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The Effect of Swiss Bank Secrecy on the Enforcement of Insider Trading Regulations and the Memorandum of Understanding Between the United States and Switzerland

I. INTRODUCTION

Switzerland is renowned for the secrecy laws which protect customers and their accounts. Bank secrecy in Switzerland originated in customary law, but is now statutory. The importance of Swiss secrecy provisions is underlined by the fact that they are a main attraction of Swiss bank accounts. The Swiss banking system owes its position in the world of finance in part to this tradition of secrecy.

Swiss bank secrecy laws have, however, become a source of contention between the United States and Switzerland. Depositors have taken advantage of the

1. H. Maine, Ancient Law (1906). Customary law originated in various European and Asian countries in times before laws were written, when controversies were decided by members of ruling aristocracies. Customs as to the outcome of cases, and therefore as to laws applied, evolved from the tendency to treat similar cases similarly. Id. Customary law arose from the fact that judges and the general public became aware of the practice on any particular point and conformed themselves to it.

2. Loi federale du 8 novembre 1934 sur les banques et les caisses d'épargne, 10 RS 325; modifiant la loi sur la banques et les caisses d'épargne du 11 mars 1971 [Recueil Systematique des lois et ordonnances de 1848 à 1947]; Recueil Officiel des lois et ordonnances de la Confédération Suisse 1971 ROLF 808, 819. [hereinafter cited as 1971 ROLF]. Article 47 is the bank secrecy provision. The banking law was passed to bolster the security of banks and of deposits in savings banks and to increase federal supervision of the banking business. Union Bank of Switzerland, Federal Law Relating to Banks and Savings Banks (1972) [hereinafter cited as Federal Law Relating to Banks].


4. Id.

5. See T. Fehrenbach, The Swiss Banks 210-36 (1966). Banking secrecy has been a troublesome issue since the 1940s, when U.S. Treasury officials tried to investigate Swiss bank records believing that Nazis were using the banks to conceal operations. The banks refused to cooperate, and the Treasury Department asked the Swiss government to help. In 1941, when the Swiss government failed to obtain bank cooperation, the Treasury Department retaliated by freezing all Swiss assets in the United States. Id. at 231. After the war, Swiss secrecy laws frustrated U.S. attempts to trace German funds to Swiss banks. The controversy was not finally resolved until 1952, when an international agreement was signed providing for the payment of 121 million Swiss francs by Switzerland to the Allies and a refund of that amount to Switzerland by West Germany. 27 Dep't St. Bull. 363 (1952). Subsequently, the Interhandel controversy arose. Interhandel was a holding company organized under Swiss law solely for the purpose of holding a controlling interest in foreign enterprises of the Nazi multinational IG Farbenindustrie (IG Farben). During World War II, the United States seized a subsidiary of Interhandel as an enemy-owned property. After the war, Interhandel sued for the return of the assets of the subsidiary, and the United States responded with the allegation that Interhandel and a private Swiss bank were conspiring to disguise IG Farben holdings. The bank, asserting secrecy law, would not permit discovery of certain documents. Many courts were occupied with various aspects of this case for over ten years.

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anonymity which bank secrecy provides to circumvent American laws, including U.S. regulations prohibiting insider trading in securities. Insider trading occurs when those with material, nonpublic information trade on the basis of that information. Insider trading undermines the expectations of fairness in securities markets. The informational advantage of insiders is one that other investors cannot overcome, regardless of their diligence. This enables insider traders to reap profits with very little risk.

Swiss banks can trade on behalf of their customers. Thus, Swiss bank customers can avoid prosecution for insider trading because inspection of the records of such transactions reveals only trading for the benefit of the bank. Bank secrecy forbids banks from disclosing the names of the customers for whom the transactions were made.

Bank secrecy laws have frustrated insider trading investigations by the Securities and Exchange Commission (SEC). Although the SEC might have evidence

Litigation finally ended in 1963 when Interhandel accepted an offer to settle proposed by then Attorney General Robert Kennedy. T. FEHRENBACK, supra, at 213-36.


8. A fact is material if a substantial likelihood exists that a reasonable stockholder would consider the fact important in making an investment decision. T.S.C. Industries v. Northway, 426 U.S. 438, 449 (1976). Although Northway did not involve an insider trading violation, courts have used this materiality standard in such cases. See, e.g., Joyce v. Joyce Beverages, 571 F.2d 703, 707 n.6 (2d Cir. 1976), cert. denied, 434 U.S. 875 (1977).

9. Nonpublic information is that which is not generally known in the marketplace. See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969), in which the significance of a mineral discovery was known to only a few corporate employees and officers.


12. Id.

13. See SEC Memo, supra note 10, at 1705-06.


15. Id. at 263.

16. A bank that has illegally disclosed the name of one of its customers can be held responsible in a civil court and might, in very serious cases, lose its license to operate. Address by Jung Leuten, First Secretary at the Swiss Embassy in Washington, D.C., before the Columbia Law School Alumni Association of Washington, D.C. (Sept. 21, 1982). Article 47 of the Bank Secrecy Law prescribes criminal penalties. 1971 ROLF 819.

indicating the likelihood of insider trading, it is unable to identify the trader since bank secrecy protects the trader's identity. That protection prevents the determination of whether that person might have access to inside information. 18

The volume of Swiss bank trading on Wall Street is significant. 19 That fact, as well as the vigorous enforcement of insider trading regulations by the SEC, 20 demonstrates the friction which exists between Swiss bank secrecy and the enforcement of U.S. regulations. In response both to complaints from Switzerland, 21 and SEC frustration, 22 the United States and Switzerland signed a Memorandum of Understanding, 23 on August 31, 1982, following negotiations between the Swiss Bankers Association (SBA) 24 and SEC. 25 The Memorandum outlines a procedure under which the Swiss banks shall provide the SEC with information about customers and their transactions if the SEC has reasonable grounds for suspecting insider trading in specific cases. 26

This Comment begins with an overview of the nature and obligation of Swiss bank secrecy and explains how secrecy laws inhibit insider trading investigations and prosecutions. A discussion of the insider trading problem in the United States and past efforts to resolve the problem posed by Swiss bank secrecy

(1982), and was organized on July 2, 1934. The SEC is an independent, nonpartisan agency with primary responsibility for administering and enforcing securities laws. It consists of five members appointed for staggered five year terms. It is also a policy-making body, with a staff of over 2,000. Securities and Exchange Commission, The Work of the Securities and Exchange Commission, reprinted in W. CARY & M. EISENBerg, CORPORATIONS A-67 (5th ed. 1980).

18. This problem is not peculiar to U.S. law enforcement efforts. See, e.g., Bugbearing Swiss Secrecy, 182 THE ACC'T 815, 816 (1980). A British Stock Exchange Council investigation was halted when three Swiss banks refused to identify clients for whom they sold shares of a corporation. Id.

19. According to Treasury Department figures, the Swiss traded $8.5 billion of equities and $337 million of corporate bonds on U.S. markets during the first half of 1981. Wall St. J., Nov. 6, 1981, at 55, col. 3.

20. Wall St. J., Dec. 18, 1981, at 22, col. 2. The SEC has sent Congress a request to increase civil penalties for insider traders up to three times the profit gained or loss avoided by such traders. Additionally, the SEC is requesting that the maximum fines for criminal violations be increased from the current $10,000 to $100,000. SEC MEMO, supra note 10, at 1708.

21. See Legal Times, Oct. 4, 1982 at 15, col. 3. The concern was about undue encroachment by U.S. law enforcement agencies and federal courts on Swiss sovereignty. Id.


24. The SBA is a private group to which virtually all Swiss banks belong. Telephone interview with Michael Mann, SEC Enforcement Division (Jan. 10, 1983). The SBA is the most important trade organization in the banking field. It was organized in 1912. H. Bar, supra note 3, at 31.


26. The SEC has reasonable grounds for a request if the conditions of Article I of the Private Agreement of the Swiss Bankers Association and the SEC are met. See infra note 231 and accompanying text.
follows. Finally, this Comment examines the potential effect of the Agreement contained in the Memorandum of Understanding under which Swiss banks have agreed to relax the protection of their secrecy laws to assist SEC insider trading investigations.

II. THE NATURE AND OBLIGATION OF SWISS BANK SECRECY

Bank secrecy,27 like the professional secrecy obligations of clergymen, lawyers, and physicians, is rooted in the right to personal privacy to which persons who hire such professionals are entitled.28 In civil law countries,29 including Switzerland, the right to privacy in personal affairs is fundamental and protected by law.30 This right to personal privacy also encompasses a right to privacy in financial affairs. Bank secrecy laws are consistent with the objective of protecting the confidentiality of personal financial matters.31 The importance of bank secrecy in Switzerland is therefore derived from the importance of individual privacy. Civil law systems consider individual privacy to be an element of a person's "personality rights" which include the most significant personal rights.32

Common law countries recognize the right of individual privacy less comprehen-

27. Swiss law does not provide a statutory definition of bank secrecy.

The term may be defined as the obligation of a bank, its managers, and employees to maintain secrecy with respect to all business and personal affairs of the bank's customers and some third parties to the extent knowledge of such matters is acquired in the course of the banking business. Schellenberg, Bank Secrecy, Financial Privacy and Related Restrictions, Switzerland, 7 INT'L Bus. LAW. 221 (1979).

28. Id.

29. The civil law system is one of the two major legal systems in the Western world. Two distinguishing characteristics of civil law systems are the codification of large areas of private law and the strong influence of Roman law. A. von Mehren & J. Gordley, The Civil Law System 3 (2d ed. 1977).

30. See art. 28 Schweizerisches Zivilgesetzbuch, Code civil suisse, Codice civile svizzero (ZGB, C.c., Cod. Civ.) art. 28 and Schweizerisches Obligationenrecht, Codes des obligation, Codice delle obbligazione (OR, C.o., Cod. Obl.) arts. 41, 49. In Switzerland, protection of personality rights is contained in Burgerliches Gesetzbuch (BGB) § 823, para. 1, which allows a claim for damages to be brought if one's body, health, life, or freedom are culpably affected. The general clauses of the French Code civil (C. Civ.) art. 1383 require that everyone pay for the harm they cause and afford protection for honor and reputation. See also K. Zweigert & H. Kotz, Introduction to Comparative Law 342-47 (1977).

31. See generally 1971 ROLF, supra note 2.


33. In the United States, invasions of the right to individual privacy comprise four separate torts: 1) the appropriation, for one's own benefit or advantage, of another's name or likeness, see, e.g., Carlisle v. Fawcett Publications, 201 Cal. App.2d 733, 20 Cal. Rptr. 405 (1962); 2) the intrusion upon a person's physical solitude or seclusion, as by invading his home; 3) disclosure to the public of private information about a person, such as information concerning debts, see, e.g., Brent v. Morgan, 221 Ky. 765, 299 S.W. 867 (1927); and 4) revealing information about a person which places that person in a false light in the public eye. W. PROSSER, THE LAW OF TORTS 804-12 (4th ed. 1971). Courts in England have not recognized a "right to privacy." Thus, individuals have a cause of action for invasions of privacy only if they can prove the elements of a tort such as defamation, breach of contract, or copyright. K. Zweigert & H. Kotz, supra note 30, at 358.
sively. The constitutional sphere of privacy in the United States protects rights the Supreme Court has labelled "fundamental." Fundamental rights include highly personal activities, such as freedom of choice in marital, sexual, and reproductive matters.

Both civil and common law countries protect individual privacy by recognizing obligations of secrecy for certain professions. However, the sanctions for violations of such obligations are significantly different. Civil law countries usually treat the revelation of confidential information as a crime. Common law countries often prescribe only disciplinary action for breaches of professional secrecy. Breaches of professional secrecy in Switzerland violate the personal right to have one's privacy respected. Since financial privacy is included in that right, bankers have an obligation of secrecy similar to that of other professions. The right to individual privacy which is the basis for bank secrecy is expressed in Article 28 of the Swiss Civil Code. In comparison, bankers in the United States have no similar duty of discretion.

34. See, e.g., Carey v. Population Services Int'l, 431 U.S. 678, 684-86 (1977) and cases cited therein. In Carey, the Court invalidated a law which allowed only pharmacists to sell nonmedical contraceptive devices to persons over sixteen years of age and prohibited the sale of such items to persons under sixteen. The Court held that the statute unconstitutionally burdened the exercise of the fundamental right to decide whether to bear a child. Id. at 687-88.

35. See Loving v. Virginia, 288 U.S. 1 (1967) (statute prohibiting interracial marriages held unconstitutional because the right to privacy encompasses decisions relating to marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (statutes prohibiting the use of contraceptives held invalid because they restricted the fundamental right of married persons to use contraceptives); and Roe v. Wade, 410 U.S. 113 (1975) (the right to privacy of individuals includes a right to decide whether to terminate a pregnancy, and this right was unjustifiably infringed by a statute prohibiting abortions except when necessary to save the life of a mother).


37. Id. Criminal sanctions exist, for example, in France (Code pénal (C. PÉN.) art. 378, which prohibits doctors, apothecaries, midwives, and generally all persons who have received secrets by virtue of their permanent or temporary position from disclosing such secrets in cases other than those explicitly authorized by statute. Germany has a prohibition less absolute than the French, see Strafgesetzbuch (StGB) § 300. Disclosure of such secrets is punishable only if unjustified; superior interests may be invoked to make a disclosure lawful. Switzerland prohibits the disclosure of private information received in a professional capacity under Schweizerisches Strafgesetzbuch, Code pénal suisse, Codice penale svizzero (StGB, C.P., COD. PÉN.) art. 321. S. STROMHOLM, supra note 36, at 119-20.


39. I. WILLIAMS, supra note 1, at 114.

40. See generally 1971 ROLF, supra note 2.


42. The Swiss Civil Code was passed in December, 1907, and went into effect January 1, 1912. It was passed in response to the need for uniformity in private law, which until 1874 was in the control of the Cantons. The Code is divided into four main parts: Law of Person, Family Law, Law of Succession, and Law of Real and Personal Property. I. WILLIAMS, supra note 1, at 13. Article 28 reads: "Where anyone is being injured in his person or reputation by another's unlawful act, he can apply to the judge for an injunction. . . ." I. WILLIAMS, THE SWISS CIVIL CODE (1976).

Swiss contract law provides the second basis for banking secrecy. The obligation of a banker to maintain secrecy with respect to clients' activities is part of the deposit contract. This contractual obligation is derived from the law of agency. The bank is an agent for its customers and owes them a duty of loyalty, including a duty to keep confidential that information learned while acting in a banking capacity. This obligation of confidentiality is an implied obligation and does not depend on express agreement.

American banks have a similar obligation. When information is sought from a bank without the consent of the depositor, it is an implied term of the deposit contract that the bank will not divulge the state of the customer's account, or any of his transactions, without the customer's consent, unless there is a public duty to disclose. Bank secrecy is also protected to some extent by provisions in the Swiss Penal Code. Banking information can come under the aegis of Article 273 of the Penal Code. Article 273 secures Swiss economic sovereignty by guarding economic matters from foreign countries when the public interest so requires. That provision prohibits anyone from transmitting manufacturing or business secrets abroad. The prohibition includes trade secrets and any kind of information concerning economic conditions which are neither obvious nor generally accessible.

The Banking Law of 1934 is the fourth basis for Swiss bank secrecy. The Banking Law was not initiated in response to a perceived need for protection of bank secrecy, but rather in reaction to the banking difficulties and failures which courts have recognized an implied obligation on the part of bankers to keep records of accounts, deposits, and withdrawals secret. In states where no such implied obligation exists, banks are free to disclose information concerning customer accounts. See, e.g., U.S. v. Miller, 425 U.S. 435 (1976), where the Court stated that a depositer "takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government." Id. at 443. U.S. banks have a duty to disclose information about accounts and deposits of customers if compelled to do so by courts, see, e.g., Brex v. Smith, 104 N.J. Eq. 386; a grand jury, see, e.g., Baker v. State, 183 Ind. 1, 108 N.E. 7 (1915); or by the government, see, e.g., DeMasters v. Arend, 313 F.2d 79 (9th Cir. 1963), appeal dismissed, 375 U.S. 936 (1965).
precipitated by the Depression of the 1930s.\textsuperscript{54} At the same time, Nazi Germany was attempting to investigate assets held in Switzerland by Jews and other “enemies of state” who would be subject to the death penalty for such holdings.\textsuperscript{55} Before passing the Banking Law, the Swiss Parliament inserted a special provision to protect foreign customers and to prohibit any Swiss banks from cooperating with the Gestapo. The relevant provision provides that anyone disclosing information acquired in the course of providing banking services, or inducing others to do so, is liable for a prison term or a fine.\textsuperscript{56} Article 47 of the Banking Law only prescribes penalties for the violation of banking secrecy; it does not define the substance of a banker’s obligation. However, cantonal codes of every Swiss state have comprehensively defined the obligations of banking secrecy.\textsuperscript{57} Judges apply this private law\textsuperscript{58} to determine whether bankers have violated secrecy law in particular cases.

Bank secrecy in Switzerland is, therefore, 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.

The extent of the bank secrecy obligation is no different for holders of “numbered accounts.”\textsuperscript{59} These accounts are not anonymous, as it is sometimes

\begin{itemize}
\item \textsuperscript{54} See Meyer, Swiss Banking Secrecy and Its Legal Implications in the United States, 14 NEW ENG. L. REV. 18, 25 (1978).
\item \textsuperscript{55} See Banking Secrecy, supra note 48, at 3, and T. Fehrenbach, supra note 5, at 59-61. Gestapo agents infiltrated Switzerland in the early 1930s and 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. T. Fehrenbach, supra note 5, at 59-61.
\item \textsuperscript{56} Federal Law Relating to Banks, supra note 2, at art. 47. The sanctions contained in art. 47 provide that:
\begin{enumerate}
\item Whoever divulges a secret entrusted to him in his capacity as officer, employee, authorized agent, liquidator, or commissioner of a bank, as a representative of the Banking Commission, officer or employee of a recognized auditing company, or who has become aware of such a secret in this capacity and whoever tries to induce others to violate professional secrecy, shall be punished by a prison term not to exceed six months or by a fine not exceeding 50,000 Swiss francs.
\item If the act has been committed by negligence, the penalty shall be a fine not exceeding 30,000 Swiss francs.
\item The violation of professional secrecy remains punishable even after the termination of the official or employment relationship or the exercise of the profession.
\item Federal and Cantonal regulations concerning the obligation to testify and to furnish information to a government authority shall remain reserved.
\end{enumerate}
\item \textsuperscript{57} T. Fehrenbach, supra note 5, at 64.
\item \textsuperscript{58} See J. Merryman, The Civil Law Tradition (1969). Private law regulates relations among citizens. Id. at 76. It is the area of law in which the sole function of the government is the regulation and enforcement of private rights. Id. at 100. Private law in civil law countries is comprised of civil law and commercial law. Id. at 107.
\item \textsuperscript{59} A numbered account is one for which the customer is designated by a four digit number instead of by name. T. Fehrenbach, supra note 5, at 67. Numbered accounts are intended to give clients more privacy, particularly in countries where having a Swiss bank account is against the law. Id.
thought; at least one bank official knows the identity of a holder of a numbered account.60 The primary purpose of these accounts is to reduce the chance of indiscretion on the part of bank personnel by referring to the depositor by number instead of by name in bank communications.61 Swiss banks are sensitive to the perception abroad that they unscrupulously open accounts for criminals with illegally obtained money;62 the banks seem reluctant to accept new numbered accounts.63 The secrecy obligation with respect to numbered accounts is exactly the same as that for other accounts.64

III. Exceptions to Bank Secrecy

A. Consent

Bank secrecy is based on a customer’s right to privacy.65 Banks therefore must reveal information about an account if a customer consents to or requests disclosure.66 Customers or their legal representatives may also authorize release of such information to third parties.67 Thus, the consent of a customer to disclosure relieves a bank and its employees of their obligation to keep the information secret.

B. Private Law Limitations

1. Family Law

Bank secrecy is also limited by provisions of private law. Swiss family law, under certain circumstances, recognizes a duty on the part of one person to manage the property of another.68 Because this obligation is more specific than the agent’s duty of loyalty upon which bank secrecy is based, the former prevails where the two conflict.69 Therefore a person who has the legal obligation to manage the property of another can acquire information otherwise protected by bank secrecy.

Under Swiss family law, a husband has a legal obligation to manage the marital70 and common71 property. The requirements of bank secrecy therefore

60. BANKING SECRECY, supra note 48, at 5.
61. Id.
62. See id. at 4-6.
63. Id. at 5. Only a small percentage of Swiss bank accounts are numbered. Such accounts are granted only when the depositor is already a customer of the bank or when the bank has established that the customer has legitimate reasons for wanting the added protection. Id.
64. Id. at 4.
65. See supra notes 19-39 and accompanying text.
66. OR, Co., Cod. obl., art. 400(1).
67. See id. art. 400.
68. ZGB, C.C., Cod. civ., arts. 200, 216.
69. See Meyer, supra note 54, at 29 n.63.
70. ZGB, C.C., Cod. civ., art. 200.
71. Id. art. 216.
yield upon a husband's request for information concerning any assets of his wife which fall within these categories. Bank secrecy also yields before a parent's request for information concerning the assets of their children, which parents are legally obliged to manage. Similarly, guardians have a duty to manage their wards' property, and can compel a bank to disclose information otherwise protected by bank secrecy.

2. Heirs

Heirs under Swiss law succeed to and acquire an inheritance, and its associated rights and duties, immediately upon the death of a decedent. The inheritance encompasses all privileges, such as that of bank secrecy, provided the inheritance includes a bank account. A dispute exists as to the extent of information a bank must reveal about the deceased's account to an heir. Banks prefer disclosing only the amount and status of assets in an account. Swiss courts have held, however, that all information in bank files must be provided to an heir. Bank secrecy may nonetheless protect information of a highly personal nature.

C. Public Law Limitations

Public law obligations supersede those of private law, so the former prevails where the two conflict. Because the right to bank secrecy is created by private law, the bank's obligation of secrecy must yield when the disclosure of otherwise confidential information is stipulated by public law. The public law duty to

72. Article 94 defines marital property as "all property belonging to the parties at the date of their marriage as well as their after-acquired property," except the wife's separate estate. Id. art. 94. Article 190 defines the wife's separate estate as assets recognized as such under a marriage contract, or under a gift from a third person, or by operation of law. Id. art. 190. Article 191 states that assets become part of the separate estate by operation of law when 1) they are exclusively intended for the personal use of one married person, 2) they belong to a married woman and are used in her trade or profession, and 3) they represent earnings of a married woman outside her domestic sphere. Id. art. 191.

75. Id. art. 290. Parents are not as a general rule bound to give security or an accounting in respect of their administration. Id.

77. Mueller, supra note 41, at 364. Heirs, for example, become immediately liable for the debts of those from whom they inherit. See ZGB, C.c., Cod. civ. art. 560.

79. Id. at 364-65 nn.15, 17.

80. BG 74 (1948) 1 485, 493. The Swiss Federal Supreme Court ruled in this decision that "[t]he question whether an exception should be made for facts of a highly personal nature which the decedent had entrusted to the banker with the explicit direction to keep them secret from heirs . . . may be left undecided." Id.


82. See generally J. MERRYMAN, supra note 58. Public law governs the organization of the state and other public entities and the relations among these entities and citizens. The role of government in
provide information or testimony in judicial proceedings may require disclosure of information protected by bank secrecy. 83 In this respect, the duty of discretion for bankers differs from that of clergymen, lawyers, and physicians, whose obligation of secrecy is absolute. 84

Judicial procedure in Switzerland is governed by federal law and by the laws of the twenty-six Cantons. 85 Cantonal law is of greater practical importance. 86 With regard to a banker’s obligation to testify, the rules of civil procedure vary among the cantons. Seven cantons allow the right to refuse to give evidence for all professions which have secrecy obligations, including bankers. 87 The Federal Code of Civil Procedure and the statutes of seven cantons 88 allow judges to decide cases concerning whether a specific witness should be required to testify when that witness is employed in a profession which has a secrecy obligation not expressly exempted in the statute requiring the provision of evidence. 89 The remaining cantons recognize no exemption to a banker’s obligation to testify in civil proceedings. 90

A duty to testify also exists with respect to administrative proceedings. 91 Federal administrative law provides an exemption for bankers in most instances. 92 Cantonal administrative procedure may either give bankers a right to

public law is not limited to the protection of private interests, but is instead motivated by the effectuation of the public interest. Id. at 76. Public law includes constitutional law, administrative law, and criminal law. Id. at 101.

83. The Swiss Federal Law of Criminal Procedure and Federal Law of Civil Procedure both stipulate a duty to provide information and testify in judicial proceedings. Id.

84. StGB, C.P., Cod. Pén. art. 32.


86. “Switzerland has the loosest form of national organization of any modern nation and the weakest central government in the West.” T. Fehrenbach, supra note 5, at 11. The federal government manages foreign affairs, controls arms and alcohol, regulates currency, and runs the railroads. Id. Everything else is left to the cantons. Id. The bulk of criminal, civil, and administrative cases take place before cantonal courts. Meyer, supra note 54, at 81 n.82.

87. The cantons which exempt bankers from the duty to testify in civil proceedings are: Argovie (§ 183 al. 2 lit. b); Berne (art. 246 al. 1); Geneve (art. 227); Neuchatel (art. 222 lit. b); Saint-Gall (art. 241 al. 1 ch. 2 and relating art. 240 ch. 3 lit. d.); Valais (art. 216 ch. 2); Vaud (art. 198 al. 1). See M. Aubert, supra note 85, at 91-92.

88. AL Tart. 42 aI lit. b. Federal civil procedural law exempts doctors, lawyers, and priests from the obligation to testify. M. Aubert, supra note 85, at 92. But for bankers the judge must consider all circumstances to decide whether to grant an exemption. Id.

89. Those cantons are: Fribourg (art. 214 al. 1 lit. c et al. 2); Nidwald (§ 148 ch. 2 and 3); Schwyz (§ 238 al. 1 ch. 2 and 239); Tessin (art. 230 lit. b and c and art. 231 al. 2); Uri (art. 192 al. 1 lit. b and d); Zoug (art. 168 al. 1 ch. 2 and 169); Zurich (art. 187 ch. 2 and 188). M. Aubert, supra note 85, at 93.

90. Those cantons are: Appenzell AR (art. 160 ch. 3); Appenzell AL (art. 182 ch. 3); Bale-Campagne (§ 161 ch. 2); Bale-Ville (§ 116 ch. 2); Glaris (art. 176 ch. 3); Grisons (art. 196 al. 2 ch. 3); Lucerne (art. 161 al. 2); Obwald (art. 153 al. 1 lit. b and al. 2) Schaffhouse (art. 203 ch. 2); Soleure (§ 172 al. 1 lit. b and al. 2); Thurgovie (art. 259 al. 1 ch. 2). See M. Aubert, supra note 85, at 94.

91. Art. 16 al. 2 JF. See M. Aubert, supra note 87, at 114.

refuse to testify or commit the decision on whether the bank secrecy obligation allows a banker to refuse to testify to the judge. 93

Banking secrecy cannot be invoked in criminal proceedings to override the duty to testify. 94 No cantonal codes of criminal procedure exempt bankers from the duty to testify in criminal proceedings. 95 The Swiss Federal Supreme Court 96 has ruled that persons with an obligation of bank secrecy must testify in criminal proceedings and that pertinent documents can be seized. 97

Public law also limits the obligation of bank secrecy in the areas of debtor law and bankruptcy proceedings. Debtors cannot use the obligation to avoid paying debts and conceal assets. 98 The Debt Collection Agency has extensive authority to gather information on the holdings of debtors from banks. 99 Accounts may be attached for money claims if the debtor has no fixed residence in Switzerland or is suspected of evading legal obligations. 100 If a debtor does not comply with an order of the Debt Collection Agency, property can be seized. Banks must then disclose all information about assets and accounts which the Agency would require the debtor to disclose. 101

Bank secrecy is similarly overridden when a bank itself is undergoing bankruptcy. Bank secrecy is set aside because the rights of creditors of the bank supersede the privacy interests of bank customers. 102 In addition, if individuals initiate bankruptcy proceedings, cantonal courts are empowered to seek certain information concerning the individual's finances which would ordinarily be protected by bank secrecy. 103

Bank secrecy in Switzerland is limited by specific provisions of private law contained in The Swiss Civil Code, as well as by several public law obligations. Those exceptions have provided no assistance to SEC insider trading investiga-

93. See Aubert, supra note 87, at 115.
94. Recueil systematique des lois et ordonnances (RSLO) art. 77, lists persons not required to testify and does not include bankers. It does include clergy, lawyers, medical doctors, pharmacists, midwives, and their assistants. See M. Aubert, supra note 87, at 100.
95. See M. Aubert, supra note 87, at 101-02.
96. The Federal Supreme Court is the Supreme Court of the Swiss Federation. It was created by the Constitution Act of 1874. I. Williams, supra note 1, at 19. Judgements of the Court are binding and final throughout the federation cantons. It has both original and appellate jurisdiction and is the court of appeals for the appellate cantonal courts. The Supreme Court hears appeals either when cantonal (rather than federal) law has wrongly been applied or when a judgement is attacked for the violation or misinterpretation of federal law. The Supreme Court has exclusive jurisdiction when the federation is a party and in cases in which cantons sue each other. Id. at 20.
97. See Schellenberg, supra note 19, at 224.
99. Mueller, supra note 41, at 368.
100. 1889 RS, supra note 98, arts. 271-76; see Comment, supra note 37, at 133-34.
101. Schellenberg, supra note 27, at 225.
102. 1889 RS, supra note 98, art. 323, para. 4.
103. 1889 RS, supra note 98, art. 232, para. 3. Banks must give information and report assets of clients undergoing bankruptcy. See Meyer, supra note 32, at 300.
tions which seek to circumvent bank secrecy. Part of the problem is that insider trading is not a crime in Switzerland, but is regulated in the United States.

IV. INSIDER TRADING IN THE UNITED STATES

The United States regulates insider trading under the Securities and Exchange Act of 1934. The regulations fall primarily under Section 16(b) of the Act and under Rule 10b-5, which was promulgated under the authority of Section 10(b) of the 1934 Act. Section 16(b) requires insiders to remit to their companies any profit made on the purchase and sale or sale and purchase of company stock made within a single six month period. One is an insider for 16(b) purposes if he is an officer or director of a company that has a class of equity securities registered under the 1934 SEC Act. Beneficial owners of 10% or more of such a registered class of securities are also insiders under Section 16(b).

Section 16(b) is unique in that the SEC has no authority to enforce liability thereunder. An action must be brought by the corporation or a shareholder, and any recovery is for the benefit of the corporation. The purpose of Section

104. 15 U.S.C. §§ 78a-78jj (1982). The Securities and Exchange Act of 1934, unlike the highly integrated 1933 Act, is a collection of provisions which are in many cases largely unrelated. See R. JENNINGS & H. MARSH, SECURITIES REGULATION 34-41 (4th ed. 1977). The 1934 Act was designed to counteract fraud, require further disclosure in some areas, and also to regulate the securities markets and the activities of broker/dealers. W. CARY & M. EISENBERG, supra note 17, at 269. The Act covers a wide spectrum of controls and subject matter. Id.


108. "Officer" generally means a formally elected president, vice-president, treasurer, controller, or secretary of the issuer. It also includes any person who exercises similar policy making responsibilities, even if that person is not a formal officer. Subject to this requirement, the term generally does not include officers of wholly-owned subsidiaries. "Director" means a duly elected and serving member of the issuer’s Board of Directors. Rasmussen, An Overview of Insider Trading Laws in the United States, 9 INT’L BUS. LAW. 389, 391 (1981).

109. Equity securities include common stock of a corporation and "participating preferred;" that is, preferred stock which carries voting rights. W. CARY & M. EISENBERG, supra note 17, at 1111-12. Equity securities typically have a residual interest in corporate earnings; they receive dividends after debt obligations are paid. Id.

110. Registration is required of (1) securities listed for trading on a national securities exchange, Securities & Exchange Act of 1934, § 12(b), 15 U.S.C. § 781(b) (1982); and (2) a class of equity securities of a company traded in the over-the-counter market if there are 500 or more shareholders of record in the class and the company has total assets of $1 million or more. Securities and Exchange Act of 1934 § 12(b), 15 U.S.C. § 781(b) (1982).

111. A person is a beneficial owner of stock registered in another’s name if the person receives “actual rewards” of ownership. Degree of control over stock is a consideration to be determined from the facts of each case. Whittaker v. Whittaker Corp., 639 F.2d 516, 526 (9th Cir. 1981). See also Beneficial Ownership of Securities Held by Family Members, SEC Exchange Act Release No. 7824 (Feb. 14, 1966).


113. Id. The SEC has no power to compel insiders to disgorge the profits to their companies. Instead, shareholders are given the right of action to bring suit in the company’s name. Attorneys get fees out
16 is to counteract the perceived unfairness of company insiders making short term profits because they have an unfair informational advantage over the general body of shareholders. An insider violating Section 16(b) must disgorge any profit realized regardless of whether proof of actual misuse of inside information or an intent to profit on the basis of such information exists. The assumption that short term trading by insiders involves a great likelihood that confidential information was used justifies this flat proscription.

The second insider trading provision, Section 10(b) of the Securities and Exchange Act of 1934, authorizes the SEC to adopt regulations prohibiting the use of "any manipulative or deceptive device" in connection with the purchase or sale of a security. The Congressional purpose behind Section 10(b) was generally to prevent inequitable and unfair practices in securities transactions. Rule 10b-5 provides that those trading for their own account in the securities of a corporation having "access, directly or indirectly to information not intended to be available for the personal benefit of anyone" may not take advantage of such information knowing it is unavailable to those with whom they are dealing. Rule 10b-5, by its terms, is not limited to traditional section 16(b) insiders or to

of the amount recovered, sometimes up to thirty-five percent, even if no lawsuit is filed. Many attorneys regularly examine SEC insider transaction data and discover section 16 cases. They then have a friend buy a few shares of the company and sue. Rasmussen, supra note 108, at 390.


117. Manipulative conduct includes practices such as rigged prices that are intended to stimulate trading and create an unwarranted and unnatural appearance of market activity. See, e.g., Piper v. Chris-Craft Indus., 430 U.S. 1, 43 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976). Deceptive conduct includes fraudulent misstatements of fact, omissions, and concealment of information indicating the misleading nature of a prior statement. See, e.g., Affiliated Ute Indians v. United States, 406 U.S. 128, 153 (1972) (bank employees made misstatements of material fact to induce the purchase of stock at less than its fair value); Superintendent of Insurance v. Bankers Life Casualty Co., 404 U.S. 6, 9-10 (1971) (seller duped into believing it would receive proceeds).

118. 3 L. LOSS, SECURITIES REGULATION 1455-56 (2d ed. 1961). See also S. Rep. No. 792, 73d Cong., 2d Sess. 12-13 (1934). Rule 10b-5 (17 C.F.R. § 240.10b-5) provide that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

securities registered on a national exchange. It proscribes purchases and sales of any security made in a fraudulent or misleading way. In addition, a Rule 10b-5 plaintiff need not prove actual reliance on a misrepresentation but only that material facts were misrepresented or withheld which a reasonable investor might have considered important.

In the landmark decision SEC v. Texas Gulf Sulphur Co., the court held that anyone in possession of material, nonpublic information is subject to a duty to either disclose it or refrain from trading. The breadth of this "disclose or abstain" rule was narrowed in Chiarella v. United States. Chiarella was found not liable under Rule 10b-5 because of the absence of a duty to disclose the nonpublic information in his possession; such a duty was held not to arise from mere possession of such information where no duty is owed to the company to keep the information confidential. The Court ruled that such a duty did arise with respect to investment firm employees entrusted by clients with confidential information about proposed mergers. Such employees violate their duty by passing confidential information to those who trade on the basis of the confidential information. A duty not to disclose is also violated when a brokerage firm passes on confidential information about an earnings forecast of a company, acquired while serving as underwriter for the company, to investors who sell their stock in the company before the information becomes public. Thus, typical insiders such as the company officials in Texas Gulf Sulphur breach a fiduciary duty by engaging in insider trading. But in the absence of such a duty or a connection with someone who violated such a duty, a misrepresentation or omission of fact does not violate Rule 10b-5.

Both Section 16(b) and Rule 10b-5 of the Securities and Exchange Act of 1934 seek to promote fairness in securities markets by preventing those with unfair informational advantages from profiting at the expense of the general body of investors who do not have the same access to the information. The regulations

120. W. Cary & M. Eisenberg, supra note 17, at 726.
121. Id.
123. 401 F.2d 833 (2d Cir. 1968) (en banc), cert denied, 394 U.S. 976 (1969).
124. Id. In Texas Gulf Sulphur, a geophysicist and several company officials who knew of a major mineral discovery by the company bought Texas Gulf Sulphur stock before the information was known even to the company's full board of directors. Id. at 844.
126. Id. at 224. Chiarella was a financial printer whose firm was hired to print tender offer documents. He broke the codes in the materials being printed, determined the identity of the companies being targeted for takeover, and bought their stock. After the announcement of the takeover bids increased the value of those shares, he sold the stock for a substantial profit. Id.
127. United States v. Newman, 664 F.2d 12 (2d Cir. 1981). Those who trade on the basis of material nonpublic information obtained from insiders have been called "tippees." Both tippees and tippers are liable under 10b-5. Id. at 16-17.
128. Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith, 495 F.2d 228 (2d Cir. 1974).
129. See Chiarella, 445 U.S. 222.
prohibit those with a fiduciary duty from trading in company securities in certain situations when it is likely that inside information was exploited. However, because Swiss banks protect the identity of their customers, they allow such trading to be completed anonymously, frustrating SEC investigations.

V. Insider Trading and Swiss Banks

Trading in securities on the basis of inside information does not presently violate any Swiss law. It now appears that Switzerland is in the process of passing a general law prohibiting insider trading, although the details of the law are as yet unknown. In the absence of such legislation, Swiss bank accounts have been used to circumvent American insider trading regulations.

Bank secrecy laws in Switzerland prohibit banks from disclosing any information about customers and their transactions of which a bank learns in the course of providing services. Such information includes the customer's name, amounts in accounts, and any deposit or withdrawal activity. Because banks are prevented from disclosing such information, insider traders can avoid the requirements of Section 16 of the 1934 Securities and Exchange Act of the United States. Insiders using a Swiss bank account as an intermediary for the purchase and sale of their company's stock, can simply refrain from reporting the transactions, and no one will know they took place.

Swiss secrecy laws similarly facilitate violations of Rule 10b-5 of the 1934 Securities and Exchange Act. Foreign banks maintain accounts at American brokerage houses and are able to trade in securities for their customers. The name of the bank rather than that of the customer appears in records of the transaction. A Swiss bank customer can engage in insider trading with the assurance that bank secrecy laws will protect the customer's identity. The inability of the SEC to discover the identities of trading customers frustrates enforcement of insider trading laws.

The SEC monitors transactions for the purpose of discovering Rule 10b-5 violations through computers programmed with information as to prices and usual trading volumes of securities. The computers identify sales and pur-

131. See Memorandum of Understanding, supra note 23.
132. See supra notes 88-114 and accompanying text.
133. Mueller, supra note 41, at 362.
134. T. FEHREN BACH, supra note 5, at 51. A bank manager can be jailed merely for revealing the existence of a bank account without the owner's permission. Id. at 64.
135. See supra notes 107-16 and accompanying text.
137. See supra notes 117-129 and accompanying text.
138. See supra note 14.
139. Hearings, 1969-70, supra note 7, at 263.
chases of securities which exceed the programmed amounts in price or volume, and SEC staff members investigate the transactions. When a large purchase or sale precedes a public announcement which dramatically affects the value of a stock, suspicions may arise that the transaction was made by a person with prior knowledge of the development. When the suspicious transactions have been effected through a Swiss bank, the SEC is unable to learn the identity of the principal. Therefore the SEC cannot determine whether the person has any connections which would suggest the person might be an insider.

Thus, Swiss bank accounts can effectively shield those seeking to circumvent U.S. insider trading regulations. Recognizing that problem, U.S. government officials and the SEC have made various attempts to counter the protection afforded by Swiss bank secrecy.

VI. U.S. ATTEMPTS TO COUNTER SWISS BANK SECRECY

Since World War II, the United States has made several attempts to counter the problem of Swiss bank secrecy laws providing protection for persons who violate U.S. securities laws. The first major attempt was the passage of the Bank Secrecy Act. The Act, which represented a unilateral attempt to solve the problem, primarily sought to increase disclosure requirements for American banks. The second attempt to counter Swiss bank secrecy involves the use of discovery motions in court to compel Swiss banks to disclose protected information.

A. The Bank Secrecy Act

The Bank Secrecy Act was first introduced in the House of Representatives in 1969, and passed into law in October 1970. Its basic premise is that U.S. prosecutors can circumvent the anonymity which foreign bank secrecy laws provide if the prosecutors can trace the flow of funds in and out of foreign accounts. The Bank Secrecy Act sought to make such tracing possible by creating elaborate recordkeeping and reporting requirements for various kinds of transactions through U.S. banks. In addition to the Act itself, the Secretary has enacted detailed regulations.

141. Id.
142. Id.
143. See supra notes 133-136, and accompanying text.
145. Hearings, 1970, supra note 14, at 12. The bill was introduced by Wright Patman, then chairman of the House Banking and Currency Committee. A similar but more rigid version was presented in the Senate by Sen. William Proxmire. Id. The Patman version was finally adopted. See supra note 144.
146. See Kedy, U.S. Foreign Policy Efforts to Penetrate Bank Secrecy in Switzerland, 6 CAL. W. INT'L L.J. 211, 247 (1976).
149. 31 C.F.R. § 103 (1983).
The recordkeeping requirements include one recording by U.S. banks of any advice, request, or instruction with regard to financial transactions to a person, account, or place outside the United States in excess of $10,000. The bank must also record the account holder's identity and reproduce each check, clean draft, or money order passing through its facilities, with only a few exceptions.

The reporting requirements are of three types. First, a report to the Internal Revenue Service is required of certain transactions over $10,000. Second, anyone who physically transports, mails, or ships currency or monetary instruments aggregating more than $5,000 between the United States and a foreign country must file a customs report. Third, a person with a financial interest in a bank, securities, or financial account abroad must report the relationship and its value in his tax return.

The declared goal of the Bank Secrecy Act is to facilitate and promote the process of gathering evidence in criminal, tax, or regulatory investigations. The constitutionality of the Act, however, is uncertain. Furthermore, two basic problems with the Act have emerged. First, the data gathering requirements are voluminous; each year 160 million pounds of paper result from microfilming and photocopying reports. The volume of the evidence may make the discovery of any incriminating pieces costly beyond proportion to their value. Second, the recordkeeping and reporting requirements are ineffective with respect to illegal cash transfers which leave no paper trail. Casino owners, tax evaders, and the like can dispose of large amounts of cash without being traced. They can also use couriers or the mail rather than banks and thereby avoid detection.

The Bank Secrecy Act has not been a very effective attempt to counter the protection Swiss bank secrecy laws afford insider traders. The Act generates an unmanageable amount of paperwork and its requirements trace only transfers

150. 31 C.F.R. § 103.33(b) (1983).
151. 31 C.F.R. § 103.34(a) (1983).
152. 31 C.F.R. § 103.34(b) (1983).
154. 31 C.F.R. §§ 103.23 and 103.25(b), (c) (1983).
157. See Stark v. Connally, 347 F. Supp. 1242 (N.D. Cal. 1972). See also California Bankers Ass'n. v. Schultz, 416 U.S. 21 (1974), where the Supreme Court struck down fourth and fifth amendment challenges to the recordkeeping requirements and a fourth amendment challenge to the reporting requirements, but reserved for future determination the issue of whether a fifth amendment challenge to reporting requirements could be successful. Id.
159. Comment, Swiss Banks and their American Clients; A Fading Romance, 3 CAL. W. INT'L L.J. 37, 56-57 (1972).
161. Id.
completed through United States banks. If only a Swiss bank is used in a transaction, secrecy is preserved. Attempts to counter bank secrecy by compelling banks to provide information through the use of discovery orders in judicial proceedings have been more effective.

B. Judicial Action

A second method to circumvent the protection which Swiss bank secrecy laws afford insider traders involves the use of discovery orders in federal courts. The SEC was recently successful in overcoming the secrecy barrier in SEC v. Banca Della Svizzeria Italiani (BSI). In that case, the SEC sought an order pursuant to F.R.Civ.P. 37 to compel BSI to provide information on the identity of customers for whom stock and stock call options had been purchased. The purchases at issue were made on American securities exchanges for the stock of St. Joe Minerals Corp. (St. Joe). The purchases took place on March 10, 1981, one day before the announcement of a tender offer by Joseph E. Seagram's and Sons, Inc. The tender offer was for $45 per share, and the stock was trading at the time for about $30 per share. The bank purchased 3,000 shares and approximately 1055 call options, which carried the right to purchase 105,500 shares. The next day, the bank instructed its brokers to close out the purchases of the options and to sell 2,000 shares. The purchasers realized a profit of almost $2 million virtually overnight.

The sudden increase in market activity with respect to St. Joe stock instigated an SEC investigation. The SEC believed that persons with knowledge of the tender offer might have made the purchases. Such knowledge could only have been obtained from sources which had a duty to keep the information confidential prior to the public announcement of the tender offer. When the SEC sought information about the transactions from BSI, the bank refused to reveal the information. Its refusal was based on the contention that such disclosure

163. "A 'call' is a negotiable option contract by which the bearer has the right to buy from the writer of the contract a certain number of shares of a particular stock at a fixed price on or before a certain agreed upon date." Texas Gulf Sulphur, 401 F.2d at 841 n.3.
164. A tender offer is an offer to purchase shares made by one company to the stockholders of another company. It is communicated to the stockholders by newspaper advertisement, and if the offeror can obtain the shareholder list, by a general mailing to all stockholders. Black's Law Dictionary 1316 (5th ed. 1979).
165. Banca Della Svizzeria, 92 F.R.D. at 112.
166. Id.
167. Id.
168. Id. at 113.
169. Id.
170. Id.
171. Id.
172. Id.
would expose the bank to criminal liability in Switzerland.\textsuperscript{173}

The court held that the good faith of the party resisting discovery is a key factor in the decision of whether to impose sanctions when foreign law prohibits the disclosure requested.\textsuperscript{174} Thus prohibition of disclosure by foreign law is not decisive of the issue; if a party resisting discovery has acted in bad faith, deliberately using foreign law to evade U.S. law, courts can impose sanctions.\textsuperscript{175} The court found that BSI was in the position of “one who deliberately courted legal impediments . . . and who thus cannot now be heard to assert its good faith.”\textsuperscript{176}

In an unprecedented decision, the court applied Section 40 of the Restatement of Foreign Relations\textsuperscript{177} and held that the considerations involved tipped in favor of the SEC.\textsuperscript{178} The court concluded it would be a “travesty of justice” to allow a foreign country to violate U.S. laws, withdraw profits from the activity, and resist accountability “by claiming . . . anonymity under foreign law.”\textsuperscript{179} In so holding, the court indicated its willingness to impose heavy sanctions for the failure to comply with discovery, including a $50,000 per day fine and an order to “cease and desist from any further trading on U.S. securities markets.”\textsuperscript{180}

Within a week, BSI had obtained waivers from some of its customers of their rights under Swiss bank secrecy laws.\textsuperscript{181}

The Supreme Court articulated the good faith standard in Société Internationale Pour Participations Industrielles et Commerciales, SA v. Rogers.\textsuperscript{182} In Société, a District Court dismissed the complaint of a Swiss holding company as a sanction for the refusal of its subsidiary to produce bank records.\textsuperscript{183} The Supreme Court re-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{173} \textit{Id.} See supra notes 56-58 and accompanying text.
\item \textsuperscript{174} Banca Della Svizzera, 92 F.R.D. at 114.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{Id.} at 117 (quoting Société Internationale v. Rogers, 357 U.S. 197, 208-209 (1958)).
\item \textsuperscript{177} \textit{Restatement (Second) Foreign Relations Law of the United States} § 40 (1965). Section 40 is concerned with the limitations on the exercise of enforcement jurisdiction. It sets forth factors to be considered in determining which of two conflicting laws of two countries should be enforced when both have jurisdiction to proscribe and enforce rules of laws and the rules require inconsistent conduct on the part of a person. The factors are: (a) the vital national interests of the states, (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose on the person, (c) the extent to which the required conduct is to take place in the territory of the other country, (d) the nationality of the person, and (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state. \textit{Id.}
\item \textsuperscript{178} Banca Della Svizzera, 92 F.R.D. at 117.
\item \textsuperscript{179} \textit{Id.} at 119.
\item \textsuperscript{180} Kronstein, \textit{SEC Moves Against Swiss Bank}, 10 Sec. Reg. & L. Rep. (BNA) 92 (1982). For a similar imposition of sanctions, see Matter of Banque Populaire, C.F.T.C. No. 80-8 (Oct. 9, 1981). In Matter of Banque Populaire, the Commodities Futures Trading Commission barred a Swiss bank from trading on U.S. contracts markets for ninety days for failing to provide information, though the bank claimed that providing the information would require it to violate Swiss law. \textit{Id.}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} 357 U.S. 197 (1958).
\item \textsuperscript{183} \textit{Id.} at 201-02. The complaint was filed as a means of seeking the return of property seized by the United States during World War II. The United States requested the bank records at issue. \textit{Id.}
\end{itemize}
\end{footnotesize}
versed, holding that the sanction of dismissal was unwarranted where there was no showing of bad faith and where Swiss law prohibited compliance with the discovery order. 184 The Court stated that the issue of whether a foreign law prohibition of production of documents excuses a failure to comply with a discovery order depends in large measure on the noncomplying party's good or bad faith. 185 Enforcement of discovery orders will be denied where a party acts in good faith. Enforcement of a discovery order has also been denied where the court found that the records sought were unnecessary to a party's case. 186

The Ninth Circuit recently followed Société Internationale and identified several factors which weigh in favor of enforcing a discovery order alleged to violate Swiss law. 187 The court held that, in the absence of good faith efforts to comply 188 and where there exists a real question as to whether the production of the requested information would in fact violate Swiss law, 189 the Swiss subsidiary of an American corporation must comply with IRS summonses. In addition, the court found it relevant that the Swiss government had taken no action to enjoin the corporation from complying with the summonses, as it had in Société Internationale. 190 The court also found that the summonses, issued pursuant to an investigation of possible criminal conduct, were more pressing than civil discovery orders. 191 This weighed in favor of enforcement because one factor in the Restatement of Foreign Relations is the importance of policies underlying the laws at issue. 192

Thus, judicial attempts to penetrate Swiss bank secrecy have met with some success. Courts have been unwilling to recognize foreign secrecy laws as an absolute bar to discovery where parties asserting the protection of such laws acted in bad faith. Foreign prohibition of disclosure will also fail to shield parties from discovery orders where the considerations of Section 40 of the Restatement of Foreign Relations justify the enforcement of American law. In the BSI case, the SEC obtained information about the customers for whom a Swiss bank

184. Id. at 208-09.
185. Id. at 206.
186. Trade Development Bank v. Continental Insurance Co., 469 F.2d 35 (2d Cir. 1972). The second circuit affirmed a district court decision not to order a Swiss bank to comply with defendant's request to release the names of its customers. The plaintiff was suing defendant insurer on a fidelity bond to recover for losses caused by the bank employee's falsification of customer records in Switzerland. The court's decision was based on the relative unimportance of the information sought. Id. at 41.
188. Id. at 1330 n.6. The district court stated that Vetco was engaged in "one of the greatest delaying actions of . . . recent memory." Id.
189. Id. at 1330 n.7.
191. Vetco, 644 F.2d at 1351-53. The court also found that section 40 of the Restatement (Second) of FOREIGN LAW OF THE UNITED STATES, see supra note 177, weighed in favor of requiring compliance with the summonses.
192. See supra note 177.
traded because the bank was compelled to obtain consent to disclosure from its customers.

However, judicial sanctions are not an effective solution to the problem of insider trading through Swiss banks. If a bank acts in good faith or section 40 factors weigh in its favor, discovery orders may not be enforced. In such cases, the SEC would be unable to obtain information it needs despite the existence of a reasonable suspicion of insider trading. Judicial sanctions are also unsatisfactory because they represent an adversarial means of resolving conflicting laws.

Just prior to the BSI decision, the SEC had initiated another insider trading action against unknown purchasers in which five Swiss banks were nominal defendants. The SEC charged the purchasers with buying stock and call options on the basis of knowledge of a prospective merger between Santa Fe International and Kuwait Petroleum. However, before this case reached the discovery stage, the Swiss Bankers Association proposed the new Agreement contained in the Memorandum of Understanding. The Memorandum of Understanding between the United States and Switzerland avoids an adversarial approach. The Memorandum allows the SEC to obtain information from Swiss banks whenever the SEC can prove it has a reasonable belief insider trading has taken place through a Swiss bank.

VII. THE MEMORANDUM OF UNDERSTANDING

A. Background of the Memorandum

On August 31, 1982, the governments of the United States and Switzerland signed a Memorandum of Understanding designed to increase cooperation between the two countries in cases in which securities are bought and sold on U.S. markets by insider traders. The Memorandum has two primary purposes: (1) to reaffirm the commitment of both countries to use the Treaty on Mutual Assistance in Criminal Matters and exchange opinions clarifying the

194. The merger agreement was negotiated between September 30 and October 5, 1981. Under its terms, Santa Fe shareholders were to receive $51 per share for common stock. Santa Fe common stock closed on the New York Stock Exchange at that time at $24 5/8 per share. The purchases at issue were made between September 1 and 25, and the selling occurred between October 7, 1982 and January, 1983. 14 Sec. Reg. & L. Rep. (BNA) No. 39, at 1717.
195. See infra § VII.
196. See Memorandum of Understanding, supra note 23, sec. 111, para. 3.
197. See SEC Release, supra note 23.
198. Id.
availability of enforcement assistance under the Treaty, and (2) to outline an agreement among the members of the Swiss Bankers Association\textsuperscript{200} establishing a procedure under which the SEC will be able to obtain assistance in insider trading investigations that are not covered by the terms of the treaty.\textsuperscript{201} The Agreement is provisional; it will terminate when Switzerland passes a general law against insider trading. Such trading will then be a criminal violation in Switzerland and therefore covered by the Mutual Assistance Treaty.\textsuperscript{202}

Negotiations on the Memorandum began after the filing of the \textit{Santa Fe} case.\textsuperscript{203} Representatives of the United States and Swiss governments agreed to meet and discuss growing conflicts in securities law enforcement matters.\textsuperscript{204} The Swiss informed the United States delegation of the intention of the Swiss government to outlaw insider trading and proposed the provisional agreement for the interim.\textsuperscript{205} The Swiss preferred that the Mutual Assistance Treaty provide the primary remedy but were aware that, as explained below, the Treaty alone would not be effective in all cases.\textsuperscript{206}

\textbf{B. Applicability of the Mutual Assistance Treaty to Insider Trading}

Prior to the signing of the Memorandum, much uncertainty surrounded the usefulness of the Mutual Assistance Treaty to SEC insider trading investigations.\textsuperscript{207} First, assistance is available under the Treaty only for matters that are crimes in both countries.\textsuperscript{208} Insider trading is not a crime in Switzerland.\textsuperscript{209} A schedule of thirty-five offenses for which assistance is definitely available is part of the Treaty, and insider trading is not included.\textsuperscript{210} Fraud is included in the Schedule of Offenses, but before the Memorandum was drafted it was unclear whether securities law violations would be included

\begin{footnotes}
\footnote{200. See Memorandum of Understanding, \textit{supra} note 23.}
\footnote{202. \textit{Id.} at art. 11. The Mutual Assistance Treaty became effective on January 23, 1977, and is an agreement between the United States and Switzerland to afford each other mutual assistance in investigations and prosecutions of activities considered crimes in both countries. Mutual Assistance Treaty, \textit{supra} note 199.}
\footnote{203. \textit{Legal Times}, Oct. 4, 1982, at 15, col. 1.}
\footnote{204. \textit{Id.}}
\footnote{205. \textit{Id.}}
\footnote{206. \textit{Id.}}
\footnote{207. \textit{Id.} at 12, 14.}
\footnote{208. Mutual Assistance Treaty, \textit{supra} note 199, ch. 1, art. 4, para. 2(a).}
\footnote{209. \textit{See supra} notes 130-132 and accompanying text.}
\footnote{210. Schedule of Offenses for which Compulsory Measures are Available, Mutual Assistance Treaty, \textit{supra} note 199.}
\footnote{211. \textit{See Mutual Assistance Treaty, supra} note 199. This is because they are not recognized as fraudulent acts under Swiss law. The Treaty is available only when the offense is a crime in both the United States and Switzerland. \textit{Id.}}
\end{footnotes}
under fraud.\textsuperscript{211} It was also unclear whether the Swiss Office of Police Matters\textsuperscript{212} would provide assistance under the Treaty if an offense were a crime under Swiss law but not covered by the Schedule.\textsuperscript{213} The Treaty has never successfully been used in the prosecution of an insider trading case.\textsuperscript{214}

These doubts are resolved by Article II of the Memorandum, which lists sections of the Penal Code under which the Swiss would consider “transactions effected by persons in possession of material nonpublic information” to be a crime.\textsuperscript{215} By explicitly stating that activities of insider traders might be considered criminal under the Swiss Penal Code, the Memorandum resolves any doubts as to the applicability of the Treaty to insider trading. Therefore, the SEC may be able to break the veil of bank secrecy using the Mutual Assistance Treaty.

A second problem in the application of the Treaty to insider trading concerned the fact that the SEC brings only civil suits against insider traders, and the Treaty by its terms applies only to criminal law enforcement.\textsuperscript{216} Article II(3)(a) of the Memorandum provides that there will be “mutual assistance in investigations or court proceedings in respect of offenses the punishment of which falls or would fall within the jurisdiction of the judicial authorities of the requesting state or a state or canton thereof.”\textsuperscript{217} Article II(3)(a) is interpreted to mean that assistance is available under the Treaty as long as the offense is one that could be prosecuted in criminal courts.\textsuperscript{218} Because insider traders can be prosecuted criminally by the Department of Justice,\textsuperscript{219} SEC investigations which anticipate civil proceedings are now explicitly covered by the Treaty.

The final source of doubt as to the applicability of the Treaty to insider trading stemmed from the limitations it places on the use of information gained under its auspices.\textsuperscript{220} Evidence or information obtained pursuant to the Treaty cannot be used for investigative purposes "nor be introduced into evidence in the requesting State in any proceeding relating to an offense other than the offense for which the assistance has been granted."\textsuperscript{221} Presumably, evidence or information obtained pursuant to the Treaty should be used for the prosecution of

\textsuperscript{212} The Swiss Federal Office for Police Matters is similar to the U.S. FBI; it is the government law enforcement agency. Telephone conversation with Michael Mann, SEC Enforcement Division member (Jan. 10, 1983).

\textsuperscript{213} Legal Times, Oct. 4, 1982, at 14, col. 1.

\textsuperscript{214} Telephone conversation with Michael Mann, SEC Enforcement Division member (Jan. 10, 1983).

\textsuperscript{215} StGB, C.P., Cod Pen, arts, 148 (fraud), 159 (unfaithful management), or 162 (violation of business secrets). See Memorandum of Understanding, supra note 23, art. II(3)(a).

\textsuperscript{216} Mutual Assistance Treaty, supra note 199.

\textsuperscript{217} Memorandum of Understanding, supra note 23, art. II(3)(b).

\textsuperscript{218} Id.

\textsuperscript{219} Legal Times, Oct. 4, 1982, at 14, col. 1. The SEC refers insider trading cases to the Department of Justice if there is to be a criminal prosecution.

\textsuperscript{220} Mutual Assistance Treaty, supra note 199, art. 5.

\textsuperscript{221} Id.
criminal offenses. A real question existed whether such information could be used in proceedings initiated by the SEC,\(^2\) which are typically civil and administrative. If the information obtained pursuant to the Treaty could only be used in criminal proceedings, then the Treaty would not be useful to insider trader prosecutions by the SEC, since such prosecutions are usually civil.

However, article II of the Memorandum commits the United States and Switzerland to an exchange of diplomatic notes\(^2\) to facilitate the application of the Treaty to administrative and judicial proceedings “in which sanctions and remedies are available other than prison sentences and fines imposed in criminal prosecutions.”\(^4\) This provision anticipates the application of the Treaty to noncriminal matters, which makes its usefulness to SEC insider trading actions more certain.

C. The Memorandum Facilitates SEC Investigations

The second major aspect of the Memorandum is contained in Article III, the Private Agreement among members of the Swiss Bankers Association (SBA).\(^5\) This Agreement establishes a procedure for cooperation with the SEC in insider trading investigations not covered by the Treaty.\(^6\) An example of such an investigation would be one consisting of an action not considered a violation of the Swiss Penal Code.\(^7\)

Under the Agreement, the SBA will appoint a Commission of Enquiry composed of three members and three deputies.\(^8\) None of the members or deputies may exercise an executive function in a Swiss bank.\(^9\) The Commission will consider inquiries transmitted from the SEC through the Department of Justice to the Swiss Federal Office for Police Matters,\(^10\) which will forward such requests to the Commission.\(^11\)

The SEC may make such an inquiry if it discovers during an investigation that just prior to the announcement of a significant merger or acquisition by a company, a customer had directed a bank to buy or sell the securities of a company that is a party to the combination or acquisition.\(^12\) The inquiry must be


\(^3\) Memorandum of Understanding, supra note 23, art. II(4).

\(^4\) Id.

\(^5\) See supra note 201.

\(^6\) Memorandum of Understanding, supra note 23, art. III(1).

\(^7\) Id.

\(^8\) Agreement, supra note 201, art. 2, para. 1.

\(^9\) Id. Members are bound by secrecy rules as to all facts of which they learn in the course of this procedure under the Agreement. Id. art. 2, para. 2.

\(^10\) Id. art. 5, para. 1.

\(^11\) Id.

\(^12\) Id. art. 1. This article provides for an inquiry if the SEC discovers that:

within 25 days prior to a public announcement (“Announcement”) of (A) a proposed merger, consolidation, sale of substantially all of an issuer’s assets or other similar business combination
accompanied by confirmation of SEC willingness to furnish evidence, or appropriate summaries thereof, relevant to the inquiry and by specific identification of the transactions involved. The SEC must also establish to the "reasonable satisfaction of the Commission" that it has persuasive information indicating that insider trading occurred. Such information would include significant price or volume changes with respect to the trading of the securities at issue. Under certain circumstances the Commission must be satisfied by the information provided, but the failure of the SEC to meet these criteria will not necessarily result in a presumption that no reasonable grounds for the request exist. The Commission then reviews information submitted by the SEC to determine if reasonable grounds exist absent satisfaction of Article 3.4 criteria.

Although these procedures facilitate SEC access to Swiss banking information, the Agreement also seeks to protect the vitality of banking secrecy by keeping the information provided under its terms as confidential as possible. The SEC must agree not to disclose any information obtained pursuant to the Agreement to anyone except in connection with an investigation of law enforcement action against an insider trader.

If the Commission is reasonably satisfied with the information provided by the SEC, it will call for a report from the appropriate bank on the transactions concerned. The bank notifies the customer, who has thirty days to supply the bank with information demonstrating that he is not involved in any violation of securities law. This information, along with the name, address, and nationality of the customer and information on the transactions is sent to the Commission within forty-five days of the Commission's request to the bank.

The Commission furnishes this information to the SEC through the Federal Office for Police Matters, unless the bank's report establishes to the reasonable

("Business Combination") or (B) the proposed acquisition of at least 10% of the securities of an issuer by open market purchase, tender offer or otherwise ... a customer gives to a bank an order to be executed in a U.S. securities market for the purchase or sale of securities or put or call options for securities of any company that is a party to a Business Combination or the subject of an Acquisition. . . .

233. Id. art. 3.
234. Id. art. 3, para. 4.
235. Id.
236. Id. The Agreement provides that the Commission shall be satisfied in all cases in which: (1) the daily trading volume of the securities at issue increased fifty percent or more at any time during the twenty-five days prior to the announcement of an acquisition or business combination above the average trading volume of such securities during the period from the ninetieth to the thirtieth trading day prior to such announcement, or (2) the price of such securities varied at least fifty percent or more during the twenty-five days prior to such an announcement. Id.
237. Id.
238. Id.
239. Id.
240. Id. art. 3, para. 5.
241. Id. art. 4, para. 1.
242. Id. art. 4, para. 2.
243. Id. art. 4, paras. 3, 4.
satisfaction of the Commission that the customer did not engage in insider trading or could not be an insider. In case of doubt regarding the accuracy of the report, the SEC or the Commission can request that the Swiss Federal Banking Commission examine the report. If the Commission finds that conditions for supplying the information to the SEC are not fulfilled, it forwards a report to the SEC explaining the reasons for this determination.

If the criteria of Article 1 and Article 3 of the Agreement are met, the bank, upon notice from the Commission, will block the customer's account to the extent of a sum equal to the profit allegedly made from insider trading, pending disposition of the case by the SEC or the courts. The Commission will forward these funds to the SEC if such proceedings terminate in a final judgment adverse to the customer. Alternatively, the bank will unblock the funds if the Commission does not send the bank report to the SEC and the SEC does not file a request for a Federal Banking Commission examination within thirty days. If such a request is filed and the Commission does not issue an amended report, the Commissioner will direct the bank to unblock the funds. The funds also will be unblocked if proceedings in the United States result in a judgment not adverse to the customer or if the SEC consents to the unblockings.

This Agreement is provisional; it is to be in force for a three year period and renewable after that on a year to year basis. Provision is made for any member bank to terminate their compliance with the Agreement. However, the banks have an incentive to comply with the Agreement because it will prevent them

244. Id. art. 5.
245. Id. An insider is defined, for purposes of this agreement, as:
   (a) a member of the board, an officer, an auditor or a mandated person of the company or an assistant of any one of them, or (b) a member of a public authority or public officer who in the execution of his public duty received information about an acquisition or business combination, or (c) a person who, on the basis of information about an acquisition or business combination received from a person described in (a) or (b) has been able to act for the latter or to benefit himself from inside information.
246. Id. art. 8.
247. See Webster's Third International Dictionary 236 (4th ed. 1976). Transfers in or out of a blocked account are prohibited.
248. See supra notes 231 & 235.
249. Id. art. 9, para. 1.
250. Agreement, supra note 201, art. 9, para. 2. A consent decree, under which the customer neither admits nor denies an insider trading violation but remits the amount in dispute, is considered a judgment adverse to the customer. Id. art. 9, para. 2(b).
251. Id. art. 9, para. 3(a)(i).
252. Id. art. 9, para. 3(a)(ii).
253. Id. art. 9, para. 3(a)(ii)(b) and (c).
254. Id. art. 11.
255. Id. Advance notice of six months is required. If any member elects to terminate, all parties to the Agreement are so informed and have one month to join in the termination. The Agreement remains in effect for the remaining parties. Id.
from being subject to such conflicting duties as existed in the BSI case. The Agreement will terminate before the three year period if, in the meantime, Switzerland passes a general law prohibiting insider trading.256

As a result of the signing of the Memorandum of Understanding, the SEC has a clear and expressed right to obtain information, despite Swiss bank secrecy laws, about the identity of those it reasonably believes might be trading on inside information through Swiss bank accounts.257 SEC investigations of insider trading trace transactions through the broker/dealer involved to reach the customer, who is then subpoenaed.258 The SEC attempts to find a connection between the customer who profited and the source of the information which might have been used.259 For example, the customer might be an officer or director of the company involved or have some relationship with someone in such a position.260 Prior to the Memorandum, SEC investigations were halted at their inception if the broker placing the relevant trading orders was acting on behalf of a Swiss bank.261

D. The Memorandum Facilitates Application of the Treaty to Insider Trading

The SEC can use the Memorandum, once it is signed by the Swiss banks,262 to obtain information previously protected by bank secrecy laws.263 The Memorandum also facilitates application of the Mutual Assistance Treaty to insider trading cases. Assistance is available under the Treaty only for matters that are crimes in both countries, and the Memorandum asserts that such trading may be prohibited by Articles 148, 162, and 159 of the Swiss Penal Code.264

Article 148 prohibits persons with an intent to profit from fraudulently inducing others to act to their detriment.265 Given the absence of a general duty to

256. Id.
257. See supra notes 162-178 and accompanying text.
258. Id.
259. See supra notes 137-143 and accompanying text.
261. See supra notes 133-142 and accompanying text.
262. As of January 1, 1983, the majority of Swiss banks had agreed to the provisions of the Agreement. 22 Int'l Legal Materials 7.
263. See Memorandum of Understanding, supra note 23. Banks will reveal information about customers' identities and transactions. Agreement, supra note 201.
264. Memorandum of Understanding, supra note 23, art. II(3)(b).
265. SrGB, C.P., Coop. Pén., art. 148 provides that:

Any person who, with intent to make an unlawful profit for himself or another, shall fraudulently mislead another person by falsely representing or concealing facts or shall fraudulently use the error of another and thus cause the deceived person to act detrimentally against his own or another's property, shall be confined in the penitentiary for not more than five years. . . .

Id reprinted in Legal Times, Oct. 4, 1982, at 17, n.27.
disclose,266 a violation of this provision requires that an insider actually offer false information, and not simply omit material information. A violation of Rule 10b-5 requires less; the mere omission to state a material fact is sufficient.267 Facts are not “falsely concealed” if there is no duty to disclose them.268 However, to the extent that there are insider trading cases in which an insider affirmatively misrepresents material facts about securities in a purchase or sale,269 this Article might apply.

Article 162 protects the privacy of manufacturing and business secrets.270 Certain types of inside information, on the basis of which illegal trading in securities takes place, are of the sort that an officer or director has a duty to guard; this duty is derived from the officer’s or director’s fiduciary duty to shareholders.271 In an insider trading case where the insider has “tipped” another, a violation of a fiduciary duty may exist.272 If the “tippee” then trades on the basis of that information, both persons would seem to have violated Article 162.273 It is not clear whether an insider with such a fiduciary duty would be committing an Article 162 type offense if he traded on the basis of confidential information.274 Although that would constitute a misuse of the information, it might not amount to a “betrayal” of a secret. The information is presumably still secret after the trading is completed.

Article 159 provides that “[w]hoever impairs another’s resources which are entrusted to him by law or contract shall be punished by imprisonment.”275 That provision is directed against “unfaithful management.”276 It is relevant to bank secrecy because divulging confidential facts under certain circumstances may be

266. Jenckel & Rider, supra note 130, at 684.
268. See Chiarella, 445 U.S. at 222. A duty to disclose does not exist because of the mere possession of material nonpublic information. In Chiarella, a printer had no duty to the target company in whose stock he traded. Id. at 232.
270. StGB, C.P., Cod. Pén., art. 162 reads: “Whoever betrays a manufacture or business secret, which he should keep by virtue of a legal or contractual obligation [and] whoever makes use of the betrayal, shall upon petition be confined in the prison or be fined.” translated in Banking Secrecy, supra note 48, at 4.
271. See Neuman, 664 F.2d at 17 (fiduciary duty violated by investment firm employees who “tipped” information about proposed mergers of their clients); Shapiro, 495 F.2d at 231-32 (company serving as underwriter learned of bad earnings of its client and had fiduciary duty to keep the information confidential); Certain Unknown Purchasers, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,323 (insiders had knowledge of the impending merger of their company and as officers and employees had a duty to keep the information confidential).
272. See Neuman, 664 F.2d at 13, where investment company employees tipped information to their friends.
273. See generally StGB, C.P., Cod. Pén., art. 162.
274. Id. StGB, C. P., Cod. Pén., art. 162 has never been applied to insider trading, since such trading is not specifically proscribed under Swiss law. See supra notes 130-132 and accompanying text.
275. Meyer, supra note 54, at 25 n.35. See also, StGB, C.P., Cod. Pén., art. 159.
276. Meyer, supra note 54, at 25 n.35.
regarded as unfaithful management. For example, the president of a company might be negotiating a merger with another company. The president knows the price the other company has offered for his company's stock, and that price might be higher than that at which the stock is currently trading on the market. If the president buys company stock for his own benefit, to sell at a profit after the merger, then he is breaching a duty to the present shareholders to get them the best price for their shares by buying at a price lower than that at which they can get from the takeover company.

E. Memorandum of Understanding: Summary

The Memorandum of Understanding resolves doubts as to the applicability of the Mutual Assistance Treaty between the United States and Switzerland by stating that insider trading offenses may be criminal under the Swiss Penal Code, specifically under articles, 148, 159, and 162. The Memorandum expands the Treaty by interpreting it to cover civil rather than exclusively criminal, prosecutions, and by explicitly stating that existing Swiss law covers some types of insider trading.

The use of the Memorandum to curb the protection bank secrecy affords insider traders is preferable to other steps the United States has taken toward this end. The Bank Secrecy Act has been ineffective. The second unilateral attempt to counter bank secrecy, the use of judicial sanctions in particular cases, forces Swiss banks to risk violating Swiss law, or at least to reduce the protection of bank secrecy law. The Memorandum is preferable to compelling banks to cooperate through the use of discovery orders because the Memorandum represents a bilateral, cooperative procedure between the two countries. The Swiss banks will no longer be subject to the conflicting demands of discovery orders in the United States and the bank secrecy obligation in Switzerland, while the United States should benefit from more efficient enforcement of insider trading regulations. The Memorandum, therefore, should prove to be a very positive development.

VIII. Conclusion

Bank secrecy is historically rooted in Swiss private law and is now protected by a statute prescribing criminal penalties for violations of the secrecy obligation. The protection bank secrecy affords has been exploited by persons seeking to circumvent U.S. securities regulations because the secrecy laws protect the identity of insider traders.

277. See Memorandum of Understanding, supra note 23, art. II(3)(b). Unfaithful management should encompass breaches of fiduciary duty by corporate managers.

278. This example was provided by Michael Mann, member of the SEC Enforcement Division, telephone conversation (Jan. 10, 1983).

279. See supra notes 145-161 and accompanying text.
The United States has made several attempts to counter the shield that bank secrecy provides. Some success has been realized through the use of judicial sanctions when the court finds that a bank has acted in bad faith. The new Memorandum of Understanding has the potential to solve the problem of insider trading through Swiss banks. Swiss bank secrecy laws protect the identity of insider traders who hold Swiss accounts. The Memorandum provides a method through which the SEC will be able to learn the identity of a person whom it reasonably suspects of insider trading. Thus, the Memorandum should resolve the problem Swiss banking secrecy has created for SEC insider trading investigations.

The Memorandum seeks to solve the problem of insider trading through Swiss banks within the framework of the 1977 Mutual Assistance Treaty. Because this Treaty may not cover some insider transactions, the Memorandum includes a provisional Agreement which establishes a procedure for cooperation between the SEC and the Swiss Office for Police Matters on insider trading investigations. When the Swiss pass a general law covering insider trading abuses that the Agreement addresses, the Agreement will terminate since the Mutual Assistance Treaty will then apply specifically to insider trading.

The negotiation of the Memorandum and Agreement represents an admirable precedent for cooperation in law enforcement between the United States and Switzerland. With increasing numbers of transactions of all kinds taking place on an international scale, such cooperation is becoming increasingly important.

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