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The Conflict between United States Securities Laws on Insider Trading and Swiss Bank Secrecy Laws

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COMMENTS

The Conflict Between United States Securities Laws on Insider Trading and Swiss Bank Secrecy Laws

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I. INTRODUCTION

In recent years the Swiss have grown defensive about the bad reputation their banks have earned for hiding so-called "dirty" money.¹ A common perception is that through the protection of strict Swiss banking and commercial secrecy laws, Swiss numbered accounts hold the ill-gotten gains of organized crime, corrupt politicians, United States income tax evaders, and inside traders on United States securities markets.² Both out of concern for preserving the integrity of what is regarded as Switzerland's most valuable asset—its banking sector³—and in response to mounting criticism from abroad, Switzerland has agreed to help the United States in its fight against international crime. Switzerland's cooperation commitments are embodied in the Treaty on Mutual Assistance in Criminal Matters⁴ and a Memorandum of Understanding⁵ which, in conjunction with a Swiss Bankers' Association Agreement,⁶ facilitate the enforcement of United States securities laws against insider trading.

This paper focuses on United States-Swiss law enforcement cooperation in the field of insider trading. Part I examines United States securities laws against insider trading and how they conflict with Swiss laws on bank secrecy. Part II examines the origin and operation of Swiss bank secrecy laws. Part III describes the United States-Swiss Treaty on Mu-

¹ See Surya, *Switzerland: An End to Strict Banking Secrecy Rules?* 5 CO. LAW. 198 (1984). In a national referendum held on May 20, 1984, the Swiss electorate rejected a Socialist Party proposal to relax Switzerland's strict banking secrecy laws. Despite this outcome, a smaller percentage than was anticipated actually voted against the initiative. Overall, however, the rejection coupled with the signing of the United States-Swiss Memorandum of Understanding, see *infra* notes 171-98 and accompanying text, reflect public sensitivity to the banking sector's tarnishing image. See Surya, *Switzerland: Referendum on the Banking Secrecy Laws*, 6 CO. LAW. 51 (1985).

² Various Congressional hearings examine how Swiss bank accounts are used to conceal criminal activities, including those of organized crime, tax evasion, and securities violations. See generally *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. (1968). See also *Crime and Secrecy: The Use of Offshore Banks and Companies*, Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess., Appendix (Comm. Print 1983).

³ See Surya, *Switzerland: An End to Strict Banking Secrecy Rules?* 5 CO. LAW. 198 (1985). The success of Switzerland's 572 banks has been attributed to the combination of the following factors: the stringent Swiss bank secrecy laws, the strength of the Swiss economy, the efficient financial infrastructure, Swiss political stability, and Switzerland's attractive geographic location. *Id.* See also Navickas, *Swiss Banks and Insider Trading in the United States*, 2 INT'L TAX & BUS. L. 159, 160 (1984); Note, *Insider Trading Laws & Swiss Banks: Recent Hope for Reconciliation*, 22 COLUM. J. TRANSNAT'L L. 303, 306 n.20 (1984) [hereinafter Note, *Recent Hope*].

⁴ Treaty on Mutual Assistance in Criminal Matters, Jan. 23, 1977, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302 [hereinafter MAT].

⁵ Memorandum of Understanding on Insider Trading, Aug. 31, 1982, United States-Switzerland, 22 INT'L LEGAL MATERIALS 1 (Jan. 1983) [hereinafter MOU].

⁶ Agreement of the Swiss Bankers' Association on the Misuse of Inside Information, Aug. 31, 1982, 22 INT'L LEGAL MATERIALS 7 (Jan. 1983) [hereinafter BA].

tual Assistance in Criminal Matters ("MAT" or "the Treaty") and its limitations. United States judicial efforts to circumvent Swiss secrecy laws are reviewed in Part IV including a discussion of two cases which have created tensions between the two countries. Part IV then notes the overall failure of unilateral attempts to reach an acceptable solution and the impetus such failure has provided for negotiating an amicable bilateral solution. The Memorandum of Understanding ("MOU") is outlined in Part V including an explanation of how it provides law enforcement cooperation in cases of insider trading not covered by the Treaty. Part VI lays out the formal procedures under the Swiss Bankers' Association Private Agreement ("BA" or "the Agreement") which the Securities and Exchange Commission ("SEC" or "the Commission") must follow to obtain Swiss cooperation in insider trading investigations. Part VII identifies the limitations inherent in the MOU and the Agreement. Finally, Part VIII concludes that the optimal solution to the conflict between United States insider trading and Swiss secrecy laws lies with Swiss legislation which criminalizes insider trading activity, thereby making mandatory assistance under the Treaty available in a wide range of insider trading cases.

II. INSIDER TRADING IN THE UNITED STATES

The need for United States-Swiss cooperation in the field of insider trading investigation and prosecution arises from the conflicting nature of United States securities and Swiss bank secrecy laws. Section 10(b) of the Securities and Exchange Act of 1934⁷ ("the Act") and Rule 10b-5⁸ make it unlawful to buy or sell securities in any fraudulent or misleading way. In addition, Section 14(e) of the Act⁹ and Rule 14e-3¹⁰ make it unlawful to buy or sell securities on the basis of material non-public information. Those who possess such information are considered "insid-

⁷ The Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982) [hereinafter the Exchange Act].

⁸ 17 C.F.R. § 240.10b-5 (1985). Rule 10b-5 is one of the most significant anti-fraud provisions enacted under the federal securities laws. It states:

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.

⁹ 15 U.S.C. § 78n(e) (1982).

¹⁰ 17 C.F.R. § 240.14e-3 (1985).

ers"¹¹ and are required to either disclose any such non-public information or refrain from trading.¹² The prohibition against insider trading is intended to preserve the integrity of the securities markets and prevent insiders from realizing unfair profits.¹³ It is widely believed that the informational advantage of insiders is one which other investors cannot overcome, regardless of their diligence.¹⁴ Willful violations of the Act are deemed criminal under section 32 of the Act and carry the potential penalty of a \$10,000 fine or five years in prison, or both.¹⁵

The SEC's Enforcement Division continually monitors securities activity through computers programmed with information on prices and usual trading volumes of securities. The computers identify sales and purchases of securities which exceed the programmed amounts in price or volume. A large purchase or sale followed by a public announcement that causes the price of the security to increase dramatically may give rise to suspicion that someone may have traded on the basis of material non-public information.¹⁶ Suspicious transactions will generally trigger a preliminary SEC investigation.¹⁷ The SEC begins its investigation by requiring a broker/dealer who participated in a questionable transaction to complete a standardized form. On that form the broker/dealer lists all the transactions in which the broker/dealer or its customers have engaged during the relevant period, identifies the number of the account

¹¹ Neither § 10(b) nor § 14(e) specifically define who is an "insider" so as to be precluded from dealing in corporate stock. Rule 14e-3 states that persons who trade on the basis of material non-public information commit a fraudulent, deceptive or manipulative act in violation of § 14(e) of the Exchange Act. Nonetheless, Rule 14e-3 does not define "insider" *per se*. See 17 C.F.R. § 240.14e-3(a). However, a jurisprudence of insider trading has developed over the years which seeks to identify insiders by their relation to the corporation whose securities are traded, or by their knowledge of material nonpublic information. See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2d Cir. 1968) (en banc) (the landmark decision in which the court defined insiders as corporate directors, managers, officers, and anyone who possesses material information which (s)he knows is unavailable to the investing public), *cert. denied*, 394 U.S. 976 (1969).

¹² The "disclose or abstain" rule that anyone in possession of material, nonpublic information is subject to a duty either to disclose it or refrain from trading originated in the decision of *Texas Gulf Sulphur*, 401 F.2d at 848.

¹³ See 15 U.S.C. § 78b (1982); SECURITIES ACTS AMENDMENTS, H.R. CONF. REP. NO. 94, 94th Cong., 1st Sess. 91 (1975), *quoted in* *United States v. Chiarella*, 445 U.S. 222, 241 (1980) (Burger, J., dissenting) (the antifraud provisions of the 1934 Act were enacted largely "to assure that dealing in securities is fair and without undue preference or advantages among investors.")

¹⁴ See Cary, *Insider Trading in Stocks*, 21 BUS. LAW. 1009, 1010 (1968).

¹⁵ 15 U.S.C. § 78ff(a) (1982). Since the SEC is not authorized to bring criminal prosecution, it will transmit its evidence to the Attorney General who will decide whether or not the Justice Department will institute criminal proceedings. See *id.* at § 78u(d).

¹⁶ Comment, *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, 555-56 (1984) [hereinafter Comment, *Effect of Secrecy*].

¹⁷ See 15 U.S.C. § 78u (1982); 17 C.F.R. § 202.5(a) (1985).

associated with each transaction, and furnishes the names and addresses of each account holder.¹⁸

A formal investigation may follow.¹⁹ The SEC will then subpoena witnesses to testify and require the production of any books, papers, correspondence, memoranda or other records which it deems relevant to the inquiry.²⁰ If necessary, the SEC may rely on the assistance of a federal district court in enforcing compliance with its subpoena.²¹ If the investigation produces evidence of a securities law violation, the SEC may order an administrative hearing to determine responsibility and impose sanctions.²² The SEC may also initiate suit in federal district court to enjoin a securities law violator,²³ obtain a rescission order,²⁴ and obtain an order for the disgorgement of any profits realized.²⁵

In the situation described above, if the broker/dealer discloses that it executed the transaction in question on behalf of a United States bank or other financial institution, the SEC may insist that the institution reveal the identity of the customer on whose behalf the broker/dealer traded.²⁶ Although the United States does have a law limiting the government's access to financial information, the Right to Financial Privacy Act of 1978,²⁷ the identity of persons trading in securities cannot be withheld from authorized government agents.²⁸ The Supreme Court's holding that a criminal defendant "has no protectable Fourth Amendment interest in his own financial records maintained by his bank"²⁹ applies equally to alleged violations of securities laws.³⁰

If, however, the institution placing the order were a Swiss bank, when asked to comply with an SEC request for information regarding the identity of the customer on whose behalf the bank traded, the Swiss bank

¹⁸ See 15 U.S.C. § 78u(a) (1982); 17 C.F.R. § 202.5(a) (1985). See also Greene, *United States-Swiss Memorandum of Understanding on Insider Trading*, INT'L FIN. L. REV. 26 (Jan. 1983).

¹⁹ 15 U.S.C. § 78u(a) (1982).

²⁰ 15 U.S.C. § 78u(b) (1982).

²¹ Note that according to § 15(b) of the Exchange Act, administrative proceedings can only be brought against persons or firms which are registered with the SEC or in relation to securities registered with the SEC. See 15 U.S.C. § 78u(a); 17 C.F.R. § 202.5(a).

²² 17 C.F.R. § 202.5(b).

²³ 15 U.S.C. § 78u(d); 17 C.F.R. § 202.5(b).

²⁴ See, e.g., *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154 (S.D.N.Y. 1971), *aff'd with modifications*, 480 F.2d 341, 390-91 (2d Cir. 1973).

²⁵ See, e.g., *Texas Gulf Sulphur*, 401 F.2d 833.

²⁶ See Greene, *supra* note 18, at 26.

²⁷ Pub. L. No. 95-630, 92 Stat. 3697 (1978) (codified at 12 U.S.C. §§ 3401-3422 (1982)).

²⁸ See Greene, *supra* note 18, at 26.

²⁹ *United States v. Miller*, 425 U.S. 435, 437 (1976).

³⁰ See Note, *Recent Hope*, *supra* note 3, at 321.

would in all likelihood refuse to cooperate.³¹ Swiss bank secrecy laws currently prohibit bankers from disclosing confidential customer information to foreign governments.³² An exception exists, however, where foreign governments seek law enforcement assistance to prosecute offenses which are also crimes under Swiss law.³³ Given that insider trading is presently legal in Switzerland, strict Swiss secrecy laws effectively nullify SEC requests for assistance.³⁴ If a Swiss banker were to disclose a customer's identity, the banker would necessarily violate various provisions of the Swiss Penal Code³⁵ and the 1934 Banking Law³⁶ and could be prosecuted criminally. The banker would simultaneously be subject to civil sanctions for violating Swiss contract law³⁷ and for denying the customer a fundamental right to financial privacy.³⁸ Finally, the banker's bank might even lose its license to operate because of the

³¹ See Greene, *supra* note 18, at 27.

³² It is a crime under article 273 of the Swiss Penal Code to disclose to a foreign authority protected information of an economic nature. Article 273 provides:

Whoever makes available a manufacturing or business secret to a foreign governmental agency or a foreign organization or private enterprise, or to an agent of any of them, shall be subject to imprisonment and in grave cases to imprisonment in a penitentiary.

STGB, C.P., COD. PEN., art. 273. For discussion of art. 273, see *infra* notes 72-73 and accompanying text.

³³ For discussion of dual criminality requirement with regard to article 8(2) of the MAT, see *infra* notes 126-27 and accompanying text. Since annulment of bank secrecy is a compulsory measure, it cannot be ordered without this requirement. See Honegger, *Demystification of the Swiss Banking Secrecy and Illumination of the United States Memorandum of Understanding*, 9 N.C.J. INT'L L. & COM. REG. 1, 17 (1983).

³⁴ See Comment, *Effect of Secrecy*, *supra* note 16, at 130.

³⁵ Disclosing confidential facts thereby causing injury to one to whom the informant owes a legal or contractual duty is punishable under STGB, C.P., COD. PEN., art. 159. It is a crime to disclose a business secret to a foreign source under STGB, C.P., COD. PEN., art. 273. See Recent Development, *Extraterritoriality: Swiss Supreme Court Refuses United States Request for Information Concerning Insider Trading—Swiss Supreme Court Opinion Concerning Judicial Assistance in the Santa Fe Case*, 22 INT'L LEGAL MATERIALS 785 (1983), 25 HARV. INT'L L.J. 456, 458 n.11 (1984) [hereinafter Recent Development, *Extraterritoriality*].

³⁶ The Federal Law Relating to Banks & Savings Banks of Nov. 8, 1934 (as amended by Federal Law of Mar. 11, 1971) 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 as 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 offense, shall be liable to a fine of up to Sf50,000 or imprisonment for up to six months, or both . . . If the offender acted with negligence he shall be liable to a fine up to Sf30,000.

AS, RO, RU, art. 47(b) [hereinafter Banking Law of 1934].

³⁷ The Swiss banker is under an implied contractual duty to respect his client's financial privacy. See Meyer, *Swiss Banking Secrecy and Its Legal Implications in the United States*, 14 NEW ENG. L. REV. 18, 24 (1978). See also Honegger, *supra* note 33, at 3.

³⁸ The Civil Code provides protection under the Protection of Personality and Complaint for Injury, ZGB, C.C. COD. CIV., art. 28. A tort action may also be brought for damages due to disclosure of identity under the Code of Obligations, OR, C.O., COD. OBL., arts. 41 & 49. See Recent Development, *Extraterritoriality*, *supra* note 35, at 458 n.10.

banker's unlawful disclosure of confidential information.³⁹

In sum, if the suspicious transaction has been effected through a Swiss bank, the Swiss bank secrecy laws will impede the SEC's ability to identify the account holder who authorized the transaction. Without the trader's identity, the SEC is incapable of determining whether the person is an insider for purposes of prosecution. By hiding behind the protective cloak of Swiss bank secrecy, inside traders go largely undetected and avoid punishment. Thus, Swiss bank secrecy laws not only thwart SEC efforts to enforce securities laws, but they create a double standard of justice and create tensions in United States-Swiss foreign relations.

It is impossible to measure precisely how much insider trading is conducted through Swiss banks.⁴⁰ Yet the volume of Swiss bank trading on United States securities markets is known to be significant and growing.⁴¹ The Swiss are regarded as "by far the largest foreign traders on Wall Street."⁴² In 1981, the Swiss traded \$14.8 billion of the \$75 billion total traded by foreigners on United States stock markets.⁴³ By 1984 the volume of Swiss trading grew to over \$20 billion as total foreign trading increased to \$124 billion.⁴⁴ Swiss trading has and continues to account for approximately one-sixth of all foreign trading on United States securities markets.⁴⁵ Given that recent advances in telecommunications and computer technology have made long-distance trading less complicated, it is expected that foreign as well as Swiss trading in United States stocks will become even more active. Expanding opportunities for trading profitably on United States markets will attract more legitimate and illegitimate traders alike. Hence, it is not surprising that the SEC is concerned with sending out signals to criminals that unlawful trading on United States markets will not be tolerated. It is against this backdrop that the SEC has decided to clamp down on inside traders who hide their illegally-obtained profits behind the protective shield of Swiss bank secrecy laws.

³⁹ See Greene, *supra* note 18, at 27.

⁴⁰ See Note, *Recent Hope*, *supra* note 3, at 306.

⁴¹ Address by Michael Mann, Chief of the Office of International Legal Assistance, SEC Enforcement Division, in Zurich (Nov. 12, 1985) (discussing International Legal Assistance in Securities Law Enforcement).

⁴² Note, *Recent Hope*, *supra* note 3, at 307.

⁴³ N.Y. Times, Sept. 1, 1982, at D13, col. 6.

⁴⁴ *Foreign Activity in U.S. Securities*, 8 SEC. INDUS. ASS'N 4 (1984).

⁴⁵ See Honegger, *supra* note 33, at 1.

III. SWISS BANK SECRECY LAWS

A. Origins of Bank Secrecy

"Banking secrecy means that the banks must keep secret any information about their clients regarding privacy and property which they receive by practicing their business."⁴⁶ Bank officers, employees, and persons directly related to the bank are all required to keep secret information regarding customer accounts. This duty is derived from four different sources of Swiss law: 1) the personality right to financial privacy, 2) the banker's contractual duty to keep a client's records secret, 3) various provisions of the Swiss Penal Code which criminalize violations of general secrecy, and 4) the 1934 Banking Law which criminalizes violations of bank secrecy.

1. Civil Law Personality Rights

Like the professional secrecy obligations of clergymen, lawyers, and physicians, bankers' secrecy obligations are derived from the civil law's⁴⁷ recognition of the right to personal privacy. In civil law countries, protection of the right to privacy—the right of an individual to be left alone, to live a life in seclusion, or to live free from unwarranted publicity—is considered an element of a person's personality rights.⁴⁸ Personality rights include protection of physical and intellectual integrity, health, family, life, and financial affairs.⁴⁹ Today, remedies for infringements of personality rights are enumerated in civil law countries' constitutions and statutes. Individuals whose privacy has been invaded may sue for relief or damages, or both.⁵⁰

Common law countries, in contrast, recognize a right to privacy which is less pervasive. In the United States, for example, although most states recognize a private cause of action for instances of privacy invasion, a constitutional right to privacy is more narrowly defined. Privacy protection via the United States Constitution extends primarily to "fundamental rights." Fundamental rights pertain largely to highly personal activities, such as freedom of choice in marital, sexual, and reproductive matters.⁵¹

⁴⁶ The civil law system is one of two major legal systems in the western world. Two notable characteristics of civil law systems are the codification of much private law and the strong influence of Roman law. See Comment, *Effect of Secrecy*, *supra* note 16, at 544 n.29.

⁴⁷ See Meyer, *supra* note 37, at 20.

⁴⁸ See Comment, *Effect of Secrecy*, *supra* note 16, at 544.

⁴⁹ See Meyer, *supra* note 37, at 21.

⁵⁰ See Comment, *Effect of Secrecy*, *supra* note 16, at 545.

⁵¹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the Constitution protects the right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 533 (1942) (the Constitution protects the rights to

While both civil and common law countries protect rights to privacy by conferring secrecy obligations on certain professionals, the two legal systems' perception of the nature of the banker-client relationship differ dramatically.⁵² Unlike the United States, where the banker-client relationship is regarded as an ordinary debtor-creditor relationship, the same relationship in Switzerland is treated as much more than an ordinary business relationship. "Possessing a deeper insight into the financial affairs of his customer than the government, or the client's family, the banker [in Switzerland] is considered a person of confidence and trust, much in the same way as a clergyman, physician, or lawyer."⁵³ It is not surprising therefore that breaches of professional secrecy obligations in Switzerland result in criminal prosecution,⁵⁴ whereas in the United States similar breaches result only in disciplinary action by professional organizations.

Bank secrecy laws in Switzerland are thus intended to protect the customer's personality right to financial privacy. The personal right to privacy which is the basis for bank secrecy is enunciated in Article 28 of the Swiss Civil Code.⁵⁵

2. *Swiss Contract Law*

Swiss contract law provides the second basis for banking secrecy. Bankers have a contractual duty to keep their customers' records secret. This duty, derived from the law of agency, is implied; it does not depend upon express agreement.⁵⁶ Disclosure is an actionable breach of contract. To establish the banker's liability, the customer must prove: 1) the damages sustained by the disclosure, 2) breach of contract by the banker, i.e., the disclosure and 3) cause in fact and proximate cause, i.e., that the damages were caused foreseeably by the disclosed information.⁵⁷ There is even a rebuttable presumption of fault against the banker. The banker's duty of nondisclosure remains in effect after the deposit contract ends and continues as long as protection of the client's interest de-

marriage and procreation); *Roe v. Wade*, 410 U.S. 113 (1973) (the Constitution protects a woman's right to decide whether to terminate her pregnancy).

⁵² See Meyer, *supra* note 37, at 21.

⁵³ *Id.* See also Navickas, *supra* note 3, at 167; Greene, *supra* note 18, at 27.

⁵⁴ Clergymen, lawyers, notaries, auditors, and physicians who divulge a client's secrets face imprisonment for between three days and three years and/or a fine of up to \$f40,000. See STFB, C.P., COD. PEN., art. 321.

⁵⁵ "Where anyone is being injured in his person or reputation by another's unlawful action, he can apply to the judge for an injunction." See ZGB, C.C., COD. CIV., art. 28.

⁵⁶ See Comment, *Effect of Secrecy*, *supra* note 16, at 546; see also Note, *Recent Hope*, *supra* note 3, at 318.

⁵⁷ OR, C.O., COD. OBL., arts. 42, 43, 44 & 99(3).

mands.⁵⁸ Suit may be brought not only against the banker, but also against the bank itself, which is vicariously liable for the breaches of its agents.⁵⁹

Since suit may be brought against the banker and the bank for breaches committed by its employees, numbered or coded accounts are sometimes used. A numbered account is one for which the customer is designated by a four-digit number instead of by name.⁶⁰ It is often erroneously assumed that numbered accounts receive special treatment under Swiss law. This is not the case.⁶¹ Numbered accounts are subject to the same legal provisions as are all other kinds of accounts. The secrecy obligation applies equally to and to the same extent as all other types of accounts.⁶²

The purpose behind using numbered accounts is to reduce the chance of unauthorized disclosure. By referring to the depositor by number instead of by name in bank communications, it is less likely that a bank employee will commit an indiscretion.⁶³ Under the Agreement between the Swiss Bankers' Association and the Swiss National Bank on the Observance of Care by Banks in Accepting Funds and on the Practice of Banking Secrecy, the banks bind themselves not to open any new account without first identifying its beneficial owner. In addition, they bind themselves not to support the flight of capital or tax evasion.⁶⁴ If the owner is suspect, the bank is not required to inform the authorities, but is obliged to immediately abandon business relations with the suspicious client.⁶⁵ Failure to comply with the terms of the above agreement may result in an assessed penalty of up to ten million Swiss francs.⁶⁶

Because Swiss banks have recently become sensitive to the charge of indiscriminately opening accounts into which criminals deposit illegally-obtained money, Swiss banks are increasingly reluctant to open new numbered accounts.⁶⁷ Coded accounts are now granted only when the depositor is already a customer of the bank or when the depositor demonstrates a good reason for wanting added protection.⁶⁸ Thus, the per-

⁵⁸ See *id.* art. 101(1).

⁵⁹ See Honegger, *supra* note 33, at 3.

⁶⁰ See Comment, *Effect of Secrecy*, *supra* note 16, at 547 n.59.

⁶¹ See Meyer, *supra* note 37, at 28.

⁶² *Id.*

⁶³ See Comment, *Effect of Secrecy*, *supra* note 16, at 548.

⁶⁴ See Honegger, *supra* note 33, at 8.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Meyer, *supra* note 37, at 28.

⁶⁸ See Comment, *Effect of Secrecy*, *supra* note 16, at 548 n.63.

centage of coded accounts is small.⁶⁹ Contrary to popular belief, purely anonymous accounts do not exist in Switzerland.⁷⁰ Although the ordinary bank employee will not know the identity of the beneficial owner of a numbered account, at least one or more senior executives must know the owner's identity. Numbered accounts are then, "nothing but an internal technical device to help banks avoid secrecy violations by their employees."⁷¹

3. *Swiss Penal Code Provisions*

The Swiss Penal Code contains various provisions which criminalize breaches of secrecy. Article 273 makes it criminal to disclose a business secret to a foreign source, if it is in Switzerland's national interest to keep such information secret, or if third persons with an interest worthy of protection have not consented in advance to disclosure.⁷² Disclosure may result in imprisonment, fine, or, in severe cases, penal servitude.⁷³ Under Article 159 of the Code, if disclosure of confidential business information results in impairment of a client's resources, the individual causing the loss may be charged with "unfaithful management."⁷⁴ Article 271 of the Code makes it a violation of Swiss sovereignty for any foreign government to request a Swiss resident to perform acts within Swiss borders without the express permission of the Swiss government. This provision applies to official contacts with United States government employees or agents, though the mail, over the telephone, or in meetings in Switzerland.⁷⁵

4. *The Banking Law of 1934*

The Banking Law of 1934⁷⁶ affords bank secrecy a fourth protection. While the Banking Law criminalizes violations of bank secrecy, this was not the express purpose for its enactment.⁷⁷ Rather, it was intended primarily to provide the proper government supervision of banking activities needed to guard against bank collapses similar to those experienced during the Great Depression in the United States.⁷⁸ Addi-

⁶⁹ See Meyer, *supra* note 37, at 28 n.55.

⁷⁰ H. BAR, *THE BANKING SYSTEM OF SWITZERLAND* 61 (1957).

⁷¹ See Honegger, *supra* note 37, at 5.

⁷² STGB, C.P., COD. PEN., art. 273.

⁷³ See Note, *Recent Hope*, *supra* note 3, at 306 n.20.

⁷⁴ Navickas, *supra* note 3, at 168.

⁷⁵ *Id.*

⁷⁶ See Banking Law of 1934, *supra* note 36.

⁷⁷ See Navickas, *supra* note 3, at 168.

⁷⁸ See Comment, *Effect of Secrecy*, *supra* note 16, at 546 n.51.

tionally, the Banking Law served a political purpose. Consonant with Switzerland's long-standing tradition of offering refuge to those fleeing religious, political, and racial persecution, the Banking Law sought to protect Jews and their assets from pillage by the Nazis.⁷⁹ To facilitate Nazi efforts to confiscate property owned by Jews and other "enemies of the state," the Nazis enacted a law making it a crime, punishable by death, to hold assets in a foreign country.⁸⁰ To ferret out funds suspected of being "enemy" holdings, Hitler sent Gestapo agents into Switzerland who pressured Swiss bankers to reveal information relating to German client accounts.⁸¹ The Swiss Parliament drafted Article 47 in an effort to discourage further cooperation with the Nazis. Article 47 made punishable by imprisonment or fine the disclosure of confidential information acquired in the course of providing banking services, as well as the attempt to induce others to disclose such confidential information.⁸²

Article 47 of the Banking Law, which is public law,⁸³ codifies existing private law⁸⁴ protection of bank secrecy found in the Civil Code and Code of Obligations.⁸⁵ Interestingly, this Federal Banking Law does not describe the requirements of the duty to respect banking secrecy. Rather, Article 47 merely prescribes penalties for violations of banking secrecy comprehensively defined in cantonal codes.⁸⁶ (Switzerland is a

⁷⁹ See Navickas, *supra* note 3, at 168. See also Address by True Davis, former United States Ambassador to Switzerland (June 1965), *quoted in* Greene, *supra* note 18, at 27-28:

Switzerland's tradition of neutrality has repeatedly made Switzerland a haven for refugees of religious, political, and racial persecution. In the 17th century, thousands of French Huguenots fleeing religious persecution came to Switzerland. Some of those became bankers and for obvious reasons had to maintain secrecy regarding their affairs with clients back in their homeland. A situation came about when a stream of French refugees poured into Switzerland following the French Revolution. A direct connection between Swiss neutrality and banking secrecy is seen in the fact that it was Hitler's persecution of the Jews which led to the Banking Law of 1934

⁸⁰ See Comment, *Effect of Secrecy*, *supra* note 16, at 547.

⁸¹ See Meyer, *supra* note 37, at 26.

⁸² See Banking Law of 1934, *supra* note 36.

⁸³ Public law is:

[t]hat branch or department of law which is concerned with the state in its political or sovereign capacity, including constitutional and administrative law, and with the definition, regulation and enforcement of rights in cases where the state is regarded as the subject of the right or object of the duty, including criminal law and criminal procedure . . .

BLACK'S LAW DICTIONARY 1106 (5th ed. 1979).

⁸⁴ Private law is:

all that part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person in whom the right inheres and the person upon whom the obligation is incident are private individuals.

BLACK'S LAW DICTIONARY 1076 (5th ed. 1979).

⁸⁵ See ZGB, C.C., COD. CIV., art. 28; OR, C.O., COD. OBL., arts. 41 & 49.

⁸⁶ See Banking Law of 1934, *supra* note 36.

confederation of twenty-six cantons loosely organized into a republic.⁸⁷ The functions of its weak central government are to "manage foreign affairs, control arms and alcohol, regulate the currency and run the railroads . . . everything else is left to the cantons."⁸⁸

As most criminal, civil, and administrative cases are heard before cantonal courts,⁸⁹ so too are alleged violations of banking secrecy. In such cases, judges will apply cantonal procedural and substantive law to determine whether a banker has breached secrecy duties; if so, the judge will select an appropriate punishment from those enumerated in the Banking Law.⁹⁰ What constitutes a breach of banking secrecy varies widely, depending upon the canton involved.⁹¹

B. Exceptions to Bank Secrecy

1. Public Law Limitations

"The fact that bank secrecy is primarily of private law character, although recognized and sanctioned by the [public] Banking Law, has far-reaching consequences."⁹² Given the supremacy of public over private law, secrecy must yield whenever the public law stipulates a duty inconsistent with private law.⁹³ Consequently, one of the many exceptions to the bank secrecy rule lies within a banker's public law duty to provide information and testify in judicial proceedings.⁹⁴

Circumstances under which bankers are obliged to testify and divulge bank secrets to Swiss authorities are determined by federal and cantonal law.⁹⁵ Criminal procedure is governed primarily by cantonal legislation.⁹⁶ Each cantonal code of criminal procedure, as well as the

⁸⁷ T. FEHRENBACH, *THE SWISS BANKS* 11 (1966).

⁸⁸ *Id.*

⁸⁹ "The bulk of criminal, civil, and administrative cases takes place before cantonal courts . . . which follow cantonal procedural codes and apply the substantive law of both the confederation and the cantons at the same time. Federal procedural laws are applied only before the Federal Supreme Court . . ." Meyer, *supra* note 37, at 31 n.82.

⁹⁰ See Comment, *Effect of Secrecy*, *supra* note 16, at 547. If the substantive provisions of federal law are to supercede cantonal procedural law, such will always be expressly mentioned in the federal law. As the Banking Law of 1934 contains no such exception, cantonal procedural law is controlling in cases of bank secrecy violations. See Mueller, *The Swiss Banking Secret*, 18 INT'L & COMP. L.Q. 360, 367 (1969).

⁹¹ See Navickas, *supra* note 3, at 170.

⁹² Meyer, *supra* note 3, at 27.

⁹³ *Id.*

⁹⁴ See Comment, *Effect of Secrecy*, *supra* note 16, at 550.

⁹⁵ Article 47(4) of the Banking Law of 1934 provides that "Federal and cantonal regulations concerning the obligation to testify and furnish information to a government authority shall remain reserved." See *supra* note 36.

⁹⁶ *Id.* See Honegger, *supra* note 33, at 6.

Federal Law of Criminal Procedure, confers a duty upon third persons to testify and furnish documents in criminal proceedings. Whereas clergymen, physicians, lawyers, and the accused are exempt from this duty, bankers must always cooperate in criminal proceedings.⁹⁷ Bank secrecy, therefore, may never be invoked to override the public duty to testify in criminal proceedings.⁹⁸

In civil proceedings, however, the particular canton law determines if bankers are required to testify and furnish documents. All twenty-six cantonal codes of civil procedure recognize a general duty of third persons to testify and furnish documents in civil proceedings, but each differs on exemptions for those in possession of financial secrets.⁹⁹ The various cantonal codes fall into three general categories. In eleven cantons, including Lucerne, persons entitled to refuse to testify are specifically enumerated; bankers are absent from the list.¹⁰⁰ In six cantons, including Zurich, the judge is permitted, by balancing the respective interests involved, to decide whether an exemption should be granted in each particular case.¹⁰¹ The Federal Law of Civil Procedure takes the same approach.¹⁰² In eight cantons, including Geneva and Berne, bankers are generally entitled to refuse to testify concerning professional secrets.¹⁰³

2. Debtor and Bankruptcy Limitations

Bank secrecy may also be broken in order to collect debts or conduct bankruptcy proceedings.¹⁰⁴ Debtors cannot hide their assets behind bank secrecy statutes to avoid paying their debts.¹⁰⁵ Thus, a debt collection agency has a right to information if it is needed to pay off creditors.¹⁰⁶ Even without prior commencement of a debt collection proceeding, a bank account may be attached for monetary claims if the account's owner has no fixed place of residence in Switzerland or is likely to evade legal obligations.¹⁰⁷ In the later stages of the attachment pro-

⁹⁷ *Id.*

⁹⁸ See Comment, *Effect of Secrecy*, *supra* note 16, at 551.

⁹⁹ See Meyer, *supra* note 37, at 31.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 32.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 35.

¹⁰⁵ See The Federal Law Concerning the Execution of Debts and Bankruptcy of Apr. 11, 1889, RS 281.1, arts. 222, 224, 228 [hereinafter the Bankruptcy Law].

¹⁰⁶ See generally M. AUBERT, I. KERNEN, & H. SCHOENLE, *LE SECRET BANCAIRE* 122-34 (2d ed. 1982).

¹⁰⁷ See Meyer, *supra* note 37, at 35.

ceeding, the creditor usually acquires a right to learn about the nature and size of the attached property.¹⁰⁸

In bankruptcy proceedings against the bank itself, bank secrecy laws may also be overridden.¹⁰⁹ It is thought that the privacy rights of a few bank customers should give way to creditors' rights to know the bank's business.¹¹⁰

3. *A Customer's Waiver of the Right to Secrecy*

Since bank secrecy is primarily a private law matter, it follows that the customer and not the bank is master of the secret.¹¹¹ Thus, the right to financial privacy can be waived if the client authorizes the bank to release confidential information to the Swiss government or a third party.¹¹² This waiver takes on added significance when the third party recipient of the information is a foreign governmental authority.¹¹³ According to the Swiss Supreme Court, if a customer does not affirmatively waive the right to financial privacy, the desire to maintain confidentiality must be presumed. The presumption may be overcome, however, by proof of explicit authorization or a manifest willingness to allow disclosure.¹¹⁴

IV. TREATY ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Assuming a customer waives the right to secrecy, the SEC, intent on investigating alleged insider trading violations, may still be barred in its access to the released information. Swiss bankers are permitted to divulge secrets to Swiss but not foreign authorities.¹¹⁵ Foreign authorities must request judicial assistance through their diplomatic missions, unless there is a special agreement. All such requests must be addressed to the

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ The Bankruptcy Law, *supra* note 105, art. 323.

¹¹¹ See Meyer, *supra* note 37, at 29.

¹¹² *Id.* Note, however, that one may envision a scenario where a customer waives his personal right to financial privacy and is later prosecuted for violating article 273 by releasing confidential information to a foreign government without the permission of the Swiss government. See *infra* note 32. Remember that article 273 protects a public interest—Switzerland's right to economic sovereignty. Remember also that in civil law countries it is public law which controls in the face of contrary private law. A conflict of this sort is intimated in the *Santa Fe* case, discussed *infra* note 162 and accompanying text.

¹¹³ See *infra* notes 155-70 and accompanying text for a discussion of waiver in the context of a United States federal court ordering that secrecy be waived. See also *infra* note 235 for a discussion of the Bankers' Agreement stipulation that traders on the United States securities markets are required to waive their rights to secrecy as a condition to trading on the United States market.

¹¹⁴ See Meyer, *supra* note 37, at 29.

¹¹⁵ See STGB, C.P., COD. PEN., art. 273, *supra* note 32.

Swiss Federal Department of Justice and Police. The Department, in turn, forwards the requests to the competent cantonal court which rules on the requests.¹¹⁶ Annuling bank secrecy is a "compulsory measure," consequently a cantonal court may only do so if it is expressly provided for under Swiss law or a ratified treaty.¹¹⁷ Treatment of United States requests for judicial assistance is often governed by the United States-Swiss Treaty on Mutual Assistance in criminal matters.¹¹⁸

Efforts to conclude a legal assistance treaty in criminal matters between the United States and Switzerland began prior to World War II.¹¹⁹ Yet not until 1973, after five years of arduous negotiation, did the two nations sign the Treaty. The Treaty did not become operative for an additional four years.¹²⁰ MAT is the first judicial assistance treaty in criminal matters signed between two countries with completely different legal systems—one, common law, the other, civil law. It is precisely in the area of criminal proceedings that divergence between civil and common law is most significant.¹²¹

The motives of the signatory nations for entering into the agreement differed greatly. Switzerland sought a comprehensive agreement covering all aspects of judicial assistance, similar to the European Convention on Mutual Assistance Matters, yet protective of Switzerland's personality rights.¹²² The Swiss would not agree to the "comparatively intrusive" discovery proceedings commonly used in the United States.¹²³ Meanwhile, the United States sought an agreement conducive to piercing the Swiss secrecy veil, particularly to prosecute tax, securities, and organized crime offenders.¹²⁴ The final agreement represents a compromise of the parties' competing interests.¹²⁵

Assistance under the Treaty includes locating witnesses, taking statements and testimony, producing and preserving business records, attaching assets, and extending service of judicial and administrative docu-

¹¹⁶ See Honegger, *supra* note 33, at 8.

¹¹⁷ *Id.* at 9.

¹¹⁸ See MAT, *supra* note 4.

¹¹⁹ See Meyer, *supra* note 37, at 63.

¹²⁰ "The lengthy period between signing and effectiveness was partially due to the elaborate ratification process and Switzerland's need to extract an Execution Law to the Treaty." Meyer, *supra* note 37, at 64 n.270. "[T]he Treaty required enactment of regulations which must have the force of law, (for example, specification of the competence of the federal and central authorities) and legal rights of appeal to challenge decisions of these authorities." Greene, *supra* note 18, at 29.

¹²¹ See Honegger, *supra* note 33, at 13.

¹²² *Id.* at 14.

¹²³ See Navickas, *supra* note 3, at 172.

¹²⁴ See Honegger, *supra* note 33, at 14.

¹²⁵ See Meyer, *supra* note 37, at 64.

ments.¹²⁶ Assistance under the Treaty is compulsory for investigations related to the prosecution of offenses which constitute crimes in both countries.¹²⁷ Given that insider trading, *per se*, is not presently a crime under Swiss law, the requirement of dual criminality takes on tremendous importance in the insider trading context.¹²⁸

The Treaty contains a schedule of thirty-five named offenses which permit the use of compulsory measures.¹²⁹ Offenses such as murder, kidnapping, larceny, extortion, fraud, arson, and perjury are included. Notably absent are violations of the securities, antitrust, and tax laws. While the Swiss do not condone such activities, they do not regard them as crimes under Swiss law.¹³⁰ For offenses not listed in the schedule, but which constitute crimes in both the United States and Switzerland, the Swiss Division of Police will determine whether the offense is significant enough to justify the use of compulsory measures; if so, assistance will be granted.¹³¹ Left unclear is whether the Swiss Division of Police will treat United States securities violations as "fraud" under the schedule for purposes of extending assistance under the Treaty. Trading on the basis of non-public information constitutes fraud in the United States where it is both a civil and criminal violation of securities laws. Unfortunately, insider trading has no readily identifiable counterpart under Swiss penal law. Of the offenses listed in the schedule, the offense which comes closest by analogy to violations of the United States securities laws is "fraud." Consequently, it is unclear whether the Swiss Division of Police will regard securities violations as triggering the use of compulsory measures.¹³²

The MAT excludes "foreign, political, military and fiscal offenses"¹³³ from its application. Consequently, Switzerland is entitled to refuse assistance if such cooperation would threaten the "public order." MAT's "public order" clause makes assistance under the Treaty discretionary if such assistance is likely to "prejudice the sovereignty, security, public policy or similar essential interests" of the assisting state.¹³⁴

The degree to which the public order clause may be invoked to defeat a request for assistance to protect bank secrecy thus becomes a cru-

¹²⁶ See MAT, *supra* note 4, art. 1(4).

¹²⁷ *Id.* art. 4.

¹²⁸ See Honegger, *supra* note 33, at 18.

¹²⁹ See MAT, *supra* note 4 (Schedule of Offenses for which compulsory measures are available).

¹³⁰ See Navickas, *supra* note 3, at 172.

¹³¹ See MAT, *supra* note 4, art. 4(3).

¹³² See Greene, *supra* note 18, at 29.

¹³³ See Meyer, *supra* note 37, at 64.

¹³⁴ See MAT, *supra* note 4, art. 3(1)(a).

cial issue. Although MAT itself does not specifically address this question, MAT correspondence between the United States and Swiss ambassadors provides some insight.¹³⁵ It is generally believed that legal assistance cannot be refused simply because a banking secret is affected.¹³⁶ Article 3(2) of MAT indicates that refusal to cooperate is intended to be a rare exception.¹³⁷ Hence, only if assistance would effect a serious breach of secrecy protection—for example, if a bank were asked to disclose relationships with a large number of its customers not involved in the alleged crime or large transactions important to the Swiss economy¹³⁸—could invocation of the public order clause successfully defeat a request for assistance.

Incorporated in the Treaty is the Swiss doctrine of “specialty.” Specialty requires that information obtained under the Treaty be used only in the proceeding for which it was requested.¹³⁹ Thus, information may not be requested and obtained under criminal charges and then be used in an unrelated fiscal prosecution or civil proceeding.¹⁴⁰ The Treaty leaves unanswered the question of whether information obtained under the Treaty by the United States Department of Justice for use in criminal proceedings against alleged inside traders may be turned over to the SEC for use in related civil proceedings. Given that few securities violations are prosecuted criminally, if special dispensation were not granted for insider trader investigations, the SEC’s enforcement efforts would be severely frustrated.¹⁴¹ In sum, it is the unsettled status that MAT accords United States securities violations and SEC investigations which creates loopholes which inside traders utilizing Swiss banking facilities may exploit.

V. THE APPROACH OF UNITED STATES COURTS

The major loopholes left open in MAT gave the SEC no choice but to resort to the use of United States federal court discovery orders in

¹³⁵ See Letters of May 25, 1973, 27 U.S.T. 2120, T.I.A.S. No. 8302, *reprinted in* 12 INT’L LEGAL MATERIALS 969-71 (1973), where the United States and Swiss Ambassadors expressed their mutual understanding that under the “public order” clause, article 3(1), a requested state could refuse assistance.

¹³⁶ See Meyer, *supra* note 37, at 65.

¹³⁷ See MAT, *supra* note 4, art. 3(2).

¹³⁸ See Meyer, *supra* note 37, at 65.

¹³⁹ Article 5(1) provides that any information obtained under the Treaty “shall not 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 assistance has been granted.” See MAT, *supra* note 4, art. 5(1).

¹⁴⁰ See Meyer, *supra* note 37, at 55.

¹⁴¹ See Greene, *supra* note 18, at 30.

order to nullify the effect of Swiss banking secrecy in insider trading prosecutions. Edward Greene, former General Counsel of the SEC conceded in January of 1983 that the MAT was of limited usefulness to the SEC.¹⁴² As of that date, the Treaty had never been successfully used to prosecute an inside trader.¹⁴³

The case of *SEC v. Banca Della Svizzera Italiana*¹⁴⁴ ("BSI") illustrates how the SEC can use federal court discovery orders to expose insiders who trade illegally on United States securities markets and attempt to hide behind the protective veil of Swiss bank secrecy laws. In *BSI* the SEC sought an order pursuant to Federal Rule of Civil Procedure 37 compelling BSI to identify the customers on whose behalf it purchased certain stock and call options¹⁴⁵ or to pay stiff penalties.

On March 10, 1981, BSI bought stock and call options of St. Joe Minerals Corp. ("St. Joe") on the New York and Philadelphia Stock Exchanges. One day later, Joseph E. Seagram and Sons, Inc. announced a cash tender offer¹⁴⁶ for all St. Joe common stock. Immediately thereafter, BSI closed out its stock option purchases and sold 2,000 of the 3,000 shares of common stock it purchased on March 10. Overnight, the purchasers made a profit of approximately two million dollars.¹⁴⁷

The sudden increase in market activity triggered a preliminary SEC investigation. The SEC suspected that persons with knowledge of the tender offer made the purchases and that such knowledge could only have come from sources who had a duty either to refrain from trading or to keep the information confidential prior to public announcement of the tender offer.¹⁴⁸ The SEC then filed suit in the United States District Court for the Southern District of New York alleging insider trading by the bank and its principals. The SEC obtained a temporary restraining order ("TRO") freezing some of BSI's assets held in an Irving Trust Company account which were thought to be the proceeds of the suspect transactions.¹⁴⁹ The TRO also directed the bank to disclose the identity

¹⁴² *Id.* at 29.

¹⁴³ See Comment, *Effect of Secrecy*, *supra* note 16, at 563.

¹⁴⁴ 92 F.R.D. 111 (S.D.N.Y. 1981).

¹⁴⁵ "A 'call' is a negotiable options 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." Comment, *Effect of Secrecy*, *supra* note 16, at 558 n. 163.

¹⁴⁶ "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 a shareholder list, by a general mailing to all stockholders." *Id.* at 558 n.164.

¹⁴⁷ See *BSI*, 92 F.R.D. at 113.

¹⁴⁸ *Id.*

¹⁴⁹ Over the next eight months, the SEC attempted to learn the identity of the Swiss bank clients

of its customers, to the extent permitted by law.¹⁵⁰

The bank refused to identify its customers, asserting that disclosure would expose the bank to civil and criminal liability in Switzerland. In an unusual decision, Judge Milton Pollack rendered an opinion requiring disclosure pursuant to Federal Rules of Civil Procedure 33 and 37. Non-compliance with the discovery order would result in \$50,000 per day in fines and an order to "cease and desist from any further trading on the US securities markets."¹⁵¹

In deciding whether to impose sanctions on the party resisting discovery when foreign law prohibits disclosure, the *BSI* court looked to Section 40 of the Restatement (Second) of Foreign Relations for guidance.¹⁵² Section 40 sets forth factors to be examined in determining which one of two conflicting national laws should be enforced when both countries have jurisdiction and the two countries' laws require inconsistent conduct. 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 persons;
- c) the extent to which the required conduct is to take place in the territory of the other country;
- d) the nationality of the persons; 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.¹⁵³

After applying Section 40, the court concluded that the relevant considerations "tipped decisively in favor of the SEC" and application of United States law.¹⁵⁴

In analyzing the vital national interests at stake, the court found that the United States interest in enforcing its securities laws to ensure the integrity of its markets was paramount.¹⁵⁵ As for the Swiss national interests, the court found significant the fact that the Swiss government, although aware of the discovery order, expressed no opposition to it. The court also noted that the secrecy privilege could be waived in this case without harm to the Swiss government, since Swiss bank secrecy

through interrogatories pursuant to FED. R. CIV. P. 33. See Navickas, *supra* note 3, at 174 n.75. See also Greene, *supra* note 18, at 30.

¹⁵⁰ The bank was given three business days to comply with the order. See Navickas, *supra* note 3, at 174 n.76.

¹⁵¹ See *BSI*, 92 F.R.D. at 113.

¹⁵² See Comment, *Effect of Secrecy*, *supra* note 16, at 559.

¹⁵³ RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

¹⁵⁴ See *BSI*, 92 F.R.D. at 117.

¹⁵⁵ *Id.*

laws were enacted primarily for the purpose of protecting bank customers' rights to financial privacy, not the Swiss government. The court reiterated the waiver provision in its discussion of hardship considerations. While the court did acknowledge the possibility that BSI could be fined and its officers imprisoned under Swiss law, the court also discussed ways in which BSI could comply with United States law without violating Swiss law. To be relieved of criminal liability under Swiss law, BSI could obtain secrecy waivers from its customers. Even without such waivers, BSI could still escape prosecution under the "State of Necessity" exception to Article 34 of the Swiss Penal Code if its disclosure constituted an act committed to protect BSI's "own good" and "fortune" from an immediate danger it did not cause and could not avoid. In the opinion of the Second Circuit, the possibility that a Swiss court could hold inapplicable the "State of Necessity" exception—since BSI had knowingly and in bad faith created its current dilemma—was a hardship BSI would have to bear.¹⁵⁶

Finally, the court held that a foreign law's prohibition of discovery is not an absolute bar to compelling discovery, particularly where the party resisting discovery has acted in bad faith.¹⁵⁷ Here, the court characterized BSI as "one who deliberately courted legal impediments and who thus cannot now be heard to assert its good faith."¹⁵⁸ The Court reasoned that sanctions were appropriate where "it would be a travesty of justice to permit a foreign company to invade American markets, violate American laws . . . , withdraw profits and resist accountability for itself and its principals for the illegality by claiming their anonymity under foreign law."¹⁵⁹

BSI demonstrates the lengths to which United States courts can and will go to enforce domestic securities laws. Where parties resist United States court discovery orders in bad faith, foreign bank secrecy laws will not deter United States courts from imposing sanctions, provided factors articulated in Section 40 of the Restatement (Second) weigh heavily in the SEC's favor. The threat of stiff penalties worked in *BSI*. Within one week after Judge Pollack's decision, the bank obtained from some of its

¹⁵⁶ *Id.* at 118. Article 34 of the Swiss Penal Code states:

Present Danger: 1. An act committed by a person to save his life, person, freedom, honor, or property from an immediate danger which cannot be averted otherwise, shall not be punishable if the danger was not caused by the offender and further if he could not be expected under the circumstances to make this sacrifice. If the danger was caused by the offender or if he could be expected to make this sacrifice, the court, in its discretion, may impose a less severe sentence.

STGB, C.P., COD. PEN., art. 34.

¹⁵⁷ See *BSI*, 92 F.R.D. at 114.

¹⁵⁸ *Id.* at 117.

¹⁵⁹ *Id.* at 119.

customers waivers of their rights to secrecy.¹⁶⁰

In other cases, judicial attempts to penetrate Swiss bank secrecy have been less successful.¹⁶¹ Just prior to the *BSI* decision, the SEC initiated another insider trading action against unknown purchasers of call options and common stock in Santa Fe International.¹⁶² The SEC indicted unknown traders who purchased call options and stock while in possession of non-public information about a prospective merger between Santa Fe International and Kuwait Petroleum. Unlike *BSI*, *Santa Fe* involved most of the major Swiss banks.¹⁶³ Had the court for the Southern District of New York ordered all the named defendants to pay steep fines for nondisclosure, it would have imperiled the health of the entire Swiss banking industry.¹⁶⁴ Furthermore, if the court had blocked the banks' access to United States securities markets as it had threatened to do in *BSI*, the court would have substantially undermined the smooth operation of those markets.¹⁶⁵ Given that Switzerland accounts for one-fifth of the total foreign trading on United States securities markets,¹⁶⁶ the withdrawal of the named defendants could have caused a temporary market upheaval, or worse, a serious long-term threat to the health of United States securities markets.¹⁶⁷

¹⁶⁰ Comment, *Effect of Secrecy*, *supra* note 16, at 559 n.181. See also Honegger, *supra* note 33, at 11 n.97:

The defendant had furnished some, but not all, of the answers to the demanded interrogatories after a waiver of Swiss banking confidentiality was secured from the customers concerned. The released information disclosed the names of three Panamanian corporations and one Swiss corporation for whom the St. Joe options had been purchased, as well as the name of the customer who had ordered the transactions on the corporations' behalf: Giuseppe Tomo, a close friend and advisor of the head of the Seagram Company.

¹⁶¹ See, e.g., *Swiss Supreme Court Opinion Concerning Judicial Assistance in the Santa Fe Case*, 22 INT'L LEGAL MATERIALS 785 (1983) (where the court refused a United States Department of Justice request pursuant to MAT for Swiss banking records revealing the identities of United States citizens suspected of engaging in unlawful insider trading. The court held that the United States failed to prove the elements of unfaithful management, fraud, or illegal disclosure of business secrets. The alleged insider trading activity was therefore not criminal in Switzerland. Hence, assistance under MAT was not mandated. The Swiss Federal Office of Police then denied the request for assistance. The court's decision reaffirmed Swiss bank secrecy and set back United States efforts to prosecute citizens who channel illegal transactions through Swiss banks). See also Recent Development, *Extraterritoriality*, *supra* note 35, at 462-63.

¹⁶² *SEC v. Certain Unknown Purchasers of the Common Stock and Call Options for the Common Stock of Santa Fe International Corporation*, [1981-82 Transfer Binder] Fed. Sec. L. Rep. (CCH) 98, (S.D.N.Y. Oct. 26, 1981) [hereinafter *Santa Fe*].

¹⁶³ Named as defendants were: Credit Suisse, Swiss American Securities, Inc., Citibank, N.A., Lombard Odier and Cie, Morgan Guaranty Trust Company of New York, Swiss Bank Corp., Drexel Burnham Lambert, Inc., Chase Manhattan Bank, N.A., and Mosely Hallgarten Estabrook and Weed, Inc. See *Santa Fe*, *supra* note 162.

¹⁶⁴ See Navickas, *supra* note 3, at 177.

¹⁶⁵ *Id.*

¹⁶⁶ See text accompanying notes 43-45.

¹⁶⁷ See Navickas, *supra* note 3, at 177.

The precariousness of the situation for both countries provided the impetus to negotiate beneficial solution. The result is embodied in the Memorandum of Understanding¹⁶⁸ and the accompanying Bankers' Agreement.¹⁶⁹ The Memorandum allows the SEC to obtain information from Swiss banks whenever the SEC can prove it has a reasonable belief that insider trading took place through a Swiss bank.¹⁷⁰

VI. THE MEMORANDUM OF UNDERSTANDING

At Switzerland's invitation, the two countries first discussed enforcement cooperation in the field of insider trading at Bern in March, 1982;¹⁷¹ discussions continued in Montreal in June, 1982.¹⁷² After two additional days of negotiation in Washington, D.C., the countries signed, on August 31, 1982, the Memorandum of Understanding.¹⁷³ Although the MOU is a declaration of intent, it does not have the binding force of an international treaty.¹⁷⁴ The MOU itself contains no procedural rules for United States and Swiss treatment of future insider trading. Procedural rules are contained in a private agreement of the Swiss Bankers' Association which is referred to in the MOU.¹⁷⁵

The MOU is divided into five articles: 1) Introduction; 2) Exchange of Opinions Regarding the Treaty Between the United States and Switzerland on Mutual Assistance in Criminal Matters; 3) Discussion of Swiss Bankers' Association; 4) Further Consultations; and 5) Other Understandings.¹⁷⁶

The Introduction states that both nations recognize the inherent conflict between the SEC's interest in identifying inside traders who utilize Swiss banks to effect their unlawful transactions and Swiss banks' interests in keeping secret their customers' identities.¹⁷⁷ Both nations recognize that the differing status of insider trading under Swiss and United States law contributes to this conflict. The nations explain that trading on the basis of material non-public information is criminal in the United States whereas such conduct, although dishonorable, is not *per se*

¹⁶⁸ See MOU, *supra* note 3, at 177.

¹⁶⁹ See BA, *supra* note 6.

¹⁷⁰ See Comment, *Effect of Secrecy*, *supra* note 16, at 561.

¹⁷¹ See Greene, *U.S., Switzerland Agree to Prosecute Inside Trades*, *Legal Times*, Oct. 4, 1975, at 17, col. 4.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Navickas, *supra* note 3, at 178.

¹⁷⁵ See MOU, *supra* note 5, art. I(7).

¹⁷⁶ See MOU, *supra* note 5.

¹⁷⁷ *Id.* art. I(3).

punishable in Switzerland.¹⁷⁸ Nevertheless, the two countries renew their commitment to providing law enforcement cooperation in the realm of insider trading, conduct which the countries agree is detrimental to their interests.¹⁷⁹

Article II of the MOU clarifies MAT in three ways which are particularly useful to the SEC. Article II 3(a) acknowledges that SEC investigations fall within the scope of MAT applicability since SEC investigations "relate to conduct which *might* be dealt with by the criminal courts."¹⁸⁰ Prior to this acknowledgement, it was unclear whether SEC investigations were eligible for mutual assistance, given that such investigations usually led to civil suits and disciplinary proceedings and rarely to criminal prosecution.¹⁸¹

Article II 3(b) of the MOU suggests that under the Swiss Penal Code, the offenses of fraud, unfaithful management, and violations of business secrets may serve as substitutes for the crime of insider trading and for purposes of obtaining assistance under MAT, at least until the Swiss enact their own law prohibiting insider trading.¹⁸²

Article II (4) of the MOU helps to clarify the meaning of Article I of MAT which provides assistance in certain "ancillary administrative proceedings in respect of measures which may be taken against the perpetrator of an offense falling within the purview of [MAT]."¹⁸³ Article II(4) has been interpreted as overcoming the Swiss presumption of specialty,¹⁸⁴ the doctrine which limits the use of information only to those proceedings for which it is obtained. With this provision, information obtained pursuant to Article I of MAT may be used in some administrative and judicial proceedings.¹⁸⁵ Switzerland has agreed to treat SEC injunctive and disgorgement proceedings as penal in nature, thus extending the use of information provided under the Treaty to such proceedings.¹⁸⁶ As for the use of MAT information in other administrative and judicial proceedings, the parties have not yet reached an agreement; they have, however, agreed to exchange diplomatic notes on the subject.¹⁸⁷

In Article III, the parties recognize that there may be securities

¹⁷⁸ *Id.* art. (2).

¹⁷⁹ *Id.* art. I(4).

¹⁸⁰ *Id.* art. II(1)(a).

¹⁸¹ See Navickas, *supra* note 3, at 178.

¹⁸² See MOU, *supra* note 5, art. II(3)(b).

¹⁸³ *Id.* art. II(4).

¹⁸⁴ See *supra* note 139.

¹⁸⁵ See Navickas, *supra* note 3, at 179.

¹⁸⁶ *Id.*

¹⁸⁷ See MOU, *supra* note 5, art. II(4).

transactions effected in the United States by Swiss banks acting on behalf of persons who possess material non-public information but which are not covered by MAT.¹⁸⁸ For example, assistance would not be required in cases of insider trading which fall outside the list of thirty-five offenses listed in the schedule or which do not constitute the Swiss crimes of fraud, mismanagement, or unlawful disclosure of business secrets. In sum, compulsory measures are not available under the treaty if known information on alleged insider trading fails to indicate the existence of an offense under the Swiss Penal Code.¹⁸⁹ The parties note that until the Swiss Parliament enacts legislation making insider trading a crime under Swiss law, cooperation in insider trading investigations not covered by the Treaty can still be obtained through a procedure adopted by the Swiss Bankers' Association.¹⁹⁰ Under certain specified circumstances, signatory banks to this private agreement would be permitted to disclose the identity of a customer and certain other relevant information.¹⁹¹ Article III (2) provides that the Swiss Bankers' Association will submit the provisional private agreement for signature to banks in Switzerland which may trade on United States securities markets.¹⁹² Article III (3) sets forth certain understandings between the governments regarding their roles with respect to the provisional agreement.¹⁹³

Article IV provides for future contacts and consultations regarding the SEC's use of best efforts to inform Swiss authorities about its investigations and the Swiss government's use of best efforts to communicate confidential information with due care.¹⁹⁴

Finally, Article V provides that the MOU "does not modify or supercede any laws or regulations in force in the US or Switzerland,"¹⁹⁵ nor confer on the bank customer the right to seek review in a United States court of a bank's decision to reveal the customer's identity pursuant to the provisional agreement.¹⁹⁶ The SEC's statutory powers have therefore not been altered by MOU. The Commission remains free to take measures outside the MOU and MAT when circumstances warrant.¹⁹⁷ Finally, the parties acknowledge the Swiss Bankers' Association's pledge to use its best efforts to promptly obtain banks' signatures to

¹⁸⁸ See MOU, *supra* note 5, art. III(1).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* art. III(2).

¹⁹³ *Id.* art. III(3).

¹⁹⁴ *Id.* art. IV(1) and IV(2)(a).

¹⁹⁵ *Id.* art. V(1).

¹⁹⁶ *Id.* art. V(2).

¹⁹⁷ See Greene, *supra* note 18, at 34.

the Agreement.¹⁹⁸

VII. THE SWISS BANKERS' ASSOCIATION AGREEMENT

The Swiss Bankers' Association lays out the formal procedure which the SEC must follow in requesting Swiss assistance in insider trading investigations not covered by MAT. The United States Department of Justice, acting on its own or on behalf of the SEC, sends a written application for assistance to the Swiss Federal Office for Police Matters which, in turn, transmits the request to a specially created Commission of Inquiry. Under certain conditions, the Commission orders the Swiss bank involved to file a report on the transaction under review and send the report to the Federal Office for Police Matters with instructions to forward the report to the SEC. The Agreement, which includes a preamble and 12 articles, can be subdivided into five parts:¹⁹⁹

- 1) the definitions of insider trading (Article 1) and insiders (Article 5);
- 2) a description of the Commission (Article 2) and preconditions to its inquiries (Article 3);
- 3) an explanation of how the Commission procures information from banks (Articles 4, 6, and 8) and transmits it to the Federal Office for Police Matters (Articles 5 and 7);
- 4) the way in which customers' accounts may be held (Article 9); and
- 5) enforcement provisions (Article 10).

The Board of Directors of the Swiss Bankers' Association agreed to appoint a Commission of Inquiry composed of three members, three deputies, and a staff.²⁰⁰ All Commission members and staff are bound by Swiss banking secrecy laws²⁰¹ and bank executives are ineligible to sit on the Commission.²⁰²

The Commission will accept SEC inquiries which relate to SEC discoveries that²⁰³ a customer directed a Swiss bank to buy or sell securities of a company involved in a business combination or acquisition before the merger or acquisition was announced. The SEC's inquiry applications must be accompanied by: 1) confirmation of SEC willingness to

¹⁹⁸ See MOU, *supra* note 15, art. III.

¹⁹⁹ BA, *supra* note 6.

²⁰⁰ *Id.* art. 2(1).

²⁰¹ *Id.* art. 2(2)j.

²⁰² *Id.*

²⁰³ *Id.* art. 1. This article provides for no inquiry if the SEC discovers that:

within 25 trading days prior to a public announcement . . . of (A) a proposed merger, consolidation, sale of substantially all of an issuer's assets or other similar business combination . . . 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 US 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.

Id.

place at the Commission's disposal all of the information in its possession materially relevant to the investigation;²⁰⁴ and 2) an SEC pledge not to disclose information obtained under the Agreement to anyone outside the SEC investigation.²⁰⁵

Furthermore, the SEC must establish to the "reasonable satisfaction of the Commission" that it has persuasive evidence indicating that insider trading occurred.²⁰⁶ The Commission *may* be satisfied if the SEC can furnish evidence of significant price or volume changes in the stock in question.²⁰⁷ However, the Commission *must* be satisfied with evidence that either price or volume changes exceeded certain stated levels.²⁰⁸ Failure of the SEC to furnish such evidence will not necessarily result in a presumption that no reasonable grounds for the request exist.²⁰⁹ Rather, the Commission will then review the information submitted by the SEC to determine whether reasonable grounds exist independent of Article 3(4) criteria.²¹⁰

If the Commission is reasonably satisfied, it will call for a report from the bank involved in the transaction under investigation.²¹¹ The bank must file a report with the Commission within forty-five days which describes the transaction in sufficient detail, including the name, address, and nationality of the customer, to demonstrate that the transaction was not made in violation of United States insider trading laws."²¹² In addition, the Commission will require the bank to:

- (a) freeze the customer's account to the extent of the profit gained or the loss avoided due to the suspicious transaction;²¹³
- (b) inform the customer of the Commission's inquiry;²¹⁴ and

²⁰⁴ *Id.* art. 3(2).

²⁰⁵ *Id.* art. 3(5).

²⁰⁶ *Id.* art. 3(4).

²⁰⁷ *Id.* art. 3(4)(i).

²⁰⁸ *Id.* art. 3(4)(ii). The Agreement provides that the Commission shall be satisfied in *all* cases where:

the daily trading volume of securities at issue increased 50% or more at any time during the 25 days prior to the announcement of an acquisition or business contribution above the average trading volume of such securities during the period from the 19th to the 13th trading day prior to such announcement, or 2) the price of such securities varied at least 50% or more during the 25 days prior to such an announcement.

Id.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* art. 4(1).

²¹² *Id.* art. 4(2-4).

²¹³ *Id.* art. 9(1). If the Commission furnishes information to the SEC, the funds will remain blocked until proceedings in United States courts terminate. If the Commission forwards no information, then the funds will be unblocked 30 days after the SEC is informed that it will receive no information. *Id.* at art. 9(2-3).

²¹⁴ *Id.* art. 4(2).

- (c) provide the customer an opportunity to respond to the SEC's allegations within 30 days of being informed of the Commission's inquiry.²¹⁵

With the information provided by the bank, the Commission will file its own report with the Federal Office for Police Matters.²¹⁶ The Commission's report is then forwarded to the SEC unless the bank or customer establishes to the Commission's reasonable satisfaction that the customer did not purchase or sell the securities involved in the transaction or that the customer was not an insider.²¹⁷ In cases in which the accuracy of the report is questioned, the SEC or the Commission may ask the Swiss Federal Banking Commission to examine the report.²¹⁸ If the Banking Commission determines that the bank has not complied with its obligations under the Agreement, the Board of Directors of the Swiss Bankers' Association will issue a warning to the bank.²¹⁹ If repeated violations are found, the bank must be excluded from the Bankers' Agreement and the Federal Banking Commission and the SEC informed.²²⁰ Although the Federal Banking Commission retains its disciplinary powers under the Banking Law, its sanctioning power is limited.²²¹ It cannot force the recalcitrant bank to furnish information or block a customer's account since the Agreement is only a multilateral contract of signatory banks and the Banking Commission is not a party to the Agreement.²²² Other signatory banks might attempt to enforce the contract, but under the Swiss Obligation Code the only available remedy for contract nonperformance is money damages. Since the remaining signatory banks will not suffer any damages, if a bank refuses to provide the Commission with information or fails to block a customer's account, the Code remedy is meaningless.²²³

Although the Agreement does allow the SEC to request the Swiss Federal Banking Commission to examine whether a report furnished by

²¹⁵ *Id.*

²¹⁶ *Id.* art. 5.

²¹⁷ *Id.* art. 5(1-2). For purposes of the Agreement, an insider is defined 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.

Id. art. 5(2).

²¹⁸ *Id.* art. 8.

²¹⁹ *Id.* art. 10.

²²⁰ *Id.*

²²¹ *See Id.* art. 8.

²²² *See Honegger, supra* note 33, at 35.

²²³ OR, C.O., COD., OBL., art. 97(1).

a bank conforms to the facts and to the present Agreement,²²⁴ the Agreement contains no provision for a review of a Commission determination that a report need not be filed. The MOU states that if the Commission "arrives at the conclusion that a client is not an insider as defined by the private Agreement, the SEC will judge this opinion as one made in good faith."²²⁵

The Bankers's Agreement is provisional; it is to be in force for a three-year period from January 1, 1983 and is renewable thereafter on a year-to-year basis.²²⁶ Provision is made for signatory banks to terminate their compliance with the Agreement.²²⁷ The Agreement will be abrogated if and when the Swiss Parliament enacts legislation making the misuse of inside information a crime.²²⁸ When insider trading becomes a crime in Switzerland, the need for the Bankers Agreement will be obviated and law enforcement assistance in a wide range of inside trading cases will become available under the existing Mutual Assistance Treaty.

VIII. EXISTING LIMITATIONS

The MOU and its companion BA clearly represent vast improvements over past practices by facilitating SEC investigations of insider trading violations concealed by Swiss bank secrecy laws. Use of the MOU and BA is preferable to the adversarial approach of United States court orders compelling discovery and assessing stiff penalties for non-compliance. As noted above, these unilateral efforts produce effects which are mutually disadvantageous to the United States and Switzerland. They threaten the livelihood of Swiss banks and the United States securities markets on which Swiss banks trade heavily. Furthermore, international relations are strained when the United States accuses Switzerland of conspiring with those who evade United States securities laws and Switzerland retorts that the extraterritoriality of United States securities law and the presence of its enforcement agents in Switzerland unduly encroach upon Swiss sovereignty.

Together the MOU and BA seek to clarify the ambiguities inherent in the MAT which are thought to have rendered the Treaty's utility to the SEC debatable. Moreover, the MOU and BA extend assistance to a new category of cases not presently covered by the Treaty. The Treaty's strict requirement that insider trading offenses be matched with the nar-

²²⁴ See BA, *supra* note 6, art. 8.

²²⁵ See MOU, *supra* note 5, art. III(3).

²²⁶ See BA, *supra* note 6, art. 11.

²²⁷ *Id.*

²²⁸ *Id.*

rowly-defined Swiss crimes of fraud, unfaithful management, and unlawful business disclosure necessarily limits assistance to a fraction of cases. Unfortunately, the MOU and BA have their share of limitations as well.

The most obvious and severe limitation of the BA is that it applies only to insider trading investigations of securities transactions which precede the public announcement of mergers and acquisitions.²²⁹ The BA would not, for example, apply to facts similar to those found in *Texas Gulf Sulphur Co.*,²³⁰ where insider information pertained not to an upcoming merger or acquisition, but to the company's discovery of oil which caused its stock to soar in value. Furthermore, the BA generally applies only to cases involving high levels of trading in affected securities over a short period of time.²³¹ Hence, the BA affords the SEC little assistance in a multitude of trading cases which constitute crimes in the United States, but which represent only dishonorable conduct in Switzerland.

Not only is insider trading defined narrowly under the BA, but so too is the definition of who is an "insider."²³² It appears that low-level corporate executives, bankers, news reporters, and stock exchange officials who are not employees of the company, but who obtain inside information in the course of their work, fall outside the scope of the BA. They do not fit the BA's definition of insiders, either as company employees, or as "tippees" who discover material information on their own.²³³ Note, however, that such persons might well be considered insiders under United States law.²³⁴

To implement the BA, signatory banks have asked their customers to sign waivers of banking secrecy allowing the banks to comply with any Commission of Inquiry requests for information.²³⁵ Without such a waiver, signatory banks will refuse to place a client's order for securities in the United States.²³⁶ Client waivers are only effective prospectively.

²²⁹ *Id.* art. 1.

²³⁰ See *Texas Gulf Sulphur*, 401 F.2d 833.

²³¹ See BA, *supra* note 6, art. 3(4). See also Navickas, *supra* note 3, at 184.

²³² See BA, *supra* note 6, art. 5(2).

²³³ See Note, *Recent Hope*, *supra* note 3, at 316-17.

²³⁴ *Id.* at 316. See, e.g., *Dirks v. S.E.C.*, 463 U.S. 646 (1983) (in dicta the Supreme Court indicated that if a "tippee" passes along to investors information which he knows or should know is material, nonpublic, and the product of a corporate insider's breach of a fiduciary duty, then the "tippee" violates Section 10(b) of the Securities Exchange Act of 1934). See also *United States v. Chiarella*, 445 U.S. 222 (1980) (it is the existence of a fiduciary relationship and not mere possession of material, nonpublic information which imposes upon "tippees" a duty to disclose such information under Section 10(b) of the Securities Exchange Act of 1934).

²³⁵ See BA, *supra* note 6, art. 12; see also Navickas, *supra* note 3, at 182.

²³⁶ See Navickas, *supra* note 3, at 183.

Consequently, the BA applies only to securities transactions made on or after January 1, 1983, the date the BA entered into force.²³⁷

Customers' waivers are problematic in another sense. If the customer expressly consents to the BA by signing a waiver of the right to confidentiality before actually trading on a United States securities market, and before there is a suspicion of any wrongdoing, the prospective waiver of a fundamental personality right may be challenged as being against public policy. Such a waiver of confidentiality may be contrary to the Swiss public order and to Article 27(2) of the Swiss Civil Code "which provides that no person can alienate his personal liberty nor impose any restrictions on his enjoyment thereof, which are contrary to law or morality."²³⁸ Because of the general nature of the customer's waiver, such an argument could possibly succeed.²³⁹ Furthermore, the customer waiver creates additional complications with regard to Article 273 of the Swiss Penal Code which seeks to protect the public interest and which individuals are not authorized to waive.²⁴⁰ If the customer's consent to the BA were presumed following the customer's failure to respond to two bank solicitations seeking consent, a Swiss court could decide that consent was never given, since, under Swiss law, silence to an offer usually does not constitute acceptance.²⁴¹

In principle, signing the BA would appear to be in a Swiss bank's best interest. Signature eliminates the dilemma banks traditionally face in deciding which of the conflicting United States and Swiss disclosure laws to follow in insider trading proceedings. Adherence to the BA allows a bank to avoid United States court-imposed asset attachments, fines, and prohibitions of trading on securities markets. Adherence also shields a bank from Swiss civil and criminal prosecutions for violating secrecy laws. Finally, to the extent that all other Swiss banks sign the BA, no one bank will acquire a competitive advantage over another.²⁴² To date, all of the members of the Swiss Bankers' Association who trade on United States securities markets have signed the BA, thus reducing the possibility that a major Swiss bank will harbor illegal insider trading profits.²⁴³

In practice, signing the BA might be less attractive than it otherwise

²³⁷ *Id.*

²³⁸ See Honegger, *supra* note 33, at 33.

²³⁹ *Id.*

²⁴⁰ See Greene, *supra* note 18, at 27.

²⁴¹ *Id.* at 34.

²⁴² See Navickas, *supra* note 3, at 183.

²⁴³ All banking and brokerage firms of consequence are members of the Swiss Bankers' Association. *Id.*

appears. Despite the fact that all Swiss Bankers' Association banks that trade on United States securities markets are signatories to the Agreement, there remain in Switzerland brokers who trade on United States securities markets who are not subject to the Swiss Bankers's Agreement.²⁴⁴ Although the volume of their United States trading activity may presently be low, if insiders can neutralize the effects of the MOU by choosing brokers who do not require customers to waive rights to confidentiality, trading through those brokers on United States stock exchanges may grow substantially.²⁴⁵ Worse yet, if, as a result of the MOU and BA, insider transactions through Swiss banks are made more difficult, determined inside traders may not halt their illegal activities. They may simply move them out of Switzerland to places such as Liechtenstein, Panama, or the Caribbean.²⁴⁶

IX. CONCLUSION

The MOU and BA arguably contribute much to improving United States efforts to detect insider trading. Exactly how much they have already contributed is difficult to measure. As the authorities involved agreed to keep all proceedings under the Memorandum secret, one cannot obtain empirical data on the Memorandum's usage.²⁴⁷ Michael Mann of the SEC's Enforcement Division admits that the SEC has been both granted and denied assistance under the MOU since its signature in 1982. He cannot reveal the reasons why assistance was withheld or when it was requested. He has, however, insinuated that both "public order" assertions and Commission of Inquiry findings, that certain traders were not insiders, led to the denials.²⁴⁸

Pending before the Swiss Parliament is legislation which would criminalize insider trading in Switzerland.²⁴⁹ This legislation represents the optimal solution for reconciling the differences between United States and Swiss attitudes towards security and bank secrecy protections. If insider trading, *per se*, becomes a crime under Swiss law, the dual criminality requirement of MAT will be met more easily than under the present regime. Mandatory assistance under the Treaty will then become

²⁴⁴ See Honegger, *supra* note 33 at 37.

²⁴⁵ *Id.* at 33.

²⁴⁶ *Id.* at 36.

²⁴⁷ Telephone Conversation with Michael Mann, Chief of the Office of International Legal Assistance, SEC Enforcement Division (Dec. 6, 1985).

²⁴⁸ *Id.*

²⁴⁹ DRAFT OF PROPOSED SWISS LEGISLATION ON INSIDER TRADING, Department Federale de Justice et Police, Doc. No. V776/LK/HS/PS/SM, annexe, *reprinted in* Navickas, *supra* note 3, at 190-91.

available in a wide range of insider trading cases. The new law is expected to encompass insider trading in more than just a mergers and acquisitions setting.²⁵⁰ It is estimated that, following review by the Swiss Parliament's first chamber in 1985 and the second chamber in 1986, the proposal will become law in early 1987.²⁵¹

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²⁵⁰ Conversation with Michael Mann, *supra* note 247.

²⁵¹ *Id.*