THE HOUSTON LAWYER
March-April, 1988
Vol. 25 No. 5

THE CRIMINAL CLOUD OVER S.E.C. INVESTIGATIONS OF INSIDER TRADING

By Joel M. Androphy

Your client, a respected real estate attorney, receives a subpoena *duces tecum* from the Securities and Exchange Commission (S.E.C.) requesting all documents relating to her purchase and sale of the stock of X.Y.Z., Inc. She contacts the S.E.C. for assurances that there will be no criminal investigation. The answer she receives is hardly reassuring. The S.E.C. tells her that they have no "present" intention to refer the matter to the Department of Justice for prosecution. Concerned about potential criminal liability if she complies with the subpoena, she seeks your advice on how to approach the investigation.

She explains that while at a cocktail party a X.Y.Z., Inc. corporate executive "hinted" to her about the imminent acquisition of X.Y.Z., Inc. by A.B.C. Corp. Acting upon this "tip," she purchased 1,000 shares of X.Y.Z., Inc stock. Her stock value soared and she immediately sold for a substantial profit.

Reluctant to spend a significant portion of her profit on your legal fees, she asks whether compliance with S.E.C. subpoena will subject her to any criminal liability. She hopes for a simple answer and only an hour of your billable time. You outline for her the following general areas of concern: (1) the scope of the S.E.C.'s investigation; (2) criminal aspects of insider trading laws; and (3) potential adverse effects of invoking the Fifth Amendment. Distressed that your explanation may consume a substantial portion of her profit, but concerned that she may be sentenced to an environment where money is not a necessity, she compromises and listens to your explanation: one eye on you, and one eye on the clock.

1. Scope of the S.E.C. Investigation

An S.E.C. investigation begins as an informal inquiry into the facts of the alleged violation.[1] It may originate from unusual price movements on the securities markets, active trading in a particular stock that is the target of a takeover, complaints from disgruntled investors, referrals from other agencies, or leads from articles in newspapers or business publications.[2] if the S.E.C. finds that the facts warrant further proceedings, a formal order of investigation is issued,[3] defining the parameters of the investigation, and authorizing the staff to issue subpoenas.[4] If, at any stage during the investigation, S.E.C. staff attorneys determine that a criminal investigation may be warranted, they will prepare a Criminal Reference Report.[5] The S.E.C. then decides whether to forward a recommendation for criminal prosecution to the Department of Justice.[6] The Commission will usually consider a panoply of factors including: (1) whether the individual has a history of recidivism in illegal or inappropriate activity in the securities field; (2) whether the nature of the alleged violation is sufficiently egregious; and (3) whether there is any attempted or actual corruption of an S.E.C. official or government agent.[7]

After the case is referred to the Department of Justice, the case is generally assigned to the United States Attorney's office in the district of the alleged offense.[8] The S.E.C. attorney who assisted in the civil investigation and drafted the recommendation of prosecution may be appointed as a special prosecutor to assist in the grand jury proceedings and trial of the criminal case. Despite claims of conflict of interest and grand jury abuse, the courts have generally found no improprieties in allowing the S.E.C. attorney to participate in the prosecution.[9] Abuse of an attorney's dual employment status, however, might be shown in particular cases, especially where the agency uses the grand jury investigation to gather information for civil and administrative proceedings to which it would not otherwise have access.[10] In that regard, it is important to remember that the S.E.C. often pursues civil and administrative sanctions while investigating the viability of potential criminal action.[11]

2. Criminal Aspects of Insider Trading Laws

Whether an allegation of insider trading stems from a civil suit for damages, S.E.C. enforcement action, or criminal indictment, some of the most commonly encountered federal securities law violations are those proscribed in Section 10(b) of the Securities and Exchange Act of 1934[12] and Rule 10b-5[13] of the corresponding federal regulation. The term "insider trading" is not to be found within that statute or regulation. One must look at the body of the case law that has evolved.[14]

The seminal case in this analysis is *In the Matter of Cady, Roberts & Co.*[15] In that case, the S.E.C. imposed disciplinary sanctions against a registered broker-dealer and his firm under §10(b). The broker had directed his customers to liquidate their holdings in a certain corporation after learning from a corporate director, who was also a representative of the same brokerage firm, that the corporation was about to announce a dividend cut. This information had not yet been made public. The S.E.C. found that the broker, who was acting as a tippee, was in violation of Rule 10b-5 because his conduct in disclosing inside information to customers "operated as fraud or deceit upon the purchasers."[16] The S.E.C. explained that a "corporate insider" (e.g., an officer, director or controlling shareholder whose position makes him privy to information which if known to others would affect their investment judgment) has an affirmative duty to disclose material information known to him prior to trading shares of the corporation or else abstain from such trading. The affirmative duty to abstain or disclose rests on two principal elements: first, the existence of a relationship giving access to inside information intended to be available only for a corporate purpose and not for personal benefit; 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. Thus, *Cady, Roberts* stands for the proposition that a fiduciary relationship of trust and confidence between corporate shareholders and insiders exists that gives rise to an affirmative duty to disclose prior to trading.

The Second Circuit approved and adopted the *Cady, Roberts* disclose or abstain rule when it issued its landmark decision in *S.E.C. v. Texas Gulf Sulphur.*[17] That case involved corporate insiders who purchased stock on the open market with nonpublic knowledge of a valuable mineral find. The Court of Appeals held that the insiders had violated Rule 10b-5 for several reasons: (1) they had exclusive access to nonpublic, inside information that they failed to disclose when trading; and (2) the information would have been "material" to a reasonable person's investment decision.

The application of the *Cady, Roberts* and *Texas Gulf Sulphur* "access to information" test was somewhat curbed by the Supreme Court in the criminal case of *Chiarella v. United States*.[18] Defendant Chiarella was an employee of a printing company that was hired by a corporation to print documents for an upcoming tender offer that had not yet been publicly announced. Despite the corporation's attempt to conceal the identity of the target company, the defendant cleverly deduced the target from the galleys sent to him, and then purchased the target company's stock low and sold high after the public announcement. Chiarella was indicted and convicted for violating §10(b) and Rule 10b-5. The issue before the Supreme Court was whether the nonpublic information that the defendant possessed created a duty to disclose vis-a-vis the sellers of the target company securities. The Supreme Court reversed the defendant's conviction. It held that the defendant had no *Cady, Roberts*, affirmative duty to disclose prior to trading because he was not the fiduciary or agent of the target company, nor had he any prior dealings with the target company. Furthermore, the inside information Chiarella possessed was only "market information"[19] about the acquiring company as opposed to information having a bearing on its "earning power or operations."[20] In other words, the Supreme Court held that there was no §10(b) duty to disclose for the mere, albeit unfair, possession of nonpublic market information; rather, the duty to disclose inside information arises only when a specific relationship between the parties in the transaction creates a fiduciary duty.

Perhaps more significant than the *Chiarella* holding is what the Court did not base its decision on. The majority refused to consider a theory of liability proffered by the government on appeal, but not raised in the trial court, concerning the employee's misappropriation of his employer's information.[21] However, Justices Stevens[22] (concurring), Brennan[23] (concurring), Blackmun[24] (dissenting), and Marshall (dissenting) seemed to find merit in then Chief Justice Burger's (dissenting) argument which read into §10(b) and Rule 10b-5 an absolute duty to disclose information or refrain from trading by any person who has misappropriated nonpublic information.

Despite the appearance that at least five Justices would have affirmed the conviction had the misappropriation theory been properly presented to the jury, the Supreme Court later reaffirmed the *Chiarella* holding in *Dirks v. Security and Exchange Commission*.[25]

Dirks was a securities analyst for a brokerage firm. He received inside information from a former insurance company executive (the "insider") that the insurance company's assets were overstated as a result of fraudulent practices. The insider asked Dirks to investigate and bring the fraud to light. Neither Dirks nor his firm owned or traded the stock of that particular insurance company, but Dirks shared his "inside" information with some clients and investors, who in turn liquidated their interests in the insurance company. At the same time, Dirks endeavored to bring the fraud to the attention of the government. Although Dirks was ultimately successful in getting the S.E.C. to investigate the fraud of the insurance company, the S.E.C. subsequently investigated Dirks for aiding and abetting certain securities law violations, including §10(b) and Rule 10b-5. The S.E.C. took the position that when a "tippee" (Dirks) receives inside information that he knows to be confidential, then regardless of his motives, he must disclose the information publicly or abstain from trading. Because Dirks aided in uncovering the fraud, the S.E.C. considered his good conduct in mitigation of punishment and only censured him. The District of Columbia Circuit upheld the S.E.C.'s censure.

The Supreme Court in *Dirks* reversed the Court of Appeals and reaffirmed *Chiarella*, holding that a tippee may assume a *derivative* duty from the insider. "[A] tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information only when the insider had breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach."[26] Since the insider did not breach any fiduciary duty to shareholders, there was no derivative duty for *Dirks* to disclose.

Since the tippee's liability is derivative to that of the insider, it is important to ascertain whether by making the tip, the insider has in fact breached a fiduciary duty. The test is "whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach."[27] The "benefit" from disclosure may be "pecuniary gain or reputational benefit that will translate into future earnings."[28]

While the law on fiduciary responsibility in insider training seemed somewhat settled by the *Cady, Roberts, Chiarella* and *Dirks* line of cases, the misappropriation theory espoused by formed Chief Justice Burger had yet to be considered by the Supreme Court. The Second Circuit, however, took the lead in developing the law in that area. In *United States v. Newman,*[29] the defendant was the head of a brokerage house's over-the-counter trading department. He received a tip concerning impending takeover bids from two investment bankers who misappropriated this confidential information from their clients who were active prospective tender offerors. The broker and his confederates acted in this tip by purchasing the target company's stock prior to the public takeover announcement, and made substantial profits in the process. The broker was later indicted for securities fraud (§10(b) and Rule 10b-5), mail fraud and conspiracy to commit those substantive offenses. The thrust of the government's case was that the investment bankers breached the trust and confidence placed in them and their employers by the employer's corporate clients and the corporate clients' shareholders, as well as the trust and confidence placed in them by their respective employers. In effect, the *Newman* indictment was the essence of the misappropriation theory discussed (but avoided) in *Chiarella*. The Court of Appeals held that in stealing the inside information, the investment bankers had breached their fiduciary duty of confidentiality to their respective employers, as well as their employers' clients, and that the broker had conspired with the investment bankers to misappropriate the inside information that was used solely for personal benefit. The Court of Appeals thus held that the broker's involvement in the transactions operated as a fraud within the meaning of Rule 10b-5 [NOTE: As *Newman* predated *Dirks*, there was no discussion of the derivative breach analysis].

'If one casually waits until a grand jury subpoena is issued to discuss the Fifth Amendment with his client, it is probably too late.'

The Second Circuit again applied the misappropriation theory in another Rule 10b-5 "printer" case. In *Securities and Exchange Commission v. Materia,*[30] the defendant (Materia) was a copy reader employed by a financial printer that prepared tender offer materials. Despite efforts to conceal the identity of the targets, Materia often was able to identify the targets and traded accordingly for profit. The S.E.C. succeeded in enjoining Materia from further trading, and also sought to disgorge his ill-gotten profits based on the misappropriation theory. The Court of Appeals held that Materia's conduct fell within the fraud and deceit language of 10b-5, i.e., he defrauded "any person"-- that being his employer. The Court further found that Materia violated a fiduciary duty to his employer as well as to his employer's customers–the offerors of each tender offer. Interestingly, the

Court of Appeals distinguished this case from *Chiarella*, which is almost factually identical, on the ground that the misappropriation theory was properly before the trier in fact in *Materia*. Another distinction is that in *Chiarella,* the defendant's duty was examined in terms of the sellers of the target company securities, while in *Materia* the defendant's duty was examined in relation to his employer and his employer's clients.

A recent "misappropriation" case that eventually reached the Supreme Court from the Second Circuit was *United States v. Carpenter.*[31] *Carpenter* involved a conspiracy and scheme to defraud between a reporter for the *Wall Street Journal* (R. Foster Winans), a clerk for the *Journal* (Carpenter) and two stockbrokers. Winans agreed to provide the stockbrokers with certain prepublication securities-related information. Based upon this prepublication information, the conspirators traded securities and made hundreds of thousands of dollars. After the scheme was uncovered, the conspirators were indicted and convicted for violations of conspiracy, mail and wire fraud, as well as violations of §10(b) and Rule 10b-5 on the theory of misappropriating material, nonpublic information belonging to the *Journal*. Finding that Winans breached his fiduciary duty of confidentiality to his employer by purloining nonpublic information, the Court of Appeals considered whether that misappropriation could serve as a predicate for the securities fraud charges. Unlike *Newman* and *Materia,* where the confidential information had been misappropriated by employees who owed a dual duty of confidentiality (to the employer as well as the employer's clients), the misappropriation in *Carpenter* was arguably only from the employer. The Court of Appeals refused to apply *Newman* and *Materia* so narrowly, and held that Winans' misappropriation fell within ambit of those cases. As the Court of Appeals noted, "[t]he Rule prohibits '*any* device, scheme or artifice to defraud.' It equally prohibits '*any* act, or deceit upon any person.'"[32]

In *Carpenter v. United States*,[33] an evenly divided Supreme Court affirmed the convictions under the securities laws, but the Court was unanimous in upholding the convictions for the mail and wire fraud violations. Nevertheless, the Court acknowledged that the *Wall Street Journal* had an intangible property right in the confidentiality of the contents and timing of its articles.[34] The Court left open the question of whether criminal liability could be imposed under Rule 10b-5 where the newspaper, admittedly a victim of fraud, had no interest in the securities traded.

The important distinction between the traditional *Cady, Roberts* fiduciary duty line of cases and the later misappropriation cases appears to be how broadly the courts are willing to define the term "inside information." Corporate insiders traditionally owe a fiduciary duty to the shareholders. This duty may, under limited circumstances, be derivatively transferred to a tippee. Whereas corporate "outsiders," e.g., Materia, have a fiduciary duty to their employers, who in turn have relationships of trust and confidence with their corporate customers. Until a full Supreme Court again considers the misappropriation theory, it would be prudent to assume "inside information" includes the concept of "misappropriation."

3. Factors to Consider in Determining Whether to Advise Your Client to Assert the Fifth Amendment

The potential for the S.E.C. to use the grand jury system to obtain civil discovery is not as alarming as the potential for the Department of Justice to use depositions and other discovery from a civil or administrative proceeding to solidify what may have been a weak criminal case.

Counsel is generally confronted with Fifth Amendment concerns during the S.E.C.'s investigatory phase. If one casually waits until a grand jury subpoena is issued to discuss the Fifth Amendment with his client, it is probably too late. The discussion should center around the following factors: (1) whether your client is a potential target or simply a witness; (2) your client's exposure to criminal sanctions; (3) the availability of documentary evidence and third party witnesses that alone could prove a case against your client; (4) whether your client is a candidate for immunity; and (5) the adverse effects of asserting the Fifth Amendment.

If your client is not regulated or licensed by the S.E.C., the adverse effects are limited. Not faced with "stop orders," suspension, license revocation, or other disciplinary proceeding,[35] the most you can anticipate is a request by the S.E.C. for an "adverse inference" instruction is a civil proceeding.[36] In that regard, and especially if you are unsure of the nature and extent of the S.E.C.'s evidence against your client, or his exposure, you may recommend asserting the Fifth Amendment at the investigatory stage. If the S.E.C. then decides to bring a civil proceeding, you may request discovery of the S.E.C.'s evidence prior to deposition and a stay of discovery[37] against your client until you have determined the extent of any criminal investigation. If you later decide to provide deposition testimony, you will have a better understanding of the case and room to argue against an "adverse inference" instruction.[38] Although your ultimate decision may never be without some error, you can minimize any miscalculations by allowing time to preview the entire case.

4. Application of the Law to the Facts

At this juncture, your client should have several questions about her criminal exposure. Criminal liability requires a "willful" violation[39]of 10(b)and 10b-5. Despite her assurances that she never took a securities law course in law school, never heard of §10(b) or Rule 10b-5 until today, and never had a grievance filed against her, it is almost a certainty that this element will be proven. There will be no question that the corporate executive at the party, i.e., the insider, owed a fiduciary duty to his corporation and shareholders, including the duty to abstain from trading, or to disclose the material, nonpublic information prior to trading. There may be a question, however, as to whether the executive received a "benefit" in divulging the tip. In that regard, your client should be prepared to disclose the nature and extent of her relationship with the executive. It is also advisable to interview the executive to avoid any surprises.

5. Strategic Considerations

Until you understand the full extent of the S.E.C.'s case, it may be prudent to have your client assert the Fifth Amendment. Without her testimony (or anyone else's), the government may never have sufficient evidence to bring an indictment.

6. Conclusion

Billable Time: $(?)
Net profit: $(?)
Potential Liability: 5 years, $10,000 fine, or both
Anticipated result: No jail, no fine

FOOTNOTES

1. 17 C.F.R. §202.5(A) (1987).
2. *Fourth Survey of White Collar Crime: Securities Fraud*, 24 Am. Crim. L. Rev. 687, 705 (1987).
3. Securities Act of 1933 §§ 19(b) and 20(a), 15 U.S.C. §77s(b), §77t(a), and the Securities Exchange Act of 1934 §§21(a) and (b), 15 U.S.C. §78u (a),(b).
4. 17 C.F.R. 203.8 (1987).
5. Matthews, *Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of S.E.C. Criminal Cases*, 39 Geo. Wash. L. Rev. 901,

914 (1971); 24 Am. Crim. L. Rev. at 706.

6. 17 C.F.R. § 202.5(f) (1987).

7. *Third Annual Survey of White Collar Crime: Securities Fraud*, 22 Am. Crim. L. Rev. 470, 490-91 (1984); Matthews, 39 Geo. Wash. L. Rev. at 916. An informal criminal reference of the S.E.C.'s investigative files may be forwarded directly to the United States Attorney. While this saves time, it can result in criminal prosecutions which are not part of any rational or structured enforcement policy. See, Kronstein, *The Shadow of Criminal Prosecution over S.E.C. Investigations*, 8 Sec. Reg. L.J. 145, 146-147 (1980).

8. 24 Am. Crim. L. Rev. at 706; Mathews, 39 Geo. Wash. L. Rev. at 916-917.

9. *United States v. Birdman*, 602 F.2d 547, 563 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *In re Perlin*, 589 F.2d 260, 265 (7th Cir. 1978).

10. *Birdman*, 602 F.2d at 563. *See also U.S. v. Sells Engineering Inc*., 463 U.S. 618, 103 S. Ct. 3133 (1983); *United States v. Baggot*, 463 U.S. 476, 103 S. Ct. 3164 (1983); Rule 6, Federal Rules of Criminal Procedure.

11. *United States v. Naftalin*, 534 F.2d 770, 774 (8th Cir. 1976), *cert. denied*, 429 U.S. 827 (1979).

12. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.§78j(b), provides in pertinent part;
    It shall be unlawful for any person, directly or indirectly, by use of any means of instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange–
    (b) To use or employ, in connection with the purchase or sale of security not so registered, any manipulative or deceptive device or contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

13. Rule 10b-5 of 17 C.F.R. §240. 10b-5 provides:
    It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentally of interstate commerce, or of the mails of any facility of any national
    securities exchange:
    (a) to employ any device, scheme or article to defraud;
    (b) to make any untrue statement of a material fact or to omit to state a material fact made, in light of the circumstances under which they were made, not misleading; or
    (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

14. Due to space limitations, this article is limited to the analysis of §10(b) and Rule 10b-5. However, the reader should be aware that another anti-fraud statute, §17(a) of the Securities Act of 1933, 15 U.S.C. §77(a), is very similar to Rule 10b-5, except that §17(a) applies *only* to sales and offers to sell securities and in inapplicable to fraud by the purchaser.

15. 40 S.E.C. 907 (S.E.C. 1961).

16. *Id*. at 913.

17. 401 F.2d 833 (2nd Cir. 1968), *cert. denied*, 394 U.S. 976, 89 S. Ct. 1471 (1969).

18. 445 U.S. 219, 100 S. Ct. 1008 (1980).

19. *Id*. at 231, 100 S. Ct. at 1116.

20. *Id.*

21. *Id*. at 236, 100 S.Ct. at 1118.

22. Justice Stevens stated, "If we assume that petitioner breached a duty to the

acquiring companies that had entrusted confidential information to his employers, a legitimate argument could be made that his actions constituted 'a fraud or a deceit' upon those companies 'in connection with the purchase or sale of any security.'"
Id. at 238, 100 S.Ct. at 1119.

23. Justice Brennan likened the misappropriation theory to common law conversion when he stated, "...a person violates §10(b) whenever he improperly obtains or converts to his own benefit nonpublic information which he then uses in connection with the purchase or sale of securities. *Id*. at 239, 100 S.Ct. at 1120.
24. Justice Blackmun, with whom Justice Marshall joined dissenting, stated, "[t]he fact that petitioner Chiarella purloined or ...'stole,' information concerning pending tender offers certainly is most dramatic evidence that petitioner was guilty of fraud. *Id.* at 245-246, 100 S.Ct. at 1123.
25. 463 U.S. 646, 103 S.Ct. 3255 (1983).
26. *Id*. at 660, 103 S.Ct. at 3264.
27. *Id*. at 662, 103 S.Ct. at 3265.
28. *Id*. at 663, 103 S.Ct. at 3266.
29. 664 F.2d 12 (2nd Cir. 1981), *cert. denied*, 464 U.S. 863, 104 S.Ct. 193 (1983).
30. 745 F.2d 197(2nd Cir. 1981), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2112 (1985).
31. 791 F.2d 1024 (2nd Cir. 1986), *aff'd*, ___U.S. ___, 108 S.Ct. 316 (1987).
32. *Id*. at 1029-1030.
33. ___U.S.___, 108 S.Ct. 316 (1987).
34. 108 S.Ct. at 320.
35. The stock exchange may terminate the membership of a broker-dealer if he fails to cooperate. *See e.g.*, Richard Neuberger, Securities Exchange Act Release No. 18428, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) paragraph 83,091 (Jan. 19, 1982) (as a self-regulatory agency, the Exchange may impose sanctions a government agency may not); *In re Lawrence H. Abercrombie*, Securities Exchange Act Release No. 15285, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) paragraph 82,342 (Oct. 18, 1979) (as self-regulatory organization, the National Association of Security Dealers is not bound by same considerations that restrict government agencies). *See also United States v. Solomon*, 509 F.2d 863, 867-71 (2d Cir. 1975) (because New York Stock Exchange (NYSE) is not agent of government, interrogation by NYSE of broker-dealer does not implicate Fifth Amendment).
36. *Baxter v. Palmigiano*, 425 U.S. 308, 316-321 (1976) adverse inference permitted); *Brink's Inc. v. City of New York*, 717 F.2d 700, 707-710 (2nd Cir. 1983) (whether to permit a party to call witnesses solely for the jury to hear their Fifth Amendment assertion and to obtain an adverse inference instruction thereon will depend on its probative versus prejudicial value); but see *Spevack v. Klein,* 385 U.S. 511, 515 (1967) (silence is not evidence of guilt).
37. *Securities & Exchange Commission v. First Financial Group of Texas Inc.*, 659 F.2d 660, 668 (5th Cir. 1981); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1988 (5th Cir.), *cert. denied*, 449 U.S. 993 (1980); *United States v. Kordel*, 397 U.S. 1, 9-13 (1970).
38. If the invocation of the Fifth Amendment was made during an S.E.C. investigation, a non-adversarial proceeding, there is authority that an inference is not justified. Glanzer, *The Use of the Fifth Amendment in S.E.C. Investi-*

gations, 41 Wash. and Lee L. Rev. 859, 915-919 (1984).

39. 15 U.S.C. § 78ff provides in pertinent part that "[a]ny person who *willfully* violates any provision of this title... or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required... shall upon conviction be fined not more than $100,000, or imprisoned not more than five years, or both" (Emphasis added). See also *United States v. Peltz*, 433 F.2d 48 (2d Cir. 1970), *cert. denied*, 401 U.S. 955, 91 S.Ct. 974 (1971). ■