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SCHOOL OF LAW 435 West 116th Street

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Washington, D.C. 20004-2505

Dear Harvey:

Having spent the Spring semester as a Visiting Professor at Stanford Law School, I have just returned to Columbia to find an April 30 letter from you that was not forwarded, requesting my views on your insider trading bill, which, I realize, has by now already gone through hearings. While it would ludicrous for me to attempt any detailed analysis at this late point, it would also be rude not to reply. Basically, I think you have done a very professional job (as always) and, of course, I support your effort to codify misappropriation theory (particularly now that McNally eliminates mail fraud as a criminal alternative).

As always, I do have few comments which you are free to dispense with at this late date:

(1) Do you really mean to make Mr. Secrist in the Dirks case liable? After all, Secrist was at least "reckless" under your § 16A(c)(1) in tipping Dirks, who he should recognize had other than altruistic interests. Perhaps there should be a "whistle blower defense"; otherwise there is the potential that corporations could threaten individuals in Secrist's position with liability.

(2) If an employee of the Federal Reserve Board buys bonds based on "inside" knowledge of forthcoming data on the money supply (or GNP data even), he seems to fall within § 16A(b)(2), which includes nonpublic information "relating to . . . the market therefor." In short, the employee need not know "firm specific" information. This is presumably your deliberate response to the Winans case, but it sweeps very broadly. What if an individual learns of an arbitrage gap between the options and index markets (or any classics arbitrage opportunity) and trades in the securities market. Does he also have material nonpublic information about the "market therefor."

(3) I fear that your reversal of Moss v. Morgan Stanley will make every insider trading class action as difficult to settle (or to apportion damages within) as a mass tort, asbestos-type class action. That is, there will now be multiple

subclasses contending for a limited fund with no clear rules of priority. Simply the disputes among the plaintiffs camp may take an eternity. My belief is that we can generate deterrence but not much compensatory relief given the ceiling on liability. Hence, why complicate matters by giving standing to much of the market? At the least, you could assign priorities.

(4) For what it is worth, I do not agree with the view expressed in § 16A(f) that the shareholder of the target who sells to an Ivan Boesky is injured by his conduct. Boesky's purchases drive the price up, not down. This is a very conclusive presumption and approaches defining black to mean white. But you have already heard those arguments before.

All in all, it is a very well done job (particularly in comparison to the House bill); thanks for sending it, and I regret I did not get it in time to make useful comments.

Your truly,

John C. Coffee, Jr.
Adolf A. Berle
Professor of Law

JCC:hd