# INSIDER TRADING
# AND
# OTHER MARKET ABUSES
# (INCLUDING THE EFFECTIVE MANAGEMENT OF
# PRICE SENSITIVE INFORMATION)

**Revised January 2016**

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**NOTE TO THE READERS**

The purpose of this booklet is to bring together the various Acts and requirements, as well as relevant corporate governance guidelines, which all have a bearing on preventing market abuse. This booklet has drawn on the Financial Markets Act 2012, section 3 of the JSE Listings Requirements, and extracts from the TRP Merger and Takeover Code to provide an outline of the legal framework.

The format of the booklet is designed to give the reader guidelines and the exact wording of the various Acts presently in force, with a simple explanation of the terms and how they are applied or interpreted. In addition, the booklet refers to other texts to provide a greater understanding of the moral context of the law, and to position the various issues in a multi-dimensional universe of information.

It is designed to assist anyone who has an interest and plays an active role in the financial markets, by providing a simple and quick-to-read reference. While it hopes to be a useful guide, it should by no means be regarded as definitive, as for the purpose of simplicity and brevity, the booklet has only addressed the key concepts and terms. However, all sections of the relevant laws and requirements have been fully referenced to direct those interested in more detailed reading to the full text from which excerpts have been drawn.

## CHAPTER 1: HISTORY AND OVERVIEW

**"When the rich wage war it is the poor who die."** ***The Devil and the Good Lord*****, Jean-Paul Sartre**

Insider trading has always been the stuff of controversy and scandal, making headlines and destroying reputations. It is at the very root of discrimination, as it gives a small, usually already relatively privileged minority, an unfair advantage over the broad majority who do not enjoy the same equality of information or opportunity.

The use of privileged information for the purposes of gain (or to avoid a loss) at the expense of others is morally and legally reprehensible. The eradication of this practice is essential to the efficient working and reputation of any market, and the society in which it operates. This is nowhere more critical than in South Africa, which is striving to remove the historical, social and economic inequities that created such huge divides between the "haves" and the "have-nots". It is also a non-negotiable requirement for all markets to remove any suspicion of impropriety in order to attract and retain investment flows.

In South Africa's past, the laws affecting insider trading became increasingly inadequate as the economy grew in sophistication. Prior to 1999, when the Insider Trading Act came into force, the offence fell under the Companies Act (1973), which contained a criminal sanction only, requiring guilt to be proven beyond reasonable doubt. This meant in practice that successful prosecution was unlikely if there was any doubt about an alleged offence.. No alternative statutory civil remedies were available to the persons prejudiced by the actions of an insider trader.

The inadequacies of the previous legal framework, particularly regarding the onus of proof in a criminal trial and the absence of a civil remedy, played a large role in the drafting of the Insider Trading Act (1998). The King Task Group into Insider Trading Legislation, together with the JSE and the FSB, started research in 1995 and consulted widely before the legislation was introduced.

The Insider Trading Act (1998), which replaced the insider trading provisions in Section 440 of the Companies Act (1973), allowed for criminal prosecution and civil action. The latter need only be proved on a balance of probabilities. The Act's ambit covered all tradable instruments listed on the JSE and the Bond Exchange of South Africa (BESA), such as equities, bonds, futures, agricultural and equity derivatives. It also made provision for the manner in which to deal with all sensitive information, including policy decisions by regulators and government, which could affect the price of a traded instrument.

Since 2013, the market abuses of insider trading, the prohibited practices of manipulative, improper, false or deceptive trading and the making of false, misleading or deceptive statements, promises and forecasts fall under the Financial Markets Act (2012).

The regulator (the FSB) can choose to act on reports of alleged insider trading activity compiled by the Market Regulation Division of the JSE or tip-offs from other sources. The FSB Directorate of Market Abuse (DMA), created in terms of the new law, then conducts an investigation. A frequently raised and yet unfounded criticism of the activities of the DMA relates to the fact that, to date, few criminal actions have been instituted. The implicit impression, albeit erroneously, is that the current regulating authority lacks sufficient expertise and powers. First, it must be clarified that responsibility for prosecutions lies solely with the Directorate of Public Prosecutions. It should also be pointed out that, globally, criminal prosecution of insider trading is rare.

Even in the United States and the United Kingdom, widely regarded as being amongst the leaders in insider trading legislation, only a handful of cases have been referred for criminal prosecution. Furthermore, far from being behind global best practice, South Africa was the first country to initiate civil prosecution of insider trading with the added advantage of compensation for those prejudiced by insider trading. This places our law amongst the most progressive and equitable in the world.

The civil provisions of the Act have been the main tool utilised by the FSB, resulting in settlements since 1999 totalling more than R93 million. In all cases, the persons involved were named in press releases.

In 2004, five years after the insider trading regime had been put in place, the FSB commissioned G:enesis Analytics to conduct a survey to assess whether the new regime had had an impact on conduct in the market.

The principle findings of the survey were as follows[1]:

- *"Market participants have become more aware of insider trading rules and regulations (according to 93% of respondents).*

- *Insider trading has become markedly less acceptable (according to 80% of respondents).*

- *Education at listed companies has increased (according to 82% of listed companies).*

- *77% of traders and asset managers viewed the insider trading regime as having been either very successful or successful in reducing insider trading.*

- *The JSE's insider trading booklet has been widely read (54% of respondents had read it).*
- *The majority of listed companies have implemented insider trading policies (59% of listed companies)."*

[1] The full G:enesis report may be accessed at website [www.fsb.co.za](http://www.fsb.co.za).

## CHAPTER 2: DEFINITION OF INSIDE INFORMATION AND WHAT CONSTITUTES AN INSIDER

**“Every Chinese wall is covered with a grapevine.” Unknown**

This chapter deals with the concepts of inside information, price-sensitive information, and what makes someone an insider. The definitions have been drawn from the Act and the JSE Listings Requirements.

### What is inside information?

Inside information is defined by the Act as:

### Section 77

*“… specific or precise information, which has not been made public and which-*

*(a) is obtained or learned as an insider; and*

*(b) if it were made public would be likely to have a material effect on the price or value of any security listed on a regulated market.”*

The Act does not define what constitutes specific or precise information and the courts will determine this on a case-by-case basis. What may constitute specific or precise information in one situation may possibly not do so in another, depending on the surrounding circumstances.

One can appreciate that the degree of precision in the information will affect the extent of the investment decisions taken by an insider. A comment such as “we are having a really good year” may be considered to lack sufficient precision to fall within the Act, but if attached to another yardstick such as market expectations or measured against the prior year may well fall within the Act.

Another term that is not defined and is subject to discussion is that of “material”. According to the Association of Investment Management and Research (AIMR) Standards of Practice Handbook, inside information is generally defined as information about a company that is both material and non-public. “*Under the securities laws of the United States, information is material if a reasonable investor is likely to consider it significant in making an investment decision or if the information is reasonably certain to have a substantial impact on the market price of a company’s securities*.”

This is useful guidance and supports the general philosophy that if you receive information as or from an insider, as defined, and that information is not public and you make an investment decision which you would otherwise not have made at that time, you are likely to be in breach of the Act. The greater the urgency to execute the decision made, the greater the likelihood that you are committing an offence.

Apart from financial data, inside information could include, for example, changes in the executive of the company through appointments or resignations, or even incapacity of a senior director through, for example, serious long-term illness.

It may also include the acquisition or loss of major contracts, labour disputes or strikes, lawsuits, defaults and liquidations, Competition Commission investigations or rulings, qualified audits, and product malfunctions. One must also not forget that government employees may possess information relating to matters such as tariffs and interest rate policy, which may be highly significant in relation to a wide variety of listed instruments.

It is also necessary to consider when information will be considered to be public. Section 79 of the Act determines that information has been made public:

*"(a) When the information is published in accordance with the rules of the relevant regulated market for the purpose of informing clients and their professional advisers;*

*(b) when the information is contained in records which by virtue of any enactment are open to inspection by the public; or*

*(c) when the information can be readily acquired by those likely to deal in any listed securities -*

*(i) to which the information relates; or*

*(ii) of an issuer to which the information relates; or*

*(d) when the information is derived from information which has been made public."*

It should be noted that these are not the only circumstances in which information would be regarded as public.

**Who is an insider?**

An insider is defined by the Act as:

***Section 77***

*"Insider means a person who has inside information-*

*(a) through-*

*(i) being a director, employee or shareholder of an issuer of securities listed on a regulated market to which the inside information relates; or*

*(ii) having access to such information by virtue of employment, office or profession; or*

*(b) where such person knows that the direct or indirect source of the information was a person contemplated in paragraph (a)."*

For example, a company director, employee, adviser or even a journalist becomes an insider when he or she is made aware of a proposed transaction that could affect the price or value of a listed security.

The potential pool of persons who could become insiders is large, and relates not only to directors, employees and advisers, but could also include advertising and production companies employed to compile and produce confidential information, such as newspaper advertisements announcing company results, cautionary announcements and other price-sensitive notices. Those people involved in defining interest rate policy are also insiders in relation to government debt instruments.

Over the years, there has been much controversy over the issue of who becomes an insider, where, how and when. For example, some insiders did not gain their advantage through a specific discussion with insiders, but gathered the information either inadvertently or in an unguarded, social setting. In many instances, this can be extremely damaging to one's reputation in the market, especially if investigation and prosecution are the consequences.

There have been classic examples of individuals who traded for gain on that information after overhearing company directors on an aeroplane or in a lift discussing price-sensitive information.. Another typical example is casual dinner party conversation, say, with one company director telling the assembled guests of a major upcoming deal, which will boost his company's fortunes. Idle conversation on the golf course or at the 19th hole has proved dangerous, and intimate conversation between family members is probably the most dangerous way to impart insider information.

Family can place enormous pressure on relatives for "tip-offs" on price-sensitive information, claiming a blood or marriage link gives them some special privilege. While blood may be thicker than water, it is no defence in an insider trading prosecution.

If a person gains inside information and knows that the direct or indirect source of the information is an insider, such person becomes an insider.

## CHAPTER 3: DISCLOSURE AND PUBLICATION OF INSIDE INFORMATION

**"Ethical axioms are found and tested not very differently from the axioms of science. Truth is what stands the test of experience."** ***Out of My Later Years*****, Albert Einstein**

This chapter deals with the requirements under the various governing laws and requirements for the disclosure, dissemination and publication of price-sensitive information. The conditions for disclosure are specifically designed to ensure that all stakeholders are given equal access to relevant information in a way that minimises the possibility of unfair advantage to a few.

In the event of an obligation, as required under the JSE Listings Requirements, to disseminate information through the appropriate channel, i.e. the JSE's Stock Exchange News Service (SENS), the company and its advisers are expected to adhere to certain requirements. It should be emphasised that the JSE only recognises a public announcement as having occurred once it has been made on SENS and in no other manner or medium.

Once all the material issues relating to a transaction, such as an acquisition, merger or disposal, or any other price-sensitive information, have been agreed on, it is necessary to announce this agreement – even if all the minutiae of the deal are not yet finalised. When general consensus on such a transaction has been reached, price-sensitive information exists, which becomes difficult to contain.

So, in terms of the JSE Listings Requirements, the following principle provisions apply in respect of material price-sensitive information[2]:

"**General obligation of disclosure**

*(a) The following provisions apply in respect of material price sensitive information:*
*With the exception of trading statements, an issuer must, without delay, unless the information is kept confidential for a limited period of time, release an announcement providing details relating, directly or indirectly, to such issuer that constitutes price sensitive information.*

*Save where otherwise expressly provided, the requirements of this paragraph are in addition to any specific requirements regarding obligations of disclosure contained in the Listings Requirements.*
*Note: Apply Practice Note 2/2015 and consider the application of the JSE Guidance Letter-Cautionary Announcements.*

*(b) Trading statements*

*All issuers, other than those who publish quarterly results, must comply with the detailed requirements of paragraph 3.4(b)(i) to (viii). Issuers with a policy of publishing quarterly results must comply with the general principles contained in paragraph 3.4(b)(ix), but may also elect to comply with paragraph 3.4(b)(i) to (viii) on a voluntary basis.*

[2] The full JSE Listings Requirements may be accessed at website www.jse.co.za.

*(i) Issuers must publish a trading statement as soon as they are satisfied that a reasonable degree of certainty exists (refer to 3.4(b)(ii)) that the financial results (refer to 3.4(b)(vi) for the period to be reported upon next will differ by at least 20% (or 15% if paragraph 3.4 (b) (vii) is applicable) from the most recent of the following (collectively referred to as the "base information"):*

*(1) the financial results for the previous corresponding period; or*

*(2) a profit forecast (in terms of paragraphs 8.35 to 8.44) previously provided to the market in relation to such period.*

*Issuers may publish a trading statement if the differences referred to in 3.4(b)(i) are less than 20% ( or 15% if paragraph 3.4 (b) (vii) is applicable) but which are viewed by the issuer as being important enough to be made the subject of a trading statement.*

*(ii) The determination of a reasonable degree of certainty in terms of 3.4(b)(i) is a judgmental decision which has to be taken by the issuer and its directors and is one in which the JSE does not involve itself. This determination may differ from issuer to issuer depending on the nature of business and the factors to which they are exposed.*

*(iii) Trading statements must provide specific guidance by the inclusion of the period to which it relates and:*

*(1) a specific number or percentage to describe the differences; or*
*(2) a range (i.e. XYZ is expecting an increase of between 15% and 20%) to describe the differences. Where an issuer elects to use a range, the range may not exceed 20% (e.g., 20% to 40%, 25% to 45% etc.); or*
*(3) a minimum percentage difference , together with any other relevant information that the issuer has at its disposal at the time. This will only be applicable in instances where the issuer has reasonable certainty in respect of paragraph 3.4(b)(i) above, but it does not have the reasonable certainty to provide guidance in accordance with paragraph 3.4(b)(iii)(1) or (2). Once the issuer obtains this reasonable certainty, it must provide the guidance referred to in paragraph 3.4(b)iii)(1) or (2).*

*(iv) If, after publication of a trading statement but before publication of the relevant periodic financial results, an issuer becomes reasonably certain that its previously published number , percentage or range in the trading statement is no longer correct , then the issuer must publish another trading statement providing the revised number, percentage or range in accordance with paragraph 3.4(b).*

*(v) In light of the existing Listings Requirements' definitions of "significant", "material" and "substantial", these words may not be used in trading statements because to do so would imply a range differing from that permitted in terms of 3.4(b)(i) (i.e. more than 20%)".*

When publishing information in terms of the Listings Requirements, it is important to note that issuers may not release the information even under a time embargo. Price-sensitive information may only be disseminated to a broad audience once it has been published by SENS. Hence, where an issuer has its own website address on the internet, an announcement may be made available on its website only after the announcement has been released through SENS.

So, for example, a company or its communications advisers may not release the financial results to the media, **even under an embargo**, until the full announcement has been published on SENS:

Again, it is important for the communications advisers, such as public relations firms, to be aware of the restriction against making the information available to the media before it has been published on SENS. SENS, which was launched by the JSE in 1997, was not only designed to ensure the equitable dissemination of information, but also to keep the issuers' costs to a minimum. The JSE makes no charge to listed companies for publishing their announcements on SENS, and investors with a computer terminal can access SENS announcements on the JSE website (www.jse.co.za) and various other websites.

Issuers must therefore determine when information is material. Currently there is no fixed legal definition of materiality, as circumstances differ from company to company. Companies should consult their sponsors and advisers on the legal issues, but should always err on the side of greater transparency and disclosure. The JSE suggests that the rule of thumb should be: "If in doubt, publish".

The JSE Listings Requirements set out specific conditions for cautionary announcements:

**Section 3, 3.9 and 3.10**

*"3.9 Immediately after an issuer knows of any price sensitive information and the necessary degree of confidentiality of such information cannot be maintained or if the issuer suspects that confidentiality has or may have been breached, an issuer must publish a cautionary announcement (complying with paragraph 11.40).*

*An issuer that has published a cautionary announcement must provide updates thereon in the required manner and within the time limits prescribed in paragraph 11.41.*

*Note Apply Practice Note 2/2015 and consider the application of the JSE Guidance Letter-Cautionary Announcements.*

*3.10 If the directors of an issuer consider that disclosure to the public of information in accordance with paragraph 3.4 will or probably will prejudice the issuer's legitimate interests, the JSE may grant a dispensation from the requirement to make such information public."*

It must be stressed that the publication of a general cautionary announcement does not mean that insiders aware of the specific details are free to trade. Only once the details have been published by SENS would they cease to possess inside information and be free to trade.

Cautionary announcements are published for a variety of reasons. One of the most common is to signal to the market that the company posting the announcement is in a price-sensitive situation, such as merger, acquisition or disposal discussions with another party. Cautionary announcements may also be employed where companies are involved in a legal dispute. In all instances, the purpose of the cautionary is to alert existing and potential future shareholders to exercise care in trading before the company is in a position to make a detailed announcement. They are just another way of saying *caveat emptor* – "Let the buyer beware". The JSE is averse to companies using a bland cautionary announcement, and requires them to provide as much detail as possible.

Companies and their directors and advisers must refresh the cautionary announcement at least every six weeks, withdraw it, or make an announcement pertaining to the reasons for the cautionary. It is unacceptable to maintain a permanent cautionary, as this prejudices the rights of shareholders.

The JSE may make an exception, as outlined in 3.10, in a case where disclosure of information is potentially damaging to the company.

In terms of the TRP Merger and Takeover Code, Rule 2, companies are expected to abide by the following requirements regarding the publication of cautionary announcements:

**TRP Rule 2, 2.2 (2.2.1) and (2.2.2 (a)(b))**

*"2.2.1 A cautionary announcement is a brief announcement to be published in the press (AND ON SENS) and is intended to preserve the integrity of trading in a company's securities on the JSE preceding or during negotiations which may lead to an announcement of a firm intention to make an offer. It may be couched in general terms and would normally state that talks are taking place or that a potential offeror is considering making an offer, or that an announcement is pending which could have a material effect on the price of the offeror's or offeree company's securities. It shall state that the holders of the securities concerned are advised to exercise caution in dealing in their securities. The potential offeror must be named in the cautionary announcement unless the Panel rules otherwise.*

*2.2.2 A cautionary announcement shall be made when an offer is under discussion, and;*

*(a) the offeree is the subject of rumour and speculation or there is abnormal movement in the price of the offeree company's securities or in the volume of such securities traded on the JSE; or*

*(b) negotiations or discussion are about to be extended to include more than a very restricted number of persons (outside those in the companies concerned who need to know and their immediate advisers)."*

The JSE Listings Requirements have also made specific provision for announcements related to qualifications on auditors' opinions. The JSE believes that the termination or resignation of auditors from a company may constitute material and price-sensitive information.

In terms of the Listings Requirements, **Section 3, 3.75-79**, companies are obliged to provide all relevant information related to auditors.

*"3.75 An issuer must notify the JSE of:*

*(a) the termination of the appointment of the auditor;*
*(b) the resignation of the auditor; and/or*
*(c) any change of the individual auditor classified as the designated auditor;*

*Without delay, and by no later than the end of the business day following the decision by the issuer to terminate or appoint the auditor or after receipt of the auditor's resignation.*

*3.76 The notification required by paragraph 3.75 must state the effective date of the termination or resignation, if it is not with immediate effect.*

*3.77 The notification required by paragraph 3.75 must be accompanied by a letter from the auditor stating the date of termination, what the auditor believe to be the reason for such termination or, in the case of resignation, the reason(s) for such resignation.*

*3.78 The JSE may, at its sole discretion, request the company to publish an announcement informing shareholders of the termination of the auditors' appointment or resignation of the auditors and the reason(s) therefore.*

*3.79 The annual financial statements for the year ended in which the termination or resignation took place, must state that the auditors' appointment was terminated or that the auditors resigned and the reason(s) therefore."*

The JSE Listings Requirements lay out specific obligations for disclosure of price-sensitive information, but it makes the following exceptions:

**Section 3, 3.6-8**

*"3.6 Issuers that deem it necessary to provide information, prior to releasing same on SENS must ensure that in doing so they do not commit an offence in terms of the FMA and in particular Section 78 (4).*

*Section 78 (4) of the FMA states the following:*

*(a) An insider who knows that he or she has inside information and who discloses the inside information to another person commits an offence.*
*(b) An insider is, despite paragraph (a) not guilty of an offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession in circumstances unrelated to dealing in any security listed on a regulated market and that he or she at the same time disclosed that the information was inside information.*

*3.7 Issuers that elect to provide information in accordance with paragraph 3.6 and become aware that the necessary degree of confidentiality of such information cannot be maintained or if the issuer suspects that confidentiality has or may have been breached, the issuer must immediately:*

*(i) inform the JSE; and*
*(ii) ensure that such information is announced accordingly.*

*3.8 When an issuer intends to release any information as contemplated in paragraph 3.5 at any meeting or forum, arrangements must be made for the publication of such information to ensure that the announcement of such information at the meeting or forum is made simultaneously with the publication through SENS in accordance with Schedule 19. If any such information is disclosed in an unplanned manner during the course of a meeting or forum, the issue must immediately:*
*(i) inform the JSE; and*

(ii) ensure that such information is announced accordingly".

**Discussions between company executives and investment analysts**

Analysts are employed to produce detailed reports on the prospects and performance of listed companies. They compile and research their information via a number of methods including interviewing executives, clients or customers, and company advisers. Investment analysis is a competitive industry, and analysts are rated and remunerated on the quality and immediacy of their information, and the accuracy of the conclusions they draw.

According to the Securities Exchange Commission in the United States, analysts *"are in the business of formulating opinions and insights – not obvious to the general investing public –concerning the attractiveness of particular securities. … The value to the entire market of these efforts cannot be gainsaid; market efficiency in pricing is significantly enhanced by initiatives to ferret out and analyse information, and thus the analyst's work is to the great advantage of all investors."*

In the Standards of Practice Handbook, the Association for Investment Management and Research, therefore concludes that insider trading violations *"should not result when a perceptive analyst reaches a conclusion about a corporate action or event through an analysis of public information and items of non-material, non-public information."*

This is known as the Mosaic Theory, which has been entrenched in the Act. It means that an analyst may come to a new conclusion that is not known to the market and "tip" his clients on condition that his mosaic contains no inside information. In addition, companies are generally cognisant of the pressures they face to provide as much information as they are permitted to enhance the understanding of their organisation and promote a fair and accurate valuation of the business and its future prospects.

In many instances, the valuation attached to a company by an analyst and the subsequent trading recommendation (to buy, sell or hold and all variations thereof) can affect the price and volumes at which a security trades.

With regard to companies providing analysts with information that could be seen as price-sensitive, it is incumbent on the analyst to be aware of the provisions of the Act and the JSE Listings Requirements. In addition, analysts must embrace further responsibilities. Guidance may be obtained by reference to the charter of the Chartered Financial Analysts Institute, which requires that a qualified CFA should establish whether the company being interviewed is disclosing price-sensitive information.

In addition, if the information has not yet been disseminated by SENS, and could possibly be deemed price-sensitive, the affected analyst should inform the company of its obligation to publish the information, and should refrain from relaying the information to clients or trading until the company has fulfilled its obligations.

Analysts and the media should be mindful of the fact that disclosure to a room full of journalists or analysts does not necessarily mean that price-sensitive information has now become "public" as defined by the relevant legislation. Such disclosure would certainly not meet the requirements of the JSE.

The Association for Investment Management and Research also prohibits its members from attempting to solicit inside information from company insiders.

In an ideal world, the same restriction should apply to journalists. However, the media is not bound by the same code of conduct that governs investment professionals. Indeed, one of the functions of the media is to uncover and publish information that is not in the public domain. Company insiders should always bear this in mind in discussions with journalists, and be cognisant of their legal restrictions when relaying company information. This does not mean, however, that journalists may not be prosecuted if they trade or pass on inside information gleaned from their sources.

By the same token, representatives of issuers that have contact with analysts should be extra cautious not to disclose price-sensitive information. One way of doing this is to restrict the number of people within the company that are allowed to speak to financial analysts, to ensure that more than one company representative is present at any meeting with analysts and that the proceedings are recorded. The 2004 G:enesis survey found that since the advent of the new insider trading regime, 96% of the companies surveyed had introduced such restrictions.

**Prohibited periods and directors' dealings**

To reinforce the prevention of the misuse of inside information, the JSE has introduced additional Listings Requirements regarding dealings by directors. A director may not deal in any securities relating to the issuer without first receiving clearance from the chairperson or other designated director.

A director must not be given clearance to deal during a prohibited period. A prohibited period is a closed period and any period where there exists any matter that constitutes unpublished price-sensitive information in relation to the issued securities (whether or not a director has knowledge of such matter).

A closed period is defined in the JSE Listings Requirements as:

*"(a) the date from the financial year end up to the date of earliest publication of the preliminary report (refer to paragraph 3.22), abridged report (refer to paragraph 3.21) or provisional report (refer to paragraph 3.16);*

*(b) the date from the expiration of the first six month period of a financial year up to the date of publication of the interim results;*

*(c) the date from the expiration of the second six month period of a financial year up to the date of publication of the second interim results, in cases where the financial period covers more than 12 months (refer to paragraph 3.15);*

*(d) in the case of reporting on a quarterly basis, the date from the end of the quarter up to the date of the publication of the quarterly results; and*

(e) *any period when an issuer is trading under a cautionary announcement*."

If a director trades in securities of the issuer he is required to disclose to the issuer without delay and in any event by no later than 24 hours after dealing the following information:

*"(i) the name of the director;*

*(ii) the name of the company of which he is a director;*

*(iii) the date on which the transaction was effected;*

*(iv) the price, number, total value and class of securities concerned.*

*A deemed value based on the prevailing market price must be included in situations where there is no price attributable to the transaction (e.g. donations). Aggregation and averaging of prices is not allowed and therefore, in instances where there have been various trades at various prices during the course of a day, the volume weighted average price must be shown together with the highest and lowest trading prices for the day.;*

*(v) in the case of options or any other similar right or obligation, the option strike price, strike dates and periods of exercise and/or vesting;*

*(vi) the nature of the transaction;*

*(vii) the nature and the extent of the director's interest in the transaction. In the case of dealings by associates, the announcement must disclose the name of the associate and the relationship with the director.*

*(viii) confirmation as to whether the trades were done on-market or off-market; and*

*(ix) whether clearance has been given in terms of paragraph 3.66. In the case of dealings by associates, this requirement does not apply.*

The issuer must in turn announce such information without delay and in any event by no later than 24 hours after receipt of such information from the director concerned.

**JSE Listings Requirements, Section 3, 3.63 (a) and (b)**

*"3.63 An issuer, via its sponsor, must announce the following information:*

*(a) details of all transactions (including off market transactions) in securities relating to the issuer by or on behalf of:*

*(i) a director and company secretary (held beneficially, whether directly or indirectly) of the issuer;*

*(ii) a director and company secretary (held beneficially, whether directly or indirectly) of a major subsidiary company of the issuer;*

*(iii) any associate of 3.63 (a) (i) or (ii) above (collectively referred to for the purposes of paragraphs 3.60 to 3.70 as "directors")".*

These JSE Listings requirements bring transparency to the trading activities of directors.

Certain governance experts hold the view that executive directors of a company should avoid being active players in the market altogether. This is because directors always have more information than the investing public, and regular dealings would attract suspicion.

Many organisations that trade in shares, for instance investment banks, are also involved as advisers to companies during corporate actions. “Chinese walls” should be imposed to avoid the possibility that price-sensitive information becomes available to the trading divisions. In other words, information made available under a confidentiality agreement to one division, such as the corporate finance department, must be kept secret from other divisions.

In addition, trading firms should consider physically separating departments and files to prevent the communication of sensitive information. For example, the corporate finance areas of a brokerage firm should be separated from the sales and research departments.

In the event that an employee is required to fulfil some role in another department – such as advising the corporate finance team - he or she is brought “over the wall” and made privy to sensitive information, thus becoming an insider. In this situation, that employee is bound by the confidentiality affecting the corporate finance team, and may not return to his or her normal function until the relevant information is disclosed publicly.

In some organisations, analysts are prohibited from owning shares in the companies they research. In addition, in many trading houses the compliance officers are responsible for ensuring that employees are not trading for their own account and benefiting from using inside information. Compliance officers are responsible for maintaining a “watch list” which comprises a list of shares in which trading is restricted. They are also required to monitor staff trading.

While this system is designed to prevent insider trading, it could also alert employees to the fact that there is corporate activity in the named counters that may not yet be public knowledge. However, if the watch list is kept secret and pre-authorised trading is required, the problem is addressed to a large degree. Although this system is not perfect, it nonetheless provides rigid checks and balances that closely control trading.

In the event of corporate activity, such as a merger or a takeover, companies are bound by the TRP requirement that the offeror or a concert party may not sell any securities in the offeree company during the offer period without the consent of the Panel.

## CHAPTER 4: INSIDER TRADING OFFENCES AND DEFENCES

**“Thieves respect property; they merely wish the property to become their property so that they may more perfectly respect it.” GK Chesterton**

This chapter deals with what constitutes an insider trading offence and the statutory defences in terms of the Act.

### Insider trading for your own account (section 78(1))

In terms of section 78(1)(a) of the Act: “*An insider who knows that he or she has inside information and who deals directly or indirectly or through an agent for his or her own account in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence.*”

However: “*An insider is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she-*

*(i) only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider.”*

*(ii) was acting in pursuit of a transaction in respect of which-*
*(aa) all the parties to the transaction had possession of the same inside information;*
*(bb) trading was limited to the parties referred to in subparagraph (aa); and*
*(cc) the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information”.*

### An insider who deals for another person (section 78(2))

In terms of section 78(2)(a) of the Act: “*An insider who knows that he or she has inside information and who deals, directly or indirectly, or through an agent for any other person in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it, commits an offence*.”

However, “*An insider is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she-*

*(i)* *is an authorised user and was acting on specific instructions from a client, and did not know that the client was an insider at the time.*

*(ii)* *only became an insider after he or she had given the instruction to deal to an authorised user and the instruction was not changed in any manner after he or she became an insider;* or

*(iii)* *was acting in pursuit of a transaction in respect of which-*

*(aa) all the parties to the transaction had possession of the same inside information;*

*(bb) trading was limited to the parties referred to in subparagraph (aa); and*

*(cc) the transaction was not aimed at securing a benefit from exposure to movement in the price of the security, or a related security, resulting from the inside information."*

Institutions that have been named "market makers" in the bond market by the South African Reserve Bank may not be deemed as carrying on insider trading if they are acting under specific instructions from the central bank to deal in bonds.

**A person who knowingly deals for an insider (section 78 (3))**

In terms of section 78(3)(a) of the Act:" *Any person who deals for an insider directly or indirectly or through an agent in the securities listed on a regulated market to which the inside information possessed by the insider relates or which are likely to be affected by it, who knew that such person is an insider, commits an offence."*

However: " *A person is, despite paragraph (a), not guilty of any offence contemplated in that paragraph if the person on whose behalf the dealing was done had any of the defences available to him or her as set out in subsection (2)(b)(ii) and (iii)".*

**An insider who discloses inside information (section 78(4))**

In terms of section 78(4)(a) of the Act: "*An insider who knows that he or she has inside information and who discloses the inside information to another person commits an offence*."

However, "*An insider is, despite paragraph (a), not guilty of the offence contemplated in that paragraph if such insider proves on a balance of probabilities that he or she disclosed the inside information because it was necessary to do so for the purpose of the proper performance of the functions of his or her employment, office or profession in circumstances unrelated to dealing in any security listed on a regulated market and that he or she at the same time disclosed that the information was inside information.*"

A person may avoid being deemed an offending insider if it was necessary for the inside information to be disclosed as part of such person's duties, for instance disclosure of financial information to the company's auditors during the audit process.

A defence is also raised in terms of the following practice note 1/93 of the SRP, specifically relating to an offer on a target company:

**Practice Note on the provisions of Rule 2, 2.2.2(b)**

*"The Panel accepts that in practice it may be necessary for an offeror to approach a small number of significant minority shareholders after issuing a cautionary notice but prior to establishing and publishing a firm offer price. The acceptance of this practice by the panel is, however, subject to certain qualifications:*

*(i) the strict observance by all parties of the secrecy provisions of Rule 2.1 and the anti-insider trading provisions of the Insider Trading Act*

*(ii) the prior clearance by the Panel if any of the following requirements are not met:*

- *(a) only minority shareholders holding 5% or more of the aggregate of all the relevant securities held by all the minority shareholders can be approached*
- *(b) not more than five minority shareholders can be approached; and*
- *(c) the relevant minority shareholders must sign an acknowledgement, before they are given any significant information relative to the proposed offer, that they will not disclose that information to any person or use any of the information for their own direct or indirect benefit, or that of any other person, prior to the public announcement of the relevant facts."*

It is crucial that the decision to disclose inside information to a shareholder is the right one, as once this is done, that shareholder will be prohibited from acting or trading on the information. Companies and advisers must be cognisant of the onerous restrictions they can impose on current and existing shareholders when disclosing material and price-sensitive information, and should give the potential recipients of the information the choice of whether they wish to become insiders or not.

**An insider who encourages or discourages another person to trade (section 78(5))**

In terms of section 78(5) of the Act: "*An insider who knows that he or she has inside information and who encourages or causes another person to deal or discourages or stops another person from dealing in the securities listed on a regulated market to which the inside information relates or which are likely to be affected by it commits an offence*."

## CHAPTER 5: MARKET MANIPULATION

**"O what a tangled web we weave, when first we practise to deceive" Sir Walter Scott**

Public confidence in the fairness of markets enhances their liquidity and efficiency. Market manipulation harms the integrity of, and thereby undermines public confidence in, securities and derivatives markets by distorting prices and creating an artificial appearance of market activity. Accordingly, authorities around the world need to have adequate systems in place to detect, investigate and prosecute market manipulation.

A prohibited trading practice (market manipulation) is an offence in terms of section 80 of the Act, which reads as follows:

*"(1) No person -*

*(a) may either for such person's own account or on behalf of another person, knowingly directly or indirectly use or participate in any practice which has created or is likely to have the effect of creating-*

*(i) a false or deceptive appearance of the demand for, supply of, or trading activity in connection with; or*

*(ii) an artificial price for, that security;*

*(b) who ought reasonably to have known that he or she is participating in a practice referred to in subparagraph (a), may participate in such practice.*

*(2) A person who contravenes subsection (1)(a) commits an offence.*

*(3) Without limiting the generality of subsection (1), the following are contraventions of subsection (1):*

*(a) Approving or entering on a regulated market an order to buy or sell a security listed on that market which involves no change in the beneficial ownership of that security, with the intention of creating-*
*(i) a false or deceptive appearance of the trading activity in; or*
*(ii) an artificial market price for, that security;*

*(b) approving or entering on a regulated market an order to buy or sell a security listed on that market with the knowledge that an opposite order or orders at substantially the same price, have been or will be entered by or for the same or different persons with the intention of creating -*

*(i) a false or deceptive appearance of trading activity in; or*

*(ii) an artificial market price for, that security;*

*(c) approving or entering on a regulated market orders to buy a security listed on that market at successively higher prices or orders to sell a security listed on that market at successively lower prices for the purpose of unduly or improperly influencing the market price of such security;*

*(d)* *approving or entering on a regulated market an order at or near the close of the market, the primary purpose of which is to change or maintain the closing price of a security listed on that market;*

*(e)* *approving or entering on a regulated market an order to buy or sell a security which order will be included in any auction during an auction call period and cancelling such order immediately prior to the auction matching for the purpose of creating-*
*(i) a false or deceptive appearance of the demand for or supply of such security; or*
*(ii) an artificial price for, such security;*

*(f)* *effecting or assisting in effecting a market corner;*

*(g)* *maintaining, at a level that is artificial, the price of a security listed on a regulated market;"*

*(4) For the purpose of subsection (1), the employment of price-stabilising mechanisms that are regulated in terms of the rules or listing requirements of an exchange does not constitute a practice which creates an artificial price for securities which are subject to such price-stabilising mechanisms.*

*(5) For the purposes of subsection 3 (a), a purchase or sale of listed securities does not involve a change in beneficial ownership if a person who had an interest in the securities before the purchase or sale, or a person associated with that person in relation to those securities, has an interest after the purchase or sale".*

Because it operates an order driven market, the JSE's ability to combat market manipulation is enhanced by the responsibility of its members to consider orders prior to entering them into the market. Rule 7.10.1 reads as follows: "*A member must give consideration to the circumstances of orders placed by clients before entering such orders in the JSE equities trading system and is responsible for the integrity of such orders."*

The trader that enters the order into the market is generally the person who will apply his mind to the appropriateness of an order. The advent of on-line trading (internet trading), where no trader is involved, poses an additional challenge. However, those JSE member firms that allow on-line trading access to the market are required to install systems designed to block orders that are potentially manipulative. The system is required to have a filter that will prevent an order from entering the market at a price that substantially deviates from the price traded last.

The JSE Market Regulation Division operates a system that identifies unusual price and volume movements. This enables surveillance staff to monitor trading activity. When an alert is generated that indicates possible market manipulation, an initial investigation is undertaken and the results are brought to the attention of the DMA.

Taking into account the exceptional surveillance capability of the JSE, incidences of market abuse are unlikely to go undetected and the consequences for offenders are likely to be serious.

## CHAPTER 6: FALSE STATEMENTS

**"A falsehood is an attempt to hide the truth from those who have a right to know" Laurence J Peter**

Like market manipulation, the issuing of false statements can harm the integrity of and undermine public confidence in markets. Incorrect published information regarding the financial state of a listed company may encourage investors to trade in the company's shares at prices that would not be sustainable were the true facts known.

False statements may also concern matters that are not directly associated with the company's current finances, but may nevertheless artificially inflate the share price, for example false claims regarding products developed or orders obtained. The prohibition could also relate to the withholding of price-sensitive information from the market, often to avoid the negative effect it would have on the share price.

False statements are prohibited in section 81 of the Act that reads as follows:

*"(1) No person may, directly or indirectly, make or publish in respect of listed securities, or in respect of the past or future performance of a company, whose securities are listed on a regulated market-*

*(a) any statement, promise or forecast which is, at the time and in the light of the circumstances in which it is made, false or misleading or deceptive in respect of any material fact and which the person knows, or ought reasonably to know, is false, misleading or deceptive; or*

*(b) any statement, promise or forecast which is, by reason of the omission of a material fact, rendered false, misleading or deceptive and which the person knows, or ought reasonably to know, is rendered false, misleading or deceptive by reason of the omission of that fact.*

*(2) A person who has made a statement as contemplated in subsection (1) and who was unaware that the statement was false, misleading or deceptive, and who becomes aware of the fact that such statement was false, misleading or deceptive must, without delay, publish a full and frank correction with regard to such statement.*

*(3) A person who contravenes subsection (1), or who fails to comply with subsection (2), commits an offence.*

Directors of the company share the responsibility with the company to ensure the accuracy of statements that are published.

It should be noted that it is not only an offence to intentionally make a false or misleading statement. A person could also be in contravention of the provisions of the Act if his negligence causes the misleading statement to be made. For example, a company director who signs off a trading statement for publication without taking reasonable steps to ensure its correctness could be committing an offence. This prohibition also relates to any other person who is responsible for a false or misleading statement.

## CHAPTER 7: THE ROLE AND FUNCTIONING OF THE JSE MARKET REGULATION DIVISION IN THE DETECTION OF MARKET ABUSE

The primary objective of the JSE's market surveillance activities regarding market abuse is prevention. Prompt disclosure by listed companies of price-sensitive information is one of the ways to limit the possibility of insider trading. The requirements for listing on the exchange include several measures, outlined in some of the previous chapters, designed to achieve prompt disclosure.

In terms of detection, the JSE Market Regulation Division has in place a number of proprietary systems that have been specifically designed to detect unusual trading volumes and price movements, which could be indicative of insider trading or market manipulation. Surveillance Officers in the Market Practices Department of the Market Regulation Division are responsible for detecting any signs of market abuse using this proprietary technology, which refreshes the trading information every half hour.

When unusual activity is detected, and there appears to be no obvious cause, the surveillance officers may contact the sponsors of a listed company and request that they ask the directors if they know of any price-sensitive information that is due to be released. Should this be the case, the company is requested to make the relevant announcement as soon as possible through SENS. If there is a delay in making an announcement, the JSE may halt trading in the company's shares until the announcement has been made.

In these circumstances, and on all other occasions when announcements are published that substantially affect the price of a listed security, the Market Regulation Division examines the trading activity prior to the announcements to see if there is evidence of possible insider trading. The sophisticated surveillance systems that have been adopted by the JSE are capable of identifying the names, addresses, telephone numbers and other details of the parties involved in the transactions.

The history of trading by an account holder in a particular security can also be scrutinised. Trades through different accounts at different broking firms can be linked, as well as accounts with similar details, such as addresses and telephone numbers. This is invaluable information in an insider trading or price manipulation investigation.

If suspicious trading activity is detected, the matter receives prompt attention, as it is discussed at weekly meetings with the DMA.

## CHAPTER 8: THE ROLE AND FUNCTIONING OF THE DIRECTORATE OF MARKET ABUSE IN THE INVESTIGATION AND PROSECUTION OF MARKET ABUSE

In terms of the Act, the DMA has wide powers of interrogation, search and seizure of records and documentation, and the ability to obtain details of the beneficial owners of securities held in nominee, to deal with market abuse investigations. The investigation team of the DMA undertakes full forensic investigations into alerts on the JSE radar screen that merit further attention. The investigation team, which is employed by the FSB, consists of staff members with accounting, legal and forensic skills.

Due to the increasingly global nature of trading in listed instruments, the FSB has also forged co-operation agreements with similar authorities elsewhere in the world, such as the Financial Conduct Authority in the UK, and the Securities Exchange Commission in the US. This allows the FSB to track the activities of insider trading suspects using other jurisdictions to contravene South African laws. For example, if a South African resident, using inside information, instructed a broker in London to make a purchase of a listed instrument to disguise the illegal nature of the deal, the FSB could call on its relationship with the FCA to detect the trading activity.

Alleged offenders and potential witnesses are summonsed to appear in an interrogation room at the FSB offices in Pretoria where they are required to answer questions under oath. All proceedings are recorded. Legal representation is permitted and every step is taken to ensure that people are fully aware of their legal rights.

The results of these investigations are placed before the DMA for their consideration. The markets, the accounting and legal professions, bankers, the South African Reserve Bank and the securities industry are represented on the DMA, but anyone directly involved in securities trading is excluded.

The DMA is responsible for considering these investigation reports, and deciding whether to institute legal action. The DMA may refer a case to the Enforcement Committee of the FSB, which has the power to impose administrative penalties on an offender. The DMA may also hand it over to the prosecuting authorities for consideration. If the case relates to alleged insider trading, the DMA can institute a civil prosecution. A list of cases under investigation and the proposed action, if any, is published in the media after each meeting of the DMA.

The DMA in the name of the FSB may institute a civil claim against a person who traded in a listed security while in possession of inside information. If it is proven that a person profited or avoided a loss through unlawful dealing, the profit or loss avoided (whether realised or not) may be recovered. In addition, a penalty of up to R1 million and three times such profit made or loss avoided may be imposed. The DMA can also respond to an offer of a settlement from any of the parties under investigation for insider trading activity.

In terms of the Act, the FSB may recoup its legal and investigation costs from any amount recovered. The balance of the funds is then distributed to investors who have been affected by the illegal transactions.

The FSB provides claims forms for parties or individuals whose eligibility has been established for a distribution payment in terms of the Act. (Such forms may also be obtained from stockbrokers.) The claimant must contact the stockbroker that executed the specific transaction for the claimant. The form is then submitted to the FSB. Should the claim be approved, the FSB will reimburse the relevant stockbroker who will credit the claimant's trading account. The claims officer has the discretion to grant a claimant a lesser amount than the amount that he or she may be entitled to, if good cause is shown for such action. However, any person aggrieved by the decision of the claims officer may appeal against such decision to the FSB Appeal Board.

(Information about the FSB investigations can be sourced from the website www.fsb.co.za).

## CHAPTER 9: PENALTIES AND LIABILITIES

**"Punishment is not for revenge, but to lessen crime and reform the criminal." Elizabeth Fry, British prison reformer**

This chapter deals with the criminal, administrative and civil actions that can be taken against offenders.

In terms of section 109 of the Act a person who is found guilty of market abuse in a criminal court is liable to a fine not exceeding R50 million or to imprisonment not exceeding 10 years, or both.

In addition, the DMA may refer cases of market abuse to the Enforcement Committee established in terms of section 99 of the Act.

When referring a case, the DMA must submit the investigation report and all relevant evidence to the Enforcement Committee. The Enforcement Committee will then furnish the alleged offender (respondent) with the documents. The respondent has an opportunity to reply to the allegations, after which the Enforcement Committee adjudicates on the matter.

If the Enforcement Committee imposes a penalty the respondent has a right of appeal.

As described in chapter 8, the FSB may issue civil summons against an alleged insider trader for the profit made or loss avoided as a result of the offending transactions, and a penalty of up to R1 million and three times such amount. In addition, these penalties are also recoverable from any person who passes on inside information, who trades on behalf of another, or who encourages another to trade. If successful, the FSB will distribute the majority of the funds to persons who could have been prejudiced as a result of the offending transactions.