Journal of Comparative Business and Capital Market Law 6 (1984) 1–54
North-Holland

WAIVER BY CONDUCT – A POSSIBLE RESPONSE TO THE INTERNATIONALIZATION OF THE SECURITIES MARKETS *

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1. Introduction

The internationalization of the securities markets has accelerated and will continue. For example, it soon may be possible to trade many securities 24 hours a day because of improved international communications and because of the growth of securities markets in New York, Tokyo, Zurich, London, Osaka, Toronto, and other financial centers [1]. As a result, national markets – particularly those in the United States – are increasingly affected by events initiated outside their borders, and the maintenance of fair and honest markets is a common interest.

Although all markets are becoming internationalized, each is policed with local laws. These laws differ substantively and procedurally, and one nation's laws often frustrate another's enforcement efforts. In particular, secrecy and blocking laws create difficulties. In these circumstances, the ability to maintain market integrity will require improved cooperation among nations. It will also require new approaches for investigating and prosecuting persons who engage

* Some of the ideas presented in this article have appeared in abbreviated form elsewhere: *Crime and Secrecy: The Use of Off-Shore Banks and Companies: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 134, 318 (March 15–16; May 24, 1983) (testimony of John Fedders); J. Fedders, Remarks to the Seminar on Litigation of Business Matters in the United States and International Legal Assistance, Zürich, Switzerland (Sept. 27, 1983) (available in the files of the Journal of Comparative Business and Capital Market Law); J. Fedders, *Foreign Secrecy: A Key to the Lock*, N.Y. Times, Oct. 16, 1983, §3 (Business), at 2, col. 3.

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0167-9333/84/$3.00 © 1984, Elsevier Science Publishers B.V. (North-Holland)

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in fraud in connection with transnational securities transactions.

This article develops a new approach. Section 2 presents the scope of the problem and considers the national interests at stake. Section 3 describes the practical problems faced by the Securities and Exchange Commission (the SEC). Section 4 reviews earlier initiatives and judicial efforts to supply the SEC with appropriate enforcement tools. Section 5 provides a new framework for analyzing the problems created by the internationalization of the securities markets. Section 6 concludes with a discussion of possible legislation based on the premise that the act of effecting a securities transaction in the United States may constitute a waiver by conduct of applicable secrecy laws.

2. Background

2.1. The internationalization of the securities markets

The Chairman of the SEC, John S.R. Shad, has said that the United States has "by far the best capital markets the world has ever known – the broadest, the most active and efficient, and the fairest " [2]. They also are well managed and policed. These factors have attracted capital to the U.S. capital markets from foreign and domestic investors and have encouraged foreign issuers and governments to register and sell their securities in the United States.

Foreign participation in the U.S. securities markets has increased dramatically in recent years. From 1978 to 1982, purchases of stocks in the United States by foreign persons and institutions, as reported by U.S. banks and brokers, increased from $20.1 billion to $41.8 billion [3]. During the same period, sales of stocks in the United States by such persons and institutions rose from $17.7 billion to $37.9 billion [4]. Transactions in bonds by foreign persons and institutions increased from $3.5 billion in purchases and $2.4 billion in sales to $11.3 billion in purchases and $9.8 billion in sales [5]. Total foreign investment in the United States is estimated to have increased from $25.6 billion in 1971 to $42.4 billion in 1978 and to $99.2 billion in 1982 [6].

The U.S. markets also are an increasingly important source of capital for foreign nations. At the end of 1982, 250 foreign issuers and 25 foreign governments had securities registered with the SEC. From November 1982 to May 1983 alone, the first six months after the SEC instituted a new short form registration statement, eleven foreign companies registered approximately $1.2 billion in offerings with the SEC. As noted by Michael Coles of Goldman, Sachs & Co.:

> The process of registering with the SEC can be a painful and time-consuming one. Nevertheless, once this bridge has been crossed, entities that are substantial users of capital then have access to the broad range of U.S. capital markets, which can frequently provide funds in greater size or on more favorable terms than alternative markets [7].

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2.2. Foreign secrecy and blocking laws versus U.S. securities laws: a collision of interests?

The internationalization of the securities markets has contributed to an increase in the number of transactions effected in the United States by financial institutions that are located in jurisdictions with secrecy or blocking statutes. At present, there are more than 15 jurisdictions with secrecy laws and at least 16 jurisdictions with blocking laws.

Secrecy laws prohibit the disclosure of business records or the identity of banks' customers [8]. Blocking laws condition the disclosure, copying, inspection, or removal of documents located in the territories with such laws on the express consent of governmental authorities [9].

When questionable transactions are effected through foreign financial institutions located in jurisdictions with nondisclosure statutes, the SEC is often unable to obtain the information needed for its investigation. As a result, persons who effect transactions through nonresident intermediaries are often able to conceal their identities and impede investigations of their conduct.

Secrecy laws reduce the ability of the SEC to police the markets in order to insure their integrity. They open the way for wrongdoers to threaten the fairness of the U.S. capital markets. As a result, secrecy and blocking laws have created a de facto double standard for enforcement of the securities laws. A strict standard exists for those trading within the United States through domestic broker–dealers, banks, or other financial institutions, and another, lesser, standard exists for those trading within the United States but through foreign institutional intermediaries. As securities laws violators increase their use of foreign intermediaries, the threat to the U.S markets will grow.

This double standard must be eliminated. Effective enforcement is essential; it assures investors, both foreign and domestic, that the U.S. securities markets are fair and honest.

2.3. The need for a new international consensus based on the waiver by conduct principle

Foreign financial institutions effecting transactions on the U.S. securities markets engage in conduct within the United States. In addition, the persons who use such institutions as agents in such transactions also engage in conduct within the United States [10]. There is a deliberate and purposeful entry into the territory of the United States.

The Supreme Court has held that a defendant will be found to have submitted to the jurisdiction of a court when the "defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" [11]. Accordingly, when a foreign financial institution and its customer enter into a securities transaction

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in the United States, they deliberately avail themselves of the privilege of conducting activities within the United States, "invoke the benefits and protections" of U.S. laws, and submit to U.S. jurisdiction [12].

Many nations consider their sovereignty threatened when the SEC seeks to penetrate the veil provided by their secrecy laws and blocking statutes. They overlook the fact that the conduct under investigation, although ordered or initiated within their territory, is carried out in the United States. They fail to recognize that, when secrecy or blocking laws are asserted to cloak such transactions, the sovereignty of the United States is impaired.

The relevant question is whether the secrecy laws or blocking statutes of one nation should be given extraterritorial application to cloak transactions that occur in the United States or any other nation. Nations should recognize that it is the customer's voluntary choice to engage in conduct within the United States, whether directly or through the intermediary of a foreign financial institution. They should recognize that such conduct involves a deliberate decision to forgo the protections of any secrecy provisions that the financial institution, the customer, or an agent might normally claim with respect to conduct that occurs within the territory of a secrecy jurisdiction.

Viewed from this perspective the issue is not the extraterritorial application of U.S. laws or the threat to the sovereignty of other nations. If the conduct in the United States is viewed as a waiver of otherwise applicable secrecy provisions, a potential conflict between sovereigns and an impediment to the SEC's investigations would be removed.

The principle of "waiver by conduct" is consistent with international comity. When a person has the right to waive the protections of a secrecy law, the act of effecting a securities transaction should serve to evidence the waiver for purposes of both the U.S. and foreign law. Accordingly, it recognizes the sovereignty and laws of nations that have secrecy laws, while providing a basis for reaffirming U.S. sovereignty and the integrity of its securities markets [13].

Blocking statutes involve national interests which generally cannot be waived by private parties. The principles of comity, however, should lead other nations to adopt a policy of restraint and to refrain from applying blocking statutes to cloak conduct that occurs within the United States.

3. The nature of the problem

3.1. Impediments to enforcement

International access to the U.S. securities markets has always presented a challenge to the enforcement efforts of the SEC. In addition, foreign bank secrecy statutes have long been recognized as a significant problem. More than

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a decade ago, Congress reported:

> Secret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of "white collar" crime ... [and] have allowed Americans and others to avoid the laws and regulations concerning securities and exchanges ... The debilitating effects of the use of these secret institutions on Americans and on the American economy are vast [14].

Similarly, blocking statutes often prevent the SEC from gaining access to information held by foreign institutions.

Secrecy and blocking laws have frustrated the SEC's efforts in cases dealing with (1) insider trading [15]; (2) disclosure requirements concerning acquisitions of corporate control [16]; (3) price manipulation [17]; (4) registration requirements of the Securities Act of 1933 [18]; (5) questionable or illegal payments [19]; (6) the looting of corporate assets [20]; and (7) the "laundering" of funds generated by other illegal activities [21]. Some examples will demonstrate the problems faced by the SEC.

3.1.1. Secrecy law example: A market fraud hypothetical

XYZ Corporation plans a tender offer for the shares of ABC Corporation. At this stage, while the information is not yet available to the public, an officer of XYZ or one of its professional consultants places a purchase order for the securities of ABC through a bank in a secrecy jurisdiction. Because the transaction is effected through a bank in a secrecy jurisdiction, the SEC is denied access to the information necessary to determine whether Sections 10(b) and 14(e) of the Securities Exchange Act [22] and Rules 10b-5 and 14(e)-3 [23] promulgated thereunder have been violated. If the transaction had been conducted through a U.S. brokerage firm, the SEC could quickly identify the individual involved [24].

3.1.2. Blocking law example: A disclosure fraud hypothetical

The SEC is investigating the fraudulent financial disclosures of a U.S. based multinational corporation with a significant subsidiary in a country with blocking laws. The SEC's enforcement staff subpoenas the U.S. parent requesting production of the foreign subsidiary's books. If the records are maintained by the subsidiary in a country with blocking laws, the SEC may be denied access to the documents, despite the fact that they could be obtained if they were located in the U.S. offices of the corporation [25].

3.2. The role of the Securities and Exchange Commission

The SEC is the agency charged with administering the Securities Act of 1933 and the Securities Exchange Act of 1934, the principal statutory components of the federal regulatory scheme governing transactions in securities [26]. In adopting this legislation, Congress recognized that the United States has a

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significant national interest in protecting the integrity of its securities markets. Section 2 of the Exchange Act establishes the necessity for regulating securities transactions:

[Securities transactions are] affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto ... and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, ... and to insure the maintenance of fair and honest markets in such transactions [27].

The SEC's most important enforcement tool is the statutory authority to seek a court order enjoining a person from engaging in violations of provisions of the securities laws. The SEC may seek an injunction not only where there is evidence of past violations but also where it appears that violations are about to occur.

The violation of such an injunction is punishable by contempt of court proceedings, which can result in imposition of a fine or imprisonment. Courts may also order additional equitable relief in such an action, including the disgorgement of illicit profits. The purpose of such remedies is not to punish a person for past conduct but to deter future violations.

3.3. The Securities and Exchange Commission's power to investigate

The SEC's power to monitor the securities markets depends upon its power to investigate. Under the securities laws, the SEC is granted broad investigatory powers to determine whether a securities violation has occurred or is threatened. In addition to having the discretion to initiate investigations, subpoena witnesses, and require the production of relevant documents, the SEC can invoke the aid of the district courts in the case of contumacy or refusal to obey a subpoena [28].

The courts have made clear that the SEC's power to subpoena documents and witnesses is not limited to those documents and witnesses located within the territorial confines of the United States [29]. Courts are willing to order corporations subject to their jurisdiction to produce books and records located in a foreign country:

The obligation to respond [to the subpoena] applies even though the person served may find it necessary to go to some other place within or without the United States in order to obtain the documents required to be produced. Congress having clothed the Commission with broad investigatory powers, we should be slow to impute to it the purpose of creating a loophole for companies incorporated abroad but which, like appellee, are actively doing business and peddling their securities in the United States [30].

Recent court decisions have permitted other U.S. law enforcement authorities to obtain orders requiring the production of documents and information

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located abroad in the course of their investigations [31].

Service of a subpoena upon a citizen or alien within the territory of the United States presents few obstacles to the SEC [32]. In *Federal Trade Commission v. Compagnie de Saint Gobain-Point-à-Mousson* [33], the court indicated, however, that subpoenas cannot be served outside the United States without approval by officials of the nation involved. The court reasoned that the compulsory nature of subpoenas intrudes upon the sovereignty of states by compelling specific acts by its nationals.

The questions decided in *Saint Gobain* were whether "Congress expressly or impliedly authorize[d] the Federal Trade Commission ... to serve its investigatory subpoenas directly upon citizens of other countries by means of registered mail" [34], and whether the district court exceeded its jurisdiction by enforcing such a subpoena [35]. The court reasoned that there is a difference between the service of a summons or a complaint and the service of an investigative subpoena, since the former are intended to provide a defendant with notice that a legal action has been commenced and the latter seeks to compel specific acts [36].

However, the court noted that direct service of U.S. subpoenas abroad does not violate international law when a foreign nation consents through an international convention to service of compulsory process upon its nationals. The court also said that a nation may consent to a particular request for service by specifying an appropriate procedural mechanism for service on the serving nation's own citizens [37].

3.4. The effect of secrecy and blocking laws on enforcement

Secrecy and blocking laws greatly limit the SEC's ability to enforce the laws and its regulations uniformly. Normally, when transactions are suspect, the enforcement staff requests the trading records of the broker and customer involved and takes testimony to determine whether illegal conduct has occurred or may be occurring. Similar action is taken when investigating suspect corporate disclosure.

When a suspicious transaction is executed by a bank located in a secrecy or blocking statute jurisdiction, a claim of protection by foreign secrecy or blocking laws is often interposed. In such cases, foreign banks and foreign broker–dealers may be prevented from cooperating with the SEC's investigations and enforcement actions even when they desire to cooperate.

The process by which an individual may evade the U.S. securities laws by using a foreign bank as an intermediary has been described by one former prosecutor as follows:

> Most Swiss banks have very large, very active accounts with brokers in New York. These accounts are maintained in the name of the Swiss bank. The securities of all the bank's customers may be lumped in together and there is no record at the New York broker of the identities of the bank's customers, the true owners of the securities... [38].

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It is essential, if the SEC is to carry out its statutory mandate to protect the fairness and integrity of the domestic securities markets, that the staff of the SEC be able to determine the identity of such purchasers and the relevant facts concerning the transactions.

4. Confronting the problem

4.1. Compelling discovery in a federal court

After it has concluded its investigation, the SEC can initiate an action in a federal district court, availing itself of the full scope of discovery under the Federal Rules of Civil Procedure [39]. If there has been effective service of a subpoena, or if a request for document production has been made and the recipient refused to comply, the SEC can seek a court order under Rule 37 of the Federal Rules of Civil Procedure to compel the requested production [40]. If this order is disobeyed, the court may impose sanctions which can include adverse findings, money fines, or contempt proceedings. However, the effectiveness of these sanctions depends upon the court's ability to enforce them.

A Rule 37 example – SEC v. Banca Della Svizzera Italiana (the St. Joe case)

The *St. Joe* [41] case demonstrates that it is possible to obtain discovery from foreign financial institutions in connection with a SEC enforcement action, despite the existence of secrecy laws. The case involved transactions in the common stock and call options for the common stock of St. Joe Minerals Corporation just prior to the announcement of a take-over bid for that corporation. The case represents one of the most significant achievements of the SEC in combating foreign secrecy laws through litigation.

After the bank in that case refused to provide needed information, the SEC made an effort through the Departments of State and Justice and the Swiss authorities to use noncompulsory means to learn the customers' identities. No such solutions were available. As a result, in October 1981, a motion seeking to compel production of the requested information was filed in federal court.

In November 1981, Judge Milton Pollack of the U.S. District Court for the Southern District of New York granted the SEC's motion and ordered the bank to either disclose its customers' identities or risk substantial sanctions, which could include fines of $50,000 for each day of noncompliance and a ban on trading in the U.S. securities markets [42]. Using Section 40 of the Restatement of Foreign Relations Law [43], Judge Pollack balanced the vital national interests at stake, the hardship which would be imposed by the decision, and the good faith of the parties. He stated:

> The strength of the United States interest in enforcing its securities laws to ensure the integrity of its financial markets cannot seriously be doubted. That interest is being continually thwarted by the use of foreign bank accounts [44].

He concluded:

It would be a travesty of justice to permit a foreign company to invade American markets, violate American laws if they were indeed violated, withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law [45].

Confronted with Judge Pollack's opinion and the possibility of substantial fines, the bank obtained a waiver of the secrecy laws from its customer and produced the requested information.

The *St. Joe* case represents a successful example of the SEC's ability to use litigation to obtain information and evidence. However, Rule 37 does not always provide a means of acquiring information [46]. The *St. Joe* case was unusual because the special circumstances of that case permitted the SEC to file an enforcement action, and utilize Rule 37, even though it had not yet identified the defendant involved.

Clearly, the *St. Joe* case is an extraordinary solution for an extraordinary set of facts. Moreover, a case-by-case method of analyzing whether production of information will be compelled does not provide the most effective deterrent against securities laws violators. Once a foreign financial institution, a subsidiary of a U.S. based multinational, or a nonresident of this country becomes involved in a SEC investigation or lawsuit, the complications and costs mount rapidly. Although Rule 37 provides one avenue for obtaining documents and evidence, the SEC must allocate an inordinate amount of resources and manpower to the task in order to strip away the veil provided by foreign laws. Unless potential violators are deterred by the fear that their conduct may be scrutinized, they will continue to use foreign secrecy and blocking laws to hide fraudulent transactions and to conceal their identities [47].

4.2. International initiatives

The SEC has not relied exclusively on litigation to penetrate the veil of foreign secrecy laws. Recognizing that workable solutions must be sensitive both to the needs of enforcement and to the sovereignty of other nations, the SEC has also sought to improve nation-to-nation law enforcement cooperation by participating in the development of international agreements and accords [48]. Although these agreements have been helpful in some areas of securities enforcement and provide a useful basis for future discussions, they have not resolved the problems faced by the SEC.

4.2.1. The Mutual Assistance Treaty with Switzerland

The 1977 Treaty on Mutual Assistance in Criminal Matters with Switzerland [49] provides for assistance in locating witnesses, procuring statements and testimony, and obtaining the production and authentication of judicial and administrative documents. The government of Switzerland has played a lead-

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ing role in forging the innovative solutions embodied in the Treaty and its efforts are responsible for important progress in this area. Nevertheless, while the Treaty has served to deter the use of Swiss secrecy laws to conceal fraud, the benefits for enforcement of securities laws have been limited.

For many cases, such as those involving trading on the basis of material nonpublic information or inadequate disclosure of ownership interests, the 1977 Treaty mechanism may not be available. This is because of the requirement of "dual criminality"; the conduct must be a criminal offense in the United States and in Switzerland in order for the Treaty to be applicable.

SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of, Santa Fe International Corporation (the *Santa Fe* case) [50] involved purchases of common stock and call options for the common stock of the Santa Fe International Corporation immediately prior to the public announcement of a merger between Santa Fe and the Kuwait Petroleum Corporation. Various banks purchased the securities for their omnibus accounts and refused to divulge the names of the principals. The SEC has been seeking the identities of the unknown purchasers since October 26, 1981, when the case was filed.

After lengthy discussions with the defendants' counsel and the government of Switzerland, a decision was made to apply for assistance pursuant to the 1977 U.S.–Swiss Treaty on Mutual Assistance in Criminal Matters. That request was made in March 1982. In January 1983, the Swiss Federal Tribunal denied the requested assistance because it determined that the SEC had not adequately established that the alleged activity constituted a criminal offense under Swiss law. The Tribunal held that while it is illegal for tippees to trade on insider information under Swiss law, it is not illegal for insiders to use that information. Because the SEC had not known the identities of the purchasers at the time of its request, it had been unable to allege whether they were "insiders" or "tippees".

Since that time, the SEC has sought other means, short of compulsory measures, to learn the customers' identities. To date, these efforts have failed. Although the SEC can move to compel discovery, it has not done so in an effort to obtain the needed evidence through cooperation rather than confrontation. As a result, the litigation has been stalled while an inordinate amount of resources has been consumed.

Time for these cases is often of the essence. The SEC's ability to pursue a case is seriously impaired when it takes 10–12 months to receive information. As a result, while the Treaty provides a useful mechanism for mutual assistance [51], its application to the types of problems the SEC encounters is not a complete solution [52].

4.2.2. The Memorandum of Understanding

In August 1982, after 6 months of consultations, the SEC and the govern-

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ment of Switzerland executed a Memorandum of Understanding (MOU) to supplement the 1977 Mutual Assistance Treaty. The U.S.-Swiss MOU represents an important step in the evolution of a cooperative framework within which countries may work to enforce and regulate the international securities marketplace and set the stage for future cooperation [53]. It reflects the interests of both the United States and Switzerland in making use of the procedures for assistance established by the 1977 Treaty in connection with SEC investigations and enforcement actions [54].

The MOU reflects the intention of the Swiss government to enact legislation making insider trading a criminal offense. Such legislation would make it possible for the SEC to request and receive pertinent information regarding insider trading under the 1977 Treaty. At the same time, the Swiss and U.S. governments agreed that, even under current Swiss law, insider trading by persons in possession of material nonpublic information may constitute a criminal offense.

Switzerland and the United States also agreed in principle to exchange diplomatic notes to facilitate application of the Treaty in ancillary administrative proceedings with respect to offenses covered by the Treaty and relating to trading by persons in possession of material nonpublic information. These notes would make clear that information and evidence obtained pursuant to the Treaty may be used by the SEC in civil injunctive actions and administrative proceedings, as well as in criminal prosecutions conducted by the Department of Justice. The two governments have undertaken to consider whether comparable diplomatic notes should be exchanged with respect to other federal securities law offenses covered by the Treaty.

4.2.3. Convention XVI

The MOU contains understandings concerning a private agreement known as Convention XVI [55]. Convention XVI provides an alternative method for supplying information to the SEC, notwithstanding the bank secrecy law, in insider information cases involving a tender offer or other business acquisition.

Convention XVI creates a Commission of Inquiry (COI) appointed by the Swiss Bankers' Association that considers requests for information by the SEC. Since the Convention applies only under specific circumstances, the COI must first determine whether the subject matter of the request is properly within its jurisdiction [56]. The Convention also establishes certain thresholds regarding trading volume and price [57]. If the volume and price criteria are not satisfied, the Convention may still be applied when the COI is satisfied that the SEC inquiry is reasonable [58].

Once it is established that Convention XVI is applicable, the following steps are taken. The COI requests that the bank involved submit a detailed report regarding the transaction. The bank freezes its customer's accounts up to the amount of the profit realized in the transaction, informs the customer, and

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gives him an opportunity to respond to the allegations contained in the request. The bank then forwards its report to the COI, which examines and submits the bank report to the Federal Office for Police Matters for transmission to the SEC.

In those cases in which the COI is persuaded that the customer did not order a purchase or sale subject to the SEC's request or finds that the customer is not an insider under the definition contained in the Convention [59], the Federal Office for Police Matters does not transmit the bank report to the SEC but explains why the report is not to be sent. Under the agreement, when the SEC's underlying dispute with the customer is resolved and its investigation of the customer is terminated, the blocked funds and accrued interest are to be unblocked and returned to the customer or remitted to the SEC in accordance with the terms of a court order.

All of the banks in Switzerland that trade in the U.S. markets have agreed to the provisions of Convention XVI. They either have requested that customers waive the protection of the secrecy laws or have put customers on notice that future orders to effect transactions in the United States will be deemed to constitute such a waiver.

Convention XVI will be terminated when Switzerland amends its penal law to include insider trading based on the use of material nonpublic information. At that time, the SEC will be able to utilize the 1977 Mutual Assistance Treaty when it needs to obtain information.

The MOU and Convention XVI are important achievements. They demonstrate what cooperation can accomplish and provide an important vehicle for the SEC when investigating insider trading cases that involve Swiss accounts.

4.3. Survey of prior initiatives

4.3.1. Proposed amendment to Section 21(c) of the Securities Exchange Act

In the mid-1970s, the SEC advocated a possible legislative solution to problems it had encountered in investigations involving foreign persons or entities [60]. The proposal contemplated that a request for information would be submitted to a foreign financial institution and that a procedure analogous to a subpoena enforcement action could be pursued in the event the SEC did not receive needed information [61]. The legislation would have authorized U.S. courts to impose sanctions for refusal to provide information or evidence, on the beneficial owners of securities that are the subject of an investigation. Sanctions would have included:

> the impoundment or withholding of any dividends or interest otherwise due any person from whom the Commission has failed to receive information...;
>
> the revocation or suspension of the right to vote or to control the vote of any securities of any issuer involved in the Commission's investigations by any person from whom the Commission has been unable to obtain information in connection with its investigation; and

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[an order to any issuer or transfer agent] ... to refrain from effecting purchase or sale by any person having an interest in any securities until such information sought from such person is furnished to the Commission [62].

The sanctions contemplated could have been ordered and enforced within the territory of the United States, thereby avoiding jurisdictional conflicts with other nations.

Unlike a motion to compel discovery under Rule 37 of the Federal Rules of Civil Procedure, which can only be employed after the SEC has commenced an enforcement action alleging violations of the securities laws, this proposed amendment envisioned a procedure that could be employed during an investigation before the SEC had determined whether any violations had occurred and whether any enforcement action was appropriate. In addition, unlike Rule 37 motions to compel discovery, the proposal would not have subjected foreign financial institutions to adverse publicity, legal costs, and conflicts between a U.S. court order and foreign secrecy laws. The proposal contemplated sanctions that could be imposed upon the beneficial owner of the securities involved without causing injury to foreign financial institutions and without forcing foreign financial institutions to choose between violating either a U.S. court order or the secrecy laws of the nation in which it is located. In fact, because the proposal contemplated that the beneficial owners could be made defendants in such actions, bank secrecy statutes applicable to financial institutions could not have been raised as an effective defense in the U.S. courts. The beneficial owners would have been forced either to identify themselves or suffer the consequences.

The proposal was innovative but did not adequately address either the means of serving a subpoena on the customer of a foreign financial institution or the procedure for enforcing such a request in a federal court. As the *Saint Gobain* decision indicates [63], there is an important distinction between the extraterritorial service of a summons and a complaint, and such service of an investigative subpoena. Extraterritorial service of an investigative subpoena may be impermissible since it is intended to compel the production of documents and information and, as a result, intrudes upon the sovereignty of another country.

The Walsh Act [64] may provide a procedural model that could remedy some of the deficiencies in the earlier proposal to amend Section 21(c) of the Securities Exchange Act. It authorizes the filing of a civil action in a federal court for the purpose of obtaining testimony and other evidence from U.S. nationals and residents who are found abroad [65]. Subpoenas issued under it must be served in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. This approach would be much less intrusive with respect to another nation's sovereignty than the service of an investigative subpoena [66]. Moreover, there

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are recognized procedures for international service of a summons and complaint [67].

4.3.2. Proposed Rule 17a-3(a)(9)

A different approach is contained in proposed Rule 17a-3(a)(9) [68]. The proposed amendment would have required, as a precondition to participation in U.S. securities markets, that those who act on behalf of the undisclosed principals establish in advance, by written agreement, their willingness to disclose the identity of their principals in response to a SEC request [69]. Brokers and dealers would have been required to obtain the agreement of those effecting transactions that they would furnish the names and addresses of the beneficial owners at the SEC's request.

Public comments concerning this proposal were negative. Among other things, it was suggested that the rule would drive securities business offshore, could easily be evaded, and would place undue burdens on brokers and dealers [70]. The proposed rule has neither been adopted nor withdrawn since the comment period closed.

4.3.3. CFTC rules concerning special calls

The rules of the Commodity Futures Trading Commission (CFTC) contain another approach, which conditions access to the U.S. futures markets upon a willingness to provide information in response to a specific request of the CFTC. The rules permit the CFTC to issue "special calls" requesting information from futures commission merchants, foreign brokers, and members of the contract markets. The rules require that futures commission merchants provide the name, address, and certain information concerning the holder, or beneficial holder, of an open futures contract, in response to such a special call [71].

The CFTC's rules also provide that, when a customer of a futures commission merchant is a foreign broker or trader, the merchant is "deemed to be the agent of the foreign broker or the foreign trader for purposes of accepting delivery and service of any communication ... [the CFTC may send] to the foreign broker or the foreign trader ..." [72]. Service of any communication on a foreign broker or trader is effective when made upon the futures commission merchant, who is required promptly to transmit the communication to the principal involved. The futures commission merchant also is deemed the agent for any customers of a foreign broker. Thus, the CFTC's special call provisions avoid many of the problems inherent in effecting service of process upon a resident of another country.

When a futures commission merchant or a customer has refused to comply with a special call, the CFTC can prohibit the contract market involved, and all futures commission merchants and foreign brokers, from executing or accepting any orders for trades on that contract market or for the specific contracts in question, except for trades closing out the positions involved.

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Thus, a special call may be enforced even when the person served is neither physically present in the United States nor owns any property within the United States.

5. New perspectives on the problem

While the Mutual Assistance Treaty and the Memorandum of Understanding between the United States and Switzerland provide means for combating those who utilize Swiss accounts to circumvent the U.S. securities laws, they do not apply to all violations of the securities laws. Furthermore, these discovery mechanisms are only available when a particular Swiss account is implicated in a transaction.

There are many nations, in addition to Switzerland, that offer anonymity to investors with respect to banking and financial transactions [73]. A broader solution is required that encompasses these nations. It is unrealistic to assume that the SEC can negotiate separate disclosure agreements with each nation that has secrecy or blocking statutes [74]. In addition, it is impractical to rely on Rule 37 of the Federal Rules of Civil Procedure, which was used in *SEC v. Banca della Svizzera Italiana* (the *St. Joe* case) [75]. This approach is often unsuitable because the SEC must have sufficient evidence to initiate a civil enforcement action before Rule 37 is available [76].

If diplomatic overtures do not provide satisfactory solutions, the U.S. Congress will have to consider some basic questions:

(1) Does the SEC need the assistance of a federal court during its investigation? As we have seen, at present the SEC can use its investigative subpoenas only if a person or entity is found within the United States and must rely, when dealing with persons located abroad, on voluntary cooperation or, where available, bilateral or multilateral international agreements.

(2) Does the SEC need legislation that puts all persons on notice and provides by operation of law that the act of effecting a securities transaction in the United States constitutes a waiver of any secrecy provisions that a person or agent might be able to claim?

(3) Would it be helpful if legislation were enacted providing that the act of effecting a securities transaction in the United States through a U.S. broker–dealer constitutes the appointment of that broker as a constructive agent for service of process in those instances when the SEC seeks information in the course of its investigations?

(4) Should legislation be enacted providing that the act of effecting a securities transaction in the United States constitutes a consent to the jurisdiction of the United States?

The problems that the SEC confronts with respect to transactions effected through foreign financial institutions are comparable to those that were once

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common within the United States when nonresidents engaged in conduct within a state and caused injury to that state's citizens. In the nineteenth century, it was recognized that each state of the United States possessed exclusive jurisdiction and sovereignty over persons and property within its territory [77]. As a corollary, it was recognized that no state could exercise direct jurisdiction and authority over persons or property outside its territory [78].

This approach became unworkable when corporations began to do business in more than one state. The states developed doctrines of express and implied consent in order to obtain jurisdiction over nonresidents and to hold them accountable for their conduct within the state. Many states enacted laws requiring corporations to consent to be sued as a prerequisite to doing business within their territory. In addition, the states often required that corporations have agents for service of process within the state. These developments were based on the fact that a corporation incorporated in one state may transact business within another state only with the latter's consent [79].

Following the development of the automobile, states enacted laws providing that a nonresident's operation of a motor vehicle within their territory would constitute the appointment of a state official as his or her agent for service of process [80]. A Massachusetts statute authorized such service of process in court actions growing out of any accident or collision in which a nonresident might be involved while operating a motor vehicle within the state [81]. An express consent was unnecessary. The consent was implied, by operation of law, from the person's decision to enter a state and operate a motor vehicle.

The internationalization of the world's securities markets makes it increasingly important that effective means be found to hold nonresidents accountable for their conduct within the United States. While U.S. and international law recognize that the United States has jurisdiction over persons who effect securities transactions in the United States, secrecy laws are a serious obstacle to the effective exercise of that jurisdiction.

The increasing use of communication satellites, advanced forms of telecommunications, data exchange through high-speed computer networks, and efficient international air travel will continue the internationalization of the securities markets [82]. This internationalization will compel the development of procedures that will permit nonresidents to be held accountable for their conduct. The growing interdependence of national economies and securities markets requires greater cooperation among nations in order to assure that violations of law, or other injuries caused by nonresidents, can be redressed.

Effective enforcement of the U.S. securities laws is not only an important interest of the the United States. It is essential so that all persons who invest and trade in the U.S. markets – both foreign and domestic – can participate with the confidence that they will not be victimized by fraudulent conduct.

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5.1. A summary of the United States experience

5.1.1. The expansion of state court jurisdiction: The early cases

The experience of the United States in adapting to the nationalization of its economy is reflected in various court cases, which may be helpful in developing means for dealing with the internationalization of the capital markets. In general, the cases reflect various approaches which required waivers and consents, both express and implied, as a precondition of engaging in specified conduct within the territory of a state. The cases are important, in the present context, because the procedural means employed to overcome jurisdictional obstacles in the nineteenth century could be used to alleviate the problems posed by secrecy laws. More recent cases [83] make clear that the United States can assert jurisdiction over persons who effect securities transactions in the United States.

In *Pennoyer v. Neff* [84], decided in 1878, the Supreme Court summarized the traditional view of the limits of state court jurisdiction. State court jurisidiction

> was defined by the "principles of public law" that regulate the relationships among independent nations. The first of those principles was "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." The second was "that no state can exercise direct jurisdiction and authority over persons or property without its territory" [85].

A nonresident defendant could not be sued unless he could be found within a state. It was believed that "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power" [86].

Pennoyer recognized, however, that "[e]very State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens" [87]. Accordingly, actions to satisfy a claim against a nonresident could proceed with respect to any property of the defendant located within the state, regardless of the owner's location [88].

Pennoyer also approved the practice of considering a foreign corporation doing business in a state to have consented to being sued in that state. The Supreme Court explained: "[A] State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members" [89].

As corporations increased their volume of interstate transactions, many states enacted laws making "consent to be sued a condition of the foreign corporation's transaction of business in the state" [90]. This approach was used

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as early as 1834 and was approved by the Supreme Court in 1856 in *Lafayette Insurance Co. v. French* [91].

The consent doctrine was applied to corporations both when they appointed an agent for service of process in compliance with a state statute and when they did not appoint such an agent [92]. According to one commentator, the rationale for the implied consent doctrine "was that a corporation which did not appoint and agent but did business within the state should not be in a better position than one which complied with the statute" [93].

Lafayette, which was cited with approval in *Pennoyer*, provides a good example of the implied consent approach. The U.S. Supreme Court declared that "[a] corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State" [94]. Accordingly, it reasoned that the consent "may be accompanied by such conditions as Ohio may think fit to impose ..." [95]. The applicable Ohio statute required "in effect, that the agent who should reside in Ohio and enter into contracts of insurance there on behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts" [96]. The Supreme Court upheld the Ohio statute stating:

> It cannot be deemed unreasonable that the State of Ohio should endeavor to secure to its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that State, and fully subject to its laws; nor that proper means should be used to compel foreign corporations, transacting this business of insurance within the State, for their benefit and profit, to answer there for the breach of their contracts of insurance ... [97].

The Supreme Court also emphasized that the necessary consent could be implied. "[W]hen this corporation sent its agent into Ohio, with authority to make contracts of insurance there", the Court declared, "the corporation must be taken to assent to the condition ... [that the agent] should also be the agent of the corporation to receive service of process in suits on such contracts ..." [98]. It added that, "in legal contemplation, the appointment of such an agent clothed him with power to receive notice, for and on behalf of the corporation ..." [99].

In 1927, in *Hess v. Pawloski* [100], the Supreme Court affirmed the implied consent approach in another context. It upheld a Massachusetts statute which provided that a nonresident's operation of a motor vehicle on a public road within the state "shall be deemed equivalent to an appointment by such nonresident of" a state official as an agent for service of process [101]. The statute authorized service of process to be made with respect to any court action "growing out of any accident or collision" in which the nonresident might be involved while operating a motor vehicle within the state, by leaving a copy of the process in the Office of the Registrar and by registered mail upon the defendant [102]. In holding that Massachusetts could permissibly declare that a nonresident's use of a highway "is the equivalent of the appointment of

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the registrar as agent on whom process may be served", the Court concluded that the Massachusetts statute "makes no hostile discrimination against non-residents but tends to put them on the same footing as residents" [103].

The Massachusetts statute made it possible to serve process upon a state official, who was deemed to be the motorist's "agent" within the territorial limits of the state, and thereby obtain personal jurisdiction over the nonresident driver. "The motorist's consent theory was easy to administer since it required only a finding that the out-of-state driver had used the State's roads" [104].

In the sections that follows, this article discusses subsequent developments in the law of jurisdiction. It then explains the "waiver by conduct" approach which is derived in part from the procedural techniques developed in the early state cases summarized above.

5.1.2. The expansion of state court jurisdiction: The minimum contacts test

International Shoe Co. v. Washington [105], which was decided in 1945, was a "culmination of the trend toward expanding state jurisdiction over foreign corporations and other nonresidents" [106]. The decision made it unnecessary to rely on the doctrines of waiver and consent that had been developed prior to 1945, but did not negate those doctrines or the reasons for their development. *International Shoe* and its progeny recognize that economic and technological change within the United States required a new approach to the jurisdictional issue.

In upholding a state "long-arm" statute, which authorized service of process upon persons outside the territory of the State of Washington, the Supreme Court adopted what has become known as the "minimum contacts" test:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional" notions of fair play and substantial justice" [107].

The "minimum contacts" standard supported the use of long-arm statutes and eliminated the need to rely on the doctrine that an out-of-state motorist or a corporation had, by acting within the territory, appointed an agent to accept service of process within the state [108]. In explaining the rationale for the "minimum contacts" standard, the Supreme Court observed:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue [109].

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The Court emphasized that determinations with respect to the existence of minimum contacts require consideration of the "quality and nature" of the defendant's activity within the forum state [110]. It pointed out that some acts of a corporate agent, even if "single or occasional", could, "because of their nature and quality and the circumstances of their commission", be deemed sufficient to render the corporation liable to suit [111]. The Court added, however, that the test would not be satisfied with respect to "an individual or corporate defendant with which the state has no contacts, ties, or relations" [112].

In 1957, in *McGee v. International Life Insurance Co. [113]*, the Supreme Court applied the "minimum contacts" test in holding that the Due Process Clause did not prevent a California court from entering a binding judgment on an out-of-state insurance company which had solicited the renewal of a single insurance contract with a California resident. "It is sufficient for purposes of due process", the Court said, "that the suit was based on a contract which had substantial connection with that State" [114]. It added that, "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died" [115]. The Court pointed out that "[i]t cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims" [116].

The Supreme Court's opinion in *McGee* also reviewed the reasons for the expansion of state court jurisdiction with respect to nonresident defendants:

In part this [trend] is attributable to the fundamental transformation of our national economy over the years. Today many commerical transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity [117].

In contrast, the Court noted that California "residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable" [118].

In *Hanson v. Denckla* [119], decided the following year, the Supreme Court held that sufficient minimum contacts did not exist between a Delaware trust company and the State of Florida to make the trust company amenable to suit in Florida. Unlike the facts in *McGee*, the Delaware trust company had transacted no business within the State of Florida and never solicited business, either in person or by mail, with the State. As a result, the Court determined that "[t]he cause of action ... is not one that arises out of an act done or transaction consummated in the forum State" [120]. The Court held that, in order for jurisdiction to exist,

it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 [121].

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A leading state case represents a further application of the minimum contacts approach. In *Gray v. American Radiator & Standard Sanitary Corporation* [122], the Supreme Court of Illinois upheld an Illinois assertion of jurisdiction over a nonresident Ohio corporation. The Ohio corporation had manufactured a valve that was incorporated into a hot water heater in Pennsylvania. The hot water heater was ultimately sold to a consumer in the State of Illinois, where it exploded and injured the plaintiff. Although the alleged wrong arose from acts performed in Ohio, and only the consequences occurred in Illinois, the Illinois Supreme Court held that a tortious act was committed in Illinois because "[i]t is well established ... that in law the place of wrong is where the last event takes place which is necessary to render the actor liable" [123].

The Illinois Supreme Court noted that "the relevant inquiry is whether the defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum" [124]. Although the record did not disclose the volume of the company's business within Illinois, the court concluded that it would be reasonable to infer that the company's transactions "result in substantial use and consumption" within Illinois:

> To the extent that its business may be directly affected by transactions occurring here it enjoys benefits from the laws of this State, and it has undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing its valves. Where the alleged liability arises, as in this case, from the manufacture of products presumably sold in contemplation of use here, it should not matter that the purchase was made from an independent middleman or that someone other than the defendant shipped the product into the State [125].

The court added that, while the benefit derived from Illinois law is indirect, "it is not unreasonable, where a cause of action arises from alleged defects in his product, to say that the use of such products in the ordinary course of commerce is sufficient contact with this State to justify a requirement that he defend here" [126].

In explaining the rationale for its decision, the Illinois Supreme Court emphasized the changes that had occurred as a result of technological and economic changes and concluded that rules of law must grow and develop "in the light of the facts of economic life as it is lived today" [127]. It pointed out that, without recognition of economic and technological changes, "jurisdictional concepts which may have been reasonable enough in a simpler economy lose their relation to reality ..." [128].

5.1.3. The scope of U.S. jurisdiction over nonresidents who engage in securities transactions within the United States

The principles articulated in *International Shoe* and its progeny have been

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applied in cases arising under the federal securities laws. International law and the law of jurisdiction clearly give the United States jurisdiction to inquire into the circumstances of transactions effected in the U.S. securities markets, including those initiated from abroad, and to pursue any court action that might arise out of such transactions. In most cases, jurisdiction has been predicated on Section 27 of the Securities Exchange Act [129], which authorizes suits to be brought in any judicial district where any act or transaction constituting a violation occurred, or where "the defendant is found or is an inhabitant or transacts business". The required minimum contacts only have to exist with respect to the United States as a whole and not with respect to the particular state in which the district court sits [130].

In *Leasco Data Processing Equipment Corp. v. Maxwell* [131], the Second Circuit Court of Appeals held that "significant conduct" within the United States by a nonresident defendant in connection with a violation of the securities laws will suffice for purposes of both subject matter and personal jurisdiction. In addition, the court held that "Congress meant §27 to extend personal jurisdiction to the full reach permitted by the due process clause ..." [132]. The court declared that "where a defendant has acted within a state or sufficiently caused consequences there, he may fairly be subjected to its judicial jurisdiction even though he cannot be served with process in the state ..." [133].

The Eighth Circuit Court of Appeals adopted a similar analysis in *Travis v. Anthes Imperial Limited* [134]. The plaintiffs in that case alleged fraud in connection with the sale of their Anthes common stock to Molson Industries Limited, a Canadian corporation [135]. Among other contacts with the United States was the fact that the closing of the sale took place in St. Louis, Missouri [136]. The Eighth Circuit declared: "In our view, subject matter jurisdiction attaches whenever there has been significant conduct with respect to the alleged violations in the United States" [137].

In *Straub v. Vaisman and Co., Inc.* [138], the Third Circuit Court of Appeals held that "[c]onduct within the United States is alone sufficient from a jurisdictional standpoint to apply the federal statutes ..." [139]. The plaintiffs in the case were foreign nationals who purchased stock in a U.S. corporation on the basis of alleged sales and misleading recommendations by a U.S. securities broker [140]. The court declared:

> [W]e entertain no doubt that application of federal law is proper, in this instance .... The fraudulent scheme was conceived in the United States by American citizens, involved stock in an American corporation traded on American over-the-counter exchange [*sic*], and an American securities broker from his office in New Jersey was responsible for the wrongful omissions. Moreover, on policy grounds the interest of the United States in regulating the conduct of its broker-dealers in this country and enhancing world confidence in its securities market is ample justification for applying the securities laws [141].

The Third Circuit reaffirmed its view in *SEC v. Kasser* [142], a SEC action brought to enforce the antifraud provisions of the U.S. securities laws. It declared, the securities laws "grant jurisdiction in transnational securities cases where at least some activity designed to further a fraudulent scheme occurs within this country" [143].

District court cases have also held that persons who engage in conduct within the United States thereby submit to its jurisdiction. For example, in *Fontaine v. SEC* [144], Investors Overseas Services (IOS), a Panamanian corporation with principal offices in Switzerland, challenged the jurisdiction of the SEC to conduct an administrative proceeding. However, IOS had acted for the Fund of Funds (FOF), a $360 million mutual fund, in the purchase and sale of the securities which comprised FOF's portfolio, and the court found that "[t]hese transactions take place in the United States" [145]. On this basis, the court held that "IOS is ... under an obligation to comply with the United States laws to which it has submitted" [146]. Another district court case held that provisions of the Securities Act "clearly apply to the offer of foreign securities within the United States" even when there is no showing that the offers were followed by an actual sale [147].

In these cases, the courts have made clear that persons who engage in securities transactions in the United States, whether directly or indirectly through a foreign financial institution, have purposefully availed themselves of the privilege of conducting activities within the United States. As a result, they have voluntarily submitted to the jurisdiction of the United States and to any legal action that might arise out of such a transaction.

As noted above, secrecy laws often frustrate the effective exercise of U.S. jurisdiction. However, the early cases [148] suggest that the United States could condition access to its securities markets. Possible conditions might include consents or waivers, based on participation in these markets by an individual or corporation. These alternatives are discussed in more detail below.

5.2. The potential for injury to foreign investors

Many of the U.S. cases in which jurisdictional issues have been considered involve fraudulent schemes in which the victims are foreigners [149]. For example, in *Bersch v. Drexel Firestone, Inc.* [150], the court indicated that the plaintiff class might include 100,000 persons "preponderantly citizens and residents of Canada, Australia, England, France, Germany, Switzerland, and many other countries in Europe, Asia, Africa, and South America" [151]. In *IIT v. Vencap, Ltd.* [152], the court estimated that 300 American investors represented 0.2% of IIT's fundholders. This means that there were approximately 150,000 foreign investors. The $3 million investment of American investors represented only 0.5% of the approximately $600 million invested in the funds [153].

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Another example of the potential for injury to foreign investors occurred in *SEC v. Vesco* [154]. At the close of 1971, four mutual funds (Fund of Funds, IIT, and two others) had over $440,000,000 in net assets invested in U.S. securities. The investors in these funds were predominately foreign [155]. After finding violations of the federal securities laws [156], the court ordered various individuals, among other things, "to make a disgorgement and restitution of $392,570,000 plus interest" [157].

These cases demonstrate that the need for effective enforcement of the securities laws within the United States is not only in the interests of the United States. It is also in the interests of the many foreign investors who participate in the U.S. markets.

The U.S. courts have held in such cases "that Congress did not mean the United States to be used as a base for fraudulent securities schemes even when the victims are foreigners ..." [158]. In *IIT v. Vencap, Ltd.*, for example, the Second Circuit declared:

> We do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners. This country would surely look askance if one of our neighbors stood by silently and permitted misrepresented securities to be poured into the United States. By the same token it is hard to believe Congress meant to prohibit the SEC from policing similar activities within this country ... [159].

In a criminal case, *U.S. v. Cook* [160], the defendant was convicted for operating a scheme out of Texas to defraud European investors. The defendant moved to overturn the conviction, claiming that the trial court lacked subject matter jurisdiction because the fraud was committed solely on foreign investors and had no impact on either domestic markets or investors. The Fifth Circuit rejected this contention. "That Congress would allow America to be a haven for swindlers and confidence men when the victims are European while expecting the highest level of business practice when the investors are American is", the court stated, " 'simply unimaginable' " [161].

The Third Circuit stated a similar view in *SEC v. Kasser*. In declining to immunize "defendants who unleash from this country a pervasive scheme to defraud a foreign corporation", the court declared:

> By sustaining the decision of the district court as to the lack of jurisdiction, we would, in effect, create a haven for ... defrauders and manipulators. We are reluctant to conclude that Congress intended to allow the United States to become a "Barbary Coast," as it were, harboring international securities "pirates" [162].

These same principles should govern the relations of other nations with the United States. No nation should permit itself to be used as a base for persons to perpetrate frauds upon their neighbors, particularly when such persons

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purposefully and voluntarily engage in fraudulent conduct within another country.

One means of achieving the goal would require law enforcement action by nations in which the perpetrators of a fraud may be found. The United States has taken such action in *SEC v. Vesco* and *SEC v. Kasser*.

Another major step to achieving this goal, consistent with principles of international comity, would be a recognition that the act of trading securities outside the territory of a secrecy jurisdiction constitutes a "waiver by conduct" of any applicable secrecy provisions that a foreign financial institution, a customer, or an agent may claim. In addition, while blocking statutes generally represent interests of a nation which cannot be waived by private parties, the considerations underlying the "waiver by conduct" approach should persuade nations to refrain from applying their blocking statutes to protect persons who engage in fraudulent conduct outside their territory.

6. The waiver by conduct approach

6.1. Models for implementing the approach

The experience of the United States in the nineteenth century suggests means of dealing with the internationalization of the securities markets. The cases applying the doctrine of implied consent recognize that certain types of conduct will suffice to provide evidence of an individual's consent. These cases provide models that could be used to establish conditions upon access to the U.S. securities markets.

The rationales used by the Supreme Court prior to 1945 to uphold implied consent statutes could be used to support legislation based on the "waiver by conduct" approach. Such legislation might declare the act of engaging in a securities transaction in the United States to constitute a waiver of any secrecy provision that a foreign financial institution, a customer, or agent might claim. Congress could also attach other consequences to the act of trading securities in the United States.

6.2. Waiver by conduct: The policy rationale

There is a fundamental distinction between a foreign financial institution that accepts and holds deposits within a nation with bank secrecy or blocking statutes and an institution located in the same jurisdiction that effects securities transactions outside its territory. In the first case, there is a reasonable expectation that the customer is entitled to the protection of applicable secrecy laws. In the second case, there should be no legitimate expectation of protection since the financial institution and its customer act outside the territory

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and beyond its jurisdiction. As Justice John Paul Stevens, in his concurring opinion in *Shaffer v. Heitner* [163], observed:

> If I visit another State, or acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property or my person while there. My contact with the State, though minimal, gives rise to predictable risks [164].

He added that the purchase of stock of a corporation organized under the laws of a foreign nation might give rise to the same consequences "because a foreign investment is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision" [165].

Secrecy laws should not be given extraterritorial effect to cloak transactions that occur in the United States or in any other nation outside the territory of a secrecy jurisdiction. If a securities transaction is effected within the United States, through a foreign financial institution, the act of cloaking the transaction with a veil of secrecy must be regarded as occurring on U.S. soil. The assertion of such power would be incompatible with U.S. sovereignty. From this perspective, the act of trading securities outside a secrecy jurisdiction is fundamentally incompatible with the extension of secrecy law protections.

Nations with secrecy laws should recognize that it is a customer's voluntary choice to cause a financial institution to engage in conduct outside their jurisdiction and outside the ambit of their secrecy laws. They should understand that the interests embodied in the secrecy laws do not extend to transactions that occur in other nations.

Accordingly, there should be no expectation that the secrecy laws of one nation will be applied to transactions that occur outside a secrecy jurisdiction. The act of effecting a transaction outside the jurisdiction in which it is located should be deemed to constitute a waiver of those secrecy provisions that an institution, its customer, or an agent might claim. All the involved parties should recognize that the transactions occur within the sovereign territory of the United States and that the customer has voluntarily, and purposefully, chosen to waive the protections of secrecy laws by engaging in conduct within the United States.

The authors believe these principles ought to be recognized even in the absence of legislation declaring that the act of trading securities in the United States shall constitute a waiver of secrecy protections. However, legislation could promote acceptance of these principles by placing all investors on notice that the United States will view the act of trading securities in the United States to constitute such a waiver. As a result, investors would necessarily have to choose to waive the protection of secrecy laws as a concomitant of a decision to trade in the United States.

While blocking statutes generally reflect national interests that cannot be waived by private parties, the considerations underlying the principle of "waiver by conduct" should lead other nations to refrain from applying

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blocking statutes to cloak conduct that occurs within the United States. This would, of course, be a matter of discretion on the part of nations with blocking statutes. However, the interests embodied in their blocking statutes must be balanced against (1) the fact that a person has purposefully engaged in a securities transaction in the United States, (2) the danger that a blocking statute jurisdiction will be used as a haven for the perpetration of frauds upon its neighbors, and (3) the possibility that its own citizens will be victimized if the perpetrators of such frauds cannot be held accountable for their misconduct within the United States. These considerations will become increasingly important as the internationalization of the securities markets proceeds. Thus, self-interest may provide a basis for persuading nations to refrain from applying their blocking statutes to securities transactions effected in the United States.

If the foregoing analysis should be generally accepted, there would rarely, if ever, be a reason for a nation to interpose a secrecy law or blocking statute between a U.S. investigation and a customer or an agent. Considerations of comity and the mutual interest in fair and honest securities markets should lead nations with secrecy or blocking statutes to adopt a policy of restraint and deny the protection of such laws to persons who attempt to use such laws to claok conduct that occurs outside their borders.

6.3. Wiaver by conduct: Implementing the approach through legislation

International recognition of the principle of "waiver by conduct" would remove a serious obstacle to transnational investigations and facilitate cooperation between nations in the enforcement of their laws. In the absence of such recognition, however, the United States might consider a number of steps to implement the "waiver by conduct" principle through legislation.

(1) The United States might enact legislation declaring, as a matter of U.S. law, that the act of trading securities in the United States constitutes a waiver of any otherwise applicable secrecy or blocking laws that a financial institution, a customer, or an agent might claim.

(2) Such legislation might require that brokers or dealers effecting transactions on behalf of persons or institutions located abroad provide clear notice to the persons or institutions with whom they deal that the act of trading will be deemed to constitute a waiver.

(3) The United States might enact legislation providing that the act of effecting a transaction in the United States shall be deemed to constitute an appointment of the U.S. broker–dealer that effected the transaction as an agent for service of process in connection with any court action arising out of the transaction. In domestic law there is precedent for this approach [166]. While service upon the broker–dealer that effected a transaction could be supplemented by other means reasonably calculated to provide actual notice of

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the action to the customer [167], service upon the broker–dealer would suffice to permit the action to go forward.

(4) Legislation might provide that the act of effecting a securities transaction in the United States shall constitute a consent to the jurisdiction of the U.S. courts and law enforcement agencies with respect to any act that arose out of the transaction. This step would serve to codify the "minimum contacts" doctrine and eliminate potential litigation regarding the sufficiency of the contacts in a particular case. Unlike the first three steps, it would not represent a significant change in existing law.

(5) Legislation might be enacted to establish a special procedure, comparable to a motion to compel discovery under Rule 37 of the Federal Rules of Civil Procedure. That legislation would provide the SEC with a means to seek the aid of a federal court, *before* it has completed its investigation and filed an enforcement action in court, when it requires information in the hands of persons or institutions located outside the United States.

(6) Legislation might incorporate sanctions similar to those envisioned in the proposed amendment to Section 21(c) of the Securities Exchange Act: the ability to impound dividends or interest, to revoke voting rights, or suspend the right to transfer securities.

Taken together, these legislative initiatives would serve to establish rules of general applicability and avoid the need to litigate difficult procedural and jurisdictional issues on a case-by-case basis. They would put all persons who trade in the U.S. securities markets on notice of the potential consequences of trading securities in the U.S. markets. Most important, they would provide effective means to hold nonresident defendants accountable for their conduct within the United States.

The principle of "waiver by conduct" is consistent with the results of the negotiations between the SEC and the government of Switzerland. For example, as part of efforts to implement Convention XVI, Swiss banks have advised their customers that, if they continue to give orders to the bank for execution on U.S. markets, these orders are to be considered as automatic approval of the stipulations of Convention XVI. Hence, by placing an order with a participating bank for execution in the U.S. capital markets, the customer agrees that the information may be provided to the SEC if certain conditions are met. While enactment of legislation based on a waiver by conduct approach would involve a more complete waiver than the one used to implement Convention XVI, it would employ the same principle.

These proposals would have a further advantage. Responsible nations that recognize the need for improved international cooperation and accountability would not be disadvantaged by those nations that seek to maintain their special status as secrecy havens.

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7. Conclusion

As it now stands, there are two sets of rules: one standard for persons trading within the United States, and another for those trading from beyond its borders. The United States must send a clear message to all who use its securities markets: "We welcome your participation, but you cannot expect preferential treatment. If you want to trade in our markets, you must agree to play by the same rules that apply to other participants in the markets."

The internationalization of the world's securities markets will continue. This is a desirable trend but, as more and more securities transactions are conducted on a transnational basis, there will be greater potential for conflicts between differing legal and economic orders. At the same time, the integrity of the U.S. capital markets requires a vigorous enforcement of the securities laws if investor confidence in the fairness and honesty of the marketplace is to continue.

All nations have an interest in protecting their domestic securities markets from fraud and other illegal conduct perpetrated by persons outside their borders. The investors of all nations should be able to engage in transnational transactions with the assurance that they will not be victimized by fraud or other deceptive conduct. Thus, the problems of monitoring the securities markets are not solely problems for the United States. Other nations have a stake in finding workable solutions, a stake that will grow as the securities markets become more international in scope.

Nations can continue to rely on traditional means of obtaining evidence and prosecuting cases and continue to pay the cost in delay, conflict, and unpredictability, or they can strive to achieve new ways of dealing with their common concerns. While the SEC was successful in the *St. Joe* case, its efforts to obtain evidence through a motion to compel production of evidence were slow and costly. Moreover, the *St. Joe* approach creates adverse publicity and legal costs for those financial institutions that serve as intermediaries. Perhaps worse, this approach may impede cooperation between the nations involved.

A new approach is needed. The common interests of nations in fair and honest securities markets can be reconciled with the desire of all nations to preserve the integrity of their sovereignty. Recognition of the waiver by conduct approach could provide a basis for such a reconciliation. Such recognition would be based on the nature of the conduct involved and on an appreciation of the larger interests of nations with secrecy laws, not merely on the ground that the United States has declared a waiver to have taken place. Similarly, when private interests are predominant, nations should refrain from applying blocking statutes to cloak transactions undertaken outside their borders.

If accepted, the principle of "waiver by conduct" would make clear that secrecy laws will not be used to protect persons who violate the laws of the

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marketplace they enter. It would minimize conflicts of jurisdiction and conflicts of law. It would provide a basis for cooperation between nations in law enforcement. It would enhance the ability of all nations to maintain the integrity of their markets and assure investors in any one market that the markets are fair and honest.

We are at a crossroads. On the one hand, there is potential for increased litigation, conflicts of law and injury to international relationships that have been characterized by friendship and cooperation. On the other hand, there is an opportunity to establish new approaches to cooperation that will serve the larger interests of all nations participating in an internationalized securities market. While the way to cooperation may appear difficult, the advantages far outweigh the difficulties.

Appendix A: An overview of secrecy laws

A.1. The background and rationale of bank secrecy

Bank secrecy laws prohibit the disclosure of the identity of bank customers and the details concerning bank accounts. The tradition of secrecy in the bank–customer relationship originally emerged in order to protect individual rights and not in order to defend against encroachments of national sovereignty by foreign countries. A tradition of confidentiality in the bank–customer relationship is maintained in many countries, although significant differences exist with regard to the circumstances under which bank secrecy may be disregarded and with regard to the penalties for its violation.

It is difficult to determine the precise number of countries which have bank secrecy laws, since these laws may be reflected in a country's case law, in general statutory or constitutional provisions dealing with the right to privacy, in the requirements of contract or tort law, and/or in explicit statutory provisions which delineate the requirements of bank secrecy and outline penalties for its violation. A significant number of countries have enacted bank secrecy laws which expressly prohibit the dissemination of bank account and bank customer information. Among the countries that have enacted statutes which explicitly require bank secrecy are Switzerland, the Cayman Islands, the Bahamas, Austria, Costa Rica, El Salvador, Lichtenstein, and Panama [168].

The tradition of secrecy in the bank–customer relationship originated with the emergence of commercial bank activity in the sixteenth century [169]. In civil law countries, the protections accorded privacy in financial matters have been viewed as one facet of the more generalized right to privacy. Civil law countries have maintained provisions, either in their constitutions or in legislation, which provide an individual whose privacy has been invaded with a cause of action for injunctive relief, for damages, or for both [170].

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In Switzerland, Austria, and Germany the bank–customer relationship was originally viewed as being imbued with a high degree of trust. Banks were required by a contractual duty to keep customer identity and customer account information secret unless a recognized exception applied. Violations of customer secrecy would give rise to a civil cause of action under relevant statutory provisions [171].

The landmark common law precedent in the development of bank secrecy throughout the British Commonwealth is the 1924 British case, *Tournier v. National Provincial and Union Bank of England* [172]. Stressing the fiduciary obligation of banks to their customers, *Tournier* adopted the rule that:

> It is an implied term of the contract between a banker and his customer that the banker will not divulge to third persons, without the express or implied consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by order of a court, or the circumstances give rise to a public duty of disclosure or the protection of the banker's own interests requires it [173].

A second element in the development of the traditions of bank secrecy is the desire of some countries to protect bank customers from oppressive or vindictive governments [174]. As noted by True Davis, former U.S. Ambassador to Switzerland:

> Switzerland's tradition of neutrality has repeatedly made Switzerland a haven for refugees of religious, political and racial persecution. In the 17th century thousands of French Huguenots fleeing religious presecution came to Switzerland. Some of these became bankers and for obvious reasons had to maintain secrecy regarding their affairs with clients back in their homeland. A similar situation came about when a stream of French refugees poured into Switzerland following the French Revolution [175].

In 1934, Switzerland enacted a statute which made violations of bank secrecy a criminal offense. This statute, Article 47 of the Swiss Banking Law [176], was enacted, in part, as a reaction to efforts of Nazi German agents to ascertain the identity of German Jews who had established Swiss bank accounts and as a reaction to revelations that a small number of Swiss bank employees cooperated with the Nazi efforts [177]. It codified what had been established business practice in Switzerland for over 200 years.

In recent years, a significant number of countries have enacted bank secrecy laws. Some of these statutes represent codifications of long-standing traditions of bank secrecy. A second group of countries, however, has sought to emulate Switzerland's success as a financial power by enacting bank secrecy laws as a means of attracting foreign capital and creating a business in international banking and finance [178].

It is clear that the ability of Switzerland to maintain its position as a primary banking center in Europe has been largely predicated on its stable

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government and currency, its political neutrality, and its reputation for highly competent investment management [179]. However, the existence of bank secrecy laws is also an important factor.

In addition to providing for secrecy in financial transactions, the second group of countries generally imposes little or no taxation on foreign funds and does not recognize the evasion of another country's tax laws as a crime [180]. An example is the Cayman Islands, a British Crown Colony about 170 miles south of Florida with a population of 15,000. In 1964, the Cayman Islands had only one or two banks and virtually no registered nonresident businesses. By late 1981, the Caymans had about 330 banks and over 13,000 registered companies [181].

A.2. The substance of foreign secrecy laws

Surveying foreign bank secrecy laws is difficult because many countries have traditions of bank–customer confidentiality, but have not enacted statutes which explicitly provide for bank secrecy. In the West Indies and the Caribbean, for example, Anguilla, Antigua, Barbados, the Bahamas, Bermuda, the Cayman Islands, Montserrat, St. Vincent, and the Turks and Caicos are all considered havens with traditions of bank secrecy. Until recently, however, only the Bahamas and the Cayman Islands had enacted bank secrecy statutes. Most of the other jurisdictions are colonies or former colonies of the United Kingdom and consequently apply *Tournier* and the English common law rules with respect to bank secrecy [182].

Even where a country has enacted legislation explicitly dealing with bank secrecy, other provisions of that country's law may be relevant to bank secrecy. For example, breaches of bank secrecy in Switzerland may give rise to actions in tort or contract, and may violate provisions of the Swiss Penal Code [183], in addition to violating Article 47(b) of Switzerland's Banking Act [184].

The remainder of this section briefly surveys the information covered by bank secrecy laws, the parties who are obligated to maintain secrecy, the penalties for violation of bank secrecy, and exceptions to the obligation of secrecy.

A.2.1. What is a secret?

Very few of the statutes explicitly define the scope of information covered by bank secrecy. However, in those countries with statutory provisions the types of information protected by bank secrecy are generally similar.

Section 10 of the Bahamian Bank and Trust Companies Regulation Act [185], one of the few statutes which defines the ambit of bank secrecy, includes "information relating to the identity, assets, liabilities, transactions, or accounts of a customer". The language of Montserrat's Confidential Information Ordinance of 1980 [186] is more general than that used in the Bahamian statute,

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although the scope of protection is essentially the same. It defines "confidential information" as "information received by a professional person from or in respect of a principal concerning any property in which the principal has an interest and which the recipient of such information is not authorized by the principal to divulge" [187].

A.2.2. Who is obligated to maintain bank secrecy?

Bank secrecy statutes differ with regard to the language they employ in defining the parties subject to the confidentiality requirements. For example, Panama's Regulations on Coded Bank Accounts [188] refer to "managers, officers and other employees of banking institutions". Article 47 of the Swiss Banking Law has a broader scope. It applies to "[w]hoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as representative of the Banking Commission, officer or employee of a recognized auditing company" [189].

Montserrat's secrecy provisions, in comparison to those of Switzerland and Panama, apply not only to those who divulge information but also to those who wilfully obtain or seek to obtain it. They cover any person who:

(a) being in possession of confidential information however obtained -
(i) divulges it; or
(ii) attempts, offers or threatens to divulge it; [or]
(b) willfully obtains or seeks to obtain confidential information to which he is not entitled [190].

A.2.3. Penalties for violations of bank secrecy

The statutes which explicitly refer to bank secrecy usually impose criminal penalties. Civil remedies are rarely provided. As a general rule, civil remedies are governed by the common law where relevant or by provisions of the civil code. One exception is the bank secrecy statute of El Salvador [191], which states that "banks are obligated to keep absolute confidentiality concerning their clients' transactions except when otherwise provided by law. Violation of this obligation makes them liable for damages".

The vast majority of bank secrecy statutes impose criminal penalties and fines for violations of confidentiality. The Bahamian statute [192], for example, provides for a fine of up to $15,000, a prison term of up to two years, or both. The statutes of Switzerland [193] and Liechtenstein [194] differentiate between willful and negligent violations of bank secrecy. A prison term or fine or both are mandated for willful violations, while for negligent violations there is only a fine. Montserrat's statute provides for a jail term of up to two years and a fine of up to $5,000 which, in the case of a "professional person", can be doubled to provide a maximum of a four year jail term and a fine of up to $10,000 [195]. The Greek secrecy statute [196] requires a minimum of six months imprisonment, with no possibility of a suspended sentence, or imposition of a fine in lieu of imprisonment.

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A.2.4. Exceptions to bank secrecy

Every jurisdiction has specific situations in which the bank either may have the option of or be required to divulge confidential information without being subject to civil or criminal penalties. In some jurisdictions, these exceptions are included in the statute. Greece, for example, provides a narrow exception:

> As an exception, information is allowed on secret bank deposits only by virtue of a specially justified decision of a domestic court, to the extent that the information is regarded as absolutely necessary for searching and punishing offenses which are regarded as felonies committed in Greece [197].

In other jurisdictions, such as Switzerland, the exceptions to bank secrecy are not specified within the secrecy statute but have developed outside of the statute [198].

Various principles of law recognize exceptions to bank secrecy statutes [199]. For example, a customer of a Swiss bank may waive the protection of the bank secrecy law and the waiver may be either explicit or implicit. As one commentator has stated, "[a] client can give a bank oral or written permission to disclose a fact subject to secrecy; even the tacit consent to the disclosure by implied action is sufficient" [200].

In Switzerland various procedural codes enacted by Swiss cantons may also supersede secrecy requirements. Bank secrecy is considered "private law" because it is contractual in nature. An "obligation to testify" often takes precedence in matters classified as "public law", such as those involving criminal proceedings, bankruptcy, debt collection, and the family. In civil proceedings, all cantons require third parties to testify:

> [I]n eleven cantons, the persons entitled to refuse testimony are enumerated individually. Bankers are not included and thus have a duty of testimony like anyone else...six cantons, including Zurich, leave it to the judge to decide, in carefully balancing the interests involved...[and] in eight cantons...all persons, including bankers, who hold professional secrets, are entitled to refuse testimony [201].

In criminal cases, Swiss federal procedures, and procedural rules in all but three cantons, compel disclosure, notwithstanding bank secrecy requirements [202]. Likewise, in proceedings involving bankruptcy of a bank and those involving efforts to recover money from a debtor, bank secrecy does not serve to prevent testimony [203]. In actions concerning tax collection, the nonreporting of income (tax evasion) will generally not provide a basis to overcome bank secrecy, but tax fraud will [204]. Other important exceptions are recognized in the 1977 Treaty between the United States and Switzerland concerning Mutual Assistance in Criminal Matters, the 1982 Memorandum of Understanding between the two governments, and Convention XVI [205].

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Most countries allow a waiver of secrecy by the customer. Many countries, in addition to Switzerland, also recognize exceptions which permit information to be provided in civil or criminal actions: in inheritance, tax fraud, or bankruptcy proceedings, by order of a court, and in other situations.

It is important to emphasize, however, that these exceptions do not necessarily enable the SEC to obtain the information which it needs in order to investigate suspected violations of the U.S. securities laws. Despite the existence of exceptions to bank secrecy, the SEC often is unable to penetrate the shield afforded by secrecy laws.

For example, in Panama, bank secrecy can be lifted by court order when a crime as defined by Panamanian law or a civil dispute occurs within that nation. This exception is strictly territorial. Consequently, when the crime in question has been committed outside of Panama, there can be no release of information. This strict territoriality may frustrate U.S. agencies' efforts to investigate crimes committed in the United States, but directed from Panama [206].

Similarly, the exceptions to the requirement of bank secrecy in the Bahamas may not provide the SEC with the means by which to pursue its investigations. As one observer recently noted:

> Bahamian law does provide for the lifting of bank secrecy when an attorney petitions the Supreme Court for a court order releasing requested documents. Bahamian authorities argue that there is no need for a U.S. criminal trial to be under way, for a defendant to be indicted or for any U.S. court action yet to have occurred, but it must be shown that a crime has been committed, the proof of which bears on the requested documents, or that a crime is suspected, the proof of which rests on the documents. From this, the prosecutor's dilemma is apparent. Realistically, he is going to need an indictment and, if he has enough evidence to indict does he really need the Bahamian records? [207].

Appendix B: An overview of blocking statutes

B.1. The background and rationale of blocking statutes

Blocking statutes are a generic classification of foreign laws which fit into at least one of the following two categories:

(1) *Discovery blocking statutes* – laws which prohibit compliance with requests for documents and information from foreign courts, investigatory agencies, or private parties. Some of these statutes apply automatically, stating that a citizen or resident may not comply with a foreign discovery request except with permission of the designated state official. Other statutes must be affirmatively invoked by a designated state official in order to prohibit a citizen or resident from complying with a discovery request.

(2) *Judgment blocking statutes* – laws which stipulate that the country

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enacting the legislation will not recognize in whole or in part the decisions of foreign courts or administrative agencies under the circumstances specified in the statute [208]. Presently, approximately 26 countries have enacted blocking statutes, including Great Britain, France, the Federal Republic of Germany, Canada, Australia, Denmark, Finland, Belgium, Greece, Italy, the Netherlands, New Zealand, Norway, the Philippines, Sweden, and Switzerland [209].

This section briefly analyzes the reasons for the development of blocking laws, traces their historical development, and compares and contrasts the provisions of a number of blocking statutes [210].

From at least 1945, the year in which *United States v. Aluminum Company of America* [211] was decided, the application of the antitrust laws beyond the borders of the United States has been the cause of diplomatic protests, international disputes, intense criticism, and protective legislation in the form of blocking laws [212]. The first blocking statutes were enacted in 1948 by the Canadian provinces of Quebec and Ontario. These statutes were enacted in response to a U.S. grand jury subpoena for documents located in Canada, which was issued in connection with an antitrust investigation of the International Paper Company [213].

During the 1960s, investigations by the Department of Justice into the activities of foreign shippers and world shipping agreements led a number of European countries, including Great Britain, France, Sweden, Norway, Finland, Denmark, and Belgium, to enact discovery blocking legislation. These blocking statutes generally were limited in scope and were applicable solely to the shipping industry [214].

By the end of the 1970s, foreign reactions to the extraterritorial application of the U.S. antitrust laws had grown stronger. A series of investigations by the Justice Department and private antitrust actions, particularly the *Westinghouse* uranium litigation [215], served as the catalysts for a significant number of countries to enact comprehensive judgment and discovery blocking statutes. These statutes, unlike their predecessors, were generally couched in broad language protecting all indigenous businesses rather than specific industries. Among the most significant statutes enacted over the last five years are those of Great Britain, France, South Africa, and the Philippines.

Many foreign countries enacted blocking statutes to combat perceived invasions of their sovereignty. The extraterritorial application of U.S. law has been seen as an effort to export American economic, judicial, and social values, as well as a failure to give due regard to the policies and values of other countries, and even as a form of protectionism intended to maintain America's relative economic strength vis-à-vis the rest of the world [216].

Many countries have been dissatisfied with the standards used by federal courts in applying U.S. laws to transnational economic activities. They perceive some decisions as attempts to apply U.S. law in situations where the connection of the transnational activity with the United States is insubstantial [217].

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Furthermore, because the scope of pretrial discovery is broader in the United States than in most countries, many believe that the integrity of their judicial systems would be undermined if domestic entities were forced to comply with U.S. discovery requests [218]. In addition, objections have been raised to the phenomenon of "legal tourism" – the practice of foreign lawyers coming to the country in order to "collect depositions, testimony and documents which will subsequently serve their clients' interests during a current or future lawsuit" [219]. U.S. pretrial discovery procedures also have been viewed as a way for American companies to impose burdensome and expensive requests on foreign competitors for confidential information which could be used against them either in legal actions or in the marketplace [220].

Finally, some countries enact blocking statutes because they disagree with the substantive provisions of U.S. laws regulating economic activity, particularly in the antitrust field. The U.S. antitrust laws contain proscriptions which are broader than those of most other countries; and private antitrust suits are rarely permitted elsewhere. In addition, treble damage awards pose a threat to many foreign industries and have been criticized by foreign commentators [221].

B.2. The substance of foreign blocking statutes

B.2.1. Types of blocking statutes

B.2.1.1. Discovery blocking statutes

Discovery blocking statutes prohibit compliance with requests or orders for documents and information from foreign courts, investigative agencies, or private parties. For example, Article 1 of the French statute [222] states:

> Except where international treaties or agreements provide otherwise, no natural person of French nationality or habitually residing on French territory, nor any officer, representative, agent, or employee of any legal entity having therein its principal office or an establishment, may... transmit, no matter where, to foreign public authorities documents or information of an economic, commercial, industrial, financial or technical nature, the communication of which would threaten the sovereignty, security or essential economic interests of France or public order, as defined by government authorites to the extent deemed necessary [223].

The Philippine discovery blocking statute [224] prohibits any individual from taking, sending, or delivering to any foreign person or government any documents or information "relating in any manner to any business carried on in the Philippines", unless it is part of regular business practices, is required in connection with proposed business transactions, is in compliance with an international agreement to which the Philippines is a signatory, or is permitted by Philippine authorities. Any person "served or issued any requirement, order, directive or subpoena of any legislative, administrative, or judicial

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authority in any jurisdiction outside the Philippines" is required to inform the designated Philippine authority, which then determines whether to permit compliance [225].

In comparison, Section 2 of Great Britain's Protection of Trading Interests Act [226] permits the British Secretary of State to prohibit compliance with foreign subpoenas or discovery requests either

> (a) if it infringes the jurisdiction of the United Kindom or is otherwise prejudicial to the sovereignty of the United Kingdom, or
> (b) if compliance with the requirement would be prejudicial to the security of the United Kingdom or to the relations of the government of the United Kingdom with the government of any other country [227].

Similarly, Australia's Foreign Proceedings Act of 1976 [228] vests the Australian Attorney General with the power to restrict the production of documents or information, either when a foreign court or tribunal exercises jurisdiction in a manner inconsistent with international law or comity or when such a restriction is "for the purpose of protecting the national interest".

B.2.1.2. Judgment blocking provisions

Judgment blocking provisions stipulate that the country enacting the legislation will not recognize in whole or in part the decisions of foreign courts under the circumstances specified in the statute. A number of countries, including the United Kingdom, Australia, Belgium, Canada, the Netherlands, the Philippines, and South Africa, have judgment blocking provisions.

One of the broadest judgment blocking provisions is South Africa's Protection of Business Act [229]. Section 1 of that Act provides that, except with the permission of the Minister of Economic Affairs, no judgment, order, direction, arbitration award, or letters of request will be enforced in South Africa concerning

> any act or transaction which took place at any time, whether before or after the commencement of this Act, and is connected with the production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic [230].

In contrast, the judgment blocking provisions of Great Britain's Protection of Trading Interests Act [231] and Australia's Foreign Antitrust Judgments Act [232] are somewhat narrower and, in some cases, require a designated official to enter an order precluding recognition of the foreign judgment. Great Britain's judgment blocking provisions apply automatically in the multiple damage situations (such as treble damage awards under the American antitrust laws) but must be affirmatively invoked by the British Secretary of State when the judgment relates to the regulation of foreign competition. In contrast,

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Australia's Foreign Antitrust Judgments Act provides the Australian Attorney General with the discretion to either reduce a foreign judgment or prohibit it entirely under the conditions specified within the statute, such as where

> it is desirable for the purpose of protecting the national interest in relation to trade or commerce with other countries, the trading operations of trading or financial corporations formed within the limits of the Commonwealth or any other matters with respect to which the Parliament has power to make laws or to which the executive powers of the Commonwealth relate that the judgment should not be recognized or enforceable in whole or in part in Australia ... [233].

B.2.2. Sanctions for noncompliance

All blocking laws carry sanctions for noncompliance. Section 3 of Great Britain's Protection of Trading Interests Act provides for fines of any person who knowingly contravenes a blocking order of the Secretary of State [234]. Other countries provide for some combination of fines and imprisonment for parties who violate a blocking statute. The French blocking statute, for example, provides for prison sentences ranging from two to six months or a fine ranging from 10,000 to 120,000 francs, or both [235].

B.2.3. Clawback provisions

In the Protection of Trading Interest Act, Great Britain created a novel remedy for parties affected by foreign punitive damage awards. Section 6 of the Act, nicknamed the "clawback" provision [236], enables a "qualifying defendant" to recover the punitive part of a multiple damages award paid by the defendant to the party in whose favor the judgment was given, whether or not the party was within the jurisdiction of the United Kingdom. For purposes of Section 6, a qualifying defendant was defined as a citizen of the United Kingdom and colonies, a corporation incorporated in the United Kingdom, or a person carrying on business in the United Kingdom.

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Notes

[1] In 1981, the seven stock exchanges with the greatest volume of equity securities were: New York – $389 billion; Tokyo – $224 billion; Zürich – $75 billion; London – $33 billion; Osaka – $32 billion; American – $26.5 billion; and Toronto – $21 billion. The seven exchanges with the largest market values of listed debt securities for the same period were: New York – $574 billion; Tokyo – $296 billion; Osaka – $288 billion; London – $188 billion; Paris – $101 billion; Stockholm – $63 billion; and Zürich – $57 billion. Federation Internationale des Bourse de Valeurs, FIBV Statistics 1981, 9, 17 (published by the New York Stock Exchange).

[2] Address by John S.R. Shad, Chairman, Securities and Exchange Commission, The Conference Board of New York (October 13, 1982).

[3] Bureau of Government Financial Operations, Office of the Secretary, U.S. Department of the Treasury, Treasury Bulletin, Winter Issue, 1st Qtr. 1983, at 106.

[4] *Id.*

[5] *Id.*

[6] Oral estimates provided by staff of the Department of Treasury to Michael D. Mann on April 28, 1983. The growing internationalization of the capital markets is also illustrated by the fact that the value of transactions in Japanese debt and equity securities, traded by foreigners, "jumped nearly fivefold since 1977 ...". Washington Post, June 20, 1983, at D6. During the six months ending March 1983, Nomura Securities Company, Japan's largest brokerage house, reported revenue from international operations of about $50 million, "three times more than two years earlier". *Id.*

[7] Coles, *Foreign Companies Raising Capital in the United States*, 3 J. Comp. Corp. L. & Sec. Reg. 300, 304 (1981).

[8] *See infra* Appendix A: Overview of secrecy laws.

[9] *See infra* Appendix B: Overview of blocking laws.

[10]

A person is subject to liability for the consequences of another's conduct which results from his directions as he would be for his own personal conduct if, with knowledge of the conditions, he intends the conduct, or if he intends its consequences, unless the one directing or the one acting has a privilege or immunity not available to the other. Restatement (Second) Agency Section 212 (1958); *see also* Sections 6 (especially comments (c) & (d)) and 8.

[11] Hanson v. Denckla, 357 U.S. 235, 253 (1958). *See infra* notes 119–121 and accompanying text.

[12] This article does not discuss in depth the requirements of subject-matter jurisdiction in the context of transnational securities transactions. In general, U.S. courts have applied two tests in determining whether subject-matter jurisdiction exists: the conduct test and the effects test. The conduct test was first applied in the context of transnational securities transactions in Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972). Courts using the conduct test generally quote Section 17 of the Restatement (Second) of Foreign Relations Law (1965):

A state has jurisdiction to prescribe a rule of law:
(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and
(b) relating to a thing located, or a status or other interest localized, in its territory.

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The effects test was first applied in the context of a transnational securities transaction in Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), *modified on other grounds*, 405 F.2d 215, *cert, denied*, 395 U.S. 906 (1969). The effects test is set forth in Section 18 of the Restatement (Second) of Foreign Relations Law (1965):

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either:
(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

For analysis of the precise contours of the application of the U.S. securities laws in the context of transnational securities cases, *see, e.g.*, Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy*, 7 J. Corp. L. 189 (1982); Johnson, *Application of the Federal Securities Laws to International Securities Transactions*, 45 Alb. L. Rev. 890 (1981); Norton, *Extraterritorial Jurisdiction of U.S. Antitrust and Securities Laws*, 28 Int'l & Comp. L.Q. 575 (1979); Mizrack, *Recent Developments in Extraterritorial Application of §10(b) of the Securities Exchange Act of 1934*, 30 Bus. Law. 367 (1975); Comment, *A Policy Approach to Subject Matter Jurisdiction in Transnational Securities Fraud Cases: Continental Grain (Australia) Party, Ltd. v. Pacific Oilseeds, Inc.*, 17 Willamette L.J. 263 (1982); Note, *Extraterritorial Application of the Federal Securities Laws: The Need for Reassessment*, 14 J. Int'l L. & Econ. 529 (1980); Recent Decisions, *Securities Regulation – Extraterritorial Application of Antifraud Provisions – IIT v. Cornfeld*, 12 Vand. J. Trans'l L. 197 (1979); Note, *The Extraterritorial Application of the Antifraud Provisions of the Securities Acts*, 11 Cornell Int'l L.J. 137 (1978); Comment, *Jurisdiction in Transnational Securities Fraud Cases – SEC v. Kasser*, 7 Den. J. Int'l L. & Pol'y 279 (1978); Note, *Extraterritorial Application of United States Securities Laws*, 42 Mo. L. Rev. 158 (1977); Note, *Extraterritorial Application of §10(b) of the Securities Exchange Act of 1934 – The Implications of Bersch v. Drexel Firestone, Inc. and IIT v. Vencap, Ltd.*, 33 Wash. & Lee L. Rev. 397 (1977); Note, *American Adjudication of Transnational Securities Fraud*, 89 Harv. L. Rev. 553 (1976).

[13] The waiver by conduct concept is an approach which may be practical for the SEC, but may be less useful for the Internal Revenue Service and the Department of Justice in connection with their efforts to enforce the tax and antitrust laws of the United States. Where securities transactions occur in the U.S. markets, the conduct that is the subject of a SEC investigation or enforcement action has occurred within the United States. In contrast, tax and antitrust enforcement actions often involve conduct that occurs outside the territory of the United States. Thus, it may be difficult to apply the concept that a person has made a deliberate choice to forgo the protections of foreign law by entering the United States. In addition, enforcement of the securities laws may be less vulnerable to charges that the United States is seeking to apply its law on an extraterritorial basis than enforcement of the tax and antitrust laws.

[14] H.R. Rep. No. 975, 91st Cong., 2d Sess. 12, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4394, 4397.

[15] *see, e.g.*, SEC v. Certain Unknown Purchasers of the Common Stock of, and Call Options for the Common Stock of, Santa Fe International Corporation, et al. 81 Civ. 6553 (S.D.N.Y. 1983); SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

[16] *See, e.g.*, SEC v. General Refractories Co., 400 F. Supp. 1248 (D.D.C. 1975); SEC v. Banque de Paris et des Pays-Bas (Suisse) S.A., 77 Civ. 798 (D.D.C. 1977). In SEC v. General Refractories Company, for example, the court found that the defendants, as a result of purchases made on the New York Stock Exchange, had surpassed the 5% beneficial ownership threshold, and failed to comply with the reporting provisions of Section 13(d) of the Securities Exchange Act and Rules 13d−1 and 13d−2 thereunder.

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[17] In SEC v. Everest Management Corp., for example, the United States District Court for the Southern District of New York found that a Swiss citizen, a former officer of a Swiss bank, had participated in the manipulation of two securities on the U.S. over-the-counter market and had intentionally utilized Swiss bank secrecy laws to conceal the manipulative conduct in which he and others had engaged. [1982 Transfer Binder] CCH Fed. Sec. L. Rep. ¶98,814 at 94,162–170 (S.D.N.Y. July 30, 1982). *See also* SEC v. Gilbert, 82 F.R.D. 723 (S.D.N.Y. 1979).

[18] *See, e.g.*, SEC v. American Institute Counselors, Inc., [1975–76 Binder] Fed. Sec. R. Rep. (CCH) ¶95,388 (D.D.C. Dec. 30, 1975).

[19] *See, e.g.*, SEC v. Lockheed Aircraft Corp., [1975–76 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,509 (D.D.C. April 13, 1976); SEC v. Goodyear Tire & Rubber Co., 77 Civ. 2167 (D.D.C. 1977).

[20] *See, e.g.*, SEC v. Vesco, 548 F. Supp. 1270 (S.D.N.Y. 1981).

[21] *See, e.g.*, SEC v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

[22] Section 10(b), 15 U.S.C. § 78(j) (1976); Section 14(e), 15 U.S.C. § 78(n) (1976).

[23] Rule 10b–5, 17 C.F.R. § 240.10b–5 (1982); Rule 14(e)–3, 17 C.F.R. § 240.14e–3 (1983).

[24] *See* U.S. v. Newman, 664 F.2d 12 (2d Cir. 1981) (banks in the Bahamas, Bermuda, Luxembourg and Switzerland used); SEC v. Banca della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1983) (Swiss banks used); Santa Fe International Corporation, 81 Civ. Action 6553 (S.D.N.Y. 1981) (Swiss banks used); U.S. v. Courtois [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,024 (S.D.N.Y. June 5, 1981) (banks in the Bahamas, Bermuda, Luxembourg and Switzerland used).

[25] *See In re* Grand Jury Subpoena Directed to Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S.Ct. 3555 (1983).

[26] These statutes were enacted in the wake of the market crash of 1929 and the depression that followed, in order to restore and maintain fair and honest securities markets. The SEC is also responsible for administering the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Trust Indenture Act of 1939 and the Public Utility Holding Company Act of 1935.

[27] Securities Exchange Act of 1934 Section 2, 15 U.S.C. §78b (1976). Section 2 of the Act points out that the danger of national emergencies, such as the market crash and the depression, makes regulation essential. The Congress finds that such emergencies, which "produce widespread unemployment and the dislocation of trade, transportation and industry ... are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets...". It declares that the expenditures required by such emergencies constitute a great burden on the national credit. In addition, it states that sudden and unreasonable fluctuations in the prices of securities adversely affect "the volume of credit available for trade, transportation and industry", impede proper appraisals of the value of securities, prevent a fair calculation of taxes owed to governmental authorities, and hinder the valuation of collateral for bank loans.

[28] Securities Act of 1933 Sections 19(b), 22(b), 15 U.S.C. §§ 77s(b), 77v(b) (1976); Securities Exchange Act of 1934 Section 21(a)-(c), 15 U.S.C. § 78u(a)-(c) (1976); Trust Indenture Act of 1939 Section 321(a), 15 U.S.C. § 77uuu(a) (1976); Investment Advisers Act of 1940 Section 209(a)-(c), 15 U.S.C. § 80b–9(a)-(c) (1976); Investment Company Act of 1940 Section 42(a)-(c), 15 U.S.C. § 80a–41(a)-(c) (1976); Public Utility Holding Company Act of 1935 Section 18(a)-(d), 15 U.S.C. § 79r(a)-(d) (1976).

Section 21(b) of the Securities Exchange Act provides:

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission

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deems relevant or material to the inquiry. *Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.*

15 U.S.C. § 78u(b) (1976) (emphasis added). Section 19(b) of the Securities Act of 1933, 15 U.S.C. § 77s(b) (1976) and Section 321(a) of the Trust Indenture Act of 1939, 15 U.S.C. § 77uuu(a) (1976) contain similar language.

[29] *See* SEC v. Minas de Artemisa, S.A., 150 F.2d 215 (9th Cir. 1945), in which the SEC, pursuant to Section 19(b) of the Securities Act, requested enforcement of an administrative subpoena directed to a Mexican company, which had been served within the United States at the Arizona residence of an American citizen who owned and operated the company. *See also* Mines and Metals Corp. v. SEC, 200 F.2d 317 (9th Cir. 1952), *cert. denied*, 345 U.S. 941 (1953).

[30] Minas de Artimesa, 150 F.2d at 218. *See also* Federal Maritime Commission v. De Smedt, 366 F.2d 464 (2d Cir.), *cert. denied*, 385 U.S. 974 (1966), in which the Second Circuit faced the same issue with respect to Section 27 of the Shipping Act of 1916, 46 U.S.C. § 826, a provision similar to Section 19(b) of the Securities Act.

[31] *See In re* Grand Jury Proceedings. United States v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), *appeal filed* (affirmed order enforcing grand jury subpoena served on a Miami branch of a Canadian bank for documents held in a Bahamian branch, notwithstanding Bahamian bank secrecy laws); United States v. Carver, Crim. No. 81-00342 (D.D.C.), *rev'd*, 671 F.2d 577 (1982) (international judicial assistance granted by the Court of Appeals, Grand Cayman Islands, despite Grand Cayman secrecy laws, including orders permitting inspection of documents and directing testimony). United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir.), *modified*, 691 F.2d 1281, *cert. denied*, 454 U.S. 1098 (1981) (affirmed order enforcing an Internal Revenue Service summons for documents held in Switzerland by a Swiss subsidiary of an American firm, notwithstanding Swiss secrecy laws); *In re* Grand Jury Proceedings. United States v. Field, 532 F.2d 404 (5th Cir.), *cert. denied*, 429 U.S. 940 (1976) (affirmed order enforcing a grand jury subpoena served upon a Canadian citizen in the United States directing him to testify concerning his activities as a managing director of a bank located in Grand Cayman Island, despite Grand Cayman Islands bank secrecy laws).

[32] *See* 17 C.F.R. § 201.14(b) (1983) setting forth the requirements of service of process within the United States. If service complies with these rules, the existence of in personam jurisdiction and the mode of service cannot be challenged.

[33] 636 F.2d 1300 (D.C. Cir. 1980).

[34] *Id.* at 1304.

[35] *Id.* at 1321.

[36] *Id.* at 1310–1313.

Given the compulsory nature of a subpoena, ... subpoena service by direct mail upon a foreign citizen on foreign soil, without warning to the officials of the local state and without initial request for or prior resort to established channels of international judicial assistance, is perhaps maximally intrusive [with respect to the foreign state's sovereignty]. *Id.* at 1313.

[37] *Id.* at 1313 n. 69.

[38] *Proposed Amendments to the Federal Deposit Insurance Act: Hearings on H.R. 15073 Before the House Comm. on Banking and Currency*, 91st Cong., 1st & 2d Sess. 12 (1969–70) (Statement of Pierre Leval, former Chief Attorney, Appellate Division, S.D.N.Y.).

[39] Fed. R. Civ. P. 37.

[40] Fed. R. Civ. P. 37 provides in pertinent part:

(a) MOTION FOR ORDER COMPELLING DISCOVERY
A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery:

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(b) FAILURE TO COMPLY WITH ORDER
(1) *Sanctions by Court in District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.
(2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

For further discussion of Rule 37, see generally 8 Wright & Miller, Federal Practice and Procedure §2284 (1970).

[41] SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981).

[42] *Id.* at 113.

[43] Restatement (Second) of Foreign Relations Law Section 40 (1965):

Limitations on Exercise of Enforcement Jurisdiction

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[44] Banca Della Svizzera Italiana, 92 F.R.D. at 117.

[45] *Id.* at 119.

[46] *See generally* Siegel, *United States Insider Trading Prohibition in Conflict with Swiss Bank*

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Secrecy, 4 J. Comp. Corp. L. & Sec. Reg. 353, 361–367 (1983).

[47] U.S. courts are increasingly responsive to requests for aid by law enforcement agencies. The most recent case illustrating this attitude concerns an investigation of Marc Rich & Co., A.G., which has received considerable publicity. Judge Leonard B. Sand has imposed fines, frozen assets, and threatened to close Marc Rich's U.S. subsidiary. *See In re* Grand Jury Subpoena Directed to Marc Rich & Co., A.G., 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S.Ct. 3555 (1983). The fines amount to $50,000 for each day the company fails to comply with the court's order. Other recent cases have involved the Bank of Nova Scotia, Deutsche Bank A.G., and the Toyota Motor Company.

The *Wall Street Journal* reported:

Generally, U.S. courts avoid requiring companies to do anything that would violate the company's home laws. But U.S. courts have increasingly ignored foreign laws forbidding compliance with subpoenas when shown evidence of "bad faith" by a company, or when they have found that U.S. interests outweigh a foreign government's concerns. In the Bank of Nova Scotia case, for instance, a federal appeals court in Atlanta said, "We aren't willing to emasculate the grand-jury process whenever a foreign nation attempts to block our criminal justice system."

Taylor and Lowenstein, *Court Decisions in Marc Rich Case to Help U.S. Pursue Foreign Firms*, Wall St. J., Aug. 22, 1983, at 17, col. 4.

This trend is likely to continue. The *Marc Rich* case illustrates how far a court will go to compel the production of evidence when a defendant is doing business in the United States. Still, in the *Marc Rich* case, the United States has yet to receive all of the documents requested. When cooperative aveues for document production are unavailable or unworkable, such litigation often represents the only practical approach for U.S. authorities.

[48] *See generally* Siegel, *supra* note 46, at 360–361.

[49] 27 U.S.T. 2019, T.I.A.S. 8302.

[50] 81 Civ. 6553 (S.D.N.Y. 1981). *See* Securities Exchange Act Release Nos. 9484 and 9485 (Oct. 26, 1981).

[51] *See* Siegel, *supra* note 46, at 360.

[52] *Id.*

[53] *Id.*

[54] The Swiss–United States negotiations, the MOU, and Convention XVI are discussed in Green, *U.S., Switzerland Agree to Prosecute Inside Traders*, Legal Times. Oct. 4, 1982, at 18, col. 1. The MOU is reprinted, *id.* at 17–19, *see also* 22 I.L.M. No. 1.

[55] Convention XVI is reprinted in Green, *supra* note 54, at 19 and 27.

[56] Convention XVI is applicable

[i]f within 25 trading days prior to a public announcement...of (A) a proposed merger, consolidation, sale of substantially all of an issuer's assets or other similar business combination ("Business Combination") or (B) the proposed acquisition of at least 10% of the securities of an issuer by open market purchase, tender offer or otherwise ("Acquisition"), a customer gives to a bank an order to be executed in the U.S. securities markets for the purchase or sale of securities or put or call options for securities of any company that is a party to a Business Combination or the subject of an Aquisition. ... *Id.*

[57] The SEC must show that

(i) material price or volume movements have occurred with respect to trading in the securities which are the subject of the Acquisition or Business Combination during the 25 day period prior to its announcement or (ii) it has other material indications that the transactions referred to...above

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were made in violation of U.S. insider trading laws. The [COI] shall be satisfied in all cases in which the daily trading volume of such securities increased 50% or more at any time during the 25 trading days prior to such announcement above the average daily trading volume of such securities during the average daily trading of such securities during the period from the 90th trading day to the 30th trading day prior to such announcement or the price of such securities varied at least 50% or more during the 25 trading days prior to such announcement. In all other cases, the [COI] shall review the information submitted by the SEC to decide whether it is reasonably satisfied that the SEC has reasonable grounds to make the Inquiry. *Id.*

[58] The MOU adds that,

The parties understand that these [price and volume] thresholds are set at high levels because they are intended to define the circumstances under which the [COI] "shall" be satisfied that the SEC has reasonable grounds to make the request. In all other cases in which the criteria are not met, the parties understand that the [COI] will be required to review the information submitted by the SEC to decide whether it is reasonably satisfied that the SEC has reasonable grounds to make a request. Accordingly, the parties understand that a failure by the SEC to meet the threshold criteria specified in the private Agreement shall not result in any presumption that the SEC does not have reasonable grounds to make the request for assistance under the terms of the private Agreement and this Memorandum of Understanding. MOU, *supra* note 54.

[59] The definition of an insider contained in Convention XVI is as follows:

a) A member of the board, an officer, an auditor or a mandated person of the Company or an assistant of any of them; or b) a member of a public authority or a public officer who in the execution of his public duty received information about an Acquisition or a Business Combination; or c) a person who on the basis of information about an Acquisition or a Business Combination received from a person described in ... a) or b) above has been able to act for the latter or to benefit himself from inside information. Convention XVI, *supra* note 55.

[60] The SEC asked that its subpoena enforcement power be clarified in November 1975, submitted a modified proposal in April 1976, and stated in March 1977 that the proposed legislation "remains our primary legislative objective in this area". *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure, 1977: Hearings on S.305 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 130 (1977).

[61] *Id.* at 142. The text of the proposal is set forth in full at 142–143.

[62] *Id.* at 143.

[63] *See supra* notes 33–37 and accompanying text.

[64] 28 U.S.C. §§ 1783, 1784 (1976).

[65] For the legislative history of the 1964 amendments to the Walsh Act, *see* 88th Cong., S. Rep. 1580, *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3790. *See also* U.S. v. Danenza, 528 F.2d 390 (2d Cir. 1975) (use of Walsh Act in context of a grand jury proceeding). Failure to comply with a subpoena issued pursuant to the Walsh Act subjects the subpoenaed person to contempt proceedings. If the person is found to be in contempt, the court can impose a fine of up to $100,000, which may be satisfied through the sale of any property the person holds in the United States.

Another approach is contained in Section 982 of the Internal Revenue Code, 26 U.S.C.A. § 982 (West Supp. 1983). Section 982 authorizes the Internal Revenue Service in the course of an audit to serve a taxpayer with a "formal document request" for production of books, records, or other documents found outside the United States (provided that normal procedures have failed to produce the documents sought). Such requests must be served by registered or certified mail at the

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taxpayer's last known address. The failure of a taxpayer to "substantially comply" with such a request may preclude the taxpayer from introducing the documents as evidence in a civil proceeding brought by the IRS for unpaid taxes.

[66] *See supra* notes 28–37 and accompanying text.

[67] *See* Fed. R. Civ. P. 4; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Hague Conference on Private International Law § XIV, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. 6638, 658 U.N.T.S. 163.

[68] Securities Exchange Act Release No. 12055, 8 SEC Docket 1155, 41 Fed. Reg. 8075; Securities Exchange Act Release No. 13149, 11 SEC Docket 1416, 42 Fed. Reg. 3312. *See* Siegel, *supra* note 46, at 365.

[69] *See generally* Siegel, *supra* note 46, at 365–367 (discussion of possible modes of unilateral action).

[70] *See* Siegel, *supra* note 46, at 365.

[71] 17 C.F.R. § 21.02 (1983).

[72] 17 C.F.R. § 15.05(b) (1983).

[73] *See infra* note 168 and accompanying text.

[74] *See* Siegel, *supra* note 46, at 361 ("At the present time,...international cooperation is pròbably not a practical solution to the SEC's enforcement problem.").

[75] *See supra* notes 41–47 and accompanying text.

[76] Although letters rogatory have on occasion been employed by the SEC, they are of limited use. Before a letter rogatory may be issued, a matter must already be pending before a U.S. district court. Often foreign cooperation is needed for investigative purposes, prior to the filing of a civil suit. In addition, letters rogatory involve a process which may take considerable time, and there is no assurance that a foreign court can, or will, comply with the request.

[77] *See* Shaffer v. Heitner, 433 U.S. 186, 197 (1977).

[78] *Id.* at 197, 199.

[79] *See* Pennoyer v. Neff, 95 U.S. 714, 735 (1878). *See also* Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404, 407 (1856). *See generally Developments in the Law – State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 920 (1960). *See infra* notes 83–104 and accompanying text.

[80] *See* Hess v. Pawloski, 274 U.S. 352 (1927). *See infra* notes 100–104 and accompanying text.

[81] Mass. Gen. Laws Ann. ch. 9, § 2 (West 1923).

[82] One example of the impact of communications advances on the securities markets is the development of international systems for providing price quotations for various securities. One New York based company, Telerate Systems, has announced a plan to provide quotations from the 16 primary dealers in government securities. Approximately one-fourth of Telerate's nearly 10,000 terminals are located overseas. Telerate is also seeking to provide information about treasury securities and short-term interest rates on the 50,000 U.S. terminals operated by Quotron Systems. In addition, London based Reuters Inc., with 38,000 terminals worldwide, has begun publishing quotes of treasury securities over its network, using terminals connected to satellite dish antennas. N.Y. Times, June 3, 1983, at D1, col. 3.

[83] *See infra* notes 131–147 and accompanying text.

[84] 95 U.S. 714 (1878).

[85] Shaffer, 433 U.S. 186, 197 (1977) (quoting Pennoyer, 95 U.S. at 722). As the Supreme Court pointed out in Shaffer v. Heitner, 433 U.S. at 199:

> If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "*in personam*" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "*in rem*" or "*quasi in rem*." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

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[86] Shaffer, 433 U.S. at 197. In Pennoyer, 95 U.S. at 723, the Supreme Court had explained that, "The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."

[87] Pennoyer, 95 U.S. at 723.

[88] *See* Shaffer, 433 U.S. at 199–200; Pennoyer, 95 U.S. at 723. In Pennover, 95 U.S. at 727, the Supreme Court added that:

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

[89] Pennoyer, 95 U.S. at 735.

[90] *Developments in the Law – State–Court Jurisdiction, supra* note 79, at 920.

[91] 59 U.S. (18 How.) 404, 407 (1856). *See Developments in the Law – State–Court Jurisdiction, supra* note 79, at 920.

[92] *Developments in the Law – State–Court Jurisdiction, supra* note 79, at 920.

[93] *Id.* (citation omitted).

[94] Lafayette Ins. Co., 59 U.S. at 407 (citation omitted).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.* at 408.

[99] *Id.*

[100] 274 U.S. 352 (1927).

[101] *See supra* note 81.

[102] *See supra* note 81.

[103] Hess, 274 U.S. at 356–357. The Supreme Court observed:

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. *Id.* at 356.

[104] Shaffer, 433 U.S. at 202.

[105] 326 U.S. 310 (1945).

[106] McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

[107] International Shoe Co., 326 U.S. at 316 (citations omitted). The type of service authorized by State "long-arm" statutes must be distinguished from that used in "implied consent" statutes, which provide for appointment of a resident agent for service of process. Service made pursuant to a long-arm statute may be made outside the State's territory but is valid only where the "minimum contacts" necessary to support personal jurisdiction exist.

[108] *See* Shaffer, 433 U.S. at 202.

[109] International Shoe Co., 326 U.S. at 319 (citations omitted).

[110] *Id.*

[111] *Id.* at 318 (citation omitted). *See* Shaffer, 433 U.S. at 204.

[112] International Shoe Co., 326 U.S. at 319 (citations omitted).

[113] 355 U.S. at 223.

[114] *Id.* (citations omitted).

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[115] *Id.*
[116] *Id.*
[117] *Id.* at 222–223.
[118] *Id.* at 223.
[119] 357 U.S. 235 (1958).
[120] *Id.* at 251.
[121] Hanson, 357 U.S. at 253. As in *McGee*, the Court noted that the need to assert jurisdiction over nonresidents had grown "[a]s technological progress has increased the flow of commerce between States ...", 357 U.S. at 250–251, and "[a]t the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome", 357 U.S. at 251.
[122] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
[123] 22 Ill. 2d at 435, 176 N.E.2d at 762–763.
[124] 22 Ill. 2d at 440, 176 N.E.2d at 365 (footnotes omitted).
[125] 22 Ill. 2d at 442, 176 N.E.2d at 776.
[126] *Id. See* World-Wide Volkswagen Corp. v. Woodson, 44 U.S. 286, 292 (1980).
[127] Gray, 22 Ill. 2d at 443, 176 N.E.2d at 766.
[128] *Id.*
[129] Section 27 states:

The district courts ... shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. 15 U.S.C. § 78aa (1976).

[130] *See* F.T.C. v. Jim Walter Corp., 651 F.2d 251 (5th Cir. 1981); Honeywell, Inc. v. Metz Apparatewerke, 509 F.2d 1137 (7th Cir. 1975); Mariash v. Morrill, 496 F.2d 1138 (2d Cir. 1974).
[131] 468 F.2d 1326 (2d Cir. 1972). *See* discussion, *supra* note 12.
[132] 468 F.2d at 1339.
[133] *Id.* The Leasco decision, among other things, affirmed the denial of a motion to dismiss the complaint for lack of personal jurisdiction against a defendant corporation on the gröund that two corporate officials had "appeared at meetings in the United States and allegedly made misrepresentations ...". *Id.* at 1341. In view of this conduct, the court did not find it necessary to determine whether the corporation could be considered to be "doing business" within the U.S. *Id.*
[134] 473 F.2d 515 (8th Cir. 1973).
[135] *Id.* at 518–519.
[136] *Id.* at 526. Molson was represented at the closing by two corporate officials.
[137] *Id.* at 524. It concluded that the defendants' conduct within the U.S. "was of such significance" to subject them to the jurisdiction of a district court. *Id.*
[138] 540 F.2d 591 (3d Cir. 1976).
[139] *Id.* at 595.
[140] *Id.* at 594–595.
[141] *Id.* at 595.
[142] 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).
[143] 548 F.2d at 114.
[144] 259 F. Supp. 880 (D.P.R. 1966).

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[145] *Id.* at 883.
[146] *Id.* at 889.
[147] SEC v. Gulf Intercontinental Finance Corporation, 223 F. Supp. 987, 995 (S.D. Fla. 1963).
Similarly, Section 416 of the proposed revision of the Restatement of Foreign Relations Law of the United States (Revised) (Tent. Draft No. 2, 1981) would recognize U.S. jurisdiction over "[a]ny transaction in securities carried out, or intended to be carried out, on a securities market in the United States ...". *Id.*, Section 416(1). Where the transactions in securities are not carried out on an American securities market and where (a) securities of the same issuer are traded on a U.S. securities market, or (b) representations or negotiations are made in the United States, or (c) either the parties subject to the regulation or persons sought to be protected are residents of the United States, the authority of the United States to exercise jurisdiction to prescribe a rule would depend on the "reasonableness" analysis articulated in Section 403(2). *Id.*, Section 416(2). Section 403(2) articulates a series of factors to be considered in determining whether the exercise of jurisdiction is reasonable, including, *inter alia*, conduct and effects within the state, the existence of justified expectations, the importance of the regulation to the regulating state, the extent other states regulate such activities or have an interest in regulating the activity, and the likelihood of conflict with other states.
[148] *See supra* notes 84–104 and accompanying text.
[149] *See, e.g.*, SEC v. Vesco, 548 F. Supp. 1270 (S.D.N.Y. 1981); IIT v. Cornfeld, 619 F.2d 909, 913 (2d Cir. 1980); IIT v. Vencap, Ltd., 519 F.2d 1001, 1016 (2d Cir. 1975); Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 977–978 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Roth v. Fund of Funds, Ltd., 405 F.2d 421, 422 (2d Cir. 1968), *cert. denied*, 394 U.S. 975 (1969); Fontaine v. SEC, 259 F. Supp. 880 (D.P.R. 1966).
[150] 519 F.2d 974 (2d Cir. 1975).
[151] *Id.* at 977–978.
[152] 519 F.2d 1001 (2d Cir. 1975).
[153] *Id.* at 1016–1017.
[154] 548 F. Supp. 1270, 1273 (S.D.N.Y. 1981).
[155] *Id.* at 1282.
[156] The court found that each of the individual defendants "in their respective capacities as officers and directors...knowingly participated in a series of transactions in which millions of dollars were diverted...to shell corporations in their control". *Id.* at 1283. This diversion was "ultimately into accounts which could be used for the personal benefit of the [individual defendants]". *Id.* at 1271. For a more detailed description of what the court termed "The Looting of the Funds", *see id.* at 1277.
[157] SEC Litigation Release No. 9793, 26 SEC Docket 928 (Oct. 29, 1982).
[158] Bersch, 519 F.2d at 987.
[159] 519 F.2d 1001, 1017 (2d Cir. 1975). *See also* Kasser, 548 F.2d 109 (3d Cir. 1977).
[160] 573 F.2d 281 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978).
[161] *Id.* at 284 (citation omitted).
[162] 548 F.2d at 116.
[163] 433 U.S. 186 (1977).
[164] *Id.* at 218 (Stevens, J., concurring).
[165] *Id.*
[166] *See* Hess v. Pawloski, 274 U.S. 352, 356–357; Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407. *See also* 17 C.F.R. §15.05(b) (1983) (existing CFTC rules).
[167] *See supra* note 67.
[168] An English language survey of bank secrecy and its impact on U.S. law enforcement is Staff Study of the Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 98th Cong., 1st Sess., Crime and Secrecy: The Use of Offshore Banks and Companies

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(Comm. Print Feb. 1983). [Hereinafter cited as "Bank Secrecy Study".]

[169] *See* Mueller, *The Swiss Banking Secret: From a Legal View*, 18 Int'l & Comp. L.Q. 360, 361 (1969).

[170] Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 New Eng. L. Rev. 18, 20–31 (1978).

[171] Mueller, *supra* note 169 at 361; Palmer, *The Austrian Banking System Under the 1979 Statute* (1980), partially *reprinted in* Bank Secrecy Study, *supra* note 168, at 193.

[172] [1924] 1 K.B. 461 (C.A.).

[173] 3 Halsbury's Laws of England § 97 (4th ed. 1973).

[174] T. Levine, T. Ferrigno, N. Watters and M. Mann, Insider Trading: A Forty-Eight Year Assessment (An Update) 65 (1982) (unpublished manuscript).

[175] Address delivered in Chicago (June 1965) *quoted in* Comment, *Swiss Bank Secrecy*, 5 Colum. J. of Transnat'l L. 128 (1966).

[176] Art. 47, Bank G. (Switz.) states:

1. Whoever divulges a secret entrusted to him in his capacity as officer, employee, mandatory, liquidator or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity, and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 francs.
2. If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 francs.
3. The violation of professional secrecy remains punishable even after termination of the official or employment relationship or the exercise of the profession.
4. Federal and cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved. *Reprinted in* Bank Secrecy Study, *supra* note 168, at 230.

[177] Mueller, *supra* note 169, at 361; Meyer, *supra* note 170, at 26.

[178] Kelly, *United States Foreign Policy: Efforts to Penetrate Bank Secrecy in Switzerland from 1940 to 1975*, 6 Cal. W. Int'l L.J. 211, 214 (1976).

[179] Bank Secrecy Study, *supra* note 168, at 85.

[180] *Id.* at 7.

[181] *Id.* at 9.

[182] Clarke, *Bank Secrecy in the English-Speaking Caribbean and Atlantic Regions, reprinted in* Bank Secrecy Study, *supra* note 168, at 181–185.

[183] For more details concerning the history and law relating to Swiss bank secrecy, *see* Levine, Ferrigno, Watters and Mann, *supra* note 174; Diamond, *Foreign Bank Secrecy and the Evasion of United States Securities Laws*, 9 N.Y.U. J. Int'l L. & Pol. 417 (1977); Schultz, *Banking Secrecy and the Swiss-American Treaty on Legal Assistance in Criminal Matters* (Swiss Bank Corporation, 1976); Kelly, *supra* note 178; Meier, *Banking Secrecy in Swiss and International Taxation*, 7 Int'l Law. 16 (1973); Thomason, *Secret Foreign Bank Accounts*, 6 Tex. Int'l L.F. 105 (1970); Mueller, *supra* note 169; Comment, *Secret Swiss Bank Accounts: Uses, Abuses, and Attempts at Control*, 39 Fordham L. Rev. 500 (1971); Comment, *Swiss Banking Secrecy, supra* note 175.

[184] *See supra* note 176.

[185] Bank and Trust Company Regulation Act of 1965, Section 10(1) (amended 1980) (Bahama Islands).

[186] Montserrat Ordinance No. 5 Section 2 (1980) (The Confidential Information Ordinance), *reprinted in* Bank Secrecy Study, *supra* note 168, at 218.

[187] *Id.*

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[188] Regulations on Coded Bank Accounts, Law Number 18, Art. 4 (Jan. 28, 1959) (Pan.), *reprinted in* Bank Secrecy Study, *supra* note 168, at 226.

[189] Art. 47, Bank G. (Switz.). *See supra* note 176.

[190] Montserrat Ordinance, *supra* note 186, at Section 5(1).

[191] Codigo de Comercio de la Republica de El Salvador, Art. 1185 (2d ed. San Salvador 1980), *reprinted in* Bank Secrecy Study, *supra* note 168, at 209.

[192] Bank and Trust Company Regulation Act of 1965, *supra* note 185, at Section 10(3).

[193] Art. 47, Bank G. (Switz.), *supra* note 176.

[194] Bank and Savings Bank Law of Dec. 21, 1960, Art. 47 (Liech.), *reprinted in* Bank Secrecy Study, *supra* note 168, at 216.

[195] Montserrat Ordinance, *supra* note 186, at Section 5.

[196] The Bank Secrecy Act, Art. 2 (Greece).

[197] *Id.* at Art. 3.

[198] *See supra* note 183 and accompanying text.

[199] *See* H. Schultz, *supra* note 183, at 8–12; Meyer, *supra* note 170, at 29–35; Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 Geo. Wash. L. Rev. 284, 291–300 (1954).

[200] Schultz, *supra* note 183, at 8.

[201] Meyer, *supra* note 170, at 31–32.

[202] Note, *The "Secret" Swiss Account: End of an Era*, 38 Brooklyn L. Rev. 384, 388 (1971).

[203] Meyer, *supra* note 170, at 35.

[204] *Id.* at 33–34. *But see In re* W., BG 68 I 196, a 1942 case involving application of the Swiss Federal Defense Tax Resolutions. There, a Swiss bank acted as an intermediary between a Swiss debtor and creditor. The debtor was required by the tax law to name the creditor, but was unable to do so because the bank refused to disclose the creditor's identity. In addressing whether the bank could properly withhold the creditor's name, the Swiss Federal Supreme Court stated:

> There is also no basis for invoking article 47 of the Banking Act for we are not dealing with relations of the bank vis-à-vis third parties but what we have here is the relationship of a debtor to his creditor in which case the Bank Secrecy Act has no application at all. We do not see under what view the bank could deny disclosing the name of the creditor to the bank's customer for whom it acted as agent in obtaining a loan .... *Id.* at 197, 198 (unofficial translation from the German).

[205] *See supra* notes 53–59 and accompanying text.

[206] Bank Secrecy Study, *supra* note 168, at 82–83.

[207] *Id.* at 58.

[208] *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction: Extraterritoriality and the Foreign Blocking Statutes*, 28 Loyola L. Rev. 213, 214 n. 6 (1982).

[209] Ad Hoc Task Force Extraterritoriality, Preliminary Report on the Extraterritorial Application of U.S. Laws, 1981 ABA Sec. Int'l Law. *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction, supra* note 208.

[210] *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction, supra* note 203, at 276–279, which cites all of the relevant statutes. A significant number of articles have been written in recent years about foreign blocking statutes. For general surveys of the area, *see, e.g.*, Pettit & Styles, *International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 Bus. L. 697 (1982); Comment, *Shortening the Long Arm of American Antitrust Jurisdiction, supra* note 208; Comment, *Foreign Blocking Legislation: Recent Roadblocks to Effective Enforcement of American Antitrust Law*, 1981 Ariz. St. L.J. 945. For analysis of Great Britain's Protection of Trading Interests Act, 1980, *see* Samie, *Extraterritorial Enforcement of United States Antitrust Laws: The British Reaction*, 16 Int'l Law. 313 (1982); Rosen, *The Protection of Trading*

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Interests Act, 15 Int'l Law. 213 (1981); Gordon, *Trends – Extraterritorial Application of United States Economic Laws: Britain Draws the Line*, 14 Int'l Law. 151 (1980); Note, *Section 6 of Great Britain's Protection of Trading Interests Act: The Claw and the Lever*, 14 Cornell Int'l L.J. 457 (1981). Discussions of the French blocking statute, Law No. 80-538 [1980], J.O. 1799, may be found in Herzog, *Current Developments – The 1980 French Law on Documents and Information*, 75 Am. J. of Int'l L. 382 (1981). Translations of a number of foreign blocking statutes and the legislative history of the French blocking statute may be found in Memorandum in Support of Defendant's Motion to Dismiss the Complaint, Compagnie Française d'Assurance pour le Commerce Extérieur v. Phillips Petroleum Company, 81 Civ. 4463 (S.D.N.Y.) at Exhibits B and C [hereinafter cited as "Phillips Memorandum"].

[211] 148 F.2d 416 (2d Cir. 1945).

[212] Rosen, *supra* note 210, at 213.

[213] *See* Comment, *Foreign Blocking Legislation*, 1981 Ariz. St. L.J., *supra* note 210, at 951.

[214] *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction*, *supra* note 208, at 268–272.

[215] *In re* Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980). In the Westinghouse uranium litigation, Westinghouse brought a treble damage antitrust action for $6.2 billion against 29 members of an alleged international uranium cartel. The Seventh Circuit affirmed the granting of default judgments against nine foreign defendants who had refused to appear before the district court. The governments of the United Kindom, France, Australia, South Africa, and Canada submitted amicus curiae briefs or memoranda to the court. Each of these countries has enacted blocking legislation. *See* Comment, *Shortening the Long Arm of American Antitrust Jurisdiction*, *supra* note 208, at 226–234; Rosen, *supra* note 210, at 220–223.

[216] *See* Comment, *Foreign Blocking Legislation*, 1981 Ariz. St. L.J., *supra* note 210, at 958–974.

[217] *Id.* at 958–963; Comment, *Shortening the Long Arm of American Antitrust Jurisdiction*, *supra* note 208, at 235–236, 245; Samie, *supra* note 210, at 314–315.

[218] Comment, *Foreign Blocking Legislation*, 1981 Ariz. St. L.J., *supra* note 210, at 970–971; Phillips Memorandum, *supra* note 210, at Exhibit B 12–21 ("There is, moreover, one stage prior to the trial which is unknown in France, the 'pretrial discovery of document' ... this accusatory procedure is contrary to the very spirit of our procedural laws.").

[219] *See, e.g.*, Phillips Memorandum, *supra* note 210, at Exhibit B 16–21 (legislative history of the French blocking statute).

[220] *Id.* at Exhibit B 18–19.

[221] Comment, *Foreign Blocking Legislation*, 1981 Ariz. St. L.J., *supra* note 210, at 963–964; Samie, *supra* note 210, at 315–317.

[222] Law Relating to the Communication of Economic, Commercial, Industrial, Financial or Technical Documents on Information to Foreign National or Legal Persons, Law No. 80-538 [1980], J.O. 1799, §1 (Fr.), translation taken from Herzog, *supra* note 210, at 382.

[223] *Id.*

[224] Presidential Decree, No. 1718 §2 (Aug. 21, 1980) (Phil.).

[225] *Id.* at §5.

[226] Protection of Trading Secrets Act, 1980, c. 11 (U.K.).

[227] *Id.*

[228] Foreign Proceedings (Prohibition of Certain Evidence) Act No. 121 of 1976, *amended by* Foreign Proceedings (Prohibition of Certain Evidence Amendment) Act No. 202 of 1976 (Austl.).

[229] Protection of Businesses Act, No. 99, 1979, *amended by* Protection of Businesses (Amendment) Act. No. 114, 1980 (S. Afr.).

[230] *Id* at §1.

[231] Protection of Trading Secrets Act, *supra* note 226, at §5.

[232] Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 (Austl.).

[233] *Id.*

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[234] Protection of Trading Secrets Act, *supra* note 226, at §3.
[235] Law Relating to Documents, *supra* note 222.
[236] Protection of Trading Interests Act, 1980, c. 11 (U.K.). *See generally* articles cited *supra* note 210.

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