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Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks

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NOTES

Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks

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I. INTRODUCTION

In 1982 a New York federal court judge ordered a Swiss company owned by United States commodities broker Marc Rich to produce documents necessary to determine Rich's United States tax liability.[1] After the court threatened to impose a 50,000 dollar penalty on the Swiss company for each day it failed to comply with the order and after the Second Circuit Court of Appeals affirmed the decision,[2] the company agreed to provide the financial records to United States investigators.[3] Before the company was able to send the documents to the United States, however, the Swiss Government impounded the records, claiming the New York judge had exercised extraterritorial jurisdiction in blatant disregard of Swiss sovereignty and Swiss bank secrecy laws.[4] Rich later fled to Switzerland with the largest delinquent tax bill in United States history: forty-eight million dollars.[5]

Contrast the above scenario with the Swiss reaction to the Iran-*Contra* investigation.[6] On November 3, 1987, in response to United States

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1. *In re* Grand Jury Subpoena Directed to Marc Rich & Co., No. M-11-188, slip. op. at 3 (S.D.N.Y. Aug. 25, 1982) (LEXIS, Genfed library, Dist. file), *aff'd sub nom. In re* Grand Jury Subpoena Directed to Marc Rich & Co., Marc Rich & Co. v. United States, 707 F.2d 663 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983). For a discussion of this case, see Note, *The Marc Rich Case: Extension of Grand Jury Subpoena Power to Nonresident Alien Corporations*, 18 GEO. WASH. J. INT'L L. & ECON. 97 (1984).

2. *Marc Rich & Co.*, 707 F.2d at 670.

3. Mufson, *Switzerland Enters Marc Rich Case to Halt U.S. From Obtaining Subpoenaed Papers*, Wall St. J., Aug. 15, 1983, at 3, col. 2; Bock, *Swiss Secrecy: Don't Bank on It*, TIME, Dec. 7, 1987, at 49.

4. Mufson, *supra* note 3; Bock, *supra* note 3. The Swiss Government had filed a note of protest with the United States Department of State after the district court imposed the contempt sanctions. Mufson, *supra* note 3.

5. Bock, *supra* note 3.

6. The Iran-*Contra* investigation concerns the Reagan Administration's secret arms sales to Iran, the proceeds of which were diverted to the Nicaraguan insurgents known as the *Contras*. United States Attorney General Edwin Meese appointed Lawrence Walsh as independent counsel to investigate whether the actions involved fraud, conspiracy, ob-

requests for bank records, the Swiss Ministry of Justice turned over to United States prosecutors thousands of pages of documents relating to Swiss bank accounts held by Lieutenant Colonel Oliver North, retired Air Force Major General Richard Secord, and other individuals implicated in independent counsel Lawrence Walsh's investigation.[7] Iranian-born businessmen Albert Hakim and Manucher Ghorbanifar, also subjects of the investigation, had filed suit in Switzerland together with Secord challenging Walsh's right to obtain the financial records under Swiss bank secrecy laws. On August 20, 1987, however, the Swiss Federal Tribunal, Switzerland's highest court, ruled that Switzerland would lift its traditional bank secrecy laws in this case and cooperate with United States investigators.[8] As a result, Mr. Walsh and his staff received over sixty pounds[9] of normally privileged bank records.

One could consider the tremendous disparity between the two situations above to be the result of the gradual relaxation of Swiss bank secrecy laws over the past ten years. More realistically, the disparity demonstrates the confusion that has been, until recently, the predominant characteristic of United States-Swiss relations concerning bank secrecy. Although Switzerland has agreed to assist the United States in tracking down criminals who use Swiss bank accounts to conceal the proceeds of their criminal activities,[10] the two nations have not always agreed on what constitutes a crime.[11] Switzerland thus refused to assist the United States in its investigation of Marc Rich for tax evasion because tax evasion is not a crime in Switzerland.[12] Switzerland gladly assisted United

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struction of justice or the misspending of federal funds. Targets of the investigation include Lieutenant Colonel Oliver North, retired Air Force Major General Richard Secord and former National Security Advisor John Poindexter.

7. Shenon, *Swiss Bank Records in Iran-Contra Case are Released to U.S.*, N.Y. Times, Nov. 4, 1987, at A1, col. 1.

8. Taylor, *Iran-Contra Counsel Walsh Is Upheld On His Authority, Access to Swiss Data*, Wall St. J., Aug. 21, 1987, at 38, col. 1. After Swiss officials had granted the United States request to freeze the bank accounts of approximately twenty United States, Iranian, Swiss, and Saudi Arabian individuals and companies in November 1986, General Secord, Mr. Hakim and Mr. Ghorbanifar filed suit requesting the Swiss court to block release of their bank records. The court rejected their arguments, and the three men appealed to the Swiss Federal Tribunal, which rejected their appeal on August 20, 1987. Mr. Hakim and Mr. Ghorbanifar made a final unsuccessful attempt to appeal the decision, lodging an appeal with the Geneva cantonal court in September. *Id.* N.Y. Times, Nov. 1, 1987, at A10, col. 2.

9. Shenon, *supra* note 7.

10. *See infra* note 288-95 and accompanying text.

11. Bock, *supra* note 3.

12. *See infra* notes 243-50 and accompanying text.

States authorities in their investigation of Oliver North and his associates for fraud because Swiss law considers fraud to be criminal.[13]

The United States has utilized numerous techniques to penetrate bank secrecy, with varying degrees of success. The United States and Switzerland have signed several agreements relating to bank secrecy and its role in United States criminal investigations.[14] These efforts have allowed United States authorities to obtain normally privileged information in numerous investigations over the past ten years, although some confusion as to what information is available still exists today.

Two recent events have expanded the scope of information available to United States investigators and alleviated some of the confusion. In November 1987 the United States and Switzerland exchanged a Memorandum of Understanding which granted United States authorities greater access to Swiss bank records.[15] In addition, in December 1987 the two houses of the Swiss Parliament enacted a new law making insider trading illegal.[16] This law will allow United States securities fraud investigators greater leeway in obtaining normally privileged financial records from Swiss banks.[17] These two developments make Swiss bank secrecy almost obsolete as a means of hiding ill-gotten gains from United States investigators. By this summer, United States authorities can expect to have access to Swiss bank records in almost all future investigations.

II. ORIGINS OF SWISS BANK SECRECY[18]

A. *Protection Other than Under the Banking Law of 1934*

The concept of Swiss bank secrecy developed from several distinct sources, one of which is the Swiss concept of the right to privacy. The

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13. *See* SWISS PENAL CODE (SCHWEIZERISCHES STRAFGESETZBUCH), *infra* note 24; Bock, *supra* note 3.

14. *See infra* notes 153, 186, 262, 288, 307 and 366.

15. *See infra* notes 366-71, accompanying text and Appendix A.

16. *See infra* notes 373-81, accompanying text and Appendix B.

17. *Id.*

18. For other detailed accounts of the origins of Swiss bank secrecy and United States efforts to obtain information held by Swiss banks, see generally Crinion, *Information Gathering on Tax Evasion in Tax Haven Countries*, 20 INT'L LAW. 1209 (1986); Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States-Swiss Memorandum of Understanding*, 9 N.C. J. INT'L L. & COM. REG. 1 (1983); Kelly, *United States Foreign Policy: Efforts to Penetrate Bank Secrecy in Switzerland from 1940 to 1975*, 6 CAL. W. INT'L L.J. 211 (1976); Meier, *Banking Secrecy in Swiss and International Taxation*, 7 INT'L LAW. 16 (1973) [hereinafter *Swiss and International Taxation*]; Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 GEO. WASH. L. REV. 284 (1955); Meyer, *Swiss Banking Secrecy and Its*

Swiss notion of personal rights recognizes the right of every individual and business entity to a "sphere of secrecy" (*Geheimsphäre*).[19] Under this theory an individual's sphere of privacy includes "his intellectual (incorporeal) existence, his health, his family life, and his financial affairs."[20] A business entity's sphere of privacy extends to "business secrets, such as sources of goods, names of customers and business organizations, and technical secrets which are not patentable or for which no protection by patents has been sought."[21]

The civil law concept of personal privacy, which includes the right to privacy in financial matters,[22] is much broader than the common law concept of personal privacy in the United States, where the constitutional right to privacy extends only to those matters that the Supreme Court considers fundamental.[23] Bank secrecy, which prohibits banks or bankers from disclosing information they obtain about their clients in the course of business and which promotes the confidentiality of personal financial matters, arose partially as a response to the Swiss civil law concept of the right to privacy.

Swiss statutory provisions[24] codified the early development of bank se-

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Legal Implications in the United States, 14 NEW ENG. L. REV. 18 (1978); Mueller, *The Swiss Banking Secret from a Legal View*, 18 INT'L & COMP. L.Q. 360 (1969); Raifman, *The Effect of the U.S.-Swiss Agreement on Swiss Banking Secrecy and Insider Trading*, 16 SEC. L. REV. 423 (1984); Note, *The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations and the Memorandum of Understanding Between the United States and Switzerland*, 7 B.C. INT'L & COMP. L. REV. 541 (1984) [hereinafter Note, *Effect of Swiss Bank Secrecy*]; Comment, *Swiss Banking Secrecy*, 5 COLUM. J. TRANSNAT'L L. 128 (1966); and Comment, *Securities Regulations Investigations—United States-Swiss Treaty Attempts to Increase Cooperation in Releasing Names of Swiss-based Account Holders Involved in United States Securities and Exchange Commission Investigations*, 15 GA. J. INT'L & COMP. L. 135 (1985), from which much of the historical background in this note was derived.

19. Meyer, *The Banking Secret and Economic Espionage in Switzerland*, *supra* note 18, at 287. Private personality rights are those of an individual. Economic personality rights are those of a business entity. *Id.*

20. *Id.*

21. *Id.* at 287-88.

22. Note, *Effect of Swiss Bank Secrecy*, *supra* note 18, at 544.

23. Roe v. Wade, 410 U.S. 113, 152 (1973). *See* S. STRÖMHOLM, RIGHT OF PRIVACY AND RIGHTS OF THE PERSONALITY - A COMPARATIVE SURVEY 119 (1967). The Supreme Court has ruled that matters such as marital choice (Loving v. Virginia, 388 U.S. 1, 12 (1967)), procreation (Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942)), contraception (Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972)) and child rearing (Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)) involve fundamental rights.

24. The most important Swiss federal laws discussed in this article are codified in the

crecy and provided penalties for its breach. Under Swiss contract law the obligation of a banker to maintain the confidentiality of all information he learns about his client is an implied condition of the deposit contract.[25] This implied obligation arises from the law of agency, under which a banker acts as an agent for his clients and owes them a duty of loyalty.[26]

Under article 97 of the Swiss Code of Obligations[27] an obligor must compensate his obligee for damages arising from his failure to perform his obligation.[28] Article 97 thus permits a bank customer to sue his bank for its failure to perform its obligations—that is, for its failure to maintain bank secrecy. In addition, under article 28 of the Swiss Civil Code[29] an individual may sue his bank and banker in tort for injuries to his person or reputation caused by violations of his rights.[30] Presumably this

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SWISS CIVIL CODE (SCHWEIZERISCHES ZIVILGESETZBUCH [hereinafter ZGB]), the SWISS CODE OF OBLIGATIONS (SCHWEIZERISHES OBLIGATIONENRECHT [hereinafter OR]) and the SWISS PENAL CODE (SCHWEIZERISCHES STRAFGESETZBUCH [hereinafter STGB]). *See* I. WILLIAMS, THE SWISS CIVIL CODE (1976) for a translation of the SWISS CIVIL CODE. *See* SWISS CONTRACT LAW (Swiss-American Chamber of Commerce trans. 1977) for a translation of the SWISS CODE OF OBLIGATIONS.

25. Comment, *Swiss Banking Secrecy, supra* note 18, at 128.

26. Note, *Effect of Swiss Bank Secrecy, supra* note 18, at 546. The contractual agreement need not express such an obligation for it to arise. *Id.*

27. The SWISS CODE OF OBLIGATIONS, enacted and entered into force at the same time as the SWISS CIVIL CODE (*see infra* note 29), sets forth Swiss laws governing contracts and agency relationships. The drafters organized it in three main parts. "[T]he first [covers] obligations in general, whether arising by contract or tort, the second [covers] special kinds of contracts, such as sale, hire, agency, suretyship, gaming contracts, annuities, partnership; and the third . . . [covers] Commercial Law including Company Law, law of negotiable instruments, and commercial registration." I. WILLIAMS, *supra* note 24, at 16.

28. Article 97 states: "If the performance of an obligation can not at all or not duly be effected, the obligor shall compensate . . . for the damage arising therefrom, unless he proves that no fault at all . . . is attributable to him." OR, *supra* note 24, at art. 97.

29. The Swiss Parliament passed the SWISS CIVIL CODE in December 1907 to unify the private law of Switzerland, which had previously been under the control of the various cantons of which Switzerland is composed. The SWISS CIVIL CODE came into force on January 1, 1912. The drafters divided the Civil Code into the following sections: a Preliminary Chapter (arts. 1-10), the Law of Persons (arts. 11-89), Family Law (arts. 90-456), the Law of Succession (arts. 457-640) and the Law of Real and Personal Property (arts. 641-977). In addition, the SWISS CIVIL CODE includes a separately numbered Final Title (arts. 1-63). I. WILLIAMS, *supra* note 24, at 13-15. ZGB, *supra* note 24.

30. Article 28 of the SWISS CIVIL CODE states:

> Where any one is being injured in his person or reputation by another's unlawful act, he can apply to the judge for an injunction to restrain the continuation of that act.

would include the ability to sue for violations of an individual's right to privacy. Finally, articles 41 and 49 of the Swiss Code of Obligations also provide bases for breach of secrecy actions against banks.[31]

The Swiss Penal Code[32] provides additional protection for bank secrecy. Article 162 imposes criminal liability on individuals who divulge legally or contractually protected business information,[33] and article 273 extends these penalties to individuals who release privileged bank information to foreign parties.[34] In addition, under article 159 of the Swiss Penal Code a banker who discloses confidential information is criminally liable if the disclosure impairs his client's resources.[35] These provisions apply not only to Swiss citizens but also to foreigners residing in Switzerland.[36] The Swiss Penal Code, in conjunction with the Swiss Civil Code and the Swiss Code of Obligations, thus fortifies the notion of bank secrecy, which evolved originally as a response to the Swiss concept of personal privacy.

B. *Protection Under the Banking Law of 1934*

In 1934 Swiss lawmakers reinforced the concept of bank secrecy by drafting the Federal Law Relating to Banks and Savings Banks of No-

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> An action for damages or for the payment of a sum of money by way of moral compensation can be brought only in special cases provided by law.

ZGB, *supra* note 24, at art. 28.

31. Article 41 of the SWISS CODE OF OBLIGATIONS states: "Whoever unlawfully causes damage to another, whether willfully or negligently, shall be liable for damages. . . ." OR, *supra* note 24, at art. 41. Article 49 of the SWISS CODE OF OBLIGATIONS states:

> Where individual inherent rights are injured, the damaged person may, where there is fault, claim compensation for any damage sustained and, where the particular seriousness of the injury and of the fault justify it, claim payment of a sum of money as reparations.
>
> In lieu of, or in addition to, this payment, the judge may also award other kinds of reparations.

OR, *supra* note 24, at art. 49.

32. The Swiss Government enacted the SWISS PENAL CODE on December 21, 1937. Voyame, *Introduction*, in INTRODUCTION TO SWISS LAW 6 (F. Dessemontet & T. Ansay ed. 1983).

33. STGB, *supra* note 24, at art. 162. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 24.

34. STGB, *supra* note 24, at art. 273. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 24.

35. STGB, *supra* note 24, at art. 159. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 24-25.

36. Comment, *Swiss Banking Secrecy*, *supra* note 18, at 130 (citing the 1939 Swiss Federal Court decision Thurgau, *Staatsanwaltschaft v. Dändliker*, *Bundesgericht*, Mar. 6, 1939, 65 (I.) S.B.G. 47).

vember 8, 1934 (Banking Law), which provides statutory sanctions in addition to the previously mentioned remedies.[37] Article 47 of the Banking Law imposes fines and even imprisonment for violations of bank secrecy. Article 47(b) provides:

> Anyone who in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the banking commission or an officer or employee of its bureau intentionally violates his duty to observe silence or his professional rule of secrecy or anyone who induces or attempts to induce a person to commit any such offence, shall be liable to a fine of up to 20,000 francs or imprisonment for up to six months, or both.
>
> If the offender acted with negligence he shall be liable to a fine of up to 10,000 francs.[38]

Thus, Swiss bank secrecy became " 'indirectly recognized as an obligation of civil law.' "[39]

Protection of bank secrecy was not the primary objective of the Banking Law.[40] Rather, various geopolitical and economic factors contributed to the law's enactment.[41] Until the promulgation of the Banking Law in 1934, no federal supervision over banks existed in Switzerland. Several international banking crises in the first half of the century provided the initial recognition of the need for federal regulation. For example, the nonexistence of external constraints on bank directors compounded by a general lack of liquid assets caused numerous Swiss banks to fail just

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37. *Bundesgesetz über die Banken und Sparkassen* (Federal Law Relating to Banks and Savings Banks of Nov. 8, 1934, as amended by Federal Law of Mar. 11, 1971) *Amtliche Sammlung der Bundesgesetze und Verordnungen der Schweizerischen Eidgenossenschaft* (Official Collection of Federal Laws and Regulations of the Swiss Confederation) (1971) [hereinafter Banking Law].

38. Translation of article 47(b) of the Banking Law by Mueller, *supra* note 18, at 362.

39. Comment, *Swiss Banking Secrecy, supra* note 18, at 129 (quoting and translating *Konkursverwaltung der Kredit- und Verwaltungsbank Zug A.G., Bundesgericht,* Oct. 21, 1960, 86 (III) *Entscheidungen des Schweizerischen Bundesgerichtes* 114, 117 (Swit. 1960)).

40. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 26. *See also* Meier, *Swiss and International Taxation, supra* note 18, at 18 ("The main objective of the Banking Law is the *protection of the depositor and other bank creditors.*"); Mueller, *supra* note 18, at 361 ("When the Banking Law was proposed in the early thirties, the pledge of secrecy was not initially mentioned and the banks themselves did not press for it to be included.")

41. For a discussion of the history of the enactment of the Banking Law, see N. FAITH, SAFETY IN NUMBERS (1982)

before World War I, creating huge losses.[42] In the early 1930s the Depression and an international banking crisis that included the collapse of the major *Banque d'Escompte Suisse* in Geneva precipitated further incentives for Swiss lawmakers to create a federal bank supervisory system despite twenty years of unsuccessful preparatory attempts.[43] These economic imperatives created no need for secrecy protection. As Bernhard Meyer writes, however, "at the same time that the need for federal supervision of the banking business was felt for economic reasons, a serious threat to privacy and banking secrecy occurred for political reasons."[44]

In the early 1930s Nazi German agents infiltrated Switzerland and attempted to discover assets held by German Jews and other "enemies of state," who could be sentenced to death for such holdings.[45] These actions by the German agents undermined the customary privacy of Swiss banking, jeopardized Swiss banks' long-standing reputation for stability and challenged the Swiss Government's sovereignty.[46] As a result, the Swiss Parliament introduced article 47 into the banking bill, establishing criminal penalties for secrecy violations and preventing Swiss banks from disclosing information to German agents.[47] Bank secrecy is, therefore, as

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42. *Id.* at 42-45. Faith writes:

> [I]n the four years before World War I, 50 out of the country's 300 or so banks disappeared through one cause or another. In 45 cases analysed by one expert, 17 went bankrupt, 20 were liquidated, 5 were refinanced, and 2 were taken over. Losses totaled more than 112 million francs, more than the total capital and reserves of the SBC, Switzerland's largest bank. The losses were roughly equally divided between creditors and the banks' loan and stock holders. *Id.* at 43.

43. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 25.

44. *Id.* at 26. *But see* N. FAITH, *supra* note 41, at 49. Faith states:

> A cardinal myth about Swiss banks is that the protection they provide their clients, the secrecy with which their affairs are shrouded, results from a generous Swiss gesture: that when Nazi agents came searching for funds which had been deposited in Switzerland by German Jews, the Swiss rallied round the persecuted minority and rushed through a special provision to prevent bankers and their employees from cooperating with the Nazi efforts. The idea is exceedingly widespread. People who are otherwise totally ignorant of the history of Swiss banks are aware of the story. Yet it is simply not true.

45. Note, *Effect of Swiss Bank Secrecy, supra* note 18, at 547. Gestapo agents "used various tricks in attempting to discover if suspected German Jews had Swiss bank accounts. These tricks included trying to make deposits in a suspect's name and bribing lower bank officials." *Id. See also* T. FEHRENBACH, THE SWISS BANKS 59-61 (1966).

46. Raifman, *supra* note 18, at 431. In addition, these acts further threatened the lives of countless German Jews.

47. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 26. Meyer writes: "[T]he article concerning criminal punishment for

one author writes, "derived from the private law right of privacy, supported by contract and agency law principles, and recognized expressly by a statute which provides criminal sanctions for violations. Despite this apparently comprehensive coverage, Swiss bank secrecy is nevertheless subject to a number of exceptions."[48]

III. Scope of Swiss Bank Secrecy

A. *Generally*

Article 47 of the Banking Law imposes penalties for the violation of bank secrecy, but it does not define the scope of the secrecy obligation. Swiss federal and cantonal[49] laws determine, therefore, the extent of the duty. One author has described the relationship between Swiss federal and cantonal law as follows:

> [T]he Federal Constitution leaves all law-making power to the cantons except as expressly delegated to the federal authorities by the Constitution itself. In addition, even where the federal authorities have the power to enact a law, this power may be limited to the enactment of guiding principles, leaving the detailed regulation to the cantons. . . . Although constitutional provisions take precedence over ordinary statutes, the supremacy of federal law requires that all forms of federal statutes prevail over cantonal constitutions.[50]

One must examine the various federal and cantonal laws that define the scope of the bank secrecy obligation to determine its limitations. Such an examination reveals that contrary to public opinion, Swiss bank secrecy is not absolute.

One commonly misunderstood practice of Swiss banks that gives rise to the notion of absolute bank secrecy is the acceptance of numbered or anonymous bank accounts. These accounts use code numbers or covernames to identify the bearer so junior bank employees such as clerical staff are unable to ascertain the account holder's identity from bank records.[51] The account holder's identity is always known, however, to

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secrecy violations passed without material discussion as all representatives understood the need for better protection of financial privacy and of the Jewish people." *But see* N. Faith, *supra* note 41, at 49.

48. Note, *Effect of Swiss Bank Secrecy*, *supra* note 18, at 547.

49. Switzerland is divided into twenty-six legally autonomous cantons, including six half-cantons. Voyame, *supra* note 32, at 4. *See also* N. Deak & J. Celusak, International Banking 225-28 (1984).

50. Voyame, *supra* note 32, at 5-6.

51. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 28.

one or more senior bank executives.[52] As Bernhard Meyer writes, "[a]part from [the] additional safeguard for discretion, . . . there is no legal difference between an 'ordinary' and a 'coded' account. The same [secrecy] restrictions apply to both types of accounts."[53] Anonymous Swiss bank accounts are thus subject to the same exceptions to bank secrecy described below as are ordinary Swiss accounts. These exceptions indicate that far from being absolute, bank secrecy is subject to numerous limitations.

B. *Consent of the Bank Customer*

Due to the private law nature of bank secrecy, the bank customer rather than the bank is the "master of the secret."[54] The bank customer or his legal representatives may ask the bank for any information concerning the customer's account and may authorize the bank to furnish this information to third parties.[55] In all other situations Swiss courts presume that a bank customer desires confidentiality absent explicit authorization or proof of a manifestation permitting disclosure.[56]

If a bank acts as an intermediary between two customers it must reveal the name of the other party at the request of either customer.[57] Banks may not otherwise reveal information to third parties, including persons, government authorities and other banks.[58] This obligation also applies to foreign bank subsidiaries and branch offices located in Switzerland and foreign residents who are on the board of directors of a Swiss subsidiary.[59]

C. *The Public Law-Private Law Distinction*

Under civil law "public law preempts irreconcilable private law."[60] Swiss public law creates a duty in each individual to testify in trial pro-

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52. *Id.*

53. *Id.*

54. Mueller, *supra* note 18, at 363 (citing BGE/RO 74 (1948) I 492).

55. Mueller, *supra* note 18, at 363 (citing the duty of information under a contract of agency, OR, art. 400). Swiss banks must maintain all records of customer transactions for ten years. *Id.*

56. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 29 (citing Steffen gegen Wolfensberger, unpublished decision of the Swiss Federal Supreme Court of Dec. 16, 1930, *cited in* M. LÜSCHER, DAS SCHWEIZERISCHE BANKGEHEIMNIS IN STRAFRECHTLICHER SICHT 9 n.14 (1972)).

57. Mueller, *supra* note 18, at 363 (citing BGE/RO 68 (1942) I 98).

58. Mueller, *supra* note 18, at 363.

59. *Id.* at 363-64 (citing the Banking Law, *supra* note 37, at art. 2(1)).

60. Raifman, *supra* note 18, at 433. One writer describes public law as "that part of

ceedings.[61] Because Swiss bank secrecy laws originate largely from private law, a banker's public law duty to testify in trial proceedings will preempt his conflicting private law obligation to maintain bank secrecy.[62] Only public law exceptions to a banker's duty to testify can prevent him from disregarding his private law secrecy obligations. Most Swiss public laws require bankers to reveal privileged financial information in court, however, and few public law exceptions to this requirement exist.

Article 77 of the Swiss Federal Code of Criminal Procedure[63] grants to certain individuals the right to refuse to testify or to produce documents in criminal proceedings, but this exception does not extend to bankers.[64] Likewise, article 42 of the Swiss Federal Code of Civil Procedure[65] authorizes "only persons enumerated in article 321 of the [Swiss] Penal Code to refuse to testify, and these only to the extent that facts to be disclosed are professional secrets within the meaning of that provision."[66] Article 321 of the Swiss Penal Code does not include bankers in the list of enumerated individuals who may refuse to testify.[67] A judge may waive the duty to reveal information normally protected by bank secrecy laws, however, if he finds that the reasons for failing to disclose the information outweigh other interests.[68]

Under article 16 of the Swiss Federal Code of Administrative Procedure,[69] unlike other Swiss federal procedure codes, the holder of a pro-

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the law that deals with the organization of the State and other public bodies, and their relations as holders of public authority, among themselves and with individuals." Voyame, *supra* note 32, at 9. Another writes that "private laws enforce the rights and obligations of private citizens." Raifman, *supra* note 18, at 433 n.52.

61. Meier, *Swiss and International Taxation*, *supra* note 18, at 20.

62. *Id.*

63. *Bundesgesetz ueber die Bundesstrafrechtspflege vom 15. Juni, 1934* [hereinafter BS]. Meier writes: "THE FEDERAL CODES OF CRIMINAL AND CIVIL PROCEDURE determine the procedures before the Federal Court (which is comparable to the United States Supreme Court). This Court exercises mainly appellate jurisdiction over decisions of cantonal tribunals." Meier, *Swiss and International Taxation*, *supra* note 18, at 21 n.20.

64. BS, *supra* note 63, at art. 77. Article 77 grants this exception to "clergymen, attorneys, notaries, physicians, pharmacists, midwives and their professional assistants." Meier, *Swiss and International Taxation*, *supra* note 18, at 21.

65. *Bundesgesetze ueber den Bundeszivilprozess vom 4. Dezember, 1947* (*Amtliche Sammlung der Bundesgesetze und Verordnungen* 1948, at 485) [hereinafter AS 1948]; Meier, *Swiss and International Taxation*, *supra* note 18, at 21 n.22.

66. AS 1948, *supra* note 65, at art. 42; Meier, *Swiss and International Taxation*, *supra* note 18, at 21.

67. STGB, *supra* note 24, at art. 321; Meier, *Swiss and International Taxation*, *supra* note 18, at 21.

68. Meier, *Swiss and International Taxation*, *supra* note 18, at 21.

69. *Bundesgesetze ueber das Verwaltungsverfahren* (*Amtliche Sammlung der*

fessional secret may refuse to testify in an administrative proceeding unless other federal law expressly imposes on him an obligation to testify.[70] A banker's capacity as the holder of a professional secret will, therefore, grant the banker immunity from testifying in most administrative proceedings.[71]

Bankers are more likely to avoid disclosing professional secrets in cantonal judicial proceedings than in federal judicial proceedings. Each canton in Switzerland promulgates its own civil and criminal procedure laws, and some cantons have enacted administrative procedure codes as well.[72] Although all cantonal codes of criminal procedure obligate third parties to testify and to provide documents in criminal cases without providing an exemption for bankers,[73] some cantonal codes of civil procedure exempt bankers from the stipulated duty to testify. For example,

> in 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. . . . [S]ix cantons, including Zurich, leave it to the judge to decide, in carefully balancing the interests involved, whether an exemption should be granted. Finally, in eight cantons, including the important ones of Geneva and Berne, all persons, including bankers, who hold professional secrets are entitled to refuse testimony.[74]

Like the Swiss Federal Code of Administrative Procedure, cantonal codes of administrative procedure generally do not create an obligation on the part of bankers to testify.[75] The existence of an obligation to testify in administrative proceedings will vary from canton to canton, however, because some of the cantonal administrative laws follow the cantonal civil procedure laws.[76] Bankers thus may be exempt from testifying in cantonal administrative proceedings if the cantonal administrative laws do not follow the cantonal civil procedure codes or, if the cantonal

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Bundesgesetze und Verordnungen 1969, at 737) [hereinafter AS 1969]; Meier, *Swiss and International Taxation*, *supra* note 18, at 21 n.24.

70. AS 1969, *supra* note 69, at art. 16; Meier, *Swiss and International Taxation*, *supra* note 18, at 21.

71. Meier, *Swiss and International Taxation*, *supra* note 18, at 21.

72. *Id.* at 21 n.26.

73. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 31. All cantons exempt the accused as well as clergymen, physicians and lawyers from testifying. *Id.*

74. *Id.* at 31-32. *See id.* at 31-32 nn.86-88 for the names of the cantons in each of the enumerated groups.

75. *Id.* at 32. Not all cantons have enacted codes of administrative procedure.

76. *Id.* at 32 (citing as an example, §§ 60 & 86 of the Zurich Code of Administrative Procedure (*Verwaltungsrechtspflegegesetz vom* 24. *Mai* 1959).

administrative laws follow the cantonal civil procedure code, where the cantonal civil procedure code exempts bankers from testifying.

Swiss public law also limits the scope of bank secrecy in actions for the execution of debts and bankruptcy proceedings. Under the Swiss Federal Law concerning the Execution of Debts and Bankruptcy of 1889,[77] a debtor cannot use the private law secrecy obligation to avoid repaying his debts.[78] In the later stages of an attachment proceeding[79] a creditor has the right to information concerning the nature and size of attached property, including bank accounts.[80] In addition, bankruptcy proceedings of a bank itself will eliminate a banker's private law right to confidentiality because the interests of the bank's creditors will supersede the privacy interests of the bank's customers.[81] Thus, the public law of bankruptcy and execution of debts narrows the scope of bank secrecy obligations.

Similar public law exceptions to bank secrecy exist under Swiss tax laws. Because tax procedures are often more closely associated with the misuse of bank secrecy than other public laws, the exceptions they create deserve separate treatment.

D. *Tax Matters*

The notion of financial privacy in Switzerland extends to the realm of taxation, in which a confidential relationship exists between the Government and the taxpayer.[82] Swiss taxpayers are subject to federal, cantonal

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77. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 35 n.107 (citing as an example *Bundesgesetz über Schuldbetreibung und Konkurs*, of Apr. 11, 1889 (hereinafter Bankruptcy Law)).

78. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 35.

79. One commentator described attachment as "seizure, without notice, of a debtor's properties located within Switzerland for the purpose of provisionally securing a creditor's claim prior to adjudication of that claim." Wirth, *Attachment of Swiss Bank Accounts: A Remedy for International Debt Collection*, 36 BUS. LAW. 1029, 1029 (1981). Debt and bankruptcy courts will grant attachment even before the creditor has commenced a formal debt collection if the debtor does not have a fixed place of residence in Switzerland and is likely to evade his legal obligations. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 35 (citing Bankruptcy Law, *supra* note 77, at arts. 271-76).

80. BGE 80 III 88; BGE 75 III 106, 107; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 35 n.110.

81. BGE 86 III 117; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 35 n.106.

82. Mueller, *supra* note 18, at 371.

and communal taxes.[83] The Swiss Constitution grants certain taxing powers to the federal government and the cantons retain sovereignty over all other tax matters.[84] Swiss taxpayers are under a duty to supply true information on their tax returns, including information regarding their income and debts and a list of the names of creditors and the amounts of interest received.[85] If this information seems inadequate to the Government, it can ask the taxpayer to come to its offices for personal interrogations or request that the taxpayer provide additional evidence or information.[86] In addition, the Government can calculate a taxpayer's liability (*Ermessenstaxation*) based on assumed income and wealth if it believes a taxpayer is underreporting his income.[87] Finally, the Swiss tax authorities may deny a taxpayer's right to appeal and may impose fines for tax evasion.[88]

Under the Swiss tax system Swiss authorities must rely almost entirely on the information each taxpayer provides.[89] The Government cannot ask third parties, including banks, to provide information on a taxpayer's income except in a few, very limited situations.[90] It is doubtful that these laws will change in the future to give tax authorities the ability to request documents from third parties, because the Swiss Government must submit all tax bills to the voters for public approval.[91] A majority of Swiss voters would probably refuse to vote for such an increase in the tax authority's powers.[92] The current system of self-assessment works satisfactorily,[93] however, largely because several preventative

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83. Houriet, *Law of Taxation*, in INTRODUCTION TO SWISS LAW 185 (F. Dessemontet & T. Ansay ed. 1983).

84. *Constitution Fédérale de la Confédération Suisse du 29 Mai 1874 avec les modifications intervenues jusqu'au 1 Janvier 1960* (Federal Constitution of the Swiss Confederation, May 29, 1874, as amended and revised to Jan. 1, 1960) arts. 3, 28-30, 41A, 41B, 62 & 63.

85. Federal Defense Tax Act [hereinafter WStB/IDN] art. 89 and similar provisions of cantonal law. *See* Mueller, *supra* note 18, at 371 n.46.

86. Meier, *Swiss and International Taxation*, *supra* note 18, at 23.

87. *Id.* at 24.

88. *Id.*

89. *Id.* at 23.

90. *Id.* Meier writes: "A legal obligation of third parties to supply information in assessment proceedings does generally not exist except in a few cases where it is regarded as an absolute necessity and only to the extent that the tax law provides it explicitly." *Id.* "For instance, with respect to partnerships to determine the income of each partner, or employers to issue salary certificates, or a debtor to certify the amount of indebtedness." *Id.* at 23 n.37.

91. Mueller, *supra* note 18, at 371.

92. *Id.*

93. Meier, *Swiss and International Taxation*, *supra* note 18, at 24.

measures ensure that Swiss taxpayers will not use bank secrecy to evade their tax obligations.[94]

The high Swiss withholding tax of thirty percent, refundable only after the taxpayer reports his income on a tax return, prevents abuses of the liberal self-assessment system.[95] In addition, tax authorities may use information from other taxpayers' tax returns when reviewing a taxpayer's assessment.[96] A substantial system of cooperation exists between the federal and cantonal tax authorities to facilitate this exchange of information gleaned from tax returns, particularly under the Swiss Federal Defense Tax Act,[97] under which cantonal and federal tax authorities must exchange relevant tax information.[98] Finally, because taxpayers must report to the Swiss tax authorities all interest paid and received in the tax year, article 90 of the Swiss Federal Defense Tax Act requires debtors and creditors to supply their debtors and creditors with certificates setting forth any interest payments made or received during the tax year.[99] Banks cannot produce modified or falsified certificates or refuse a taxpayer's request to furnish information concerning assets in the bank's possession.[100] This required chain of documentation frustrates taxpayer attempts to evade their tax obligations through the use of bank secrecy.

Swiss tax law treats banks differently from other taxpayers in one situation. In order to uphold confidence in bank privacy, Swiss tax authorities may not use information gleaned from a bank's tax return for any purpose other than to assess the veracity of the bank's self-assessment.[101] Contrary to the general rule, tax authorities may not use information from bank tax returns when reviewing the returns of other taxpayers. In order to avoid conflicts of interest, the Swiss Federal Tax Administration may appoint a special committee whose members are bound by bank secrecy.[102] Such a committee can review bank tax returns without violating their duties as tax administrators to exchange information with other tax authorities. Thus, the Swiss legislators have created a system of self-disclosure that upholds the right to financial privacy and bank secrecy, but which, through a complex series of documentation requirements, discourages taxpayers from using bank secrecy to evade

94. Mueller, *supra* note 18, at 371.
95. *Id.*
96. *Id.*
97. WStB/IDN, *supra* note 85; Mueller, *supra* note 18, at 373.
98. WStB/IDN, *supra* note 85, at art. 90(1); Mueller, *supra* note 18, at 373.
99. WStB/IDN, *supra* note 85, at art. 90(6); Mueller, *supra* note 18, at 371.
100. Mueller, *supra* note 18, at 372.
101. *Id.*
102. *Id.*

taxes. Swiss tax laws thus establish additional public law exceptions to bank secrecy. Although public law exceptions to the private law right of financial secrecy are more common than private law exceptions, private law exceptions do exist, particularly in the areas of family and succession law.

E. *Family and Succession Law*

Swiss family law frequently creates an obligation on the part of one person to manage the property of another.[103] In such situations the specific law creating the duty to manage the property will take precedence over the more general law establishing bank secrecy (*lex specialis derogat legi generali*),[104] and the person who has the obligation to manage the property may obtain financial information otherwise unavailable because of bank secrecy.[105] Under the Swiss family law doctrines of Union of Property (*Gueterverbindung*)[106] and Community Property (*Guetergemeinschaft*)[107] each spouse retains ownership of his or her property throughout the marriage and the husband has the duty to manage the marital[108] or common[109] property. Bank secrecy must yield, therefore, with regard to the wife's assets included in the common or marital property.[110] Similarly, because parents are legally obligated to manage their children's property[111] and guardians and custodians have a duty to manage their wards' property,[112] these individuals have access to financial information that bank secrecy would otherwise protect.

Under Swiss inheritance laws heirs acquire their inheritance and its associated rights and duties without delay at the time of the decedent's

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103. ZGB, *supra* note 24, at arts. 200 & 216; Note, *Effect of Swiss Bank Secrecy*, *supra* note 18, at 548 n.68.

104. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 29.

105. Note, *Effect of Swiss Bank Secrecy*, *supra* note 18, at 548.

106. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 29.

107. *Id.*

108. ZGB, *supra* note 24, at art. 200; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 29 n.64.

109. ZGB, *supra* note 24, at art. 216; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 29 n.64.

110. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 29.

111. ZGB, *supra* note 24, at art. 290; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 30 n.68.

112. ZGB, *supra* note 24, at arts. 413 & 419; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 30 n.69.

death.[113] Each heir succeeds immediately to the decedent's interest in bank secrecy and the right to obtain all bank information associated with the estate's bank accounts.[114] While banks prefer to reveal only the amount and status of a decedent's accounts, Swiss courts have held that the inheritance laws entitle heirs to all information concerning an account unless it is of a highly personal nature.[115] Courts have espoused this view in order to protect heirs, claiming that more information than the mere amount and status of a bank account is often necessary to trace possible additional inheritance assets.[116]

An individual can prevent his heirs from having access upon his death to confidential personal information held by his banker only by expressly requesting that the bank withhold such information from his heirs.[117] A court will not presume such intent absent an express request by the decedent.[118] Thus, Swiss bank secrecy will yield to heirs except for expressly privileged personal information.

Swiss family and succession law provide some of the few private law exceptions to bank secrecy. In conjunction with the various public law exceptions to bank secrecy, these private law exceptions limit the scope of bank secrecy and deter the use of Swiss bank accounts to hide assets from tax auditors, securities regulators and other law authorities. The illegal use of Swiss bank secrecy continues, however, and efforts by foreign governments to penetrate the veil of secrecy place tremendous pressure on the Swiss Government to limit further the extent of bank secrecy. In responding to this pressure the Swiss Government has attempted to achieve the near impossible—it has tried to facilitate the

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113. ZGB, *supra* note 24, at art. 560. The law states:

> The inheritance vests as a whole in the heir or heirs by operation of law at the death of the deceased.
>
> Subject to certain statutory exceptions, all rights that belonged to the deceased . . . pass *ipso jure* to the heir or heirs, and the latter become personally liable for the debts of the deceased.
>
> The vesting of the inheritance in the instituted heir dates back to the time of the opening of the succession, and the statutory heirs are bound to deliver up the estate to them according to the rules on possession. *Id.*

For a detailed discussion of the position of heirs under Swiss succession law, see Mueller, *supra* note 18, at 364-66 and Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 29-30.

114. Mueller, *supra* note 18, at 364.

115. *Id.* (citing BGE/RO 89 (1963) II 89 *et seq*, Cantonal High Court of Zurich, *quoted in* SJZ/RSJ 61 (1965) p. 354 *et seq.*).

116. Mueller, *supra* note 18, at 364-65.

117. *Id.* at 365-66.

118. *Id.*

investigations of foreign authorities that lead to Swiss bank accounts while maintaining the deeply-rooted Swiss concepts of personal financial privacy, political neutrality and sovereignty. The history of United States-Swiss relations illustrates the difficulty inherent in such a position and the frustrations each country has experienced in attempting to arrive at an acceptable solution.

IV. United States Responses to Swiss Bank Secrecy

A. *Generally*

The right to financial privacy is much more limited in the United States than in Switzerland.[119] Although United States banks recognize a general right to financial privacy with regard to most third parties, they do not recognize such a right with regard to government inquiries.[120] One commentator writes:

> [United States banks] have regularly afforded government agents informal access to customer records without notifying the customer to whom the records pertain. Even when legal process is directed to the bank, protection for customers is inadequate, for banks regularly comply without notifying them. Banks have little incentive to protect the privacy interests of their customers through engaging in litigation to contest the validity of a subpoena, but they do have an incentive to cooperate with the Government, which heavily regulates the banking industry.[121]

One must consider the United States reaction to stringent Swiss secrecy standards in light of the very relaxed view of bank secrecy to which government officials have grown accustomed in the United States. The great disparity between the two countries' views has created tremendous dissension which various unilateral and bilateral treaties have only partially alleviated.

B. *United States Foreign Policy During World War II*

World War II provided the setting for an early clash between United States foreign policy and Swiss bank secrecy laws. United States foreign policy towards Switzerland throughout the war combined, as James Kelly writes, "the economic warfare tactics used against all the European neutrals (as an indirect method of striking at Germany) with a

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119. Kelly, *supra* note 18, at 212. *See supra* notes 19-23 and accompanying text.

120. Kelly, *supra* note 18, at 212.

121. *Id.* at 212 (quoting Freund, *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 193 (1974)).

New Deal politician's distrust for Swiss corporate and banking law. Not surprisingly, United States-Swiss relations were severely strained during the period."[122]

United States economic warfare tactics against Switzerland and other wartime neutrals had two goals: to prevent trade between the Axis powers and the European neutrals in order to keep strategic materials from reaching the Axis and to prevent a post-war economic recovery in Germany by stopping Axis flight capital and looted property from reaching protected foreign bank accounts.[123] Because the Swiss economy relied heavily on international trade,[124] United States control over strategic supplies such as petroleum, food and raw industrial materials made the Swiss heavily dependent on the United States and allowed the United States Government to exact a series of wartime concessions from Switzerland.[125] In order to further inhibit trade between Germany and Switzerland and to prevent German assets from finding refuge in secret Swiss bank accounts, the United States crippled the Swiss economy by freezing 1.2 billion dollars of Swiss assets located in the United States and by blacklisting more than 1,800 companies suspected of supporting the Axis.[126]

United States attempts to stifle a post-war German economic recovery[127] took several forms.[128] One commentator has described the major areas of American concern as being "the Axis economic penetration of Latin America, the question of German cartels, combines, and technology, and the tracking down and frustration of German efforts to hide funds abroad for another attempt at world conquest."[129] The last of these concerns led to the enactment of the United States Safehaven Program and placed United States foreign policy and Swiss bank secrecy laws in direct conflict.[130]

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122. Kelly, *supra* note 18, at 215.

123. *Id.*

124. *Id.* at 215-16.

125. *Id.* at 216.

126. *Id.* Blacklisted companies were unable to obtain export licenses, funds, passport visas and the use of communications facilities. *Id.* at 216 n.11.

127. Kelly writes: "Many individuals within the Roosevelt Administration felt that Germany's military defeat in World War II would be viewed within Germany as a temporary setback, and that a third attempt at world domination was inevitable." *Id.* at 216.

128. *Id.*

129. *Id.* at 216-17.

130. *Id.* at 217. *See* Clayton, *Security Against Renewed German Aggression*, 13 DEP'T. ST. BULL 21, 27-33 (1945) for a discussion of the Safehaven Program; Kelly, *supra* note 18, at 217 n.13.

Under the Safehaven Program, the United States State Department, the Treasury Department and the Foreign Economic Administration worked in conjunction to obstruct German efforts to hide assets in neutral countries.[131] The 1944 United Nations Monetary and Financial Conference at Bretton Woods, New Hampshire endorsed the Safehaven Program, recognizing that German transfer of assets abroad jeopardized United Nations attempts to maintain peaceful international relations.[132] The Conference called for the forty-four signatory nations "to urge the neutrals to prevent such concealment and to facilitate the return of such property to proper authorities."[133]

Initial attempts by the United States Government to uncover hidden German assets were unsuccessful, however, and caused much Swiss-American ill-will.[134] The distrust many of Roosevelt's appointees felt toward Swiss banking aggravated this ill-will further. One author noted that:

> [m]any [in Washington] looked on the Swiss corporate structure, with its holding companies, lack of antitrust laws, and complete freedom from government regulation with distaste, or even considered it immoral. From this general bias came a feeling . . . that Nazis . . . were using Swiss banks to cover up their global operations. . . . Switzerland and its banks . . . had a good image and could cover nicely for the more unsavory Nazi one. . . . There was a certain amount of this going on - but it never approached the extent which Treasury officials darkly imagined. . . . The Nazis were always almost pathologically suspicious of their own people's dealings through Swiss banks or Swiss fronts, and permitted it to take place only under limited circumstances.[135]

The United States was ultimately successful in penetrating bank secrecy under the Safehaven Program when a significant breakthrough occurred in 1945. Following a series of bilateral economic negotiations between the Allies and various neutral European countries,[136] President

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131. Kelly, *supra* note 18, at 217.

132. United Nations Monetary and Financial Conference, Final Act and Related Documents (U.S. Dep't of State Pub. 2187, Conference Series 55, 1944); Kelly, *supra* note 18, at 217 n.14.

133. United Nations Monetary and Financial Conference, Final Act and Related Documents (U.S. Dep't of State Pub. 2187, Conference Series 55, 1944); Kelly, *supra* note 18, at 217.

134. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 40.

135. T. FEHRENBACH, *supra* note 45, at 74; Kelly, *supra* note 18, at 217-18.

136. Kelly, *supra* note 18, at 218. The Allies held the first talks with Spain and Sweden. *Id.*

Roosevelt led a special mission to Switzerland.[137] On the way to Switzerland the mission stopped in London and Paris to consult with British and French officials so the three Allies could present a united position to the Swiss.[138] Negotiations continued between United States and Swiss officials throughout February and on February 17, 1945, the Swiss drafted a decree (the Bern Agreement or Decree) under which it agreed to lift bank secrecy partially.[139]

Under the Bern Agreement Switzerland froze all German holdings in its banks subject to an investigation by the Swiss Clearing Office[140] to determine the extent of German holdings in Switzerland and the identity of the rightful owners of the property.[141] The Decree permitted Swiss Clearing House officials to enter only Swiss banks that reported holding German assets.[142] Fines of up to 10,000 Swiss francs and a year in prison for failure to disclose such accounts encouraged mandatory reporting by banks.[143] Once a bank reported accounts containing German assets, the account holders had the burden of proving the assets were free from German taint.[144] Thus, under the Bern Agreement, Swiss bank secrecy yielded to Allied efforts with regard to certain bank accounts notwithstanding Swiss neutrality.[145]

C. *The Washington Accord*

Although the Bern Agreement represented a major breakthrough in United States-Swiss relations and some optimism existed on the part of the United States negotiators,[146] relations deteriorated in the year follow-

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137. *Id.* Dingle M. Foote, Parliamentary Secretary to the British Ministry of Economic Warfare, and Emil Guionin from the French Ministry of Finance were the Allied representatives for Britian and France. *Id.* at 218 n.16.

138. *Id.* at 218.

139. *Id.* at 219.

140. The Swiss Clearing House was a quasi-governmental agency that oversaw Swiss wartime trade. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Although the Swiss were officially neutral in World War II, public opinion in Switzerland against the Nazi empire seemed to supersede Swiss public opinion against the relaxation of bank secrecy. T. FEHRENBACH, *supra* note 45, at 82. *But cf.* N. FAITH, *supra* note 41, arguing that the Swiss experienced few moral problems because of their German connections and that the Swiss banks profited substantially during the war through their dealings with German customers.

146. Chief American negotiator Lauchlin Currie, Administrative Assistant to President Roosevelt, wrote:

ing the Decree.[147] Swiss concern mounted that the United States was disregarding Swiss economic needs in order to defeat Germany.[148]

After the German surrender, Allied investigating teams attempted to establish from the German side the amount of German funds in Switzerland.[149] The Allied investigators' suggestion that 750 million dollars in German investments was hidden in Swiss bank accounts received little support from the Swiss Clearing Office, which had announced that under its census only 250 million dollars of German assets was sheltered in Swiss banks.[150]

In December 1945 the United States removed its freeze on European trade but maintained a freeze in neutral countries "to assure that camouflaged enemy assets were not released."[151] Numerous requests for the disclosure and liquidation of German assets in Switzerland flooded into Switzerland from the United States and other nations.[152] Only in 1946 were the Swiss and the United States able to reach a workable decision

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> We had good reason to believe that Switzerland had become the favorite safe haven for Nazi financial resources. This arose partly from proximity, partly from the world-wide ramifications of Swiss financial and industrial enterprises, and partly from the Swiss bank-secrecy laws, which gave peculiar and unique protection to the cloaking of financial interests.
>
> In this . . . the Nazi's made grave miscalculations. The Swiss government has definitely decided . . . that . . . it will . . . not permit its facilities to be used as a cloak for post-war Nazi financial operations.
>
> . . .
>
> The Swiss Government realized that [only by freezing all German assets in Switzerland and by preventing their dissipation and concealment] could it remove the accusation that its facilities were being used by the Nazis.
>
> . . .
>
> We feel we can rely upon the honest and very efficient Swiss Government Administration to insure that the job will be well done and that few German assets will escape disclosure.

Currie, *Tumbling the Nazi Financial Redoubt*, N.Y. Times, Apr. 29, 1945, § 6 (Magazine), at 10. *See also* Kelly, *supra* note 18, at 220.

147. Kelly, *supra* note 18, at 220.

148. *Id.* at 218-19.

149. *Id.* at 220.

150. *Id.*

151. *Id.* at 221 n.22 (citing U.S. Treas. Dep't Press Release No. V-155 (Dec. 7, 1945)).

152. Kelly, *supra* note 18, at 221-22. Examples of such requests include Law No. 5 of the Potsdam Conference's Allied Control Council (*Control Council Gazette*, No. 2, p. 27 (24 BRIT. Y.B. INT'L L. 239, 239-40 nn.4-5 (1947)) and article 6 of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparations Agency and on the Restitution of Monetary Gold (14 DEP'T ST. BULL. 114, 117 (1946)); Kelly, *supra* note 18, at 221-22.

concerning the frozen German assets in Swiss banks.

On May 25, 1946, the Governments of France, the United Kingdom and the United States entered into an accord with the Swiss Government entitled "Understanding Reached Between Allied and Swiss Governments" (Washington Accord), under which the countries agreed to various concessions relating to German assets in Swiss banks and the repair of German-caused war damage.[153] The Washington Accord included four main provisions: the Swiss Compensation Office would identify and liquidate German property interests in Switzerland;[154] the Swiss and the Allies would split the liquidation proceeds equally;[155] the Swiss would transfer 58.1 million dollars in gold wrongfully confiscated by Germany from occupied countries and transferred to Switzerland to a gold pool established by the Paris Reparation Agreement, where countries the Nazis had looted could receive their pro rata share of the gold;[156] and the Allies would discontinue blacklisting Swiss companies and the United States would release frozen Swiss assets in the United States.[157]

Although fulfillment of the various provisions of the Washington Accord was problematic,[158] it represented a practical solution to a complex problem. While the Swiss were at a bargaining disadvantage, they managed to maintain their sovereignty while permitting the Allies to obtain access to German-held bank accounts.[159] This early clash between the

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153. Understanding Reached Between Allied and Swiss Governments, 14 DEP'T ST. BULL. 1121 (1946) [hereinafter Washington Accord]; Kelly, *supra* note 18, at 222 n.29.

154. Washington Accord, *supra* note 153, at art. I(1), 14 DEP'T ST. BULL. at 1121 (1946); Kelly, *supra* note 18, at 223.

155. Washington Accord, *supra* note 153, at art. II(1), 14 DEP'T ST. BULL. at 1121; Kelly, *supra* note 18, at 223-24. The Allies "claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority within Germany." 14 DEP'T ST. BULL. 1121, 1121 (1946). *See* Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 40 n.140.

156. Washington Accord, *supra* note 153, at art. II(2), 14 DEP'T ST. BULL. at 1122; Kelly, *supra* note 18, at 224.

157. Washington Accord, *supra* note 153, at art. IV, 14 DEP'T ST. BULL. at 1122; Kelly, *supra* note 18, at 224.

158. *See* Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 40-41. Meyer writes:

> The fulfillment of the various commitments . . . caused problems and, except for the gold provisions and partial liquidation of assets from Germans living in Switzerland, the agreement was not carried out. . . . [A] new agreement in 1952 between the original parties and a separate but related agreement between Switzerland and West Germany was necessary to discharge the Washington Accord. *Id.*

159. Kelly, *supra* note 18, at 224 (citing T. FEHRENBACH, *supra* note 45, at 93). Kelly writes:

> No Swiss government agency or official was allowed to enter a Swiss bank unless

United States and Switzerland over bank secrecy foreshadowed future disputes, however, because the solution the Washington Accord reached did not address the issue of bank secrecy other than in the limited case of German-held assets. Subsequent disputes between the United States and Switzerland confronted the violability of Swiss bank secrecy more generally.

D. *The Interhandel Case*[160]

Beginning in the early 1920s numerous German corporations found it desirable to organize their foreign enterprises as Swiss holding companies in order to take advantage of Switzerland's long-established neutrality and financial freedom and to avoid rampant German inflation, taxes, economic chaos and strong anti-German sentiment.[161] Interhandel[162] was one such holding company. Organized under Swiss law and located in Switzerland, Interhandel held controlling interests in the foreign enterprises of the German corporation I.G. Farben (Farben).[163] One of the foreign enterprises in which Interhandel held a controlling interest was the United States corporation General Aniline and Film Corp. (GAF).

Farben's interest in GAF was cloudy.[164] While GAF claimed that

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the banker reported that German assets were held. The census was voluntary. The German assets transferred or liquidated consisted for the most part of German-held companies where the ownership could be traced. Where a firm had "protective coloring" the Swiss followed their own law. If cantonal law said a company was Swiss, it was Swiss. *Id.*

160. Société Internationale v. Rogers, 357 U.S. 197 (1958), *rev'g* Société Internationale v. Brownell, 243 F.2d 254 (D.C. Cir. 1957), *reh'g denied*, Société Internationale v. Brownell, 225 F.2d 532 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 937 (1956), *reh'g denied*, 350 U.S. 976 (1956), *aff'g as modified* Société Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953). For a lengthy discussion of this case, see Kelly, *supra* note 18, at 225-36 and N. FAITH, *supra* note 41, at 147-78.

161. Kelly, *supra* note 18, at 225.

162. The Swiss holding company was originally named *Internationale Gesellschaft für Chemische Unternehmungen A.G.* or *I.G. Chemie.* In order to remove the company further from any association with Germany, the name changed after World War II to *Société Internationale pour Participations Industrielles et Commerciales S.A.*, or *Société Internationale.* Translated into German, this name becomes *International Industrie und Handelsbeteiligungen A.G.*, or Interhandel. *Id.* at 226-29.

163. *Internationale Gesellschaft Farbenindustrie A.G. Id.* at 226.

164. In 1929 Max Ilgner, a Farben director, organized the American I.G. Chemical Corporation in New York to act as a holding company for Farben's United States businesses. When the Justice Department began an antitrust investigation into another Farben-organized United States corporation, Farben changed the name of American I.G. Chemical Corporation to General Aniline and Film Corp. (hereinafter GAF) and sold its

Farben had terminated its interests in GAF, the United States Government believed that Farben had merely concealed its interest in the company.[165] Accordingly, soon after the United States entered World War II, its Alien Property Custodian seized GAF as enemy property.[166]

After the war Interhandel sued the United States Government[167] to recover its seized assets, claiming it was neither an enemy nor an ally of an enemy under section 9(a) of the Trading with the Enemy Act of 1917.[168] Pursuant to Rule 34 of the Federal Rules of Civil Procedure,[169] the United States Attorney General requested pretrial discovery of documents under the possession, custody or control of Interhandel, including a large number of financial records maintained by Interhandel's bank.[170] Interhandel responded that it could not produce the documents of its bank, Sturzenegger and Cie, because the documents were not in Interhandel's possession, custody or control.[171] When the district court ordered Interhandel to make the production, the Swiss Federal Attorney announced that production of such documents would violate Swiss economic espionage and bank secrecy laws, and he prohibited disclosure of the documents.[172] Interhandel filed several motions to be relieved from the production on the grounds of bank secrecy, and the United States filed several motions to dismiss the complaint. Ultimately the district court referred the matter to a Special Master to make findings as to the Swiss laws preventing production and Interhandel's good faith in attempting to obtain the documents.[173]

The Special Master concluded that the Swiss Government had acted in accordance with its established laws and that "there was no evidence of collusion between plaintiff and the Swiss Government in the seizure of

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GAF stock to Interhandel in order to forestall the investigation and cloud the connections between Farben and GAF. *Id.*

165. *Id.* at 227.

166. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 41.

167. Société Internationale v. McGranery, 111 F. Supp. 435, 437 (D.D.C. 1953).

168. *Id.* Trading with the Enemy Act of 1917, § 9(a), 50 U.S.C. app. § 1 (1982).

169. FED. R. CIV. P. 34. Rule 34(a) permits parties to request the production of documents and tangible objects in the "possession, custody or control" of the party upon whom the request is served. Rule 34(b) requires the party upon whom the request is served to respond to the request within thirty days, with exceptions, after service of the request. *Id.*

170. Société Internationale v. McGranery, 111 F. Supp. at 438.

171. *Id.*

172. *Id.* at 438-39.

173. *Id.* at 439.

the documents."[174] Although the district court confirmed the Special Master's findings, it granted the United States' motion to dismiss the complaint but delayed the effective date of dismissal in order to give Interhandel additional time to obtain waivers and Swiss Government approval for production.[175] When it became evident that Interhandel would be unable to produce the necessary documents, the district court dismissed the complaint in November 1953.

The court of appeals affirmed the district court's dismissal but granted Interhandel an additional six month grace period in which to comply with the request for production.[176] During the six month period Interhandel presented the district court with a Swiss Government-approved plan to achieve compliance with the production order.[177] Under the plan a neutral investigator would review the documents in question and, without violating bank secrecy, submit a report to the parties identifying the documents relevant to the litigation.[178] The parties could then attempt to obtain bank secrecy waivers for the relevant documents or to obtain them through letters rogatory or by copying.[179] The district court and court of appeals rejected this plan, however, causing Interhandel to appeal to the United States Supreme Court.[180]

In June 1958 the United States Supreme Court reversed the lower court decisions by unanimous vote.[181] While the Court found that the documents in question were within Interhandel's control under Rule 34 of the Federal Rules of Civil Procedure, it also found that dismissal of the suit under Rule 37[182] was an unconditional denial of due process because Interhandel's noncompliance had resulted from its inability to produce the documents rather than from wilfulness or bad faith.[183] The Supreme Court remanded the case for possible determinations of Inter-

174. *Id.*
175. *Id.* at 448.
176. Société Internationale v. Brownell, 225 F.2d at 543.
177. Société Internationale v. Brownell, 243 F.2d at 255.
178. *Id.*
179. *Id.* at 255. *See infra* notes 259-61 and accompanying text.
180. Société Internationale v. Brownell, 243 F.2d at 255-56.
181. Société Internationale v. Rogers, 357 U.S. 197.
182. FED. R. CIV. P. 37. Under Rule 37(a)(2), if a party fails to respond to a request for inspection of documents submitted under Rule 34 of the Federal Rules of Civil Procedure (*see supra* note 169), the discovering party may move for an order compelling inspection in accordance with the request. If the court grants the motion compelling inspection and the party fails to comply with the order, under Rule 37(b) the court may impose sanctions on the party for failing to comply, including holding it in contempt of court. *Id.*
183. *Id.* at 211-12.

handel's good faith, exploration of plans for fuller compliance or trial on the merits.[184]

After the district court's dismissal became final, but before the Supreme Court agreed to hear the case, other events transpired between Switzerland and the United States that caused relations between the two countries to deteriorate further. On August 9, 1956, in a note delivered to the United States Department of State,[185] the Swiss Government charged that the United States had violated the Washington Accord when it failed to release Swiss assets located in the United States. The Swiss Government asked the United States "to submit the Interhandel controversy to arbitration or conciliation in conformity with the provisions of the United States-Swiss Treaty of Arbitration and Concilation of February 16, 1931."[186]

The United States rejected Switzerland's request on January 11, 1957, in a note and memorandum.[187] Switzerland responded by suing the United States in the International Court of Justice (International Court), asking for restoration of GAF's assets or submission of the issue to arbitration.[188] The United States claimed that Interhandel had not exhausted all available remedies and that the International Court's jurisdiction was subject to the Connally Amendment, which excluded from the International Court's jurisdiction matters within the domestic jurisdiction of the United States.[189] The International Court rendered judgment in favor of the United States in March 1959, stating that the Swiss had failed to exhaust all possible remedies.[190]

The Interhandel dispute raged for close to twenty years before Switzerland and the United States were finally able to reach a settlement in 1965. In 1962 Congress amended the War Claims Act of 1948[191] and the Trading with the Enemy Act[192] to permit the United States Attorney

184. *Id.* at 213.

185. Kelly, *supra* note 18, at 232-33.

186. *Id.* at 233 n.47. Arbitration and Conciliation Treaty Between the United States and Switzerland, Feb. 16, 1931, 47 Stat. 1983, T.S. No. 844.

187. 36 DEP'T ST. BULL. 350 (1957); Kelly, *supra* note 18, at 233 n.48.

188. Kelly, *supra* note 18, at 233.

189. Declaration on the Part of the United States of America, August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598; Kelly, *supra* note 18, at 234 n.50.

190. Interhandel case (Switzerland v. U.S.), 1959 I.C.J. Pleadings 5; Kelly, *supra* note 18, at 234 n.51.

191. War Claims Act of 1948, 50 U.S.C. app. § 2001 (1951) (amended by Pub. L. No.87-846, § 101, 76 Stat. 1107, 1107 (1962)).

192. Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 (1968) (amended by Pub. L. No. 87-846, § 201, 76 Stat. 1107, 1113 (1962)).

General to sell the GAF stock through an investment bank or underwriting house and to place the proceeds in escrow until the Interhandel dispute was resolved.[193] Upon resolution the parties agreed to divide the sale proceeds as follows: 1.5 million dollars was allocated to the expenses involved with the sale; 17.5 million dollars was allocated to the United States for back taxes; 120.9 million dollars was allocated to the Interhandel shareholders; and 189.2 million dollars was allocated to the United States for its war claims fund.[194]

E. *The Bank Secrecy Act*

After the Interhandel dispute the character of United States-Swiss relations changed noticeably. Whereas the Interhandel dispute and the controversy resulting in the Washington Accord stemmed from foreign acts that affected the United States, after 1965 United States authorities realized that United States citizens were using bank secrecy to evade or avoid United States laws.[195] Areas that concerned authorities in particular included tax fraud and tax evasion, the avoidance of securities laws, "black market currency dealings, bribes and kickbacks to government and military officials, the laundering of stolen money and securities, and the financing of illegal narcotics traffic."[196]

Realizing that bilateral actions between the United States and Switzerland might fail to address all these problems, the United States initiated attempts at unilateral action within the United States to make it harder for United States citizens and businesses to transfer their money to protected foreign bank accounts.[197] Under this theory United States investigations would never come into conflict with foreign bank secrecy laws because domestic laws requiring extensive reporting would provide the United States Government with sufficient information on questionable transactions to prevent illegally obtained money from reaching a safe haven in Switzerland.

In the late 1960s and early 1970s both the Senate and the House of Representatives considered legislation designed to curb the abuses of for-

193. Pub. L. No. 87-846, 76 Stat. 1107 (1962) (amending War Claims Act of 1948, 50 U.S.C. app. § 2001 (1951) and Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 (1968)).

194. Kelly, *supra* note 18, at 235-36.

195. *Id.* at 236.

196. *Foreign Bank Secrecy and Bank Records: Hearings on H.R. 15073 Before the House Comm. on Banking and Currency*, 91st Cong., 1st and 2nd Sess. (1969-70) [hereinafter *House Hearings*]. *See* Kelly, *supra* note 18, at 240 n.68.

197. Kelly, *supra* note 18, at 246-47.

eign bank accounts by requiring extensive domestic record-keeping. On December 3, 1969, Chairman Wright Patman of the House Banking and Currency Committee introduced a bill to the House of Repesentatives proposing amendments to the Federal Deposit Insurance Act[198] requiring stricter record-keeping and reporting requirements for certain types of transactions.[199] After conducting extensive hearings,[200] the House Committee on Banking and Currency recommended the legislation to the full House,[201] which approved it by unanimous vote on May 25, 1970.[202]

Senator William Proxmire introduced similar legislation to the Senate on April 6, 1970.[203] After hearings before the Senate Subcommittee on Financial Institutions,[204] the Senate Committee on Banking and Currency recommended the legislation to the full Senate,[205] which approved it on September 18, 1970.[206] Subsequently, a joint Senate-House Committee adopted the House version of the legislation on October 5, 1970, and President Nixon signed it into law on October 26, 1970.[207]

The legislation that President Nixon signed into law (Bank Secrecy Act or Act) and its implementing Treasury Regulations[208] established an extensive reporting and recording system for all financial transactions so domestic authorities will not have to rely on foreign disclosures to prove violations of United States law.[209] Title I of the Act governs financial record-keeping and requires individuals, banks and other financial insti-

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198. 12 U.S.C. § 1811 (1982). The legislation also amended the National Housing Act, 12 U.S.C. § 1701 (1982).

199. H.R. 15073, 91st Cong., lst Sess. (1969).

200. *House Hearings*, *supra* note 196.

201. H.R. REP. No. 975, 91st Cong., 2d Sess. (1970).

202. H.R. 15073, 91st Cong., 2d Sess., 116 CONG. REC. 16,949-73 (1970).

203. S. 3678, 91st Cong., 2d Sess. (1970).

204. *Foreign Bank Secrecy: Hearings on S.3678 and H.R. 15073 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong., 2d Sess. (1970).

205. S. REP. No. 1139, 91st Cong., 2d Sess. (1970).

206. S. 3678, 91st Cong., 2d Sess., 116 CONG. REC. 32,621-44.

207. Pub. L. No. 91-508, 84 Stat. 1114-36 (codified in scattered sections of 12 U.S.C., including §§ 1730d, 1829b and 1951-59 (1970)) [hereinafter Bank Secrecy Act]; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 68 n.293.

208. 31 C.F.R. § 103; 37 Fed. Reg. 6912-15 (1972), *amended by* 37 Fed. Reg. 26517 (1972); 38 Fed. Reg. 2175 (1973); Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 69 n.297.

209. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 68.

tutions to maintain extensive records.[210] Banks and other financial institutions must maintain records indicating the identity of all account holders and individuals authorized to act on behalf of account holders.[211] Banks must also make copies of all checks and other similar financial instruments presented for deposit, payment or collection.[212] Individuals having an interest in or authority over foreign financial accounts must maintain detailed records of such accounts.[213] Title I requires that banks and individuals retain such records for at least five years.[214] The Act authorizes the use of injunctions and civil and criminal penalties as sanctions for violations of Title I.[215]

Title II of the Act concerns reporting requirements for currency and foreign transactions and applies to a broad range of financial institutions.[216] Title II's four chapters identify three different kinds of reports that financial institutions need to file.[217] Under Chapter 2, financial institutions must file reports with the Internal Revenue Service for every deposit, withdrawal, exchange, payment or transfer of over 10,000 dollars in currency regardless of whether the transaction involves a foreign entity.[218] Under Chapter 3, every individual who either transports more than 10,000 dollars in currency or other monetary instruments from the United States to, or to the United States from, any place outside the United States or receives more than 5,000 dollars in currency or other monetary instruments that have been shipped to the United States from elsewhere, must file a report with the Customs officer.[219] Under Chapter 4, any United States resident or citizen or anyone doing business in the United States who has a financial interest in or authority over a foreign financial account must indicate and describe such a relationship on his tax return.[220]

Title III of the Bank Secrecy Act amended section 7 of the Securities

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210. 31 C.F.R. § 103.34-.39 (1977). *See* Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 69-71 for a detailed discussion of the Act.

211. 31 C.F.R. § 103.34(a) (1977).

212. 31 C.F.R. § 103.34(b) (1977).

213. 31 C.F.R. § 103.32 (1977).

214. *Id.*

215. 31 C.F.R. §§ 103.47 & 103.49 (1977).

216. 31 C.F.R. § 103.21-.27(1977).

217. *Id.*

218. 31 C.F.R. § 103.22 (1977).

219. 31 C.F.R. § 103.23 (1977).

220. 31 C.F.R. § 103.24 (1977).

Exchange Act of 1934 (1934 Act)[221] and made the 1934 Act margin requirements "applicable to all American borrowers without regard to the lender's place of business or the site of the transaction."[222]

The Bank Secrecy Act thus established stringent reporting standards in an effort to alleviate the need of United States authorities to seek information from foreign financial institutions that may be subject to secrecy obligations. Despite strong congressional support, these requirements encountered opposition, particularly from the banking industry, which bore much of the cost of the new requirements.[223]

In June 1972 the American Civil Liberties Union, the Security National Bank of California and the California Bankers Association sought an injunction in the United States District Court to enjoin the Secretary of the Treasury from enforcing specific provisions of the Act.[224] The plaintiffs alleged that enforcement of the Act's restrictions injured their constitutional right to freedom from unreasonable search, their rights of privacy and due process, their privilege against self-incrimination and their first amendment right of private association.[225] In September 1972 a three-judge district court upheld the constitutionality of the foreign reporting requirements but held that sections 221 and 222 of the Title II domestic reporting requirements violated the plaintiffs' fourth amendment rights to privacy. The Court thereby enjoined the defendants from enforcing those sections of Title II of the Act.[226] Three appeals to the United States Supreme Court followed, resulting finally in a decision upholding the constitutionality of the Act and its regulations.[227]

With regard to Title I, the Supreme Court held that: because a sufficient nexus existed between the evils Congress sought to address in the Act and the record-keeping procedures that the Act established, and because the burdens of record-keeping were not unreasonable, the Title I

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221. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78kk (1981)) [hereinafter 1934 Act] § 7, *as amended by* Bank Secrecy Act, Pub. L. No. 91-508, 84 Stat. 1124 (codified at 15 U.S.C. § 78g (1976)).

222. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 70.

223. Kelly, *supra* note 18, at 248-50. *See House Hearings, supra* note 196; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 71 n.316 and accompanying text.

224. Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972).

225. The plaintiffs claimed that because the reporting requirements were burdensome, they deprived banks of their right to due process. *Id.* at 1244.

226. *Id.* at 1251.

227. California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

requirements did not violate the plaintiffs' rights to due process of law;[228] Title I's record-keeping provisions did not violate the plaintiffs' fourth amendment rights against illegal search and seizure because the regulations included no requirement that banks disclose documents to the Government;[229] and no violation of the plaintiffs' fifth amendment rights occurred because the bank plaintiffs, being corporations, had no such right and a depositor plaintiff incriminated by evidence produced by a third party sustains no fifth amendment violation.[230]

With regard to the plaintiffs' Title II claims, the Court held:

> The regulations are sufficiently tailored so as to single out transactions found to have the greatest potential for . . . circumvention [of United States laws] and which involve substantial amounts of money. They are therefore reasonable in the light of that statutory purpose, and consistent with the Fourth Amendment.[231]

With regard to domestic transactions, the Court held that the reporting requirements were reasonable and violated no fourth amendment rights because "neither incorporated nor unincorporated associations [have] an unqualified right to conduct their affairs in secret."[232]

Although the Court upheld the constitutionality of the Bank Secrecy Act, the issue is not completely moot because the Supreme Court left several issues unresolved.[233] The Court did not address the question whether individuals could resist producing self-incriminating documents under the fifth amendment in an investigation conducted under the Bank Secrecy Act. In addition, the Court did not address directly the issue of financial privacy. One commentator noted that "[u]nder the circumstances of the decision and the narrow view that the Supreme Court [took], it seems reasonable to conclude that the Court's holding in *Shultz* is limited in scope to the present regulations and not to the Act's maximum potential."[234]

While the Bank Secrecy Act makes it more difficult to hamper law enforcement through the use of secret foreign bank accounts, it does not solve the problem. Individuals who can move their money without a rec-

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228. *Id.* at 45-50.
229. *Id.* at 53-54.
230. *Id.* at 55.
231. *Id.* at 63.
232. *Id.* at 66-67 (quoting United States v. Morton Salt Co., 338 U.S. 632 (1950)).
233. Kelly, *supra* note 18, at 252; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 73.
234. *See* Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 73.

ord or the aid of financial institutions will be able to avoid application of the law entirely. In addition, as one writer noted, "[t]he bulk of the data generated [under the Act] is staggering; sufficiently so, that the sheer size of the 'haystack' might very well make the discovery of incriminating 'needles' costly beyond proportion to any value they might have."[235]

The Bank Secrecy Act is, however, only one of several measures taken by the United States. In response to specific problems such as tax evasion and the avoidance of securities laws, the United States and Switzerland have devised further plans to combat the illegal use of secret Swiss bank accounts by United States citizens and businesses. These unilateral and bilateral efforts have resulted in several treaties and other agreements that vary in their effectiveness.

V. TAX EVASION

A. *Generally*

Americans have used Swiss bank secrecy to avoid United States tax laws in numerous ways. As former United States Attorney for the Southern District of New York, Robert Morgenthau, stated in Congressional hearings on the subject, "[t]he ways in which foreign secret bank accounts are used to avoid income taxes are almost as numerous as the ways of earning money."[236] A businessman can skim cash receipts by failing to report all his income made outside the United States and by placing such income in a foreign bank account.[237] A businessman making purchases abroad for resale in the United States can declare inflated purchase prices to reduce his domestic profit and can have the seller put the difference between the actual prices and the inflated prices in a foreign bank account.[238] A businessman selling items abroad can declare lower than actual sale prices and can place the difference in a protected

235. Comment, *Swiss Banks and their American Clients: A Fading Romance*, 3 CAL. W. INT'L L.J. 37, at 56-57 (1972).

236. *Legal and Economic Impact of Foreign Banking Procedures on the United States: Hearings Before the House Comm. on Banking and Currency*, 90th Cong., 2d Sess. 14 (1968) (Statement of Robert M. Morgenthau, former United States Attorney for the Southern District of New York); Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 43 n.152. For a detailed discussion of the various maneuvers used to avoid taxes, see Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 43-47.

237. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 43.

238. *Id.* at 44.

foreign account.[239] Investors can channel their investment decisions through Swiss banks in order to avoid capital gains taxes.[240] In addition, individuals can transfer money to a foreign account as a loan and repatriate the money by claiming a tax deduction on the loan (by declaring the loan bad) or by claiming that the money is a loan from a foreign enterprise.[241] Finally, and perhaps most simply, individuals can transfer money from a United States bank to a Swiss account using an assumed name, so investigators would obtain only the pseudonym and the name of the recipient bank upon investigation but would acquire no knowledge of the account holder's identity.[242]

The diversity and complexity of these various methods indicates the futility of isolated attempts by the United States to prevent tax evasion through the use of Swiss bank accounts. Instead, the United States has made numerous unilateral and bilateral attempts to prevent such acts.

B. *The Swiss Tax System*

Swiss federal and cantonal laws concerning tax offenses vary widely in their terminology, investigative procedures and punishments.[243] Most Swiss tax laws do distinguish, however, between tax evasion, which involves the nonreporting of income, and tax fraud, which involves affirmative action such as "deceiving the tax authorities by deliberately using incorrect, falsified or untrue balance sheets, financial statements, inventories and other documents of evidentiary value, or . . . through concealing documents containing tax-relevant evidence or by using other fraudulent means."[244] Penalties for tax evasion generally involve fines, often calculated as a percentage of the tax deficiency.[245] Penalties for tax fraud include fines, imprisonment or both.[246] One writer has attempted to explain the reasons for the distinction between tax fraud and tax evasion:

> The rationale for this differentiated penal treatment for the two kinds of tax offenses must evidently be sought in an attitude considering tax fraud—that has close similarities to the severely punishable common crime of fraud—as having a much higher degree of moral turpitude and social

239. *Id.*
240. *Id.* at 45.
241. *Id.* at 46-47.
242. *Id.* at 47.
243. Meier, *Swiss and International Taxation*, *supra* note 18, at 25.
244. *Id.* at 25 (citing Decision of the Swiss Federal Court of March 16, 1951, published in Archiv fuer Schweizerisches Abgaberecht, vol. 20, at 91 for comparison).
245. Meier, *Swiss and International Taxation*, *supra* note 18, at 25.
246. *Id.*

harm than mere tax evasion.[247]

This differentiation may also determine whether Swiss bank secrecy will yield to United States tax investigations.[248] Because Swiss tax authorities conduct investigations of tax evasion under administrative procedures and not under Swiss Penal Code provisions, they cannot compel bankers to furnish information normally covered by bank secrecy.[249] Swiss authorities prosecute tax fraud under both Swiss Penal Code procedures, under which bank secrecy will yield to an investigation, and administrative procedures, under which bank secrecy will not yield.[250] Thus, bank secrecy will yield to tax investigations only in cases of tax fraud being prosecuted under the Swiss Penal Code. This dichotomy has created tensions between the Swiss and United States Governments when United States tax investigations, which do not distinguish between tax evasion and tax fraud, have led investigators to protected Swiss bank accounts. The two countries have made several unilateral and bilateral attempts to avoid this problem, with varying degrees of success.

C. *Unilateral Internal Revenue Service Efforts*

United States tax authorities have been most successful in obtaining information on the illegal use of tax havens when they have relied on unilateral Internal Revenue Service (IRS) action.[251] A common IRS method of obtaining information involves the use of administrative summons and grand jury subpoenas. Although administrative summons are probably not enforceable on taxpayers residing outside the United States, subpoenas issued to United States citizens abroad are enforceable as long as the citizen has minimum contacts with the United States.[252]

A more intriguing method that the IRS has utilized is the use of paid informants.[253] The use of informants has allowed the IRS to gain access

247. *Id.*

248. *Id.* at 26.

249. *Id.*

250. *Id.*

251. Crinion, *supra* note 18, at 1214. This success may be due to the fact that unilateral actions do not depend on foreign governments, thus allowing the United States Government to apply laws innovatively to new situations. *Id.*

252. *Id.* at 1215. "26 U.S.C. § 7604(a) provides that the summons is enforceable by the district court in the district in which the taxpayer resides or may be found. Thus, a taxpayer residing outside the United States is likely not subject to an administrative summons." *Id.* at 1215 n.38. For a detailed discussion of the use of summons and subpoenas in tax evasion cases and the relevance of minimum contacts, see Crinion, *supra* note 18, at 1215-25.

253. Crinion, *supra* note 18, at 1225-28.

to confidential bank records,[254] and the United States Supreme Court has held that these actions do not violate the fourth amendment.[255]

The IRS has also conducted investigations with other United States Government agencies, as it did under the Swiss Mail Watch Program, in which the IRS worked with the United States Postal Service to microfilm the exterior of all envelopes believed to come from Swiss banks,[256] and through the use of IRS representatives who assist with foreign investigations of public and specifically requested information.[257] The IRS also has public records at its disposal, although it does not use this source of information very often, particularly in connection with investigations of assets held in Switzerland.[258]

Finally, under Rule 28(b) of the Federal Rules of Civil Procedure, the IRS may gather information in a foreign country with the assistance of a foreign tribunal through the use of a letter rogatory.[259] Under this procedure the United States court hearing a particular case sends a letter rogatory, on behalf of the party requesting the information, to the foreign tribunal which, if it grants the request, will obtain the information and send it to the United States court.[260] In practice, however, "U.S. tax authorities have rarely used the letter rogatory principally because not all foreign courts cooperate with the request and because of the strict bank and commercial secrecy laws in those countries."[261]

The IRS thus has several unilateral measures of varying effectiveness to use when it investigates tax cases involving foreign secret bank accounts. In addition, the United States and Switzerland have entered into

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254. *See id.* at 1225-28 for a discussion of Project Haven, an IRS investigation that used paid informants to obtain confidential bank records.

255. United States v. Payner, 447 U.S. 727 (1980); Crinion, *supra* note 18, at 1227 n.136.

256. Crinion, *supra* note 18, at 1228. The Swiss Mail Watch provided sufficient information for the IRS to initiate 168 audits and to collect approximately two million dollars in taxes and penalties. *Id.*

257. *Id.* at 1228-29.

258. *Id.* at 1229.

259. FED. R. CIV. P. 28(b); Crinion, *supra* note 18, at 1231 n.176. A letter rogatory consists of a formal communication in writing sent by a court in which an action is pending, to a court in a foreign country, requesting the foreign court, through its procedural and jurisdictional rules, to assist the administration of justice in the former country. The request rests entirely on the comity of the courts toward each other. BLACK'S LAW DICTIONARY 815 (5th ed. 1979).

260. Crinion, *supra* note 18, at 1231-32.

261. *Id.* at 1232. *But see* United States v. Carver, Civil Appeal No. 5, slip op. (Cayman Islands Court of Appeal, Nov. 1982) (Court held that Cayman law allows disclosure by banks and ordered such disclosure). Crinion, *supra* note 18, at 1232-33.

several bilateral agreements concerning the role of bank secrecy in tax fraud investigations.

D. *The Convention for the Avoidance of Double Taxation*

On May 24, 1951, the United States and Switzerland entered into the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income (Convention).[262] Under article XVI(l) of the Convention Switzerland agreed to exchange information with the United States in two situations: when the information is necessary to prevent double taxation and when the information is necessary to prevent fraud or the like in relation to taxes covered by the Convention.[263]

Numerous Swiss treaties cover the first kind of information, and the Swiss recognize it as an area in which they should exchange information even in the absence of a treaty.[264] Switzerland interprets such clauses broadly "to include information necessary for the protection of an abuse of treaty benefits (i.e., fraudulent claims of tax relief)."[265] Because the Swiss interpret these clauses to include fraudulent claims of tax relief, the second kind of information the Convention describes must refer to

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262. Convention between the United States and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, May 24, 1951, 2 U.S.T. 1751, T.I.A.S. No. 2316 [hereinafter Convention].

263. *Id.* at art. XVI(1). Article XVI of the Convention states in part:

> (1) The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment and collection of the taxes which are the subject of the present Convention. No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade process.
>
> . . .
>
> (3) In no case shall the provisions of this Article be construed so as to impose upon either of the contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

264. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 58. Meyer writes: "Double taxation treaties with other countries such as the United Kingdom, France and Germany contain similar information clauses and the Confederation grants 'carrying out' information even in the absence of explicit treaty stipulation." *Id.*

265. *Id.*

fraud involving United States income taxes.[266]

The second situation that article XVI(l) covers does not define clearly the range of information available to United States investigators. While information necessary to prevent fraud is available under the Convention to United States investigators, the meaning of the term "fraud" varies because it depends on the law of the country from which information is requested.[267] Article XVI(1) does state that information that discloses any trade, business, industrial or professional secret or any trade process is not available.[268] Otherwise, few clues existed until 1970 as to whether bank secrecy prevents the exchange of information under article XVI(1), and court decisions covered the range of possibilities.[269] In 1955 the Swiss Federal Tax Administration (FTA) refused to supply information on bank affairs to the IRS because Swiss law prevented such an investigation.[270] In 1957, however, the Swiss Federal Council upheld the decision of the FTA to supply information to the IRS in a tax fraud case concerning the control of a Swiss corporation and its transactions with a United States company.[271] Until the Swiss Federal Supreme Court handed down a decision in 1970, the relation of article XVI(1)'s fraud provision to bank secrecy remained unclear.

On December 23, 1970, the Swiss Federal Supreme Court handed down its decision in *X v. Federal Tax Administration*,[272] which clarified the scope of article XVI(l). The case involved a request by the IRS for information from Swiss bank books and records regarding transactions between a Swiss bank and an United States citizen suspected of tax fraud.[273] The FTA had investigated the allegations and had agreed to provide the IRS with the information.[274] The taxpayer appealed the

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266. *Id.*

267. Convention, *supra* note 262, at art. II(2).

268. Convention, *supra* note 262, at art. XVI(l).

269. Meier, *Swiss and International Taxation*, *supra* note 18, at 33.

270. Published in 2 LOCHER, HANDBUCH UND PRAXIS DER SCHWEIZERISCH - AMERIKANISCHEN DOPPELBESTEUERUNGSABKOMMEN, EINKOMMENS- UND ERBSCHAFTSSTEUERN (HANDBOOK AND PRACTICE OF THE SWISS-AMERICAN CONVENTIONS FOR THE AVOIDANCE OF DOUBLE TAXATION, INCOME AND ESTATES AND INHERITANCE TAXES), art. XVI, No. 4 [hereinafter LOCHER]; Meier, *Swiss and International Taxation, supra* note 18, at 33 n.81.

271. 2 LOCHER, *supra* note 270, at art. XVI No. 14; Meier, *Swiss and International Taxation, supra* note 18, at 33 n.83.

272. BGE 96 (1970) I 737, 71-1 U.S. Tax Cas. (CCH) para. 9435 at 86,566 (1970) (unofficial translation); 10 I.L.M. 1029 (1971) (unofficial translation); Meier, *Swiss and International Taxation, supra* note 18, at 33.

273. 71-1 U.S. Tax. Cas. at 86,567; 10 I.L.M. at 1029.

274. *Id.*

FTA decision to the Swiss Federal Supreme Court, claiming there was no basis in Swiss federal law for the investigation since no Swiss taxes were in question and that bank secrecy prohibited such disclosure.[275] The Swiss Federal Supreme Court denied the appeal, stating that the Convention's fraud clause, article XVI(1), entitled the FTA to supply the IRS with bank information on allegedly questionable transactions between a Swiss bank and a United States citizen. [276]

The court stated that neither the text of the Convention nor its spirit indicates that article XVI(1)'s provisions apply only in cases in which the taxpayer has avoided taxes in both Switzerland and the United States.[277] The court ruled instead that the Convention applies to situations where Switzerland could obtain the information under its domestic laws if it were prosecuting the alleged crime.[278] Thus, under the court's analysis, article XVI(1) would overcome bank secrecy only if the taxpayer's acts constituted prosecutable fraud under Swiss law. In determining what constituted fraud under Swiss law, the court held that instead of looking at divergent cantonal law, the United States negotiators must have interpreted the laws of the three major banking cantons of Zurich, Basel and Geneva as an expression of the prevailing Swiss law.[279] Thus, the court held that since the cantons of Zurich, Basel and Geneva prosecuted tax fraud cases under their Codes of Criminal Procedure, which do not authorize bankers to deny requests for information under bank secrecy, an obligation existed under federal law for bankers to reveal financial information in certain cases.[280]

The decision in *X v. Federal Tax Administration* is very favorable to the United States because it gave the IRS access to previously unavailable information. The decision failed to indicate, however, whether the duty of Swiss officials under the Convention's fraud clause is to assist in investigations or is merely to provide information. This issue arose several years later in the case of *X. and Y-Bank v. Swiss Federal Tax Administration.*[281]

In *X. and Y-Bank* the Swiss Supreme Court ruled that merely furnishing an official report fulfilled Switzerland's obligations under the

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275. *Id.*

276. 71-1 U.S. Tax. Cas. at 86,574; 10 I.L.M. at 1037.

277. 71-1 U.S. Tax. Cas. at 86,571; 10 I.L.M. at 1034.

278. *Id.*

279. 71-1 U.S. Tax. Cas. at 86,573; 10 I.L.M. at 1036.

280. *Id.*

281. BGE 101 (1975) I 160, 76-1 U.S. Tax Cas. (CCH) para. 9452 at 84,211 (1975) (unofficial translation).

Convention.[282] The court ruled that the Convention only pertained to the furnishing of information available to the tax authorities under the laws of the state responding to the request, and that the Convention's legislative history provided no basis for concluding that the Swiss, by waiving the principle of non-assistance, intended to assure the United States tax authorities full legal assistance.[283]

Under article XVI(1) of the Convention, Swiss bank secrecy thus yields to United States tax fraud investigations only with regard to tax fraud (as opposed to tax evasion) and only to the extent that Switzerland must provide an official report summarizing the investigation conducted at the request of the IRS.[284] In addition to being of questionable evidentiary value in tax court proceedings,[285] these reports may not be admissible in tax court proceedings because article XVI(l) provides that "[a]ny information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment and collection of the taxes. . . ."[286] Because in the United States every individual has a constitutional right to attend tax court proceedings and hearings or to inspect the reports that these events generate, Switzerland would have the right to deny access to relevant information.[287] Thus, although the Convention restricted the scope of bank secrecy in tax investigations, the change in scope had only a minor impact on the ability of United States tax authorities to obtain privileged information when prosecuting tax offenders.

E. *The Mutual Assistance Treaty*

In 1977 the United States and Switzerland entered into the Treaty for the Mutual Assistance in Criminal Matters (Mutual Assistance Treaty or Treaty).[288] The Treaty marked the first significant effort by the Governments of Switzerland and the United States to cooperate in the prose-

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282. *Id.* at 84,213.

283. *Id.*

284. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 63.

285. *Id.* at 63 n.262; U.S. TAX CT. R. PRAC. & P. 143.

286. Convention, *supra* note 262, at art. XVI(l).

287. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 63. The sixth amendment to the United States Constitution guarantees this right to United States citizens. U.S. CONST. amend. VI.

288. Treaty for Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 (entered into force Jan. 23, 1977) [hereinafter Mutual Assistance Treaty or Treaty].

cution of activities considered to be criminal in both countries.[289] The Treaty provides for bilateral assistance, particularly by establishing procedures for the exchange of information.[290] Under the Treaty the United States and Switzerland agree to provide information on request in three situations: when the offense would be punishable under the law of the requested state if committed within its jurisdiction or included in the Schedule of Offenses attached to the Treaty;[291] if the offense involves bookmaking, lotteries or gambling;[292] or if the offender is involved in an organized criminal group.[293] The Treaty does not specifically address the issue of bank secrecy.[294] Correspondence between the Swiss and United States Governments subsequent to the enactment of the Treaty indicates, however, that a requested state may refuse to grant assistance if the disclosure would be likely to result in prejudice to essential interests of the requested state.[295]

The Treaty's application to tax investigations is limited. Because the Treaty Schedule does not include tax evasion in the list of enumerated offenses, and because tax evasion is not a crime in Switzerland, the Treaty does not require bank secrecy to yield in tax evasion investigations.[296] Furthermore, although the Treaty provides the Swiss tax authorities with discretion to compel disclosure with regard to other crimes,[297] this exception does not apply to tax evasion because tax evasion is a minor offense, not a crime, in Switzerland.[298] Thus, only in cases of tax fraud, which most cantons treat as a criminal offense, and in tax investigations involving gambling or organized crime, will the Treaty apply so as to penetrate bank secrecy.

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289. Raifman, *supra* note 18, at 443.

290. Crinion, *supra* note 18, at 1239.

291. Mutual Assistance Treaty, *supra* note 288, at art. 4, para. 2(a).

292. *Id.* at art. 4, para. 2(b).

293. *Id.* at art. 6, para. 2(a). To be involved in an organized criminal group a party must knowingly be "(1) a member of such a group; or (2) an affiliate of such a group performing supervisory or managerial functions or regularly supporting it or its members by performing other important services; or (3) a participant in any important activity of such a group. . . ." *Id.*

294. Mutual Assistance Treaty, *supra* note 288; Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States, supra* note 18, at 65.

295. Interpretive Letter to the Mutual Assistance Treaty, *supra* note 288, from Shelby Cullom Davis, United States Ambassador to Switzerland, to Dr. Albert Weitnauer, Swiss Ambassador to the United States (May 25, 1973), 27 U.S.T. at 2149, T.I.A.S. No. 8302 (1976).

296. Crinion, *supra* note 18, at 1239.

297. Mutual Assistance Treaty, *supra* note 288, at art. 4, para. 3.

298. Crinion, *supra* note 18, at 1239.

The United States has thus utilized a variety of information-gathering tools with varying degrees of success to obtain Swiss bank information ordinarily protected by bank secrecy. While bank secrecy continues to impede investigations of tax evasion, the United States Government has been fairly successful in penetrating Swiss banks in investigations for tax fraud. The United States Government has also been fairly successful in penetrating bank secrecy in investigations involving violations of United States securities laws. As with the techniques used to penetrate bank secrecy in tax investigations, the information-gathering techniques that United States authorities have developed for investigations into securities law violations have varied in their effectiveness.

VI. AVOIDANCE OF SECURITIES LAWS

A. *Generally*

Congress enacted the Securities Exchange Act of 1934[299] to protect investors in the United States securities markets.[300] The 1934 Act prohibits trading in United States securities markets while in possession of material, nonpublic information.[301] Because Swiss banks trade securities in their own names both for their accounts and for those of their customers,[302] and because securities markets recently have become increasingly international,[303] Swiss bank secrecy plays a major role in the effectiveness of Securities and Exchange Commission (SEC)[304] investigations into

299. 1934 Act, *supra* note 221.

300. Quinn & Co. v. SEC, 452 F.2d 943, 947 (10th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (cited in Comment, *Securities Regulations Investigations - United States - Swiss Treaty Attempts to Increase Cooperation in Releasing Names of Swiss-based Account Holders Involved in United States Securities and Exchange Commission Investigations*, 15 GA. J. INT'L & COMP. L. 135, 135 n.1 (1985)).

301. 1934 Act, *supra* note 221, § 10(b), 15 U.S.C. § 78j(b). The test for materiality is whether " 'a *reasonable* man would attach importance . . . [to the information] in determining his choice of action in the transaction in question. . . .' This, of course, encompasses any fact '. . . which in reasonable and objective contemplation *might* affect the value of the corporation's stock or securities. . . .' " SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), *reh'g denied*, 404 U.S. 1064 (1972) (quoting List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965) (quoting Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963))).

302. Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, *supra* note 18, at 45.

303. Raifman, *supra* note 18, at 424. Between 1971 and 1981, foreign financial institutions increased their activities in the United States securities markets from 71 billion dollars to 198 billion dollars, an increase of over 600%. *Id.* at 424-25 n.8.

304. The 1934 Act established the Securities and Exchange Commission. 1934 Act, *supra* note 221, at § 4(a), 15 U.S.C. § 78(d) (1981).

insider trading.[305] Conflicts arise when bank secrecy laws prevent the SEC from obtaining necessary information concerning securities transactions channeled through Swiss banks.

B. *The Mutual Assistance Treaty*

The SEC has attempted to obtain information from Swiss banks under two agreements, the Treaty for the Mutual Assistance in Criminal Matters[306] and the Memorandum of Understanding[307] (Memorandum). Despite the Mutual Assistance Treaty's apparent helpfulness, it has provided little assistance to United States securities investigations seeking confidential information[308] because many activities under investigation by the SEC are crimes in the United States but not in Switzerland.[309] For example, although trading public securities while in possession of material, nonpublic information constitutes fraud in the United States, such activity is not yet a crime in Switzerland.[310] In addition, the Treaty provides assistance only in criminal proceedings, whereas the SEC is an administrative agency whose proceedings are administrative in nature.[311] United States courts have thus been forced to attempt to obtain financial information by convincing the Swiss Government that insider trading involves one of the activities enumerated in the Schedule of Offenses attached to the Treaty or that insider trading is criminal under one of the provisions of the Swiss Penal Code.

The unsatisfactory results achieved by the Mutual Assistance Treaty led the SEC to seek to compel discovery of bank records under Rule 37 of the Federal Rules of Civil Procedure.[312] In *SEC v. Banca Della Svizzera Italiana and Certain Unknown Purchasers of Call Options for the*

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305. Insider trading had been described as "the act of purchasing or selling securities while in possession of material, non-public information about an issuer or the trading market for an issuer's securities." Comment, *supra* note 300, at 135 n.2.

306. Mutual Assistance Treaty, *supra* note 288.

307. U.S.-Swiss Memorandum on Insider Trading, Aug. 31, 1982, 14 Sec. Reg. & L. Rep. (BNA) 1737 (Oct. 8, 1982) [hereinafter Memorandum].

308. Raifman, *supra* note 18, at 445.

309. *Id.*

310. Honegger, *supra* note 18, at 18. *But see infra* notes 373-81, accompanying text and Appendix B.

311. *Id.*

312. FED. R. CIV. P. 37, *supra* note 182. One author writes: "To bring a rule 37 motion against a foreign or nonresident party, the party must allege that the nonresident has sufficient contacts in the forum state to be subject to that state's jurisdiction. *See* Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980)." Raifman, *supra* note 18, at 451 n.172.

Common Stock of St. Joe Minerals Corp.,[313] after the Swiss bank refused consistently to divulge privileged information, the District Court for the Southern District of New York ordered the bank to reveal the information under threat of severe sanctions.[314] In *SEC v. Certain Unknown Purchasers of the Common Stock, and Call Options for the Common Stock of Santa Fe Int'l Corp.*[315] the court denied the SEC's application for an order compelling the Swiss bank defendants to reveal privileged information but granted the SEC's application for a temporary restraining order preventing the defendants from disposing of assets related to the controversy.[316] While these methods were not conducive to improved foreign relations between the United States and Switzerland, they indicated to Switzerland the concern with which the United States viewed the situation and proved to both countries the need for a more successful agreement than the Mutual Assistance Treaty.

C. *The 1982 Memorandum of Understanding*

Following these forceful decisions, United States and Swiss representatives met in attempts to reach a more conciliatory position with regard to cooperation in insider trading investigations.[317] On August 31, 1982, United States and Swiss representatives signed a Memorandum of Understanding,[318] thereby "establishing mutual cooperation in pursuing violators of U.S. securities laws prohibiting insider trading."[319] Although the Memorandum is not legally binding and did not require acceptance by the Swiss Parliament or the United States Congress,[320] it symbolized the recognition by both countries of the need for a consensus on bank secrecy laws and insider trading investigations.

The Memorandum includes five parts and the Agreement of the Swiss Bankers' Association[321] (Bankers' Agreement). The Introduction indi-

313. 92 F.R.D. 111 (S.D.N.Y. 1981).

314. *Id.* at 113.

315. [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 98,323 at 92,025 (S.D.N.Y. Oct. 26, 1981).

316. *Id.* at 92,026.

317. Hawes, Lee & Robert, *Insider Trading Law Developments: An International Analysis*, 14 LAW & POL'Y IN INT'L BUS. 335, 391 (1982).

318. Memorandum, *supra* note 307. One commentator has stated that "[u]nlike a treaty, a memorandum of understanding is not a binding agreement requiring acceptance by the U.S. Senate or the Swiss Parliament. It represents only an expression of intent by the two nation's [sic] governments." Raifman, *supra* note 18, at 423 n.1.

319. Raifman, *supra* note 18, at 423.

320. *Id.* at 461-62.

321. Agreement XVI of the Swiss Bankers' Association with regard to the handling

cates that both nations recognize the conflicts between their laws and their concern over recent court decisions.[322] The Introduction also states that the countries recognize the need for mutual assistance and that they accept the Bankers' Agreement as part of their final understanding.[323]

Part Two of the Memorandum affirms the Treaty and sets forth the scope of its use.[324] The Memorandum notes that pursuant to the Treaty, the countries must supply information if "the investigation relates to conduct which might be dealt with by the criminal courts"[325] and if the offense is a crime under the laws of each nation.[326] Part Two also states that "transactions effected by persons in possession of material non-public information could be an offense under Articles 148 (fraud), 159 (unfaithful management), or 162 (violation of business secrets) of the Swiss Penal Code."[327]

Part Three of the Memorandum discusses the Bankers' Agreement.[328] It notes that although compulsory measures may be unavailable under the Treaty if the alleged activity is not a crime under the Swiss Penal Code, the Bankers' Agreement may permit participating banks to reveal information under specific circumstances.[329] Part Three of the Memorandum states that the Bankers' Agreement would be submitted for signature to those banks that trade with the United States and that it will govern the relationship between the signatory banks and those clients placing orders with the signatory banks to be executed in the United States.[330]

In Part Four of the Memorandum the United States and Switzerland provide for future consultations concerning insider trading investigations,[331] and in Part Five the nations agree that the Memorandum does not supersede the laws or regulations of either country.[332]

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of requests for information from the Securities and Exchange Commission of the United States on the subject of misuse of inside information, Memorandum, *supra* note 307, at 1740 [hereinafter Bankers' Agreement].

322. Memorandum, *supra* note 307, at 1737-38. *See* Honegger, *supra* note 18, at 23-24 for a discussion of the Memorandum.

323. *Id.* at pts. I(5) & (7).

324. *Id.* at pt. II.

325. *Id.* at pt. II(3)(a).

326. *Id.* at pt. II(3)(b).

327. *Id.*

328. *Id.* at pt. III.

329. *Id.* at pt. III(1).

330. *Id.* at pt. III(2).

331. *Id.* at pt. IV.

332. *Id.* at pt. V(1).

D. *The Bankers' Agreement*

The significant element of the Memorandum is the Bankers' Agreement. The Bankers' Agreement established the procedures the United States and Switzerland would follow in insider trading investigations leading to Swiss bank accounts. The procedures set forth in the Bankers' Agreement require the United States Department of Justice to send a written application for information to the Swiss Federal Office for Police Matters, which will forward the request to a specially created commission. The commission then investigates the allegations and, in certain circumstances, asks the banks to furnish it with information which it transmits to the SEC via the Swiss Federal Office for Police Matters.[333]

One commentator has organized the contents of the Bankers' Agreement into five substantive categories: "(1) the definition of what is considered insider trading, and who is regarded as an insider . . .; (2) the Commission and the preconditions of its inquiries . . .; (3) the procurement and transmission of information by the Commission . . .; (4) the blocking of the customer's account . . .; and (5) various other provisions. . . ."[334] Under article I of the Bankers' Agreement, Switzerland agrees to reveal information only in cases where a customer gives a bank "an order to be executed in the [United States] securities markets" within twenty-five trading days prior to a public announcement of a proposed business combination or acquisition.[335] Article 5(2) of the Bankers' Agreement defines an insider as:

> 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 [arts. 5(2)(a) or (b)] above has been able to act for the latter or to benefit himself from inside information.[336]

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333. Bankers' Agreement, *supra* note 321, at arts. 3(1), 4(1) and 5.

334. Honegger, *supra* note 18, at 25 (statutory references ommitted).

335. Bankers' Agreement, *supra* note 321, at art. I. Article 1 defines "business combination" as a "merger, consolidation, sale of substantially all of an issuer's assets or other similar business combinations." *Id.* Article 1 defines "acquisition" as "acquisition of at least 10% of the securities of an issuer by open market purchase, tender offer or otherwise." *Id. See* Honegger, *supra* note 18, at 24-31 for a discussion of the Bankers' Agreement.

336. *Id.* at art. 5(2).

Article 2 of the Bankers' Agreement empowers the Board of Directors of the Swiss Bankers Association to appoint a Commission of Inquiry (Commission) composed of individuals who are not executives of either a bank or a company subject to Swiss bank secrecy laws.[337] Under article 3 the Commission handles requests for information only under certain conditions. As summarized, these conditions are: (1) the United States Department of Justice transmit its written application to the Federal Office for Police Matters;[338] (2) the inquiry include documentation of evidence materially relevant to the investigation;[339] (3) the inquiry identify specifically transactions in question;[340] (4) the SEC establish to the satisfaction of the Commission that material price or volume movements have occurred or that the transactions violated United States insider trading laws;[341] and (5) the SEC agree not to disclose the information to any person except in connection with its investigations.[342]

If the SEC meets these conditions, the Commission shall request the necessary information from the Swiss banks.[343] The Swiss banks, who will invite their customers to supply the requested information, must file reports with the Commission within forty-five days of receipt of the inquiry.[344] If the Commission determines from a bank's report that the alleged activity does not constitute insider trading or the customer is not an insider, it will not furnish the information to the SEC.[345] The Commission must also ask the banks to block the customer's account to the extent of any suspected profit or avoided losses.[346] Article 9(3) lists the methods by which banks can unblock customers accounts.[347]

Article 12 of the Bankers' Agreement states that "banks undertake to inform their clients in due form about the contents of the present [Bankers'] Agreement."[348] Because under Swiss law the customer and not the bank is the master of the banking secret,[349] "the customers' consent to the [Bankers'] Agreement, waiving the right of confidentiality to the nec-

337. *Id.* at art. 2(1).
338. *Id.* at art. 3(1).
339. *Id.* at art. 3(2).
340. *Id.* at art. 3(3).
341. *Id.* at art. 3(4).
342. *Id.* at art. 3(5).
343. *Id.* at art. 4(1).
344. *Id.* at arts. 4(2) & (3).
345. *Id.* at arts. 5(1) & (2).
346. *Id.* at art. 9(1).
347. *Id.* at art. 9(3).
348. *Id.* at art. 12.
349. *See supra* note 54 and accompanying text.

essary extent, must be obtained in advance to guarantee the applicability of the [Bankers'] Agreement in all future cases."[350] Swiss banks have obtained actual consent from customers and implied customer consent where customers fail to respond to two successive requests to submit to the terms of the Bankers' Agreement or when customers have submitted orders to be executed on the United States securities markets.[351]

The Memorandum of Understanding and the Bankers' Agreement provide the substantive changes necessary to avoid conflicts between Swiss bank secrecy laws and United States investigations into securities violations. United States authorities prefer to request information under the Memorandum rather than under the Mutual Assistance Treaty because the Mutual Assistance Treaty applies only to offenses that are criminal under the Swiss Penal Code, and insider trading is not a crime in Switzerland.[352] In addition, the Memorandum permits the SEC to request information without resorting to the court system and Rule 37 of the Federal Rules of Civil Procedure, thus alleviating much of the adversarial nature of the process.

Unfortunately, the Memorandum does not eliminate conflicts altogether. The Memorandum is not legally binding on either Government and is, therefore, subject to breach by either country at any time.[353] The Memorandum applies only to specified offenses, and the Commission's broad power to determine whether an alleged offense falls within the scope of the Memorandum could render the Memorandum's beneficial effect largely illusory. Finally, some commentators have suggested that the Memorandum's customer consent requirement "may be contrary to the Swiss public order and to article 27 subsection 2 of the Swiss Civil Code, which provides that no person can alienate his personal liberty nor impose any restrictions on his own enjoyment thereof which are contrary to law or morality."[354]

The Memorandum of Understanding and Swiss Bankers' Agreement have played a significant role nonetheless in fostering United States-Swiss foreign relations. While these agreements have allowed Swiss bank secrecy laws and the notion of personal financial privacy to remain largely intact, they have provided United States investigators with access to information necessary for the prosecution of securities laws violations.

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350. Honegger, *supra* note 18, at 29.

351. *Id.* at 29.

352. *See supra* note 310 and accompanying text. *But see infra* notes 373-81, accompanying text, and Appendix B.

353. *See supra* note 318.

354. Honegger, *supra* note 18, at 33.

This success in the area of securities laws investigations corresponds to a more general trend in the role of Swiss bank secrecy worldwide.

VII. DEVELOPMENTS SINCE 1982

A. *Generally*

A review of United States-Swiss relations over the past twenty-five years demonstrates a gradual relaxation of Swiss bank secrecy laws. Several events since 1982 have confirmed this trend. In 1984 Swiss Finance Minister Otto Stich declared publicly that he intended to continue to pursue changes to bank secrecy laws in order "to make the [laws] less secretive so that foreign regulatory authorities, such as the U.S. Security and Exchange Commission, could obtain information on suspected wrongdoing."[355] Swiss citizens do not necessarily agree with his views. On May 20, 1984, Swiss voters were asked to vote on a nationwide referendum making the country's bank secrecy laws less restrictive.[356] Although observers did not expect the generally conservative Swiss electorate to approve the measure, as one commentator states, "the very fact that matters ha[d] advanced to the stage where such a proposal even [got] to a vote at all has sent shivers down the collective spine of the [Swiss] banking establishment."[357]

In March 1986 the Swiss Federal Council ordered six Swiss banks to freeze all bank accounts held or believed to be held by former Philippine President Ferdinand Marcos after unknown individuals attempted to withdraw some of the money from the accounts.[358] This decision represented a particularly sharp break from Swiss traditions for two reasons. First, the Swiss Government had traditionally left untouched the assets of deposed dictators, such as the Shah of Iran, despite substantial pressure from the international community.[359] Second, and perhaps more significantly, the Swiss Government froze the Marcos bank accounts on its own initiative; the Philippine Government had not requested such action or initiated a lawsuit at the time of the freeze.[360]

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355. Parry, *Finance Minister Fights to Loosen Swiss Secrecy Laws*, Am. Banker, Nov. 13, 1984, at 32, col. 1.

356. Parry, *Once-Provincial Zurich Now Spells Stability, Secrecy to European Finance*, Am. Banker, Feb. 23, 1984, at 22, 23.

357. *Id.*

358. Evans, *Bank Leu—Or Pandora's Box*, EUROMONEY, Apr, 1987, at 40; Parry, *Swiss Government Blocks Marcos Funds*, Am. Banker, Mar. 26, 1986, at 2.

359. Schapiro, *Swiss Banks Still Sell Secrecy*, THE NATION, Sept. 6, 1986, at 1, col. 2.

360. Wall St. J., Mar. 26, 1986, at 35, col. 3.

The action left Swiss bankers in an uproar. "Under the pretext of morality without compromise," they warned, "the [Swiss] government degrades our financial image and risks compromising our prosperity and development."[361] In April 1986 Swiss authorities affirmed their actions, however, freezing all assets held by Haiti's exiled former leader Jean-Claude Duvalier, this time at the request of the new Haitian Government.[362]

Although Switzerland is expected to enact legislation in 1988 making insider trading a crime under Swiss law,[363] the SEC has nonetheless been successful in obtaining Swiss bank information necessary for the prosecution of insider trading. In May 1986 the Bahamas branch of the oldest major bank in Switzerland, Bank Leu Ltd., revealed the name of its customer, investment banker Dennis Levine, in exchange for immunity in one of the largest and most celebrated insider trading investigations on record.[364] Swiss officials have also aided SEC investigations by agreeing to freeze bank accounts suspected of containing illegal profits derived from insider trading. For example, in March 1987, at the SEC's request, Switzerland agreed to freeze temporarily five bank accounts connected with individuals whom the SEC suspected of insider trading.[365] A significant change in the Swiss laws governing insider trading as well as a recent agreement between the United States and Switzerland will facilitate this trend towards the increased exchange of information between the two countries.

B. *The 1987 Memorandum of Understanding*

On November 10, 1987, the United States and Switzerland exchanged a Memorandum of Understanding (1987 Memorandum) making it easier for law enforcement officials in the two countries to exchange information in investigations of insider trading, money laundering and other crimes.[366] The 1987 Memorandum sets forth procedures for both countries to follow in requesting information under the 1977 Treaty on Mu-

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361. Schapiro, *supra* note 359, at 1, col. 2.

362. Studer, *Officials Freeze Duvalier Assets in Swiss Banks*, Wall St. J., Apr. 16, 1986, at 36, col. 1.

363. *See infra* notes 373-81, accompanying text and Appendix B.

364. Putka, *Those Famed Swiss Bank Accounts Aren't Quite as Impenetrable as They Used to Be*, Wall St. J., June 20, 1986, at 21, col. 4.

365. Jones, *Sorry Ollie*, FINANCIAL WORLD, June 30, 1987, at 10.

366. Memorandum of Understanding, Nov. 10, 1987, United States-Switzerland [hereinafter 1987 Memorandum]. *See infra* Appendix A for the text of the 1987 Memorandum.

tual Assistance in Criminal Matters.[367] In response to Swiss concerns about United States strong-arm tactics, the 1987 Memorandum commits both the United States and Switzerland to use the Mutual Assistance Treaty rather than unilateral measures as a first resort in gathering evidence.[368] In response to United States complaints about Swiss delays in providing information, the 1987 Memorandum commits Switzerland to streamline its handling of United States requests for information.[369] Swiss Interior Minister Elizabeth Kopp stated that this streamlining would mean that "normal" United States requests for information, which typically took two to three years to process, would now take only one year.[370] The 1987 Memorandum also establishes a notification system for each country for early notification of pending requests for information that could result in legal confrontations.[371]

C. *Swiss Insider Trading Laws*

On December 16, 1987, the two houses of the Swiss Parliament[372] resolved their dispute over the wording of a law making insider trading a criminal offense in Switzerland and paved the way for the law's adoption in mid-1988.[373] The new law authorizes Swiss courts to impose jail

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367. 1987 Memorandum, *supra* note 366, at art. II. *U.S., Switzerland Strengthen Insider Trading Access Agreement*, 19 Sec. Reg. & L. Rep. (BNA) No. 45, at 1730 (Nov. 13, 1987).

368. 1987 Memorandum, *supra* note 366, at art. III(3). *U.S., Switzerland Strengthen Insider Trading Access Agreement*, 19 Sec. Reg. & L. Rep. (BNA) No. 45, at 1730 (Nov. 13, 1987).

369. 1987 Memorandum, *supra* note 366, at art. II(2). *U.S., Switzerland Strengthen Insider Trading Access Agreement*, 19 Sec. Reg. & L. Rep. (BNA) No. 45, at 1730 (Nov. 13, 1987).

370. *U.S., Switzerland Strengthen Insider Trading Access Agreement*, 19 Sec. Reg. & L. Rep. (BNA) No. 45, at 1730 (Nov. 13, 1987).

371. 1987 Memorandum, *supra* note 366, at art. III. *U.S., Switzerland Strengthen Insider Trading Access Agreement*, 19 Sec. Reg. & L. Rep. (BNA) No. 45, at 1730 (Nov. 13, 1987).

372. The Swiss Parliament was designed along the lines of the United States bicameral Congress. Two houses compose the Parliament. The National Council, or the lower house, is composed of 200 members who represent the Swiss population. The Council of States, or the upper house, has forty-six members—two representatives from each canton and one representative from each of the six half-cantons. Voyame, *supra* note 32, at 3.

373. *See infra* Appendix B for the text of the new law. *Swiss Parliament Agrees on Insider Trading Compromise*, 20 Sec. Reg. & L. Rep. (BNA) No. 1, at 7 (Jan. 8, 1988). Under Swiss law, the Swiss electorate can require that a new federal law be put up for a popular vote if 50,000 or more eligible voters file a request for a popular referendum. Once the Swiss Parliament has passed a new law it does not enter into force until the deadline for filing a popular referendum has passed or, if the requisite number of voters

sentences of up to three years or fines of up to 50,000 dollars on individuals who profit or help others to profit from the use of confidential information in stock transactions.[374] The law deliberately left vague the question whether the Swiss Government can prosecute someone who overhears privileged information and then executes stock trades based on that information.[375] The two houses worded the statute broadly to resolve their dispute over its scope; Finance Minister Otto Stich and the Council of States (the upper house) had wanted the law to cover only transactions on the stock exchange, while Interior Minister Elizabeth Kopp and the National Council (the lower house) had intended the law to cover off-market transactions in banks and finance houses as well.[376] Commentators expect the law to be in effect by the summer of 1988.[377]

The new Swiss law will ensure that United States authorities investigating securities fraud will have increased access to Swiss bank records. Because insider trading will be a crime in both the United States and Switzerland, normally privileged financial information will be available to United States authorities under the 1977 Treaty on Mutual Assistance in Criminal Matters.[378] Also, the mere announcement that Switzerland is going to criminalize insider trading will probably deter individuals who are perpetrating securities fraud in the United States from attempting to hide the proceeds in Swiss bank accounts.[379] In addition to aiding United States investigations, the new law will reduce the amount of insider trading going on in United States markets. Swiss Interior Minister Elizabeth Kopp told United States Attorney General Edwin Meese in November that the new law will effectively prevent Swiss banks from trading on inside information in markets worldwide.[380]

The United States and Switzerland further ensured the effectiveness of the new insider trading law when the two countries exchanged the 1987

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has requested a referendum, after the electorate has approved the law. Voyame, *supra* note 32, at 4, 13. Voyame writes: "This lengthy process . . . contributes to and reinforces and precludes measures excessively influenced by current events." *Id.* at 13. The popular referendum filing date deadline for the Swiss insider trading law is April 11, 1988. *See infra* Appendix B.

374. *Swiss Parliament Agrees on Insider Trading Compromise*, 20 Sec. Reg. & L. Rep. (BNA) No. 1, at 7, 8 (Jan. 8, 1988).

375. *Id.*

376. *Id.* at 7-8.

377. *Id.* at 8.

378. *See supra* note 288-95 and accompanying text.

379. THE ECONOMIST, Feb. 28, 1987, at 88, col. 3.

380. *Swiss Parliament Agrees on Insider Trading Compromise*, 20 Sec. Reg. & L. Rep. (BNA) No. 1, at 7, 8 (Jan. 8, 1988).

Memorandum, which states that once the new Swiss law becomes effective, it will provide assistance to the SEC not only in civil and administrative proceedings but in criminal investigations as well.[381]

VIII. CONCLUSION

The relaxation of Swiss bank secrecy regulations has aided United States investigations tremendously. The passage of the new Swiss law on insider trading and the compromise reached by the United States and Switzerland in the 1987 Memorandum have expanded the scope of information available to United States authorities almost completely. Tax evasion is one of the few remaining crimes where information is still unavailable to United States investigators under the 1977 Treaty on Mutual Assistance in Criminal Matters.

These advances do not guarantee the success of all future investigations, however. Relaxation of Swiss bank secrecy laws may encourage individuals seeking financial privacy to abandon Swiss bank accounts in search of potentially more secure financial havens such as Hong Kong, Panama, Luxembourg, Liechtenstein, West Germany and various Caribbean islands.[382] Foreign deposits in Luxembourg banks, where bank secrecy laws remain stringent, grew by nearly 40% last year to an estimated 160 billion dollars,[383] putting Luxembourg in competition with Switzerland to be the second largest money haven in the world as measured by the amount of foreign deposits.[384] One commentator has even suggested that the Swiss themselves have moved billions of dollars to foreign banks to take advantage of stricter bank secrecy laws abroad.[385] In addition, many foreign depositors who are keeping their bank accounts in Switzerland are depositing their funds through other secrecy havens,

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381. *Swiss Parliament Agrees on Insider Trading Compromise*, 20 Sec. Reg. & L. Rep. (BNA) No. 1, at 7, 8 (Jan. 8, 1988).

382. One writer notes that "many other nations have . . . bank secrecy requirements [similar to those of Switzerland]. These include Panama, Liechtenstein, the Bahamas, Luxembourg, and West Germany. In addition to Swiss banks, the banks in Hong Kong, Panama, and Curacao are the ones probably most often used for illicit, sophisticated stock transactions." Note, *Secret Foreign Bank Accounts*, 6 TEX. INT'L L.F. 105 (1970) (footnote ommitted). Many of these countries do have unilateral agreements with the United States which allow United States officials free access to accounts stashed there. Jones, *supra* note 365, at 10.

383. Finn and Pouschine, *Luxembourg: Color it green*, FORBES, Apr. 10, 1987, at 42.

384. *Id.* The Cayman Islands is the largest money haven in the world, with over 200 billion dollars in foreign deposits. *Id.*

385. *Id.* at 44.

in order to add another layer of protection.[386] Since 1982 deposits from Liechtenstein[387] in Swiss banks increased fourfold to five billion dollars.[388] Overall Swiss deposits from Panama and the Caribbean grew tremendously between 1978 and the end of 1984, from four billion dollars to twenty-five billion dollars.[389] Thus, although United States authorities have obtained numerous concessions from Switzerland, United States investigations may begin to lead to bank accounts in other countries where secrecy laws deny access to United States authorities. Only a multilateral agreement concerning bank secrecy will alleviate entirely the problem of financial nondisclosure.[390]

United States authorities must also concern themselves with the potential harm to United States foreign relations if they continue to confront the issue of bank secrecy as they have in the past. United States bargaining power has frequently placed it in a very strong position to demand concessions from Swiss banks.[391] United States authorities have threatened to hassle Swiss banks doing business in the United States or to withdraw the banks' ability to do business in the United States if Switzerland did not provide requested information.[392] The tremendous economic clout that the United States market wields, as well as the global ambitions of the big Swiss banks, has forced Swiss banks to con-

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386. Putka, *supra* note 364.

387. One commentator notes the significance of Liechtenstein deposits:

> The principality of Liechtenstein, a tiny neighbor of Switzerland, is internationally known for its generous legislation which "enables any individual to transform himself easily, quickly and inexpensively into a legal entity and thus gain complete anonymity. . . .
>
> [Such an arrangement] may be used for many illegal purposes. What often happens is that an American businessman forms a dummy corporation which opens a bank account in Switzerland. . . . Even if the bank should reveal the account holder's name, all that could be found out would be the name of a Liechtenstein trust. The true owner is thus insulated. [This may occur also using] a dummy corporation in the Caribbean, in Panama, or in any other secrecy-oriented jurisdiction.

Meyer, *Swiss Banking and Its Legal Implications in the United States, supra* note 18, at 44-45 (footnotes omitted).

388. Putka, *supra* note 364.

389. *Id.*

390. The SEC claims that the Netherlands Antilles, Turkey, Colombia, Morocco and the Cayman Islands have unilateral agreements with the United States that permit United States authorities free access to financial records concerning bank accounts held in those countries by United States citizens. Jones, *supra* note 365.

391. Finn and Poushine, *supra* note 383, at 43.

392. *Id.*

cede to demands by United States investigators.[393] United States officials must recognize that these methods, as well as such strong-arm tactics as the use of Rule 37 Motions to Compel and veiled contempt of court threats, do little to enhance the United States image abroad or to inspire conciliation. Some countries with bank secrecy laws will not bow to such pressure. As one top United States financial regulator stated, because Luxembourg banks don't have the same global aspirations as do the Swiss banks, "[the United States] could put pressure on the Luxembourg banks, but [the Luxembourg banks] aren't nearly as exposed as the Swiss."[394]

Although Switzerland has eased its bank secrecy laws recently, United States officials will continue to face impregnable financial records abroad. The United States must continue its efforts to obtain information under current agreements while attempting to establish multilateral agreement on the scope of financial privacy, perhaps somehow tied to membership in the International Monetary Fund[395] or a similar international organization, and it must avoid unilaterally imposing its views on the financial institutions of foreign nations.

Elliot A. Stultz

393. *Id.*

394. *Id.*

395. On July 21, 1944, representatives from twenty-two countries at the United Nations Monetary and Financial Conference (Conference) at Bretton Woods, New Hampshire agreed to establish the International Monetary Fund (IMF). Henry Morgenthau, Jr., President of the Conference, described the goals of the Conference and the reasons for the creation of the IMF as being the establishment of a stable and orderly system of international currency relationships and the revival of international investment (following World War II) through international cooperation on a multilateral basis. Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, T.I.A.S. No. 1501 (current version at 29 U.S.T. 2203, T.I.A.S. No. 8937). Statement of Henry Morgenthau, Jr., discussed in H. AUFRICHT, THE INTERNATIONAL MONETARY FUND 7 (1964) (citing 2 Proceedings and Documents of the United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July 1-22, 1944, at 1630-36 (1948)). Membership in the IMF could be conditioned on a country's willingness to allow foreign sovereigns to obtain bank records necessary for an investigation in the foreign state. This membership requirement would appear to conform with the policies that led to the creation of the IMF.

APPENDIX A

MEMORANDUM OF UNDERSTANDING

BETWEEN THE GOVERNMENT OF SWITZERLAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS AND ANCILLARY ADMINISTRATIVE PROCEEDINGS

I. Introduction

1. This Memorandum of Understanding (MOU) is a statement of intent setting forth the understandings reached by the delegations of Switzerland and the United States acting on behalf of their respective executive authorities (the Parties) to improve their cooperation in the field of international law enforcement. These understandings continue a long tradition of law enforcement cooperation between Switzerland and the United States and were reached in the course of consultations between representatives of Switzerland and the United States.

On the basis of the foregoing consultations, the Parties reaffirmed the two countries' interest in mutual assistance in criminal matters and ancillary administrative proceedings under Article 1 of the Treaty between the Government of Switzerland and the Government of the United States of America on Mutual Assistance in Criminal Matters (the Treaty) in accordance with mutually acceptable procedures and with a view to avoiding or minimizing conflicts as to questions of sovereignty.

2. During the consultations the delegations engaged in an exchange of opinions pursuant to Article 39(1) of the Treaty. Sections II and IV of this MOU memorialize the exchange of opinions and related understandings that the Parties have reached in order, in particular, to avoid or minimize conflicts arising from the exercise of jurisdiction in law enforcement matters. Section V of this MOU memorializes the exchange of opinions and related understandings that the Parties have reached in order more effectively to utilize the Treaty to combat all forms of organized crime.

II. Use of Existing Mechanisms

1. The Parties note the importance of the Treaty and other treaties and domestic legislation such as the Swiss Federal Act on International Mutual Assistance in Criminal Matters (IMAC), as contemplated by Article 38 of the Treaty (hereinafter called the instruments). The Parties note that the instruments provide mechanisms for cooperation between the law enforcement authorities of the Parties in connection with investi-

gations or court proceedings involving criminal offenses, including a duty or tax fruad as defined under Swiss law. Such cooperation may include assistance in locating and hearing witnesses, producing and authenticating judicial or business records and serving judicial or administrative documents.

2. The Treaty, in particular, has been used on numerous occasions by the law enforcement authorities of both countries. The Parties understand that the procedures provided by the instruments should be used as a first resort whenever available and to the extent applicable. The Parties will use their best efforts to interpret and apply the instruments to provide assistance when requested by the Central Authority of the other Party and to streamline the implementation process of the instruments in order to improve their practical availability and effectiveness.

III. Early Warning/Consultations

1. In order to continue and improve international law enforcement cooperation in a manner consistent with the interests of both countries, the Parties understand that the appropriate authorities will undertake contacts or consultations in the future when the need to do so is recognized mutually.

2. The Parties understand that each Central Authority will exercise its best efforts to inform the others, as appropriate, when its authorities seek the production of evidence located or believed to be located in the territory of the other in connection with a criminal matter arguably within the scope of the instruments. Communications and consultations will occur, as appropriate, as the matter proceeds, with a view to production of the evidence while avoiding or minimizing jurisdictional conflicts.

3. The Parties understand that both Parties will use best efforts to avoid using unilateral compulsory measures to which the other objects for the production of evidence located in the territory of the other in any criminal matter arguably within the scope of the instruments unless:

(a) the Central Authority of the Party seeking the evidence has made a request for assistance under Article 29 of the Treaty or has sought informally the views of the Central Authority of the other Party regarding the availability of the instruments as a means of obtaining assistance;

(b) the Central Authority of the requesting Party, by providing the reasons therefor, has informed the Central Authority of the requested Party that denial or unreasonable delay in securing production of the evidence may prejudice the successful completion of an investigation or proceeding; and

(c) the Central Authorities have had 30 days, or other mutually

agreed period of time, within which to consult in an effort to resolve the matter to their mutual satisfaction.

Even where the above conditions have been met, the Parties will continue to exercise moderation and restraint in undertaking to enforce unilateral compulsory measures to which the other objects or to block enforcement of such measures.

4. The Parties understand further that they will use their best efforts to insure that the information obtained in such communications is handled with appropriate care to prevent it from becoming public and, in particular, will not be disclosed to any person except officials dealing with the case concerned and, once an official request has been presented, parties having a right of appeal in connection with the handling of the request.

IV. Moderation and Restraint

Where the above-mentioned mechanisms are not available to obtain evidence in areas covered by this MOU the Central Authorities will, with a view to avoiding or minimizing conflicts of jurisdiction, use best efforts to convince the authorities concerned to apply moderation and restraint including the procedures provided by Article III of this MOU when considering unilateral compulsory measures for the production of evidence or measures aimed at blocking its production.

V. Organized Crime

The Parties recognize that organized criminal groups often abuse existing laws in different countries in order to conceal their illicit activities, most notably in the field of drug trafficking. The Parties also recognize their compelling mutual interest in investigating and prosecuting those who traffic in dangerous drugs. Indeed, groups of drug traffickers and money launderers almost always resort to acts of intimidation and attempts to gain influence in legitimate bodies so as to shield themselves from criminal prosecution, thereby meeting the elements of Article 6, Paragraph 3 of the Treaty.

The Parties therefore reaffirm the two countries' interest in mutual assistance, in conformity with agreed procedures, with a view to combatting organized crime. They consider that such forms of criminal activity as drug trafficking, counterfeiting, extortion, robbery or terrorism (which may also involve money laundering) can be circumstantial evidence of the existence of organized crime.

In view of these considerations, the Parties understand that the Central Authorities will continue their practice of using their best efforts to

interpret and apply the instruments, in particular, such provisions that deal with organized crime and drug trafficking, in such a way as to provide assistance to the widest extent possible.

VI. Legal Status

This MOU is not intended to create legal obligations. It embodies statements of intent of the two Parties. The Parties further understand that this MOU does not modify or supersede any laws or regulations in force in Switzerland or in the United States. This MOU is not intended to create any rights enforceable by private parties and does not impose any obligations on the legislative and judicial branches of the Parties.

IN WITNESS WHEREOF, the respective representatives, duly authorized for this purpose, have signed this Memorandum of Understanding.

DONE at Washington, in duplicate, this 10th day of November, 1987.

ON BEHALF OF THE GOVERNMENT OF SWITZERLAND:	ON BEHALF OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
s/Elizabeth Kopp	s/Edwin Meese III

APPENDIX B

TRANSLATION OF THE SWISS LAW PROHIBITING INSIDER TRADING*

Art. 161

1. Anyone who, as a board member, manager, auditor or agent of a corporation or of one of its parent or subsidiary corporations; or

   anyone who, as a member of an administration or as a government official; or

   anyone who, as an aide to one of the above-mentioned persons;

   procures a pecuniary benefit for himself or someone else, by using or bringing to the attention of a third-party confidential information that would considerably and foreseeably influence the price of a stock traded on the Swiss stock market or foreign securities markets or respective equity securities (Bucheffecten) of a corporation, or of options on these,

   will be subject to imprisonment or a fine.

2. Anyone who obtains information, directly or indirectly, from a person named in paragraph 1 and procures a pecuniary benefit for himself or another by using the information will be subject to a maximum jail sentence of one year or a fine.

3. Information concerning a future dividend, a merger, or a matter of comparable bearing will be deemed information within the scope of paragraphs 1 and 2.

4. If a merger of two corporations is planned, then paragraphs 1 and 2 will apply to both corporations.

5. Paragraphs 1 through 4 are equally applicable when the use of confidential information relates to coupons, other securities or equity securities (Bucheffekten) or options on those of a cooperative enter-

prise or a foreign corporation.

* Translation by Herman Raspé. All errors in translation are attributable solely to the author. In its original, the law states:

Schweizerisches Strafgesetzbuch
Änderung vom 18, Dezember 1987

Die Bundesversammlung der Schweizerischen Eidegenossenschaft, nach Einsicht in eine Botschaft des Bundesrates vom 1. Mai 1985,[1] *beschliesst:*

I

Das Schweizerische Strafgesetzbuch[2] wird wie folgt geändert:

Art. 161

Ausnüzen der Kenntnis vertraulicher Tatsachen

1. Wer als Mitglied des Verwaltungsrates, der Geschäftsleitung, der Revisionsstelle oder als Beauftragter einer Aktiengesellschaft oder einer sie beherrschenden oder von ihr abhängigen Gesellschaft,

als Mitglied einer Behörder oder als Beamter,

oder als Hilfsperson einer der vorgenannten Personen,

sich oder einem andern einen Vermögensvorteil verschafft, indem er die Kenntnis einer vertraulichen Tatsache, deren Bekanntwerden den Kurs von in der Schweiz börslich oder vorbörslich gehandelten Aktien, andern Wertschriften oder entsprechenden Bucheffekten der Gesellschaft oder von Optionen auf solche in voraussehbarer Weise erheblich beeinflussen wird, ausnützt oder diese Tatsache einem Dritten zur Kenntnis bringt,

wird mit Gefängnis oder Busse bestraft.

2. Wer eine solche Tatsache von einer der in Ziffer 1 genannten Personen unmittelbar oder mittelbar mitgeteilt erhält und sich oder einem andern durch Ausnützen dieser Mitteilung einen Vermögensvorteil verschafft,

1. BBI 1985 11 69
2. SR 311.0

wird mit Gefängnis bis zu einem Jahr oder mit Busse bestraft.

3. Als Tatsache im Sinne der Ziffern 1 and 2 gilt eine bevorstehende Emission neuer Beteiligungsrechte, eine Unternehmensverbindung oder ein ähnlicher Sachverhalt von vergleichbarer Tragweite.

4. Ist die Verbindung zweier Aktiengesellschaften geplant, so gelten die Ziffern 1-3 für beide Gesellschaften.

5. Die Ziffern 1-4 sind sinngemäss anwendbar, wenn die Ausnützung der Kenntnis einer vertraulichen Tatsache Anteilscheine, andere Wertschriften, Bucheffekten oder entsprechende Optionen einer Genossenschafte oder einer ausländischen Gesellschaft betriff.

II

1 Dieses Gesetz untersteht dem fakultativen Referendum.
2 Der Bundesrat bestimmt das Inkrafttretn.

Ständerat, 18. Dezember 1987

Nationalrat, 18. Dezember 1987

Der Präsident: Masoni
Die Sekretärin: Huber

Der Präsident: Reichling
Der Protokollführer: Anliker

Datum der Veröffentlichung: 12. Januar 1988[1]
Ablauf der Referendumsfrist: 11. April 1988

1. BBI 1988 1 3