

INVESTORS MANAGEMENT: INSTITUTIONAL INVESTORS AS TIPPEES

Twelve of fifteen institutional investors, "tippees" of Merrill Lynch, Pierce, Fenner & Smith, have been censured for violations of section 17(a) of the Securities Act of 1933,¹ section 10(b) of the Securities Exchange Act of 1934,² and rule 10b-5³ promulgated thereunder. The Hearing Examiner's decision in *In re Investors Management Co.*⁴ is the first clear holding that tippees are subject to rule 10b-5 prohibitions.⁵ The SEC on its own motion has taken the legal issues for review; findings of fact and imposition of sanctions will stand as determined by the Hearing Examiner.⁶ This Comment will discuss several issues bearing on liability of institutional investors as tippees.

I. FACTS OF *Investors Management*

Proceedings against two of the original fifteen respondents were discontinued;⁷ the remaining thirteen comprise one registered invest-

¹ 15 U.S.C. § 77q (1964).

² *Id.* § 78j(b).

³ 17 C.F.R. § 240.10b-5 (1970). The language of rule 10b-5 is taken from the language of § 17(a). The prohibitions of rule 10b-5 run against both purchasers and sellers; the prohibitions of § 17(a) are limited to sellers. Although respondents were charged with violations of both, the extension of rule 10b-5, because it covers purchasers and sellers, is more significant and throughout this Comment reference will be made only to the rule.

⁴ [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,832 (1970).

⁵ In *Ross v. Licht*, 263 F. Supp. 395 (S.D.N.Y. 1967), friends of controlling shareholders of a closely held corporation were held liable for trading on inside information. The court held them liable either as tippees or for aiding and abetting traditional insiders in violating rule 10b-5.

⁶ SEC Exchange Act Release No. 8947 (July 30, 1970), in [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,844. Although neither the Division of Markets and Trading of the Commission nor any of the respondents appealed from the Hearing Examiner's decision, the Commission has determined to hold a limited review because "the legal issues raised respecting the obligations of 'tippees' were important matters of first impression having significant implications" *Id.* Several of the respondents are challenging the Commission's right to review the decision, alleging that more than 30 days had passed between the service upon the parties of the initial decision and the Commission's action and that therefore the period for review had run. They further contend that the proceedings, limited as they are to legal issues, are really rulemaking. Although censured, the respondents had not sought review because they wished to avoid increased unfavorable publicity and substantial legal expenses. See Statement by Certain Respondents in Response to the Commission's Orders of July 30, 1970 Directing Review of Legal Issues, *In re Investors Management Co.*, in [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,832. See also 17 C.F.R. § 201.17(c) (1970).

⁷ Proceedings were discontinued as to Anchor Corporation and Hartwell, Inc. The Hearing Examiner held that, although both respondents were in common corporate control with defendants who had violated the law, their relationship with the wrongdoers was too attenuated to justify liability. [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,832, at 83,962.

ment company,⁸ two registered investment advisors,⁹ four unregistered investment advisors,¹⁰ and six "hedge" funds.¹¹ During a three day period in June 1966, these respondents sold 175,800 shares of common stock of Douglas Aircraft Co.¹² while possessing inside, material information received from Merrill Lynch. The information—that Douglas' earnings would be significantly lower than previously expected—was gathered by Merrill Lynch as part of its investigations as prospective managing underwriter of a Douglas convertible debenture offering. It passed prior to its public release from the underwriting department to several Merrill Lynch institutional salesmen, who thereupon telephoned several of their leading customers to advise them in fairly specific terms of the drop in Douglas' earnings.¹³ Several of the respondents discussed the earnings drop at a luncheon, but in much more general terms.¹⁴

The Hearing Examiner found that twelve respondents had traded with actual or constructive knowledge¹⁵ that the information was non-public and material; citing *In re Cady, Roberts*¹⁶ and *SEC v. Texas Gulf Sulphur Co. (TGS)*,¹⁷ he held them in violation of rule 10b-5. These two cases make clear that the obligation to disclose or refrain from trading does not apply only to those who glean inside information as a result of traditional corporate relationships.¹⁸ The Hearing Examiner held that the obligation extended as well to "tippees," persons who through an insider become aware of information which should be used "only for a corporate purpose and not for [the] personal benefit of anyone."¹⁹

The action against the remaining respondent, Dreyfus Corporation, was dismissed. The Hearing Examiner found that the Dreyfus decision-

⁸ Madison Fund, Inc.

⁹ J. M. Hartwell & Co.; Van Strum & Towne, Inc.

¹⁰ Investors Management Co.; Dreyfus Corp.; Burden Investors Services, Inc.; Wm. A. M. Burden & Co.

¹¹ Hartwell & Assoc.; Park Westlake Assoc.; Fleschner Becker Assoc.; Jones & Co.; Jones Assoc.; Fairfield Partners.

¹² See [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶77,832, at 83,930.

¹³ *Id.* at 83,933-35. Initial SEC proceedings against Merrill Lynch were settled, resulting in the closing of several offices and suspension of personnel for periods ranging up to 60 days. SEC Exchange Act Release No. 8459 (Nov. 25, 1968), in [1967-1969 Transfer Binder] CCH FED. SEC. L. REP. ¶77,629.

¹⁴ [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶77,832, at 83,958-60.

¹⁵ The constructive knowledge standard imposes liability on the trader if it appears that he knew or should have known that the information was not yet in general circulation. *Id.* at 83,940. This standard apparently imposes an affirmative duty of inquiry before trading if the information is not clearly public.

¹⁶ 40 S.E.C. 907 (1961).

¹⁷ 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

¹⁸ Insiders traditionally had been considered to include officers, directors, and major stockholders. A major influence behind this definition was § 16 of the Exchange Act, 15 U.S.C. § 78p (1964), the requirements of which were specifically imposed on these three classes.

¹⁹ [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶77,832, at 83,939 (quoting *Cady, Roberts*, 40 S.E.C. at 912) (bracketed matter omitted by Hearing Examiner).

maker responsible for the sale of 21,300 shares of Douglas had never received—and thus the sale was not in connection with—the inside information concurrently possessed by a Dreyfus analyst.²⁰ Because this determination apparently rests on factual foundations alone, it will not be subject to the Commission's review, which will focus solely on the question whether tippee trading is a violation of rule 10b-5.

II. JURISDICTION OVER THE RESPONDENTS

Before reaching the 10b-5 question, the Hearing Examiner faced a jurisdictional challenge. Thirteen of the respondents²¹ argued that section 15(b)(7),²² on which the SEC based its jurisdiction, had been added to the 1934 Act in 1964 to permit the SEC to proceed against persons associated with broker-dealers. The SEC had previously been limited to proceeding against the broker-dealers only. Therefore, respondents contended, the term "any person" in the section was limited to those associated with broker-dealers, and could not apply to them.²³

But section 15(b)(7) specifically provides that the Commission may

by order censure *any person*, or bar or suspend for a period not exceeding twelve months any person from being associated with a broker or dealer, if the Commission finds that such censure, barring, or suspension is in the public interest and that such person has committed or omitted any act or omission enumerated in clause . . . (D) . . . of paragraph (5) of this subsection²⁴

Clause (D) includes "willful violations . . . of this title [Exchange Act] or any rule or regulation under [this Act]."²⁵ Thus sections 15(b)(7) and 15(b)(5)(D) combine to permit the SEC to proceed against any person who violates rule 10b-5. Moreover, section 10(b) of the Exchange Act, rule 10b-5 promulgated thereunder, and section 17(a) of the Securities Act all begin with the language, "It shall be unlawful for any person."

Citing the clear wording of this section, its legislative history, and SEC interpretations,²⁶ the Hearing Examiner rejected the respondents'

²⁰ *Id.* at 83,960-61. The Dreyfus dismissal is further discussed at text accompanying notes 47-50 *infra*.

²¹ All but Anchor Corp. and Van Strum & Towne, Inc.

²² 15 U.S.C. § 78o(b) (1964).

²³ *See, e.g.*, Memorandum in Support of Respondent Fleschner Becker Associates' Proposed Findings of Fact and Conclusions of Law 20-22.

²⁴ 15 U.S.C. § 78o(b)(7) (1964) (emphasis added).

²⁵ 15 U.S.C. § 78o(b)(5)(D) (1964).

²⁶ [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. 77,832, at 83,931-32.

argument and correctly held that the SEC could properly proceed against all of them.²⁷

The Hearing Examiner's decision to censure the respondents should not obscure the significance of finding jurisdiction in this case. Respondents in a future case could be barred or suspended from being associated with a broker-dealer for up to twelve months.²⁸ Registered investment advisors might have their registration suspended or revoked.²⁹ The 1970 amendments³⁰ to the Investment Company Act permit the Commission, after notice and hearings, temporarily or permanently to bar from association with an investment company any person who willfully violates any provision of the Exchange Act or rules thereunder.³¹ Further, because their exemption from registration was removed by the 1970 amendments,³² investment advisors who advise only registered investment companies are now liable to administrative sanctions.

Future respondents are also liable to criminal prosecution under section 32(a) of the 1934 Act.³³ If found guilty, they can be fined up to \$10,000 or imprisoned for up to two years.³⁴ Civil actions are also possible. The SEC, by bringing proceedings, has identified potential defendants for would-be plaintiffs. This defendant-identifying effect is especially significant to plaintiffs in a tippee situation because the discovery of the link between trading and inside information might otherwise require a tremendous amount of investigation.³⁵

Had the SEC been held to lack jurisdiction, the Commission would have been unlikely to continue the vigorous investigation of those not

²⁷ See 5 L. LOSS, SECURITIES REGULATION 3384-87 (Supp. to 2d ed. 1969).

[Section 15(b)(7)] is broad enough to permit a bar or suspension order (or a censure order, for that matter) against a person who has never been either a broker-dealer or an associated person.

Id. 3386. Bromberg agrees with this inclusive analysis. See Bromberg, *Tippee Risks and Liabilities*, 3 REV. SEC. REG. 875, 878 (1970).

²⁸ See 15 U.S.C. § 78o(b)(7) (1964).

²⁹ See *id.* § 80b-3.

³⁰ Act of Dec. 14, 1970, Pub. L. No. 91-547, 84 Stat. 1413.

³¹ *Id.* § 4(b), 84 Stat. 1415.

³² *Id.* § 24(b)(3), 84 Stat. 1430.

³³ 15 U.S.C. § 78ff(a) (1964).

³⁴ *Id.*

³⁵ The collateral estoppel effect of findings of fact by a hearing examiner in any subsequent criminal or civil proceeding is unsettled. Although the modern trend has been to follow the rule of *Bernhard v. Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942), and thus to discard the mutuality of estoppel concept, there may be reasons why private civil actions in securities cases demand a different result. The Fifth Circuit recently questioned the wisdom of allowing collateral estoppel in such cases, and then found that the defendant's constitutional right to a jury trial precluded its use as to a previous SEC injunction action. *Rachel v. Hill*, No. 29,585 (5th Cir., filed Dec. 3, 1970). The record and report of an administrative proceeding which leads to sanctions, however, will undoubtedly be tremendously valuable to anyone bringing either a civil or criminal action.

In an SEC proceeding, the violation must be proved by a preponderance of the evidence. *In re Pollisky, Harris Gabriel*, Exchange Act Release No. 8141 (Aug. 10, 1967), in [1966-1967 Transfer Binder] CCH FED. SEC. L. REP. ¶ 77,465.

within the more narrow broker-dealer class; the possibility of criminal and civil liability for those not under SEC examination would thus be greatly reduced. Conversely, with the jurisdiction extended, all those active in the market know that they are vulnerable to criminal punishment and civil liability as well as to the SEC sanctions of suspending, barring, or censuring.

III. THE LEGAL ISSUES

Broad language in several earlier cases notwithstanding, the decision of the Hearing Examiner is the first clear holding that tippees are within the ambit of rule 10b-5. Indeed, the Commission recognized this in its review order, noting that the decision raised "important matters of first impression."³⁶

The decision relied almost exclusively on two well-known cases. In *Cady, Roberts*,³⁷ the SEC censured a brokerage firm partner for trading on information obtained from an employee of the firm. As a member of the board of directors of Curtiss-Wright, the employee became aware of a determined—although not yet announced—dividend reduction. When he passed the information to the partner, the partner became a tippee.³⁸ When the partner traded, he violated sections 17(a) and 10(b), and rule 10b-5. Building on *Cady, Roberts*, the Second Circuit in *TGS*³⁹ held liable a number of TGS employees who had traded upon nonpublic information concerning the magnitude of a Canadian ore strike. Again, the use of material inside information was found to violate section 10(b) and rule 10b-5.

Relying specifically on these two cases, the Hearing Examiner held that the "obligation of affirmative disclosure extends beyond those who happen to hold traditional corporate insider information or relationships."⁴⁰ Yet despite the broad language of the previous cases, the move to tippee liability is neither as inevitable nor as trouble free as the Hearing Examiner suggests.

First, the Second Circuit reserved the question of tippee liability in its discussion of the *TGS* defendants:

As Darke's [one of the insider defendants] "tippees" are not defendants in this action, we need not decide whether, if they acted with actual or constructive knowledge that the material information was undisclosed, their conduct is as

³⁶ Note 6 *supra*.

³⁷ 40 S.E.C. 907 (1961).

³⁸ Although the SEC could have dealt with the partner as a tippee, it found that, because the tipper-employee's relationship to Curtiss-Wright prohibited his own use of the information, by "logical sequence" the partner in the firm of the employee was similarly prohibited.

³⁹ 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

⁴⁰ [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. 77,832, at 83,939.

equally violative of the Rule as the conduct of their insider source, though we note that it certainly could be equally reprehensible.⁴¹

Moreover, in expanding the rule's scope, the Hearing Examiner rested on two premises first articulated in *Cady, Roberts* and relied upon thereafter in *TGS*. Both these premises—(1) that rule 10b-5 extends beyond those traditionally considered corporate insiders, and, (2) that the Commission will try to insure some sort of rough equality in the market through 10b-5—were enunciated in language that seems to foreshadow this extension to tippees. The Commission in *Cady, Roberts* defined the obligation not to trade required by rule 10b-5:

Analytically, the obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.⁴²

This language, however, contains not only a suggestion that rule 10b-5 be greatly extended but also an indication of its limit. The information received by tippees in situations like that of *Investors Management* is not passed to them for a corporate purpose—at least, not from Douglas' point of view. The information was passed from Douglas to Merrill Lynch for an obvious corporate purpose, but Merrill Lynch served no Douglas corporate purpose in passing it to its clients. Merrill Lynch had its own corporate purpose in transmitting the information to its clients, but neither that corporate purpose nor a colorable claim that Merrill Lynch owed its clients some sort of fiduciary duty to pass the information should prevent a finding of liability. A middle ground is reached when a company director talks with an institutional analyst. The analyst performs an invaluable service by fanning the public interest in the company and the director will want to maintain a good relationship with him. Thus the information passes for a corporate purpose. The situation differs from the Douglas-Merrill Lynch transfer because here the director passes information with the understanding that the analyst may trade on it. Yet it falls short of the Merrill Lynch-client situation—and thus makes the question of 10b-5 liability much more difficult—insofar as neither the director nor the analyst knowingly deals in inside information. A director's tip to a friend, of course, is unprotected, if only because the information passes for no corporate purpose.

⁴¹ 401 F.2d at 852-53.

⁴² 40 S.E.C. at 912 (footnotes omitted).

The problems do not stop with trying to define "corporate purpose." How should a relationship giving access to inside information be defined? How indirect must the access be before the language of *Cady, Roberts* will cease to apply? Professor Mundheim has suggested that, because the definitions of what constitutes material, nonpublic information remain imprecise, and because some public service is performed by the information-gathering functions of institutional investors, there may be reason to apply 10b-5 restrictions less severely to them than to either the classic insider or the classic tippee, whose trading produces no particular public good.⁴³ The point herein is simply that these questions were not dealt with adequately by the Hearing Examiner, and that the Commission should not repeat his omissions. The next section will discuss in greater detail the possible distinctions to be made in light of the institutional investor's function.

IV. MARKET FUNCTIONS OF INSTITUTIONAL INVESTORS

The Hearing Examiner failed to consider whether prohibitions against insider trading or trading by casual tippees such as friends of corporate officers are appropriately applied to institutional investors. Institutional investors operate full time in assessing investment opportunities; the essence of their operation is their ability and willingness to gather large quantities of corporate information. Their role in information gathering and investment assessment affords them an important position in the market. The casual tippee, on the other hand, provides no service to the market, but merely takes advantage of gratuitous information. This distinction between the institutional investor and the individual tippee should not be dismissed lightly.

Information in the hands of the institutional investor may often be difficult to characterize as either inside or the product of thorough investigation. To penalize an incorrect categorization may tend to inhibit thorough investigation. And, to the extent that the institutional investor is uncertain about the status of information, it will naturally tend to curtail its own use of the information and to prevent its dissemination to other investors. *Investors Management* is a good example of the difficulties inherent in determining that a respondent's knowledge of given information is inside.

The Hearing Examiner imposed upon the respondents a standard of actual or constructive knowledge.⁴⁴ As applied to an individual tippee, this standard makes eminent good sense, for he will be likely to know from the nature of the information and the circumstances of its

⁴³ Mundheim, *Insider Trading—A Tentative Draft Outline*, in *THE LAW, DISCLOSURE AND THE SECURITIES MARKET MATERIALS* 43-53 (PLI 1970).

⁴⁴ Note 15 *supra* & accompanying text.

transmission that he is receiving inside information. In fact, the information will frequently be presented as nothing more or less than an "inside tip." Thus to apply to him either an actual or constructive knowledge standard will not bring about dramatically different results. But the constructive standard as applied to institutional investors may be quite a different matter. Communication within the small and fairly closed institutional investors' community is extensive. Information held by a member of the community is not easily characterized. Occasionally the information source will make clear the nature of the information, but more often than not ambiguity may be the rule. For example, how should a rumor abroad within the community be characterized? In *Investors Management*, the inside information was circulating at an investors' luncheon.

The Hearing Examiner has thus imposed an affirmative duty on institutional investors to determine the character of all their information. The potential ramifications on the flow of information within the market community were apparently not explored and certainly not articulated.

The institutional and individual tippee also stand on different footing in determining the information's "materiality." Although some alleged "hot tips" may be a far cry from material inside information, an individual receiving a "tip" is seldom able to claim that it did not determine his investment decision: he presumes and hopes for an inside edge, and his actions are usually attributable to this single "tip." But to the institutional investor, the inside information may be only one piece of a larger and more sophisticated puzzle, the total solution of which determines the investment decision.

A full-scale policy analysis of whether greater consideration must be given to the economic consequences to institutional investors is not intended herein. But it should be borne in mind that in many cases the information-gathering efforts of the institutional investors have been prods to reticent corporations, increasing the flow of information in the market.⁴⁵ And it must be recognized that, despite their positive aspects, decisions like *TGS* and *Investors Management* have to some degree inhibited information gathering.⁴⁶ Certainly careful regulation of the securities market is necessary so that small investors will be convinced that they are entering a "fair and honest market." Yet mutual funds, pension fund managers, banks, and insurance companies—institutional investors all—are conduits to the market for the capital of the small investor. The extent to which the small investor is hurt by the inability

⁴⁵ See Mundheim, *Beware of How You Handle That Tip*, INST. INV., Sept. 1970, at 40, 42.

⁴⁶ Several representatives of mutual funds reported that the flow of information had recently decreased markedly, specifically because of *TGS*. They felt that *Investors Management* had not yet further decreased the flow—in part a function of their expectation that the full Commission will reverse the Hearing Examiner's holding. Interview with four mutual fund representatives, in Philadelphia, Oct. 30, 1970 (anonymity requested).

of these money managers to acquire legitimate information is an important economic consideration to be weighed in any decision curtailing the flow of information to these managers. In its review of the Hearing Examiner's decision, then, the Commission should consider and articulate responses to these questions bearing on tippee liability in the institutional context.

V. THE DREYFUS CORPORATION DISMISSAL

The Hearing Examiner found that, although the Dreyfus analyst was at all relevant times in possession of the same inside information as the censured defendants, the decisionmaker, Dreyfus President Howard Stein, was not made aware of the specific information when he decided to sell the Douglas stock. Rather than reveal that his recommendation was based on inside information and thus possibly unusable, the analyst approached Stein with an emphatic recommendation to sell based on other research information unrelated to the Merrill Lynch tip. With the recommendation, and observing the day's performance of the stock, Stein decided to sell. The Hearing Examiner held:

[A]lthough on June 23 Dreyfus Corporation possessed inside corporate information regarding Douglas earnings, no use was made of that information in connection with the sale that day of the Dreyfus Fund's holdings of Douglas stock. . . . [I]t is concluded that Dreyfus Corporation did not commit the violations charged⁴⁷

The Hearing Examiner has thus held that no liability will attach to trading if the flow of material inside information within the institutional investor stops short of the decisionmaker. This holding may be limited to the specific facts of the Dreyfus situation. Mr. Stein is widely known for his reliance on his own knowledge of recent stock performances;⁴⁸ thus the dismissal may be based only on the putative minimal effects of the analyst's urgings in this instance. The dismissal is not so articulated, however, and if given full scope might be interpreted as permitting certain trading by an institutional investor with inside information. If the analyst possessing the information is sufficiently circumspect in his reasons for his recommendation, the Hearing Examiner would apparently find trading protected.

Industry members have agreed that this practice is now being followed in some places, and that it is acceptable to them:⁴⁹ better to trade for the "wrong" reasons than not to trade at all.

⁴⁷ [1969-1970 Transfer Binder] CCH FED. SEC. L. REP. ¶77,832, at 83,961.

⁴⁸ See TIME, Aug. 24, 1970, at 52-57.

⁴⁹ See Interview, *supra* note 46.

Although unlikely to survive SEC scrutiny, various schemes may develop along these lines should the Hearing Examiner's approach in this case rest untouched. More subtle than the emphatic but undocumented recommendation given to a decisionmaker who reads between the lines is the recommendation stressing those aspects of the stock's performance which veil the analyst's reliance on inside information. Such spurious reports may not be limited to inside information situations alone. As pointed out above,⁵⁰ categorizing information is not always an easy matter: recommendations may be camouflaged whenever the analyst has the slightest doubt about the status of his information. Again, the result may be the right decision made for the wrong reasons.

CONCLUSION

The problem raised by *Investors Management*—whether the prohibitions of section 10(b), rule 10b-5, and section 17(a) should be enforced against tippees—may be answered by the broad language of *Cady, Roberts* and *TGS*. Yet the extension of rule 10b-5 to tippees goes significantly beyond either of these cases. In determining the wisdom of this application, the Commission must consider the role of institutional investors in the market, appreciating their information-gathering functions. It must consider the economic implications of the extension of 10b-5 liability, and the difficulties in defining the elements of any rule imposed.

⁵⁰ Text following note 44 *supra*.