

1992

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Elyse Diamond

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Recommended Citation

Elyse Diamond, *Outside Investors: A New Breed of Insider Traders?*, 60 Fordham L. Rev. S319 (1992).
Available at: <https://ir.lawnet.fordham.edu/flr/vol60/iss6/15>

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OUTSIDE INVESTORS: A NEW BREED OF INSIDER TRADERS?

ELYSE DIAMOND

INTRODUCTION

Technological advances in computer and telecommunication systems have promoted the internationalization of the securities markets by enabling investment activity on a global scale, virtually without interruption.¹ This increased participation,² however, has heightened the opportunity for widespread abuse of securities laws, particularly encouraging insider trading violations.³ At the same time, the increasing complexity of investment activity has made enforcement of securities regulations more difficult.⁴

This Note will examine the effects of the growth of transnational participation in securities trading on the development and enforcement of insider trading laws around the world. Part I provides an overview of the development, current status, and existing substantive regulations of insider trading laws in the United States, and also reviews the potential for further legislation outside of the United States. This Part further includes a general comparison of key aspects of domestic and foreign regulations. Part II then examines the problems with the attempted application and enforcement of insider trading regulations within the framework of international trading participation. This Part focuses on problems of extraterritorial application and enforcement of United States insider trading laws and considers the progress that has been made in dealing with these limitations. Finally, this Note concludes that while substantial measures are being taken by the Securities Exchange Commission ("SEC") and some foreign securities regulators to promote the

1. See Gruson, *The Global Securities Market: Introductory Remarks*, 1987 Colum. Bus. L. Rev. 303, 305-06 [hereinafter *Global Securities Market*]. Other factors promoting the internationalization of the securities markets include: domestic economic growth, the volatility of domestic financial markets, and the impact of national "political and economic philosophies" regarding securities regulation. *Id.* at 304-05.

2. In 1988 alone, "foreign direct investment in [the United States] totaled \$328.9 billion." *Foreign Investment in U.S. Exceeds American Investment Abroad Last Year*, 21 Sec. Reg. & L. Rep. (BNA) 1638 (Nov. 3, 1989). "By one estimate, world stock market capitalization grew from 2.5 trillion dollars in 1980 to 8.2 trillion dollars in 1988 and the dollar volume of trading in U.S. equity securities by foreign investors rose from \$75.5 billion in 1981 to \$481.9 billion in 1987." *Insider Trading, The Internationalization of the Securities Markets and the SEC's Enforcement Program*, 23 Sec. Reg. & L. Rep. (BNA) 1376, 1376 n.1 (Sept. 20, 1991) [hereinafter *SEC's Enforcement Program*] (citing Goelzer and Sullivan, *Obtaining Evidence for the International Enforcement of the United States Securities Laws*, 16 Brooklyn J. Int'l L. 145 (1990)).

3. See *House Committee Report Critical of SEC's International Enforcement*, 20 Sec. Reg. & L. Rep. (BNA) 1551 (Oct. 14, 1988). The Committee estimated that uninvestigated foreign trades in 168 reports of suspicious trading activity referred to the SEC yielded "gross potential profits . . . of at least \$38.1 million." *Id.*

4. See *SEC's Enforcement Program*, *supra* note 2, at 1376.

enforcement of insider trading prohibitions, continued development of foreign law and increased international cooperation are essential to maintain control over insider trading activity in this complex global market.

I. AN OVERVIEW OF SUBSTANTIVE INSIDER TRADING REGULATIONS

The development of transnational securities trading brings new challenges for national authorities charged with enforcing national securities regulations. Interaction of national insider trading laws is inevitable in the current global market, and effective control over insider trading at the international level is impossible without a commitment by individual countries to police this activity. For this reason, the starting point for international regulation of insider trading must be at the national level.

A. *Insider Trading Regulations in the United States*

The United States relies on a centralized regulatory system to govern insider trading,⁵ the enforcement of which is the responsibility of the SEC.⁶ United States securities regulation is founded on a system of disclosure.⁷ These laws set guidelines for the disclosure of information to investors by issuers of corporate securities.⁸ The SEC, in turn, is charged with enforcing these disclosure rules.

1. Liability Under the Securities Exchange Act of 1934: Section 10(b)

The authority to regulate insider trading in the United States derives principally from Section 10(b) of the Securities Exchange Act of 1934 (" '34 Act'"), a criminal anti-fraud section⁹ implemented by the SEC as Rule 10b-5.¹⁰ Neither Rule 10b-5 nor the section from which it derived, however, includes a definition of insider trading or even uses this express terminology. Instead, Rule 10b-5 makes it unlawful to employ any "device, scheme or artifice to defraud," to omit or make an untrue statement of material fact, or to operate a fraud or deceit on any person in connection with the purchase or sale of any security.¹¹

5. Some individual states, however, have enacted their own insider trading regulations as well. For example, New York law uses language similar to Rule 10(b), *see* 17 C.F.R. § 240.10b-5 (1991), prohibiting the use of "fraud, deception, concealment, suppression, false pretense" to induce or promote the sale of securities in this state. *See* N.Y. Gen. Bus. Law § 352-c (Consol. 1980).

6. *See* Securities Exchange Act of 1934, Pub. L. No. 291, § 4, 48 Stat. 881, 885 (1934) (codified as amended at 15 U.S.C. § 78d (1981)) [hereinafter "'34 Act'"].

7. *See* Rasmussen, *An Overview of Insider Trading Laws in the United States*, 9 Int'l Bus. L. 389, 389 (1981).

8. *See id.*

9. '34 Act, *supra* note 6, § 10(b), 48 Stat. at 891 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kkk (1988)).

10. 17 C.F.R. § 240.10b-5 (1991).

11. *See id.*

Since its inception, this amorphous definition of insider trading has lent itself to broad extensions of liability under the statute and to differing interpretations among federal courts of what constituted an offense pursuant to the '34 Act.¹² Developing from common law, it gradually "became an established principle of federal law under rule 10b-5 that insiders owe a fiduciary duty of disclosure when engaged in face-to-face purchases or sales with corporate shareholders."¹³ Eventually, this duty was extended to insiders who trade, even impersonally, in breach of a fiduciary duty.¹⁴

In 1980, the Supreme Court narrowed lower courts' interpretations of the '34 Act in a landmark insider trading case, *Chiarella v. United States*.¹⁵ In *Chiarella*, the Supreme Court held that a violation of the '34 Act requires a showing that one owing a fiduciary duty to disclose or to abstain from trading has breached this duty by fraudulently using non-public material information in connection with the trading of securities.¹⁶ This is known as "abstain or disclose" liability. The Court reversed defendant Chiarella's criminal conviction under the '34 Act, holding that Chiarella did not have a sufficiently close relationship with the sellers of the subject company's securities to trigger the duty of disclosure required for liability under Rule 10b-5.¹⁷ In particular, the Court held that abstain or disclose liability does not arise "from the mere possession of non-public market information," and that therefore no fraud had been perpetrated by Chiarella.¹⁸

Abstain or disclose liability, as defined by the Court in *Chiarella*, also has been found to extend to "tippees"—investors who trade based on

12. See D. Langevoort, *Insider Trading Regulation* 36 (1989). Regarding the interpretations of the duty of disclosure under Rule 10b-5, compare *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 828-29 (D. Del. 1951) ("duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the unformed minority stockholders"), *reaff'd*, 100 F. Supp. 461 (D. Del. 1951), 103 F. Supp. 47 (D. Del. 1952) and *Karden v. National Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Pa. 1947) (duty to disclose under 10b-5 arises when "directors and officers . . . in purchasing the stock of the corporation from others, fail to disclose a fact coming to their knowledge by reason of their position, which would materially affect the judgement of the other party to the transaction").

13. D. Langevoort, *supra* note 12, at 39.

14. See *Cady, Roberts & Co.*, 40 S.E.C. 907 (1961). The SEC's opinion reasoned that the defendants' access to the confidential information as a matter of course in his corporate position, and the unfair advantage this gave him, made it reasonable to subject him to liability. See *id.* at 912. The Supreme Court's ruling in *Chiarella v. United States*, 445 U.S. 222 (1980), however, has ostensibly invalidated earlier common law interpretations of Rule 10b-5. See *infra* notes 15-18 and accompanying text.

15. 445 U.S. 222 (1980).

16. See *id.* at 228. Chiarella, an employee of Pandick Press, knowingly violated company policy by discovering the identity of the subject company of a tender offer from confidential materials prepared by Pandick and subsequently purchasing that company's securities before the bid was revealed. See *id.* at 224.

17. See *id.* at 232-33.

18. *Id.* at 235.

inside information obtained from a company insider.¹⁹ In *Dirks v. SEC*,²⁰ the Supreme Court established that 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."²¹ Tippee liability further requires that the tippee knew, or should have known, that the tipper communicated the information for personal gain.²²

Despite the broad reach of the law, the success of the '34 Act was hindered by the SEC's limited resources for investigating and prosecuting potential violators, as well as by the limited penalties available under the statute.²³ Convicted violators faced only injunction of future violations and disgorgement of the illegally obtained profits.²⁴

2. Enactment of Further Legislation: 1984 and 1988

As a result of the enforcement problems of the '34 Act, Congress passed the Insider Trading Sanctions Act of 1984 ("ITSA").²⁵ ITSA amended the '34 Act to impose penalties where there has been a violation of any provision of the '34 Act by the sale or purchase of "a security while in possession of material nonpublic information."²⁶ ITSA subjected violators to more stringent sanctions including a possible forced return of up to three times the illegally obtained profits.²⁷

Despite ITSA's improvements to the '34 Act, the well-publicized insider trading scandals involving Dennis Levine and Ivan Boesky evinced the need for further deterrence of insider trading²⁸ and led to the enactment of the Insider Trading and Securities Fraud Enforcement Act of

19. See D. Langevoort, *supra* note 12, at 44.

20. 463 U.S. 646 (1983).

21. *Id.* at 660. Dirks, an investment analyst, advised clients to sell shares of Equity Funding of America after learning of its fraudulent practices from a former employee of that company. See *id.* at 649. The Court held that no liability existed as Dirks did not receive confidential information from a company insider breaching a fiduciary duty. See *id.* at 665.

22. See, e.g., *State Teachers Retirement Bd. v. Fluor Corp.*, 592 F. Supp. 592, 594 (S.D.N.Y. 1984) (holding that tippee liability requires the tippee have "knowledge of each element, including the personal benefit, of the tipper's breach") (emphasis in original).

23. See D. Langevoort, *supra* note 12, at 59.

24. See *id.*

25. Pub. L. No. 98-376, 98 Stat. 1264 (1984) (codified as amended in scattered sections of 15 U.S.C.).

26. *Id.* § (2)(A).

27. See *id.*

28. See Ingersoll, *Political Pressure Building to Stem Trading Excesses*, *Wall St. J.*, Nov. 17, 1986, at 29, col. 5 (Eastern ed.); Swartz & Ingersoll, *Wall Street May Face Big Changes in Wake of the Boesky Scandal*, *Wall St. J.*, Dec. 3, 1986, at 1, col. 6 (Eastern ed.); see also 134 Cong. Rec. 23,595, 23,597-9 (remarks of the House Committee on Energy and Commerce on need for new insider trading legislation in light of Wall Street scandals).

1988.²⁹ Any individual who purchases or sells securities contemporaneously with a violator's purchase or sale of the same security is given a private right of action under this Act.³⁰ This Act also expanded the scope of liability by allowing the imposition of penalties against controlling persons who "knew or recklessly disregarded the fact that such controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred."³¹ Other provisions of the Act require brokers, dealers, and investment advisors to enact written policies for the prevention of insider trading.³² Insider trading remains undefined under United States law, and the development of SEC regulation under these statutes continues in modern case law.³³

3. The Misappropriation Theory of Liability: From the *Chiarella* Dissent

The Supreme Court's majority opinion in *Chiarella* left undecided whether, in addition to "abstain or disclose" liability, Rule 10b-5 imposes liability for insider trading under the "misappropriation" theory.³⁴ Pursuant to this theory, a violation of Rule 10b-5 occurs when one entrusted with confidential information misuses this knowledge by secretly trading on it for personal gain.³⁵ This theory attaches the requisite breach of fiduciary duty to the entruster of the private information rather than to the shareholders of the company whose stock was traded.³⁶ The Second Circuit has explicitly adopted this interpretation of 10b-5.³⁷ More recently, the Seventh and Ninth Circuits have adopted the misappropria-

29. Pub. L. No. 100-704, 102 Stat. 4677 (1988) (codified as amended in scattered sections of 15 U.S.C.).

30. *See id.* § 5.

31. *Id.* § 3(a)(2).

32. *See id.* §§ 3(b)(1), 3(b)(2).

33. *See, e.g.,* United States v. Willis, 737 F. Supp. 269, 277 (S.D.N.Y. 1990) (charging a psychiatrist with using inside information obtained from a patient—held that because the information was learned during a confidential session with the patient, the defendant need not have been told that the information was confidential); *see also For the First Time, Jury Finds Tippee Liable Based On Circumstantial Evidence*, 22 Sec. Reg. & L. Rep. (BNA) 1539 (Nov. 11, 1990) (discussing United States District Court of Utah finding of tippee liability purely on the basis of circumstantial evidence).

34. The majority did not rule on the validity of the misappropriation theory because it held that the jury was improperly charged on this theory. *See Chiarella v. United States*, 445 U.S. 222, 236 (1980). In his dissent, Chief Justice Burger found support for a theory of liability based on misappropriation under Rule 10b. *See id.* at 240 (dissenting). For an in depth analysis of this theory, see D. Langevoort, *supra* note 12, at 147-75.

35. *See* D. Langevoort, *supra* note 12, at 147.

36. *See id.*

37. *See* United States v. Newman, 664 F.2d 12, 17 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1983). Newman misappropriated confidential information regarding proposed mergers and acquisitions that he learned from two employees of two investment firms whose various clients confided this information to the firms. The court held that Newman was liable under Rule 10b-5 under the misappropriation theory. *See id.* at 15-16.

tion theory.³⁸

In *Carpenter v. United States*,³⁹ the Supreme Court affirmed by a divided vote a 10b-5 conviction premised on the misappropriation theory. The Court, however, did not deliver an opinion on this issue of the case, so the validity of the misappropriation theory of liability remains uncertain. In addition, the *Carpenter* Court also found a violation of the federal criminal wire fraud and mail statutes under a misappropriation theory.⁴⁰

4. Section 16(b) of the '34 Act

Section 16(b) of the '34 Act⁴¹ was designed to regulate specified insider trading activity, and has a much narrower application than Rule 10b-5. Section 16(b) prohibits an officer, director, or "beneficial owner"⁴² from purchasing and selling securities for profit within a six month period based on information learned through his or her relationship with the issuer.⁴³ This type of trading is known as short-swing trading.⁴⁴

An action under 16(b) may be brought only by the corporate issuer or a shareholder, and recovery is limited to the profits earned from the prohibited activity.⁴⁵ Significantly, Section 16(b) does not require that the

38. See *SEC v. Cherif*, 933 F.2d 403, 410 (7th Cir. 1991); *SEC v. Clark*, 915 F.2d 439, 453 (9th Cir. 1990). After being fired from his position at First National Bank of Chicago, Cherif secretly returned to the bank on various occasions to obtain confidential information regarding buyouts and tender offers being handled by the bank. See *Cherif*, 933 F.2d at 406. Cherif was convicted of insider trading under the misappropriation theory even though he was no longer an employee of the bank at the time of the trading. See *id.* at 411. The Ninth Circuit found Clark guilty under the misappropriation theory for tipping material nonpublic information regarding his employer's plans to buy another company. See *Clark*, 915 F.2d at 441.

39. 484 U.S. 19 (1987).

40. See *id.* at 24. Violations of mail and wire fraud statutes are brought by the United States Justice Department rather than the SEC. The Court's acceptance of this theory for violations of those statutes, however, keeps alive the potential for use of this theory by the SEC in insider trading cases. See Note, *A Comparative Analysis of Insider Trading Laws: The United States, the United Kingdom and Japan — The Current International Agreements on Securities Regulation*, 13 *Suffolk Transnat'l L.J.* 167, 176 (1989) [hereinafter *Comparative Analysis*].

41. '34 Act, *supra* note 6, § 16(b), 48 Stat. at 896 (codified as amended at 15 U.S.C. § 78p(b) (1988)).

42. The statute provision is applicable to all beneficial owners holding more than ten percent of the outstanding stock. See *id.*

43. See generally Thel, *The Genius of Section 16: Regulating the Management of Publicly Held Companies*, 42 *Hastings L. Rev.* 391 (1990-91) (detailing the enactment of Section 16 and the purpose of Section 16(b)).

44. See D. Langevoort, *supra* note 12, at 282.

45. Profits under Section 16(b) are calculated by compiling a list of all purchases and sales made during the requisite period and matching the lowest purchase price with the highest selling price for the same number of shares, until all of the purchases and sales have been accounted for. See L. Loss, *Fundamentals of Securities Regulation* 634 (1983). This formula maximizes the profits earned by the offender thereby creating the largest possible penalty.

trade involve material or nonpublic information.⁴⁶ Section 16(b), unlike Rule 10b-5, is thus limited by its application to short-swing trades and by its application to only specified inside traders.

5. Rule 14e-3 of the '34 Act

A final regulatory tool in the United States is Rule 14e-3,⁴⁷ adopted by the SEC in 1980 to regulate illegal trading of material nonpublic information concerning tender offers.⁴⁸ As adopted, Rule 14e-3 does not require a breach of a fiduciary duty in order to trigger liability.⁴⁹ The Second Circuit recently issued an en banc decision confirming the validity of 14e-3 absent this requirement.⁵⁰ The court held that "the language and legislative history of section 14(e) [of the '34 Act], as well as congressional inactivity toward it since the SEC promulgated Rule 14e-3(a), all support the view that Congress empowered the SEC to prescribe a rule that extends beyond the common law."⁵¹

B. Insider Trading Regulation Abroad

The current globalization of securities trading mandates the international enforcement of insider trading prohibitions.⁵² Worldwide cooperation is essential to the successful deterrence of insider trading because of the absence of any uniform international regulation.⁵³ The likelihood of obtaining foreign assistance may depend on the extent to which other countries have enacted insider trading legislation.⁵⁴

1. Regulation Among the European Community Member States

Like the United States, the United Kingdom also has a centralized system for securities regulation, including insider trading.⁵⁵ The United Kingdom first imposed criminal sanctions for insider trading with the Companies Act of 1980 ("Companies Act").⁵⁶ This Act makes it illegal

46. See 10 H. Bloomenthal & S. Wolf, *International Capital Markets and Securities Regulation* § 1.08[5][b], at 1-117 (1991).

47. See 17 C.F.R. § 240.14e-3 (1991).

48. See *id.*

49. See *id.* Instead of applying the fiduciary principle, pursuant to this Section *any person* who trades securities based on material information relating to a tender offer that he knows or should know is nonpublic is liable. See *id.*

50. See *United States v. Chestman*, 947 F.2d 551, 563 (2d Cir. 1991).

51. *Id.* at 560.

52. See *supra* notes 1-4 and accompanying text; see also Ferrara & Fields, *SEC Expands Enforcement Role to the International Marketplace*, Nat'l L.J., Apr. 24, 1989, at 26 (discussing the overwhelming increase in amount of securities sold and purchased abroad).

53. See *id.*

54. See D. Langevoort, *supra* note 12, at 30.

55. See *infra* notes 76-83 and accompanying text. As a member nation the United Kingdom will also be subject to the minimum standards established in the EC insider trading Directive.

56. Companies Act, 1980, ch. 22, §§ 68-73 (Eng.).

to "buy or sell a security on the London Stock Exchange (now the International Stock Exchange or ISE) on the basis of unpublished specific information likely to materially affect the market price of the stock if the defendant knew the information was price sensitive."⁵⁷ The Company Securities (Insider Dealing) Act of 1985⁵⁸ extends criminal liability to trading of "advertised securities through an 'off market' dealer."⁵⁹ This Act was amended in 1986 to include civil penalties as well.

Pursuant to the Insider Dealing Act, it is unlawful for anyone connected with a company, or anyone who gets information from a connected person, to trade on what he knows is specific "unpublished, price sensitive information" relating to the security.⁶⁰ The Act defines a "connected person" [as] one who is a director, an officer, or an employee of a company or a related company, or one who occupies a position involving a professional or business relationship with that company or related company.⁶¹ The Act also prohibits "tipping" of such information when it is reasonably foreseeable to the tipper that the information will be used for illegal trading.⁶² Defenses under this statute include a showing that the trading was not for profit, or that the trading was done "in good faith in the course of [the trader's] function as a liquidator, receiver, or trustee in bankruptcy."⁶³

Prosecutions under the Insider Dealing Act are conducted by the Department of Trade and Industry ("DTI"). The specificity of the regulations, coupled with the prosecution's burdensome proof requirements, makes obtaining convictions difficult for the DTI and limits the usefulness of the United Kingdom's otherwise comprehensive insider trading regulations.⁶⁴ Under British law, the alleged offender must be shown to have had actual knowledge that the trade involved nonpublic and price sensitive information.⁶⁵

France has also enacted criminal statutes prohibiting insider trading of securities listed on exchanges.⁶⁶ Regulation began in 1967 with the establishment of the Commission des Operations de Bourse ("COB"), the

57. 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 108[5][b], at 1-118.

58. Company Securities (Insider Dealing) Act, 1985, ch. 8 (Eng.).

59. 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 108[5][b], at 1-118. This is an important step for effective enforcement because "[a]n active market is developing among dealers away from organized stock exchanges to meet investors' demand for international trading opportunities." Cox, *Internationalization of the Capital Markets: The Experience of the Securities and Exchange Commission*, 11 Md. J. Int'l L. & Trade 201, 209 (1987).

60. 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 108[5][b], at 1-119.

61. *Id.* at 1-118.

62. *See id.* at 1-119.

63. Morse, *United Kingdom*, in 10A International Capital Markets and Securities Regulation § 6.13[2], at 6-48-9 (H. Bloomenthal ed. 1991).

64. *See* 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 1.08[5][b], at 1-122.

65. *See* Companies Act, 1980 ch. 22, § 68(1)(c); Insider Dealing Act, *supra* note 58, § (1)(c).

66. *See* discussion on the EC Directive *infra* notes 76-83 and accompanying text.

agency charged with investigating securities violations.⁶⁷ Liability under French law extends to insiders, defined as "the president, the directors, and the members of the administrative or supervisory council of a corporation," and to any other person who has obtained inside information in the course of professional work.⁶⁸ French law imposes a stringent burden of proof; this requirement increases the difficulty of obtaining a criminal conviction and makes the statute more difficult to enforce.⁶⁹ In addition, the narrow interpretation given to "inside information" has sharply limited the application of the French law. This information is required to be "precise, specific and certain"⁷⁰ and refers only to information regarding the "technical, commercial or financial" aspects of a company.⁷¹ Finally, the COB's efforts to investigate insider trading cases have at times been frustrated by limitations on jurisdiction.⁷²

Denmark is the final European Community nation to promulgate an insider trading law. Pursuant to legislation enacted in 1986, anyone who trades on a Danish stock market⁷³ benefitted by nonpublic information is subject to criminal liability.⁷⁴ Contrary to United States insider trading law, the Danish system does not distinguish between insiders and outsiders.⁷⁵

In order to promote investor confidence in the developing single European market, the Commission of the European Community (the "EC")⁷⁶ developed a proposal establishing uniform minimum standards for insider trading regulation among its member states.⁷⁷ The proposed Directive extends liability to both fiduciaries and tippees and, unlike the American statutes, includes a definition of inside information.⁷⁸ Under the Directive, inside information is nonpublic information that "would have a significant impact on the price of shares if it were made public."⁷⁹ The Directive also establishes what one expert has described as

67. Ordinance 67-833 (1967) (Fr.).

68. Miller, *France*, in 10A International Capital Markets and Securities Regulation § 7.16[2], at 7-37 (H. Bloomenthal ed. 1991).

69. *See id.*

70. *Id.* § 7.16[2], at 7-38.

71. 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 1.08[5][c], at 1-123.

72. *See id.* at 1-124 n.8 (citing Robert, *International Cooperation: The Obstacles Met by the C.O.B. and the Directions Followed*, in ALI-ABA Conference on Internationalization of Capital Markets 256-57 (1981)).

73. See discussion on the EC Directive *infra* notes 76-83 and accompanying text.

74. *See Note, Toward the Unification of European Capital Markets: The EEC's Proposed Directive on Insider Trading*, 11 Fordham Int'l L.J. 432, 442 (1988) [hereinafter *Unification*].

75. *See id.*

76. The EC is comprised of twelve member nations: Belgium, Denmark, Federal Republic of Germany, France, Great Britain, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. *See Unification, supra* note 74, at 432 n.3.

77. *See Financial Institutions and Company Law*, 20 Bull. E.C. (No. 4) 29 (1987).

78. *See Unification, supra* note 74, at 448.

79. *Revised Insider Trading Ready For Ministerial Review*, 20 Sec. Reg. & L. Rep. (BNA) 1528 (Oct. 7, 1988).

"an information exchange system among national authorities aimed at preventing cross-border insider trading activities."⁸⁰

Although this proposal will have little effect on the United Kingdom, France, or Denmark, all of whom possess insider trading laws, those member states lacking significant insider trading legislation will be more dramatically affected.⁸¹ The EC's proposed Directive does not, however, establish uniform guidelines for sanctioning convicted inside traders, and as a result, one analyst explains, "investors will face varying levels of deterrence in each Member State."⁸² The absence of uniform penalties undermines, to some extent, the Directive's goal of standardizing insider trading prohibitions.⁸³

2. Regulation in Canada

Unlike the centralized control over insider trading regulation evidenced in the United States, the authority to regulate this activity in Canada has been delegated to the individual provinces.⁸⁴ Consequently, seven of the ten provinces regulate insider trading,⁸⁵ and these laws, while not completely uniform, are of similar construction.⁸⁶ The provincial statutes provide for both civil and criminal liability.⁸⁷ Similarly, the Canadian government may bring charges for violations of the federal criminal code.⁸⁸

Canadian regulation is twofold. First, provisions impose reporting requirements for any trading activity conducted by corporate "insiders,"⁸⁹ second, Canadian law imposes liability on insiders who trade on undisclosed material information regarding the issuer security traded.⁹⁰ An insider is a director, senior officer, or anyone else who exerts control over

80. *Id.*

81. *See id.*

82. *Unification, supra* note 74, at 449.

83. *See id.*

84. British North America Act, 1867, 30 Vict., ch. 3, § 92(11); *see also* the Canada Business Corporations Act, Can. Bus. Corp. Act, ch. 44, §§ 126-29 (1974-76) (regulates, however, the incorporation of federal companies and contains a provision regarding insider trading in this particular area).

85. For Ontario's insider trading statute to apply, an issuer's securities must be either listed on its stock exchange or registered for sale in the province. *See* 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 1.08[5][e], at 1-127. For insider trading laws to apply in every other province, a corporation must have listed its securities on that province's exchange, must have publicly distributed shares in that province before, and must have shareholders of record with addresses within that province. *See id.* In light of these requirements, it is entirely possible for the laws of more than one province to apply to a single issuer.

86. *See id.* § 108[5][e], at 1-127.

87. *See* Cowan, *Canada*, in 10A International Capital Markets and Securities Regulation § 4.13, at 4-81 (H. Bloomenthal ed. 1991).

88. *See id.*

89. *See id.* § 4.08, at 4-54. United States regulation also includes specific reporting requirements for trading by corporate insiders. *See* 17 C.F.R. 240.10b-6 (1991).

90. 10A Cowan, *supra* note 87, § 4.08, at 4-54.

more than ten percent of equity shares.⁹¹ Liability also extends to tippees, but in this respect the individual provinces differ. Compare the laws of Ontario and Quebec—in Ontario, a tippee must be in a “special relationship” with the issuer to be held liable, while in Quebec tippee liability extends to anyone “who knowingly possesses nonpublic information trading.”⁹²

3. Regulation in Australia

Detailed regulation of insider trading in Australia is embodied in the Securities Industry Act,⁹³ which has been adopted by every state. The Code makes it illegal “for a person associated with a corporation to deal in its securities on the basis of nonpublic, materially price sensitive information obtained as a result of that association.”⁹⁴ It is also unlawful for a connected person to tip others and for a tippee to trade on such information when he knows it came from a connected person.⁹⁵ Violations are punishable by both civil and criminal penalties.⁹⁶

Despite its thorough provisions, the Security Industry Act has not only proved ineffective but has also failed to result in a single insider trading conviction.⁹⁷ As a result, Australia is enacting legislation which is designed to stiffen the penalties.⁹⁸ Furthermore, the newly created Australian Securities Commission is gathering substantial resources to better enforce the existing regulations.⁹⁹

4. Regulation in Asia

Japanese insider trading legislation,¹⁰⁰ embodied in the Securities and Exchange Law,¹⁰¹ is essentially modeled after the United States laws. Yet Article 58, the general anti-fraud statute modeled after Rule 10b-5, fails to expressly criminalize insider trading and therefore has been

91. See *id.* § 4.08, at 4-54.

92. Bornstein & Dugger, *International Regulation of Insider Trading*, 1987 Colum. Bus. L. Rev. 375, 395 [hereinafter *International Regulation*] (citing Ontario Securities Act, §§ 131(1)-(2), 131(4), 131(7) and Quebec Securities Act § 189).

93. See Securities Industry Act, Austl. Acts P., No. 66, § 128 (1980).

94. 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 1.08[5][f], at 1-129 to 1-130.

95. See Securities Industry Act, *supra* note 93, §§ 128(3),(4).

96. A draft of proposed new legislation in Australia states that the new law “should make clear that a criminal conviction for insider trading is not a prerequisite to a person obtaining a civil remedy against the person who engaged in or was involved in the insider trading.” *Australian Insider Trading Bill to be Introduced in Parliament Soon*, 23 Sec. Reg. & L. Rep. (BNA) 771, 772 (May 17, 1991) [hereinafter *Australian Bill*]; see *infra* notes 97-99 and accompanying text.

97. See *Australian Bill*, *supra* note 96, at 771.

98. See *id.*

99. See *id.* at 772.

100. See Note, *Japanese Securities Regulation: Problems of Enforcement*, in Annual Survey of Financial Institutions and Regulation, Transnational Financial Services in the 1990s, 60 Fordham L. Rev. S255, S255-63 (1992).

101. See Securities and Exchange Law of 1948, No. 25 (1948) (Japan).

deemed too general to be used to prosecute insider trading.¹⁰² Article 189, modeled after Section 16(b) of United States law, requires that short-swing trading profits made by corporate insiders be turned over to the company issuer,¹⁰³ but the effectiveness of Article 189 was severely limited by the repeal of Japan's reporting requirements.¹⁰⁴ Japan's development into an economic leader, coupled with the expansion of its securities market, has led to increasing pressure (particularly from the United States) to strengthen insider trading regulation.¹⁰⁵ In addition, recent insider trading scandals in Japan have sparked greater recognition of the need for increased regulation by the Japanese Ministry of Finance ("MF").¹⁰⁶ In April 1989, the MF adopted more stringent penalties for insider trading violations, including imprisonment and fines.¹⁰⁷ Nevertheless, the limited resources of the MF¹⁰⁸ and the history of relaxed rules in this area will likely delay the effectiveness of this legislation in Japan.¹⁰⁹

In Hong Kong, insider trading activity was first criminalized by Section 140 of the 1974 Securities Ordinance. This initial statute was never enforced, however, and this particular¹¹⁰ Section was repealed in 1978 with the enactment of Part XIA.¹¹¹

Rather than providing for criminal or civil punishment, the 1978 provision penalizes an offender by publicizing the findings of the "Insider Dealing Tribunal," the body charged with investigating suspected violators.¹¹² Publication follows a thorough Tribunal inquiry and details the Tribunal's findings, in which the subject of the inquiry is either exonerated or inculcated in the Tribunal's report.¹¹³ This unique regulatory

102. See Oda, *Japan Moves Against Insider Trading*, Fin. Times, June 2, 1988, § 1, at 10 [hereinafter *Japan Moves*].

103. See L. Loss, M. Yazawa & B. Banoff, *Japanese Securities Regulation* 38 (1983).

104. See Grass, *Internationalization of the Securities Trading Markets*, 9 Hous. J. Int'l L. 17, 48 (1986) [hereinafter *Trading Markets*].

105. See *Japanese Insider Trading Law Likely To Take Effect in 1989*, 20 Sec. Reg. & L. Rep. (BNA) 881 (June 10, 1988) [hereinafter *Japanese Insider Trading*] (discussing proposed amendments to Japan's securities laws being enacted to crack down on insider trading activity).

106. See Oda, *Japan Moves*, *supra* note 102, at 10. In 1987, a bank sold all of its shares of Tateho Chemical Company just before this company announced heavy losses. See *id.* Following this incident the MF "recommended a number of measures to deal with insider trading including the adoption of a statute specifically making insider trading unlawful." H. Bloomenthal & Holme Roberts & Owen, *Emerging Trends in Securities Law* § 10.04, at 10-20 (1989) [hereinafter *Emerging Trends*].

107. See *Japanese Insider Trading*, *supra* note 105, at 881.

108. See *Investment Banks*, Bus. Int'l; Financing Foreign Operations (March 1, 1991), available in LEXIS, Asiapc Library, Japan File.

109. See Wagstyl, *Tokyo SE Reticence on Insider Deal Casts Doubt on Reforms*, Fin. Times, Aug. 27, 1988, § I, at 20.

110. See Rogers, *Hong Kong*, in 10B *International Capital Markets and Securities Regulation* § 12.12[1][a], at 12-118 (H. Bloomenthal ed. 1991).

111. See *id.* § 12.12[1][b], at 12-119.

112. See *id.* § 12.12[2][a], at 12-120.

113. Culpable insider trading under this provision is defined as trading conducted by a

system, however, has had little success deterring inside trading activity.¹¹⁴ Debate in Hong Kong continues as to whether this should be considered a criminal or civil offense and whether more traditional sanctions should attach.¹¹⁵

5. Other Developments

Switzerland recently criminalized insider trading activity,¹¹⁶ and proposals for legislation in other countries continue to develop.¹¹⁷ Major insider trading prohibitions may be enacted over the next few years as the internationalization of the world's securities markets continues and pressure increases from those nations with substantial regulations.¹¹⁸

C. Comparison of Central Aspects of Regulation

The United States has the most comprehensive system of regulating insider trading activity, and these regulations have served as a model for many foreign insider trading prohibitions.¹¹⁹ Even slight variations from the United States model, however, can have a marked effect on the applicability of insider trading laws.¹²⁰ In addition, national philosophies, as well as a country's allocation of resources to combat this conduct, determine the extent to which securities laws violations—and in turn, insider

connected person, or by one who is tipped by a connected person, based on " 'relevant information' concerning those securities." *Id.* § 12.12[2][b][i], at 12-120. A connected person is a "director, employee or 'substantial shareholder'" of the corporation whose shares are traded or of any "related corporation". 10B Rogers, *supra* note 110, § 12.12[2][b][iii], at 12-121. Information that is nonpublic and materially price sensitive constitutes relevant information under this provision. *See id.* § 12.12[2][b][ii], at 12-121.

Culpability under this regulation also requires that the securities traded were listed on the Hong Kong stock exchange at the time of the trading or within the preceding five years. *See id.* § 12.12[2][b][iv], at 12-122.

114. *See* 10B Rogers, *supra* note 110, § 12.12[3][a], at 12-128.

115. *See Trading Procedures*, Bus. Int'l; Financing Foreign Operations (Dec. 1, 1990), available in LEXIS, Asiapc Library, HKong File.

116. *See SEC Has Sought Enforcement Help Under Swiss Treaty, Attorney Says*, 20 Sec. Reg. & L. Rep. (BNA) 1294 (Aug. 19, 1988); *see also* Emerging Trends, *supra* note 106, § 10.04, at 10-23 (effective July 1, 1988, the Swiss law applies to insiders, tippees and tippees).

117. For a discussion of proposed insider trading regulations in the Netherlands, Belgium and Ireland, *see Unification*, *supra* note 74, at 444-45.

118. *See SEC's Enforcement Program*, *supra* note 2, at 1386.

119. *See* Japan's Securities and Exchange Law, *supra* note 101, art. 189. The Law prohibits short-swing trading by high level, specified insiders, modeled after Section 16(b) of United States' '34 Act. In addition, the SEC inspired the creation of the French securities regulatory agency, the Commission des Operations de la Bourse. *See Tunc, A French Lawyer Looks at American Corporations Law and Securities Regulation*, 130 U. Pa. L. Rev. 757, 759 (1982).

120. For example, in the United Kingdom, to be subject to the insider trading prohibitions, persons "must have some direct connection with the issuer". *Trading Markets*, *supra* note 104, at 47. Alternatively, under American law, where there must be a fiduciary obligation to be bound by the regulations, less of an issue is made over the direct link between issuer and trader. *See infra* notes 138-39 and accompanying text. This distinction, while seemingly minimal, may enable the United States laws to enjoy greater utility.

trading activities, are sanctioned in individual nations.¹²¹ Following is a review of central aspects of United States and foreign insider trading regulations.

1. Criminal v. Civil Liability

Statutes which include civil liability generally require lesser standards of proof than those that impose criminal liability.¹²² For this reason, countries that enact civil provisions against insider trading should have more success in effectively punishing violators than those who impose purely criminal sanctions.

United States regulation is unique in that it developed predominantly from a general criminal anti-fraud statute.¹²³ Today, however, violators in the United States are subject to both criminal and civil penalties.¹²⁴ Similarly, the United Kingdom, France, and Denmark began their regulation by criminalizing insider trading.¹²⁵ But of these three, only the United Kingdom has followed the United States in imposing civil liability as well.¹²⁶ The EC Directive on insider trading, effective in 1992, fails to establish any uniform sanctions for the member states.¹²⁷

Like those in the United Kingdom and the United States, Canadian provincial laws impose both civil and criminal penalties for insider trading violations.¹²⁸ Sanctions in Canada may be imposed by civil codes or provincial legislation, and these are augmented by the federal criminal code.¹²⁹ The Australian National Code, which has been adopted by all of its states, similarly imposes both criminal and civil liability.¹³⁰

Although Japan enacted an anti-fraud statute modeled after Rule 10b-5, this initial provision was not enforced because the MF was reluctant to

121. See *Global Securities Market*, *supra* note 1, at 306.

122. "[A] criminal statute is to be strictly construed and cannot be used as the flexible tool needed to check the range of possible [trading] transactions." 10A Miller, *supra* note 68, § 7.16[1], at 7-37.

123. See *supra* note 9 and accompanying text. Rather than following this approach, most nations have instead enacted laws specially dealing with insider trading.

124. For an in-depth discussion on the prosecution of insider trading cases and the criminal and civil sanctions available under United States law, see D. Langevoort, *supra* note 12, at 199-239.

125. See *supra* notes 56-59, 66-67, 73-74 and accompanying text.

126. See *Comparative Analysis*, *supra* note 40, at 182.

127. See *supra* text accompanying note 82. The EC Directive sets only general minimum standards for insider trading regulation. The enactment of more specific prohibitions and sanctions remains within the authority of the individual nations. See Note, *Insider Trading and the EEC: Harmonization of the Insider Trading Laws of the Member States*, 8 B.C. Int'l & Comp. L. Rev. 151, 169 (1985) [hereinafter *Laws of the Member States*].

128. See, e.g., Securities Act, R.S.O., ch. 466, § 118(1) (1980) (Can.) (makes violating insider trading prohibitions a crime).

129. See *supra* notes 87-88 and accompanying text.

130. See *supra* note 96 and accompanying text; see also H. L. Ffrench, *International Law of Take-Overs and Mergers: Asia, Australia and Oceania* 358 (1986) (discussing Section 128 of the Securities Industry Act of 1980; Act provides for civil relief to those hurt by insider dealing and makes this activity a crime).

prosecute absent express language criminalizing insider trading.¹³¹ Japan has since amended its laws to include more specific prohibitions, and the law now explicitly imposes criminal penalties for insider trading violations.¹³² Hong Kong does not subject insider traders to either civil or criminal penalties. Instead, as discussed, punishment is in the form of publication of the violator's culpability in an official report.¹³³

Pursuant to the aforementioned French, Danish, and Japanese prohibitions, the agency charged with prosecuting insider trading offenses in these countries is faced with the difficult burden of establishing each element of a criminal offense before sanctions are available. This requirement severely hampers the effectiveness of these regulations.¹³⁴ Uniform establishment of civil liability for insider trading activity would assist the international enforcement of insider trading laws in these nations.

2. Who Are "Insiders?"

The inclusion or absence of a specific definition for "insiders" in prohibitions of insider trading is the second element that appears to have substantial impact on the effectiveness of insider trading laws. Failure to provide even a general framework for defining insiders may result in a provision too broad to provide effective regulation, as enforcers may be reluctant to subject anyone to liability. Conversely, a strict definition of insiders may impede enforcement efforts by making it difficult to fit potential violators into the rigid classification required under the law.¹³⁵

Regulations in the United States do not contain a precise definition of "insiders."¹³⁶ Rather than hindering enforcement, however, the absence of a strict definition has instead allowed broad extensions of liability for insider trading.¹³⁷ In the United States, the notion has developed that insiders are, at a minimum, those who have a fiduciary duty to either disclose material nonpublic information or refrain from trading.¹³⁸ This

131. See *supra* note 102 and accompanying text; see also H.L. French, *supra* note 130, at 22 (stating Article 58 of Securities and Exchange Law has not been applied to insider trading cases).

132. See *supra* note 107 and accompanying text; see also *Comparative Analysis, supra* note 40, at 188-89 (discussing 1988 proposal to amend Japan's law).

133. See *supra* note 112 and accompanying text.

134. See *supra* notes 69, 74 and accompanying text. While prohibitions making insider trading a crime may have an adverse effect on the ability to obtain convictions, it is also true that creation of criminal liability is a positive step towards enforcement in countries where insider trading was previously subject to no restrictions at all.

135. As one author explains, by providing an express definition of insider trading the United Kingdom has created "a more restrictive application of the law." *Comparative Analysis, supra* note 40, at 191.

136. See *id.* at 178, discussing Congress's intentional failure to include a definition in 1988 insider trading statute.

137. The absence of a definition for insider trading has led to "expansive interpretation by the courts of impermissible insider trading conduct [and] has enabled the SEC to successfully prosecute an increasing number of violators." *Id.* at 179.

138. See *supra* notes 15-17 and accompanying text. "The fiduciary principle, however,

fiduciary duty has also been extended to "temporary insiders" and tippees.¹³⁹ Similarly, the EC Directive adopts a moderate definition, encompassing both fiduciaries and tippees,¹⁴⁰ to avoid either a very limited or an over-broad construction. In Australia, insiders are those associated with a securities issuer who learn of the subject information through this association.¹⁴¹ Identical in most respects to the United Kingdom's laws, the Australian Code emulates United States law in that it expressly includes as insiders shareholders of more than ten percent of a company's stock.¹⁴² Tippees who receive the information from an associated person are also insiders under the Code.¹⁴³ Japan's new criminal insider trading provision creates three categories of insiders. These are: the corporate insiders, quasi-insiders (including attorneys, brokers, and others), and public officials who have access to inside information.¹⁴⁴ Hong Kong's provisions also require that, in order to justify an investigation, the trading must have been done by a connected person or by one who received a tip from such connected person.¹⁴⁵

The insider trading laws of the United Kingdom mandate strict adherence to a theory of liability premised on one's status as a "connected person."¹⁴⁶ This theory is also applicable to tippees who receive information from connected persons.¹⁴⁷ By requiring a direct link between the trader and issuer, this approach is more narrow than those of the other nations and thus is more limited in its application.

An interesting distinction exists between the laws of the Canadian provinces Ontario and Quebec with respect to the characterization of tippees as insiders. In Ontario, tippees are subject to liability as insiders only if they are in a "special relationship" with the issuer as defined in its statute.¹⁴⁸ Pursuant to Quebec's statute, however, insiders include any corporate outsider who trades on what he knows is inside information.¹⁴⁹

is by no means rigid or inflexible; it leaves room for creative interpretation that allows a court so inclined to expand its scope in accord with perceptions about fairness in the securities marketplace." D. Langevoort, *supra* note 12, at 58.

139. See *supra* notes 20-22 and accompanying text. There is also a possibility that this common-law definition of insiders extends to those who misappropriate this information. See *supra* notes 34-40 and accompanying text.

140. See *supra* text accompanying note 78.

141. See *supra* note 94 and accompanying text. This connected status applies to any person in a position "that may reasonably be expected to give him access to the [requisite] information by reason of a professional or business relationship existing between himself and the company or a related company." H.L. Ffrench, *supra* note 130, at 359.

142. See Hambrook, *Australia*, in 10B International Capital Markets and Securities Regulation § 10.09[2], at 10-50-51 (H. Bloomenthal ed. 1991).

143. See *supra* note 95 and accompanying text.

144. See 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 1.08[5][g], at 1-132.

145. See *supra* note 113 and accompanying text; see also H.L. Ffrench, *supra* note 130, at 61 (insiders must have a connection to subject corporation within six months prior to the illegal trading).

146. See *supra* note 61 and accompanying text.

147. See *supra* note 60 and accompanying text.

148. See Securities Act, R.S.O., ch. 466, § 131(1) (1980) (Can.).

149. See Securities Act, R.S.Q., ch. 48, § 189(5) (1982) (Can.).

France, in contrast, has a much broader definition of insiders than do these nations.¹⁵⁰ Insiders include the traditional high-level corporate insiders as well as a broad second category consisting of anyone else who obtains the information during the course of his employment.¹⁵¹ Insider trading laws in Denmark, though, do not differentiate between insiders and outsiders.¹⁵²

While most of these foreign statutes are newly enacted and/or little used as of yet, the broad meaning they apply to insiders provides at least the potential for their application to a wide variety of situations. The meaning applied under French law allows for especially great applicability, while the United Kingdom's standard may limit the utility of its otherwise comprehensive regulations.

3. Defining "Inside Information"

Like the definitions of insiders, statutory definitions of inside information can have a profound effect on the applicability and effectiveness of insider trading regulations.

United States law fails to include a specific definition of inside information in Rule 10(b), its original and primary weapon against insider trading.¹⁵³ Later provisions, however, establish that insider information consists of "material, nonpublic information."¹⁵⁴ This construction of inside information provides enough of a framework for imposing liability, but remains broad enough to allow wide application. The United Kingdom restricts this definition only slightly by requiring that inside information be unpublished, specific information likely to materially affect the market price of the security.¹⁵⁵ Australian law echoes this definition.¹⁵⁶ The EC Directive on insider trading includes a corresponding definition of inside information, defining it as nonpublic information that would have significant impact on the price of the security if it were made public.¹⁵⁷ Japan's statute provides a broad range of matters to which nonpublic information must refer in order to qualify as inside informa-

150. See *infra* note 151 and accompanying text. Other aspects of the French law, however, prevent the broad application of this statute that appears to be available in light of this definition. See *infra* note 157 and accompanying text.

151. See *supra* note 68 and accompanying text. Note, however, that this language does not expressly extend the French definition of insiders to tippees who do not learn the information through their employment. See *Laws of the Member States, supra* note 127, at 171.

152. See *supra* note 74 and accompanying text.

153. See '34 Act, *supra* note 6, § 10(b), 48 Stat. at 881 (codified at 15 U.S.C. § 78j (1988)).

154. See Pub. L. No. 100-704, § 3(a)(2), 102 Stat. 4677 (1988); see also *TSC Industries Inc. v. Northway*, 426 U.S. 438 (1976) (materiality refers to information regarding a security that a reasonable investor would consider important).

155. See *supra* note 57 and accompanying text.

156. See *supra* note 94 and accompanying text.

157. See Dawkins, *EEC Proposes Action On Insider Dealing*, *Fin. Times*, Apr. 29, 1987, § 1, at 48, col. 1.

tion,¹⁵⁸ and Denmark's statute very generally refers to all nonpublic information.¹⁵⁹

In contrast, the meaning given to inside information in France is far narrower. The information must be "precise, special and certain" and must refer to either "technical, commercial or financial" aspects of the issuer.¹⁶⁰

Inside information under Ontario law is defined as information that is price-sensitive due to knowledge of a material fact or a material change in relation to the issuer.¹⁶¹ The remaining Canadian provinces define inside information simply as undisclosed material information.¹⁶²

Definitions applied to inside information in these nations are, again, for the most part uniform in that they refer to nonpublic, price-sensitive information.¹⁶³ France's specialized definition, however, serves as a restraint on the applicability of its insider trading laws, as may Ontario's definition, to a lesser extent.¹⁶⁴ The EC Directive, described above, does not define inside information as strictly as the French law.¹⁶⁵ This omission should give securities authorities subject to the insider trading provision greater flexibility in bringing insider trading charges.

4. Type of Securities Regulated

The effectiveness of insider trading statutes may be hindered if they are made applicable only to securities that are traded on a formal, organized exchange. France, Denmark, and the Canadian provinces each place this restriction on the application of their laws.¹⁶⁶ United States regulations, again, are widely applicable to securities traded both on or off an exchange,¹⁶⁷ and the EC Directive applies to trading of both listed securities and off-market transactions.¹⁶⁸ With off-market trading activity on the rise, application of insider trading regulations to informal exchanges becomes increasingly important.

158. See *Japan Moves*, *supra* note 102, at 10.

159. See *supra* note 74 and accompanying text.

160. See *supra* notes 70-71 and accompanying text. In one case, the Paris Court held that knowledge of rumors did not qualify as inside information under the law. See *Laws of the Member States*, *supra* note 127, at 173 (citing Judgement of May 26, 1977, Cour d'appel Paris, 1978, J.C.P. II No. 18,789).

161. See 10 H. Bloomenthal & S. Wolff, *supra* note 46, § 1.08[5][e], at 1-128.

162. See *id.*

163. See *supra* text accompanying notes 154-58.

164. See *supra* notes 70-71 and accompanying text.

165. See *supra* note 79 and accompanying text.

166. See *supra* notes 67, 74, 85 and accompanying text. The United Kingdom's prohibition of off-market trading is the primary reason it is viewed as having the most comprehensive insider trading regulations of the EC member nations. See *Laws of the Member States*, *supra* note 127, at 176-77.

167. See '34 Act, *supra* note 6, § 2, 48 Stat. at 885 (codified at 15 U.S.C. § 78b (1988)).

168. See *Unification*, *supra* note 74, at 437.

5. Enforcement of Regulations

The adoption of more severe insider trading regulations, without an underlying dedication to the enforcement of these provisions, is not enough to mount a substantial attack on insider trading. Whatever the elements of substantive insider trading regulations, these laws will only be effective in combatting this illegal conduct if they are enforced by national governments and/or regulatory agencies. A country's national philosophy regarding insider trading plays a substantial role in the extent to which illegal trading regulations are enforced.¹⁶⁹

For example, despite the structural similarities between Japan's Securities Exchange Law and the United States insider trading regulations, only extremely limited action has been taken pursuant to the Japanese law,¹⁷⁰ in contrast to the widespread application of the United States law.¹⁷¹ This is primarily due to the fact that the Japanese virtually sanctioned insider trading activity until very recently.¹⁷² Even with the newly enacted changes in Japanese law, this underlying philosophy may remain an obstacle to effective enforcement of illegal trading.¹⁷³ Hong Kong's reluctance to enact traditional civil and criminal laws prohibiting insider trading is also attributable to the national government's underlying acceptance of this conduct as a natural part of securities trading.¹⁷⁴ There has been only one Tribunal Report issued in Hong Kong since the enactment of Part XIIA, and this report was issued more than two years after the alleged insider trading occurred.¹⁷⁵ Until these countries make curbing insider trading a national priority and change their enforcement policies, they cannot successfully deter this activity.

Limited availability of resources to regulatory authorities provides an additional obstacle to thorough enforcement of insider trading laws.¹⁷⁶ Moreover, jurisdictional barriers often inhibit the enforcement efforts of regulatory authorities.¹⁷⁷ This is increasingly true due to the growing

169. See *infra* notes 170, 172 and accompanying text.

170. See L. Loss, M. Yazawa & B. Banoff, *supra* note 103, at 192.

171. See *supra* notes 6-51 and accompanying text.

172. See L. Loss, M. Yazawa & B. Banoff, *supra* note 103, at 192.

173. See *supra* note 109 and accompanying text; see also *Comparative Analysis*, *supra* note 40, at 189 nn.111-12 (insider trading is socially acceptable and common behavior in Japan).

174. See *supra* text accompanying note 110.

175. See 10B Rogers, *supra* note 110, § 12.12[3], at 12-128. In addition, "no transaction is void or voidable by reason of its being an insider dealing." H.L. Ffrench, *supra* note 130, at 62.

176. See, e.g., *Government, Not SIB, Urged To Enforce British Securities Regulatory Scheme*, 19 Sec. Reg. & L. Rep. (BNA) 1846-47 (Dec. 4, 1987) (discussing an argument that the British Securities Investigations Board, which has authority to bring prosecutions, should not be the body charged with this responsibility due to its lack of commitment to the enforcement of British securities laws and due to the dearth of junior investigators available to look into insider trading activity).

177. See *supra* note 72 and accompanying text. In the past, French and British insider trading investigations have been hampered by the alleged violators' use of foreign banks

number of insider trading cases that entail extraterritorial elements.¹⁷⁸

PART II: INTERNATIONAL ENFORCEMENT OF INSIDER TRADING LAWS

A. Introduction

Technological advances have enabled the trading of United States securities to take place outside of the country.¹⁷⁹ As a result, much of today's illegal trading of American securities is facilitated by the use of foreign brokers and institutions.¹⁸⁰ Both Dennis Levine and Ivan Boesky, for example, utilized foreign bank accounts to aid their illegal trading.¹⁸¹

As discussed, United States law is by far the most comprehensive. Indeed, many countries have yet to impose substantial insider trading laws at all. Absent the enactment of uniform prohibitions of this activity worldwide, an event which is not likely to occur soon, if ever,¹⁸² some traders will take advantage of the discrepancies by trading outside of those nations imposing harsh penalties.¹⁸³ Therefore, despite existing jurisdictional and extraterritorial discovery limitations, international application of United States insider trading laws is essential to maintaining control over illegal insider trading activity.¹⁸⁴

for the trading activity. See Cruickshank, *Insider Trading and the EEC*, 10 Int'l Bus. L. 345, 346 (1982).

178. This is the greatest obstacle faced by the SEC in its enforcement efforts. For an in-depth discussion of these barriers and the methods used by the SEC to overcome them, see *infra* notes 186-267 and accompanying text.

179. See *supra* note 1 and accompanying text.

180. See D. Langevoort, *supra* note 12, at 25.

181. See *Wall Street Rogues; Where are they Now?*, USA Today, Nov. 23, 1990, at 3B. "The Boesky, Dennis Levine and other high profile cases heightened the need for the SEC to develop an enforcement program that could directly attack violations by U.S. citizens in foreign countries and by non-U.S. persons acting overseas, whose activities significantly affected the U.S. securities markets or U.S. investors." *SEC's Enforcement Program*, *supra* note 2, at 1376.

182. See, e.g., *Global Securities Market*, *supra* note 1, at 306 (citing the cost of adopting uniform regulations, in addition to the varying national market structures and philosophies, as major obstacles to the enactment of uniform regulations worldwide).

183. See D. Langevoort, *supra* note 12, at 25.

184. See *SEC's Enforcement Program*, *supra* note 2, at 1376. This section of the Note focuses on the extension of United States insider trading laws beyond its own national borders. This extension results from the fact that the SEC, more than any other national securities regulatory agency, has increasingly attempted to apply its regulations extraterritorially. See *Emerging Trends*, *supra* note 106, § 10.04, at 10-22; see also *infra* notes 224-33 and accompanying text (discussing bilateral and multilateral cooperative agreements entered into by the SEC to facilitate extraterritorial application of United States securities laws).

The internationalization of the securities markets, however, has affected trading not only in the United States but worldwide. An overwhelming amount of foreign exchange trading takes place on the London market. In addition, a number of foreign companies are listed on the London and Tokyo Exchanges. See *Global Securities Market*, *supra* note 1, at 303 & n. 1.

B. Jurisdictional Barriers to International Enforcement

The United States Constitution requires that minimum standards be met before a United States federal court can acquire personal jurisdiction over an individual and subject matter jurisdiction over a controversy. Acquisition of personal jurisdiction must meet the standards of the Due Process Clause,¹⁸⁵ and subject matter jurisdiction can only be extended if it has been authorized by Article III and Congress.¹⁸⁶

1. Acquiring Personal Jurisdiction

Questions of personal jurisdiction are raised when the SEC attempts to investigate or prosecute insider trading involving either foreign participants or foreign witnesses.¹⁸⁷ The Supreme Court has held that, in acquiring personal jurisdiction over a foreigner, due process requires that it be in keeping with "traditional notions of fair play and substantial justice."¹⁸⁸ This criterion is satisfied when there has been a finding of sufficient "minimum contacts" between the foreign subject and the United States.¹⁸⁹

The Supreme Court's interpretation severely limits the ability of a foreigner to defeat an SEC effort to bring him into a United States court. The Court's criteria will likely be satisfied by any continuous trading of United States securities, any trading conducted through United States accounts, or even by a single act that is directly related to the SEC's claim.¹⁹⁰

2. Acquiring Subject Matter Jurisdiction

The Preamble to the Securities Exchange Act of 1934 states that its provisions "provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails."¹⁹¹ Based upon an interpretation of this language, two tests have developed as the basis to establish subject matter jurisdiction in cases with extraterritorial elements: the "conduct" test and "effects" test.

Pursuant to the "conduct" test, a court will examine where the activities occurred and will determine whether the activity taking place in the

185. U.S. Const. amend. XIV, § 1.

186. U.S. Const. art. III, § 2, cl. 1.

187. See Mann & Mari, *Current Issues in International Securities Law Enforcement*, in P.L.I. International Securities Markets 1 (Aug. 22, 1988) [hereinafter *Current Issues*].

188. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987)(quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

189. *World-Wide Volkswagen v. Woodsen*, 444 U.S. 286 (1980).

190. See, e.g., *SEC v. Tome*, 833 F.2d 1086 (2d Cir. 1987)(acquiring personal jurisdiction over Tome, a foreign citizen who traded United States stock through foreign brokers but had other contacts with the United States unrelated to the trading activity), *cert. denied*, 486 U.S. 1014 (1988).

191. Pub. L. No. 291, 48 Stat. 881 (1934).

United States is substantial in relation to the overall conduct.¹⁹² In *Leasco Data Processing Equipment Corp. v. Maxwell*,¹⁹³ for example, the Second Circuit found jurisdiction under the conduct test. The court held that "abundant misrepresentations" made to an American citizen in the United States constituted substantial conduct even where the remainder of the activities transpired abroad.¹⁹⁴ In a more recent case applying the conduct test, the SEC asserted jurisdiction where a foreigner traded on a foreign exchange through United States accounts on the theory that there was a substantial impact on the United States domestic market.¹⁹⁵

The second test utilized to assert subject matter jurisdiction is the "effects" test. Application of this test requires an examination of the impact that the activities in question, all of which may have occurred abroad, have had in the United States. Where the effect is found to have been significant, jurisdiction may be extended.¹⁹⁶ The first case that applied the "effects" test was *Schoenbaum v. Firstbrook*.¹⁹⁷ In *Schoenbaum*, the Second Circuit asserted jurisdiction despite the fact that the conduct occurred outside of the United States and involved foreign investors.¹⁹⁸ Apparently, the rationale was that the trading of United States securities was held to have injured United States investors.¹⁹⁹ In addition, the Seventh Circuit has applied the "effects" test by examining the foreign conduct to determine if it "caused foreseeable and substantial harm to interests in the United States."²⁰⁰

There are limitations on the extension of jurisdiction under these two tests. In *Bersch v. Drexel Firestone, Inc.*, for instance, the Second Circuit held that conduct that is "merely preparatory" does not constitute substantial conduct where the majority of activity occurs abroad.²⁰¹ Also, the mere involvement of a United States citizen is not enough to confer subject matter jurisdiction.²⁰² Despite these limitations, these tests appear to permit United States courts broad exercise of subject matter jurisdiction over potential violators operating abroad.

C. Extraterritorial Discovery

United States securities laws give the SEC authority to investigate and

192. See Haseltine, *International Regulation of Securities Markets: Interaction Between United States and Foreign Laws*, 36 Int'l & Comp. L.Q. 307, 319 (1987) [hereinafter *Interaction*].

193. 468 F.2d 1326 (2d Cir. 1972).

194. *Id.* at 1339.

195. See *SEC's Enforcement Program*, *supra* note 2, at 1383.

196. See *Interaction*, *supra* note 192, at 321-22.

197. 405 F.2d 200, 206, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968)(*en banc*), *cert. denied*, 395 U.S. 906 (1969).

198. See *id.* 206.

199. See *id.*

200. *Tamari v. Bache & Co.*, 730 F.2d 1103, 1108 (7th Cir. 1984).

201. 519 F.2d 974, 992 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

202. See *id.*

subpoena witnesses "from any place in the United States."²⁰³ United States courts have, in turn, interpreted this language to authorize extraterritorial discovery as long as jurisdictional requirements are met.²⁰⁴ Foreign opposition to this extraterritorial discovery exists, however, and is embodied in statutory restrictions on the release of information. As a result, "[t]he principal problem the SEC confronts in its efforts to police the internationalized U.S. securities markets is obtaining information that is located outside U.S. borders. . . ."²⁰⁵

1. Foreign Secrecy and Blocking Laws

A significant barrier to extraterritorial enforcement of United States insider trading laws surfaces when an SEC subpoena or request for information conflicts with foreign secrecy or blocking laws.²⁰⁶

Some nations have adopted blocking laws requiring specified information to remain confidential in order to protect national interests.²⁰⁷ These statutes safeguard national interests, and thus "private parties to a lawsuit lack the power to waive prohibitions against disclosure."²⁰⁸ Canada, France, and the United Kingdom are among the nations that have enacted blocking statutes.²⁰⁹

Bank secrecy laws make it illegal for a foreign bank to disclose information about its bank records without the customer's authorization.²¹⁰ Secrecy laws may be waived by individual customers provided that this does not prejudice the rights of third parties to whom the bank owes a duty of secrecy.²¹¹ Application of these laws can frustrate an SEC attempt to gain access to information that may be vital to an insider trading case.²¹²

2. Unilateral Attempts to Obtain Discovery

Faced with a foreign secrecy or blocking law, the SEC may resort to

203. 15 U.S.C. 78u(b) (1988).

204. See, e.g., SEC v. Minas de Artemisa, 150 F.2d 215, 218 (9th Cir. 1945) (holding as long as a subpoena has been properly executed in the United States, it may be used to acquire discovery material outside of the country).

205. *Current Issues*, supra note 187, at 1.

206. See *id.* at 9-10.

207. See *id.* at 50.

208. *International Regulation*, supra note 92, at 410 (footnote omitted).

209. See *Current Issues*, supra note 187, at 50-53. France's blocking statute automatically "prohibits the disclosure of certain economic, commercial, financial or other types of information to foreign authorities." *Interaction*, supra note 192, at 313. The Canadian and United Kingdom blocking statutes authorize designated officials to prohibit the disclosure of specified information but, unlike the French statute, do not operate automatically to block disclosure. See Foreign Extraterritorial Measures Act 1984-1985, ch. 49, § 3; Protection of Trading Interests Act of 1980, ch. 11, § 1(3).

210. See The Bahamas Banks and Trust Companies Regulation (Amendment) Act, 1980. See generally Hurd, *Insider Trading and Foreign Bank Secrecy*, 24 Am. Bus. L.J. 25 (1986) (discussing the effects of these statutes on insider trading regulation).

211. *International Regulation*, supra note 92, at 410-11.

212. See *Current Issues*, supra note 187, at 53.

United States courts to compel production of the requested information pursuant to Rule 37 of the Federal Rules of Civil Procedure.²¹³ A court's decision to grant or deny an order to compel will often be based on consideration of the factors listed in Section 40 of the Restatement (Second) of Foreign Relations Law of the United States.²¹⁴ Focusing on international comity considerations, the criteria under the Restatement include: (a) the national interests of each country; (b) the hardship of inconsistent enforcement upon the individual; (c) the extent of the conduct in the foreign nation; (d) the nationality of the individual involved; and (e) the extent to which compliance will be achieved through enforcement.²¹⁵

Generally, United States courts have ordered motions to compel based on an analysis of these factors. In the landmark case *SEC v. Banca Della Svizzera Italiana* ("BSP"),²¹⁶ the court held that BSI could not use Swiss secrecy laws to avoid disclosure and application of United States insider trading laws.²¹⁷ In another case, the Supreme Court introduced a second balancing test focusing on the first factor in Section 40.²¹⁸ This test merely weighs the importance of the requested discovery material against the interests of each nation.²¹⁹ The Court developed this test from Section 437(1)(c) of the Restatement of the Foreign Relations Law but did not state whether the analysis should be exclusive.²²⁰

Use of a unilateral approach to achieve compliance with United States law, such as court-ordered compliance, is problematic for a number of reasons. First, the court might not order compliance with United States law.²²¹ More likely, an order to compel may be ignored where compliance will subject a foreign institution to civil and criminal penalties in its

213. Fed. R. Civ. P. 37; see Note, *Court Ordered Violations of Foreign Bank Secrecy and Blocking Laws: Solving the Extraterritorial Dilemma*, 1988 U. Ill. L. Rev. 563, 577-82. See generally D. Langevoort, *supra* note 12, at 29 (discussion on motions to compel).

214. See *Current Issues*, *supra* note 187, at 31 (citing Restatement (Second) of Foreign Relations Law of the United States § 40 (1965)).

215. See Restatement (Second) of Foreign Relations Law of the United States § 40 (1965).

216. 92 F.R.D. 111 (S.D.N.Y. 1981).

217. Following BSI's refusal to reveal the names of its customers, the SEC moved for a motion to compel. BSI argued that the motion should be denied because BSI would be subject to civil and criminal penalties in Switzerland if it made these disclosures. In granting the SEC's motion, the court stated that "a foreign law's prohibition of discovery is not decisive" on this issue. *Id.* at 114; see also *In re Grand Jury Proceedings v. Bank of Nova Scotia*, 740 F.2d 817, 829 (11th Cir. 1984) (concluding under analysis of Rest. § 40 that United States interests in getting discovery information outweighed those of the Cayman Islands in retaining bank secrecy), *cert. denied*, 469 U.S. 1106 (1985).

218. See *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., S.D. Iowa*, 482 U.S. 522 (1987).

219. See *id.* at 543-44.

220. See *id.* at 544 n.28.

221. See, e.g., *In re Sealed Case*, 825 F.2d 494 (D.C. Cir. 1987) (reversing contempt order against bank for refusal to respond to grand jury subpoena emphasizing that bank had acted in good faith throughout the proceedings), *cert. denied*, 108 S. Ct. 451 (1987).

own country.²²² Finally, as experts have noted, "this unilateral approach [is] time consuming, expensive[,] and strain[s] international relations."²²³

D. *Bilateral and Multilateral Cooperative Approaches to International Enforcement*

Bilateral and multilateral approaches, consisting primarily of cooperative agreements between the United States and foreign countries, are a far better method for conducting successful extraterritorial investigations and promoting transnational enforcement of insider trading regulations.²²⁴ Cooperative agreements have increasingly become the SEC's method of choice for facilitating international enforcement of insider trading regulations.²²⁵ These agreements provide methods for successful extraterritorial discovery by enabling the SEC to work around foreign secrecy and blocking statutes.²²⁶ At the same time, SEC action under these agreements comports with notions of international comity by promoting cooperative regulatory efforts as opposed to forced regulation.²²⁷ The two forms of international cooperative agreements that are used to conduct insider trading investigations and prosecutions are (1) mutual legal assistance treaties for the production of evidence in criminal matters; and (2) memoranda of understanding. Finally, legislative initiatives promoting international cooperation, in addition to meetings between national securities regulators, provide the opportunity for international communication and cooperation regarding worldwide regulation of securities trading.

1. Treaties on Mutual Legal Assistance in Criminal Matters

The United States has entered into bilateral treaties regarding mutual legal assistance in criminal matters with Switzerland,²²⁸ the Netherlands,²²⁹ Turkey,²³⁰ the Cayman Islands,²³¹ and Italy.²³² Treaties with

222. "The Swiss penal Code provides sanctions for persons associated with banks who breach client confidentiality" in violation of its secrecy law. *Current Issues, supra* note 187, at 53.

223. *Id.* at 1.

224. *See Interaction, supra* note 192, at 309. A cooperative approach towards international enforcement of insider trading is preferable to unilateral action because it can better accommodate the different levels of regulatory control existing worldwide. *See id.* For example, unilateral pressure to enforce strict insider trading laws in countries with less-developed regulatory structures could stifle the development of these nations' domestic markets. *See id.*

225. *SEC's Enforcement Program, supra* note 2, at 1386.

226. *See id.*

227. *See id.*

228. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter the Swiss Treaty]. For a detailed analysis of the Swiss Treaty, see *Current Issues, supra* note 187, at 54-63.

229. Treaty on Mutual Legal Assistance in Criminal Matters, June 12, 1981, U.S.-Neth., 21 I.L.M. 48, T.I.A.S. No. 10734 [hereinafter the Netherlands Treaty].

230. Treaty on Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turk., 32 U.S.T. 3111, T.I.A.S. No. 9891.

Columbia, Morocco, Canada, the Bahamas, Belgium, Mexico, and Thailand have been negotiated but have not yet been ratified by both countries.²³³

The SEC has ensured that each of these treaties covers securities law offenses.²³⁴ Pursuant to the treaties, the SEC and the respective foreign regulator agree to provide assistance in the production of evidence for criminal investigations, including insider trading. The Swiss Treaty, for example, "provides for broad assistance in . . . criminal matters . . . includ[ing] assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of business records, and service of judicial or administrative documents."²³⁵

The principal shortcoming of such treaties, however, is their bilateral nature, which limits their availability to the two named nations.²³⁶ A second limitation of many of the treaties is the requirement that the subject matter of the request for assistance be a crime in both nations.²³⁷ This is a particularly significant obstacle to obtaining meaningful cooperation in insider trading investigations because the United States has promulgated more developed insider trading laws than other nations. Mutual assistance treaties also tend to have a limited scope, and their bureaucratic nature often makes obtaining compliance too time-consuming to offer much help.²³⁸

2. Memoranda of Understanding

In an effort to create a less formalized and therefore more expeditious method of obtaining assistance in these cases, the SEC has entered into Memoranda of Understanding ("MOUs") with the appropriate authorities of foreign countries.²³⁹ These MOUs promote mutual exchange of the information needed for the investigation of insider trading and other securities law violations.²⁴⁰

Each party to the MOU agrees to assist and cooperate with the investi-

231. Treaty Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K.-N. Ir., 26 I.L.M. 536 [hereinafter the Cayman Islands Treaty]; see also *Cayman Islands Mutual Assistance Treaty Should Aid Enforcement Efforts*, 18 Sec. Reg. & L. Rep. (BNA) 1051 (July 18, 1986).

232. Treaty on Mutual Assistance in Criminal Matters, Nov. 9, 1982, U.S.-Italy, 27 I.L.M. 574.

233. See *SEC's Enforcement Program*, *supra* note 2, at 1386.

234. See *Current Issues*, *supra* note 187, at 54.

235. *Id.* (citing Letter of Submittal, Senate Ex. F, 94th Cong., 2d Sess. (Feb. 18, 1976)).

236. See *Current Issues*, *supra* note 187, at 54.

237. For example, "except for cases of organized crime, the offenses investigated must have dual criminality" for the Swiss Treaty to apply. *Id.* But see generally Netherlands Treaty, *supra* note 229 (does not require dual criminality).

238. See *SEC's Enforcement Program*, *supra* note 2, at 1386.

239. See *id.*

240. See *id.*

gations conducted by the other.²⁴¹ In 1982, the United States entered into its first MOU with Switzerland,²⁴² creating an official mechanism for requesting and obtaining information needed in SEC investigations of insider trading.²⁴³ The United States has subsequently entered into MOUs with the United Kingdom's Department of Trade and Industry,²⁴⁴ the Japanese Ministry of Finance,²⁴⁵ the Ontario, Quebec, and British Columbia Securities Commissions,²⁴⁶ the Brazilian Securities Commission,²⁴⁷ the Commission des Operations de Bourse of France,²⁴⁸ the Ministry of Finance of the Netherlands,²⁴⁹ the Mexican Commission Nacional de Valores,²⁵⁰ and, most recently, with the Director General of Norway's Banking, Insurance, and Securities Commission.²⁵¹ Additionally, on September 25, 1991, the United States and the United Kingdom entered into a second, more comprehensive MOU.²⁵² The new MOU "provides for mutual assistance 'across a wider range of laws and regulations' and expands the forms of assistance the regulators may provide."²⁵³ Unlike treaties, MOUs are not binding agreements.²⁵⁴ While admittedly this means that neither party is strictly bound to cooperate, the informal character of the MOUs, in contrast to the mutual assistance treaties, apparently facilitates their swift enactment and implementation.²⁵⁵ The MOUs also eliminate the requirement that the subject matter of the investigation be an illegal activity in both countries, a

241. *See id.*

242. This initial MOU has been repealed and replaced with a new one. *See infra* note 243 and accompanying text.

243. Following the enactment of criminal insider trading laws in Switzerland, the United States entered into a second MOU with Switzerland in 1987. *See Current Issues, supra* note 187, at 64.

244. *See U.S., U.K. Sign Agreement to Share Securities, Commodities Information*, 18 Sec. Reg. & L. Rep. (BNA) 1397 (Sept. 26, 1986).

245. *See US, Japan Sign Accord to Share Surveillance, Investigatory Information*, 18 Sec. Reg. & L. Rep. (BNA) 769-70 (May 30, 1986).

246. *Joint Press Release, U.S. and Canadian Provincial Securities Regulators Sign Memorandum of Understanding to Enhance Cooperation in Enforcement*, 11 O.S.C. Bull. No. 1, Jan. 8, 1988.

247. *See SEC, Brazilian Officials Sign Memo to Enhance Enforcement Cooperation*, 20 Sec. Reg. & L. Rep. (BNA) 1059-60 (July 8, 1988). This is the SEC's first MOU with any South American regulatory authority. According to the SEC, "[t]he Brazilian MOU and the Canadian MOU are the most comprehensive agreements on cooperation in enforcement matters between securities regulators negotiated by the SEC." *Id.* at 1059. The Brazilian MOU expressly states that it is applicable to, among others, requests for assistance regarding insider trading.

248. *See SEC's Enforcement Program, supra* note 2, at 1386.

249. *See id.*

250. *See id.*

251. *U.S., U.K. Agree to Broader MOU; First MOU Between Norway, U.S. Signed*, 23 Sec. Reg. & L. Rep. (BNA) 1407 (Sept. 27, 1991).

252. *See id.* at 1406.

253. *Id.*

254. *See SEC's Enforcement Program, supra* note 2, at 1386.

255. *See id.* at 1387.

characteristic of many of the bilateral treaties.²⁵⁶ Therefore, they are particularly useful when the SEC is investigating activity that does not constitute an offense in the foreign nation. Finally, MOUs often provide broader coverage of securities offenses than do treaties.²⁵⁷

3. The International Securities Enforcement Cooperation Act ("ISECA")²⁵⁸

The SEC proposed ISECA to Congress in 1988, and Congress enacted the legislation in two parts. First, ISECA includes a provision that allows the SEC to assist foreign regulators in determining whether there has been a violation of the foreign law, regardless of whether the conduct constitutes an offense in the United States, something the SEC was previously unable to do. This provision was incorporated into Section Six of the Insider Trading and Securities Fraud Enforcement Act of 1988.²⁵⁹ This provision is reciprocal in nature, as it includes, as a consideration for granting assistance, whether the requesting agency has agreed to provide assistance to the SEC.²⁶⁰ It is unlikely that the SEC will provide aid to foreign authorities who fail to cooperate with SEC investigations in their country.

The remaining proposed ISECA provisions were enacted in the Securities Acts Amendments of 1990.²⁶¹ These provisions effectively exempt the SEC from United States disclosure requirements of "confidential documents furnished by foreign securities officials to the SEC."²⁶² Thus the SEC does not have to disclose confidential documents provided by foreign officials, making the officials more likely to disclose information. The provisions also increase the SEC's authority to sanction securities professionals who have conducted illegal activities in a foreign country.²⁶³

256. See *supra* note 237 and accompanying text.

257. The Canadian MOU, for instance, provides that the two regulatory agencies will even "investigate, using subpoena power where necessary, on behalf of one another, to ensure that the necessary information is obtained." *Current Issues, supra* note 187, at 73. The Japanese MOU, however, provides for assistance only on a case-by-case basis. See *supra* note 245.

258. See generally Comment, *International Securities Enforcement Cooperation Act and Memoranda of Understanding*, 31 Harv. Int'l L.J. 295 (1990) [hereinafter *Enforcement Cooperation Act*] (outlining the provisions of this Act).

259. Pub. L. No. 100-704, § 6, 102 Stat. 4677, 4681-4682 (1988).

260. See *id.* § 6(b)(2), 102 Stat. at 4682.

261. Securities Acts Amendments of 1990, Pub. L. No. 101-550, 104 Stat. 2713 (1990).

262. *Enforcement Cooperation Act, supra* note 258, at 295. This was an extremely significant change, as foreign authorities and governments were often reluctant to provide the SEC with confidential information essential to insider trading investigations because this information was required to be disclosed under United States law. See *id.*

263. See *Enforcement Cooperation Act, supra* note 258, at 295.

4. The International Organization of Securities Commissions ("IOSCO")²⁶⁴

Finally, in addition to international legislation, international organizations further enable cooperation among national securities regulators. IOSCO is an international organization of securities regulatory agencies, originally organized by Great Britain, that meets annually and provides a forum for participating agencies to discuss current securities issues.²⁶⁵ IOSCO draws representatives from approximately fifty countries, and with the continued development of insider trading regulations around the world and almost daily announcements of new treaties and MOUs, IOSCO becomes an increasingly important organization.²⁶⁶ This organization is continuously working with participating nations to create legislation facilitating further enactment of bilateral and multinational cooperative agreements between securities authorities.²⁶⁷

CONCLUSION

As technological advancements continue to promote international economic interaction, and as the movement towards the creation of a global market continues, the regulation of national securities markets becomes increasingly complex. Successful development of this world market has led to a breakdown of the traditional system of unilateral securities regulation.

Barriers to international regulation are beginning to erode, however, as evidenced by the increasing enactment of insider trading and other securities legislation around the world. In addition to the adoption of national legislation and enforcement policies, international cooperation has become essential to policing insider trading activity. Efforts at international cooperation have begun, encouraged primarily by those nations with major legislation in this area, in the form of Mutual Assistance Treaties, MOUs, and the establishment of international securities organizations, such as IOSCO. The continued promotion of participation through cooperative agreements, particularly multilateral agreements and policies, is essential for successful prosecution and deterrence of insider trading activity at the international level.

264. See *Current Issues*, *supra* note 187, at 90-91.

265. See, e.g., *Regulators Agree To Move Cautiously On Enforcement, Information Exchanges*, 20 Sec. Reg. & L. Rep. (BNA) 1861 (Dec. 9, 1988) [hereinafter *Regulators Agree*] (discussing talks at IOSCO's 13th annual meeting).

266. See *SEC's Enforcement Program*, *supra* note 2, at 1377.

267. See *Regulators Agree*, *supra* note 265, at 1862.

