Oklahoma Law Review

Volume 63 | Number 3

2011

United States v. Nacchio: The Tenth Circuit's Civil Approach to Sentencing for Insider Trading

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United States v. Nacchio: The Tenth Circuit's Civil Approach to Sentencing for Insider Trading*

I. Introduction

In 1984, The Sentencing Reform Act created the United States Sentencing Commission (Commission) to act as an independent agency in the judicial branch.[1] The Commission's "principal purpose is to establish sentencing policies and practices for the federal criminal justice system" that meet the basic purposes of criminal punishment: deterrence, incapacitation, punishment, and rehabilitation.[2] Pursuant to these goals, the Commission developed guidelines to govern criminal sentencing in federal court.[3] The Sentencing Guidelines were meant to "provide a framework for courts to impose consistent and proportional sentences for convicted defendants . . . ."[4]

Insider trading is treated "as a sophisticated fraud"[5] and is specifically covered by Section 2B1.4[6] of the United States Sentencing Guidelines.[7] If a

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* I want to express my sincere gratitude and appreciation for my faculty advisor, Professor Brian M. McCall, for his insight, guidance, and encouragement throughout the writing of this Note.

1. *See* U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS 1.1 (1987); *see also* 28 U.S.C.A. § 991(a) (West 2008); William K.S. Wang & Marc I. Steinberg, *Practising Law Institute Insider Trading*, PRACTISING L. INST. § 7:2.2, at *7-23 to -24 (2006).

2. U.S. SENTENCING COMM'N, *supra* note 1, at 1.1; *see also* 28 U.S.C.A. § 991(b) (West 2008).

3. *See* Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-23.

4. *Id.* § 7:2.2, at *7-24.

5. U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4 cmt. background (2001); Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-28-29..

6. The 2000 version of the Sentencing Guidelines that was used by the district court for sentencing Mr. Nacchio is no longer effective. *See* United States v. Nacchio, 573 F.3d 1062, 1066 (10th Cir. 2009), *cert denied*, 130 S. Ct. 54 (2009); *see also id.* at 1066 n.5 (explaining that the 2000 Guideline §§ 2F1.1 (Fraud and Deceit) and 2F1.2 (Insider Trading) were deleted by consolidation with § 2B1.1); U.S. SENTENCING COMM'N GUIDELINES MANUAL pt. F; Elkan Abramowitz & Barry A. Bohrer, *Loss Calculation in Sentencing for Securities Fraud Cases*, 242 N.Y. L.J. 3, n.10 (2009). For the convenience of the reader, and consistency, all references to U.S.S.G. § 2F1.2 throughout the remainder of this Note's text will be referred to as § 2B1.4, which is the current version of the Sentencing Guidelines specifically applicable to the offense of insider trading.

7. *See Nacchio*, 573 F.3d at 1067 (citing U.S.S.G. § 2F1.2 (2000) (current version at U.S.S.G. § 2B1.4 (2011)), *cert. denied*, 130 S. Ct. 54 (2009); *see also* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4.

defendant is convicted of insider trading, the defendant's sentence term may be increased based on the amount of "gain" resulting from the offense.[8] Thus, the court's gain calculation is critical to determination of an insider trading defendant's sentence.

In *United States v. Nacchio*, on an issue of first impression, the Tenth Circuit announced a new standard for calculating the gain of a defendant convicted of insider trading in violation of federal securities law.[9] In *Nacchio*, the court debated the adoption of two differing methods—net-profit versus civil disgorgement—for calculating gain.[10] After thoroughly considering each method, the court specifically adopted civil disgorgement as the model for calculating gain for criminal sentencing of insider trading defendants.[11]

Nacchio takes one side of a current split between the Eighth and Tenth Circuits regarding the proper calculation of gain for insider trading offenses. This Note examines the court's opinion in *Nacchio* and considers how the Tenth Circuit's method of gain calculation will affect future sentencing for inside traders. Furthermore, this Note suggests that the Tenth Circuit's approach, based on civil jurisprudence, more accurately measures an inside trading defendant's gain and, therefore, is more consistent with the basic policies of criminal punishment.

Part II gives a brief history of securities law, the origin of the offense of insider trading, federal sentencing guidelines specific to insider trading, and then explains the differing methods for calculating gain. Part III describes the facts and procedural history of *United States v. Nacchio*. Part IV discusses the Tenth Circuit's decision to adopt a civil standard for sentencing defendants convicted of insider trading. Part V argues that the Tenth Circuit is correct in determining that disgorgement is an appropriate guidepost for calculating gain for defendants convicted of insider trading. Disgorgement is more attuned to the complexities of securities markets and seeks to punish a defendant only for the amount of gain proximately related to the fraud.[12] Part V then explores potential future effects of using a disgorgement standard. Part VI concludes this Note.

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8. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4(b)(1); *see also Nacchio*, 573 F.3d at 1067; United States v. Mooney, 425 F.3d 1093, 1097-99 (8th Cir. 2005) (en banc).
9. *See Nacchio*, 573 F.3d at 1086.
10. *See id.* at 1067-86.
11. *See id.* at 1086.
12. *See Nacchio*, 573 F.3d 1062.

II. Background Law

A. Brief History of Securities Law

Federal securities regulation in the United States grew out of the stock market crash of 1929[13] and the subsequent congressional enactments of the Securities Act of 1933 and the Securities Exchange Act of 1934.[14] The primary goal of the 1933 Act is to protect consumers by requiring greater disclosure in the distribution of securities, thus giving investors the ability to make a fair evaluation of investments.[15]

Following the Securities Act of 1933, Congress passed the Securities Exchange Act of 1934 (Exchange Act) in order to protect investors[16] and "insure honest securities markets . . . thereby promot[ing] investor confidence."[17] The Exchange Act is a broad act governing all aspects of publicly traded securities.[18] The Exchange Act attempts to place all investors on equal footing with regard to securities transactions.[19] "A significant purpose of the Exchange Act was to eliminate the idea that the use of inside information for personal advantage was a normal [benefit of holding a] corporate office."[20] As a result, the Exchange Act contains "provisions that protect investors from fraud and material misstatements or omissions of material facts in connection with any purchase or sale of securities."[21] The Exchange Act delegates power to the Securities and Exchange Commission (SEC) to promulgate regulations designed to prohibit manipulation or deception in the trading of securities and rules defining liability for willful violations of the law.[22] Specifically, Section 10(b) of the Exchange Act makes it unlawful for any person to use any manipulative or deceptive device when purchasing or selling a security.[23]

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13. *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 19 (6th ed. 2009) [hereinafter HAZEN, LAW].

14. *See id.* at 17.

15. *See id.* at 19-20.

16. *See* Basic Inc. v. Levinson, 485 U.S. 224, 230 (1988).

17. United States v. O'Hagan, 521 U.S. 642, 658 (1997).

18. *See* HAZEN, LAW, *supra* note 13, at 20; *see also* THOMAS LEE HAZEN, PRINCIPLES OF SECURITIES REGULATION 179 (2d ed. 2006) [hereinafter HAZEN, PRINCIPLES]

19. *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 851-52 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969).

20. *In re* Cady, 40 S.E.C. 907, 912 n.15 (1961).

21. HAZEN, LAW, *supra* note 13, at 20-21 (internal citations omitted).

22. *See* United States v. Nacchio, 573 F.3d 1062, 1067 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 54 (2009).

23. 15 U.S.C.A. §78j(b) (West 2000); *see also* United States v. Mooney, 425 F.3d 1093,

The SEC elaborated somewhat on what constitutes an offense under Section 10(b) in Rule 10b-5.[24] This rule states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails of any facility of any national securities exchange, (a) to employ any device, scheme or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operations or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[25]

Rule 10b-5 has been interpreted to prohibit among other things, "purchasing or selling a security of any issuer, on the basis of material non-public information . . . in breach of a duty of trust or confidence."[26]

B. Defining the Offense of Insider Trading

"The seminal case of insider trading is *In re Cady, Roberts & Co.*, decided by the SEC in 1961."[27] The Chairman of the SEC considered a critical question regarding the duties of a broker who receives material non-public information relating to a publicly traded company.[28] In *Cady*, a client of a selling broker attended a company board meeting where the Board of Directors made the decision to pay a lower dividend than previous quarters.[29] During a recess of the board meeting, the client called his broker and informed him of the material non-public information regarding the lower dividend.[30] Before the reduced dividend had been announced to the public, the broker executed two orders to sell the company's stock based on the information provided by his client.[31] Later, when the lower dividend announcement was made public, the

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1106 n.10 (8th Cir. 2005) (en banc).

24. *See* 17 C.F.R. § 240.10b-5 (2010) (elaborating on 15 U.S.C.A. § 78j(b)); *see also Mooney*, 425 F.3d at 1106 n.10.

25. 17 C.F.R. § 240.10b-5.

26. *Nacchio*, 573 F.3d at 1067 (citing 17 C.F.R. § 240.10b5-1 (a)) (internal quotations omitted).

27. HAZEN, PRINCIPLES, *supra* note 18, at 283 (citing *In re* Cady, 40 S.E.C. 907 (1961)); THOMAS LEE HAZEN, CORPORATE COUNSEL GUIDES: SECURITIES REGULATION § 12.14 at 328 (2011) [hereinafter HAZEN, SECURITIES].

28. *See In re Cady*, 40 S.E.C. at 907.

29. *See id.* at 907-09.

30. *See id.* at 909.

31. *See id.*

New York Stock Exchange was forced to suspend trading shares of the company due to the large volume of sell orders.[32]

In its review, the SEC held that before trading, "insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment."[33] The SEC declared that a "[f]ailure to make disclosure in these circumstances constitutes a violation of the anti-fraud provisions [of the Exchange Act]."[34] Additionally, the SEC held that if disclosure prior to trading is improper or unrealistic, the transaction must not be made.[35] The SEC went on to explain that:

> [T]he obligation[s] [are based] on two principle elements: 1) a relationship that gives access, directly or indirectly, to information that is intended solely for a corporate purpose and not for individual benefit; and 2) the inherent unfairness that arises when a party takes advantage of such information knowing it is unavailable to others with whom they are dealing.[36]

Later, in *SEC v. Texas Gulf Sulphur Co.*, the Second Circuit further defined an "insider" and explained an insider's duties to the investing public.[37] The defendants were charged with violating Section 10b of the Securities and Exchange Act and Rule 10b-5 by purchasing stock based on valuable inside information regarding the company's drilling activities.[38] The Second Circuit expanded the definition of "insider" from directors and officers of a company to *anyone* in possession of material inside information.[39] The court clearly articulated that an insider has a duty to the investing public to either disclose the material inside information; or if for some reason the insider cannot disclose or chooses not to, then to abstain from trading or recommending the securities pertaining to the inside information.[40]

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32. *See id.* at 909-10.
33. *Id.* at 911.
34. *Id.*
35. *See id.*
36. *Id.* at 912; *see also* Karen Testa, Note, *Securities-Insider Trading-The Personal Gain Test: The Supreme Court Creates a Bridge Between Chiarella and Fraudulent 'Outsider Trading' – Dirks v. Securities & Exchange Commission*, 103 S. Ct. 3255 (1983), 14 SETON HALL L. REV. 715, 723 (1984).
37. *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969); *see also* HAZEN, SECURITIES, *supra* note 27, § 12.14 at 328.
38. *See Tex. Gulf Sulphur* Co., 401 F.2d at 839-40.
39. *See id.* at 848 (emphasis added).
40. *See id.*

The court stated that in the absence of material non-public information, an insider is free to invest in his own company.[41] The duty to disclose or abstain from trading only arises in situations where the insider obtains information that is reasonably certain to have a substantial effect on the market price of the security if the inside information is disclosed.[42] For an insider to commit the offense of insider trading both knowledge and deceptive action are required.[43]

C. United States Sentencing Guidelines Specific to Insider Trading

Congress passed the Sentencing Reform Act in 1984 and created the United States Sentencing Commission "to develop rules to govern sentencing in the federal courts."[44] The Sentencing Reform Act mandated that the Sentencing Commission define categories of offenses and create guideline ranges for appropriate sentences.[45] Congress' primary objective for creating the Commission was to reduce crime through an effective and fair sentencing system.[46] In an effort to promote individualized sentencing and prevent disparate sentences, the Sentencing Commission created the United States Sentencing Guidelines (U.S.S.G.).[47] In a 2005 decision, *United States v. Booker*, the United States Supreme Court declared that under the Sixth Amendment, the U.S.S.G. could no longer be mandatory; however, the Court stated that even "[w]ithout the 'mandatory' provision, the [Sentencing] Act nonetheless require[d] judges to take account of the Guidelines together with other sentencing goals."[48] Therefore, although advisory, U.S.S.G. continue to play a crucial role in sentence determination.

Within a range of levels from one (0-6 months) to forty-three (life),[49] a conviction of insider trading carries with it a base level offense of eight (0-6 months).[50] A defendant convicted of insider trading may additionally have his

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41. *See id.*

42. *See id.*

43. *See* United States v. Nacchio, 573 F.3d 1062, 1072 (10th Cir. 2009) (citing United States v. Mooney, 425 F.3d 1105, 1106 n.9 (8th Cir. 2005) (en banc) (Bright, J., dissenting)), *cert. denied*, 130 S. Ct. 54 (2009); *see also* SEC v. Happ, 392 F.3d 12, 32 (1st Cir. 2004); 3 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG AND LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 6:128 (2d ed. 2009).

44. Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-23.

45. *See id.*

46. *See* U.S. SENTENCING COMM'N, *supra* note 1, at 1.2.

47. *See* Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-23-24.

48. United States v. Booker, 543 U.S. 220, 259 (2005) (holding that the Sixth Amendment right to a jury trial prohibits the Sentencing Guidelines from being mandatory); *see also* Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-27, *7-37 to -38.

49. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL ch. 5, pt. A, sentencing table (2001).

50. *See id.* at § 2B1.4(a); *see also* United States v. Nacchio, 573 F.3d 1062, 1067 (10th Cir.

base sentence term increased relative to the amount of gain resulting from the offense.[51] Section 2B1.4(b) of the U.S.S.G., which describes the specific offense characteristic of insider trading, advises that if the resulting gain of the offense exceeds $5,000, then an insider trading defendant's sentence term should be increased in proportion to that gain.[52] After calculating an offense level based on the inside trader's gain, and considering other factors such as the defendant's criminal history,[53] a court can then use a sentencing table[54] to determine the appropriate sentencing term in months of imprisonment.[55]

Following U.S.S.G. Section 2B1.4, if a defendant is convicted of insider trading, the calculation of gain is a significant factor in determining the years of imprisonment an inside trader will face.[56] When the Sentencing Commission drafted Section 2B1.4, they envisioned that the sentence of an inside trader would be increased in direct proportion to the increase in value the insider realized through trading in securities based on material non-public information—that is, the amount of gain.[57] Therefore, it is important for a sentencing court to consider that "[t]he gain resulting from the deception stops when the deception stops, though there may be later gain (or loss) as the stock market gyrates along, unmolested by any deception."[58] In order to ensure that a defendant is sentenced in accordance with the harm that the defendant actually caused by deceiving the market, it is crucial for a court to conduct an economic analysis to determine the gain that the defendant received from trading with insider knowledge.[59]

2009), *cert. denied*, 130 S. Ct. 54 (2009); Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-29-31.

51. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4(b) (2001); *see also Nacchio*, 573 F.3d at 1067; United States v. Mooney, 425 F.3d 1093, 1099 (8th Cir. 2005) (en banc).

52. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4(b)(1). The Guidelines refer to the specific offense characteristic of insider trading: "If the gain resulting from the offense exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount." *Id.*

53. *See* Wang & Steinberg, *supra* note 1, § 7:2.2, at 7-23 n.70 (listing cases that consider nature of crime and prior record).

54. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.1, § 2B1.4(b)(1) (2001).

55. *See* Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-24-5.

56. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4(b)(1).

57. *See id.* § 2B1.4 cmt. background.

58. David H. Angeli & Per A. Ramfjord, *Reexamining 'Loss' and 'Gain' in the Wake of Dura Pharmaceuticals v. Broudo—New Ammunition for Securities Fraud Defendants*, CHAMPION, May 2006, at *14 (citing United States v. Mooney, 425 F.3d 1093 1105-06 (8th Cir. 2005) (en banc) (Bright, J. dissenting)).

59. *See* United States v. Olis, 429 F.3d 540, 546 (5th Cir. 2005) (citing United States v. West Coast Aluminum Heat Treating Co., 265 F.3d 986, 991 (9th Cir. 2001) (proposing using a "realistic, economic approach to determine what losses the defendant truly caused or intended

D. Differing Approaches for Calculating Gain

Currently, there are two distinct methods used for calculating an inside trader's gain for sentencing, giving rise to a circuit split. They are the net-profit calculation and the civil disgorgement model. Both have their strengths and weaknesses. Sentences based on calculations using one of these methods are not likely to be consistent with sentences based on calculations using the other.

1. Net-Profit Calculation of Gain

A net-profit approach to calculating an inside trader's gain, like the method adopted by the Eighth Circuit,[60] is simple and efficient. In order to calculate the gain from the illegal transaction, the court determines the price of the stock at the point when the defendant purchased the stock with inside information and the number of shares purchased at that time.[61] Next, the court determines the price of the stock at the point in time when the defendant sold the stock previously purchased based on the inside information, and the number of shares sold.[62] Then, the court subtracts the value of the shares purchased with inside information from the value of the shares when they were subsequently sold to determine the net-profit amount of gain.[63]

For example, suppose on day 1 a stock has an inherent value of $100 per share. On day 2, an insider learns of material non-public information and purchases 2,000 shares at $100 each, for $200,000. On day 4, the material information is disclosed to the public and the stock price rises to $125 per share. The insider sells all 2,000 shares for $250,000. A court using the net-profit method would calculate the gain to be $50,000.[64]

A net-profit calculation does not consider external factors related to the stock price (such as inherent stock value or extrinsic market factors) that may also impact the price of the stock. Therefore, the net-profit method has the potential to punish inside traders for factors unrelated to their deception.[65] In

to cause.")); *see also* United States v. Nacchio, 573 F.3d 1067 (10th Cir. 2009); *Mooney*, 425 F.3d 1105 (Bright, J., dissenting). *See generally* Angeli & Ramfjord, *supra* note 58.

60. *See Mooney*, 425 F.3d 1093, 1101.

61. *See generally Mooney*, 425 F.3d 1093.

62. *Id.*

63. *Id.*

64. *See Mooney* at 1106-07 (Bright, J., dissenting) (describing a hypothetical example of net-profit calculation and resulting sentencing); *see also* Alexandra A.E. Shapiro & Nathan H. Seltzer, *Measuring 'Gain' Under the Insider Trading Sentencing Guideline Based on Culpability for the Deception*, 20 FED. SENT'G REP., 194, 198 (2008) (illustrating additional hypothetical scenarios for calculating gain).

65. *See id.* at 1104-05 (Bye, J., concurring in part and joining in the dissent in part); *see id.*

the example above, if on day 3 the stock climbed $3 per share based solely on market factors unrelated to the non-public information the insider used in his purchase, the court would still calculate the gain from the insider's deception as $50,000. Nevertheless, a net-profit calculation does "provide[] a clear and coherent bright-line rule, eliminating the need for extensive factfinding . . . ."[66]

2. Civil Disgorgement Calculation of Gain

A disgorgement approach to calculating gain involves extensive fact-finding in order to identify the point when (if at all) the security market learned of the inside information and absorbed this non-public information into the value of the stock.[67] This method seeks to exclude market factors that affect the value of the security and are unrelated to the defendant's deception.[68] A disgorgement calculation of gain is much more complex than simply subtracting the purchase value from the sales value of the ill-gotten securities. For example, suppose on day 1 a stock has an inherent value of $100 per share. On day 2, an insider learns of material non-public information and purchases 2,000 shares at $100, for $200,000. On day 3, the stock price climbs $3 per share based solely on market factors unrelated to the non-public information the defendant used in his purchase. Thus, the stock would have a value of $103 completely unrelated to the defendant's deception on the market. On day 4, the material information is disclosed to the public and the stock price rises to $125 per share. On day 5, the stock price subsequently falls, for unrelated market reasons, to $110 per share, and the inside trader then sells the 2,000 shares for $220,000.[69]

Using a disgorgement theory for calculating a defendant's gain, a court would begin by conducting an economic study to determine what effect the disclosure of the material non-public information had on the value of the stock.[70] The study would attempt to ascertain the value of the stock when the non-public information was disclosed and absorbed by the market, which is

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at 1105 (Bright, J. dissenting).

66. *See* CORPORATE COUNSEL'S GUIDE TO INSIDER TRADING AND REPORTING § 4:9 (Thompson Reuters Supp. 2009) (explaining the *Mooney* majority's net-profit approach to calculating an insider trading defendant's gain). *See generally* Mooney, 425 F.3d 1105; *see also* Nacchio, 573 F.3d 1077.

67. *See, e.g.,* United States v. Nacchio, 573 F.3d 1062, 1067 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 54 (2009).

68. *See generally Nacchio*, 573 F.3d 1062.

69. *See Mooney* at 1106-07 (Bright, J., dissenting) (describing a hypothetical example of net-profit calculation and resulting sentencing); *see also* Shapiro & Seltzer, *supra* note 64, at 198 (illustrating additional hypothetical scenarios for calculating gain).

70. *See Nacchio*, 573 F.3d at 1077-80; *see also* Shapiro & Seltzer, *supra* note 64, at 198.

not necessarily the same point as when the defendant sold the stock.[71] Next, the court would exclude the inherent value of the stock and other market factors that effected the price of the stock and were unrelated to the insider's deception, regardless of whether or not such factors were to the insider's benefit.[72]

A disgorgement calculation of gain using the above example might look something like this: stock price when material non-public information was revealed and absorbed by the market price ($125); minus the inherent value of stock ($100); minus unrelated market factors increasing the value of the stock ($3); equals $22 gain per share from insider knowledge. Exclude unrelated market factors decreasing the value of the stock and multiply by the number of shares (2,000) for a total of $44,000 gain to the defendant.[73] Clearly, this system is more complex than net-profit, and even has the potential to yield gain calculations that are higher than the actual profit at the time of sale. Yet considering the complexities of securities markets and the sophistication of the fraud of insider trading, the disgorgement approach is a more appropriate measure of the gain *proximately* related to the inside trader's deception.[74]

D. Mooney*: The Eight Circuit's Gain Calculation*

Prior to *Nacchio*, the Eighth Circuit was "the only other circuit decision squarely deciding the issue of gain under the insider trading sentencing guideline."[75] In *United States v. Mooney*, the defendant was convicted of securities fraud for trading in his company's stock based on inside information regarding a potential acquisition.[76] Mr. Mooney appealed the district court's calculation of gain, arguing that the court had overestimated the amount he had profited from insider trading, and thus had incorrectly determined his sentence.[77] The divided en banc Eighth Circuit rejected the market absorption approach proposed by Mr. Mooney, and instead adopted the net-profit calculation used by the district court to determine gain.[78] The court interpreted

71. *See* Shapiro & Seltzer, *supra* note 64, at 194, 198.

72. *See id. See generally Nacchio*, 573 F.3d 1062.

73. *See* Shapiro & Seltzer, *supra* note 64, at 194 (illustrating additional hypothetical scenarios for calculating gain).

74. *See Nacchio*, 573 F.3d at 1077.

75. *Id.* at 1069; *see* Shapiro & Seltzer, *supra* note 64, at 194-95.

76. *See* United States v. Mooney, 425 F.3d 1093, 1097 (8th Cir. 2005) (en banc). Mr. Mooney was Vice President of Underwriting for United Healthcare Corp. (United). *See id.* at 1095. Mr. Mooney traded in United's stock based on confidential due diligence meetings he had attended pertaining to a potential acquisition of a privately owned healthcare company (Metra). *See id.* at 1095-98.

77. *See id.* at 1098.

78. *See Nacchio*, 573 F.3d at 1070 (citing *Mooney*, 425 F.3d at 1100).

the language of Section 2B1.4 of the U.S.S.G. to require a calculation of the defendant's *actual* gain, *instead of excluding* any gain attributable to external market forces.[79] The court declined to consider the changes in market value of the stock which may have resulted from factors extrinsic to the material non-public information.[80] Instead, the court held that gain was properly calculated by measuring the increase in the stock price from the time when the defendant purchased the options to when the defendant sold the options, less transaction fees.[81] The court concluded that adopting a market absorption theory, as proposed by Mr. Mooney, would require extensive fact-finding by the sentencing court.[82] Additionally, the court stated that difficulty would arise in ascertaining the point where the market absorbed and adjusted to the revelation of the material non-public information used by the insider.[83]

The *Mooney* majority further reasoned that a sentencing theory based on civil jurisprudence, and based on compensating victims, would not comport with the goals of punishment and deterrence in criminal sentencing.[84] The divided court held that the net "increase in value realized by the defendant's trades provides a simple, accurate, and predictable rule for judges to apply [in criminal sentencing] and follows the congressional mandate that sentences reflect the seriousness of the offense."[85]

Judge Bright was joined by Judge Lay in a powerful dissent to the court's interpretation of the Federal Sentencing Guidelines and calculation of gain.[86] Judge Bright focused on the specific language "*gain resulting from the offense*" found in the U.S.S.G., and looked to relevant statues and regulations to help define the "*offense*" involved in insider trading.[87] Analyzing the Guidelines and statutes,[88] Judge Bright interpreted "'[t]he offense' . . . not [as] the purchase of stock itself, but the *use of a manipulative or deceptive contrivance in connection with* the purchase."[89] Thus, according to the dissent's interpretation of the statutes and regulations relating to insider trading, the offense is not the purchase itself, but the *deception entwined* with

79. *See Mooney*, 425 F.3d at 1099-1100.
80. *See id.* at 1099-1101 (dismissing civil disgorgement approach).
81. *See id.* at 1099-1100.
82. *See id.* at 1101.
83. *See id.* at 1099.
84. *See id.* at 1098-1101.
85. *Id.* at 1101.
86. *See id.* at 1105 (Bright, J., dissenting).
87. *See id.* (emphasis added).
88. *See id.* at 1106 (citing 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5); *accord* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4 cmt. (2001) (referencing statutory provisions).
89. *Mooney*, 425 F.3d at 1106.

the purchase.[90] Expanding on this interpretation, the dissent reasoned that the "gain resulting from the offense . . . [was] not the gain resulting from the purchase . . . [but instead] the gain resulting from the deception."[91]

Judge Bright proposed a hypothetical to illustrate how a net-profit approach would lead to disparate sentencing for defendants whose real conduct was the same.[92] In Judge Bright's hypothetical, three corporate officers each with the same insider knowledge *purchased stock at the same time and price*.[93] Later in the hypothetical, after "the insider knowledge is made public, and . . . absorbed by the market and the stock price reflects that knowledge," each of the three officers *sold the stock at different times*.[94] Officer *A* sold the stock for a $10,000 gain, Officer *B* sold stock for a $45,000 gain, and Officer *C* sold the stock for a loss.[95] Judge Bright explained that although each of the three hypothetical corporate officers purchased the stock with material inside information at the same time, because the officers sold the stock at different times and for different market prices, each corporate officer could have staggeringly different sentences if the net-profit theory was used.[96] In contrast, if a market absorption approach was utilized to determine the stock price after the inside knowledge is made public and absorbed by the market, each of the hypothetical defendants would receive the same standard in sentencing.[97] Thus, Judge Bright stated that a market absorption theory would align with the Sentencing Guidelines policy of promoting uniformity in sentencing and equal sentencing for equal crimes.[98]

III. United States v. Nacchio

A. Factual Background

In 1997, Joseph Nacchio became Qwest Communication International, Inc.'s (Qwest) Chief Executive Officer.[99] "Like many corporate executives,

90. *See id.*
91. *See id.*
92. *See id.* at 1107.
93. *See id.*
94. *Id.*
95. *See id.*
96. *See id.* Using the net-profit approach to calculate gain for the hypothetical corporate officers in Judge Bright's illustration, Officer *A* would receive a two (2) level increase for his $10,000 gain, Officer *B* would receive a six (6) level increase for his $45,000 gain, and Officer *C* would not receive any increase at all because under a net-profit theory, Officer *C* lost money on the ill-gotten stocks. *See id.*
97. *See id.*
98. *See id.* at 1106-07.
99. *See* United States v. Nacchio, 573 F.3d 1062, 1065 (10th Cir. 2009), *cert. denied*, 130

Mr. Nacchio received a substantial portion of his compensation in stock options rather than in cash."[100] In September 2000, after Qwest merged with another larger telecommunications company, Mr. Nacchio established new revenue, earnings, and growth targets for 2001.[101] Mr. Nacchio announced to the public a prediction of $21.3 to $21.7 billion for Qwest's 2001 year end expected revenue.[102]

Immediately following Mr. Nacchio's announcement of the new revenue targets, "some Qwest employees expressed concern that the public guidance and revenue targets were too high."[103] Qwest's Vice President of Financial Planning, Robin Szeliga, was presented with an internal "risk estimate" memo by two financial analysts which forecasted significant problems with the public predictions.[104] The memo suggested that Qwest could fall short of its public target by $900 million.[105] Ms. Szeliga disclosed the contents of the risk estimate memo to Mr. Nacchio and Qwest's Chief Financial Officer, Robert Woodruff.[106]

In October 2000, Mr. Nacchio held options worth $7.4 million in Qwest stock with an expiration date of June 2003.[107] Qwest had a company policy that only allowed officers to sell stock according to either a fixed plan or during short "trading windows" immediately following Qwest's quarterly earnings announcements.[108] "Mr. Nacchio announced that he would exercise [his] options and sell approximately one million shares each quarter" in order

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S. Ct. 54 (2009). Mr. Nacchio was also a member of the Board of Directors. *See id.*

100. United States v. Nacchio, 519 F.3d 1140, 1146 (10th Cir. 2008); *see* United States v. Nacchio, 573 F.3d 1062, 1065 (10th Cir. 2009). Stock options are a common part of CEO salaries as they provide both incentives for the executives to perform and cash-flow advantages to the company. *See Nacchio*, 519 F.3d at 1147.

101. *See Nacchio*, 519 F.3d at 1144-45.

102. *See id.* at 1145.

103. *Id.*

104. *See id.*

105. *See id.*

106. *See id.* One reason for the "risk" and the potential shortfall in revenue was that "Qwest had traditionally relied on revenues from long-term leases, known as indefeasible rights of use (IRUs), to use space on Qwest's fiber optic network." *See id.* "Because Qwest collected money for the entire lease up front, IRU sales generated one-time revenue [and not] recurring income." *Id.* Therefore, in order to meet Mr. Nacchio's aggressive revenue target, Qwest would have had to "make an 'aggressive pivot' or 'shift' from its reliance on the sale of IRUs to recurring revenue streams." *Id.* The numbers were troublesome as "Qwest [already] had a poor track record in growing recurring revenue, [and] the 2001 budget would require Qwest to double its 2000 growth rate for recurring revenue" to make the 2001 public revenue target. *Id.*

107. *See id.* at 1147.

108. *See id.*

to realize the entire $7.4 million value before their expiration date.[109] Although this plan was approved by Qwest's General Counsel, Mr. Nacchio did not enter into the formal trading plan at that time.[110]

In December 2000, Qwest executives informed Mr. Nacchio that a significant shift from sales of one-time revenue generating leases, known as indefeasible rights of use (IRUs),[111] to monthly recurring revenue sales had to occur by April 2001 for the company to achieve the 2001 year-end public revenue target.[112] At this time, Mr. Nacchio and other Qwest insiders were aware of the possibility that the company may not meet the 2001 year-end public revenue target; however, the public was unaware of the risk because Qwest did not disclose the composition of its revenue attributable to each of these two sources.[113]

In early April 2001, Mr. Nacchio was informed that "the market for IRU sales was drying up"[114] and "Qwest could not rely on IRU sales to cover the estimated gaps in the 2001 year end revenue projections."[115] Mr. Nacchio was told that "recurring revenue [sales targets] [were] off by 19%, indicating that the company was well short of increasing its monthly recurring revenue sales in time to reduce its third and fourth quarter budget gaps."[116]

In spite of the revenue shortfall indications, "on April 24, 2001, Qwest announced its first quarter earnings in a press release."[117] Mr. Nacchio also conducted a conference call with investors during which he announced the company was "still confirming" the previously issued public revenue

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109. *Id.*

110. *See id*. Mr. Nacchio did briefly enter into a formal trading plan in February 2001. *Id*.

111. *See id.* at 1145.

112. *See id.* If Qwest failed to sign up enough new recurring revenue customers in the first quarter of 2001, it would not later have the benefit of compounding the revenue to close its third and fourth quarter budge gaps and Qwest would be forced to revise its public guidance downward. *See id.*

113. *See id*. It was Qwest's policy not to disclose the portion of its income attributable to the one-time IRU revenue sales. *See id.* In February 2001, Mr. Nacchio briefly entered into the fixed plan to sell options, but he cancelled the plan less than one month later, when Qwest's stock fell below $38 per share. *See id.* at 1147.

114. *See id.* at 1145-46. A Qwest Executive Vice-President, Greg Casey, told Mr. Nacchio that the IRU market was drying up and the company could not rely on IRUs as a source of revenue after the second quarter. *See id.* at 1146.

115. *See id.* On April 9, Ms. Szeliga informed Mr. Nacchio that the 2001 revenue plan was very risky if Qwest was going to rely solely on IRUs to cover the estimated gaps in the revenue projections. *See id.*

116. *Id.* Nonetheless, at the same time, "Mr. Nacchio was told at a company meeting that even 'with all of the debates . . . the internal current view of Qwest was that they would reach $21.5 billion by December 31st 2001,' still meeting the public projections." *Id.*

117. *Id.*

guidance.[118] Mark Schumacher, Qwest's controller, advocated for Mr. Nacchio to disclose to *investors* the company's one-time IRU and recurring revenue numbers; however, Mr. Nacchio declined to do so.[119] Two days after Mr. Nacchio's conference call with investors, Qwest's second quarter trading window opened.[120] While Mr. Nacchio was receiving "internal reports regarding IRU sales and recurring revenue and assuring investors that the company was on track to meet its public guidance, he was selling over a million shares of Qwest stock."[121] Between April 26, 2001 and May 15, 2001, Mr. Nacchio sold 1,255,000 shares of Qwest stock.[122] In this brief window, Mr. Nacchio's rate of stock sales rose to approximately four times his average rate of sales from 1998 to 2000.[123]

In a late July 2001 press release, Qwest reported the company's second quarter financial results, and announced to investors that Qwest's expected revenue for 2001 would be near the low end of previously predicted ranges.[124] On August 14, 2001, Qwest "disclosed the magnitude of its 2000 and 2001 [one-time] IRU sales in a filing with the SEC."[125] Finally, "[o]n September 10, 2001, Mr. Nacchio issued a press release lowering Qwest's public revenue targets for 2001 and 2002."[126] Subsequently, Qwest's stock fell to half its value.[127]

118. *See id.* Mr. Nacchio did not break down Qwest's earnings into one-time IRUs and recurring revenue despite the fact that analysts and investors repeatedly requested a breakdown of Qwest's revenue during the first quarter of 2001. *See id.*

119. *See id.* Later the same day, Mr. Nacchio met with investors in Los Angeles. *See id.* Those investors pointed out that other telecom companies had lowered their guidance, and one of the investors asked Mr. Nacchio how Qwest was going to meet its growth targets. *See id.* Mr. Nacchio responded to the investor by declaring that Qwest had better products and better management and stressing Qwest's strong revenue growth in the category of "data and IP." *See id.* One-time revenue transactions made up a portion of this revenue but Mr. Nacchio did not mention this to investors. *See id.*

120. *See id.* at 1147.

121. *Id.* at 1146.

122. *See id.* at 1147. During this time, the stock price fluctuated between $37-$42 per share. *See id.*

123. *See id.* However, Mr. Nacchio sold only "slightly more than the one million shares per quarter he had declared his intention to sell in his October 2000 announcement." *Id.*

124. *See* United States v. Nacchio, 573 F.3d 1062, 1066 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 54 (2009). In early August 2001, "Mr. Nacchio gave a presentation in which he showed a slide reporting Qwest's annual actual and estimated IRU sales as a percentage of revenue from 1996 to 2001." *Id.* This presentation was filed publicly with the SEC. *See id.*

125. *Id.*

126. *Id.*

127. *See Nacchio*, 519 F.3d at 1146.

"In December 2003, Mr. Nacchio was indicted and charged with forty-two counts of insider trading."[128] The government claimed Mr. Nacchio knew it was unlikely that Qwest could meet the 2001 year-end revenue targets the company had publically announced to investors.[129] The government alleged Mr. Nacchio violated securities laws by selling Qwest stock "on the basis of material, nonpublic information."[130]

B. Procedural History at the District Court

At the district court, Mr. Nacchio "was convicted on nineteen counts of insider trading covering the trades that he had made from April 26, 2001 to May 29, 2001."[131] The district court calculated Mr. Nacchio's gain from the trades[132] and sentenced him to "seventy-two months' imprisonment on each count, to run concurrently, and two years of supervised release on each count, also to run concurrently."[133] On appeal to the Tenth Circuit, Mr. Nacchio challenged the determination of his sentence term[134] claiming "the district court incorrectly calculated the 'gain resulting from the offense' under [U.S.S.G. Section 2B1.4]."[135]

IV. The Tenth Circuit's Decision

A. An Issue of First Impression — Gain Resulting from Insider Trading

In *United States v. Nacchio*, the Tenth Circuit addressed as an issue of first impression the proper method for calculating an inside trader's gain for the purpose of criminal sentencing.[136] The Court relied on the U.S.S.G.,

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128. *Nacchio*, 573 F.3d at 1064.

129. *See id.*

130. *Id.*

131. *Id.* at 1066. "[Mr. Nacchio] was acquitted of twenty-three counts covering earlier trades." *Id.*

132. *See id.* at 1068-69 (rejecting both the government's proposed net-profit approach and Mr. Nacchio's proposed market absorption theory and instead calculating gain by taking Mr. Nacchio's total net-profit from the sale and subtracting the cost to purchase the options, and the amount withheld for taxes—since taxes withheld were not actually converted to cash by Nacchio).

133. *Id.* at 1066. Additionally, "[t]he district court . . . assessed a $19 million fine and ordered [Mr. Nacchio] to forfeit approximately $52 million." *Id.*

134. *See id.* In addition to appealing the 'gain' calculation, Mr. Nacchio successfully appealed the amount he was ordered to forfeit by the district court. *See id.* at 1090.

135. *Id.* at 1066 (referencing Section 2F1.2, the 2000 version of the Sentencing Guidelines, which is the version that the district court used when sentencing Mr. Nacchio); *see supra* note 6 and accompanying text.

136. *Nacchio*, 573 F.3d 1062.

commentary to the Guidelines, the *Mooney* majority and dissent, relevant case law, and United States policy for federal sentencing to direct their determination of the proper standard.[137]

The court began its discussion by examining the offense of insider trading and the language of the Federal Sentencing Guidelines statute.[138] The court analyzed the language of Section 2B1.4 of the Sentencing Guidelines,[139] along with the application instructions in the Guideline commentary, and concluded that both the U.S.S.G. and the commentary limited the gain computation to that gain resulting from the deceptive nature of the action[140] and, therefore, should exclude factors unrelated to the defendant's conduct.[141]

Citing *United States v. Olis*,[142] a Fifth Circuit decision regarding criminal securities fraud,[143] the Tenth Circuit stated that the language of the Guidelines itself recognizes that there is an inherent value in stock which should not be reflected in a gain computation.[144] The court stressed the importance of excluding unrelated market factors from the gain computation,[145] and held that "it [is] incumbent upon [a] district court to adopt a realistic, economic approach [to sentencing] that . . . [takes] into account . . . the *deception* intertwined with . . . [a defendant's] insider knowledge, and . . . compute his gain for sentencing purposes . . . resulting from that *deception*."[146] The court concluded that "Mr. Nacchio's increased prison sentence should be linked to the gain actually resulting from the offense, not to gain attributable to legitimate price appreciation and the underlying inherent value of Qwest shares."[147]

The Tenth Circuit found the district court's net-profit calculation of Mr. Nacchio's gain inadequate because it "ignored [many] factors unrelated to [Mr.

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137. *See id.* at 1069-71.

138. *See id.* at 1072.

139. *See id.*

140. *See id.* at 1073 (interpreting U.S.S.G. § 1B1.1 cmt. n.1(l) and § 1B1.3(a)(1)).

141. *See id.* at 1079-80.

142. United States v. Olis, 429 F.3d 540 (5th Cir. 2005) (calculating Mr. Olis's sentence under Section 2B1.1 and adding 26 levels to the base offense finding that Mr. Olis caused a loss of $105 million to one investor); *see also* Abramowitz & Bohrer, *supra* note 6 (citing *Olis*, 429 F.3d 540).

143. *See Nacchio*, 573 F.3d at 1075 (citing *Olis*, 429 F.3d 545-49) (supporting the theory that stock price movements based upon factors unrelated to the defendant's offense should be excluded from a Guidelines loss determination).

144. *See id.*; *see also* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4 cmt. background (2001) (defining 'gain' as "the total *increase in value* realized through trading in securities by the defendant" (emphasis added)).

145. *See Nacchio*, 573 F.3d at 1074.

146. *Id.* at 1072 (emphasis added).

147. *Id.* at 1075.

Nacchio's] criminal fraud that could have contributed to the increase in the value of [Qwest's stock]."[148] Acknowledging that a net-profit approach would provide a more simplistic calculation for gain,[149] the court explained that the Guidelines themselves recognized that "sentencing computations in financial fraud cases may involve some element of imprecision."[150] The court stated that "a critical objective of federal sentencing is imposing criminal punishment on a defendant that reflects his or her culpability for the criminal offense."[151] Therefore, despite greater complexity and imprecision, district courts must conduct a thorough analysis grounded in economic reality when imposing criminal sentences in insider trading cases.[152]

Next, the *Nacchio* court turned to civil jurisprudence for guidance to properly determine gain from insider trading offenses.[153] Stating that "[c]riminal cases have the same 'tangle of factors effecting price' that is found in civil cases,"[154] the court determined that civil disgorgement should be the guidepost for insider trading gain calculations because "it seeks to strip the wrongdoer of ill-gotten gains and deter improper conduct."[155] Relying on the Supreme Court's decision in *Dura Pharmaceuticals*, and the Fifth Circuit's opinion in *Olis*, the court found the district court was "required to consider the myriad of factors unrelated to criminal fraud that could have contributed to the value of the securities."[156]

The civil disgorgement remedy is generally "the difference between the value of the shares when the insider sold them while in possession of material, non-public information, and their market value a reasonable time after public dissemination of the inside information."[157] The court explained that a disgorgement approach is consistent with central principles of federal

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148. *Id.* at 1074 (citing HAZEN, LAW, *supra* note 13, at 195).

149. *See id.* at 1077.

150. *Id.* (citing U.S.S.G. § 2F1.1 cmt. n.9 ("[T]he loss need not be determined with precision. The court need only make a reasonable estimate of the loss, given the available information.") (citations omitted)); *see supra* note 6 and accompanying text.

151. *Nacchio*, 573 F.3d at 1077 (citing United States v. Martinez-Barragan, 545 F.3d 894, 904 (10th Cir. 2008)).

152. *See id.* (citing United States v. Olis, 429 F.3d 540, 547 (5th Cir. 2005)) (internal citations and quotation marks omitted).

153. *See id.* at 1078.

154. *Id.* (quoting Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 343 (2005)).

155. *Id.* at 1079.

156. Abramowitz & Bohrer, *supra* note 6, at 3; *see also Nacchio*, 573 F.3d at 1077-78 (quoting SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004)).

157. *Nacchio*, 573 F.3d at 1077-78 (citing SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004)) (quoting SEC v. MacDonald, 699 F.2d 47, 55 (1st Cir. 1983) (en banc)); *see also* Abramowitz & Bohrer, *supra* note 6, at 4 (citing *Happ*, 392 F.3d at 31) (quoting *MacDonald*, 699 F.2d at 55)).

sentencing policy—individualized punishment and deterrence—because it endeavors "to hold the defendant accountable [only] for the portion of the increased value of the stock that is related to his or her criminally culpable conduct."[158] The court then used the hypothetical from the *Mooney* dissent to illustrate how the district court's net-profit calculation would run contrary to the purposes of federal sentencing, individualized sentencing and avoiding unwarranted sentencing disparities, by resulting in sentences detached from the defendant's criminally culpable conduct.[159] Finally, the court reasoned that, "even viewed solely from a policy perspective, [disgorgement] would be a more appropriate means [than net-profit] to determine a defendant's gain resulting from [insider trading]"[160] because it is focused on defendant culpability and is "consonant with the purposes of federal sentencing."[161]

The court rejected the district court's net-profit approach to calculating an inside trader's gain, concluding that it "[did] not square with the plain language of the relevant sentencing guideline . . . and its commentary."[162] The Tenth Circuit then reversed the district court's sentencing order and held that Mr. Nacchio was entitled to resentencing using disgorgement as the guidepost for calculating the gain resulting from his insider trading.[163]

V. Analysis

A. The Tenth Circuit Remains True to the U.S.S.G.

The Tenth Circuit's holding in *United States v. Nacchio*, is consistent with the plain language of U.S.S.G. 2B1.4, the commentary to the statute, and United States Federal Sentencing policies. The court properly concluded that disgorgement is a fair standard to use as a benchmark for a court calculating gain for inside traders because "the purpose of disgorgement is to force the defendant into giving up unjust enrichment he received as a result of his illegal activities [in violation of the securities laws]."[164] The *Nacchio* court's

158. *See Nacchio*, 573 F.3d at 1080.

159. *See id.* at 1082.

160. *Id.* at 1085-86.

161. *Id.* at 1085.

162. *Id.* at 1072.

163. *See id.* at 1087, 1090-91. Following remand, the district court ordered the parties to file sentencing statements. *See* United States v. Nacchio, No. 05-cr-00545-MSK, 2009 WL 5126376, at *4-*5 (D. Colo. Dec. 18, 2009). The sentencing statements are available on Westlaw. *See* Sentencing Statement by the United States Regarding 18 U.S.C. § 3553(a), United States v. Nacchio, No. 05-cr-00545-MSK, 2010 WL 3336351 (D. Colo. June 10, 2010); Joseph P. Nacchio's Section 3553(a) Sentencing Statement, United States v. Nacchio, No. 05-cr-00545-MSK, 2010 WL 3336350 (D. Colo. June 10, 2010).

164. SEC v. Lawbaugh, 359 F. Supp. 2d 418, 425 (D. Md. 2005).

adoption of a civil disgorgement model for calculating gain effectively incorporates federal sentencing policy by considering an individual defendant's criminal culpability in order to hold the defendant responsible for the gain realized by trading securities with material inside information, while excluding extrinsic market factors and inherent stock value.

B. Determining Gain Using Disgorgement Accurately Reflects the Purposes of Imposing a Criminal Sentence

Title 18 United States Code Section 3553 lists several factors to be considered when imposing a criminal sentence.[165] The statute states that a sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes"[166] of "reflect[ing] the seriousness of the offense, . . . provid[ing] just punishment for the offense, . . . [and] afford[ing] adequate deterrence to criminal conduct . . . ."[167]

1. Criminal Sentencing Should Reflect the Seriousness of the Offense

A basic and fundamental principle underlying the United States economy is the integrity of the securities markets.[168] When an individual purchases or sells securities while in possession of material non-public information this integrity is breached and the stability of the financial markets and the economy are jeopardized. Congress and the SEC realized the threat and the seriousness of an insider's possession and misuse of material non-public information and created statutes and rules specifically aimed at preventing[169] and punishing[170] this type of behavior. In order to evaluate the effectiveness of criminal sentencing, a broad view of securities laws must be considered. Thus, the criminal sanctions for insider trading need to be evaluated in the context of related civil provisions.

a) Rule 16(b) Civil Short-Swing Profit Liability Aimed at Prevention

To emphasize the serious nature of the offense of trading with inside information, and in an effort to deter the misuse of such information, the SEC created a rule which imposes strict civil liability for corporate officers, directors, and principle stockholders who own at least ten percent of a company's stock and purchase and sale, or sale and purchase, stock within a

165. *See* 18 U.S.C.A. § 3553(a) (West 2003).
166. *Id.*
167. *Id.* § 3553(a)(2).
168. *See* HAZEN, SECURITIES, *supra* note 27, § 1.1 at 2-6, § 12.14 at 326-27. *See generally* WILLIAM K.S. WANG & MARC I. STEINBERG, INSIDER TRADING § 2.3.1, at 24-26 (2010).
169. *See* Rule 16(b) (codified as 15 U.S.C.A. § 78p(b) (West 2002)).
170. *See* Rule 10(b) and Rule 10b-5(codified as 17 C.F.R. § 240.10b-5 (2010)).

six month period.[171] Rule 16(b) of the Securities Act declares that any profit realized from a purchase and sale, or sale and purchase, by a statutory insider within a six month period is strictly recoverable to the corporation irrespective of any intention of the insider entering into the transaction.[172] Rule 16(b) may be enforced without any allegation of trading based on material inside information.[173] Instead, a purchase and sale within six months of each other by a statutory insider is sufficient to trigger disgorgement to the company of any profit received. This strict civil liability, without any required allegation of the insider's use of non-public information, emphasizes the importance given to insider trading offenses by Congress and the SEC.[174]

b) Rule 10b Criminal Liability Aimed at Punishment

In an effort to punish and deter *anyone* from trading securities with material non-public information, the SEC passed Rule 10b-5, which makes it a criminal offense for any person, directly or indirectly, to purchase or sell a security on the basis of fraud or deceit.[175] Because Congress did not intend criminal punishment to be strictly imposed, however, there are two safeguards for imposing criminal liability for a violation of Rule 10b-5:[176] First, "the Government must prove that a person 'willfully' violated the provision,"[177] and second, "a defendant may not be imprisoned for violating Rule 10b-5 if [the defendant] proves that he had no knowledge of the Rule."[178]

Section 10(b) makes the use of any "deceptive device" in connection with the purchase or sale of any security unlawful,[179] and Rule 10b-5 makes it unlawful to "engage in any act . . . which would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[180] The plain language of the relevant statues indicate that deception combined

171. *See* 15 U.S.C.A. § 78p(b); *see also* HAZEN, SECURITIES, *supra* note 27, § 13.2 at 360-64.

172. *See id.* (referring to a purchase or sale of a security within a six month period); *see also* R.D. Hursh, Annotation, *Securities Exchange Act Provision Regarding Liability of Directors, Officers and Principle Stockholders for Profits on Short-Swing Speculation in Corporation's Stock*, 40 A.L.R. 2d 1346, 1348-49 (1955); *see also* HAZEN, SECURITIES, *supra* note 27, § 13.2 at 360-64.

173. *See* 15 U.S.C.A. § 78p(b); *see also* HAZEN, SECURITIES, *supra* note 27, § 13.2 at 360-64.

174. *See* HAZEN, SECURITIES, *supra* note 27, § 13.2 at 363.

175. *See* 17 C.F.R. § 240.10b-5.

176. *See* United States v. O'Hagan, 521 U.S. 642, 665 (1997).

177. *Id.* at 665 (citing 15 U.S.C. § 78ff(a)).

178. *Id.* at 666 (citing 15 U.S.C. § 78ff(a)).

179. 15 U.S.C.A. § 78j(b).

180. 17 C.F.R. 240.10b-5 (2010).

with trading is key a component to a criminal violation of the securities laws.[181] Thus, the *Nacchio* court clearly and accurately defined the offense as "deception intertwined with the [sale of securities] due to . . . possession of insider knowledge."[182] The civil disgorgement benchmark is appropriately tailored to punish only on the basis of the criminal act, and not on the basis of enrichment not proximately caused by criminal deception.[183]

Tailoring punishment only to deceptive action finds support in *United States v. O'Hagan*, in which the Supreme Court stated that "[Section] 10(b)'s language . . . requires deception 'in connection with the purchase or sale of any security.'"[184] A net-profit approach for calculating an inside trader's gain for sentencing would not take into account the deception intertwined with trading. Unlike disgorgement, a net-profit calculation does not take into account the value of the security up to the point when, and for a reasonable time after, the material non-public information is disclosed to investors.[185] Net-profit is a simple measure of the difference in the price of a security at Point A (purchase) and Point B (subsequent sale).[186] When employing a net-profit calculation of gain, the impact that the material non-public information may have on the value of the security is not even a factor, and thus the net-profit approach does not consider the impact of the insider's deception on public investor's confidence. The Tenth Circuit's disgorgement benchmark for calculating gain for criminal inside trading sentencing better adheres to the congressional goal of crafting a sentence that reflects the seriousness a defendant's deception combined with trading in securities.

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181. *See* 15 U.S.C.A. § 78j(b); *see* 17 C.F.R. 240.10b-5.

182. United States v. Nacchio, 573 F.3d 1062, 1072 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 54 (2009).

183. *See id.* at 1080; *see also* S.E.C. v. Unioil 951 F.2d 1304, 1306 (1991); S.E.C. v. Maxxon Inc., 465 F.3d 1174, 1179 (C.A.10 Okla. 2006) (discussing disgorgement and stating that "some end-date determination is necessary in determining remedy in securities fraud action so that the defendant is *not required to disgorge profits not causally connected to violation*") (emphasis added) (citing ARNOLD S. JACOBS, DISCLOSURES & REMEDIES UNDER THE SECURITIES LAWS § 20:109) (internal citations omitted); S.E.C. v. Haligiannis, 470 F. Supp.2d 373 (S.D.N.Y. 2007) ("amount of disgorgement . . . only a reasonable approximation of profits causally connected to the violation . . . ." *id*. at 384); S.E.C. v. Opulentica, LLC, 479 F. Supp.2d 319, 330 (S.D.N.Y. 2007) ("Principal issue in determining amount of disgorgement to be ordered in action under federal securities law is amount of gain received by each defendant from fraud.") (internal citations omitted).

184. United States v. O'Hagan, 521 U.S. 642, 658 (1997) (holding that a defendant may be criminally liable under a misappropriation theory for deceptive conduct in connection with securities transactions under § 10(b)); *see also* Shapiro & Seltzer, *supra* note 64, at 198.

185. *See generally* United States v. Mooney, 425 F.3d 1093 (8th Cir. 2005) (en banc).

186. *See generally id*.

2. A Criminal Sentence Should Provide Just Punishment for the Offense

The Eighth Amendment to the United States Constitution provides protection for defendants by preventing punishment that is grossly disproportionate to an offense.[187] Congress has stated that a criminal sentence shall be "sufficient, but not greater than necessary."[188] Section 2B1.4 of the U.S.S.G., which defines punishment for the offense of insider trading, provides courts some guidance for determining Congress' intended measure of just punishment for inside traders.[189] The Background to Section 2B1.4 clearly states that a defendant's gain should be used to determine the offense level for sentencing.[190] In order for insider trading punishment to be "just," it should correlate to the actual harm that the defendant proximately caused by the deceptive trading. The Background to Section 2B1.4 defines gain as the "total increase in value,"[191] thus recognizing that securities have some inherent value, and therefore "a defendant should be held responsible only for any *increase* in value that he realizes as a result of his deception."[192] By conducting a thorough economic analysis to determine a defendant's profit received from deceptive trading, and excluding factors unrelated to the defendant's culpable conduct, the Tenth Circuit's disgorgement benchmark to calculate gain for an inside trader's term of imprisonment is consistent with the congressional goal of imposing a sentence that is not greater than necessary to provide "just" punishment for the offense.

In contrast, a net-profit approach may impose a sentence that is grossly disproportionate to the harm that was proximately caused by the defendant's deceptive trading. For instance, consider a scenario where an insider purchases stock based on material non-public information.[193] At the time of purchase the stock is trading at $5 per share.[194] A short time after the purchase, the material information is disclosed to the public and the stock price rises to $8 per share.[195] Nevertheless, the insider refrains from selling the stock; instead, the insider holds the stock for many years and the stock legitimately increases in value to $20 per share.[196] Now, suppose the insider

187. *See* U.S. CONST. amend. VIII.

188. 18 U.S.C.A. § 3553(a) (West 2003).

189. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4 (2001).

190. *See id.* § 2B1.4 cmt. background (2001).

191. *Id.*

192. Shapiro & Seltzer, *supra* note 64, at 198. Of course, an inside trader should also be held responsible for the crime itself, regardless of any realized increase in value.

193. *See id.* at 194 (illustrating a hypothetical scenario calculating gain using net-profit and disgorgement methods).

194. *See id.*

195. *See id.*

196. *See id.*

sells the stock for $20 per share.[197] Using the net-profit approach for calculating the insider's gain, the insider's sentence would be based on $15 worth of gain instead of the actual $3 worth of gain that proximately resulted from the insider's criminal conduct.[198]

If the insider, in the above hypothetical, had traded 350 shares, he should receive no increase above the base 0-6 month sentence when the gain is calculated at $3 per share, for a total gain of $1,050.[199] But, if the gain is calculated at $15 per share, for a total gain of $5,250, the insider should receive an increased sentence of 6-12 months.[200] A double-length sentence for the same crime seems at least somewhat disproportionate, and potentially raises Eighth Amendment concerns.

The Tenth Circuit's disgorgement approach would force a sentencing court to conduct a thorough analysis to determine the value of the stock a reasonable point in time after the material non-public information was disclosed to the public and base the defendant's punishment on the harm that was proximately caused by the offense. While more complex, disgorgement is a more accurate and fair standard for determining a defendant's term of imprisonment based on individual culpability.

3. Punishment Should Adequately Deter Criminal Conduct

It might be argued that the *Mooney* majority's net-profit approach to calculating gain for sentencing inside traders provides more deterrence than a disgorgement theory. The hypothetical above, where the insider purchased the stock for $5 based on material non-public information and later sold for $20, illustrates how the *Mooney* court's approach would deter one from committing the offense of insider trading based on the fear that one would be held accountable, and imprisoned, based on factors completely unrelated to the offense committed. The possibility of serving exponentially more prison time under a net-profit calculation may be the ultimate deterrent for insiders considering the offense.

Nevertheless, deterrence is not the only goal in criminal punishment, and deterrence alone is not universally accepted as a sufficient justification for punishment. Under Retributivitist theories, punishment should be just and

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197. *See id*.

198. *See id*. (illustrating a hypothetical scenario calculating gain using net-profit and disgorgement methods).

199. *See* U.S. SENTENCING COMM'N GUIDELINES MANUAL §§ 2B1.1, 2B1.4, 5A (2001) (providing rules and charts for calculating the length of sentences).

200. *See id*.

should correlate to the defendant's culpability.[201] The high deterrent value of using a net-profit approach is not enough to override inherent justifications for punishing inside traders no more and no less than deserved based on their individual culpability and the harm caused by their deception. Furthermore, a net-profit calculation has the potential to produce a lower sentence for an inside trader than what may be warranted based on the inside trader's actual conduct.[202]

The primary purpose of disgorgement as a civil remedy for violating security laws is to deprive violators of ill-gotten gains.[203] In addition to depriving wrongdoers of unjust enrichment, disgorgement is also intended "to deter others from violating securities law by making violations unprofitable."[204] Admittedly, both net-profit and disgorgement theories for calculating gain have deterrent value; however, the *Nacchio* court's disgorgement approach is a more accurate and fair standard for punishing the complex crime of inside trading. It attempts to correlate the defendant's sentence with the actual profit received based on the defendant's culpable conduct, exclusive of other market factors.[205] While adopting a net-profit approach might serve as more of a deterrent, this must be weighed against the fairness to the defendant in serving an extraordinary (and perhaps unjustified) sentence.

The Tenth Circuit correctly determined that the policies of federal sentencing—punishment, deterrence, individualize sentencing, and avoiding unwarranted sentencing disparities—would be better suited by using disgorgement as a guideline for calculating gain.[206]

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201. *See, e.g.,* DEAN JOHN CHAMPION, SENTENCING 4-5 (2008).

202. *See* United States v. Mooney, 425 F.3d 1093, 1106-07 (8th Cir. 2005) (en banc) (Bright, J., dissenting).

203. *See* United States v. Nacchio, 573 F.3d 1062, 1079 (10th Cir. 2009) (citing *Mooney*, 425 F.3d at 1107 n.11 (Bright, J., dissenting)), *cert. denied*, 130 S. Ct. 54 (2009); SEC v. Merch. Capital, LLC, 400 F. Supp. 2d 1336 (N.D. Ga. 2005); *see also* SEC v. First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998) ("Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable."); S.E.C. v. Jones, 476 F. Supp.2d 374, 387 (S.D.N.Y. 2007); S.E.C. v. JT Wallenbrock & Assocs., 440 F.3d 1109, 1113-14 (C.A.9.Cal. 2006); S.E.C. v. Lawbaugh, 359 F. Supp.2d 418 (D.Md. 2005); S.E.C. v. Drexel Burnham Lambert, Inc., 956 F. Supp. 503, 507 (S.D.N.Y. 1997); S.E.C. v. Michel 521 F. Supp.2d 795, 830-831 (N.D. Ill. E. Div. 2007).

204. *First Pac. Bancorp*, 142 F.3d at 1191.

205. *See generally* United States v. Nacchio, 573 F.3d 1062 (10th Cir. 2009).

206. *See id.* at 1084-85; *see also* 18 U.S.C.A. § 3553(a)(2) (West 2003).

C. Calculating Gain Is No Exact Science

Congress did not specify a formula for calculating the "gain resulting from the offense" in Section 2B1.4 of the U.S.S.G.. The Background to Section 2B1.4 merely states that "[b]ecause the victims and their losses are difficult if not impossible to identify, the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant . . . is employed instead of the victims' losses."[207]

In order to calculate the gain under the *Nacchio* Court's new standard, trial courts must conduct an in-depth economic analysis to determine the point at which the stock price absorbed the material inside information.[208] Nevertheless, district courts are not left without guidance. In *SEC v. MacDonald*, the First Circuit set forth a formula for the district court to use to when calculating a disgorgement figure.[209] The *MacDonald* court recognized that the reasonable period for dissemination and digestion of the inside information will naturally vary depending on the significance of the information disclosed.[210] Furthermore, the *Nacchio* court gave lower courts some guidance for determining an inside trader's gain explaining that "[i]n civil insider trading cases, the proper amount of disgorgement is generally the difference between the value of the shares when the insider sold them while in possession of the material, non-public information, and their market value 'a reasonable time after public dissemination of the inside information.'"[211]

Thus, lower courts within the Tenth Circuit must weigh the facts of each case to determine the date where the market has absorbed the disclosure of inside information in order to mark the point at which an inside trader's gain should be measured. The Tenth Circuit explained that while the district court's analysis should be grounded in sound economic theory, it did not have to be exact science;[212] therefore, district courts will have discretion in

207. U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4 cmt. background (2001).

208. *See Nacchio*, 573 F.3d at 1077.

209. *See id.* at 1078 n.13 (citing SEC v. MacDonald, 699 F.2d 47, 55 (1st Cir. 1983) (en banc) (remanding case to the district court in order to determine a reasonable time after the inside information had been generally disseminated to the public, and instructing the district court to consider the volume and price at which the shares were traded following disclosure, insofar as they suggested the date by which the news had been fully digested and acted upon by investors)).

210. *See MacDonald*, 699 F.2d at 54 (comparing the significance of inside information revealed in *MacDonald* with the magnitude of the inside information revealed in SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969)).

211. *Nacchio*, 573 F.3d at 1078 (citing SEC v. Happ, 392 F.3d 12, 31 (1st Cir. 2004)).

212. *See id.* at 1070-80.

determining the point to use as the benchmark for determining gain.[213] Also, to aid in their determinations following *Nacchio*, district courts have many examples of disgorgement being applied in civil jurisprudence to guide their analysis.[214] These examples, combined with the discretion afforded district courts for calculating gain, will ensure that the U.S. Constitutional and Congressional goals of criminal punishment are met when sentencing inside traders within the Tenth Circuit.

D. Nacchio's *Effect on the Future of Insider Trading Sentencing*

Nacchio continues a trend (originating with the Fifth Circuit in *United States v. Olis*[215]) of adopting a civil standard as a backdrop for determining criminal responsibility in securities cases on the basis that the civil standard is more attuned to the complexities of the stock market.[216] Federal circuit courts currently differ on the proper way to calculate this gain.[217] As a result of *Nacchio*, district courts within the Tenth Circuit must now conduct a thorough analysis in economic principles when determining gain for sentencing inside traders. It is probable that both criminal defendants and government prosecutors will employ economic experts to analyze both the stock market and individual securities in order to determine which point to use as the benchmark for the gain calculation.[218] An expert's market study should exclude factors unrelated to the defendant's deception[219] in an attempt to isolate the amount of

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213. *See id.* at 1080.

214. *See* S.E.C. v. Unioil, 951 F.2d 1304, 1306-08 (1991) (stating that "[t]he touchstone of a disgorgement calculation is identifying a causal link between the illegal activity and the profit sought to be disgorged," *id.* at 1306, then demonstrating and discussing disgorgement calculation, *id.* at 1306-08); *see also* S.E.C. v. Bilzerian, 29 F.3d 689, 696-97 C.A.D.C. (1994); S.E.C. v. Bilzerian, 814 F.Supp. 116, 123 (1993) (describing a disgorgement calculation); Zacharias v. S.E.C. 569 F.3d 458; S.E.C. v. Levine 517 F.Supp.2d 121, 128 (2007) (declaring that "[a]ny risk of uncertainty in calculating disgorgement should fall on the wrongdoer[s] whose illegal conduct created that uncertainty") (citing S.E.C. v. First Jersey Sec. Inc., 101 F.3d 1450, 1475 (2nd Cir. 1996)); *see also* SEC v. Happ, 392 F.3d 12 (1st Cir. 2004).

215. United States v. Olis, 429 F.3d 540 (5th Cir. 2005) (remanding case to the district court for resentencing because the district court did not take into account extrinsic factors relating to stock price decline).

216. *See* Angeli & Ramfjord, *supra* note 58, at *12; *see also* Abramowitz & Bohrer, *supra* note 6, at 5.

217. *Compare Nacchio*, 573 F.3d 1062, *with* United States v. Mooney, 425 F.3d 1093, 1105 (8th Cir. 2005) (en banc); *see also* Wang & Steinberg, *supra* note 1, § 7:2.2, at *7-25; *see also* Abramowitz & Bohrer, *supra* note 6, at 5.

218. *See generally* Abramowitz & Bohrer, *supra* note 6 (discussing relevant cases and using experts regarding loss and gain calculations under the Sentencing Guidelines); *see also* Shapiro & Seltzer, *supra* note 64, at 198-99.

219. *See* Shapiro & Seltzer, *supra* note 64, at 194 (listing external market factors affecting

gain, if any, that can be attributed to the material non-public information's impact on the market, thereby ensuring that "the amount of gain calculated by the court [will not overstate] the seriousness of the offense."[220]

Insider trading has been characterized as "a sophisticated fraud."[221] It is therefore reasonable to accept the need for a sophisticated method to calculate an inside trader's gain from deception. As the Tenth Circuit correctly concluded, determining the insider's gain using a thorough economic analysis specific to the facts of each case furthers federal sentencing objectives of punishing inside traders for the ill-gotten gain proximately received as a result of their deception, individualized sentencing, and ensuring just punishment for the offense.

VI. Conclusion

"Congress's goals of greater sentencing uniformity based on real conduct and avoidance of unwarranted disparities . . . can be achieved only by recognizing the importance of the causal relationship between conduct and sentence."[222] Unlike a net-profit calculation, disgorgement may not be an exact science and does not provide a bright line rule for sentencing courts to follow; however, extensive fact-finding and economic analysis should be employed to a greater degree in criminal sentencing when determining a prison sentence that will take months or years out of a defendant's life.[223] The Tenth Circuit's sophisticated standard for calculating gain is not only a fair standard for punishing a sophisticated fraud, it is also consistent with the foundations of criminal justice and United States policy on criminal sentencing. The *Nacchio* disgorgement standard adopted by the Tenth Circuit meets congressional goals of formulating a sentence not greater than necessary to provide both: just punishment for defendants convicted of inside trading; and adequate deterrence for others.

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stock price such as "changed economic circumstances, changed investor expectations, new industry-specific or firm-specific factors, conditions or other events") (quoting Dura Pharmaceutical, Inc. v. Broudo, 544 U.S. 336, 343 (2005)).

220. *See* Shapiro & Seltzer, *supra* note 64, at 194, 198-99 ; *see* Abramowitz & Bohrer, *supra* note 6, at 5.

221. U.S. SENTENCING COMM'N GUIDELINES MANUAL § 2B1.4 cmt. background (2001).

222. Shapiro & Seltzer, *supra* note 64, at 194, 198.

223. *See generally* Angeli & Ramfjord, *supra* note 58 (discussing cases applying U.S.S.G. loss calculation and the application of those principles to U.S.S.G. gain calculations and arguing that gain should only be attributed to the value realized from the insider's conduct, not unrelated market factors); *see also* Shapiro & Seltzer, *supra* note 64, at 198-99.