How hedge fund advisers can reduce insider trading risk

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Abstract

Law enforcement officials are looking closely for insider trading at the advisers to hedge funds. This paper discusses some of the approaches that hedge fund managers use to prevent insider trading violations. They include avoiding agreements to keep information confidential and avoiding business communications between hedge fund personnel and close family members or personal friends. The paper also discusses steps to prevent receipt of information about investment opportunities that could mistakenly create a record that an adviser agreed to keep information confidential. Finally, it describes the many legitimate reasons that analysts at money managers have to communicate in private with senior management of public companies and ways hedge fund advisers can police the insider trading risks associated with those communications. For example, an adviser may use the terms of Reg FD to persuade a public company to make a public disclosure of information that had been conveyed inadvertently in a private conversation and that might, with hindsight, appear to be material and non-public.

Keywords: insider trading, hedge fund adviser, duty of trust and confidence, tipper-tippee, solicitation of investment opportunities, Reg FD, mosaic theory

INTRODUCTION

Two leading law enforcement officials have been highly critical of the state of compliance with the insider trading laws at hedge funds.[1] Among the problems they cited were the lack of a compliance culture at the firms and a business model based on the collection of information from corporate insiders for use in trading securities.

Many hedge fund advisers would justifiably bristle at this criticism. They take compliance with the insider trading and other applicable laws with the utmost seriousness. The leaders of these firms instil the right attitude towards compliance by words and deeds, and the firms have detailed, written compliance policies and devote enormous resources to conscientious compliance with the insider trading laws.

The purpose of this paper is to discuss some of the approaches that hedge fund managers use to prevent insider trading violations. That discussion will lead to several topics that should be worthwhile both to hedge fund managers and the law enforcement agencies that oversee them. The topics include the financial incentives hedge fund advisers have to cultivate a highly compliant culture, the value to the securities markets of the work of financial analysts at hedge funds, and the legitimacy of private communications with officers of public companies. Exploring these topics will help stake out the lines that the securities laws draw between behaviour that is not acceptable and conduct that is acceptable as well as socially useful and encouraged.

INCENTIVES FOR CAREFUL COMPLIANCE

Many hedge fund advisers care about compliance not only because they are good citizens who want to obey the law but also because strict compliance is essential to the success and survival of the funds. Hedge fund investors are extremely sensitive about the integrity and reputation of the advisers to whom they entrust their money. A whiff of scandal will cause them to withdraw their investments as quickly as the formation documents permit. Performance and returns matter, but not at the expense of other important values such as safety and reliability.

For this reason, many money managers are deliberately conservative when deciding whether to restrict trading once someone at the firm receives information raising an insider trading question. Their goal is not just to reduce the risk that a court would find an insider trading violation; it is also to reduce the risk that the Securities and Exchange Commission (SEC) or a criminal prosecutor would pursue a serious investigation. An investigation can be nearly as damaging as a violation. It distracts portfolio managers and other personnel, imposes costs and burdens, reduces financial returns, and can lead to disclosure to current and prospective investors. A prolonged investigation of possible misconduct can result in major withdrawals by investors and the demise of the firm even if the firm has a strong position on the merits and could ultimately persuade a court that no violation occurred. The situations are not identical, but the closure of Pequot Capital Management and Galleon Management illustrate the harsh consequences that can follow publicity of insider trading investigations or accusations. Hedge fund managers therefore want to be in a position to persuade a law enforcement agency to conclude an investigation quickly.

A conservative approach to compliance can and does co-exist with the healthy appetite at many hedge funds for the collection of information about companies with publicly traded securities. Hedge fund advisers that engage in fundamental analysis of the business and financial statements of individual public companies would probably concede that one comment from the SEC Director of Enforcement was true: They actively seek information for their financial and trading models.

The advisers would go on to say that there is nothing wrong with that when done within appropriate bounds. In fact, Congress, the Supreme Court, and the SEC recognised that the work of financial analysts produces substantial benefits for all investors in the securities markets. Having smart, diligent financial analysts combing through publicly available information about companies, and thinking hard about it, promotes full and accurate disclosures from the public companies, decreases volatility in the share price of the company, makes pricing more efficient, and

helps identify the companies that are likely to be economic winners or losers.[2] Empirical studies demonstrate that financial analysts are among those more likely to sniff out accounting and disclosure mistakes at companies.[3]

DOS AND DON'TS

A variety of hedge fund advisers accommodate their goals of compliance and insightful research by making insider trading prevention and risk control key parts of their policies and procedures. Below are a few of the leading dos and don'ts at many hedge funds.

Use disclaimers

One practice some hedge funds use to reduce insider trading risk is to build and maintain a record that they do not agree to maintain information in confidence and do not want to receive any confidential information that could restrict securities trading. Having such a record would often refute a key element of an insider trading case and should rapidly satisfy an investigating law enforcement agency that an insider trading violation did not occur.

An essential element of every theory of insider trading liability (save one) is that a breach of a duty of trust and confidence must occur.[4] That means that a recipient of information must have agreed to keep the information confidential[5] or must have a duty imposed by another law to keep the information confidential. For example, directors and officers of corporations have a duty to keep information about the corporation confidential.[6] Other relationships creating such a duty are discussed below.

Therefore, avoiding the creation of such a duty reduces insider trading risk, and hedge funds can take steps to prevent the formation of some types of duty. Whenever hedge fund personnel communicate with company employees, broker-dealer representatives, or other sources of information, they should routinely and frequently make some form of the following disclaimers:

- We are a securities investor. We collect information to assist us in buying and selling securities.
- We do not agree to keep any information from you confidential unless we sign a written confidentiality agreement in advance. We intend our securities trading to remain unrestricted, and we do not agree to restrict our securities trading in any way.
- We do not want to receive any information you are obliged to keep confidential, that you are not authorised to disclose to us, or that you were not authorised to receive. Do not provide us with any such information.
- Please acknowledge that you agree to these conditions. If they are not acceptable, please do not provide us any information.

Circumstances might not always permit this entire set of disclaimers to be made word-for-word, but adviser personnel should convey the main points: The adviser is an investor in securities and does not agree to keep information confidential or to restrict its trading.

The adviser should keep a record that the disclaimers were made. When possible, the adviser should make the disclaimers before receiving any information, send them in writing, and obtain a written acknowledgement from the third party. When that is not feasible, the adviser should document that the disclaimers were made and acknowledged. The disclaimers should be repeated as often as circumstances require.

Making these statements will not eliminate all risk that a hedge fund adviser will be found to have a duty of confiden-

tiality, but the disclosures and the evidence that they were made and understood can be helpful in several ways. They should reduce the number of occasions that a third party provides questionable information, and they certainly reduce the chance that an agreement to maintain confidentiality will be found to exist. The disclosures and information also are evidence that the adviser did not know that it received information from a person who should not have made the disclosure. As discussed below, this will diminish potential tippee liability. In these ways, the disclaimers should assist in preventing an insider trading investigation and in bringing one to a conclusion.

Exercise extra care with sources having a personal relationship to you

Some hedge funds have policies to address the risk that a duty of confidentiality would be found in other situations. These policies deal with close personal relationships between a source of information and a hedge fund employee. Developments in insider trading law reviewed below created the need for those policies.

Although the main way an institutional investor assumes a duty of confidentiality is by entering into an agreement, a duty may exist by operation of law. An SEC rule defines two such positions. One is when the two persons communicating have a history, pattern, or practice of sharing confidences and the particular communication was expected to be kept confidential. The second is receipt of material, non-public information from a spouse, parent, child, or sibling unless the recipient demonstrates that the source did not expect the information to be kept confidential.[7]

The Supreme Court created a third occasion when a person assumes a duty of confidentiality. A tippee takes on such a duty when a tipper breaches a duty owed to another person by disclosing information to the tippee and the tippee knows that the tipper is breaching the duty.[8] 'Whether disclosure is a breach of duty … depends in large part on the purpose of the disclosure. … [The] test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders.'[9]

The Court at first defined personal benefit as 'a pecuniary gain or a reputational benefit that will translate into future earnings', but it then went on, as have later legal authorities, to define personal benefit with great breadth. In particular, for our current purposes, the Court made this point: 'The elements of fiduciary duty and exploitation of non-public information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.'[10]

Hedge funds can deal with some of these risks by requiring an analyst, trader, or portfolio manager to disclose to the legal or compliance department when he or she is likely to have business discussions with a close friend or family member. The hedge fund can then arrange to impose restrictions, monitor the communications, or assign another employee to have the discussions. Hedge funds also could periodically review a sample of external communications to identify frequent sources of information and then determine whether any personal relationships with employees or other circumstances raise a question.

Do not inadvertently agree to keep information confidential

Another compliance approach addresses a common situation that, if not handled carefully, can result in producing evidence that the adviser agreed to keep informa-

tion confidential when it did not intend to enter into such an agreement. The situation involves information about investment opportunities that are not yet publicly known.

It arises in the following way. Third parties often seek to interest hedge funds in securities transactions that have not been publicly announced. Examples include a private investment in public equity (PIPE), an offering of convertible bonds, or a debt restructuring. Information about the transaction is often material and could have a non-trivial effect on the market price of related securities if publicly disclosed.

Agents for the potential offeror, usually a broker-dealer, need to check the market for interest in the transaction. One appropriate way for them to do that is to obtain a confidentiality agreement from the hedge fund before revealing key information that could be material,[11] but some broker-dealers are not as careful as they should be. Before obtaining a confidentiality agreement, they can reveal too much information, such as the name of the issuer, the type of transaction, or even preliminary price terms.

Broker-dealers also sometimes take an additional step before a hedge fund agrees to confidentiality. They send an uninvited e-mail with information about the transaction and an attachment containing details. The broker-dealer might feel safe in doing so because the detailed attached documents typically say the information is confidential; the information is to be used solely to evaluate the proposed transaction; and the recipient agrees to these terms.

This pattern of events can put the careful hedge fund manager at risk and force a decision on whether trading should be restricted. The hedge fund possibly has material, non-public information, and it has documents labelling the information as confidential and stating that the recipient agreed to keep the information confidential.

On the other hand, in the manager's mind, the hedge fund has deliberately not agreed to keep any information confidential. The manager should not be found to have a duty by agreement because one person may not unilaterally impose a confidentiality agreement on another. Volitional acceptance is needed.[12] Equally, the disclosure should not be seen as a tip. The broker-dealer is not, and in the typical case does not appear to be, breaching a duty when communicating about the possible transaction with the hedge fund — just the opposite. The broker-dealer is doing its job to identify interest in the transaction and possible buyers. The communications are authorised and encouraged by the issuer and, absent unusual facts, do not indicate otherwise.

The difficulty is that evidence about the broker-dealer's first call or e-mail to the adviser's employee might be lost, ambiguous, or self-serving. A law enforcement agency might suspect an express or implied agreement, and a court might infer an agreement.[13] One prominent insider trading case turns in part on whether a large shareholder orally agreed to keep information about a PIPE confidential.[14]

Hedge funds can take several steps to reduce the risk. Using the disclaimers discussed above would help. Add to them that you do not want third parties to send you unsolicited information about possible investment opportunities. Periodically send to potential counterparties and their agents the disclaimer about not wanting unsolicited information about possible deals and ask them to take your employees off the lists for such e-mails.

Create a procedure within the adviser to direct all communications about possible investment opportunities to a person in an area walled-off from trading deci-

sions. If the adviser does not have an area protected by an information barrier, and many do not, have a procedure to tell outside business partners to begin any discussion of an investment idea with a person at the hedge fund whose knowledge does not taint trading by the firm, such as one of the compliance officers or in-house lawyers. Such a person can conduct an initial vetting of an idea without the need to restrict trading, can check the firm's existing trading in the relevant securities, and can make an informed judgment about the circumstances in which the adviser might be willing to sign a confidentiality agreement to obtain more information about an opportunity.

SEC regulations recognise that this approach creates a defence to an insider trading charge. An entity does not trade on the basis of material, non-public information if the individual making an investment decision for the entity was not aware of the information and the firm had reasonable policies and procedures to prevent traders from becoming aware of the information.[15]

DO NOT DEPEND ON REG FD BUT TAKE ADVANTAGE OF IT

Diligent analysts at hedge funds and other financial institutions pour over the public disclosures of the companies they follow but nonetheless often find it beneficial to discuss the disclosures with senior, knowledgeable management at the company. These communications occasionally occur in private or small groups, but, since adoption of Regulation FD in 2000, some analysts have come to rely on the company to avoid disclosing material, non-public information when the company should not. Cautious hedge funds do not rely exclusively on the company's compliance with Reg FD and have policies to address problematic disclosures.

In general, Reg FD prohibits representatives of a public company from disclosing material, non-public information to one or a select few investors. Material disclosures must be widely disseminated to the public.[16] Compliance with Reg FD is a responsibility of the company and not of analysts or shareholders.

Because Reg FD prohibits selective disclosures, law enforcement officials not familiar with the work of financial analysts might be prone to question the legitimacy of private or small group conversations between hedge fund personnel and senior management of a public company. When a company has made extensive public disclosures and decided not to disclose other information and when Reg FD requires the company to make broad public disclosures of material, non-public information, why would a hedge fund analyst talk with the CEO or CFO other than in expectation of gaining some unfair disclosure or illegitimate trading advantage?

The answer is that analysts have a variety of legitimate reasons for communicating privately with senior management of a public company. They can ask a clarifying question about a public disclosure. They can learn details about the components of specific financial statement numbers or items. They can reinforce their understanding of the key factors affecting a company's business. They can dig into the minutiae of a company's business in a way the public disclosures will never reach. In short, analysts gain colour and context from communicating with the company outside of the earnings calls and other public sessions and seeking details that are not by themselves material.[17]

Law and public policy encourage these efforts. When adopting Reg FD, the SEC said:

> an issuer is not prohibited from disclosing a non-material piece of information

> to an analyst, even if, unbeknownst to the issuer, that piece helps the analyst complete a 'mosaic' of information that, taken together, is material. Similarly, since materiality is an objective test keyed to the reasonable investor, Regulation FD will not be implicated where an issuer discloses immaterial information whose significance is discerned by the analyst. Analysts can provide a valuable service in sifting through and extracting information that would not be significant to the ordinary investor to reach material conclusions. We do not intend, by Regulation FD, to discourage this sort of activity. The focus of Regulation FD is on whether the issuer discloses material non-public information, not on whether an analyst, through some combination of persistence, knowledge, and insight, regards as material information whose significance is not apparent to the reasonable investor.[18]

Before adoption of Reg FD, the Second Circuit made a similar observation in a wrongful tipping case: 'A skilled analyst with knowledge of the company and the industry may piece seemingly inconsequential data together with public information into a mosaic, which reveals material non-public information.'[19]

Private conversations with company management still carry risk for hedge funds even though diligent research is encouraged and even though compliance with Reg FD is the company's responsibility. Sometimes in these communications an analyst could learn information that might seem to be material and non-public — particularly with the benefit of hindsight. Although a hedge fund investor generally does not have a relationship of trust or confidence with the company or its representatives, the SEC or a criminal prosecutor could get interested if, after the communication, the hedge fund buys or sells the company's securities and within a short time the company announces a significant corporate event, such as a major new product, contract, or merger.

In these circumstances, a law enforcement agency is likely to look carefully at the nature of the relationship between the analyst and the company source. Did the analyst say or do anything to indicate he agreed to keep the information confidential? Is the source a close family member of the analyst? Did the company source tip the analyst? Did the analyst or hedge fund adviser offer the source something of value for the information? Are the source and analyst long-time friends or former business school roommates?

Prudent hedge fund advisers therefore police these risks. As discussed above, they use disclaimers and avoid sensitive communications between family members or long-time friends. If they receive information that could, in retrospect, be seen as material and non-public, they stop trading in the company's securities while they consider an appropriate response. A first step is to have adviser personnel double-check whether the company already made the information public. Sometimes an overlooked public disclosure will have included the information. When that is discovered, the hedge fund's concerns are over and it may go ahead and trade the company's securities.

Another approach is to take advantage of Reg FD and discuss the matter with the company. The company might agree that the information could be viewed as material and non-public and was inadvertently disclosed. It would then issue a public disclosure of the information, which would free the hedge fund to trade. Alternatively, the company might provide assurance that the information is not material.

CONCLUSION

The effort here has been to describe several tools hedge fund advisers could use to mitigate and contain the risk of insider trading investigations or violations. Depending on the specific nature of a hedge fund's business or investment objectives, some of the guidelines above should be useful in building an evidentiary record that could help put an early end to a law enforcement inquiry. Of course, their limitations need to be recognised as well. Compliance programmes cannot remove all legal risk. In particular, they cannot stop those bent on wrongdoing and circumventing the controls that a hedge fund adviser puts in place.

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References

(1) Gallu, Joshua (2009) 'Inside Trading', *Bloomberg* (13th November) (reporting comments of the Director of the SEC Division of Enforcement, which referred to a 'business model consist[ing] of vigorous attempts to collect information from corporate insiders and to utilize that information to trade' and 'the lack of a corporate culture of compliance', although he apparently added that 'the vast majority of hedge funds' probably operate in a lawful manner); Pulliam, Susan (2009) 'Fund Chief Snared by Taps, Turncoats', *Wall Street Journal*, A1 (30th December) ('"There is reason to fear that there is a culture — not only at hedge funds but at large firms in the financial sector — that thinks nothing of casually exchanging material non-public information," said Preet Bharara, the Manhattan US attorney.').

(2) See *Dirks v. SEC*, 463 U.S. 646, 658-59 (1983); Donald C. Langevoort, Insider Trading: Regulation, Enforcement & Prevention 11-3 to 11-4 (2009) (discussing comments from members of Congress).

(3) Dyck, Alexander, Morse, Adair, & Zingales, Luigi, (2008) 'Who Blows the Whistle on Corporate Fraud?', *Chicageo GSB*, Research Paper No. 08-22, (SSM 891482) (financial analysts, auditors, short sellers, and equity holders uncover a larger percentage of corporate fraud than other sources). See also SEC Proposing Release for Amendments to Regulation SHO, 74 Fed. Reg. 18042, 18044, 18049 (20th April, 2009) (describing the role that short sellers play in addressing overvalued companies and correcting upward stock price manipulation).

(4) See generally 17 C.F.R. § 240.10b5-1(a). The exception is for trading in connection with a tender offer. See *ibid.* § 240.14e-3; *United States v. O'Hagan*, 521 U.S. 642, 666-69 (1997).

(5) 17 C.F.R. § 240.10b5-2(b)(1).

(6) See *Chiarella v. United States*, 445 U.S. 222, 228 (1980) ('a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation'); *SEC v. Talbot*, 530 F.3d 1085, 1094-95 (9th Cir. 2008) (director of a corporation has a duty of trust and confidence to the corporation and its shareholders, and breach of the duty supports an insider trading violation based on the misappropriation theory).

(7) 17 C.F.R. § 240.10b5-2(b)(2), (3).

(8) *Dirks v. SEC*, 463 U.S. 646, 660 (1983) ('a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material non-public information only when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach'). The Supreme Court said that a person is a tippee when he 'knows or should know' that there has been a breach of duty by the tipper, but a 'should know' standard is not likely to meet the mental state requirement

necessary for a violation of section 10(b) of the Exchange Act. *Aaron v. SEC*, 446 U.S. 680, 690–91 (1980) (section 10(b) evinces a congressional intent to proscribe only knowing or intentional misconduct); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197–99 (1976) (same). At least one court of appeals requires that a tippee know of the tipper's breach of duty. See *United States v. Falcone*, 257 F.3d 226, 232, 234 (2d Cir. 2001) (criminal case; the government must prove the tippee's knowledge that the tipper had breached a duty); *United States v. Mylett*, 97 F.3d 663, 668 (2d Cir. 1996) (criminal case; Rule 10b-5 'requires that the defendant subjectively believe that the information received was obtained in breach of a fiduciary duty').

(9) *Dirks v. SEC*, 463 U.S. 646, 662 (1983).

(10) *Ibid*. at 663–64. See also *SEC v. Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003) (benefit from tip was to maintain a good relationship with a friend and frequent partner in real estate deals); *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (benefit from tip was to effect a reconciliation and maintain a networking contact with friend); *SEC v. Stevens*, Litigation Release No. 12813, 1991 WL 296537 (SEC) (settled enforcement action alleging a tipping violation by a corporate officer who was alleged to have acted to protect and enhance his reputation and protect his continued earnings power); Donald C. Langevoort, Insider Trading: Regulation, Enforcement & Prevention 11-7 (2009) (discussing Stevens case). The breadth of the personal benefit standard established by these authorities seems excessive because some of these intangible and speculative benefits do not appear to be credible evidence of a breach of duty.

(11) See paragraphs 14 and 17 of the settled complaint in *SEC v. Shane*, Civ. Action No. 05-4772 (S.D.N.Y.), SEC Litigation Release No. 19227 (18th May, 2005).

(12) *United States v. Chestman*, 947 F.2d 551, 567 (2d Cir. 1991) (noting, in context of insider trading case, that 'a fiduciary duty cannot be imposed unilaterally by entrusting a person with confidential information'); *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 799 (2d Cir. 1980) (expectation on part of source that party receiving non-public information will not trade does not impose duty of confidentiality); *SEC v. Mayhew,* 916 F. Supp. 123, 130 (D. Conn. 1995) (the fact that an insider who disclosed material non-public information 'expected [the recipient] to keep the substance of the lunch conversation confidential, did not, in itself, give rise to a fiduciary duty'), aff'd, 121 F.3d 44 (2d Cir. 1997).

(13) See *SEC v. Lyon*, 605 F. Supp. 2d 531, 543–47 (S.D.N.Y. 2009) (on summary judgment motions in insider trading case based on PIPE offerings, finding that the material fact of whether the defendants agreed to keep information confidential remained in dispute); *SEC v. Lyon*, 529 F. Supp. 2d 444, 451–53 (S.D.N.Y. 2008) (holding that SEC had adequately alleged existence of predicate duty for misappropriation theory liability by pleading that purchase agreement and other materials related to PIPE offering contained confidentiality conditions and provisions, including requirements that defendants use information for sole purpose of evaluating possible investment in the offering, and discovery might reveal that defendants had explicitly accepted the conditions or that it was customary practice among participants in private placement market to be bound and abide by such provisions); *SEC v. Deephaven Capital Management*, LLC, Civil Action No. 06-0805 (D.D.C.), SEC Litigation Release No. 19683 (2nd May, 2006) (settled; complaint in paragraphs 12 and 15 alleged oral agreements to keep information confidential or undertakings 'by pattern or practice' to maintain confidentiality).

(14) *SEC v. Cuban*, 634 F. Supp. 2d 713 (N.D. Texas 2009), on appeal, No. 09-10996 (5th Cir.).

(15) 17 C.F.R. § 240.10b5-1(c)(2).
(16) 17 C.F.R. § 243.100(a).
(17) See CFA Centre for Financial Market Integrity/National Investor Relations Institute, Best Practice Guidelines Governing the Analyst/Corporate Issuer Relations 5 (2004), at http://www.ciri.org/media/uploads/attachment1102543026.pdf ('Analysts would fail in their due diligence if they did not seek direct communication with company representatives, especially investor relations and other senior management executives, to fully understand the information in a company's public disclosure documents.')
(18) SEC Adopting Release on Selective Disclosure and Insider Trading, Securities Act Rel. 7881, 65 Fed. Reg. 51716, 51722 (24th August, 2000). See also *Dirks v. SEC*, 463 U.S. 646, 658 n.17 (1983) (Court noted that SEC asserted that analysts were free to obtain corporate information from management for purposes of filling in the interstices in analysis).
(19) *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 165 (2d Cir. 1980); see also *SEC v. Bausch & Lomb, Inc.*, 565 F.2d 8 (2d Cir. 1977) ('Many a corporate executive, conscious of the antifraud provisions of the Securities Acts, may analogize an encounter with a financial analyst to a fencing match conducted on a tightrope; he is compelled to parry often incisive questioning while teetering on the fine line between data properly conveyed and material inside information that may not be revealed without simultaneously disclosing it to the public.')