 1967 Ordinance did the French parliament finally promulgate a statute making insider trading a crime in 1970 (1970 Statute).<sup>64</sup> The 1970 Statute instituted a limited equal-access enforcement regime whereby anyone who acquired material nonpublic information through their “professional functions” was forbidden from trading on that information prior to disclosure to the general public.<sup>65</sup> The 1970 Statute was, however, limited in its scope because it failed to reach tippees and tippees.<sup>66</sup> As one commentator notes, “[t]he 1970 Statute’s approach to the tipper-tippee problem reflected a deeply rooted tradition in France’s business community: insiders were expected to give friends and relatives tips. . . .”<sup>67</sup> Subsequent amendments in 1983, 1988, and 1989 did strengthen French insider trading laws leading up to France’s ultimate implementation of the current European Community regime summarized below.<sup>68</sup> Very few enforcement actions were, however, brought under the early French insider trading regime,<sup>69</sup> and courts hesitated to impose prison terms (or even significant fines) on those who were convicted.<sup>70</sup> Indeed, as late as 1989, an article in *Le Figaro* reported that while the SEC strikes fear in the hearts of traders on Wall Street, the French securities regulators do not

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des opérations débourse et relative à l’information des porteurs de valeurs mobilières et à la publicité de certaines opérations de bourse [Ordonnance 67-833 of September 28, 1967 Establishing a Commission on Stock Exchange Operations and Relating to the Information of Holders of Securities and the Publication of Certain Stock Market Transactions], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 29, 1967, p. 9589.

63. Irving, *supra* note 62, at 72.

64. Irving, *supra* note 62, at 48; Loi 70-1208 du 23 décembre 1970 portant modification de la loi n° 66-537 de 24 juillet 1966 sur les sociétés commerciales et de l’ordonnance n° 67-833 du 28 septembre 1967 instituant une commission des opérations débourse et relative à l’information des porteurs de valeurs mobilières et à la publicité de certaines opérations de bourse [Law 70-1208 of December 23, 1970 Amending Law 66-537 of July 24, 1966 on Commercial Companies and Ordinance 67-833 of September 28, 1967 Establishing a Commission on Stock Exchange Operations and Relating to the Information of Holders of Securities and the Publication of Certain Stock Market Transactions], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 24, 1970, p. 11891.

65. See Irving, *supra* note 62, at 51 (noting the limited equal-access enforcement regime).

66. See Irving, *supra* note 62, at 64 (noting the limitations of the 1970 Statute).

67. Irving, *supra* note 62, at 64.

68. See Irving, *supra* note 62, at 66–71 (noting amendments that strengthened French insider trading laws).

69. See Irving, *supra* note 62, at 43 (noting that very few enforcement actions were brought under the early French insider trading regime).

70. See Irving, *supra* note 62, at 65 (“Although the 1970 Statute permitted courts to impose stiff penalties, the French courts failed to send any guilty [insiders] to jail. Indeed, [insiders] suffered only negligible fines.”).

seriously scare anyone in Paris.<sup>71</sup>

There was no criminal prohibition of insider trading in the United Kingdom until 1980 when, due in part to U.S. pressure, Parliament promulgated the Companies Act.<sup>72</sup> Prior to that time, English common law refused to recognize a fiduciary or other duty requiring executives to disclose information advantages to counterparties while trading in their company's shares.<sup>73</sup> Few countries on the European continent, however, followed France and England's lead. As of 1986, only three of the twelve European Union members regulated insider trading.<sup>74</sup>

Things began to change, however, in 1989 when, also due in part to U.S. influence, the European Council promulgated the Directive Coordinating Regulations of Insider Dealing (1989 Directive), which mandated that member states regulate insider trading.<sup>75</sup> Since the 1989 Directive's adoption, every one of the European Community's member states have complied with the mandate and implemented conforming insider trading laws.<sup>76</sup>

When Switzerland's stringent bank secrecy laws (combined with the "dual criminality" agreement between the two countries) began to interfere with the SEC's insider trading enforcement program, the U.S. mounted "an aggressive, and ultimately successful, campaign to persuade the Swiss government to bring its insider trading legislation into line with U.S. law as interpreted by the SEC."<sup>77</sup> The Swiss adopted an insider trading law in 1988 that paralleled the U.S. model and removed the principal obstacles to U.S. cross-border enforcement in that country.<sup>78</sup> As one

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71. Irving, *supra* note 62, at 70 (citing LE FIGARO/L'ACTUALITE, Jan. 10, 1989, at I, col. 1).

72. Companies Act 1980, c.22, §§ 68-73.

73. See, e.g., *Percival v. Wright* (1902) 2 Ch. D. 421. This is probably still true as a matter of civil law in the U.K. See also Kern Alexander, *UK Insider Dealing and Market Abuse Law: Strengthening Regulatory Law to Combat Market Misconduct*, in RESEARCH HANDBOOK ON INSIDER TRADING 407, 410 (Stephen Bainbridge ed., 2013) (noting lack of fiduciary duty in English common law).

74. Viveca Hostetter, *Turning Insider Trading Inside Out in the European Union*, 30 CAL. W. INT'L. L.J. 175, 186 (1999) (noting that as of 1986, only the United Kingdom, Denmark, and France regulated insider trading).

75. See Council Directive 89/592/EEC, 1989 O.J. (L 334) 30 (mandating that member states regulate insider trading). See also Katja Langenbacher, *Insider Trading in European Law*, in RESEARCH HANDBOOK ON INSIDER TRADING 429 (Stephen Bainbridge ed., 2013); Heminway, *supra* note 60, at 119 ("The United States, acting through the SEC, was an impetus behind . . . the EC Directive.")

76. See Newkirk and Robertson, *supra* note 56 (noting compliance with the mandate across the European Union).

77. Mahoney, *supra* note 61, at 317.

78. Mahoney, *supra* note 61, at 318. Swiss insider trading laws were overhauled in 2013 and are currently codified at Article 142 (civil enforcement) and Article 154 (criminal

commentator notes, that “the SEC [was] the principal beneficiary of [the 1988 Swiss insider trading law] cannot be seriously disputed.”<sup>79</sup> Indeed, the Swiss insider trading law has since been referred to as “lex Americana” in Swiss legal circles.<sup>80</sup>

The story is similar elsewhere around the globe. In the East, Japanese traders were permitted, and “sometimes even encouraged,” to trade on inside information until 1988,<sup>81</sup> when that country adopted an insider trading law, due in large part to U.S. pressure.<sup>82</sup> Japan presented a peculiar problem for the SEC in its campaign against insider trading. Despite the fact that prior to 1988, as one foreign investor noted, Japanese traders had “never even heard the words [‘insider trading’],”<sup>83</sup> Japan’s capital markets were continuing to rapidly attract new investors from around the world, so much so that, by 1988, the Tokyo Stock Exchange had surpassed the New York Stock Exchange as the largest in the world.<sup>84</sup> But if rampant insider trading destroys market confidence, as the SEC had repeatedly argued to domestic investors, domestic courts, and foreign governments, “then Tokyo investors should [have been] a demoralized lot”; clearly, however, they were not demoralized.<sup>85</sup> These circumstances forced the SEC into the awkward position of explaining “the level of enthusiasm evident in the Tokyo market’s rise without assuming either that these investors cannot rationally evaluate the losses they suffer as a consequence of insider trading or that they do not perceive such losses to be significant.”<sup>86</sup> Regardless of the SEC’s

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enforcement) of the Financial Market Infrastructure Act (criminal enforcement). English translation available at <https://www.fedlex.admin.ch/eli/cc/2015/853/en> [<https://perma.cc/3FES-ZH3L>]. AS 5339 art. 142, 154 (2015).

79. Mahoney, *supra* note 61, at 318.

80. Mahoney, *supra* note 61, at 317–18 (noting also that the Swiss law represents “a triumph of SEC pressure through persuasion and enforcement”).

81. Tomoko Akashi, *Regulation of Insider Trading in Japan*, 89 COLUM. L. REV. 1296, 1296 (1989).

82. See Kin’yū shōhin torihiki-hō [Financial Instruments and Exchange Act] [FIEA], Act No. 25 of 1948, arts. 166, 167, translated in <https://www.fsa.go.jp/common/law/fie01.pdf> [<https://perma.cc/R46M-RX38>] (Japanese insider trading law as amended in 1988); see also J. Mark Ramseyer, *Insider Trading Regulation in Japan*, in RESEARCH HANDBOOK ON INSIDER TRADING 347 (Stephen Bainbridge ed., 2013) (explaining the origin of Japan’s 1948 insider trading laws and the rationale for the 1988 amendments); Heminway, *supra* note 60, at 118 (Japanese “insider trading regulation was implemented in 1988 in response to pressure from the United States and other developed states.”).

83. David E. Sanger, *Insider Trading, the Japanese Way*, N.Y. TIMES, Aug. 10, 1988, at D1.

84. See, e.g., Winifred Swan, *The 1988 Japanese Insider Trading Amendments: Will Japan See Results from these Tougher Laws?*, 12 U. PA. J. INT’L BUS. L. 275, 275 (1991) (noting that the Tokyo Stock Exchange was the “world’s largest stock market” as of 1989).

85. Mahoney, *supra* note 61, at 308.

86. Mahoney, *supra* note 61, at 308.

motivation, in 1988, the *New York Times* reported that, “[w]ith the link between trading between trading in New York and Tokyo growing closer every day, the [SEC] has been pressing for uniform regulation of insider activity in both markets.”<sup>87</sup> Then Chairman of the SEC, David Ruder, even traveled to Japan while the new insider trading laws were being drafted and “pronounced the result satisfactory.”<sup>88</sup>

Hong Kong first made insider trading illegal in 1991.<sup>89</sup> India created its Securities and Exchange Board to regulate insider trading in 1992.<sup>90</sup> China had no regulations pertaining to insider trading until 1993 and did not have a complete enforcement regime in place until 1998,<sup>91</sup> after having “accepted an offer from the U.S. Securities Exchange Commission to provide technical advice.”<sup>92</sup> Russia did not enact its first insider trading law until 2010.<sup>93</sup>

With limited exceptions,<sup>94</sup> insider trading regulations came late to the

87. Sanger, *supra* note 83.

88. Mahoney, *supra* note 61, at 319.

89. See James H. Thompson, *A Global Comparison of Insider Trading Regulations*, INT’L J. ACCT. AND FIN. REPORTING, 2013, at 1, 7, <http://www.macrothink.org/journal/index.php/ijaf/article/viewFile/3269/2976> [<https://perma.cc/HU5Z-D7GP>] (discussing the 1991 amendment to Hong Kong’s Security and Futures Commission Ordinance).

90. Umakanth Varottil, *The Long and Short of Insider Trading Regulation in India*, 13 Q. BRIEFING, NSE CTR. FOR EXCELLENCE IN CORP. GOVERNANCE, Apr. 2016, at 1, [https://www1.nseindia.com/research/content/res\\_QB13.pdf](https://www1.nseindia.com/research/content/res_QB13.pdf) [<https://perma.cc/6EVM-GS89>].

91. See *id.* at 5 (“China first made insider trading illegal in 1993 with the introduction of the Establishment of Securities Companies with Foreign Equity Participation Rules.”). See also Hui Huang, *The Regulation of Insider Trading in China: Law and Enforcement*, in RESEARCH HANDBOOK ON INSIDER TRADING 304 n.10 (Stephen Bainbridge ed., 2013) (noting that China codified the key provisions of its current insider trading regulations in the Securities Law of the People’s Republic of China in 1998).

92. Minkang Gu & Robert C. Art, *Securitization of State Ownership: Chinese Securities Law*, 18 MICH. J. INT’L L. 115, 117 (1997); see also Liu Duan, *Comment: The Ongoing Battle Against Insider Trading: A Comparison of Chinese and U.S. Law and Comments on How China Should Improve Its Insider Trading Law Enforcement Regime*, 12 DUQUESNE BUS. L.J. 129, 143 (2009) (noting that the “general framework of China’s insider trading laws, established with the assistance of the U.S. SEC, largely mirrors U.S. law . . .”).

93. See O protivodejstvii nepravomernomu ispol’zovaniju insajderskoj informacii i manipulirovaniju rynkom i o vnesenii izmenenij v otdel’nye zakonodatel’nye akty Rossijskoj Federacii [On Prevention of Illegitimate Use of Inside Information and Market Manipulation and on Amendments to Certain Laws of the Russian Federation], 2010, Federal Law No. 224-FZ (Russia’s first insider trading law) [hereinafter Federal Law No. 224-FZ].

94. Brazil is one notable exception. Brazil adopted its first civil restrictions on the practice of insider trading with the promulgation of the Corporation Act in 1976. See James H. Thompson, *supra* note 89, at 1, 9, <http://www.macrothink.org/journal/index.php/ijaf/article/viewFile/3269/2976> [<https://perma.cc/HU5Z-D7GP>] (“In 1976, Brazil implemented the Corporation Act that created the Brazil Securities Commission (CVM) to regulate the stock market exchange, ensure fair trading practice, and protect investors from market manipulation.”). Brazil did not, however, make insider trading illegal until the adoption of the

global south as well. South Africa adopted insider trading regulations in 1989.<sup>95</sup> Columbia and Costa Rica made insider trading illegal in 1990.<sup>96</sup> Other Latin American countries such as Argentina, Chile and Peru adopted insider trading regulations in 1991.<sup>97</sup> Ultimately, seventy-seven of the eighty-seven countries that had insider trading laws on the books by the year 2000 adopted them after 1980.<sup>98</sup> The average year of adoption of insider trading laws for developed countries was 1990, and the average year of adoption for undeveloped countries was 1991.<sup>99</sup> By the close of the twentieth century, of the 103 countries that had established stock exchanges, only sixteen had yet to adopt insider trading regulations.<sup>100</sup>

### III. SOME REPRESENTATIVE REGIMES

Countries have not been uniform in their approach to regulating insider trading. This section summarizes some representative insider-trading regimes around the globe.

#### *Japan*

As an occupying power from 1945 to 1952, the United States had direct and significant influence over Japan's adoption of its Securities and Exchange Act in 1948 (1948 Act).<sup>101</sup> Consequently, the 1948 Act did not develop organically from Japanese cultural values and market experiences,<sup>102</sup>

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Anonymous Societies Law in 2001. See Otavio Ribeiro de Medeiros, *Insider Trading in the Brazilian Stock Market* (August 18, 2009), at 4, <https://ssrn.com/abstract=1457444> [<https://pepma.cc/AH2Y-SVGM>] (“With the new Anonymous Societies Law – Law 10303 of 2001, the use of privileged information began to be considered a crime liable to punishment.”). But despite these early beginnings, Brazil did not win its first insider trading criminal conviction until 2010. See Thompson, *supra* note 89, at 9 (“[Brazil] did not make its first criminal conviction relating to insider trading until 2010.”).

95. Laura Nyantung Beny, *The Political Economy of Insider Trading Laws and Enforcement: Law vs. Politics? International Evidence*, in RESEARCH HANDBOOK ON INSIDER TRADING 289 tbl.15.3 (Stephen Bainbridge ed., 2013). Beny's data is drawn from an empirical study by Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading*, 57 J. FIN. 75 (2002).

96. Beny, *supra* note 95, at 287 tbl.15.3.

97. Beny, *supra* note 95, at 287–88 tbl.15.3.

98. Beny, *supra* note 95, at 287–89 tbl.15.3.

99. Beny, *supra* note 95, at 287–89 tbl.15.3.

100. Beny, *supra* note 95, at 287–89 tbl.15.3. This number of countries failing to regulate insider trading has since grown smaller, though no comprehensive study provides an updated number.

101. See, e.g., Swan, *supra* note 84, at 276 (noting that the 1948 Act was “imposed by the Allied Forces”).

102. Swan, *supra* note 84, at 276 (noting there was “no internal pressure for such

but was instead modeled after U.S. law, combining provisions from the U.S. Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>103</sup> Like its statutory counterparts in the U.S., the only provision of the 1948 Act that expressly addressed insider trading was Article 189, its parallel to the short-selling trading provision in Section 16(b) of the U.S. Exchange Act.<sup>104</sup> A crucial aspect of this provision (its reporting requirement in Article 188, the Japanese equivalent of Section 16(a)) was, however, repealed by the Japanese Diet in 1953,<sup>105</sup> and Article 189 was virtually abandoned thereafter.<sup>106</sup> The 1948 Act also included a Section 10(b) equivalent, the general anti-fraud provision in Article 58,<sup>107</sup> but Japan never used this provision to address insider trading “on the theory that Article 58 could not be strictly construed to cover insider trading, and because the concept of insider trading itself was not sufficiently defined in Japanese law to trigger criminal penalties.”<sup>108</sup> As Professor J. Mark Ramseyer explains, “Japanese prosecutors and judges stayed with the American SEC’s original plan for the rule.”<sup>109</sup> As noted above, insider trading was therefore left virtually unregulated until 1988, when the Japanese Diet passed extensive amendments to their existing securities laws (1988 Amendments).<sup>110</sup>

Prior to 1988, Japan was regarded as an “insider[‘s] heaven,”<sup>111</sup> in which trading on material nonpublic information was simply “a way of life.”<sup>112</sup> By 1988, however, foreign investors, especially those trading from within the highly regulated U.S., had begun to “complain that the market [was] unfair to outsiders who can’t play the game according to the peculiar Japanese rules.”<sup>113</sup> Consequently, the 1988 Amendments reflected, at least in part, an attempt to “accommodate the huge Japanese stock market to

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legislation in Japan” and the law simply “arose as a result of the Allied Occupation”).

103. See Ramseyer, *supra* note 82, at 352 (noting that the Act “blended the 1933 and 1934 US securities statutes”).

104. 15 U.S.C. § 78(b) (2018).

105. Akashi, *supra* note 81, at 1300.

106. See Ramseyer, *supra* note 82, at 352 (noting that the Japanese “abandoned” Article 189).

107. This provision is currently codified in Kin’yū shōhin torihiki-hō [Financial Instruments and Exchange Act] [FIEA], Act No. 25 of 1948, art. 157; see Ramseyer, *supra* note 82, at 353 (“The Americans also imposed on Japan a Rule 10b-5 equivalent.”).

108. Akashi, *supra* note 81, at 1289.

109. Ramseyer, *supra* note 82, at 354.

110. Kinyū shonin toriniko [Securities and Exchange Law], Law No. 75 of 1988.

111. Akashi, *supra* note 81, at 1302.

112. Swan, *supra* note 84, at 275.

113. Tetsuo Jimbo, *Japan’s Inside-Trading “Tradition” Under Attack*, CHRISTIAN SCI. MONITOR, Sept. 13, 1988, at 12. See also Swan, *supra* note 84, at 283–84 (noting that “American traders felt handcuffed; they could not make insider trades as the Japanese did, and the Japanese were unwilling to trade any other way”).

Western standards of fair play.”<sup>114</sup> In addition to reinvigorating its Section 16 analogue, Japan’s 1988 Amendments introduced a limited equal access insider trading enforcement regime.<sup>115</sup>

As commentators noted at the time, in contrast to the U.S. regime’s reliance on the vague anti-fraud provisions of Section 10(b) of the Exchange Act (which the Japanese already had on their books in Article 58), “the Japanese Diet decided instead to create clear and specific prohibitions against insider trading,”<sup>116</sup> choosing ex ante notice and “clarity at the cost of flexibility” in enforcement.<sup>117</sup> Specifically, the 1988 Amendments prohibit “Corporate Insiders” from trading in a firm’s shares while in possession of material nonpublic information acquired by virtue of their relationship to that firm.<sup>118</sup> The “Corporate Insiders” covered by the prohibition are defined by an exclusive list, including the issuer’s employees, major shareholders, outside counsel, persons in contractual privity with the issuer, and former insiders.<sup>119</sup> The 1988 Amendments also include a provision that specifically targets tender offers.<sup>120</sup> It prohibits trading in a target by any “person who acquires information from his affiliation (whether by employment, stock holdings, legal authority, or contractual ties) to the acquirer in a tender offer.”<sup>121</sup> While the Japanese regime prohibits trading by any tippee who

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114. Jimbo, *supra* note 113. It should also be noted that some domestic pressure also began to arise in Japan around this time due the highly publicized Tateho Chemical Company scandal, in which “[o]ne month after Hanchin Sogo Bank helped rescue Tateho Chemical from financial disaster in August 1987, Hanshin sold off 337,000 of its Tateho shares shortly before the public announcement of Tateho’s huge losses in bond futures trading.” Swan, *supra* note 84, at 282.

115. See Ramseyer, *supra* note 82, at 352 (describing the content of the 1988 Amendments). This provision, which is now codified as Articles 163 and 164 of the FIEA, has a reporting requirement under Article 163, and Article 164 then provides:

For the purpose of preventing wrongful use by Officers or Major Shareholders of a Listed Company, etc. of secret information they have obtained in the course of their duty or by virtue of their position, a Listed Company, etc. may request its Officer or Major Shareholder who makes Sales, etc. of Specified Securities, etc. of the Listed Company, etc. within six months after having made Purchase, etc. of them for his/her own account, or makes Purchase, etc. of Specified Securities, etc. of the Listed Company, etc. within six months after having made Sales, etc. of them for his/her own account, to provide the Listed Company, etc. with profits earned by such Sales, etc. and Purchase, etc.

Translation available at <https://www.fsa.go.jp/common/law/fie01.pdf> [<https://perma.cc/8Q8Q-YJ3G>].

116. Swan, *supra* note 84, at 288.

117. Akashi, *supra* note 81, at 1316.

118. Akashi, *supra* note 81, at 1312.

119. FIEA, art. 166(1).

120. FIEA, art. 167.

121. See Ramseyer, *supra* note 82, at 356 (paraphrasing FIEA art. 167).

received material nonpublic information directly and intentionally from an insider, remote tippees are not typically subject to liability.<sup>122</sup> Precluding remote-tippee liability was intended by the drafters to “provide a bright line rule of liability.”<sup>123</sup> Interestingly, tippers were not subject to insider trading liability in Japan until a recent 2013 amendment imposed such liability.<sup>124</sup> Finally, the Japanese law has no equivalent to the U.S. misappropriation theory; outsider trading on information misappropriated from someone other than the issuer whose stock is traded is not generally prohibited, except where the information was obtained by the acquirer in a tender offer.<sup>125</sup>

Article 166 of Japan’s insider trading statute defines material information pursuant to a detailed and extensive list of categories.<sup>126</sup> The list is not, however, exhaustive because it includes two catchall provisions that capture decisions or facts that may have “a significant influence on investors’ investment decisions.”<sup>127</sup> Ministerial Ordinance No. 10 of 1989 provides even more clarity on the test for materiality under Japanese law by offering a quantitative test for what information will *not* be deemed material under the law. This ordinance provides that an event or decision is not material if

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122. See Ramseyer, *supra* note 82, at 356. (“Because the ban covers only those who hear from a defined insider, secondary and tertiary tippees may freely trade.”). But note that courts have interpreted the statute to impose liability on remote tippees when an insider tipper intends to convey material nonpublic information to a third party through an intermediary or agent. See, e.g., Hiroko Tabuchi, *Japanese Insider Trading Case Ensnarers U.S. Firm*, N.Y. TIMES (June 8, 2012), <https://dealbook.nytimes.com/2012/06/08/japanese-insider-trading-case-ensnarers-u-s-firm/> [<https://perma.cc/7M2L-3SWP>] (describing a Japanese insider trading prosecution of a trader who “had learned of [an offering] through a securities consultancy, whose source was an employee at the offering’s lead underwriter”). I thank Masa Yamamoto for bringing this exception to the general rule that remote tippees are not liable under Japanese law to my attention.

123. Akashi, *supra* note 81, at 1314.

124. FIEA, art. 167-2, paras. 1, 2.

125. See Franklin A. Gevurtz, *The Globalization of Insider Trading Prohibitions*, 15 TRANSNAT’L LAW 63, 84 (2002) (explaining the absence of a misappropriation theory in Japanese insider trading law).

126. FIEA, art. 166(2). The list of categories of material information includes:

management decisions about issuing securities, reductions in capital, stock splits, alterations in dividends, mergers, purchases or sales in whole or in part of a business, dissolution and marketing a new product; disasters or damages to the corporation; changes in principal shareholders; events causing delisting of a security; differences between actual and forecasted sales and profits; any other events listed by Cabinet Ordinance; and, finally, other important facts involving the management, business or assets of the corporation which would material affect investment decisions.

Gevurtz, *supra* note 125, at 73–74. Though the Japanese statute’s laundry list certainly offers greater certainty than the U.S. standard, its final “catchall” provisions at article 166, paragraph 2 (iv, viii) still leaves it open to charges of ambiguity.

127. FIEA, art. 166, para. 2(iv, viii).

it “affects less than ten percent of the company’s book value of their total assets, as of the last day in the most recent fiscal year, or ten percent of the company’s sales in the most recent fiscal year.”<sup>128</sup> The Japanese statute authorizes the Japanese Financial Services Agency (FSA) to issue a rule on when information is “public.”<sup>129</sup> The FSA did so, providing that information is public twelve hours after its disclosure to at least two media outlets or immediately upon disclosure to the Tokyo Stock Exchange via its Timely Disclosure Network.<sup>130</sup>

Since the Japanese model is not fraud-based, it requires neither a breach of fiduciary duty nor scienter as elements of the crime.<sup>131</sup> In this sense, it has broader reach than the U.S. model and is much easier to enforce.<sup>132</sup> It imposes “a duty to disclose information or to abstain from trading [on persons] simply because they know that they possess certain material nonpublic information.”<sup>133</sup> The absence of a guilty mind requirement, however, led the drafters to impose lesser penalties than antifraud statutes such as Article 58.<sup>134</sup> But while the Japanese regime is broader than the U.S. regime in failing to require proof of fraud, it is also narrower insofar as it typically does not impose remote tippee or misappropriation liability.<sup>135</sup> Finally, the Japanese model also differs from the U.S. regime by offering a statutory definition of who counts as an “insider,”<sup>136</sup> and of what information counts as “material”<sup>137</sup> and “nonpublic,”<sup>138</sup> allowing it to avoid at least some of the pitfalls of legal ambiguity that have plagued the common-law development of these elements under U.S. law.

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128. Swan, *supra* note 84, at 292–93. A slightly different quantitative test applies to “the creation of a new business or product.”

129. FIEA, art. 166, para. 4.

130. Ramseyer, *supra* note 82, at 357.

131. See Akashi, *supra* note 81, at 1313 (noting that the Japanese model “do[es] not require any proof of fraud” and “may be automatically invoked without a showing of recklessness or intent to defraud”).

132. See Heminway, *supra* note 60, at 121–29 (explaining that the reliance of U.S. insider trading laws on the unclear and ever-changing concept of fiduciary duties makes the laws harder to enforce than those of Japan and Germany); Swan, *supra* note 84, at 288 (explaining that the absence of a scienter requirement makes Japanese insider law easier to enforce than its U.S. counterpart).

133. Akashi, *supra* note 81, at 1313.

134. Akashi, *supra* note 81, at 1313.

135. Heminway, *supra* note 60, at 118.

136. See FIEA, art. 166, para. 1 (defining “company insider”).

137. See FIEA, Art. 166, para. 2 (defining “material fact”).

138. See Ramseyer, *supra* note 82, at 357 (explaining how the Financial Services Agency, under authority given by the 1988 Amendments, has defined “non-public”).

*European Union*

As noted above, the first coordinated effort to regulate insider trading in Europe came with the adoption of the 1989 Directive.<sup>139</sup> The 1989 Directive introduced a hybrid enforcement regime “modeled largely on the [then-existing] insider trading laws of France and the United Kingdom.”<sup>140</sup> This regime was superseded by the Market Abuse Directive (MAD) in 2003,<sup>141</sup> which was in turn just recently replaced by the European Commission’s Market Abuse Regulation (MAR) in July of 2016.<sup>142</sup> The adoption of the MAR marked Europe’s transition from a patchwork of different insider trading regimes exercising discretion under a shared directive into a single insider trading enforcement regime, unified under a single code that is directly applicable to the member states.<sup>143</sup> The MAR defines “inside information” as

information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.<sup>144</sup>

This was essentially a recodification of the old MAD definition.<sup>145</sup> As one commentator notes, “[i]n aiming for a reduction of trading benefits for

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139. 1989 O.J. (L 334) 30.

140. Manning Gilbert Warren III, *The Regulation of Insider Trading in the European Community*, 48 WASH. & LEE L. REV. 1037, 1039 (1991).

141. 2003 O.J. (L 96) 16.

142. 2014 O.J. (L 173) 179. MAR went into effect on July 3, 2016. *See New EU rules to fight insider dealing and market manipulation in Europe’s financial markets take effect*, EUROPEAN COMMISSION PRESS RELEASE, (Jul. 1, 2016), [http://europa.eu/rapid/press-release\\_IP-16-2352\\_en.htm?locale=EN](http://europa.eu/rapid/press-release_IP-16-2352_en.htm?locale=EN) [<https://perma.cc/Q267-49RU>] (“The essential delegated and implementing acts based on the Market Abuse Regulation have been adopted in time to ensure that market participants and supervisory authorities can implement the new rule book and apply it as of 3 July 2016.”).

143. *See* Langenbucher, *supra* note 75, at 430 (noting that directives under European law are “binding solely with regard to the ends to be achieved” and grant “discretion as to the choice of form and methods employed,” while regulations “binding in their entirety and directly applicable in all Member States”). Of course, there will remain variations among the Member States’ insider trading regimes even with the promulgation of MAR, as individual countries national laws will still supplement the transnational code (much as state laws continue to supplement federal insider trading regulations in the U.S.). *See* Langenbucher, *supra* note 75, at 431 (“This set of harmonized core rules is supplemented by bodies of national law that differ among the Member States.”).

144. MAR, *supra* note 142, art. 7, para. 1(a), translation available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0596> [<https://perma.cc/57AE-3JAF>].

145. MAD, *supra* note 128, at art. 1, para. 1, sub para. 1.

those who profit from informational asymmetries, [the European definition of ‘inside information’] works a revival of the SEC’s ‘parity of information’ approach” that was rejected by the U.S. Supreme Court in *Chiarella*.<sup>146</sup> Under the European definition, the demand that the information be precise was “borrowed from France’s insider trading jurisprudence,”<sup>147</sup> and is intended to rule out mere rumors.<sup>148</sup> The requirement that the information have a “significant effect on the price” of the traded securities was adapted from the British insider dealing laws.<sup>149</sup> Whether information has a significant effect on price under European law depends on whether “a reasonable investor would be likely to use [it] as part of the basis of his or her investment decisions.”<sup>150</sup> This definition appears similar to the materiality standard embraced by courts in the United States, though there is some indication that European courts are prepared to interpret it more broadly.<sup>151</sup>

The MAR runs some risks by adopting a broad definition of inside information. First, an overly broad definition of inside information might have a chilling effect on information gathering by market professionals.<sup>152</sup> Second, unlike in the U.S., MAR links issuer disclosure requirements to its definition of inside information, requiring disclosure of all information meeting that definition, irrespective of trading or selective disclosure by insiders.<sup>153</sup> Some scholars have expressed the concern that too broad an interpretation of “inside information” under the MAR by regulators and the courts risks increasing volatility by “flooding the markets with irrelevant information.”<sup>154</sup>

Under the MAR, insider trading liability arises any time “a person possesses inside information and uses that information” to trade or tip.<sup>155</sup> In

146. Warren, *supra* note 140, at 1059.

147. Warren, *supra* note 140, at 1060.

148. See Gevurtz, *supra* note 125, at 74 (noting that this element was adapted from the French statute).

149. See Warren, *supra* note 140, at 1062 (noting that the “significant effect” language was “borrowed” from the British Company Securities (Insider Dealing) Act 1985).

150. MAR, *supra* note 142, at art. 7, para. 4.

151. See Langenbucher, *supra* note 75, at 442 (describing a proposed regulation that would consider any information influencing an investment decision to be inside information).

152. See, e.g., Franklin A. Gevurtz, *The Road Not Taken: A Comparison of the E.U. and U.S. Insider Trading Prohibitions*, 56 WASH U. J.L. & POL’Y 31, 44 (2018) (noting that “a primary argument made by critics of the broad reach of the E.U. prohibition is that it will deter parties from investigating companies by depriving researchers of rewards for their efforts.”).

153. MAR, *supra* note 142, at art. 17, para. 1 (requiring that an “issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.”).

154. Langenbucher, *supra* note 75, at 445–47.

155. MAR, *supra* note 142, at art. 8, para. 1; MAR, *supra* note 145, at art. 10, para. 1.

addition, the “use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information,” also incurs liability.<sup>156</sup> The language makes it clear that the prohibition applies not only to classic and constructive insiders, but to any person “who possesses inside information . . . where that person knows or ought to know that it is inside information.”<sup>157</sup> Though the language of the MAR requires that one both “possess” and “use” inside information to incur liability,<sup>158</sup> the European Court of Justice read the same language in the MAD as creating a rebuttable presumption of use from an insider’s possession.<sup>159</sup>

In sum, the European Community introduced the world’s first multinational insider trading regime.<sup>160</sup> MAR’s application to any person who possesses inside information renders it more expansive than the fraud-based U.S. model (which requires a breach of fiduciary or similar duty of trust and confidence)<sup>161</sup> and more expansive than the Japanese model (which does not typically impose misappropriator<sup>162</sup> or remote tippee liability).<sup>163</sup> MAR’s application to strategic termination of orders (e.g., cancelling standing orders) based on material nonpublic information also extends its scope of liability beyond that of the U.S. and most other regimes around the globe.<sup>164</sup> Indeed, when coupled with its broad definition of inside information and its presumption of use from possession, the European model offers something very close to a parity-of-information regime.<sup>165</sup> For

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156. MAR, *supra* note 142, at art. 8, para. 1.

157. MAR, *supra* note 142, at art. 8, para. 4.

158. MAR, *supra* note 142, at art. 8, para. 1.

159. Langenbucher, *supra* note 75, at 435–36.

160. Warren, *supra* note 140, at 1076 (noting that the “EC must be credited with being the first body to establish multinational insider trading laws”).

161. See, e.g., *O’Hagan*, 521 U.S. at 651–52 (explaining that insider trading liability under either the classical or misappropriation theory requires proof of a fiduciary or similar duty of trust and confidence). See also *supra* Part II. (discussing the classical and misappropriation theories).

162. Gevurtz, *supra* note 125, at 84.

163. See Ramseyer, *supra* note 82, at 356 (noting that “secondary and tertiary tippees may freely trade”).

164. For example, the SEC has made it clear that the act of terminating an existing 10b5-1(c) trading plan based on inside information does not violate the law because it does not involve the sale or purchase of a security. *Exchange Act Rules, Questions and Answers of General Applicability, Question 120.17*, U.S. SEC. & EXCH. COMM’N (Mar. 31, 2020), <https://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm> [<https://perma.cc/XV64-QZ6G>].

165. There are two provisions in MAR that prevent it from implementing a true parity-of-information regime. As Professor Gevurtz explains, Article 9 “excludes a person’s knowledge of the person’s own intention to purchase or sell securities from the definition of inside information,” and Paragraph 28 of MAR’s preamble “excludes research and estimates based upon publicly available data from being considered inside information.” Gevurtz,

example, as Professor Franklin A. Gevurtz notes, the European regime “not only picks up individuals who receive tips (in other words, information passed on for the purpose of the recipient’s trading), but also persons who simply overhear a conversation by insiders.”<sup>166</sup> Under the European model, all that matters is that a trader “was aware that he was in possession of material non-public information” when trading.<sup>167</sup> This statutory model offers a streamlined approach to insider trading enforcement that offers the advantage of relative clarity and simplicity, though perhaps at the expense of overbreadth.

### *Australia*

The insider trading enforcement regime in Australia has been described as “the most expansive in the world.”<sup>168</sup> Australia’s Corporations Act of 2001 defines “information” broadly to include even “matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and matters relating to the intentions, or likely intentions, of a person.”<sup>169</sup> The Australian courts have not hesitated to give this definition the expansive interpretation its terms suggest.<sup>170</sup> The Corporations Act defines “inside information” as simply any information that is “not generally available,” and that, if it were generally available, “a reasonable person would expect it to have a material effect on the price or value” of a security.<sup>171</sup> Information is regarded as “generally available” if it is “readily observable.”<sup>172</sup> With so broad a definition of inside information, the Corporations Act ultimately imposes insider trading liability upon *any* person who knowingly “possesses inside information” and trades on it, or

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*supra* note 152, at 46.

166. Gevurtz, *supra* note 125, at 80.

167. Gevurtz, *supra* note 152, at 39 (Gevurtz offers the contrasting outcomes of the Mark Cuban insider trading case in the U.S. and the David Einhorn insider trading case in the U.K. as an illustration of the broader reach of insider trading laws in Europe. The facts of the two cases are very similar. Cuban escaped liability while Einhorn did not.) *See also* John P. Anderson, *A Tale of Two Cities: Mark Cuban, David Einhorn, and the Ethics of Insider Trading Reform*, 15 TENN J. L. & POL’Y 48, 48 (2020) (contrasting the Mark Cuban and David Einhorn insider trading cases).

168. Gordon Walker & Andrew F. Simpson, *Insider Trading Law in New Zealand*, in RESEARCH HANDBOOK ON INSIDER TRADING 386, 396 (Stephen Bainbridge ed., 2013).

169. *Corporations Act 2001* (Cth) s 1042A.

170. *See* Keith Kendall & Gordon Walker, *Insider Trading in Australia*, in RESEARCH HANDBOOK ON INSIDER TRADING 365, 371 (Stephen Bainbridge ed., 2013) (citing the New South Wales Court for the holding that “information may be imprecise” and the Federal Court for the proposition that information includes a “person’s internal thought processes”).

171. *Corporations Act 2001* (Cth) s 1042A.

172. *Corporations Act 2001* (Cth) s 1042C(1)(a).

who tips another who is likely to trade.<sup>173</sup>

Australia's insider-trading regime is more expansive than that of the United States because it does not require the breach of a fiduciary or similar duty. Anyone knowingly possessing inside information is deemed an insider under Australia's Corporations Act. Insofar as the Australian law imposes liability on misappropriators and remote tippees, it is also more expansive than the Japanese regime. The Australian regime is arguably even more expansive than the broad European model due to the former's liberal definition of "inside information"<sup>174</sup> (which lacks the European requirement that the information be "precise" or specific)<sup>175</sup> and because the Corporations Act does not make "use" of inside information in trading an element of liability.<sup>176</sup> Thus, the use-versus-possession debate that has plagued the U.S. enforcement regime with uncertainty for so long was settled by Australian lawmakers in the statutory language of the Corporations Act.<sup>177</sup> Ultimately, the Australian regime is as close to a true parity-of-information regime as can be found globally. The Australian model has also had some influence. For example, New Zealand initially modeled its insider-trading regime upon the U.S. fiduciary-fraud model, but it has since adopted Australia's parity-of-information approach.<sup>178</sup>

### *Canada*

The Canadian insider trading enforcement regime is unique in that it lacks a national securities regulator.<sup>179</sup> Like the United States prior to the adoption of the Securities Act of 1933 and the Exchange Act of 1934, Canadian securities laws are adopted and enforced locally by the individual provinces.<sup>180</sup> The insider trading laws of Ontario, which is home to the

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173. *Corporations Act 2001* (Cth) ss 1043A(1)-(2). It should be noted that this broad definition is subject to a number of express exceptions and defenses detailed under the Act. See Kendall & Walker, *supra* note 170, at 380-82 (describing several exceptions and defenses).

174. See Kendall & Walker, *supra* note 170, at 371 (noting that Australian courts have adopted a wide definition of what constitutes information).

175. MAR, *supra* note 142, at art. 7, para. 1(a).

176. See *Corporations Act 2001* (Cth) s 1043A(1)(a) (defining an insider as one who "possesses" inside information).

177. See Anderson, *supra* note 8, at 347-49 (describing the use versus possession discourse between the SEC and U.S. courts).

178. See Walker & Simpson, *supra* note 168, at 388 (detailing a 1988 New Zealand case that is based on the fiduciary-fraud model).

179. Laura Nyantung Beny & Anita Anand, *Private Regulation of Insider Trading in the Shadow of Lax Public Enforcement: Evidence from Canadian Firms*, 3 HARV. BUS. L. REV. 215, 224 (2013).

180. See *id.* (noting that Canadian insider trading laws are "enacted and enforced at the

Toronto Stock Exchange, warrant special attention.<sup>181</sup>

The Securities Act of 1990 sets forth Ontario's insider trading laws. The Securities Act provides that "[n]o person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed."<sup>182</sup> The Act also prohibits the disclosure of material nonpublic information unless it is "in the necessary course of business."<sup>183</sup>

While Ontario's insider trading regime limits trading and tipping by those in a "special relationship" with the issuer, it is not a fiduciary-fraud-based regime. The Securities Act defines a "person or company that is in a special relationship with an issuer" broadly to include any employee or affiliate of the issuer; anyone considering or evaluating whether to make a takeover bid on the issuer; anyone considering or evaluating whether to become party to a reorganization or merger with the issuer; anyone engaging in any business activity with the issuer; or anyone who "learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection . . . and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship."<sup>184</sup> Under this limited equal-access model, those standing in a special relationship are prohibited from trading regardless of whether their trading or tipping would breach a fiduciary duty of disclosure. Alternatively, those who might breach a duty to disclose to the source of the information under the misappropriation theory in the United States will not be liable under Ontario's regime if they do not stand in a special relationship to the issuer of the securities in which they are trading.<sup>185</sup> For these reasons, Ontario's equal-access regime is broader in scope than the fiduciary-fraud-based regime in the United States in some respects, and narrower in others. Nevertheless, the Ontario law's definition of those in a "special relationship with a reporting issuer" is sufficiently broad to generate considerable overlap in coverage with the U.S. regime, including its regulation of tippees.<sup>186</sup>

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provincial and territorial levels").

181. *Id.* Most other Canadian provinces model their securities laws on the Ontario regime.

182. Securities Act, R.S.O. 1990, c S.5 § 76(1).

183. Securities Act, R.S.O. 1990, c S.5 § 76(2).

184. Securities Act, R.S.O. 1990, c S.5 § 76(5).

185. Consider, for example, recent enforcement actions against Canadian investment banker Richard Moore. Moore was held liable by U.S. regulators under the misappropriation theory, but he was not found liable for insider trading by Canadian regulators. Barbara Schecter, *How the SEC and the OSC Differ in Their Approaches to Trading Offenses*, FIN. POST (Apr. 22, 2013), <http://business.financialpost.com/legal-post/how-the-sec-and-the-osc-differ-in-their-approaches-to-trading-offences> [<https://perma.cc/ZXW3-6TAT>].

186. Securities Act, R.S.O. 1990, c S.5 § 76(1). *Cf. supra*, Part I. (detailing the scope of

*Russia*

The Russian Federation did not begin regulating insider trading until July of 2010, when it enacted its Law on Counteracting the Illegitimate Use of Insider Information and Market Manipulation and on the Amendment of Certain Legislative Acts of the Russian Federation (the 2010 Law).<sup>187</sup> Though this law was enacted in 2010 (and recently amended in 2018<sup>188</sup>), its provisions pertaining to criminal liability did not go into effect until July 2013.<sup>189</sup> Since 2013, the Russian Federation has only issued notice of seven insider trading investigations, and this author has been unable to find confirmation of a single criminal conviction for insider trading.<sup>190</sup> Absent significant enforcement action from the Central Bank of the Russian Federation (the entity responsible for implementation and civil enforcement of the 2010 Law) or prosecutors before the courts, interpretation of the new Law and its recent amendments must involve some speculation at this early stage. Nevertheless, there are a number of provisions worthy of note.

Initially, the 2010 Law appeared to offer a significant departure from other jurisdictions in its definition of “inside information.” It defined inside information as “any precise and specific non-public information the disclosure of which may significantly affect the price of a particular financial instrument, foreign currency and/or commodity,”<sup>191</sup> but then added the requirement that the information be included in an exhaustive list of types of

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insider trading liability under the U.S. enforcement regime).

187. Federal Law No. 224-FZ. Prior to the adoption of the Law, the Federal Law on the Securities Market No. 39-FZ, which was enacted in April 1996, proscribed only trading on non-public “official information” (*sluzhebnyaya informatsiya*). [Federal Law No. 39-FZ on the Securities Market] 1996, <https://www.ebrd.com/downloads/legal/securities/russiasm.pdf> [https://perma.cc/DKA3-AQ78].

188. Natalia A. Drebezgina, Alan Kartashkin, Maxim A. Kuleshov, and Svyatoslav A. Skopintsev, *Regulation of Inside Information in Russia: What Will Change in 2019*, DEBEVOISE UPDATE, at 1 (Sept. 10, 2018), [https://www.debevoise.com/-/media/files/insights/publications/2018/09/20180910\\_regulation\\_of\\_inside\\_information\\_in\\_russia\\_what\\_will\\_change\\_in\\_2019\\_eng.pdf](https://www.debevoise.com/-/media/files/insights/publications/2018/09/20180910_regulation_of_inside_information_in_russia_what_will_change_in_2019_eng.pdf) [https://perma.cc/9W99-79YP].

189. Alexander Anichkin et al., *Russia Adopts the Law on Insider Trading*, CLIFFORD CHANCE: BRIEFING (July 2010), [https://www.cliffordchance.com/content/dam/cliffordchance/PDF/Russia\\_adopts\\_law\\_on\\_inside\\_trading.pdf](https://www.cliffordchance.com/content/dam/cliffordchance/PDF/Russia_adopts_law_on_inside_trading.pdf) [https://perma.cc/54QN-Q6JW] (explaining that “provisions of the Law on Insider Trading establishing criminal liability for the insider trading . . . only come into force 3 years after official publication of the law”).

190. *Market Misconduct: Detected Cases of Market Manipulation and Illegal Use of Insider Information*, BANK OF RUSS., [https://old.cbr.ru/eng/finmarket/inside\\_detect/](https://old.cbr.ru/eng/finmarket/inside_detect/) [https://perma.cc/737S-WC8Y] (last visited Jan. 1, 2021).

191. Federal Law No. 224-FZ, art. 2(1). See Olga Anisimova et al., *Russia’s New Law on Insider Trading and Market Manipulation*, ORRICK RUSSIA PRACTICE GROUP ALERT (Sept. 20, 2010), <https://www.lexology.com/library/detail.aspx?g=9091778a-a810-4948-b308-096c276957b6> [https://perma.cc/4AAH-V5G3] (quoted text from this translation).

inside information published by the Central Bank of the Russian Federation and issuers themselves.<sup>192</sup> Though the 2010 definition of what constitutes inside information did not differ significantly from the European or U.S. regimes', its limitation of scope to "an exhaustive list of insider information approved by the regulator and/or each issuer"<sup>193</sup> was quite innovative.<sup>194</sup> Depending on its implementation, it might have provided greater certainty for market participants than regimes operating under more ambiguous standard-based tests for materiality. The recent 2018 amendments, however, removed the requirement that the inside information be of a type included on these lists; the change thus seems to preclude these lists from functioning as a limit to the definition of inside information.<sup>195</sup> According to some commentators, the result will be that

information will be deemed insider information only by virtue of the fact that it is not publicly available and its distribution may have a material impact on the price of financial instruments, . . . irrespective of whether it has been included on lists of insider information approved by the Central Bank of Russia/the issuer or not.<sup>196</sup>

If this is how the law is interpreted, then these amendments will bring the Russian definition of inside information into closer conformity with the European model.<sup>197</sup>

As written, the 2010 Law's restrictions on insider trading appear to be quite broad insofar as they prohibit all trading or tipping while in possession of inside information, regardless of one's status as a statutory insider.<sup>198</sup> In this way, the Russian regime tends toward the broad, parity-of-information model adopted in Europe, which likely influenced the Russian drafters.<sup>199</sup> As such, the Russian model rejects the American fiduciary-fraud-based approach and extends insider trading liability beyond that of the Japanese regulation by imposing liability on misappropriators and remote tippees. Similar to the Japanese model, however, the Russian law offers an

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192. Alexander Anichkin et al., *The Insider Information Law: Now It Is Serious (English)*, CLIFFORD CHANCE: BRIEFINGS (Aug. 14, 2018), [https://www.cliffordchance.com/briefings/2018/08/the\\_insider\\_informationlawnowitisseriou0.html](https://www.cliffordchance.com/briefings/2018/08/the_insider_informationlawnowitisseriou0.html) [<https://perma.cc/6QJM-XJPU>].

193. *Id.*

194. For example, though the Japanese law defines materiality by statute, the list it provides of the types of information generally regarded to be material is not exhaustive. Ramseyer, *supra* note 82, at 356.

195. Anichkin et al., *supra* note 192.

196. Anichkin et al., *supra* note 192.

197. Anichkin et al., *supra* note 192.

198. Anisimova et al., *supra* note 191.

199. See Anisimova et al., *supra* note 191 (noting that the Russian legislators were influenced by the E.U. and U.S. models).

exhaustive list of those who count as “insiders.”<sup>200</sup> The Russian law also requires that legal entities maintain a list of all their statutory insiders, and that they notify these persons of their inclusion on the list.<sup>201</sup> Like Europe, Russia generally requires the public disclosure of inside information by issuers and certain other market participants.<sup>202</sup> Though one does not need to be a statutorily defined insider to possess inside information and therefore have a duty not to trade, another innovation characteristic of the Russian Law is that its statutorily defined insiders share the *additional* duty to report all their transactions to the relevant issuer and the Bank of Russia upon the issuer’s or Bank’s request.<sup>203</sup> Finally, all legal entities with respect to which inside information exists are required to develop and implement insider trading monitoring and compliance programs, and the Bank of Russia has unrestricted access to the issuer’s premises and records when conducting compliance reviews.<sup>204</sup>

### *China*

China began regulating insider trading on a limited basis in the early 1990s, but the key provisions of its current regime were laid out in the Securities Law of the People’s Republic of China (Securities Law), which was adopted in 1998 (implemented 1999) and was recently overhauled in 2005 (implemented 2006).<sup>205</sup>

Pursuant to Article 75 of the Securities Law, insider information is defined as “information that concerns the business or finance of a company or may have a major effect on the market price of the securities thereof and that hasn’t been publicized in securities trading.”<sup>206</sup> The same article then

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200. Federal Law No. 224-FZ, art. 4 was recently amended in 2018 to add persons holding shares entitling them to a voting interest of 25% of issuers, and those having access to certain information pertaining to tender offers. Drebezhina et al., *supra* note 188.

201. See Arthur Illiev et al., *Russia Adopts the Law on Insider Trading*, CLIFFORD CHANCE CLIENT BRIEFING (July, 2010), [https://www.cliffordchance.com/content/dam/cliffordchance/PDF/Russia\\_adopts\\_law\\_on\\_inside\\_trading.pdf](https://www.cliffordchance.com/content/dam/cliffordchance/PDF/Russia_adopts_law_on_inside_trading.pdf) [<https://perma.cc/BFL2-595W>] (“[E]very legal entity which is an insider . . . will be obliged to (i) keep an insiders list, [and] (ii) notify each particular insider of its newly acquired status as the insider. . .”).

202. Federal Law No. 224-FZ, art. 8; see, e.g., Illiev et al., *supra* note 201 (“[I]nsiders must disclose insider information in a manner to be provided in a separate regulation. . .”).

203. Federal Law No. 224-FZ, art. 10. Prior to the 2018 amendments, insiders were required to make such disclosures automatically, but the amendments soften the requirement, demanding only that such information be provided to issuers upon request. Drebezhina et al., *supra* note 188, at 3.

204. Federal Law No. 224-FZ, art. 11; see, e.g., Drebezhina et al., *supra* note 188, at 3 (elaborating on the expansion of powers of the Bank of Russia regarding compliance review).

205. Duan, *supra* note 92, at 138.

206. [Securities Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 75, <http://www.china.org.cn/>

provides a list of the categories of information that will satisfy this definition, including (1) any “major event,”<sup>207</sup> (2) plan to distribute dividends or increase capital,<sup>208</sup> (3) major changes in equity structure,<sup>209</sup> (4) major changes in security for company debts,<sup>210</sup> (5) the mortgaging, selling, or discarding of more than 30% of a major asset of a company,<sup>211</sup> (6) acts by senior management exposing the company to liability,<sup>212</sup> or (7) plans to acquire another company or to be acquired.<sup>213</sup> The list also concludes with a “catchall” category, (8) “[a]ny other important information that has been recognized by the securities regulatory authority under the State Council as having a marked effect on the trading prices of securities,” offering regulators discretion to add categories as needed.<sup>214</sup>

Restrictions on the use of inside information are detailed in Article 73. By its language, Article 73 appears to implement a broad equal-access model<sup>215</sup> by providing that any “insider who has access to any insider information of securities trading or who has unlawfully obtained any insider information is prohibited from taking advantage of the insider information . . . to engage in any securities trading.”<sup>216</sup> Article 74, however, subsequently offers an exhaustive list of who counts as an “insider who has access to insider information,” and thereby narrows the scope of liability principally to those having a fiduciary duty to shareholders under the

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english/government/207337.htm [https://perma.cc/2P4A-H8GK] [hereinafter Securities Law].

207. Securities Law, art. 75(1). What constitutes a major event is defined by Article 67 of the Securities Law, which offers another list detailing events “subject to U.S. [SEC] Form 8-K-like continuing disclosure.” Nicholas Calcina Howson, *Punishing Possession—China’s All-Embracing Insider Trading Enforcement Regime*, in RESEARCH HANDBOOK ON INSIDER TRADING 327, 334 (Stephen Bainbridge ed., 2013). Some commentators have noted that Article 75 and incorporated Article 67 lists open a potential loophole for events that are not expressly covered. For example, one commentator suggests that inside information such as that at issue in *SEC v. Tex. Gulf Sulphur*, 401 F.2d 833 (2d Cir. 1968), “(wherein the company discovered minerals in exploratory drilling) do not fall under any item listed as ‘insider information’ in Articles 75 and 67.” Duan, *supra* note 92, at 142. Arguably, however, such information could be easily captured by regulators by availing themselves of the “catchall” provision in Securities Law, art. 75(8). *See infra* note 214.

208. Securities Law, art. 75(2).

209. Securities Law, art. 75(3).

210. Securities Law, art. 75(4).

211. Securities Law, art. 75(5).

212. Securities Law, art. 75(6).

213. Securities Law, art. 75(7).

214. Securities Law, art. 75(8); for example, though a non-public earnings forecast is not expressly included in the Article 75 list, the CSRC has held that it is included in the Article 75(8) catchall category. Huang, *supra* note 91, at 310.

215. *See* Howson, *supra* note 207, at 331–32 (noting that, on “first view,” Article 73 reads like an equal-access rule).

216. Securities Law, art. 73.

classical theory in the United States, namely corporate officers, directors, managers, and lower-level employees who acquire the information by virtue of their employment.<sup>217</sup> Insider status under Article 74 does, however, extend a bit beyond the American classical theory's scope by also expressly including within the definition of "insider" functionaries "of the securities regulatory body, and other personnel who administer the issuance and transaction of securities pursuant to their statutory functions and duties."<sup>218</sup> Interestingly, some commentators have noted that by referencing only current directors, supervisors, senior managers, etc., the Securities Law offers a potential loophole for *former* "insiders" who recently stepped down to trade on the information they acquired while still an insider.<sup>219</sup> Finally, though the list of those who count as insiders is exclusive, Article 74, similar to Article 75, also includes a "catchall" provision that grants general authority to regulators under the State Council to prescribe new categories of "insiders."<sup>220</sup>

Article 73 is not fraud-based, and there is no express requirement of scienter.<sup>221</sup> Indeed, the statute's language suggests that liability can be imposed on those who trade while merely possessing inside information.<sup>222</sup> Some scholars read the absence of any requirement of a causal connection between the information and the trading as effectively imposing "strict liability for [enumerated persons under Article 74 who] happen to possess inside information at the time they trade in securities of the company."<sup>223</sup>

But while Articles 73 and 74 may appear overbroad in failing to articulate a clear intent requirement, they may also seem too narrow in another respect. Tipsters, tippees, and those who would qualify as misappropriators under U.S. law are conspicuously absent from Article 74's list of insiders. At least part of this omission is addressed by Article 76,

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217. Securities Law, art. 74(1)-(7). See Duan, *supra* note 92, at 139-40.

218. Securities Law, art. 74(5). See Huang, *supra* note 91, at 308 (noting that the insider trading prohibition is not limited to traditional corporate insiders).

219. See Duan, *supra* note 92, at 141 (noting that former corporate officers or directors who trade stock "based on the information they obtained while they were on their posts" are "examples of the 'loopholes' in China's *Securities Law*").

220. Securities Law, art. 74(7). See Huang, *supra* note 91, at 308 (noting that the last subsection of Article 74 is a "catch-all" provision).

221. See Howson, *supra* note 207, at 336 (noting that Article 73 does not require a showing of scienter).

222. See Howson, *supra* note 207, at 335-36 (noting a "failure of Chinese law to require any scienter or breach of duty on the part of those in possession of inside information who trade in the relevant securities before public disclosure of the information").

223. Howson, *supra* note 207, at 335-36. But see Hui Huang, *The Regulation of Insider Trading in China: A Critical Review and Proposals for Reform*, 17 AUSTL. J. CORP. L. 281, 291-92 (2005) (suggesting that the Chinese insider trading regime does impose an intent requirement for liability).

which provides that “[a]ny insider who has access to insider information or has unlawfully obtained any insider information on securities trading may not purchase or sell the securities of the relevant company . . . or advise any other person to purchase or sell such securities.”<sup>224</sup>

By prohibiting insiders with access to inside information from advising others to purchase shares in the relevant security, Article 76 explicitly imposes liability on tippees.<sup>225</sup> The status of tippees and misappropriators, however, remained ambiguous until the Supreme People’s Court and the Supreme People’s Procuratorate issued guidance on when information is “unlawfully obtained” in 2012.<sup>226</sup> Per Professor Hui Huang’s summary of the Judicial Interpretation, information is “unlawfully obtained” under Article 76 if it is obtained

(1) through such means as theft, cheating, tapping, spying, extraction, bribery and private trading; (2) from the close relatives of primary insiders, or people with other types of close relationships with primary insiders; (3) from people who have contact with primary insiders during the sensitive period of the inside information.<sup>227</sup>

These three categories seem broad enough to cover tippees and misappropriators under the American model. Indeed, they appear to go even further by including thieves, “extractors,” and those who obtain the information from primary insiders, regardless of the circumstances. The statute does not, therefore, appear to condition liability on the breach of any fiduciary or similar duty of trust and confidence.

Some commentators have suggested that the Securities Law reflects an attempt to “transplant” the American classical and misappropriation theories of liability to China by listing the categories of persons and conduct held liable under the U.S. model.<sup>228</sup> But without also embracing the common-law fiduciary model that informs the U.S. regime, China is left with an enforcement model that some have argued is “plagued by contradictions.”<sup>229</sup>

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224. Securities Law, art. 76.

225. Howson, *supra* note 207, at 333 (noting that this language in Article 76 imposes “tipper” liability).

226. Interpretation on Several Issues Concerning the Specific Application of the Law in Handling Criminal Cases of Insider Trading and Leaking of Inside Information (promulgated by the Sup. People’s Ct. and the Sup. People’s Procuratorate, Mar. 29, 2012, effective June 1, 2012) (ABI/Inform Global). See Huang, *supra* note 91, at 305 (“On 29 March 2012, the Supreme People’s Court and the Supreme People’s Procuratorate jointly issued a judicial interpretation to provide guidance on the handling of criminal insider trading cases.”).

227. Huang, *supra* note 91, at 309.

228. See Huang, *supra* note 91, at 303 (“[T]he Chinese insider trading regulation is essentially transplanted from overseas jurisdictions, particularly the USA. . .”).

229. Howson, *supra* note 207, at 331.

As noted above, Article 73 suggests a broad equal-access regime, but Article 74's definitions of who counts as an "insider" indicates a more limited scope (similar to the American classical theory).<sup>230</sup> Article 76's provisions then impose liability on trading practices that extend beyond the reach of the American classical theory—and even the misappropriation theory—suggesting a gestalt shift back to an equal-access regime. Ultimately, one is tempted to conclude that Chinese officials simply cobbled together the country's insider trading enforcement laws on an *ad hoc* basis, with little regard to whether or how the provisions might cohere.<sup>231</sup> In any event, as with Russia, the actual scope and content of China's nascent insider-trading regime may only be revealed through its enforcement actions and judicial interpretations, and there have been few such actions and interpretations to date.<sup>232</sup>

### *India*

India recently completed a statutory overhaul of its insider trading regulations in January of 2015 (2015 Regulation), making India's insider-trading regime one of the newest among large-market economies. As noted above, India passed its first insider trading enforcement law in 1992, but the law suffered from a number of interpretive challenges and was rarely enforced.<sup>233</sup> The Securities and Exchange Board of India (SEBI) appointed a committee to propose reforms in 2013. The 2015 Regulation was based on this committee's 2015 report. India's new regulation defines the elements of insider trading liability with greater clarity than its predecessor, while also broadening the regime's scope of liability.

Like many other regimes around the globe, India rejected the U.S. fiduciary model in favor of what, after the 2015 Regulation, appears to be a broad parity-of-information regime. The 2015 Regulation prohibits "insiders" from trading "in securities that are listed or proposed to be listed

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230. Howson, *supra* note 207, at 331–32 (noting that Article 73 reads like an equal-access provision, but is then confined by Article 74 so as to suggest a much more limited scope of application).

231. Howson, *supra* note 207, at 316 ("China's insider trading law appears to have transplanted both the equality of access theory and the fiduciary-duty-based theories consisting of the classical theory and the misappropriation theory.").

232. Howson, *supra* note 207, at 328 (noting that Chinese "enforcement against insider trading has been anemic").

233. Indian authorities did bring one high profile case against Hindu Lever and some of its employees for trading on inside information concerning a pending merger of Brooke Bond. The appellate authority did not, however, uphold the charges, finding that the information was publicly available at the time of the trades. Varottil, *supra* note 90, at 1 (discussing the case of Hindustan Lever).

on a stock exchange when in possession of unpublished price sensitive information.”<sup>234</sup> In predicating liability on mere possession of material nonpublic information, the 2015 Regulation departs significantly from the former regime, which required a causal connection between the information and the trading. In addition, the 2015 Regulation defines “insider” quite broadly as “any person who is: (i) a connected person; or (ii) in possession of or having access to unpublished price sensitive information.”<sup>235</sup> The 2015 Regulation then defines “unpublished price sensitive information” broadly as “any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities.”<sup>236</sup> With the net of insider trading liability cast so broadly, regulators recognized the risk that insiders who are compensated in firm shares may never be able to liquidate them for innocent purposes (e.g., for portfolio diversification) without incurring liability without some rule-based safe harbor.<sup>237</sup> Consequently, the 2015 Regulation includes some affirmative defenses to insider trading liability. For instance, insiders are permitted to trade pursuant to trading plans.<sup>238</sup> India’s trading plan defense is similar to that authorized under SEC Rule 10b5-1(c),<sup>239</sup> but it has some unique characteristics. For example, under the 2015 Regulation, trading plans must be approved by a

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234. Prohibition of Insider Trading Regulations, 2015, Gazette of India part II, sec. 4(1), [http://www.sebi.gov.in/cms/sebi\\_data/attachdocs/1421319519608.pdf](http://www.sebi.gov.in/cms/sebi_data/attachdocs/1421319519608.pdf) [<https://perma.cc/QCM6-9AHK>] [hereinafter Prohibition of Insider Trading Regulations].

235. *Id.* at part I, sec. 2(1)(g).

Connected Person” is also defined generally as

any person who is or has during the six months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access.

*Id.* at part I, sec. 2(1)(d)(i). The regulation then goes on to offer a non-exclusive list of persons who qualify as connected persons.

236. *Id.* at part I, sec. 2(1)(n). This definition then goes on to offer a non-exclusive list of information that will typically qualify: “(i) financial results; (ii) dividends; (iii) change in capital structure; (iv) mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions; (v) changes in key managerial personnel; and (vi) material events in accordance with the listing agreement.”

237. *Id.* at part II, sec. 5 (noting that the “provision intends to give an option to persons who may be perpetually in possession of unpublished price sensitive information and enabling them to trade in securities in a compliant manner”).

238. *Id.* at part II, sec. 5.

239. 17 C.F.R. § 240.10b5-1(c) (2017).

firm's compliance officer.<sup>240</sup> Moreover, the first trade under an Indian trading plan cannot take place until six months after the plan's adoption, and no trades under the plan may take place during the twenty day period preceding the due date for the firm's financial filings, nor may plan trades be executed during the two days following a financial filing.<sup>241</sup> Indian trading plans are also "irrevocable," which precludes the possibility of strategic termination so prevalent in the United States.<sup>242</sup> Finally, in stark contrast to the U.S. regime, Indian compliance officers are required to publish the trading plan with stock exchanges upon the plan's approval.<sup>243</sup>

The 2015 Regulation also imposes a broad restriction on the "[c]ommunication or procurement" of unpublished price-sensitive information, "except where such communication is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations."<sup>244</sup> Without a clear definition of what constitutes a "legitimate purpose," however, some have expressed concern that the restrictions on communication are "too restrictive, leading to a virtual freeze in communication."<sup>245</sup>

Like many other recently adopted insider trading enforcement regimes around the globe, only time will tell how India's will be implemented, interpreted, and enforced. One thing, however, is clear, India's new insider trading enforcement regime broadens the scope of liability and offers improved clarity over its predecessor.

### *Brazil*

Brazil was one of the first countries to prohibit insider trading with the

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240. Prohibition of Insider Trading Regulations, part II, sec. 5.

241. *Id.* at part II, sec. 5.

242. *Id.* at part II, sec. 5(4) (providing that trading plans are "irrevocable"). See Anderson, *supra* note 8, at 357–59 (discussing the problem of early trading plan termination in the United States).

243. Prohibition of Insider Trading Regulations, part II, sec. 5. It is worth noting a bill that would require the SEC to consider similar reforms to SEC Rule 10b5-1 trading plans was recently passed in the U.S. House of Representatives. Promoting Transparent Standards for Corporate Insiders Act, H.R. 624, 116th Cong. (2019). This author has raised some concerns for adopting any such reforms under the current U.S. insider trading model. See John P. Anderson, *Undoing a Deal with the Devil: Some Challenges for Congress's Proposed Reform of Insider Trading Plans*, 13 VA. L. & BUS. REV. 303, 306-07 (2019) (discussing challenges for Congress-proposed reform of insider trading plans).

244. Prohibition of Insider Trading Regulations, Chapter II, sec. 3(1).

245. Jayashree P. Upadhyay, *Insider Trading: New Rules Confound India, Inc.*, BUS. STANDARD (Dec. 20, 2015), [http://www.business-standard.com/article/opinion/insider-trading-new-rules-confound-india-inc-115122000686\\_1.html](http://www.business-standard.com/article/opinion/insider-trading-new-rules-confound-india-inc-115122000686_1.html) [https://perma.cc/K4QE-5W2X].

promulgation of its Corporation Law of 1976 (1976 Law).<sup>246</sup> In that same year, another law created Brazil's civil securities enforcement arm, the Securities and Exchange Commission of Brazil (CVM).<sup>247</sup> Under the 1976 Law, directors and officers were made administratively liable for the use of material nonpublic information acquired by virtue of their position to gain a trading advantage in the purchase or sale of their company's shares.<sup>248</sup> A 1984 CVM regulation (1984 Regulation) then expanded civil liability for trading based on material nonpublic information beyond directors and managers to include controlling shareholders and "all of those who had directly accessed information due to their professional position, function, or in collaboration with the corporation, even if indirectly."<sup>249</sup> Despite these early beginnings, however, Brazil did not impose criminal liability for insider trading until 2001, with an amendment of the Capital Markets Law (2001 Amendment).<sup>250</sup> The 2001 Amendment made it a crime to use "relevant information not yet disclosed to the market of which one has knowledge and *about which one should keep confidential*, capable of providing to oneself or to a third party undue advantage by means of trading with securities, in one's own name or in the name of others."<sup>251</sup>

Thus, while administrative and civil liability for insider trading under Brazil's 1976 Law and its 1984 Regulation followed a broad equal-access model, criminal liability under the 2001 Amendment required the breach of some duty of confidentiality,<sup>252</sup> and therefore more closely resembled the American fiduciary-fraud model.<sup>253</sup> Brazil's administrative, civil, and criminal enforcement models were, however, rendered more uniform under a recent 2017 amendment that imposes broader criminal liability upon *anyone* who uses "any relevant non-disclosed information that may result, to oneself or to a third party, in unfair advantage, by trading securities on one's

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246. Lei No. 6.404 art. 155, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976.

247. Lei No. 6.385 art. 4, de 7 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.12.1976.

248. See Viviane Muller Prado, *Enforcing Insider Trading Law: The Brazilian Experience*, 38 MISS. C. L. REV. 93, 96–97 (2020) (“[S]ince 1976, the legal system has prohibited trade based on material, nonpublic information. . . . In origin, this legal provision was only applicable to directors and officers. . . .”).

249. *Id.* at 97 (summarizing the effect of Articles 9–11 of the 1984 CVM regulation).

250. Lei No. 6.385 art. 27-D, de 7 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.12.1976, amended by Lei No. 13.506, de 13 de Novembro de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.11.2017.

251. *Id.*, translated in Medeiros, *supra* note 94, at 4.

252. *Id.*

253. See, e.g., *O'Hagan*, 521 U.S. at 651–52 (holding that insider trading liability under U.S. law requires proof of a breach of a fiduciary or similar duty of “trust and confidence”).

or on [a] third party's behalf."<sup>254</sup> Violators are subject to one to five years' imprisonment and a criminal fine of up to three times the amount of the gain made or loss avoided from the trading; the penalty is increased by one third if the crime is committed by one who was under an independent duty (e.g., directors and managers) to keep the nonpublic information confidential.<sup>255</sup> The 2017 amendment also imposes tipper liability upon those "who disclose any confidential information related to a material fact to which this person has had access due to their job or position in an issuing company or by virtue of a commercial or professional relationship . . . with the issuing company."<sup>256</sup> As with India, it remains to be seen how the jurisprudence of Brazil's recently amended criminal insider trading regime will develop. As written, it is quite broad in scope. To date, however, no actions have been brought under the 2017 amendment.<sup>257</sup> Indeed, only two criminal insider trading cases have been brought to final disposition in Brazil since such conduct first became a crime in 2001.<sup>258</sup>

#### IV. TREND TOWARD UNIVERSALITY

While insider trading regimes around the globe may differ in terms of their scope and approach, the preceding section reflects an explosive trend toward insider-trading regulation over the last few decades. A 2002 study by Professors Uptal Bhattacharya and Hazem Daouk shows just how remarkable this trend has been.<sup>259</sup> According to that study, while no country had laws specifically regulating insider trading in the first third of the twentieth century, and only one country (the United States) regulated it in the second third, by the close of the twentieth century, every developed country around the globe, and nearly all emerging-market countries, had

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254. Lei No. 6.385 art. 27-D, de 7 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.12.1976, amended by Lei No. 13.506, de 13 de Novembro de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.11.2017, translated in Prado, *supra* note 248, at 98 n.29.

255. *Id.*; see also Allekos Genadopoulos, *Insider Trading in Brazil—Criminal and Administrative Perspective*, PACHECO NETO SANDEN TEISSEIRE ADVOGADOS (Nov. 12, 2017), <http://www.pnst.com.br/en/uncategorized/insider-trading-brazil-criminal-administrative-perspective/> [https://perma.cc/5GWF-PFJL] (discussing insider trading in Brazil from a criminal and administrative perspective).

256. Lei No. 6.385 art. 27-D, de 7 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 9.12.1976, amended by Lei No. 13.506, de 13 de Novembro de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 14.11.2017, translated in Prado, *supra* note 248, at 98 n.30.

257. See Prado, *supra* note 248, at 114 (noting that the last criminal action was brought in 2010).

258. See Prado, *supra* note 248, at 113 ("Until 2018, the Brazilian enforcement system had only produced two final decisions on the criminal level involving insider trading cases.").

259. Bhattacharya & Daouk, *supra* note 95, at 89–90.

adopted insider trading regulations.<sup>260</sup> It may be tempting to draw some conclusions from this significant trend:

- (1) The near-universal adoption of insider-trading regulations reflects a global, cross-cultural recognition that insider trading is unethical, economically inefficient, or is otherwise harmful to securities markets.
- (2) Although the U.S. was the only country regulating insider trading for a number of years, the recent trend toward near-universal regulation offers compelling evidence that such regulation is objectively important and valid.
- (3) The near-universal adoption of insider-trading regulations suggests that insider trading proscriptions are enforced around the globe and—based on (2)—this is progress.

In fact, some SEC staff members seem to have drawn precisely these conclusions in an address to a European audience in 1998:

[T]he European Economic Community has formally recognized the importance of insider trading prohibitions by passing a directive requiring its members to adopt insider trading legislation. The preamble to the directive stresses the economic importance of a healthy securities market, recognizes that maintaining healthy markets requires investor confidence and acknowledges that investor confidence depends on the “assurance afforded to investors that they are placed on an equal footing and that they will be protected against the improper use of inside information.” These precepts echo around the world as reports of increased insider trading regulation and enforcement efforts are daily news.<sup>261</sup>

Yet, rather than reflecting a cultural convergence on the need to regulate insider trading, a cynic might argue that the very need for the European directive on insider trading reflected the fact that, as indicated above, a number of European countries were unwilling to adopt insider trading regulations without being forced to do so, and that the countries that had adopted such regulations on their own were not enforcing them.<sup>262</sup> If this cynical description of events offers a more accurate explanation of why insider trading regulations were recently adopted across Europe and elsewhere around the globe, then perhaps the recent trend toward near-universal insider trading regulation does not reflect an emerging cultural

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260. Bhattacharya & Daouk, *supra* note 95, at 89–90.

261. Newkirk and Robertson, *supra* note 56 (quoting Council Directive 89/592 of Nov. 13, 1989, Coordinating Regulations on Insider Trading, 1 Common Mkt. Rep. (CCH) ¶ 1761).

262. See Beny, *supra* note 95, at 266 (noting that some countries have allowed insiders to “trade with impunity notwithstanding the laws on the books”).

consensus concerning the dangers of insider trading, but rather reflects the phenomenon of regulatory ritualism. The problem of ritualism has been a persistent theme in recent international human rights scholarship, and there are some parallels between global trends in human rights law and insider trading law that warrant inspection. Examples of ritualism in the context of international human rights may warrant some caution against drawing hasty conclusions from perceived universality in the context of insider trading.

#### V. THE PROBLEM OF RITUALISM

Our contemporary international human rights regime is manifest in a series of post-World War II treaty documents.<sup>263</sup> Some commentators have suggested that the substance of these declarations, charters, and conventions reflects little more than the rights agenda of the Allied Powers who guided their drafting and who incentivized their adoption by non-Western states after World War II.<sup>264</sup> Nevertheless, despite this Western influence, the modern human rights system appears to have been a dramatic success, achieving almost universal acceptance in the international community during the short span of a few decades. For example, the International Covenant on Civil and Political Rights (ICCPR) has 173 state members and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) has 171 state members.<sup>265</sup> Such widespread acceptance is particularly impressive in light of the fact that both covenants require member states to incorporate their extensive rights provisions into their municipal law.<sup>266</sup> As in the case of insider trading, it may be tempting to draw some conclusions from this rapid global convergence:

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263. The principal treaty documents are the United Nations Charter (UNC) (1945), the Universal Declaration of Human Rights (UNDHR) (1948), the International Covenant on Civil and Political Rights (ICCPR) (1976), and the International Covenant of Economic, Social, and Cultural Rights (ICESCR) (1976). Together these instruments are typically referred to as the International Bill of Rights. All except the UNDHR are legally binding treaties. The UNDHR is merely hortatory in nature.

264. See, e.g., Makau Mutua, *The Complexity of Universalism in Human Rights*, in HUMAN RIGHTS WITH MODESTY 51, 61 (Andres Sajo, ed., 2004) (noting that “[n]on-Western philosophies and traditions particularly on the nature of man and the purposes for political society were either unrepresented or marginalized during the early formation of human rights[,]” and therefore “[i]nternational human rights fall within the historical continuum of the European colonial project”).

265. *Ratification of Status of Ratification Interactive Dashboard*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM’N, <http://indicators.ohchr.org/> [<https://perma.cc/9XH4-7FDX>] (last visited Oct. 7, 2021).

266. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 2, §1, Dec. 16, 1966, 993 U.N.T.S. 3.

- (i) The near-universal adoption of these human-rights instruments reflects a global, cross-cultural embrace of the values reflected in these instruments.
- (ii) Although the modern human rights regime found its origins in once controversial Western liberal cultural values shared by the Allied Powers at the close of WWII, the recent trend toward near-universal acceptance confirms the validity of these values.
- (iii) The near-universal adoption of these human rights instruments proves that the rights they comprise are in fact being protected within the member states and—based on (ii)—this is progress.

Although it is tempting to draw these conclusions, many human rights scholars would caution against it.

In *Social Theory and Social Structure*, Professor Robert Merton identifies different modes of adaptation to normative orders imposed upon individuals or cultures from an external source: conformity, innovation, ritualism, retreatism, and rebellion.<sup>267</sup> Ritualism “occurs when there is no acceptance of particular normative goals, but great deference is paid to the formal institutions that support them. It can be defined as ‘acceptance of institutionalized means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves.’”<sup>268</sup>

Professor Hilary Charlesworth and others have applied this concept of ritualism to the context of international human rights. Human rights ritualism is “a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses.”<sup>269</sup> States that cope with the contemporary international human rights regime ritualistically “accept human rights treaty commitments to earn international approval, but they resist the changes that the treaty obligations require.”<sup>270</sup> Acts of ritualism in this context include “ratifying human rights treaties without implementing their provisions domestically; perfunctory reporting to international human rights bodies; [and] failing to provide remedies for human rights breaches or to develop policy to prevent infringements in the future.”<sup>271</sup>

267. ROBERT MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 194 (1968). See also Hilary Charlesworth & Emma Larking, *Introduction: The Regulatory Power of the Universal Periodic Review*, in *HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM* 10 (Hillary Charlesworth & Emma Larking eds., 2014) (discussing the Universal Periodic Review in international human rights monitoring in the context of ritualism as a way of adapting to a normative order).

268. Charlesworth, *supra* note 13, at 12 (quoting JOHN BRAITHWAITE ET AL., *REGULATING AGED CARE: RITUALISM AND THE NEW PYRAMID* 7 (2007)).

269. Charlesworth, *supra* note 13, at 12.

270. Charlesworth, *supra* note 13, at 12–13.

271. Charlesworth & Larking, *supra* note 267, at 18.

Sadly, human rights ritualism is not the exception. Indeed, Professor Charlesworth points out that “rights ritualism is a more common response than an outright rejection of human rights standards and institutions.”<sup>272</sup> By outwardly ratifying international treaties, and simply “invoking and celebrating the language of human rights without any intention to respect, protect and fulfill them in reality,”<sup>273</sup> countries have found that they can enjoy many of the carrots associated with membership in the international human rights community (e.g., aid, trade, and military cooperation) while avoiding the sticks reserved for outsiders (e.g., economic sanctions, exclusion from international counsels and summits, and even military intervention).<sup>274</sup>

Professor Charlesworth offers the Cambodian experience as just one example. The UN-brokered 1991 Paris Peace Agreement (winning a ceasefire between Cambodia and Vietnam) made a brokered peace contingent on Cambodia’s willingness to guarantee its citizens all the rights and freedoms embodied in the major human rights instruments.<sup>275</sup> Cambodia then ratified both the ICCPR and ICESCR (as well as the Convention against Torture and the Convention on the Rights of the Child) in 1992.<sup>276</sup> Since that time, “there has been a great deal of human rights talk in Cambodia but very little actual progress on the protection of human rights.”<sup>277</sup> And this strategy of human rights ritualism “seems to have been successful for Cambodia in flying under the radar of international scrutiny.”<sup>278</sup>

Professor Eric Posner, in his book, *The Twilight of Human Rights Law*, also recognizes the problem of ritualism as being pervasive, noting that though ratification of human rights treaties has become “all but

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272. Charlesworth, *supra* note 13, at 12.

273. Walter Kalin, *Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal*, in HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 25, 28 (Hillary Charlesworth & Emma Larking eds., 2014).

274. See, e.g., ERIC A. POSNER, *Do States Comply with Human Rights Treaties*, in THE TWILIGHT OF HUMAN RIGHTS LAW 69, 70 (2014) (noting that “[s]ome Western governments make aid conditional on compliance, or at least improved compliance, with human rights norms”); Charlesworth & Larking, *supra* note 267, at 18 (noting that countries can gain the “positive reputational benefits or legitimacy associated with human rights commitments.”).

275. Charlesworth, *supra* note 13, at 3–5.

276. Charlesworth, *supra* note 13, at 13.

277. Charlesworth, *supra* note 13, at 9.

278. Charlesworth, *supra* note 13, at 14. There is a rich literature identifying examples of human rights ritualism elsewhere. See, e.g., Melanie O’Brien, *Ritualism and the Erosion of Human Rights*, NEW MANDALA (Feb. 29, 2016), <http://www.newmandala.org/ritualism-and-the-erosion-of-human-rights/> [<https://perma.cc/7K9T-9WUA>] (discussing human rights ritualism in China); HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 25-83 (Hillary Charlesworth & Emma Larking eds., 2014) (discussing ritualism in the context of the Universal Periodic Review in international human rights monitoring).

compulsory[,]”<sup>279</sup> few parties take their obligations seriously.<sup>280</sup> Indeed, Posner notes that most non-liberal states are “apt to treat human rights treaties as propaganda.”<sup>281</sup> For example, as Professor Walter Kalin notes, some “Islamic countries with traditional understandings of gender roles regularly make recommendations regarding women’s rights, such as ‘to eliminate all forms of discrimination against women’ (Bahrain) or to ‘enact laws in the area of equality of opportunity and rights for men and women’ (Kuwait).”<sup>282</sup>

Why do exporters of human rights norms and genuine proponents of the international human rights regime permit such blatant ritualism? The answer may be that accepting ritualism is the price of universality, and universality is necessary to lend an air of legitimacy and authority to the broader regime and its goals.<sup>283</sup> Moreover, as Kalin explains, even obvious expressions of ritualism, such as Bahrain’s and Kuwait’s advocacy for gender equality, can improve the legal status of the regime because, when made repeatedly, they can “be seen as an expression of *opinio juris* contributing to the development of customary international law.”<sup>284</sup> More still, while Professor Takele Bulto recognizes that, for example, the “uniform engagement of African states with the HRC’s UPR mechanism is more closely associated with ritualism than genuine commitment to the values inherent in the system[,]” the mere fact of engagement improves the chances of “norm cascade and norm infiltration.”<sup>285</sup>

Nevertheless, appreciating the pervasiveness of human rights ritualism also forces one to question conclusions (i) through (iii) above. For instance,

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279. POSNER, *supra* note 274, at 21.

280. Posner notes, for example, that while nearly all states have ratified the ICCPR, Freedom House classifies 47 states as “not free.” POSNER, *supra* note 274, at 32.

281. POSNER, *supra* note 274, at 37.

282. Kalin, *supra* note 273, at 35 (quoting Human Rights Council, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review – Oman*, 17th Sess., U.N. Doc. A/HRC/17/7, at para. 89 (Mar. 24, 2011); Human Rights Council, *Universal Periodic Review: Report of the Working Group on the Universal Periodic Review – Armenia*, 15th sess., U.N. Doc. A/HRC/15/9, at para. 94 (July 6, 2010)).

283. For example, as Kalin notes, the Human Rights Council’s Universal Periodic Review (“UPR”) system “is based on and draws its legitimacy from its universal and non-selective character and thus would quickly degenerate into ritualism should some states decide to withdraw from the process.” Yet, “[p]aradoxically, the universality of the UPR contributes to ritualism insofar as it provides states that have a weak human rights record and low commitment with an opportunity to claim they are dedicated to human rights simply by virtue of participation in the UPR and accepting recommendations.” Kalin, *supra* note 273, at 30–31.

284. Kalin, *supra* note 273, at 36.

285. Takele Soboka Bulto, *Africa’s Engagement with the Universal Periodic Review: Commitment or Capitulation?*, in HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RITUALS AND RITUALISM 235, 252–54 (Hillary Charlesworth & Emma Larking eds., 2014).

given the prevalence of ritualism, near universal ratification of the principal human rights instruments tells us very little about whether the citizens and leadership of the member states have authentically embraced the core values reflected in those instruments. If member states do not authentically embrace these values, then there is little warrant for the conclusion that universal adoption of the instruments offers evidence of their validity. Finally, pervasive ritualism also precludes the inference from universal adoption to the conclusion that human rights are actually being protected in member states.

There is evidence that the recent trend toward near-universal regulation of insider trading around the globe may also be explained by ritualism. Consider Germany, Europe's largest economy.<sup>286</sup> As one commentator notes, “[f]or a long time, Germany represented a capital marketplace which refused to take the regulation of insider trading seriously.”<sup>287</sup> Some have suggested that, historically, insider trading in Germany was simply regarded as taking advantage of a fortunate tip.<sup>288</sup> It was “what financial life was all about.”<sup>289</sup> Insider trading guidelines were adopted in Germany in 1970, but “[they] were only a voluntary code of behavior to which one had to subject oneself expressly.”<sup>290</sup> Germany grudgingly adopted insider trading regulations after the 1989 Directive was adopted because it had no choice—and because it recognized that, without the regulations, “it would lose its reputation as a developed capital market.”<sup>291</sup> Nevertheless, Germany delayed adoption of its insider trading regulations for another five years (until 1994), two years after the Directive's 1992 deadline.<sup>292</sup> As Professor Gevurtz suggests, in some cases, the only goal served by adopting an insider trading prohibition “might be simply to have such a law, in which event, the

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286. See, e.g., *List of European Countries by GDP*, STATISTICS TIMES, <https://statisticstimes.com/economy/european-countries-by-gdp.php> [<https://perma.cc/9W5T-RQMA>] (last visited Oct. 23, 2021) (listing Germany as “the largest economy in Europe”).

287. Jeorg Hartman, *Insider Trading: An Economic and Legal Problem: How Would O'Hagan Come Out Under the New German Securities Trading Act*, 1 GONZ. J. INT'L L. 46, 72 (1997-1998).

288. Council Regulation 5313375 (2015) (quoting *Insider Trading Law Possible, Says Exchange Chief Von Rosen*, 2 Int'l Sec. Reg. Rep. (BNA) No. 9, at 3–4 (Apr. 12, 1989)).

289. *A Survey of Europe's Internal Market*, ECONOMIST, July 8, 1989, at 17.

290. Hartman, *supra* note 287, at 72.

291. Hartman, *supra* note 287, at 72. See also Richard S. Biegen et al., *Countries Strengthen Insider Trading Laws*, NAT'L L.J. (Nov. 13, 1995), at C22 (noting that Germany's adoption of insider trading legislation “was largely a response to international pressure, especially from the European Community”); Gevurtz, *supra* note 125, at 66 (noting that Germany only adopted insider trading laws “over significant internal opposition and resulting delay”).

292. Heminway, *supra* note 60, at 119.

law, by its very existence, achieves its objective.”<sup>293</sup> And indeed the “insider trading laws of some European Community member nations, who must adopt prohibitions in order to comply with the EU Directive, might illustrate this.”<sup>294</sup> As one commentator put it at the time of the Directive’s adoption, “Seen in the worst light, the [D]irective merely assists the [European Community] in its promotion of a dangerous imagery of regulation: the [D]irective’s denunciation of insider trading conveys the false impression of a comprehensively-regulated marketplace.”<sup>295</sup>

In addition to the European Union, other multinational bodies began associating carrots and sticks with the adoption of insider trading regulations. For example, the International Organization of Securities Commissions (IOSCO) began including an insider trading regulation among its “Objectives of Securities Regulation” in 1998.<sup>296</sup> Approximately eighty-five percent of the world’s markets are members of the IOSCO, and the World Bank and International Monetary Fund use the IOSCO’s objectives to review the “financial health” of countries.<sup>297</sup>

Moreover, the American SEC’s considerable influence on international market policies cannot be underestimated. While expressing an interest in recognizing “cultural differences,” in its 1988 Policy Statement on the Regulation of International Securities Markets,<sup>298</sup> the SEC made it clear that its goal was to “minimize differences between systems.”<sup>299</sup> The 1988 Policy Statement also noted that the SEC “believes it has a responsibility to assume a leadership role” in this effort towards uniformity.<sup>300</sup> Indeed, as Professor Franklin A. Gevurtz suggests, the “instinctive imitation spawned by the

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293. Gevurtz, *supra* note 125, at 89.

294. Gevurtz, *supra* note 125, at 89.

295. Warren, *supra* note 140, at 1040.

296. Int’l Org. of Sec. Comm’ns [OICU-IOSCO], *Objectives and Principles of Securities Regulation* (May 2003), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf> [<https://perma.cc/9A25-HGY6>]; see also Int’l Org. of Sec. Comm’ns [OICU-IOSCO], *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation*, at 241, (May 2017), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf> [<https://perma.cc/H6AR-RMDQ>] (“Principle 36: Regulation should be designed to detect and deter manipulation and other unfair trading practices.”).

297. See, e.g., Int’l Org. of Sec. Comm’ns [OICU-IOSCO], *Fact Sheet* (Nov. 2020), <https://www.iosco.org/about/pdf/IOSCO-Fact-Sheet.pdf> [<https://perma.cc/V3QZ-QBFW>] (noting that the IOSCO Objectives and Principles of Securities Regulation “form the basis for the evaluation of the securities sector for the Financial Sector Assessment Programs (FSAPs) of the International Monetary Fund (IMF) and the World Bank”).

298. Policy Statement of the Securities and Exchange Commission on the Regulation of International Securities Markets, Exchange Act Release No. 6807, [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,341 (Nov. 1988) [hereinafter 1988 SEC Policy Statement].

299. See Mahoney, *supra* note 61, at 312 (quoting language from the 1988 SEC Policy Statement).

300. Mahoney, *supra* note 61, at 312

growing cultural and economic dominance of the United States at the close of the Twentieth Century” must be part of any explanation for the recent surge in insider trading prohibitions.<sup>301</sup>

It has already been noted that the European Directive and Japan’s adoption of insider trading regulations likely came about at least in part due to “an international effort to encourage insider trading regulation consistent with the predominant U.S. model.”<sup>302</sup> Recall that there “was no internal pressure” for Japan’s adoption of its Securities and Exchange Act in 1947; rather, the Act “arose as a result of the Allied Occupation.”<sup>303</sup> Similarly, as commentators put it at the time, the 1988 insider trading amendments were intended to “show foreign governments, especially the U.S., that the Finance Ministry [was] determined to lift its ethical standards[,]”<sup>304</sup> or at least to “create the *appearance* of a change.”<sup>305</sup> Indeed, it has been suggested that Japan’s failure to recognize the misappropriation theory of insider trading liability in its 1988 Amendment may have reflected an attempt to simply map the Japanese law onto the then-existing U.S. regime’s scope of coverage.<sup>306</sup> The misappropriation theory was not recognized by the U.S. Supreme Court until 1997.<sup>307</sup> Commissioner David Ruder even stated during his 1988 visit to Japan that the new law “covers 98 percent of what we cover in the United States.”<sup>308</sup> But Japan’s failure to subsequently expand the scope of their insider trading laws to match coverage in the United States “might appear to be the reaction of a government which was not sure how much it really wanted to enact an insider trading prohibition” in the first place.<sup>309</sup>

Also noted above, the SEC offered to provide “technical advice” and assistance in drafting China’s insider trading laws.<sup>310</sup> And, as one commentator suggests, China agreed to this U.S. influence at least in part, “to meet international standards of securities regulation in order to attract more foreign investment.”<sup>311</sup> Consequently, as one scholar explains, the

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301. Gevurtz, *supra* note 125, at 67.

302. Heminway, *supra* note 60, at 115, 118.

303. Swan, *supra* note 84, at 279.

304. Jimbo, *supra* note 113.

305. Swan, *supra* note 84, at 284 (italics added).

306. See Gevurtz, *supra* note 125, at 84 (noting the “similarity between the scope of the Japanese prohibition, and the scope of the United States Supreme Court’s traditional theory”).

307. The Supreme Court did not recognize the misappropriation theory of insider trading liability until its decision in *United States v. O’Hagan*, 521 U.S. 642 (1997).

308. Jimbo, *supra* note 113.

309. Gevurtz, *supra* note 125, at 85.

310. Minkang Gu & Robert C. Art, *Securitization of State Ownership: Chinese Securities Law*, 18 MICH. J. INT’L L. 115, 117 (1997); see also Duan, *supra* note 92, at 143 (“The general framework of China’s insider trading laws, established with the assistance of the U.S. SEC, largely mirrors U.S. law. . .”).

311. Gu & Art, *supra* note 310, at 117.

“convergence of laws [pertaining to insider trading] can be attributed to convergence of cultural attitudes only marginally. For the most part . . . political pressures, primarily from the United States [and international bodies under American influence], [are] playing a major role as well.”<sup>312</sup> At a minimum, as one commentator notes, the “very magnitude of the SEC’s efforts concerning multijurisdictional insider trading belies the conclusion that foreign markets and regulators are providing the impetus behind the expansion of insider trading prohibitions.”<sup>313</sup>

Other evidence of an absence of cultural consensus concerning the regulation of insider trading may be found in evidence of weak enforcement. As Professor Laura Nyantung Beny explains, “enforcement rather than enactment” is the best measure of a country’s commitment to a regulation “because it requires an expenditure of scarce resources” and “demonstrates political and legal will to give the insider trading prohibition teeth.”<sup>314</sup> While it is true that recent decades have witnessed an explosion in the number of insider trading regulations found in statute books around the globe, as has often been the case in context of human rights, this has not translated into a similar explosion in enforcement.

For instance, even the United Kingdom, which was out in front of most of Europe in adopting insider trading regulations, has lagged far behind the U.S. in enforcement and, despite the broad enforcement powers and discretion at its regulators’ disposal, has earned the reputation of being a “‘light touch’ jurisdiction.”<sup>315</sup> Unsurprisingly, Germany’s adoption of insider trading regulations was followed by weak enforcement,<sup>316</sup> and many other European countries (e.g., Austria, Ireland, and Luxembourg) had not enforced their laws at all as of the date of the latest comprehensive worldwide

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312. Licht, *supra* note 60, at 198.

313. Mahoney, *supra* note 61, at 315–16.

314. Beny, *supra* note 95, at 280; *see also* Bhattacharya & Daouk, *supra* note 95, at 96–97 (finding that a nation’s enforcement of insider trading laws is associated with a reduction in the cost of equity).

315. Alexander, *supra* note 73, at 407; *See* Thompson, *supra* note 89, at 6 (noting that the UK’s Financial Services Authority has “struggled to convict people of insider trading and lags behind the United States when it comes to enforcement”). There is some evidence that attitudes have changed since the financial crisis of the early 2000s, and that regulators are becoming more aggressive in the UK. *See* Lain MacNeil, *The Trajectory of Regulatory Reform in the UK in the Wake of the Financial Crisis*, 11 EUR. BUS. ORG. L. REV. 483, 497–98 (2010) (noting that “[r]ecent high-profile investigations into insider-dealing rings said to be operating among market professionals have provided plenty of high-profile evidence of the new” more aggressive approach).

316. *See* Hugo Miller, *In Land of Discretion, No Jail for Swiss Insider Trading*, BLOOMBERG (Dec. 2, 2018, 11:00 PM), <https://www.bloomberg.com/news/articles/2018-12-03/swiss-inside-traders-dodge-jail-in-land-where-discretion-rules> [<https://perma.cc/6W7H-ZQEJ>] at 4 (noting that “criminal convictions remain rare” in Germany).

data collection.<sup>317</sup> In addition, neither Austria, Bulgaria, Slovakia, Czech Republic, Estonia, Finland, nor Slovenia criminalized insider trading and market manipulation until the European Commission compelled it with the adoption of the Directive on Criminal Sanctions for Market Abuse (CSMAD), which required that “[m]ember States . . . ensure that the criminal offences of insider dealing and market manipulation are subject to criminal sanctions.”<sup>318</sup> Presumably, there would be no need for any such directive if a number of European countries were not resisting criminal liability for insider trading.

It was noted above that the Swiss sometimes refer to their insider trading laws as “lex Americana,”<sup>319</sup> and this lack of cultural identity is reflected in that country’s weak enforcement.<sup>320</sup> Even since Switzerland’s 2013 overhaul of its insider trading laws, “many insiders trade with impunity” and “convictions . . . are rare. . . . [P]unishments are lax.”<sup>321</sup> Other developed economies such as Japan, Canada, Russia, China, Hong Kong, and New Zealand have lacked vigor in their insider trading enforcement.<sup>322</sup> Moreover, what little enforcement there is in these countries is often attributable to outside (usually U.S.) political influence.<sup>323</sup>

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317. Beny, *supra* note 95, at 287.

318. European Commission Press Release IP/11/1218, European Commission Seeks Criminal Sanctions for Insider Dealing and Market Manipulation to Improve Deterrence and Market Integrity (Oct. 20, 2011), [http://europa.eu/rapid/press-release\\_IP-11-1218\\_en.htm](http://europa.eu/rapid/press-release_IP-11-1218_en.htm) [https://perma.cc/8ATE-64ZB]. See *EU Calls for Criminal Penalties for Insider Trading*, EUBUSINESS (Oct. 17, 2011), <http://www.eubusiness.com/news-eu/finance-economy.cxy> [https://perma.cc/H8NP-AJEQ]; see also *Commission Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation*, COM (2011) 654 final (Oct. 20, 2011). CSMAD went live on July 3, 2016. See European Commission Press Release IP/11/1218, New Framework on Market Abuse Published in the Official Journal (Jul. 3, 2016), <http://europa.eu/rapid/midday-express-12-06-2014.htm?locale=en> [https://perma.cc/8E3E-R2Z5].

319. Mahoney, *supra* note 61, at 317–18.

320. See Miller, *supra* note 316, at 1 (noting that Switzerland lacks the “enforcement culture that exists elsewhere” for insider trading laws).

321. See Miller, *supra* note 316, at 1 (The author notes that since “a 2013 overhaul of insider-trading statutes, only 10 people have been convicted of market abuse—eight by summary penalty order and two by trial. . . . Nobody went to prison, and one fine was little more than the price of a yearly rail pass.”).

322. See, e.g., Beny & Anand, *supra* note 179, at 229 (“Because of lax public enforcement and the rarity of private enforcement, insider trading has been viewed as being relatively prevalent in Canada.”). See also Beny, *supra* note 95, at 287 (noting that as of 2000, neither China nor New Zealand had enforced their insider trading laws even once); Thompson, *supra* note 89, at 6–7 (noting little enforcement in Hong Kong and minimal fines for insider trading in Japan); Walker & Simpson, *supra* note 168, at 404 (pointing out that as of 2013, there had been no high profile insider trading enforcement actions in New Zealand).

323. See Heminway, *supra* note 60, at 118 (arguing that increased enforcement in Japan is “a response to pressure from the United States”); see also Ramzi Nasser, *The Morality of Insider Trading in the United States and Abroad*, 52 OKLA. L. REV. 377, 409 (1999) (“In

Insider trading enforcement is weaker still for emerging-market countries. Of the sixty-five emerging-market countries that had enacted insider trading regulations by 2000, forty-five had yet to bring a single enforcement action by that date.<sup>324</sup> India offers one example of regulatory ritualism in this context. As noted above, India adopted insider trading regulations in 1992, but it took its regulators “17 years to realize the term ‘insider trading’ did not literally mean ‘insiders within the company.’”<sup>325</sup> Yet even after achieving this “humble” realization, a 2011 review found that India had never won a single insider trading conviction.<sup>326</sup>

Explanations for weak enforcement vary. Some are cultural. For example, one commentator suggests that, in addition to “grossly inadequate” enforcement mechanisms and the lack of “resources and power necessary to effectively enforce [its] *Securities Law*,” China’s culture is to blame for the “ineffective enforcement” of its insider trading provisions.<sup>327</sup> The problem is that “the Chinese culture, specifically, China’s traditional social values,” place a “heavy emphasis on family ties and ‘connections’ with friends and associates.” Consequently, “[i]t is difficult, if not impossible, for relatives or friends not to do favors for each other, e.g., to pass along ‘valuable’ information.”<sup>328</sup> In addition, “to a certain extent, insider relationships and insider tipping are viewed as a form of business development.” Indeed for some in China, “people with insider information feel a moral obligation to ‘tip’ relatives, friends, and business associates.”<sup>329</sup>

Another explanation for weak enforcement in China, which may also explain weak enforcement in other mixed economies, is potential conflicts between state regulators and state owners of the traded securities.<sup>330</sup> Since the Chinese government has retained majority ownership in many of its publicly-traded companies, one commentator notes that the Chinese regulators are naturally “hesitant to take action against [a state-owned

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recent years, the United States has put pressure on other countries to punish inside traders in the same way they are punished in the United States. The United States’ influence has helped bring about some arrests as well as some prison sentences.”).

324. Beny, *supra* note 95, at 287–89.

325. Thompson, *supra* note 89, at 8.

326. Thompson, *supra* note 89, at 8.

327. Duan, *supra* note 92, at 145–49.

328. Duan, *supra* note 92, at 145.

329. Duan, *supra* note 92, at 145.

330. See, e.g., Howson, *supra* note 207, at 329 (noting the conflicting roles of the Chinese securities regulators: “tasked on one side with the protection of investors and market transparency, and on the other side with ‘provid[ing] the [state-owned enterprises] with preferential access to the financial resources of the capital market for the best interests of the government’”) (alteration in original) (quoting Sherr Han, *A Comparative Study of Insider Trading Regulation Enforcement in the U.S. and China*, 9 J. BUS. & SEC. L. 41, 56–60 (2007)).

enterprise], which action may negatively affect state shares and assets.”<sup>331</sup> Moreover, regulators and the officers of state-owned enterprises are “often connected in one way or another, making it doubly difficult for the [regulators] to enforce insider trading laws” against those officers.<sup>332</sup>

Similar cultural obstacles to enforcement have been noted in Japan. For example, shortly after the adoption of the 1988 Amendment, a senior officer at a major Japanese securities firm resisted the notion that new regulations of insider trading improved fairness.<sup>333</sup> He argued that the “stock market reflects the country’s characteristics, and the Japanese stock market is formed in a way which is best suited for the Japanese people.”<sup>334</sup> He went on, “if foreign investors want to win in Japan, they have to learn the Japanese way—as we had to learn their way when we entered their market—instead of demanding we change our custom.”<sup>335</sup> Another executive expressly challenged the idea that insider trading was unfair in Japan, though leaving open the possibility that it may be unfair elsewhere: “If everyone who participates in market activities is more less [sic] a beneficiary of insider information, do you call it unfair?” He added, “If so, I’d like to know who are outsiders. Outsiders in the Japanese stock market are those who have nothing to do with the stock market.”<sup>336</sup> As one commentator notes, since Japan “has always been an insider society where ‘the rights of the insider—the tight-knit village, the clan, the alumni class—always have been paramount,’” such “strong cultural norms . . . may hinder the laws’ ability to stop insider trading” in Japan.<sup>337</sup> In short, “[i]nsider trading is simply not viewed as wrong by many of the participants in Japan’s securities markets,” and it can be difficult to enforce a criminal law without moral authority.<sup>338</sup>

There is much evidence suggesting that the recent global trend toward the adoption of insider trading laws may be explained as regulatory ritualism. And, just as in the context of human rights, this evidence of ritualism should force us to pause before drawing any strong conclusions from the near-universal regulation of insider trading. Specifically, given the prevalence of ritualism, the near-universal adoption of insider trading laws may tell us very little about the universal cultural and political embrace of the policy

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331. Duan, *supra* note 92, at 148.

332. Duan, *supra* note 92, at 148 (also noting that this potential “also exists between the [regulators] and fund management and securities companies” because many “of the executives and directors of fund and securities companies are former officials” in the regulatory agency) (alteration in original).

333. Jimbo, *supra* note 113.

334. Jimbo, *supra* note 113.

335. Jimbo, *supra* note 113.

336. Jimbo, *supra* note 113.

337. Swan, *supra* note 84, at 300.

338. Swan, *supra* note 84, at 300.

rationales that purportedly inform their insider trading regulations, nor does pervasive regulation necessarily support the validity of those rationales. Indeed, the evidence suggests that the majority of states that have adopted insider trading regulations do not enforce them with vigor (if they are enforced at all). In fact, as is often the case in the human rights context, the lack of enforcement tends to suggest that many countries may have adopted insider trading laws precisely to deflect international scrutiny of their markets. Moreover, also similar to the context of human rights, it seems clear the U.S. (as the principal exporter of the value of insider-trading regulation) has an incentive to turn a blind eye to such ritualism—for the mere appearance of universality lends authority to its own enforcement regime at home and abroad. As one commentator notes, “[w]ere internationalization [of laissez faire insider trading regimes] to produce any substantial evidence that investors in the aggregate are not overly concerned with insider trading, the theoretical underpinnings of [the SEC’s] vast regulatory and enforcement history would be threatened.”<sup>339</sup>

## VI. LESSONS FROM THE GLOBAL EXPERIENCE

What lessons can be learned from the international experience of insider trading regulation summarized thus far? To begin, the comparative analysis above suggests that there is no one way to organize an insider trading enforcement regime. Europe, Australia, Russia, and India offer examples of broad parity-of-information regimes. Japan, Canada, and China embody variations of the equal-access model. And countries that do not (or did not) regulate insider trading at all offer current and historical examples of laissez-faire regimes. It is instructive that markets have functioned under all of these models with varying degrees of success.<sup>340</sup> Moreover, the international experiences vary in other ways. Canada offers a working model of insider trading regulation that is left to provincial governments. All of the regimes summarized above are statute-based, rather than developed through the common law as in the United States. Many of these statutes define elements of insider trading liability with great specificity, and some permit issuers to aid in these definitions. All of these lessons and examples may prove useful to scholars, jurists, and legislators as reform is contemplated in the United States.

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339. Mahoney, *supra* note 61, at 314.

340. See, e.g., Jeff Desjardins, *Charting the World’s Major Stock Markets on the Same Scale (1990-2019)*, VISUAL CAPITALIST (Dec. 13, 2019), <https://www.visualcapitalist.com/worlds-major-stock-markets-same-scale-1990-2019/> [<https://perma.cc/4JKN-FSWR>] (comparing the relative success of stock markets among the world’s largest economies).

### *Codification*

For example, one of the principal arguments offered by the SEC and legislators against codification of a clear definition of insider trading in the United States has been that any express statutory definition would undermine flexibility in enforcement.<sup>341</sup> As Professor Stephen Bainbridge explains, there has been a fear “that any definition would have to be either so broad as to be unworkable or so narrow as to reduce the SEC’s and the courts’ flexibility to address new forms of trading.”<sup>342</sup> But the global example dulls this concern. As the summary above reflects, the United States is perhaps the only country in the world that leaves the criminal enforcement of its insider trading regime to common-law development.<sup>343</sup> All other countries have preferred implementation by statutory definition. The international example therefore offers some empirical evidence to the conclusion that the SEC’s concerns over statutory implementation of an insider trading regime may be overblown. In fact, as noted above, Japan rejected reliance on the broad anti-securities-fraud provision (which tracks the language of Exchange Act Section 10(b) in the United States) “on the theory that [this provision] could not be strictly construed to cover insider trading, and because the concept of insider trading itself was not sufficiently defined in Japanese Law [at the time] to trigger criminal penalties.”<sup>344</sup>

### *Statutory Definitions*

Should legislators in the United States choose to drop our notoriously confusing and vague common-law, fiduciary-cum-fraud enforcement regime<sup>345</sup> in favor of a simpler statutory model with broader reach, they may find the detailed parity-of-information models in Australia, Europe, and India instructive. If, however, there is a desire to preserve the current fiduciary-cum-fraud model, international examples can aid in drafting statutory elements that would offer dramatic improvements in clarity and therefore bring greater certainty to traders. Two examples follow which focus on the notoriously vague insider trading elements of “materiality” and “publicity.”

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341. BAINBRIDGE, *supra* note 4, at 145.

342. BAINBRIDGE, *supra* note 4, at 145 n. 30.

343. This author has failed to identify a single common-law insider trading enforcement regime outside of the United States.

344. Akashi, *supra* note 81, at 1298.

345. See Anderson, *supra* note 40, at 284–93 (offering a detailed account of the ways in which the current fiduciary-cum-fraud regime in the United States is unjust, irrational, and incoherent).

The test for when information will be deemed “material” has been the source of much controversy in the United States.<sup>346</sup> Materiality is a relative concept and cannot therefore be defined by statute with the precision necessary to offer absolute *ex ante* certainty to traders. Even assigning an objective percentage point (say, information that moves a stock’s price five percent) would not give advance notice to traders because it will still be difficult, if not impossible, to determine the price effect of such information in advance. It can even be difficult to determine price influence *ex post* because price movements can have multiple causes (both market-driven and firm-specific). The most promising tack to statutory reform in this area may therefore be to combine a general definition with an exclusive list of types of information that will be deemed material if they satisfy that definition. So, for example, following the European lead, “materiality” might be defined as, say, “information of a precise nature that is of a type identified in statutory subsection [x] and which relates, directly or indirectly, to an issuer or a security, and that, if made public, would likely have a significant effect on the price of that security.”<sup>347</sup> Statutory subsection [x] could then offer the exclusive list of types of information that may be material. Making the list exclusive would help to improve *ex ante* certainty for traders. Borrowing from the Chinese model, this list might include earnings information, any plan to distribute dividends, change in equity structure, acts by senior management exposing the company to liability, or plans to be acquired.<sup>348</sup>

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346. See, e.g., Joan MacLeod Heminway, *Just Do It! Specific Rulemaking on Materiality Guidance in Insider Trading*, 72 LA. L. REV. 999, 1013–14 (2012) (proposing a method “for constructing the desired materiality guidance” that requires the proponent to:

- (1) isolate factual circumstances . . . in which materiality guidance routinely is needed; (2) identify the elements of materiality . . . and ways in which . . . each element is measured . . . and (3) incorporate each materiality element and measurement technique into guidance . . . applicable to the isolated factual circumstances

Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131, 1190–91 (2003) (explaining how “enhanced materiality guidance” should reduce “the number of insider trading class actions filed or . . . result in the dismissal of more of these cases on a pretrial motion”); Anderson, *supra* note 40, at 279–82 (“[T]he lack of a clear and objective standard permits almost any information to be deemed material for the purposes of insider trading liability. . .”).

347. See similar language at MAR, *supra* note 142, at art. 7, para. 1

- [I]nformation of a precise nature, which has not been made public, relating, directly or indirectly, to one or more financial instruments and which if it were made public, would be likely to have a significant effect on the prices of those financial instruments or . . . of the related derivative financial instruments. . . .

348. The list could also draw upon the guidance offered by the SEC concerning compliance with Regulation Fair Disclosure:

- (1) Earnings information; (2) mergers, acquisitions, tender offers, joint ventures,

Then, following the Russian example, the list could also include an issuer-specific category that would grant the issuer the opportunity to identify additional types of potential material information by publicly filing them in advance.<sup>349</sup> For example, product sales data may be material to a manufacturer, but not to a bank. If so, the manufacturer would file it as a type of potentially material information, but the bank would not.

On this model, a person who trades on information that is not of a type identified on the exhaustive list (including the issuer's supplement) could not be prosecuted for insider trading. A person who trades on the basis of information that falls within a statutorily defined category, but which is not of a "precise nature" or would be unlikely to have "a significant effect" on the price of the stock also could not be prosecuted for insider trading. Only one who trades on nonpublic information that is precise and likely to have a significant effect on the stock price when released, *and* that is of a type identified by the statute or issuer supplement would be potentially liable for insider trading.

This hybrid approach to materiality would cabin the unavoidably vague "significant effect" (or some similar) test with a precise and exhaustive list of types of potentially material information. In doing so, it would maintain flexibility for prosecutors and regulators within the identified categories, while the categories themselves would provide some certainty and notice to traders. Adding the issuer-specific category also grants power to the issuer—the owner of the information and the principal victim of any potential insider trading—with the power to supplement the statutory list as needed to protect the firm and its shareholders.

The current U.S. common-law tests for determining when information is "nonpublic" for purposes of insider trading liability are the dissemination and absorption test and the efficient capital market hypothesis test.<sup>350</sup> Under the dissemination and absorption test, information is public if it is "disseminated in a manner calculated to reach the securities market place in

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or changes in assets; (3) new products or discoveries, or developments regarding costumers or suppliers (*e.g.*, the acquisition or loss of a contract); (4) changes in control or in management; (5) change in auditors or auditor notification that the issuer may no longer rely on an auditor's audit report; (6) events regarding the issuer's securities—*e.g.*, defaults on senior securities, calls of securities for redemption, repurchase plans, stock splits or changes in dividends, changes to the rights of security holders, public or private sales of additional securities; and (7) bankruptcies or receiverships.

Selective Disclosure and Insider Trading, Exchange Act Release Nos. 33,7881, 34,43154, Investment Company Act Release No. 24,599, 65 Fed. Reg. 51,716 (Aug. 24, 2000).

349. Anichkin et al., *supra* note 192.

350. See WILLIAM WANG & MARC STEINBERG, *INSIDER TRADING* 143 (2010) (providing an overview of dissemination, absorption, and the efficient capital market hypothesis tests).

general through recognized channels of distribution.”<sup>351</sup> Under the efficient capital market hypothesis test, information is considered public when it is impounded in the price of the stock by traders in the active investment community, regardless of whether it has been publicly disclosed by the issuer.<sup>352</sup> Neither one of these vague standards, however, provides adequate notice to traders *ex ante*.<sup>353</sup> In fact, in his dissenting opinion in *Dirks v. S.E.C.*, Justice Harry Blackman expressed frustration that “[t]he SEC seemingly has been less than helpful in its view of the nature of disclosure necessary to satisfy the disclose-or-refrain duty. The [SEC] tells persons with inside information that they cannot trade on that information unless they disclose; it refuses, however, to tell them how to disclose.”<sup>354</sup>

Perhaps the most promising approach to statutory reform of the publicity element of insider trading liability would be to follow Japan in adopting a bright-line rule. Under the Japanese rule, information is public twelve hours after its disclosure to at least two media outlets.<sup>355</sup> Whether the disclosure needs to be to two (as opposed to one) media outlet is debatable. It would seem that disclosure to one media source should be sufficient in this digital age of immediacy and viral dissemination through electronic means. Moreover, there is no reason to assume that the disclosure must be to a media outlet; any number of other sources may work just as well (e.g., the issuer’s Facebook, Instagram, or Twitter account, the issuer’s website or listserv, a webcast conference, or, of course, an SEC filing). In any event, a key to ensuring adequate notice to traders will be to adopt the bright-line approach of offering a statutory list of approved forms of disclosure. In addition, as with the materiality element considered above, the list of acceptable modes of dissemination could include an issuer-specific category whereby issuers may identify modes of dissemination that make the most business sense for the firm. The twelve-hour rule should, however, remain uniform to ensure certainty and to prevent gaming.

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351. *In re* Certain Trading in the Common Stock of Faberge, Inc., Exchange Act Release No. 10174, 45 SEC Docket 249, 255 (May 25, 1973).

352. *See* *United States v. Libera*, 989 F.2d 596, 601 (2d Cir. 1993) (“The issue is not the number of people who know [the information]. Once the information is fully impounded in price, such information can no longer be missed by trading because no further profit can be made.”).

353. *See* Anderson, *supra* note 40, at 282–85 (“Absent explicit standards of satisfaction it is often impossible for traders to know whether the threshold [for publicity] has been crossed at the time of trading.”) (alteration in original).

354. *Dirks v. S.E.C.*, 463 U.S. 646, 678 (1983) (Blackmun, J. dissenting).

355. *See* Ramseyer, *supra* note 82, at 357 (noting the Financial Services Agency specifications “that if insiders want to rely on disclosure to the press, they must disclose the information to at least two firms . . . and wait at least 12 hours”).

*Lessons of Ritualism*

The lessons of regulatory ritualism must also be borne in mind when drawing upon the international experience to inform proposed insider trading reforms here in the United States. For example, one in favor of liberalizing the current regime to, say, permit issuer-licensed insider trading, may take comfort in the fact that evidence of ritualism removes a number of arrows from the quiver of those who advocate broader regulation. First, the fact of ritualism significantly weakens claims of regulatory inevitability and global consensus that are often enlisted against liberalization. Second, the reality that most of the developed and technologically advanced markets in the world have insider trading laws on the books but choose not to enforce them undermines many of the traditional policy justifications for expansive and rigorous insider-trading regulation. Third, evidence of insider trading ritualism also suggests that even the appearance of global consensus (based on the number of insider trading laws on the books) is quite flimsy. To the extent that these laws were adopted as a result of external pressure from the U.S. or other international bodies (and not from a genuine cultural embrace of the rules or the rationales behind them), they will only remain on the books so long as those incentives remain unchanged. Just as recent shifts in global political and economic power from West to East and North to South have tested the viability of the Western corpus of human rights that are embraced only ritualistically, those same shifts may also test the continued recognition of insider trading regulation as an international norm for markets.

Alternatively, for those who are convinced that a broad and vigorous insider trading enforcement regime is necessary in the U.S. and elsewhere around the world, the evidence of insider trading ritualism should be interpreted as a call to action. If most American market participants, regulators, legislators, politicians, and judges are truly convinced that markets cannot be fair, efficient, or inspire confidence unless insider trading is regulated, then they will need to do a better job of convincing other cultures of this. U.S. incentives and influence may have been enough to get these laws on the books in other countries, but, as Professor Marc Steinberg explains, the likelihood that “‘admired’ executives may be faced with criminal prosecution in a culture that has declined to embrace the evils of such ‘gentlemen’ offenses” is low.<sup>356</sup> To overcome the problem of insider trading ritualism in resisting cultures, it will be necessary to switch from incentives to persuasion as the preferred method of influence. Economic arguments should be demonstrated rather than assumed. Some empirical

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356. Marc I. Steinberg, *Insider Trading Regulation—A Comparative Analysis*, 37 INT’L L. 153, 169–70 (2003).

work to this end has been done,<sup>357</sup> but much more is needed.<sup>358</sup> And the equally important ethical justifications should be made explicit by appeal to generally accepted moral reasons, as well as ethical paradigms and tropes familiar to the target culture. Such “enlightenment missions” should strive to appeal directly (and in a culturally sensitive manner) to the constituencies within that country who are directly affected by insider trading abuses: “corporate insiders, bankers, brokers, judges, legislators, and the investing public.”<sup>359</sup>

Even (or especially) as exporters of the norms of insider trading regulation, our insider trading enforcement regime in the U.S. would benefit a great deal from such a frank discourse concerning the economic and ethical implications of insider trading regulation within our own culture, particularly as we look to reforming our enforcement regime. No responsible proposals for reform should be offered without an honest appraisal of these foundational questions.

#### CONCLUSION

The insider trading regime in the United States is in need of reform. Whatever shape that reform takes, it would be remiss to begin the effort without first considering the experiences of other countries. There is much

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357. See e.g., Bhattacharya & Daouk, *supra* note 95, at 75 (empirical study finding that the “cost of equity in a country . . . does not change after the introduction of insider trading laws, but decreases significantly after the first prosecution”); Laura Nyantung Beny, *Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Argument*, 32 J. CORP. L. 237, 237 (2007) (finding that “more stringent insider trading laws are generally associated with more dispersed equity ownership, greater stock price accuracy and greater stock market liquidity”); Beny & Anand, *supra* note 179 (finding that Canadian firms tend to be “super-compliant” with insider trading laws despite lax enforcement, suggesting that such enforcement enhances corporate performance).

358. Beny’s 2007 study identified some challenges to empirical research in the field of insider trading, noting that “the sample of available countries is quite small and there may be differences among them in data reliability.” Beny, *supra* note 357, at 281. Beny also recognized that the problem of ritualism must be accounted for in empirical studies, noting that it is “possible that some countries enacted insider trading laws merely in response to external pressure, resulting in rote transplantation of foreign insider trading laws unrelated to such countries’ financial, legal, and institutional characteristics.” *Id.* Moreover, empirical studies suggesting that the adoption and enforcement of insider trading laws correlates to increased volume and liquidity must confront the significant counterexample of Japan. As Ramseyer noted, within two years of the Diet declaring insider trading criminal in 1988, “the volume of shares traded plummeted, and the market capitalization of Japanese firms disappeared. Two decades later, the market has yet to recover.” Ramseyer, *supra* note 82, at 347.

359. Steinberg, *supra* note 356, at 171.

to be learned from the close to one hundred statutory insider trading enforcement regimes that have been implemented around the world in the last few decades. These regimes are varied in their theories of liability and in their scope. They reflect some innovations in statutory language that, if implemented in the U.S., would improve clarity in the law and provide greater certainty to market participants. These innovations should be considered.

Perhaps more importantly, however, the problem of regulatory ritualism among insider trading regimes around the world counsels caution. This ritualism suggests that countries have implemented their insider trading enforcement regimes due to external pressure—not necessarily because they are convinced of their ethical and economic merit. As the principal exporters of the norm of insider trading regulation, scholars, jurists, and legislators in the United States should engage in the honest appraisal of its ethical and economic goals. This honest appraisal will not only aid in confronting ritualism abroad; it will be crucial to the effort of implementing a just, rational, and coherent enforcement regime at home. Significantly for this author and others who have advocated for some liberalization of the current regime, the phenomenon of global insider trading ritualism forecloses the assumption that global consensus has settled the question against such liberalization.