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Section 16(b) and the influence that it might have in the Italian insider trading laws

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Abstract

The purpose of this article is to imagine the influence that section 16(b) might have in the Italian Law System. Insider trading has long been considered a feature of the world's financial market, despite the universal criminalization of it. Criminalization of insider trading have a moral dimension. Maybe financial market is accustomed to live with it, but, in spite of this, governments around the world are looking for the best solution to contrast it. We know that in US system, SEC has introduced criminal penalties for insider trading and the European Union is working on a MAD2 to go at fiercely insider trading. But, we have to remember that European States should not apply exactly the whole European Union law, but each State implements, in accordance with its law, EU directives. This is one of the reason why insider trading law is different between Uk and Italy. I think that Us system has a good rule to prevent and to contrast insider trading: the short swing trading rule. Italian government should establish a rule similar to section 16(b), with a difference, because this rule could help to contrast many types of insider trading, because of its absolute presumption of guilt.

In this article, I'll write about the short swing trading and I'll explain the case. Then I'll explain the only one rule that we have in Italy to contrast insider trading and I'll prove that it could not be sufficient to stop insider trading conduct. Without a working well civil liability, no criminal penalties will be enough. The reason why a person use illegally inside information to trade is money, so just the fear to lose "that" money, and more of that, could prevent him to be guilty of insider trading. I'm sure that this is not the universal solution to contrast or to eliminate insider trading in financial markets, but certainly it could be the beginning to fight back the issue.

1. The section 16 of the Securities Exchange Act of 1934

The Securities Exchange Act of 1934 establishes rules to govern the national securities exchanges, the practices employed in trading in securities listed and registered on them, the brokers and dealers. The section 16 seeks to accomplish this by depriving officers, directors and substantial stockholders of any incentive to abuse their position by trading in the securities of their

corporations on the basis of non-public information[1]. This section was incorporated into the Act because of the speculative practices of corporate insiders. It reflects a congressional compromise between those who advocated no regulations and those who supported absolute prohibition of insider trading[2].

The section 16 provides:

"(a) DISCLOSURES REQUIRED -

(1) DIRECTORS, OFFICERS, AND PRINCIPAL STOCKHOLDERS REQUIRED TO FILE.—Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 12, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission.

(2) TIME OF FILING.—The statements required by this subsection shall be filed—

(A) at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g);

(B) within 10 days after he or she becomes such beneficial owner, director, or officer, or within such shorter time as the Commission may establish by rule;

(C) if there has been a change in such ownership, or if such person shall have purchased or sold a security- based swap agreement involving such equity security, be- fore the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission

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[1] COOK, FELDMAN, Insider trading under the securities Exchange Act, 66 Harvard Law Revew, 385, 612 (1953), p. 557

[2] Purchase and Sale Under Section 16(b) of the Securities Exchange Act, 10 Syracuse L. Rev., 296 (1959)

determines that such 2-day period is not feasible.

(3) CONTENTS OF STATEMENTS.—A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements or security-based swaps as have occurred since the most re- cent such filing under such subparagraph.

(4) ELECTRONIC FILING AND AVAILABILITY.—Beginning not later than 1 year after the date of enactment of the Sarbanes- Oxley Act of 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in

equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same there- after; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement or a security-based swap involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

(c) It shall be unlawful for any such beneficial owner, director, or officer, directly or indirectly, to sell any equity security of such issuer (other than an exempted security), if the person selling the security or his principal (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter, or does not within five days after such sale deposit it in the mails or other usual channels of transportation; but no person shall be deemed to have violated this subsection if he proves that notwithstanding the exercise of good faith he was unable to make such delivery or deposit within such time, or that to do so would cause undue inconvenience or expense [...]".

This is the disposal of section 16(a)(b)(c), that was enacted by Congress in 1934 and then modified in part. It was the first provision targeted at insider trading. The Congress, to curb taking-profits by insider based on non-public information, enacted this rule of easy application.

While the section 16(a) of the Act requires periodic reports by officers, directors, and principal shareholders of companies with publicly traded companies detailing the status of their ownership of company securities and changes in ownership thus can be tracked, the section 16(b) establishes that if such changes occurring within a six-month period may be reviewed for possible application of its.

The short-swing rule, sure enough, states an absolute presumption 'cause any profits realized by an officer or director or beneficial owner of more than 10 percent of any class of equity securities of a publicly traded corporation from a non-exempt purchase and sale, or sale and purchase of any

equity security of such company occurring within a six-month period must be disgorged to the company[3]. In other words, the rule 16(b) is mechanically applied and states a strict liability without it being important if the trading is done on the bases of inside, material, information. For the mere fact that the purchase and sell, or sell and purchase, were in place by an officer, a director or a beneficial owner for more than 10 percent of any securities within any period non less than six months, the rule triggers the liability for the insiders.

Short-swing profits include "any profit realized". If there are multiple stock transactions over a period of time longer than six months, any purchase will be paired with any sale occurring within a six-month time frame even if stock certificates for those paired purchases and sales do not match. This principle has been adopted by the courts to limit the ability of insiders and principal stockholders to avoid the restrictions of section 16(b).

This rule avoids in a insider trading process having to prove, at first, the scienter, then the materiality of the information on the bases of which the insider had traded and finally that the defendant is an insider, because the section 16(b) prescribes who is an officer, a director or a beneficial owner.

Moreover, to encourage enforcement, the act authorizes federal civil actions to be brought on behalf of the company by a qualified shareholder if the company declines to institute litigation within 60 days of a demand[4].

In the civil law system there isn't a rule like section(b). In Italy, in particular, the insider trading laws are very unspecific, too general and establish just a penal or administrative liability for the insiders.

The short-swing trading rule prevent insider trading, not all types of it, but a part. I think that a period of six months, however, even if it could be a long period, it will be not sufficient. E.g., an insider could purchase stocks on 1 February and then he should wait, at most, 3rd august to sell. In six months the price trend could be expected, but if the period could be too long, maybe the insider could not risk to sell his securities or purchase any securities

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[3] See, MEEKER AND COONEY, The Problem of Definition in Determining Insider Liabilities Under Section 16(b), 45 Va. L. Rev., 949 (1959)

[4] See Gollust v. Mendell, 501 U.S. 115, 121 (1991), 4. 15 U.S.C. § 78p(b). Section 16(a) facilitates the recovery of short-swing profits by requiring statutory insiders to disclose any change in ownership within ten days of the end of the month in which the change occurs. The insider makes the disclosure in a Form 4 filed with the SEC, which sets forth the transactions in a manner in which it will be readily apparent whether purchases and sales resulted in short-swing profit.

because he could not know what will be the price trend and which effects would have the non-public information that he has because their relationship with the company.

2. The "purchase and sale" in the section 16(b) provision

Most of the litigation under section 16(b) has been concerned with the meaning of "purchase" and "sale"[5].

To define the purchase or sale it could be helpful to look the other provisions of the Act. "Purchase" is defined as including "any contract to buy, purchase, or otherwise acquire" and "sale" is defined as including "any contract to sell or otherwise dispose off"[6]. But, this definitions are inadequate because they include the words they are attempting to define and because they are clearly not exclusive.

Two different modes of analysis have evolved to define a "purchase" and a "sale": the "objective" and the " pragmatic" approaches. The first is applies to traditional cash-for-stock purchase or sale, the second applies to a merger exchange.

The objective approach operated in a mechanical fashion. Courts employing it inquired into neither an insider's reasons in making the transaction nor her access to or use of inside information[7]. The result is that any transaction that could be defined as a purchase or sale and brought within the parameters of the statute would occasion liability.

"The pragmatic approach" instead "involves a number of elements. First, and most important, it applies only in the certain unusual circumstances. If these circumstances exist, then the transaction is characterized as 'unorthodox'. Unorthodox transactions are ill-defined, but they usually have peculiar features that either make it unfair to apply section 16(b) or make it difficult to determine whether or when a purchase or sale has taken place..."[8]. Apparently[9], the pragmatic approach applies if the first of the following questions is answered "yes" and the second two are answered "no":

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[5] See BAKER & CARY, Cases on Corporations, 588, 1959
[6] Sections 3(a)(13) and 3(a)(14) SEA of '34
[7] See Park & Tilford, Inc. v. Shulte, 160 F.2d 231 (2nd Circ. 1947)
[8] TOMLINSON, Section 16(b): A Single Analysis of Purchase and Sale - Merging the Objective and Pragmatic Analyses, Duke L.J., 1981, 941-947
[9] As can be seen from what was held by the court in many cases, like Ferraiolo v. Newman, 259 F.2d 342 (6th Circ. 1958); Kern Country Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973)

1. Is the transaction in question of a type that may be characterized as unorthodox?

2. Did the insider have control over the timing of the decision involved the transaction?

3. Did the insider have access to inside information, irrespective of whether that information was in fact used?

However, "the law is clear that the pragmatic approach is used to determine the boundaries of section 16(b)'s definitional scope only in borderline situations, particularly those involving unorthodox transactions"[10]. When a transaction clearly comes within the statute's language, this approach must be applied[11].

3. Who's covered by section 16(b)

The section applies to "every person who is directly or indirectly the beneficial owner of more than 10 per cent of any class of any equity security which is registered on a national securities exchange, or who is a director or officer of the issuer of such security [...]". Therefore, the intent of the rule was to destroy "the vicious practices unearthed at the hearings" involving "the fragrant betrayal of their fiduciary duties by directors and officers"[12], because of their fiduciary duties accessed to confidential information.

Section 16(a) requires directors and certain officers to file their beneficial ownership of the company's stock to the SEC and to the public. For this section 16(b), an officer is: a president and chief executive officer; any vice president in charge of a principal business unit, division or function; principal financial officer; principal accounting officer and any other person who performs similar policy-making functions for the company. This definition also includes officers of the company's parent or subsidiaries, if those officer perform a significant policy-making function in the company and for the company. In other words, a person could be considered an officer if she, in fact, exercise officer functions. In other words, to determining whether a person is an officer, we have to consider not the personal title, but whether that person performs significant policy-making functions.

This approach prevents that a person with high level functions from

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[10] Gund v. First Florida Bank, 726 F.2d 682-686 (11th Circ. 1984)

[11] WANG - STEINBERG, Insider Trading, Little, Brown and Company, 1996

[12] Sen. Rep. No. 1455, 73d Cong., 2d Sess. 55 (1934)

seeking to escape liability by abstaining title and allows persons with officer titles, but no significant managerial functions to avoid the liability under section 16(b).

Instead, a director is "any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated"[13].

The question was, in the past, whether an entire business entity, whether corporation or partnership, can be a director of another corporation because the entity has a representative on the latter corporation's board. The answer now is yes[14].

Directors and officers, like buyer/seller, are insiders if they had those status at the moment of the purchase or at the moment of the sale, even though they did not have the status at the other end of the trade[15].

About beneficial owner, we have to remember that a person falls within section 16(b) if he is "directly or indirectly" the beneficial owner of... Therefore, the courts will attribute stock listed in P's name as being indirectly beneficially owned by Y, with two consequences: i) a sale in P's name could be matched against a purchase in Y's name; or ii) a purchase and sale in P's name could be covered by section 16(b) because Y is a director or an officer of the company even if P is not. So, P and Y would be considered the same person for the purposes of the application of the section 16(b). Both will be liable for short swing trading, and both will have to recover their eventually profits.

In the case of beneficial owner, a purchaser/seller will be an insider even if he is not such a beneficial owner such both of the time of the purchase and sale, or the sale and purchase. Therefore, it is clear that a person is caught by the "10 per cent owner" prong of section 16(b) only if he has that more than 10 per cent status at both ends of the trade. the purchase that puts a person over 10 per cent does not cont for the purposes of the section 16(b). It is important, to apply the short swing rule, that a person is beneficial owner of more than 10 per cent in the moment of the purchase or sell. Instead, if a person already has more than 10 per cent and makes an additional purchase, then sells such a big chunk on month later that that sale bring him below 10

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[13] Section 3(a)(7) SEA of '34

[14] The first case that recognized that a director of a corporation could be acting on behalf of another business entity was Rattner v. Lehman, 193 F.2d 564 (2nd Circ. 1952)

[15] CAREY & EISEMBERG, Cases and Materials on Corporations, 7th Edition, Unabridged, 1995, p. 963-964

per cent, the section 16(b) can be apply[16]. On the other hand, if a person, in the moment of the purchase or sell, is beneficial owner of more than 10 per cent, for example the 13 per cent, and then sell, at first a 3,5 per cent and after a months the 9,3 per cent. Sure he will be liable for short swing profits for both sales, because it's important the first moment in which he was the beneficial owner of 13 per cent[17].

4. Who may sue and the computation of profits

The corporation or any shareholder, even one who did not own any shares when the insider's trade took place, may sue against insider. Any recovery goes into the company treasury.

Any purchase and sell which could be part of a short swing trading must be reported to the SEC (section 16(a)). The insider has to file a statement showing his ownership in the company's stocks within ten days after any calendar month in which that ownership changes. The SEC discloses the information to the public.

This suit is a federal law suit, therefore it must be brought in federal court.

The section 16(b) could catch someone who is not in fact trading on material information, but the converse is also true: a careful insider could avoid the section 16(b) liability even though he is blatantly trading based on inside information, as mentioned above, if he, to trade, waits for six months and one day.

But, if the section applies, the defendant must give to the corporation his profits realized by the short swing trading. in the case of multiple trading within a six month period, the concept of profit is ambiguous. But the courts, in fact, performed the calculation so as to produce the maximum possible profit. in other words, they will take the shares having the lowest purchase price and match them with the shares having the highest sale price, ignoring any eventually losses. This means that, paradoxically, the insider may have to hand over profits, even if he had an overall losses in the trade during the six months.

As a practical matter, if an insider makes a sale in six months of a purchase, or vice versa, he does so only at his great peril.

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[16] CLARK, Corporate Law, 1986, p. 298

[17] Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 (1972)

5. The different approach of Italian system law about insider trading

The structuring about insider trading law system in Italy is very different from USA system. At first, Italy is influenced from European Union Law system. At second, Italy miss a rule like section 16(b), namely a rule which contain an absolute presumption of guilty. Any elements, in a claim against an insider, must be prove: from the "materiality" of the information, to the status of insider.

Look at the regulatory implant about insider trading law.

In Italy insider trading is regulated from TUF (Testo unico in materia di intermediazione finanziaria)[18]. This is a civil law, but the rules about insider trading contain penal and administrative provisions: this is the first peculiarity. Then, the rules do not establish a private action for the investor or the possibility of a class action by investors who were injured by an insider. Finally, the only one that could be as a civil party in criminal proceedings is the Consob[19], which is the public authority responsible for regulating the Italian securities market. Therefore, Consob may exercise the rights and powers granted by the Criminal Procedure Code to the bodies and associations representing the interests injured by the crime. It may also intervene as a civil claimant and request, by way of compensation for the loss occasioned to the integrity of the market by the crime, damages in an amount to be assessed by the court.

By virtue of the duty to protect the integrity of the market, the public authority may claim damages to the defendant and the compensation will not be allocated to a fund for the market, but it will be used by Consob for self-financing. This is an other peculiarity.

Also, the TUF establish only penal sanctions and administrative sanctions, but it not establish a civil liability for insiders. It implements the European Union MAD (Market Abuse Directive) directive and therefore follows its prescription in the rules.

So, three are the conduct that could be insider trading: i) the ordinary insider trading; ii) the tipping; iii) the tayautage. In particular, articles 184 and 187-bis TUF establish respectively a penal sanction and an administrative sanction when a person, possessing inside information by virtue of his

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[18] Decreto Legislativo n. 58, February 24th 1998

[19] Commisione Nazionale per le Società e la Borsa

membership of the management, administrative or supervisory bodies of an issuer, his holding in the capital issuer or the exercise of his employment, profession, duties, including public duties, or position:

"a) buys, sells or carries out other transactions involving, directly or indirectly, for his own account or for the account of a third party, financial instruments using such information;

b) discloses such information to other outside the normal exercise of his employment, profession, duties or position;

c) recommends or induces others, on the basis of such information, to carry out any of the transactions referred to in paragraph a)".

Both, articles 184 and 187-bis, are formulated in the same way. The only difference between them is that article 184 applies to the primary insiders. Primary insiders are persons with a direct contact to insider facts. Article 187-bis applies to the secondary insiders are defined solely by the fact that they possess inside information.

Surely, those rule do not establish an absolute presumption about certain transactions, when it were on place by primary insider.

For the short swing rule purpose, it is not important that a primary insider has done a transaction while was in possession of inside information. The federal law presume that he, by virtue of his relationship with the issuer, is already in possession of inside information.

In Italy the possibility to condemn him to refund the issuer because he traded in a six month period is not establish.

For example, to prove that section 16(b) is still applied, Federal Courts in New York, in two recent cases, have added significantly to the law regarding several important issues arising under the short-swing trading rule. The issues are of particular interest to investors in convertible debt securities with fixed and floating conversion price features, traders in options, and hedge funds.

To represent this cases it is important to explain how the rule is applied.

In Analytical Surveys, Inc. v. Tonga Partners, L.P.[20], the Second Circuit Court of Appeals trackled four principal issues.

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[20] 2012 WL 1970389 (2d Cir., June 4, 2012)

Fact: In 2003, Tonga acquired a $1.7 million promissory note (the "2003 note") ASI, a publicly-traded U.S. company. The 2003 note was convertible at any time prior to maturity at a conversion price equal to the lowest of a fixed price and two possible floating prices (each based on the company's stock price in certain periods prior to conversion). At maturity, the note would convert automatically into shares based on the conversion price at the maturity date. In May 2004, ASI defaulted on its registration rights obligations, entitling Tonga to exercise certain remedies, including acceleration, prepayment at a premium or conversion. Instead of exercising any of these remedies, Tonga negotiated with ASI in June 2004 to exchange the 2003 note for a new note (the "2004 note") with an equivalent face amount, the same conversion price formula, and a maturity date that was deferred from April 2005 to January 2006. The 2004 note also eliminated mandatory conversion at maturity. In November 2004, Tonga converted the 2004 note at the applicable floating price of $1.05 per share. Over the next five days, Tonga sold in the open market at prices ranging from $3.52 to $6.62 the 1,701,341 shares it had obtained through the conversion.

The Federal Court First, it endorsed a "bifurcated method" for analyzing short-swing profit liability in the context of so-called "hybrid derivatives" – that is, convertible securities with both fixed- and floating-price conversion features. Second, the circumstances of a limited partnership, with a general partner that is a Section 16 insider, that realizes short-swing trading profits. It concluded that the portion of those profits allocable to the limited partners in the partnership are disgorgable under the rule. Third, it interpreted the seldom-considered "debt previously contracted" exemption, offering a narrow view of when it applies. Finally, it reiterated its support for a limited view of the scope of the Supreme Court's judicially crafted "Kern County" exception for unorthodox transactions – those that literally give rise to liability under section 16 even though that result is not dictated by the basic policy underlying the section.

Instead, In Roth vs. Goldman Sachs Group, Inc.[21], a district court in the Southern District of New York analyzed the treatment of a ten percent beneficial owner in connection with the expiration or cancellation of a short call option position. The court found that liability can attach in this situation only if the defendant is a ten percent beneficial owner both when the option is

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[21] 2012 WL 2006021 (S.D.N.Y., June 5, 2012)

written and when it expires or is cancelled.

The decision turned on the application of Rule 16b-6:

- Writing the Option. Writing a fixed-price call option is defined as a "put equivalent position" under rule 16a-1(h), and rule 16b-6(a) provides that establishing a put equivalent position is deemed a sale of the underlying securities for section 16(b) purposes.

- Exercise or Conversion of the Option. The closing of a derivative security position as a result of its exercise or conversion, as well as the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position, are exempt from section 16(b) under 16b-6(b).

- Cancellation or Expiration of the Option. Rule 16b-6(d) provides that upon the closing of a put equivalent position as a result of its cancellation or expiration within six months of the option being written, any profit derived from writing the option is recoverable under section 16(b). The profit is limited to the premium received by the writer. Rule 16b-6(d) does not clearly state what are the specific purchase and sale transactions that give rise to the disgorgement liability for the premium.

Goldman was not an insider at the time the call options expired, and therefore argued that it could not be held liable under section 16(b), which imposes liability on a ten percent beneficial owner only if it has that status both at the time of the relevant purchase and sale. Goldman also argued the expiration of the options was not a purchase for section 16 purposes. Although the first argument was Goldman's primary position and the basis for the court's ruling, the court addressed the second argument at some length, reflecting sympathy for the plaintiff's position.

Goldman's second argument drew on the Second Circuit Court of Appeals' holding in Allaire Corp. v. Okumus. In that case, the defendant wrote call options and became a ten percent beneficial owner three days later. The options expired unexercised approximately one month after being written and a month after that the defendant, while still an insider, wrote additional call options. The plaintiff argued that under rule 16b-6(a) the expiration of the first set of call options was a purchase matchable against a sale arising from the writing of the second set of call options. The Court of Appeals acknowledged that the plaintiff's reading of the rule was not implausible. Observing, however, that the exercise of a fixed-price option is a non-event for section 16(b)

purposes because it involves no opportunity for abuse of inside information, the court held that an insider writing a fixed-price option should not be worse off if the option expires unexercised. The court found, therefore, at least in that context, that the expiration of the first set of call options could not be matched with the writing of the second set of call options to create liability. A broad reading of Allaire would have, therefore, helped Goldman.

In Roth, however, the court found that, absent some limitation, the holding in Allaire would undermine rule 16b-6(d), which requires only the writing of an option and its expiration to impose liability. The court therefore concluded that Allaire should be read as interpreting only rule 16b-6(a). The court noted that rule 16b-6(d) makes sense only if the expiration of an option can serve as a purchase to match the sale that takes place when the option is written.

Against this persuasive logic, the plaintiff creatively argued that the writing of the short call options by Goldman was in and of itself both the relevant purchase and sale because this afforded the opportunity for the abuse of inside information against which section 16(b) is aimed. The court expressed sympathy for this position from a policy perspective, but ultimately rejected it as inconsistent with the requirement of Section 16 that there be a separate purchase and sale in order for liability to arise, noting that the plaintiff was unable to adduce any precedent finding that a single transaction could comprise both. Accordingly, under Roth, a ten percent beneficial owner writing a fixed-price call option can be subject to liability under rule 16b-6(d) only if the writer is a ten percent beneficial owner at both the time the option is written and its expiration. As described above, in the circumstances of Roth Goldman was only a ten percent shareholder at the time it wrote the call options, and therefore was not subject to disgorgement liability. Notwithstanding the court's seeming reluctance to reach that result, it seems most consistent with the longstanding interpretation that a ten percent shareholder must be such at the time of both a purchase and a sale in order to incur disgorgement liability under section 16.

Therefore, I think that a rule like section 16(b) in the Italian law system is a good think to prevent insider trading. But I think that the period should be to long. Six months, maybe, are few, because an expert insider, like a director or an officer, could know which will be the price trend in six months, but I could not prevent the price trend in one year. The market, infact, is constantly changing, because it is influenced from many factors, so it is impossible to

establish which factor, in one year, could influence the market and the stocks price, too. So, no insider would risk his capital if he is not sure that his investment will end well.

Infact, we have to remember that the insider's ultimate is to make money. Therefore, the conclusion is automatic.

6. Conclusion

The idea behind the short swing is to discourage the practice of making use of inside information that was not readily available to other investors at the time of the purchase to earn returns.

In spite of the short-swing trading rule was the first rule and then SEC established other rules, it continues to apply and continues to be necessary to contrast insider trading.

For this reason, I think that it should be established in the Italian law system. In Italy the problem about insider trading rule is that it's very difficult to prove all the elements in a proceeding and often the government can not recover. Articles 184 and 187-bis tuf do not help to contrast insider trading. Maybe, Italian system need more specific rules, because it is not enough.

The short-swing trading, if formulated by providing for a period of one years, could work to reduce the issue. Maybe somebody could answer that thus would impede the free circulation of the shares in the markets. But, this rule does not impede the free circulation of shares, it impedes just that a high level employee or a particular shareholder (a major shareholder) to make profits overusing their privileged position.