

A Comparative Overview of the State Prohibition on Market Abuse in the United States of America*

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Abstract

It is important to note that market abuse is outlawed both at a federal and state level in the United States of America (the US). In relation to this, it is worth noting that the state prohibition on market abuse has relatively and immensely contributed to the combating of market abuse activities in the US capital and financial markets to date. Consequently, it is on this basis that this article provides a brief overview analysis of the enforcement of the market abuse prohibition, firstly in California state. Secondly, a similar analysis will be done focusing on Delaware state. Lastly, the enforcement of the market abuse ban in Washington state will be undertaken. The aforementioned states are selected not only because of their unique and relatively consistent anti-market abuse enforcement approaches but also because of the potential enforcement lessons that could be adopted from such approaches, especially in South Africa. Thereafter and where appropriate, relevant provisions and cases from the selected US states will be contrasted with similar provisions and cases in South Africa in order to identify and recommend, where necessary, possible anti-market abuse enforcement approaches that could be incorporated in the South African anti-market abuse regulatory and enforcement framework.

Keywords: market abuse, California, Delaware, Washington, enforcement approaches.

1. Introduction

It is important to note that market abuse¹ is outlawed both at a federal and state level in the United States of America (the US).² In relation to this, it is worth noting that the state prohibition on market abuse has relatively and immensely contributed to the combating of market abuse activities in the US capital and financial markets to date. Consequently, it is on this basis that this article provides a brief overview analysis of the enforcement of the market abuse prohibition, firstly in California state. Secondly, a similar analysis will be done focusing on Delaware state. Lastly, the enforcement of the market abuse ban in Washington state will be undertaken. The aforementioned states are selected not only because of their unique and relatively consistent anti-market abuse enforcement approaches,³ but also because of the potential enforcement lessons that could be adopted from such approaches, especially in South Africa.⁴ Thereafter and where

* Influenced in part, by Chitimira A Comparative Analysis of the Enforcement of Market Abuse Provisions (LLD Thesis 2012 NMMU) 188-210. In this regard, I wish to thank Professor Lawack.

¹ This term refers to both insider trading and market manipulation in this article.

² Steinberg "Insider Trading Regulation—A Comparative Perspective" 2003 *The International Lawyer* 153 169-171.

³ Crandall "State Securities Regulation and the Internet" 2001 *Legislation & Public Policy* 23 24-31; Langevoort "Federalism in Corporate/Securities Law: Reflections on Delaware, California, and State Regulation of Insider Trading" 2006 *University of San Francisco Law Review* 879 880-892. For further related comparative analysis, see Bhattacharya & Daouk "The World Price of Insider Trading" 2002 *Journal of Finance* 75 75-108; Lyon & Du Plessis *The Law of Insider Trading in Australia* (2005) 159-168 for related comparative analysis in other countries & Avgouleas *The Mechanics and Regulation of Market Abuse: A legal and Economic Analysis* (2005) 75-502.

⁴ Chitimira A Comparative Analysis of the Enforcement of Market Abuse Provisions (2012) 188-210. Also see Botha "Control of Insider Trading in South Africa: A Comparative Analysis" 1991 *SA Merc LJ* 1 1-18; Botha "Increased Maximum Fine for Insider Trading: A Realistic and Effective Deterrent?" 1990 *SALJ* 504-508; Chitimira *The Regulation of Insider Trading in South Africa: A Roadmap for an Effective, Competitive and Adequate Regulatory Statutory Framework* (2008) LLM dissertation, University of Fort Hare, 41–72. See related comments by Van Deventer "Anti-Market Abuse Legislation in South Africa" (10-06-2008) 1-5 <<http://www.fsb.co.za/public/marketabuse/FSBReport.pdf>> (accessed 05-05-2013) & see further Myburgh & Davis "The Impact of South Africa's Insider Trading Regime: A Report for the Financial Services Board" (25-03-2004) 8-33 <<http://www.genesis-analytics.com/public/FSBReport.pdf>> (accessed 09-02-2013). See further Osode "The new South African Insider Trading Act: Sound law reform or legislative overkill?" 2000 *Journal of African Law* 239 239; Bhana "Take-Over Announcements and Insider Trading Activity on the Johannesburg Stock Exchange" 1987 *South African Journal of Business Management* 198-208; Jooste "A critique of the insider trading provisions of the 2004 Securities Services Act" 2006 *SALJ* 437 441–460; Van Deventer "New watchdog for insider trading" 1999 *FSB Bulletin* 2 3. Also read the recently repealed Securities Services Act 36 of 2004, hereinafter referred

appropriate, relevant provisions and cases from the selected US states will be contrasted with similar provisions and cases in South Africa in order to identify and recommend, where necessary, possible anti-market abuse enforcement approaches that could be incorporated in the South African anti-market abuse regulatory and enforcement framework.

2. Overview of the State Prohibition on Market Abuse

2.1 Prohibition on Insider Trading in California

Insider trading is statutorily prohibited under the California Corporations Code.⁵ Put differently, an issuer or any other person who is an officer, director or controlling person of such issuer or any person who knowingly has access directly or indirectly, to material non-public information that relates to any securities by virtue of his relationship with the issuer is prohibited from dealing in such securities in order to prevent insider trading.⁶ Notably, there is a requirement of knowledge on the part of the accused person that the material non-public information he obtained will significantly affect the market price of the securities in question before incurring any insider trading liability.⁷ Moreover, such liability can only be imposed upon the accused if he fails to prove that the affected person was aware of the non-public information in question; or that the affected person would have purchased or sold the securities in question at the same price even if the material non-public information was made public.⁸

California's insider trading prohibition is limited only to officers, directors, controlling shareholders of an issuer (primary insiders) and/or any other person who obtains non-public material information by virtue of his relationship with primary insiders.⁹ Consequently, violations by other persons who fortuitously obtain non-public material information not on the basis of their relationship with any of the primary insiders are not expressly covered under California's insider trading prohibition.¹⁰ Nonetheless, California's insider trading prohibition has an extra-territorial application that covers any violations that are perpetrated in California by primary insiders of a corporation incorporated in another state or country (foreign corporations).¹¹ In relation to this, accessorial liability can also be imposed on individuals who tip, induce or assist others to contravene any California's insider trading provisions.¹²

2.2 Prohibition on Market Manipulation in California

Disclosure-based market manipulation, trade-based market manipulation, Internet-based market manipulation and commodity-based market manipulation practices are statutorily prohibited under the California Corporations Code. Trade-based market manipulation practices include:

- (a) the use of a device, scheme or artifice to defraud or manipulate the price of a security;¹³
- (b) effecting a transaction in a security which involves no change in the beneficial ownership;
- (c) entering orders for the sale or purchase of any security with the knowledge that similar orders have been entered at the same price and/or at the same time for that security by the same or different persons; and
- (d) effecting alone, or with other persons, a series of transactions in any security to create actual or apparent active trading in such security in order to raise or depress the price of that security for the purposes of inducing its sale or purchase by others.¹⁴

to as the Securities Services Act, in conjunction with the Financial Markets Act 19 of 2012, hereinafter referred to as the Financial Markets Act, which came into effect on 03 June 2013 to trace the anti-market abuse enforcement approaches that are employed in South Africa.

⁵ Also known as the Corporate Securities Law of 1968 (California Statutes 1968, Chapter 88), hereinafter referred to as the California Corporations Code. See ss 25402 & 25502.5 read with s 25502.

⁶ S 25402 California Corporations Code.

⁷ S 25402 read with ss 25110; 25210 & 25230 (which prohibits investment advisors and broker-dealers from dealing in securities without licensure or exemption) of the California Corporations Code.

⁸ S 25402 read with ss 25502.5 & 25502 of the California Corporations Code. Also see generally related remarks by Bingham McCutchen Securities Litigation Group "California's Unique Treble Damages Insider Trading Law Applied to Corporations Incorporated Outside of California" 2006 Securities Litigation Alert 1-3 <<http://www.bingham.com.01.2006/03>> (accessed 26-10-2013).

⁹ S 25402 of the California Corporations Code. Also see Langevoort 2006 University of San Francisco Law Review 886.

¹⁰ S 25402 of the California Corporations Code.

¹¹ *Friese v Superior Court* (2005) 36 Cal Rptr 3d 558 (Cal Ct App) 563-568, where it was held that although the internal affairs doctrine (as codified under s 2116) stipulates that only the state of incorporation may adjudicate on insider trading and/or any other violations, the defendants' breach of s 25502.5 of the California Corporations Code did not merely give rise to fiduciary duties violations but to insider trading and as such it was not rigidly subject to the internal affairs doctrine.

¹² S 25403 of the California Corporations Code.

¹³ S 25541 of the California Corporations Code.

¹⁴ S 25400(a) & (b) of the California Corporations Code.

Disclosure-based market manipulation practices include the dissemination of false or misleading material information pertaining to the sale or purchase of a security by a broker-dealer or any other person so that the price of such security will or is likely to rise or fall (raising or depressing its market price) for the purposes of inducing others to purchase or sell that security.¹⁵ In line with this, disclosure-based market manipulation practices also include the oral or written communication of false or misleading statements that relate to the sale or purchase of securities by any offenders.¹⁶ Liability for both disclosure-based market manipulation and trade-based market manipulation requires proof on the part of the prosecution that the offenders wilfully participated, directly or indirectly in the effecting of a manipulative transaction or in the making or dissemination of a false and misleading statement of a material fact relating to any security; or that they omitted to state such material fact in order to make the statement, in light of the circumstances it was made, not misleading.¹⁷

Commodity-based market manipulation practices that are outlawed include:

- (a) wilful engagement by any person, in the making of a false report;
- (b) entering any false record or untrue statement of a material fact and/or omitting to make the material fact in order to make any statement relating to a commodity, commodity contract or option false and misleading.¹⁸

Additionally, engaging in any transaction, act, practice or course of business which operates or would operate as fraud or deceit upon commodities investors and the employing of any device, scheme or artifice to defraud or manipulate the sale or purchase of any commodity is prohibited.¹⁹

Internet-based market manipulation as well as franchise-related touting and manipulative practices are statutorily prohibited in California.²⁰ For example, the intentional making of any untrue statement of a material fact relating to the sale or purchase of a franchise is a felony under the California Corporations Code.²¹ Moreover, the California Department of Corporations established the Internet Compliance and Enforcement Team to oversee the prohibition of Internet-based market manipulation by *inter alia* requiring all persons to obtain a permit before issuing any securities.²²

2.3 Available Market Abuse Penalties and Remedies in California

An issuer or any person who wilfully engages in insider trading or market manipulation and fails to rely on the defences as earlier discussed²³ will be liable for a fine not more than \$10 million upon conviction or be imprisoned in a state prison (or pursuant to the California Penal Code)²⁴ for a period between two and five years, or be liable for both the fine and imprisonment.²⁵ Moreover, an issuer as defined in the Public Company Accounting Reform and Investor Protection Act of 2002²⁶ who commits insider trading, market manipulation or who violates any rule or order that prohibits market abuse will be criminally liable for a fine not more than \$25 million upon conviction, or imprisonment in a state prison, or in terms of the California Penal Code,²⁷ for a period between two and five years and/or be liable for both such fine and imprisonment.²⁸ The California Corporations Code specifically imposes a fine not exceeding \$10 million, or imprisonment in a state prison for a period between two and five years, or both such fine and imprisonment upon any person who wilfully employs, directly or indirectly, a device, scheme or artifice to defraud or manipulate the offer, purchase or sale of securities.²⁹ Similarly, an issuer as defined in the Sarbanes-Oxley Act³⁰ who wilfully employs, directly or indirectly, a

¹⁵ S 25400(d) read with ss 25400(c) & (e) & 25401 of the California Corporations Code.

¹⁶ Ss 25400 & 25401 read with s 25404 of the California Corporations Code.

¹⁷ Ss 25400; 25401; 25541 read with ss 25404; 25500 & 25501 of the California Corporations Code.

¹⁸ S 29536(b) of the California Commodity Law of 1990 (hereinafter referred to as the California Corporations Code).

¹⁹ S 29536(a); (c) & (d) of the California Corporations Code read with s 29520; 29535 & 29538 of the same Code, which prohibits any person from purchasing or selling commodities without licensure or exemption and/or from concealing evidence or making untrue statements to the California Department of Corporations.

²⁰ Ss 31200 to 31204 of the California Corporations Code.

²¹ Ss 31200 to 31204 read with ss 31210; 31211 & 31220 of the California Corporations Code.

²² Ss 25111 to 25113; 25140(c) read with ss 25400 & 25401 of the California Corporations Code. Also see California Department of Corporations "Internet Investments Ordered to Stop Selling" Press Release 98-11 (10-06-1998) <<http://www.corp.ca.gov/pressrel/nr9811.htm>> (accessed 27-10-2013); California Department of Corporations "Department of Corporations Files Internet Market Manipulation Actions" Press Release 00-11 (20-06-2000) <<http://www.corp.ca.gov/pressrel/nr0011.htm>> (accessed 27-10-2013) & Crandall 2001 Legislation & Public Policy 23-31.

²³ See paragraph 2.1 above.

²⁴ S 1170(h) of the California Penal Code.

²⁵ S 25540(b) of the California Corporations Code.

²⁶ Public Law 107-204, 116 Stat 745 (as codified in scattered sections of 15; 28 USC), hereinafter referred to as the Sarbanes-Oxley Act and its relevant provisions will be referred to only where necessary. See s 2 of the Sarbanes-Oxley Act; also see Palmiter Securities Regulation: Examples and Explanations (2005) 23.

²⁷ S 1170(h) of the California Penal Code.

²⁸ S 25540(c) read with s 25540(a) of the California Corporations Code.

²⁹ S 25541(a) of the California Corporations Code.

device, scheme or artifice to defraud or manipulate the offer, purchase or sale of a security will be liable for a fine not exceeding \$25 million, or imprisonment in a state prison for a period between two and five years, or both such fine and imprisonment.³¹

Persons who violate the insider trading provisions will be directly liable to the person who sold or purchased the affected security for the damages equal to the difference between the price at which such security was sold or purchased and the market value which such security would have acquired at the time of the purchase or sale if the information known to the defendant had been publicly disseminated prior to that time.³² This civil liability also includes interest at a legal rate accruing to the plaintiff (affected person) provided that a reasonable period of time has lapsed for the market to absorb the publicly disclosed material information, or that the defendant failed to rely on any available defences.³³ In addition, any person other than the issuer who commits insider trading will be liable to the issuer or anyone acting derivatively on behalf of the issuer for civil damages of up to three times the profit gained or loss avoided as a result of the insider trading in question.³⁴

Any person (defendant) who commits market manipulation will be liable for compensatory damages to any other person (plaintiff) who purchased or sold securities at an affected or manipulated price as a result of such defendant's illicit act or transaction.³⁵ This civil liability seems not to be limited to the plaintiff who initially bought or sold the securities that were affected by the defendant's market manipulation.³⁶ In the same vein, any person who wilfully disseminates false or misleading statements which relate to any securities will be liable to the affected person, for rescission or compensatory damages.³⁷ It is not required that the plaintiff should have actually relied on the false or misleading statements in question before the defendant is held liable for such recessionary or compensatory damages plus interest at a legal rate.³⁸ Furthermore, there is secondary civil liability for controlling persons, aiders and abettors who participated in disclosure-based market manipulation.³⁹

The California Corporations Code further imposes separate criminal penalties on any person who commits commodities-based market manipulation offences.⁴⁰ Such a person will be liable for a fine not more than \$250 000 or imprisonment in a state prison, or pursuant to the California Penal Code for a period between two and five years or for both such fine and imprisonment.⁴¹ With regard to civil liability, there are no private rights of action for the affected persons to recover their damages directly from those who commit commodities-based market manipulation offences.⁴² Nevertheless, any person who aids or assists another person to contravene any commodities-based market manipulation provisions will be jointly and severally liable with any such person for damages.⁴³

Any person who wilfully engages in franchise-related touting and market manipulation will be liable to a fine not exceeding \$100 000 or imprisonment in a state prison for a period not exceeding one year, or imprisonment pursuant to the California Penal Code,⁴⁴ or both such fine and imprisonment.⁴⁵ Such a person will also be liable to the franchisee, franchisor or any other affected person for compensatory damages.⁴⁶ A controlling person or every partner in a company who aids or abets another person to commit franchise-related touting and market manipulation offences will be jointly and severally liable with such person for actual damages suffered by the affected person and/or a temporary and permanent

³⁰ S 2 of the Sarbanes-Oxley Act.

³¹ Ss 25541(b); 25542 of the California Corporations Code read with s 1170(h) of the California Penal Code.

³² S 25502 of the California Corporations Code.

³³ S 25502 of the California Corporations Code. It is important to note that this provision gives private rights of action to the affected persons in order for them to recover their insider trading damages directly from offenders.

³⁴ S 25502.5 of the California Corporations Code. These treble insider trading damages are determined by calculating the difference between the price at which the security was purchased or sold and the market value that it would have gained at the time of the sale or purchase if the non public information known to the defendant or the offender was publicly disseminated; *Friese v Superior Court* 563-568.

³⁵ Ss 25500; 28900 & 28901 of the California Corporations Code.

³⁶ On the other hand, market manipulation offenders are apparently exempted from any liability that could arise from routine statements such as press releases and quarterly reports that are not intended to induce others to sale or purchase any securities, see s 25500 read with s 25400 of the California Corporations Code.

³⁷ S 25501 read with s 25501.5 of the California Corporations Code.

³⁸ S 25501 read with s 25501.5 of the California Corporations Code.

³⁹ S 25501 read with ss 25504 & 25504.1 of the California Corporations Code.

⁴⁰ S 29550 of the California Corporations Code.

⁴¹ S 29550(b) & (c); read with s 29551 of the California Corporations Code, which stipulates that the California State may also bring criminal charges against the offenders under any other statute. Also see s 1170(h) of the California Penal Code.

⁴² S 29555 of the California Corporations Code.

⁴³ S 29552 read with ss 29553 & 29554 of the California Corporations Code.

⁴⁴ S 1170(h) of the California Penal Code.

⁴⁵ Ss 31410; 31411 read with s 31412 of the California Corporations Code.

⁴⁶ S 31300 read with 31301 of the California Corporations Code.

injunctive relief.⁴⁷

The California Department of Corporations can also impose administrative penalties such as public censure, suspension, revocation of licenses, civil injunctions and administrative orders against any person who engages in fraudulent and manipulative Internet-based offering of investments and financial services.⁴⁸ Additionally, the California Department of Corporations can impose remedies such as rescission, restitution, civil penalties and administrative penalties against any person who commits Internet-based market manipulation offences.⁴⁹ Lastly, the California Department of Corporations can issue investigation orders against Internet-based market manipulation offenders and/or refer any such related criminal matters to the relevant courts for further investigation or prosecution.⁵⁰

2.4 Analysis and Evaluation of the California Anti-Market Abuse Enforcement Framework

The California Department of Corporations, the Commissioner of Corporations and the relevant courts are responsible for the enforcement of market abuse provisions in California.⁵¹ As earlier stated,⁵² California employs criminal, civil and administrative sanctions to combat market abuse activities.⁵³ These sanctions are enforced by the California Department of Corporations through the Commissioner of Corporations and the courts. In relation to this, it must be noted that there is no specific regulatory body established to oversee the enforcement of market abuse laws in California. Consequently, the Commissioner of Corporations has a variety of powers which include:

- (a) imposing fees and penalties;
- (b) cease and desist orders;
- (c) revocation orders;
- (d) restitution orders;
- (e) civil injunction orders;
- (f) investigation orders;
- (g) public censure against the offenders; and
- (h) issuing permits to all persons who seek to offer or sell investments, commodities or securities in California.⁵⁴

The Commissioner of Corporations has further powers to make, amend or rescind any rules and/or orders for the purposes of effectively enforcing the securities and market abuse provisions.⁵⁵ Similarly, the Financial Services Board (the FSB) is empowered to make market abuse rules in South Africa.⁵⁶ Notwithstanding the fact that there is no specific regulatory body that policies the enforcement of market abuse laws in California, it is submitted that the Commissioner of Corporations has, from time to time, consistently exercised his/her powers to curb market abuse activities.⁵⁷

With regard to Internet-based market manipulation, the California Department of Corporations relies on the Internet Compliance and Enforcement Team to investigate and prosecute any activities that amount to unlicensed securities, franchises or commodities offerings, and fraud and market manipulation.⁵⁸ The Internet Compliance and Enforcement Team also ensures that there is extensive investigation and surveillance of Internet-based market manipulation.⁵⁹ Accordingly, if any violation is detected, it will be reported to the Commissioner of Corporations who then determines whether it was fair and justifiable.⁶⁰ Put differently, when the Commissioner of Corporations receives some leads from the Internet Compliance and Enforcement Team's surveillance, junk mail and public complaints and referrals from other enforcement bodies, he may impose damages or other applicable remedies against the offenders.⁶¹ In contrast to this,

⁴⁷ Ss 31302 & 31302.5 of the California Corporations Code.

⁴⁸ Ss 25530 to 25534 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 30 & related remarks by the California Department of Corporations "Fighting Internet 'Cyber Investment Fraud'" <<http://www.corp.ca.gov/pub/cyber.htm>> (accessed 28-10-2013).

⁴⁹ S 25535 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 30.

⁵⁰ S 25533 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 30.

⁵¹ Crandall 2001 Legislation & Public Policy 28-30.

⁵² See paragraph 2.3 read with paragraphs 2.1; 2.2.

⁵³ This also the position in South Africa. See ss 78; 80; 81 & 82 of the Financial Markets Act.

⁵⁴ Ss 25111 to 25113 of the California Corporations Code; also see Crandall 2001 Legislation & Public Policy 28-30.

⁵⁵ Ss 31502 & 31503 of the California Corporations Code.

⁵⁶ S 84(2)(f) of the Financial Markets Act.

⁵⁷ Crandall 2001 Legislation & Public Policy 29-30.

⁵⁸ Ss 25000 to 31516 of the California Corporations Code; also see Mariano "Stock Fraud Spurs Regulators to Look Online" (21-06-2000) <<http://news.cnet.com/news/01-1005-200-2126256.html>> (accessed 29-10-2013).

⁵⁹ Crandall 2001 Legislation & Public Policy 24.

⁶⁰ S 25140(c) of the California Corporations Code; Crandall 2001 Legislation & Public Policy 24.

⁶¹ S 25535 of the California Corporations Code; also see paragraph 2.3 above. This has enabled California to curb Internet-based market manipulation successfully since 1998 to date, see Crandall 2001 Legislation & Public Policy 26-31.

there is no specific regulatory body that prohibits and investigates Internet-based market abuse practices in South Africa.⁶²

The district courts have to date enabled the California Department of Corporations to enforce the market abuse prohibition consistently in California. For example, the California Department of Corporations has successfully filed for a number of civil remedies such as the disgorgement of profits, damages and civil injunctions in the courts.⁶³

Likewise, South Africa also provides for civil,⁶⁴ criminal⁶⁵ and administrative⁶⁶ penalties for insider trading in terms of the Financial Markets Act. With regard to criminal penalties, the South African legislature has rigidly provided for a fixed maximum fine of R50 million, or imprisonment for a period not exceeding ten years, or both.⁶⁷ Although *prima facie* these penalties seem to be quite significant, it is submitted that Cassim⁶⁸ correctly argues that the current available market abuse penalties might not be high enough for deterrence purposes. For example, some unscrupulous persons and/or companies may take any fine for market abuse offences just like another cost of doing business. Furthermore, no distinction has been made in relation to the penalties imposed on natural and juristic persons to increase deterrence.⁶⁹ Moreover, in South Africa, civil and administrative penalties and remedies are mainly enforced by the FSB⁷⁰ and the Enforcement Committee (the EC)⁷¹ respectively. However, the Financial Markets Act does not expressly provide civil penalties and remedies for market manipulation offences.⁷² This flaw could potentially weaken South Africa's anti-market abuse regime,⁷³ compared to similar foreign legislation in countries like the US.

As briefly highlighted above, one can conclude that California has managed to develop a relatively consistent anti-market abuse enforcement framework that discourages a number of market abuse practices (including franchise-related, capital markets related as well as Internet-related market abuse violations).

2.5 Prohibition on Insider Trading in Delaware

Unlike the position in California,⁷⁴ insider trading is mainly outlawed as a breach of fiduciary duties by directors, officers or other employees (primary insiders) of an issuer who sell or purchase the issuer's securities or commodities on the basis of non-public inside information.⁷⁵ Apparently, this fiduciary-related insider trading liability may be imposed upon any offenders who violate Delaware's securities and market abuse laws even if the issuer or any other affected persons did

⁶² Internet-based market abuse practices are not expressly prohibited under the Financial Markets Act, see ss 78; 80; 81 & 82. Moreover, Internet-based market abuse practices are also not expressly outlawed in the Consumer Protection Act 68 of 2008.

⁶³ *Friese v Superior Court* 561, where the court held that the civil derivative cause of action for disgorgement of insider trading profits was also applicable to companies that were not incorporated in California; also see *Langevoort 2006 University of San Francisco Law Review* 886-887; *Medifast v Minkow* (2011) 10 CV 382 (JLS BGS), where the court held that defendants were not liable for civil remedies for their alleged market manipulation; *Louisiana Pacific Corporation v Money Market 1Institutional Investment Dealer and others* (2011) 09-CV-03529 (JSW), where market manipulation damages were granted against the defendants; *Williams v Gaylor* (1902) 186 US 157, where it was *inter alia* held that a corporation that issues securities in any State is protected from possible market abuse liability that may arise from another State under the internal affairs doctrine; *Clothesrigger Inc v G T E Corporation* (1987) 191 Cal App 3d 605, where it was held that California's market abuse laws may be enforced whenever necessary to prevent fraud and other deceptive or manipulative practices; *Diamond Multimedia Systems Inc v Superior Court* (1999) 19 Cal 1036, the court held that California's securities and market abuse laws should be consistently enforced to promote financial markets that are fair and free from fraud and market abuse practices; *Desai, Lamb, Long and Christopher Long v Deutsche Bank Securities Limited, Deutsche Bank Securities Inc and others* (2009) 08-55081 US App Lexis 16704 (US App 9th Cir), the court held *inter alia* that the defendants were not liable for stock price manipulation because the appellants failed to establish a motion for class certification in terms of Rule 23(b)(3) of the federal rules.

⁶⁴ S 82.

⁶⁵ S 109(a).

⁶⁶ S 99.

⁶⁷ S 109 (a).

⁶⁸ Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 2)" 2008 SA Merc LJ 177 191-195.

⁶⁹ S 109(a) of the Financial Markets Act.

⁷⁰ S 84 of the Financial Markets Act.

⁷¹ S 99 of the Financial Markets Act.

⁷² Ss 80 & 81; also see Cassim 2008 SA Merc LJ 192. This suggests that persons who fall victim to market manipulation practices are left to find their own civil remedies. Also see Cassim "An Analysis of Market Manipulation under the Securities Services Act 36 of 2004 (Part 1)" 2008 SA Merc LJ 33 36.

⁷³ Notably, there is no specific statutory civil remedy provision for market manipulation violations as outlawed under ss 80 & 81 of the Financial Markets Act.

⁷⁴ See paragraph 2.1 above.

⁷⁵ See generally s 144 read with ss 160 to 162; 122(17); 271 & 174 under Title 8 of the Delaware General Corporation Law (hereinafter referred to as the Delaware General Corporation Law); s 73-202 read with ss 73-203 & 73-204 in Title 6 of the Delaware Code, under Chapter 73 of the Delaware Securities Act as amended (hereinafter referred to as Delaware Securities Act); also see *Langevoort 2006 University of San Francisco Law Review* 881 & *Brophy v Cities Service Co* (1949) 70 A2d 5 (Del Ch), where it was *inter alia* held that the defendants' breach of fiduciary duty of loyalty was tantamount to insider trading.

not suffer actual damages as result of the offender's alleged insider trading.⁷⁶ Likewise, a corporation may not repurchase its own shares if such repurchase will affect its payment of debts or cause capital impairment.⁷⁷

In addition, any sale or purchase of securities on the basis of non-public material information by a beneficial owner, director or officer of an insurer is also treated as insider trading.⁷⁸ This prohibition on insurance-related insider trading allows the insurer to recover any damages suffered within a period of less than six months unless the sale or purchase of the affected securities was done in good faith.⁷⁹ Intention on the part of the offenders is not required for the purposes incurring insurance-related insider trading liability.⁸⁰ On the other hand, in South Africa, there is no provision that specifically prohibits insurance-related insider trading in the Financial Markets Act.⁸¹

2.6 Prohibition on Market Manipulation in Delaware

Any person who employs a device, scheme or artifice to defraud or manipulate the offer, sale or purchase of a security will be liable for market manipulation.⁸² In addition, any person who make or omits to make a statement of a material fact in order to deceive or mislead others to purchase or sale a security will be liable for fraud and/or market manipulation.⁸³ In the same light, any persons who are not registered with the Securities Commissioner are prohibited from offering to sell or purchase any securities.⁸⁴ Moreover, misleading filings and unlawful purchase or sale of securities by broker-dealers, shareholders or any other person are prohibited.⁸⁵ This was probably targeted at preventing securities or stock price market manipulation by professional persons like broker-dealers, investment advisors, shareholders and other relevant stakeholders.

Unlike the position in California,⁸⁶ under the Delaware courts, a breach of fiduciary duty of disclosure by directors who issue misstated financial statements or misleading public statements to defraud, induce or manipulate others to purchase or sell any securities may give rise to monetary damages against such directors.⁸⁷

Although it appears that there is no statutory provision that expressly prohibits commodities-based market manipulation in Delaware, a number of deceptive or unfair commerce, trade and insurance practices are outlawed to *inter alia* combat market abuse activities.⁸⁸ Delaware also prohibits racketeering and other forms of organised crime in order to discourage all persons from engaging in market abuse activities.⁸⁹ In contrast to this, there is no provision that specifically prohibits racketeering and/or commerce and trade-related market abuse activities in South Africa, especially under the Financial Markets Act.⁹⁰

2.7 Available Market Abuse Penalties and Remedies in Delaware

Any person who engages in fraudulent market manipulation which results in investors losing \$50 000 or more will be

⁷⁶ *Brophy v Cities Service Co 5; Kahn v Kohlberg, Kravis, Roberts & Co LP (2010) CA No 436 (Del SC) & Guth v Loft Inc (1939) 5A2d 503 (Del) 510*, where it was held that an employee occupying a position of trust and confidence towards his employer who nonetheless abuses non-public material information relating to the employer's securities to gain profit will be liable for insider trading regardless of whether the employer suffered actual loss.

⁷⁷ In other words, a corporation may not repurchase its own shares while in possession of non public material information that relates to any securities to prevent insider trading, see s 160 of the Delaware General Corporation Law.

⁷⁸ Ss 5104 & 5105 in Title 18, under Chapter 51 of the Delaware Insurance Code (hereinafter referred to as the Insurance Code).

⁷⁹ S 5104 (a) of the Insurance Code.

⁸⁰ S 5104 (a) read with 5104(b) & (c) of the Insurance Code.

⁸¹ See ss 78; 80; 81 & 82 & other relevant provisions under Chapter X entitled "Market Abuse" of the Financial Markets Act. Moreover, in South Africa, insurance-related insider trading is not expressly prohibited under both the Long-Term Insurance Act 52 of 1998 as amended and the Short-Term Insurance Act 53 of 1998 as amended.

⁸² This indicates that trade-based market manipulation practices are also prohibited in Delaware, see s 73-201(1) of the Delaware Securities Act.

⁸³ S 73-201(2) & (3) of the Delaware Securities Act.

⁸⁴ S 73-202 read with ss 73-203 & 73-204 of the Delaware Securities Act.

⁸⁵ Ss 73-209; 73-301 of the Delaware Securities Act & s 610 read with ss 612 & 616 in Title 8 (Delaware General Corporation Law) under Chapter 6, which is also known as the Delaware Professional Service Corporations Act (hereinafter referred to as the Professional Service Corporations Act).

⁸⁶ See paragraph 2.2 above.

⁸⁷ See generally s 220(d) read with s 220(b) & (c) of the Delaware General Corporation Law, which gives shareholders the right to seek and/or inspect financial statements in order to *inter alia* prevent fraud and market manipulation; also see *Malone v Brincat (1998) CA No 15510 WL 919123 (Del Supr. Ct); Malone v Brincat (1998) 722 A2d 5 (Del)* where it was held that the director or defendant who filed or disseminated false information in a financial statement could be held liable for a breach of general fiduciary duties of care, loyalty or good faith and not for common law prohibited fraudulent and market abuse activities & *Seinfeld v Verizon Communications Inc (2006) 909 A2d 717 (Del)*, the court held that shareholders are entitled to inspect or seek relevant information from a corporation to detect and prevent fraud and disclosure-based market manipulation.

⁸⁸ Ss 2303 & 2304(1) to (12) in Title 18, under Chapter 23 of the Insurance Code; also see s 2532(a) to (c) in Title 6, under Chapter 25 of the Delaware Code which is also known as the Delaware Uniform Deceptive Trade Practices Act (hereinafter referred to as the Uniform Deceptive Trade Practices Act).

⁸⁹ S 1503 in Title 11, under Chapter 15 of the Delaware Criminal Code.

⁹⁰ See ss 78; 80; 81 & 82.

liable per violation to a fine not exceeding \$200 000 upon conviction, or imprisonment for a period not more than five years at level V incarceration, or both such fine and imprisonment.⁹¹ In the same way any person who engages in fraud or market manipulation which results in investors losing \$10 000 or more but less than \$50 000, will be liable per violation for a fine not more than \$100 000 upon conviction, or imprisonment for a period not more than three years at level V incarceration, or both such fine and imprisonment.⁹² Furthermore, any person who wilfully violates any related fraud or securities provisions of the Delaware Securities Act will be liable for a fine of not more than \$100 000, or imprisonment for a period no more than two years, or both such fine and imprisonment.⁹³ The Securities Commissioner may impose injunctions, administrative remedies and stop orders to prohibit market abuse violations by the offenders by suspending or revoking the purchase or sale of any affected security.⁹⁴

A broker-dealer, broker-dealer agent, issuer agent, investment advisor, investment advisor's representative or any other person who offers, sells or purchases securities by means of an untrue statement or any other market manipulation practices will be liable for civil compensatory damages.⁹⁵ Moreover, the courts may impose upon the insider trading offenders, orders for damages, disgorgement of illicit profits and other applicable remedies.⁹⁶ The courts may further impose a fine of up to \$5 million or imprisonment for a period not exceeding 20 years upon the insider trading offenders.⁹⁷

With regard to prohibited manipulative trade practices, the offenders may be ordered by the relevant courts through an injunction to pay legal costs, compensatory damages or to disgorge any profits gained to the affected persons.⁹⁸ Moreover, any persons who engage in insurance related market abuse activities will be ordered by the courts to disgorge any profits they gained at the expense of the insurers.⁹⁹ The Commissioner of Insurance may also issue cease and desist orders and penalty orders against any person who commits insurance-related market abuse offences.¹⁰⁰

2.8 Analysis and Evaluation of the Delaware Anti-Market Abuse Enforcement Framework

Like California,¹⁰¹ Delaware does not have a specific regulatory body that enforces its market abuse laws. Nonetheless, Delaware has established a consistent system of reliance on judicial law standards, as well as well-developed common law and private enforcement measures to combat market abuse activities.¹⁰² Consequently, the Delaware Supreme Court, the Delaware Chancery Court, the Delaware General Assembly, the Delaware Corporate Law Council, the Delaware Division of Securities and the Delaware Division Corporations bear the responsibility of enforcing the Delaware's securities and market abuse laws.¹⁰³

As stated earlier,¹⁰⁴ Delaware generally treats any securities dealing that is based on non-public inside information by primary insiders as a breach of fiduciary duties that also amounts to insider trading. Thus, although Delaware does not have a statutory provision that expressly prohibits insider trading, it has to date successfully relied on common law principles on fiduciary duties to combat insider trading.¹⁰⁵ This success has prompted other commentators to conclude

⁹¹ S 73-604(a) of the Delaware Securities Act.

⁹² S 73-604(b) of the Delaware Securities Act.

⁹³ S 73-604(c) of the Delaware Securities Act. The Supreme Court may also order the offenders to restate any profits they obtained from the affected investors, see s 73-604(d) & (e) of the Delaware Securities Act.

⁹⁴ S 73-206 read with ss 73-601 & 73-602 of the Delaware Securities Act.

⁹⁵ S 73-605(a) & (b) of the Delaware Securities Act.

⁹⁶ *Brophy v Cities Service Co 5*; *Kahn v Kohlberg, Kravis, Roberts & Co LP 436*, where the defendants were mandated to pay damages and to disgorge their insider trading profits to the affected persons (plaintiffs) even if such persons did not suffer actual damages.

⁹⁷ The United States Department of Justice District of Delaware "Newark Man Pleads Guilty to Insider Trading Charges" Press Release 25 March 2011, where Jeffery Temple of Newark DE was convicted of insider trading in March 2011 and was consequently liable for a fine not exceeding \$5 million or imprisonment for a period of up to 20 years.

⁹⁸ S 2533(b) & (c) read with subsections (d) & (e) of the Uniform Deceptive Trade Practices Act.

⁹⁹ S 5104 of the Insurance Code.

¹⁰⁰ S 2308 read with s 2311 of the Insurance Code.

¹⁰¹ Paragraph 2.4 above.

¹⁰² See related remarks by Bebchuk & Hamdani "Federal Corporate Law: Lessons from History" 2006 Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series 558 35-37 <http://lsr.nellco.org/harvard_olin/558> (accessed 03-11-2013).

¹⁰³ Roe "Washington and Delaware as Corporate Lawmakers" 2009 Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series 638 8-12 <http://lsr.nellco.org/harvard_olin/638> (accessed 03-11-2013); Jones "Dynamic Federalism: Competition, Cooperation and Securities Enforcement" 2005 Boston College Law School Faculty Paper 36 2 <<http://lawdigitalcommons.bc.edu/lsp/36>> (accessed 04-11-2013) & Wilson "Climate Change: The Real Threat to Delaware Corporation Law, Why Delaware Must Keep A Watchful Eye on The Content of Political Change in the Air" 2010 Entrepreneurial Business Law Journal 481 484-490.

¹⁰⁴ Paragraph 2.5 above.

¹⁰⁵ *Brophy v Cities Service Co 5*, the defendants were ordered to pay compensatory insider trading remedies to the plaintiffs regardless of whether such plaintiffs suffered actual damages; *Kahn v Kohlberg, Kravis, Roberts & Co LP 436*, where the plaintiffs (stockholders) were allowed to institute a derivative action against the defendants (corporate fiduciaries) for their alleged insider trading violations without proof of any actual damages suffered by such plaintiffs or their corporation & *Guth v Loft Inc 503-510*, the court held that any breach of fiduciary duties through insider trading was against public policy.

that Delaware was effectively combating insider trading and market manipulation because it cedes other areas of its laws that involve insider trading enforcement to the federal government.¹⁰⁶ Unlike the position in Delaware, insider trading liability is not limited to instances where there is a breach of a fiduciary duty by primary insiders in South Africa.¹⁰⁷

On the other hand, Delaware's fiduciary-related insider trading remedies were controversially applied in some few cases.¹⁰⁸ Be that as it may, one fact which is certain is that Delaware relies heavily on its courts' judicial law standards and private enforcement to monitor and enforce its insider trading prohibition.¹⁰⁹

In addition to the Delaware specialised corporate bar, courts and judicial law standards,¹¹⁰ the Delaware Division Corporations' Securities Commissioner has powers to investigate, *subpoena* any suspects and issue stop orders, injunctions and other administrative remedies against any persons who commit insider trading or market manipulation.¹¹¹ Likewise, the Commissioner of Insurance may issue investigation orders, cease and desist orders, penalty orders and judicial review orders against any market abuse offenders.¹¹² This has enabled Delaware Division Corporations to effectively complement the relevant courts in tackling and addressing market abuse challenges.¹¹³ Unlike California,¹¹⁴ Delaware further has a specialised commercial court and whistle-blower immunity provisions to encourage employees or any person to report any securities and market abuse violations without fear of reprisals from their employers or other offenders.¹¹⁵ In relation to this, South Africa relies mainly on the FSB rather than judicial law standards to enforce its market abuse prohibition. Moreover, South Africa's market abuse laws do not have a specific whistle-blower immunity provision to encourage all persons to report market abuse violations to the FSB or other relevant authorities without any fear of victimisation.¹¹⁶ Furthermore, as earlier stated,¹¹⁷ the criminal penalties and/or available remedies for market abuse offences are still relatively few and little for deterrence purposes.

Given the above analysis, one can conclude that Delaware has to date managed to flexibly and consistently develop effective and robust common law as well as judicial law standards to increase the private enforcement of its market abuse prohibition. Perhaps this explains why some commentators allude to the fact that Delaware is the "corporate haven" of the US.¹¹⁸

¹⁰⁶ Hamemesh "How We Make Law in Delaware and What to Expect from Us in the Future" 2007 *Journal of Business & Technology Law* 409 413-414.

¹⁰⁷ See ss 78 & 82 of the Financial Markets Act.

¹⁰⁸ *In re Oracle Corporation Derivative Litigation* (2003) WL 21396449 (Del Ch); *In re Oracle Corporation Derivative Litigation* (2004) 867 A2d 904 (Del Ch) 934; *In re Oracle Corporation Derivative Litigation* (2005) 872 A2d 960 (Del Ch), the court held that the fiduciaries (defendants) should have traded on the basis of non public inside information they possessed to the detriment of their corporation before any disgorgement of profits can be paid to the affected plaintiff. Nonetheless, the court denied the defendants' motion to dismiss the plaintiff's derivative action for breach of fiduciary duties and/or insider trading; *Guttman v Huang* (2003) 823 A2d 492 (Del Ch) 499-507; *In re American International Group Inc* (2009) 965 A2d 763 (Del Ch) 813; *Paddy Wood v Baum, Berndt, Brown & others* (2007) CA 621 (Del Supr. Ct); *Pfeiffer v Toll Brother Inc & others* (2010) 989 A2d 683 (Del Ch), where the court *inter alia* held that the plaintiff must prove that he suffered actual harm as a result of the defendant's breach of fiduciary duty through insider trading. This ruling was later reversed by the Delaware Supreme Court citing its unduly restricted approach and the defendants were ordered to pay compensatory damages regardless of whether the plaintiff suffered actual loss through breach of fiduciary duties or insider trading & Milbank Corporate Governance Group "Delaware Supreme Court Rejects Narrow Reading of Brophy" (27-07-2011) Client Alert 1-4 <<http://www.milbank.com/cl/al.pdf>> (accessed 27-07-2013), apparently, this so-called Brophy claim for insider trading damages is contingent upon the courts' interpretation of the violation in question. Similarly, in *Zapata Corporation v Maldonado* (1981) 430 A2d 779 (Del Ch), it was held that affected persons will only recover their insider trading damages if prior investigations were objectively conducted and such objectivity is discretionally determined by the courts.

¹⁰⁹ Kahan & Rock "Symbiotic Federalism and The Structure of Corporate Law" 2005 *Vanderbilt Law Review* 1573 1604-1609 & 1620; Ott "Delaware Strikes Back: Newcastle Partners and The Fight for State Corporate Autonomy" 2007 *Indiana Law Journal* 159 171-173; Cary "Federalism and Corporate Law: Reflections upon Delaware" 1974 *Yale Law Journal* 663 666-670; Roe 2009 *Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series* 638 8-9 <http://lsr.nellco.org/harvard_olin/638> (accessed 03-11-2013); *Bebchuk & Hamdani* 2006 *Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series* 558 23-25 <http://lsr.nellco.org/harvard_olin/558> (accessed 03-11-2013) & Roe "Delaware's Competition" 2003 *Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series* 432 3-4 <http://lsr.nellco.org/harvard_olin/432> (accessed 03-11-2013).

¹¹⁰ *Wilson* 2010 *Entrepreneurial Business Law Journal* 484; 486 & 490.

¹¹¹ Ss 73-206; 73-601; 73-602 & ss 73-401 to 73-404 of the Delaware Securities Act.

¹¹² Ss 2306 to 2309 & 2311 of the Insurance Code.

¹¹³ *Nacco Industries Inc v Applica* (2009) 997 A2d 1 (Del Ch) 23, the court held that common law remedies were available against those who engage in Schedule 13D misstatements filing and other related disclosure-based market manipulation practices.

¹¹⁴ Paragraph 2.4 above.

¹¹⁵ See ss 1703 & 1704 in Title 19, under Chapter 17 of the Delaware Code, also known as the Delaware Whistleblowers' Protection Act (hereinafter referred as the Whistleblowers' Protection Act).

¹¹⁶ See ss 78; 80; 81 & 82 of the Financial Markets Act. Put differently, although s 159 of the Companies Act 71 of 2008, hereinafter referred to as the Companies Act 2008; the Protected Disclosures Act 26 of 2000; s 9 of the South African constitution & the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 can be employed to protect shareholders, directors and other employees from occupational reprisals, there are no specific provisions in the Financial Markets Act that can be used to encourage and/or protect market abuse whistleblowers from such reprisals.

¹¹⁷ See related remarks in paragraph 2.4 above.

¹¹⁸ See *Bebchuk & Hamdani* 2006 *Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series* 558 1-5 <http://lsr.nellco.org/harvard_olin/558> (accessed 03-11-2013); *Wilson* 2010 *Entrepreneurial Business Law Journal* 481-493; Ott 2007 *Indiana Law Journal* 159-162; *Ahdieh* "From 'Federalization' to 'Mixed Governance' in Corporate Law: A Defence of Sarbanes-Oxley" 2005 *Buff Law Review* 721 736; Cary 1974

2.9 Prohibition on Insider Trading in Washington

Unlike South Africa¹¹⁹ and California,¹²⁰ Washington does not have a specific provision that directly and expressly prohibits insider trading. Nevertheless, insider trading is indirectly outlawed by discouraging directors, officers or employees from using non-public information filed with or obtained from the Department of Financial Institutions to deal in any security or commodity for personal gain.¹²¹ In contrast to the position in Delaware,¹²² liability for insider trading is apparently not restricted only to instances where there is a breach of fiduciary duties by primary insiders in Washington. Moreover, Washington does not clearly provide whether it is required that the offenders should have profited or benefited from their alleged insider trading before incurring any liability.¹²³ The prohibition on insider trading is primarily restricted to directors, officers or other employees of a company.¹²⁴ Despite this, Washington prohibits broker-dealers, investment advisors and any other person from offering or selling any security or commodity without being registered to prevent insider trading and other related illicit practices.¹²⁵

2.10 Prohibition on Market Manipulation in Washington

Any person who employs a device, scheme or artifice to manipulate the offer, sale or purchase of securities will be liable for fraud and/or market manipulation.¹²⁶ Similarly, any person who received a consideration from another person is prohibited from employing a scheme, device, an act, practice or course of business and/or a dishonest practice for the purposes of influencing or advising other persons to purchase or sale any security.¹²⁷ Accordingly, an investment advisor, broker-dealer or any other person who knowingly and manipulatively purchases or sells any security for his own account or for another person will be liable for market manipulation.¹²⁸ This also indicates that trade-based market manipulation practices are statutorily outlawed in Washington.

Likewise, disclosure-based market manipulation practices such as the making of false or misleading statements of a material fact or omitting to make a material fact in relation to any filed documents for the purposes of influencing the purchase or sale of any securities are prohibited.¹²⁹ In relation to this, offering or selling unregistered securities by any person is expressly prohibited in Washington.¹³⁰ This prohibition is mainly aimed at discouraging all persons from deliberately engaging in unlawful fraudulent or market manipulation activities.

Commodity-based market manipulation is also prohibited in Washington. For example, no person may directly or indirectly employ a device, scheme or artifice to defraud or influence others to purchase or sale any commodity contract or commodity option.¹³¹ Additionally, any person who engages in a transaction, act, practice, or course of business that

Yale Law Journal 664-702; Pritchard "London as Delaware?" 2009 University of Michigan Law School John M Olin Center for Law, Economics & Working Paper 09-008 1-2 <<http://www.law.umich.edu /centersandprograms/olin/papers.htm>> (accessed 04-11-2013) (seemingly, a John M Olin Center for Law & Economics is also established in the Harvard University Law School); Kahan & Rock 2005 Vanderbilt Law Review 1574 & 1620; Hamermesh 2007 Journal of Business & Technology Law 409-414; Jones 2005 Boston College Law School Faculty Paper 36 1-4 <<http://lawdigitalcommons.bc.edu/lstfp/36>> (accessed 04-11-2013); Roe 2003 Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series 432 2-44 <http://lsr.nellco.org/harvard_olin/432> (accessed 03-11-2013); Roe "Delaware's Politics" 2005 Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series 511 1-8 <http://lsr.nellco.org/harvard_olin/511> (accessed 03-11-2013); Thompson "Collaborative Corporate Governance: Listing Standards, State Law and Federal Regulation" 2003 Wake Forest Law Review 961; Strine "The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face" 2005 Del J.Corp.L. 673 673-683; Fisch "The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters" 2000 U.Cin.Law Review 1061 1064; Rock "Saints and Sinners: How Does Delaware Corporate Law Work?" 1997 UCLA Law Review 1009 1024; Jones "Rethinking Corporate Federalism in Era of Corporate Reform" 2004 Journal of Corp. Law 625; Stelman "Regulatory Competition, Choice of Forum and Delaware's Stake in Corporate Law" 2009 Del J.Corp.L. 57 66 & Gorris, Hamermesh & Strine "Delaware Corporate Law and The Model Business Corporation Act: A Study in Symbiosis" 2011 Law & Contemporary Problems 107 112-116.

¹¹⁹ See ss 78 & 82 of the Financial Markets Act.

¹²⁰ Paragraph 2.1 above.

¹²¹ See s 21.30.160 in Title 21, under Chapter 21.30 of the Revised Code of Washington Commodity Transactions 1986 c 14, s 46 (hereinafter referred to as the Commodity Transactions Act) & s 21.20.480 in Title 21, under Chapter 21.20 of the Revised Code of Washington 1951 c 5, s 2 as amended by 1959 c 282, s 69 (hereinafter referred to as the Securities Act of Washington); also see s 21.20.140 of the Securities Act of Washington, which requires all persons to register with the Department of Financial Institutions before offering to sell any security or commodity.

¹²² Paragraph 2.5 above.

¹²³ S 21.20.480 of the Securities Act of Washington & s 21.30.160 of the Commodity Transactions Act.

¹²⁴ See s 21.20.480 read with s 21.20.140 of the Securities Act of Washington & s 21.30.160 of the Commodity Transactions Act.

¹²⁵ Ss 21.20.030; 21.20.035 & s 21.20.140 of the Securities Act of Washington & s 21.30.050 of the Commodity Transactions Act.

¹²⁶ S 21.20.010(1) & (3) of the Securities Act of Washington.

¹²⁷ S 21.20.020 of the Securities Act of Washington.

¹²⁸ S 21.20.020(2) read with ss 21.20.030 & 21.20.035 of the Securities Act of Washington.

¹²⁹ Ss 21.20.010(2) & 21.20.350 of the Securities Act of Washington.

¹³⁰ S 21.20.140 read with ss 21.20.040; 21.20.180 & 21.20.210 of the Securities Act of Washington.

¹³¹ S 21.30.060(1) of the Commodity Transactions Act.

will deceive others,¹³² or who makes a false or misleading report, record or statement of a material fact by omission or otherwise¹³³ in order to induce others to purchase or sell any commodity or commodity option will be liable for market manipulation. Notably, any person who deliberately omits to state a material fact in relation to the purchase or sale of any commodity contract or commodity option will be liable for such omission and/or market manipulation.¹³⁴ Moreover, no person may purchase or sell a commodity contract or commodity option, or engage in a trade, business or other act as a commodity merchant unless he is registered, licensed or exempted by the Commodity Futures Trading Commission.¹³⁵ This preventative measure is employed to combat commodity-based market manipulation. In contrast to the position in Washington state, South Africa's market abuse laws do not have a specific provision that directly and expressly prohibits commodities-based market abuse practices.¹³⁶

2.11 Available Market Abuse Penalties and Remedies in Washington

Any person who commits insider trading, market manipulation or other related securities violations will be liable upon conviction for a fine not exceeding \$5 000, or imprisonment for a period of not more than ten years, or both such fine and imprisonment.¹³⁷ Similarly, any person who alters, destroys, shreds or conceals a record or document and/or who knowingly attempts to make a false or misleading statement of a material fact will be liable for a class B felony or a fine not exceeding \$500 000, or both such fine and class B felony.¹³⁸ The Director of Financial Institutions may refer any criminal matters to the attorney general for further investigation and prosecution.¹³⁹

Furthermore, any person who commits fraud, market manipulation or other related securities violations will be liable to the person buying or selling the affected securities for civil damages and reasonable legal costs plus 8% interest per annum.¹⁴⁰ Every person who directly or indirectly controls another person and who commits or aids another person to commit market manipulation and other related securities violations will be jointly and severally liable with such person for civil damages and reasonable legal costs plus 8% interest per annum.¹⁴¹

The Director of Financial Institutions may also institute administrative actions such as restraining orders, administrative fines, injunctions, orders for judicial review and stop orders against the securities and market abuse offenders.¹⁴² Accordingly, any person who filed a false or misleading report or statement of a material fact in order to engage in market abuse activities or any other related securities violations will be liable to the affected persons for damages and reasonable legal costs.¹⁴³ The Director of Financial Institutions may further suspend the sale or trading of the affected securities by or through a broker-dealer, until the false or misleading statements or reports are corrected.¹⁴⁴

Persons who perpetrate commodity-based market abuse and other related violations will be liable to a fine not exceeding \$20 000 upon conviction, or imprisonment for a period not more than ten years, or both such fine and imprisonment.¹⁴⁵ However, no liability will be imputed upon any accused person if he proves that he had no knowledge of the violated rule or order or that he acted in good faith.¹⁴⁶ The prosecuting attorney may further impose criminal proceedings against any person who wilfully commits fraud, market manipulation or any other commodities-related violations.¹⁴⁷ The Director of Financial Institutions may, through the courts, issue compliance orders, declaratory judgments, cease and desist orders, summary orders, suspension orders, restitution orders, order for civil penalties, injunctions and other civil or administrative remedies against those who contravene the commodities provisions through fraud or market abuse practices.¹⁴⁸

¹³² S 21.30.060(3) of the Commodity Transactions Act.

¹³³ S 21.30.060(2) of the Commodity Transactions Act.

¹³⁴ S 21.30.070 read with ss 21.30.080 & 21.30.090 of the Commodity Transactions Act.

¹³⁵ S 21.30.050 read with ss 21.30.020; 21.30.030 & 21.30.040 of the Commodity Transactions Act.

¹³⁶ See ss 78; 80; 81 & 82 of the Financial Markets Act.

¹³⁷ S 21.20.400 (as amended by 2003 c 53) of the Securities Act of Washington.

¹³⁸ S 21.20.400 (as amended by 2003 c 288) of the Securities Act of Washington & s 9A.20.021(1)(b) of the Revised Code of Washington which deals with the punishment of the class B felony.

¹³⁹ S 21.20.410 read with s 21.20.420 of the Securities Act of Washington.

¹⁴⁰ S 21.20.430(1) & (2) of the Securities Act of Washington.

¹⁴¹ S 21.20.430(3) of the Securities Act of Washington.

¹⁴² S 21.20.280 read with ss 21.20.290; 21.20.390 & 21.20.395 of the Securities Act of Washington.

¹⁴³ S 21.20.745 of the Securities Act of Washington.

¹⁴⁴ S 21.20.750 of the Securities Act of Washington.

¹⁴⁵ S 21.30.140 of the Commodity Transactions Act.

¹⁴⁶ S 21.30.140 read with s 21.30.150 of the Commodity Transactions Act.

¹⁴⁷ S 21.30.360 read with s 21.30.370 of the Commodity Transactions Act.

¹⁴⁸ Ss 21.30.110; 21.30.120; 21.30.130; 21.30.200 & 21.30.350 of the Commodity Transactions Act.

2.12 Analysis and Evaluation of the Washington Anti-Market Abuse Enforcement Framework

The Director of Financial Institutions, courts (including the attorney general's office) and the Department of Financial Institutions share the responsibility of enforcing the market abuse prohibition in Washington.¹⁴⁹ As stated earlier,¹⁵⁰ Washington does not have a specific provision that prohibits insider trading. Accordingly, this could be creating some enforcement challenges for both the courts and the Department of Financial Institutions. For instance, it is extremely difficult to prove whether the accused person has knowingly committed any insider trading violations because the insider trading offence is not clearly defined.¹⁵¹

A number of civil, criminal and administrative penalties may be employed by the Director of Financial Institutions against any market abuse offenders. For example, the Director of Financial Institutions may impose administrative penalties such as public censure, suspension or revocation of the license of any broker-dealer, salesperson, investment advisor's representative, investment advisor or any other person who commits market abuse and other related securities violations.¹⁵² Remarkably, unlike the position in Washington, the FSB is not statutorily and expressly empowered to use public censure against the market abuse offenders in South Africa.¹⁵³ The Director of Financial Institutions has further powers to investigate (publicly or privately) market abuse and other related violations.¹⁵⁴ In line with this, the Director of Financial Institutions may *subpoena* witnesses in relation to any ongoing investigation which pertains to securities or market abuse violations.¹⁵⁵ Unlike Delaware,¹⁵⁶ Washington statutorily empowers its Director of Financial Institutions to publicly disseminate any information concerning an ongoing market abuse investigation and/or any other securities or commodities violations, if such dissemination is in the public interest.¹⁵⁷ The Director of Financial Institutions may also impose administrative sanctions like injunctions, mandamus, cease and desist orders, restraining orders and restitution orders against any person who commits market abuse offences or violates any provision of the Securities Act of Washington.¹⁵⁸

The Director of Financial Institutions relies on the relevant courts to enforce its administrative sanctions or other court actions against the market abuse offenders and those who violate the relevant rules.¹⁵⁹ The courts play a key role in judicial review hearings involving any person aggrieved by an order or decision of the Director of Financial Institutions.¹⁶⁰

Unlike Delaware¹⁶¹ and California,¹⁶² Washington statutorily empowers the Director of Financial Institutions to cooperate with other State and federal enforcement authorities in order to effectively combat fraud, market abuse and other related securities or commodities violations.¹⁶³ Another advantage of Washington is the statutory availability of non-exclusive common law penalties and private rights of action for the prejudiced persons to claim their damages directly from the market abuse offenders.¹⁶⁴ This has enabled Washington to have some influence on corporate law making (including the development and enforcement market abuse laws) both at State and federal levels in the US.¹⁶⁵ Likewise, the Financial Markets Act now directly empowers the FSB to cooperate with other local and international regulatory bodies in order to enhance the enforcement of the market abuse prohibition in South Africa.¹⁶⁶ However, it remains to be seen whether this provision¹⁶⁷ will be successfully employed to investigate and combat cross-border market abuse

¹⁴⁹ Conspicuously, unlike the position in South Africa, Washington does not have a specific regulatory body that enforces its market abuse prohibition.

¹⁵⁰ Paragraph 2.9 above.

¹⁵¹ Notwithstanding the advantages of this broad and unrestricted insider trading enforcement approach, it is submitted that Washington should consider enacting an adequate provision that expressly define and prohibit the insider trading offence to enhance enforcement.

¹⁵² S 21.20.110(1) read with (2) to (9); ss 21.20.120 & 21.20.130 of the Securities Act of Washington.

¹⁵³ See s 84 read with s 82 of the Financial Markets Act. In other words, the Financial Markets Act merely provides that the FSB may publish the outcome of its market abuse investigations on its website or any other appropriate media if such publication is in the public interest, see s 84(2)(e).

¹⁵⁴ Ss 21.20.370 & 21.20.700 of the Securities Act of Washington.

¹⁵⁵ Ss 21.20.380 & 21.20.700 of the Securities Act of Washington; also see ss 21.30.100 & 21.30.110 of the Commodity Transactions Act.

¹⁵⁶ Paragraph 2.8 above.

¹⁵⁷ S 21.20.370(1) & (2) of the Securities Act of Washington & s 21.30.170 of the Commodity Transactions Act.

¹⁵⁸ S 21.20.390 of the Securities Act of Washington.

¹⁵⁹ Ss 21.30.120 & 21.30.140 of the Commodity Transactions Act.

¹⁶⁰ S 21.20.440 of the Securities Act of Washington & s 21.30.400 of the Commodity Transactions Act, which states that the Director of Financial Institutions has powers to make, amend or rescind any rules, forms and orders relating to commodities transactions.

¹⁶¹ Paragraph 2.8 above.

¹⁶² Paragraph 2.4 above.

¹⁶³ S 21.20.450 of the Securities Act of Washington & s 21.30.180 of the Commodity Transactions Act.

¹⁶⁴ S 21.20.420 read with s 21.20.430 of the Securities Act of Washington & s 21.30.370 of the Commodity Transactions Act.

¹⁶⁵ Roe 2009 Harvard Law School John M Olin Center for Law, Economics & Business Discussion Paper Series 638 5-9 <http://lsr.nellco.org/harvard_olin/638> (accessed 03-11-2013).

¹⁶⁶ See s 84(2)(b) of the Financial Markets Act.

¹⁶⁷ See s 84(2)(b) of the Financial Markets Act.

activities in South Africa and elsewhere. In addition, as earlier stated,¹⁶⁸ the available penalties and/or available remedies for market abuse offences are still minimal and somewhat inconsistently¹⁶⁹ enforced in South Africa.

3. Concluding Remarks

The article has revealed that the regulation and enforcement of the market abuse ban in the US mainly involves the relevant financial or corporation departments at the states level.¹⁷⁰ Although this state prohibition on market abuse is not uniform,¹⁷¹ it has, to a great extent, relatively managed to consistently discourage market abuse practices in the US.

On the other hand, the South African market abuse regime relies mainly on the FSB to police and enforce the market abuse ban. This approach has so far not been able to achieve more settlements and prosecutions in cases involving market abuse in South Africa.¹⁷² This could be evidenced in part, by many delays in investigations, settlements and the inherent paucity of successful criminal prosecutions obtained in market abuse cases in South Africa to date.¹⁷³ Moreover, deficiencies such as the inconsistent application of the market abuse provisions and the use of few enforcement measures have directly impeded the curbing of market abuse in South Africa.¹⁷⁴ In light of these and other flaws indicated above, it is submitted that the Financial Markets Act should be amended to enact specific provisions for separate and distinct criminal penalties that can be imposed upon any juristic person or individual who commit or attempts to commit insider trading or market manipulation offences in South Africa (with higher criminal penalties being imposed on such juristic persons).

It is also suggested that the Financial Markets Act should be amended to provide specific market abuse whistleblower immunity provisions and bounty rewards for the purposes of encouraging all the persons to report market abuse activities to the FSB and/or other relevant enforcement authorities in South Africa. Furthermore, the Financial Markets Act should be amended to statutorily and expressly empower the FSB to use public censure against the market abuse offenders in South Africa. Additionally, the Financial Markets Act should be amended to enact provisions that specifically prohibit insurance-related as well as Internet-based market abuse practices in South Africa.

Furthermore, as is the position in Delaware (where there is a system in place for periodic revisions of the Delaware Codes), the South African policy makers should consider appointing a National Market Abuse Commission to examine and review all the matters and laws pertaining to market abuse in South Africa. In conclusion, another option is for the South African policy makers to consider introducing provincial market abuse statutes to: (a) create regulatory competition among the provinces to attract investors by effectively combating market abuse activities (b) promote dual or concurrent regulation and enforcement of the market abuse ban both at a provincial and national level. This should, however, be managed well to avoid creating potential problems such as balkanisation and/or violating the *autrefois* acquit or *autrefois* convict doctrine.

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¹⁶⁸ See related remarks in paragraphs 2.4 & 2.8 above.

¹⁶⁹ For instance, and notwithstanding the fact that civil and administrative sanctions in respect of market manipulation may be imposed upon the offenders under the Financial Institutions (Protections of Funds) Act 28 of 2001, hereinafter referred to as the Protections of Funds Act, no similar provisions are found in the Financial Markets Act except for s 99 which simply provides for the referral of any related contraventions to the EC.

¹⁷⁰ See the discussion in paragraphs (including sub-paragraphs) under 2 above.

¹⁷¹ In relation to this, it is submitted that Delaware and other relevant states should enact specific and/or adequate statutory provisions that expressly prohibit insider trading and other related illicit activities and empower more regulatory authorities to enhance the combating of market abuse in the US.

¹⁷² Paragraphs 2.4; 2.8 & 2.12 above.

¹⁷³ See the FSB Annual Report 2011 4 99-101; the FSB Annual Report 2013 3 128-130.

¹⁷⁴ Generally see paragraphs 2.4; 2.8 & 2.12 above.

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