

Research Article

DO INSIDER TRADING LAWS NEED TO BE REFORMED?

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ABSTRACT

There are a variety of issues that need to be addressed in deciding whether insider trading rules need to be reformed. The article defines insider trading along with describing the characteristics of insider trading to understand that specific individual behavior constitutes insider trading. The individuals that are subject to the law are discussed, and a class of individuals who are not subject to the insider trading laws are identified. The types of insider trading are described. The different insider trading laws are reviewed to see if a particular law should be updated. Congress and insider trading law are examined, if only because for many years, Congress was exempt from insider trading laws. Finally, the punishments for violating the insider trading laws are examined, searching for penalties that are either too lenient or too severe. With this analysis, it can be decided whether the current laws pose an effective deterrent to insider trading or whether the laws need to be changed.

Keywords: Ban Stock Trading for Government Officials Act, Cryptocurrency, Insider Trading, Rule 10b5, Rule 10b6, Rule 10b18, Rule 14e3, Rule 16.

INTRODUCTION

In deciding whether insider trading rules need to be reformed, there are various issues that need to be addressed. First and foremost, insider trading should be defined along with a description of the characteristics of insider trading to understand that specific individual behavior constitutes insider trading. Second, the individuals that are subject to the law should be discussed, and a class of individuals who are not subject to the insider trading laws should be identified. In this instance, the types of insider trading are described. Third, the different insider trading laws should be reviewed to see if a particular law should be updated. Fourth, Congress and insider trading law will be examined, if only because for many years, Congress was exempt from insider trading laws. Finally, the punishments for violating the insider trading laws should be examined, searching for penalties that are either too lenient or too severe. When this analysis is accomplished, then it can be determined whether the current laws pose an effective deterrent.

DEFINITION OF INSIDER TRADING

According to Black's Law Dictionary, insider trading is the "use of material, nonpublic information in trading the shares of a company by a corporate insider or other person who owes a fiduciary duty to the company."¹ The Securities and Exchange Commission (SEC) defines insider trading as buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, on the basis of material, nonpublic information about the security."² Under the SEC definition, insider trading may also include the "tipping" of material, nonpublic information to a third party by an insider, where the tipped

individual misappropriated the information given.³ The Legal Information Institute (LII) defines insider trading to be the "trading of a company's securities by individuals with access to confidential or material non-public information about the company."⁴ Under the LII definition, when insider trading occurs, one or more individuals are taking advantage of privileged access which is thought of as a breach of a fiduciary duty.⁵ Federal law defines an "insider" to be a company officer, director, or a person who is in control of at least 10 percent of a company's stock or equity.⁶

CHARACTERISTICS OF INSIDER TRADING

The four elements to insider trading include: (1) the defendant actually received information, (2) the information was material, (3) the information was nonpublic, and (4) the information directly influenced the defendant's trade.⁷ In other words, the federal government is required to prove that a defendant purchased or sold one or more securities based on material, nonpublic information regarding a security or issuer.⁸ A prosecutor must show that the defendant actually received information that was material and nonpublic and that the information directly impacted the trade made by the defendant.⁹ However, a defendant can raise the affirmative defense that they were subject to a binding contract that was entered in good faith to buy or sell specific amounts of the security at issue and that the contract went into effect before they were aware of the information.¹⁰ In criminal cases, the standard of proof is beyond a reasonable doubt (95 percent), whereas in civil cases the standard of proof is by the preponderance of the evidence (51 percent, or more

³*Id.*

⁴LII Staff, Insider Trading, Cornell Law School: Legal Information Institute (n.d.), available at https://www.law.cornell.edu/wex/insider_trading.

⁵*Id.*

⁶*Id.*

⁷Justia Staff, Insider Trading Law, Justia (Oct. 2022), available at <https://www.justia.com/criminal/offenses/white-collar-crimes/insider-trading/>.

⁸SEC's Rule 10b5-1, 17 C.F.R. § 240.10b5-1.

⁹Justia Staff, *supra*, note 7.

¹⁰*Id.*

¹BRYAN A. GARDNER (ED. IN CHIEF), BLACK'S LAW DICTIONARY 811 (Thompson West Publishing 8th ed. 1999).

²SEC Staff, Insider Trading, U.S. Securities and Exchange Commission (n.d.), available at <https://www.investor.gov/introduction-investing/investing-basics/glossary/insider-trading#:~:text=illegal%20insider%20trading%20refers%20generally,nonpublic%20information%20about%20the%20security.>

likely than not).¹¹ Thus, on its face, it appears that the elements of insider trading and its affirmative defense are reasonable and need not be changed.

The advocates for decriminalizing insider trading contend that permitting trades predicated on inside information ensures that new information is received by the market faster, thereby ensuring that the stock market is acting more efficiently.¹² According to the Nobel laureate economist, Milton Friedman, a former professor at the University of Chicago Economics Department, the advantage of insider trading is that the people most likely to possess knowledge regarding the weaknesses of a firm have an incentive to ensure that the public is aware of those weaknesses.¹³ This is a powerful argument because it is based on the Efficient Market Hypothesis (EMH), which states that stocks always trade at their fair value on exchanges, making it impossible for investors to purchase undervalued stocks or sell stocks for inflated prices.¹⁴ Even with the existence of insider trading, according to EMH and Prof. Milton Friedman, it is impossible to outperform the stock market via expert stock selection or market timing (i.e., insider trading).¹⁵ The EMH posits that the only way to receive higher returns is by buying riskier investments.¹⁶ In other words, the stock market is a perfectly competitive market, where the EMH holds because perfectly competitive markets are allocatively and productively efficient.¹⁷

TYPES OF INSIDER TRADING

The two types of insider trading are legal and illegal trading.¹⁸ Each type of insider trading will be discussed in turn.

Legal Insider Trading

Legal insider trading occurs when an insider trades the firm's securities (i.e., stock, bonds, etc.) and reports the trades to the proper authorities such as the SEC.¹⁹ This form of insider trading frequently occurs in the stock market. Insider trading is legal if it follows SEC rules.²⁰ For example, legal insider trading happens when a Chief Executive Officer (CEO) buys company shares or employees purchases their company stock.²¹ Such purchases are legal provided

the transaction are disclosed and registered with the SEC.²² The reason that the SEC closely monitors insider trading is that it can potentially affect share prices in the stock market.²³ As long as insider transaction are registered and disclosed to the SEC and follow SEC rules, there is no need to prevent insiders from buying and selling their company stock.

Illegal Insider Trading

Insider trading is illegal when it is the result of buying or selling the stock of a public company based on material, nonpublic information.²⁴ The SEC considers insider trading to be illegal when it is a breach of a fiduciary duty or a relationship of trust and confidence that is predicated on material, nonpublic information.²⁵ Material information is "information that would affect a company's current or future prospects or an investor's decision to invest in a company."²⁶ Nonpublic information is "data relating to a company that has not been made public but could have an impact on its share price."²⁷ Essentially, illegal insider information is any fact that can be financially advantageous if an individual acts on the information before the information is generally available to the public.²⁸

For example, if a Chief Financial Officer (CFO) accidentally shares quarterly earnings at a restaurant, the waiter or waitress who hears the information, and then makes a trade based on the information, could be the victim of a criminal insider trading investigation.²⁹ If a family member learns about material nonpublic information, and then shares it with another family member, they too could be the target of a government investigation.³⁰ The SEC closely monitors trading volumes, where trading volumes increase after material information becomes public knowledge.³¹ If trading volumes increase before material information is released, this fact is usually scrutinized by the SEC.³² The purpose of SEC scrutiny to ensure that investors have the same amount of information and no one has an unfair advantage.³³ In other words, the SEC attempts to ensure EMH dominates the stock market. There is seemingly nothing to criticize here.

UNITED STATES TRADING LAWS

There are various stock market trading rules to consider. Although this list may not be comprehensive, it intends to cover the more significant rules on insider trading.

¹¹Julia Kagan, Burden of Proof: Meaning, Standards and Examples, *Investopedia* (Jun. 30, 2023) available at <https://www.investopedia.com/terms/b/burden-proof.asp#:~:text=paying%20any%20claims-,The%20Bottom%20line,evidence%20required%20for%20a%20claim.>

¹²Justia Staff, *supra*, note 7.

¹³*Id.*

¹⁴Lucas Downey, Efficient Market Hypothesis (EMH): Definition and Critique, *Investopedia* (Apr. 24, 2023), available at <https://www.investopedia.com/terms/e/efficientmarkethypothesis.asp>.

¹⁵*Id.*

¹⁶*Id.*

¹⁷Mary Hall, Why Are There No Profits in a Perfectly Competitive Market?, *Investopedia* (Apr. 18, 2022), available at <https://www.investopedia.com/ask/answers/031815/why-are-there-no-profits-perfectly-competitive-market.asp#:~:text=In%20a%20perfectly%20competitive%20market%2C%20every%20firm%20is%20considered%20to,its%20marginal%20cost%20of%20production.>

¹⁸Michael Santos, Insider Trading: FAQ Part 1, *Prison Professors* (n.d.), available at <https://prisonprofessors.com/insider-trading-faq-part-1/#:~:text=There%20are%20two%20types%20of%20insider%20trading%2C%20legal%20and%20illegal.&text=In%20the%20illegal%20kind%2C%20one,based%20on%20the%20inside%20information.>

¹⁹*Id.*

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶SIA Staff, Material Information Meaning & Definition, *The Securities Institute of America, Inc.* (n.d.), available at <https://securitiesce.com/definitions/5861-material-information/#:~:text=Material%20Information%20is%20information%20that,%20invest%20in%20the%20company.>

²⁷James Chen, Material Nonpublic Information (MNPI)? Definition and Laws, *Investopedia* (Apr. 25, 2022), available at <https://www.investopedia.com/terms/m/materialinsiderinformation.asp#:~:text=Nonpublic%20information%20typically%20relates%20to,certain%20transactions%20with%20financial%20institutions.>

²⁸Michael Santos, *supra*, note 18.

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

Rule 10b5

Rule 10b5 is a regulation that was created by the Securities Act of 1934.³⁴ It targets security fraud. Under Rule 10b5, it is illegal for anyone to directly or indirectly use any means to defraud, make false statements, omit relevant information, or do business in a way that deceives another person when conducting transactions of stock and other securities.³⁵ Formally, Rule 10b5 is known as the Employment of Manipulative and Deceptive Devices (EM-DD).³⁶

Rule 10b5 is the main driver for the SEC to investigate security fraud claims.³⁷ Violations of the rule includes: (1) executives making false statements to increase share prices, (2) companies hiding significant losses or decreased revenue using creative accounting practices, or (3) activities conducted to give current shareholders an increased return on investment while any deception is hidden or fraudulent.³⁸ Rule 10b5 also covers false statements by executives to drive stock prices down so that they might purchase more shares at a lower price.³⁹ Finally, Rule 10b5 involves schemes to illicit profits or attract more investors by changing the shareholder balance.⁴⁰

The characteristics of Rule 10b-5 seem appropriate. In this author's opinion, in general, no change is needed to this rule.

Rule 10b5-1(c)(1), or the Affirmative Defense

Rule 10b5-1(c)(1) established an affirmative defense to Exchange Act Section 10(b) and Rule 10b-5 for insider trading when an individual buys or sells a security and can show that material, nonpublic information was not a consideration in making the trading decision, and the trade was performed before the person became aware of the material, nonpublic information.⁴¹ With this defense, there was a binding contract to buy or sell a security, and there were specific instructions to execute a trade for a trader's account or a written plan was agreed upon for trading securities.⁴²

This is a reasonable rule, and in the author's opinion, it should not be changed.

Rule 10b5-2 and Selective Disclosure

Rule 10b5-2 addresses the misappropriation theory, a theory in which an individual employs insider information to commit securities fraud against an information source.⁴³ Rule 10b5-2 can apply under nonbusiness situations because an individual that obtains confidential information is required to maintain a duty of trust.⁴⁴

Misappropriation theory assumes that an individual who employs insider information in trading securities has committed securities fraud against the source of the information.⁴⁵ Misappropriation theory is different from the classical theory of insider trading. Under the classical theory of insider trading, there is a corporate insider's breach of duty to shareholders in a transaction.⁴⁶ An insider could be an employee, director, or officer of the company.⁴⁷ For example, in *O'Hagan*, the defendant acted on inside information regarding a takeover bid for Pillsbury Corp.⁴⁸ Based on the information above regarding Rule 10b5-2, it appears that there is no need to change the rule. It is comprehensive and consistent in its purpose.

Rule 10b6 and Rule M

Rule 10b6 was an anti-manipulation rule that prohibited an issuer from buying stock before the stock had been completely distributed.⁴⁹ The purpose of the rule was to stop issuers from manipulating the market by bidding for shares before they were available to the public, thereby artificially the price of the stock.⁵⁰ The rule leveled the playing field for investors, dealers, brokers, issuers, and underwriters for shares that were newly issued.⁵¹ In 1996, the SEC replaced Rule 10b6 with Rule M, where the regulation became effective on March 4, 1997.⁵² Rule M consists of six rules that address various trading issues and the parties.⁵³ Rule M consists of Rule 100, Rule 101, Rule 102, Rule 103, Rule 104, and Rule 105. Rule 100 contains the definition for Rule M. Rule 101 is concerned with activities of broker-dealers and underwriters regarding stock distribution. Rule 102 encompasses issuers and persons selling securities. Rule 103 is an oversight rule for passive market making in Nasdaq. Rule 104 stabilizes transaction activities by underwriters. Rule 105 guards short selling in a public offering.⁵⁴

Based on the information contained herein, it appears that no changes are needed to Rule M.

Rule 10b18 or Safe Harbor

Rule 10b18 is intended to reduce liability for companies when they repurchase the firm's common stock.⁵⁵ The rule is a safe harbor provision because it reduces or eliminates legal liability if the following four conditions are satisfied:⁵⁶

- An issuer or affiliate must purchase all shares from a single broker-dealer in a single day.
- An issuer with an average daily trading volume (ADTV) less than \$1 million per day or with a public float value less than \$150 million cannot trade within the last 30 minutes of trading. On the

³⁴Brian Dolan, Rule 10b-5: Definition and Role in Securities Fraud, *Investopedia* (Feb. 27, 2023), available at <https://www.investopedia.com/terms/r/rule10b5.asp>.

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

⁴¹SEC Staff, Insider Trading Arrangements and Related Disclosures, U.S. Securities and Exchange Commission (Feb. 24, 2023), available at [https://www.sec.gov/investment/insider-trading-arrangements-and-related-disclosures#:~:text=Rule%2010b5-1\(c\)\(1\)%20provides%20an%20affirmative,the%20trading%20decision%20be%20cause%20before](https://www.sec.gov/investment/insider-trading-arrangements-and-related-disclosures#:~:text=Rule%2010b5-1(c)(1)%20provides%20an%20affirmative,the%20trading%20decision%20be%20cause%20before.).

⁴²*Id.*

⁴³Brian Dolan, *supra*, note 34.

⁴⁴*Id.*

⁴⁵Adam Hayes, Misappropriation Theory: What It Is, How It Works, Example, *Investopedia* (Jun 1, 2022), available at

https://www.investopedia.com/terms/m/misappropriation_theory.asp,

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*United States v. O'Hagan*, 521 U.S. 642 (1997).

⁴⁹Will Kenton, Rule 10b-6: Meaning, History, Replacement, *Investopedia* (Jul. 21, 2022), available at [https://www.investopedia.com/terms/r/rule-10b-6.asp#:~:text=Rule%2010b-6%20was%20designed,underwriters%20for%20newly%20issued%20shares](https://www.investopedia.com/terms/r/rule-10b-6.asp#:~:text=Rule%2010b-6%20was%20designed,underwriters%20for%20newly%20issued%20shares.).

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵Adam Barone, Rule 10b-18 Definition and How Compliance Works, *Investopedia* (Jan. 10, 2021), available at

<https://www.investopedia.com/terms/r/rule10b18.asp>.

⁵⁶*Id.*

other hand, companies with higher average trading volumes or public float values can trade until the last 10 minutes of trading.

- An issuer must repurchase stock at a price not greater than the highest independent bid or the last transaction price quoted.
- An issuer cannot purchase over 25 percent of the average daily volume.

If a company adheres to these four conditions when repurchasing company shares, the firm is not violating Rule 10b18. It should be noted that Rule 10b-18 is concerned with the manner, timing, price, and volume of repurchases.⁵⁷ Compliance with the voluntary. Firms must satisfy the four conditions daily for stock repurchases to qualify for safe harbor. In this author's opinion, the satisfaction of the four conditions above should be mandatory rather than voluntary. The hidden issue is that companies repurchase their stock to ensure a high stock price. High stock prices is usually a management goal, where senior managers receive significant bonuses when the price of company shares are high. In this circumstance, a high stock price does not reflect whether a firm is producing innovative products. Rather, the high stock price is an artificial event, where a company has the appearance of being success when in fact it may be declining in the market. This author recommends that the safe harbor provision of Rule 10b 18 be modified so that a company can only repurchase a fixed percentage of the outstanding stock so that investors are not deceived regarding the viability of the firm. I recommend that the maximum number of shares that can be repurchased be no more than five percent of the shares outstanding.

Rule 14e3 and Tender Offers

Rule 14e-3 prevents insiders affiliated with the bidder and the target from revealing confidential information about a tender offer.^{58,59} With narrow exceptions, Rule 14e-3 forbids a person that possesses material information related to a tender offer from trading the securities of a target company provided that the bidder has taken substantial steps in furtherance of the bid.⁶⁰

In this author's opinion, Rule 14e-3 should not be changed because it prevent a subtle form of insider trading that should not be allowed.

Rule 16 and Filing Responsibilities

Rule 16 states the regulatory responsibilities of directors, officers, and principal shareholders.⁶¹ The rule requires filing standards for insiders, where insiders are defined to be directors, officers or stockholders that directly or indirectly possess sock that result in ownership of more than 10 percent of a company's common stock or preferred stock.⁶² Rule 16 demands those insiders file Forms 3, 4, and 5 electronically or in hardcopy. Form 3 is an initial statement of securities ownership provided there is an initial public offering (IPO) of stock or bonds, or if an individual become a director, officer or

holds at least 10 percent of corporate stock. New directors, officers and significant shareholders are required to file Form 3 with 10 days of acquiring investment assets. If a material change of the securities owned by a company insider, they are obliged to file Form 4. If an insider buys or sells stock within a given year, they must file Form 5, provided they have not filed Form 4.⁶³

The purpose of Rule 16 seems to be to disclose to the SEC transactions made by insiders. If an insider adheres to Rule 16, the transaction is legal. This rule does not need to change.

Rules on Crypto Currency

Cryptocurrency is currently being advertised as new form of digital money. The defining feature of cryptocurrency is that it is not issued by a central authority or government entity, thereby making it immune from government interference or manipulation.⁶⁴ In other words, cryptocurrency exists outside the control of these entities. The purported advantage of cryptocurrency is that it facilitates cheaper and faster money transfers without a single point of failure.⁶⁵ Its disadvantage is its volatility. According to Gianti, Bitcoin, the undisputed leader in cryptocurrencies, is more volatile in the short-run than in the log-run (ATR 14 > ATR 200), where ATR stands for Average True Range.^{66,67} Bitcoin is three times more volatile than Nasdaq in the short term and twice as volatile in the long term, and is ten time more volatile than the European Union (EU) Euro and the United States dollar.⁶⁸

There is a problem with viewing cryptocurrency as money. According to Krugman and Wells, money has the following three properties: (1) it is a medium of exchange, (2) a store of value, and (3) a unit of accounting.⁶⁹ Although cryptocurrency can be a medium of exchange for criminals,⁷⁰ with its significant volatility, cryptocurrency can hardly be considered a store of value or a unit of accounting. In fact, cryptocurrencies act more like speculative stocks than money.⁷¹ Thus, in this author's opinion, crypto currencies should be highly regulated by governments, if only to protect the asset values of its holders. It is imperative that that regulation be instituted to ensure that the value of cryptocurrencies remain stable. Nothing short of this will suffice.

⁵⁷*Id.*

⁵⁸SEC Staff, Fair to All People: The SEC and the Regulation of Insider Trading, U.S. Securities and Exchange Commission Historical Society (n.d.), available

athttps://www.sechistorical.org/museum/galleries/it/resilience_a.php#:~:text=Rule%2014e-3%20prohibits%20insiders,a%20Rule%2010b-5%20violation.

⁵⁹*Chiarella v. United States*, 445 U.S. 222 (1980).

⁶⁰ SEC Staff, *supra*, note 58.

⁶¹James Chen, Section 16 Definition and SEC Filing Requirements, *Investopedia* (Nov. 30, 2020), available

at<https://www.investopedia.com/terms/s/section-16.asp#:~:text=According%20to%20Section%2016%2C%20anyone,statement%20required%20by%20Section%2016.>

⁶²*Id.*

⁶³*Id.*

⁶⁴ Jake Frankenfield, Cryptocurrency Explained with Pros and Cons for Investment, *Investopedia* (Jul. 24, 2023), available at<https://www.investopedia.com/terms/c/cryptocurrency.asp#:~:text=Advantages%20Explained,police%20transactions%20between%20two%20parties.>

⁶⁵*Id.*

⁶⁶ Stefano Gianti, Bitcoin vs Risk: Understanding Volatility, *Swissquote* (Apr. 7, 2021), available at<https://medium.com/swissquote-education/bitcoin-vs-risk-understanding-volatility-472efe96e439#:~:text=Besides%2C%20we%20observe%20that%20Bitcoin,volatile%20than%20the%20EUR%20FUSD.>

⁶⁷Adam Hayes, Average True Range (ATR) Formula, What It Means, and How to Use It, *Investopedia* (Dec. 20, 2022), available at<https://www.investopedia.com/terms/a/atr.asp>,

⁶⁸Stefano Gianti, *supra*, note 66.

⁶⁹PAUL KRUGMAN AND ROBIN WELLS, *ECONOMICS* (Worth Publishers 6th ed. 2021).

⁷⁰ Stefano Gianti, *supra*, note 66.

⁷¹Yash Majithia, 15 Most Volatile Cryptocurrencies in 2023, *Technopedia* (Aug. 11, 2023), available at<https://www.techopedia.com/cryptocurrency/most-volatile-crypto#:~:text=Volatile%20cryptos%20experience%20significant%20price,throught%20short-term%20trading%20strategies.>

CONGRESS AND INSIDER TRADING

According to Parlapiano *et al.*, at least 97 current members of Congress purchased or sold stock, bonds or other financial assets that involved their congressional work or reported similar transactions by their spouse or dependent child.⁷² Members of Congress are not banned from investing in any, including firms that are affected by their congressional decisions.⁷³ The New York Times analyzed trades done by members of Congress between 2019 and 2021, finding that many of the trades were conducted independently by a spouse or a broker.⁷⁴ Some members of Congress sold all their stocks or moved their stocks to blind trusts, while other two members stated that the trades were accidental.⁷⁵

Stewart observed that most voters do not want members of Congress to trade stocks.⁷⁶ On July 19, 2023, a Wednesday, Sens. Kirsten Gillibrand (D-NY) and Josh Hawley (R-MO) introduced the Ban Stock Trading for Government Officials Act (BST-GOA).⁷⁷ The bill would limit how members of Congress, the President, the Vice President, and senior executive branch officials, including their spouses and dependents, could invest.⁷⁸ The bill would bar them from holding and trading individual stocks, making no exception for blind trusts, or black boxes controlled by third parties who make trades on their behalf.⁷⁹ However, they would be able to own mutual funds and index funds.⁸⁰ The investment into mutual funds and index funds would not necessarily be a detriment to government officials. It should be remembered that Warren Buffet once recommended that busy individuals, such as members of Congress, the President, Vice President, and senior executive officials, should consider investing in index funds because their returns were substantial.⁸¹ Finally, if the rules are broken, the penalty would be at least 10 percent of the value of the prohibited investments.

In this author's opinion, BST-GOA is an excellent bill, deserving to become law. However, given the financial controversy surrounding the current President of the United States and his family,⁸² it is doubtful that BST-GOA would be signed into law. If the accusations of influence peddling prove to be true, there is no reason to believe that

⁷²By Alicia Parlapiano, Adam Playford, & Kate Kelly, These 97 Members of Congress Reported Trades in Companies Influenced by Their Committees, *The New York Times* (Sep. 13, 2022), available at <https://www.nytimes.com/interactive/2022/09/13/us/politics/congress-members-stock-trading-list.html#:~:text=At%20least%2097%20current%20members,New%20York%20Times%20has%20found.>

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶Emily Stewart, Even Congress Thinks Its Members Should Stop Playing the Stock Market, *Vox* (Jul. 21, 2023), available at <https://www.vox.com/politics/2023/7/21/23802923/congress-stock-trading-ban-gillibrand-hawley-bill-pelosi>

⁷⁷*Id.*

⁷⁸*Id.*

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹James Royal, Warren Buffett's Investment Advice: 9 Top Pieces of Wisdom for Investing Success, *Bankrate* (Jun. 20, 2023), available at <https://www.bankrate.com/investing/warren-buffett-top-investment-advice/#:~:text=Buffett%20has%20long%20advised%20most,have%20extensive%20intelligence%20on%20companies.>

⁸²COA Staff, Comer Reveals New Evidence in Biden Family's Influence Peddling Schemes, *Committee on Oversight and Accountability* (May 10, 2022), available at <https://oversight.house.gov/release/comer-reveals-new-evidence-in-biden-family-influence-peddling-schemes/#:~:text=The%20Biden%20Family%20Used%20Business,of%20dollars%20from%20foreign%20companies.>

the bill would be signed into law. Even so, if the vote in both houses of Congress were veto-proof for political expediency, BST-GOA could still become law. Hopefully, the bill proposed by Sens. Gillibrand and Hawley becomes law, if only to assure the American that there is one law for all of us, not one law for the elite and another law for the electors.

PENALTIES FOR INSIDER TRADING

The penalty for insider trading can be civil, criminal or both. The maximum sentence for conducting insider trading is 20 years in federal prison, where the maximum criminal fine is \$5 million for an individual and \$25 million for a company.⁸³ There is no mandatory minimum sentence for insider trading, because the minimum sentence is left to the discretion of a federal judge.⁸⁴ The sentencing guidelines may suggest that a defendant receive a particular sentence for insider trading, but the sentence judge has the discretion to depart from the guidelines, sentencing a defendant to probation.⁸⁵ It should be noted that the Insider Trading Sanctions Act of 1984 permits the SEC to sue for civil penalties for insider trading.⁸⁶ The criminal penalties can be significant, particularly when it involves prison time. There is no need to change the 20-year sentencing maximum. The \$5 million maximum fine for individuals and \$25 million maximum fine for corporations is substantial, particularly if they are incident-dependent. The \$25 million maximum fine for businesses is a bump-in-the-road for major corporations. The maximum fines could be adjusted depending on the wealth of an individual or the size of the company and nature of the violation. However, any change in the maximum fine would likely precipitate an intense legal battle with a defendant to determine the appropriate fine. Because of the increased legal costs for the government and a corporate defendant, the maximum fines should probably stay the same, particularly if the amount is incident-dependent. If multiple incidents require multiple maximum fines to be imposed, this fact likely reinforces the stability of the maximum fines.

There are also departures from the sentencing guidelines to consider. This author is not a fan of mandatory sentencing because it does not take into consideration the unique characteristics of individuals or corporations. Although one could argue that mandatory sentencing is objective, discretion is preferable, particularly when individuals and small businesses are defendants. The SEC should not impose a fine that bankrupts an individual or a corporation. It should be remembered that for businesses, the employees likely completely innocent. Any major disruption of their lives would probably result in experiencing substantial financial hardship when they were not responsible for the violation.

CONCLUSION

In conclusion, insider trading is type of security trading that has many facets. Most of the SEC rules do not need to change. However, some rules need to be created (e.g., cryptocurrency) and some rules need to change (e.g., stock trades by members of Congress). This essay was an attempt to see what needed to be changed and what needed to stay the same regarding insider trading. It is a difficult topic to analyze. Even so, one way to understand what should be changed is to examine the definition of insider trading, the elements of insider trading, the characteristics of insider trading, the types of insider trading, the trading laws of the United States, Congressional insider

⁸³ Michael Santos, *supra*, note 18.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

trading, and the penalties for insider trading. Then, one can adequately answer what trading laws need to be reformed or changed.

Donald L. Buresh Biography

Donald L. Buresh earned his Ph.D. in engineering and technology management from North central University. His dissertation assessed customer satisfaction for both agile-driven and plan-driven software development projects. Dr. Buresh earned a J.D. from The John Marshall Law School in Chicago, Illinois, focusing on cyber law and intellectual property. He also earned an LL.M in intellectual property from the University of Illinois Chicago Law School (formerly, The John Marshall Law School), an LL.M. in cybersecurity and privacy from Albany Law School, graduating summa cum laude and is currently earning an LL.M. in financial compliance and risk management from Albany Law School. Dr. Buresh received an M.P.S. in cybersecurity policy and an M.S. in cybersecurity, concentrating in cyber intelligence, both from Utica College. He has an M.B.A. from the University of Massachusetts Lowell, focusing on operations management, an M.A. in economics from Boston College, and a B.S. from the University of Illinois-Chicago, majoring in mathematics and philosophy. Dr. Buresh is a member of Delta Mu Delta, Sigma Iota Epsilon, Epsilon Pi Tau, Phi Delta Phi, Phi Alpha Delta, and Phi Theta Kappa. He has over 25 years of paid professional experience in Information Technology and has taught economics, project management, negotiation, managerial ethics, and cybersecurity at several universities. Dr. Buresh is an avid Chicago White Sox fan and keeps active by fencing épée and foil at a local fencing club. Dr. Buresh is a member of the Florida Bar.

List of Acronyms

Acronym	Description
ADTV	Average Daily Trading Volume
ATR	Average True Range
BST-GOA	Ban Stock Trading for Government Officials Act
CFO	Chief Financial Officer
EM-DD	Employment of Manipulative and Deceptive Devices
EMH	Efficient Market Hypothesis
EU	European Union
LII	Legal Information Institute
SEC	Securities and Exchange Commission

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