UNITED STATES INSIDER TRADING PROHIBITION IN CONFLICT WITH SWISS BANK SECRECY

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1. Introduction

The struggle to enforce federal securities laws that prohibit insider trading [1] has recently been described as an unwinnable war [2]. Violations are difficult to detect, expensive to investigate, and extremely troublesome to prove. The Securities and Exchange Commission (SEC), nonetheless, remains intransigent in the face of adversity. The Director of the SEC’s Division of Enforcement, John M. Fedders, has pledged to “intensify… efforts to prevent, detect and prosecute” trading based on non-public information [3]. Commenting on an article in Fortune magazine called “The Unwinnable War on Insider Trading”, SEC Commissioner Barbara Thomas announced that “everyone contemplating this sort of activity should understand that we will keep fighting the battle vigorously, and he or she trades at his or her peril” [4].

Although the SEC has succeeded in increasing the riskiness of insider trading [5], the Commission’s efforts are frequently thwarted when the violator has traded through a foreign bank. Bank secrecy laws in Switzerland, as well as in other countries, have proved an effective shield for traders desiring anonymity. Fortune’s assessment is gloomy — “Someone with a Swiss bank account and access to inside information can usually run roughshod through the financial markets, with little likelihood of being caught” [6]. An investigation of trades executed through foreign banks may be the toughest battle in the unwinnable war.

This paper will describe SEC enforcement problems [7] from both a legal and a policy perspective, and it will examine possible solutions. Section 2 will present the legal conflict through a discussion of the competing points of view of the United States and Switzerland [8]. Section 3 will analyze the enforcement methods available to the SEC and to the courts, with particular emphasis on recent litigation resulting from an SEC investigation of insider trading in the stock and options of St. Joe Minerals Corporation.

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2. The conflict

When an insider-trading transaction is executed on a U.S. exchange by a Swiss bank, the legal conflict arises from a twofold discrepancy between U.S. law and Swiss law. First, insider trading, a criminal offense in the United States, is not outlawed in Switzerland [9]. Secondly, in the United States bankers have a duty to disclose banking information to government authorities, so long as the investigation is not deemed unnecessary; and in some states they have no obligation of confidentiality beyond that imposed by considerations of professional ethics [10]. In Switzerland bankers may not disclose banking information to government authorities or anyone else except by specific court order or the customer’s express permission [11]. When the SEC uncovers evidence of insider trading that leads to a Swiss bank, the SEC’s legally mandated inquiry into the identity of the bank’s trading customers may be met by a reply that disclosure would subject the bank and its officers “to the risk of long-term imprisonment, fine, civil liability, and administrative sanction in Switzerland” [12].

2.1. The United States perspective

There is no doubt that non-public information is widely used in trading on U.S. exchanges. A 1980 study by Lehman Brothers Kuhn Loeb Inc. showed a “clear pattern of pre-announcement buying” in stocks of tender offer target companies [13]. A similar study by Fortune magazine showed that in twenty randomly selected tender offers and acquisitions in 1980 and 1981 a large gain in stock price preceded the formal announcement [14]. Although some rise in the stock price can be explained by neutral factors such as last-minute buying by the acquiring company, the clear implication of these studies is that someone had advance knowledge of the proposed takeovers and was acting on that information. Because takeovers are complicated transactions requiring the services of lawyers, accountants, financial analysts, and others, a rather large number of individuals routinely hear of a transaction before it is publicly announced.

Large potential profits create a substantial temptation to trade on non-public information. The announcement of a tender offer usually raises the trading price of the target company’s stock by the amount of the premium that the bidder has offered to pay. One who has pre-announcement knowledge and buys at the lower pre-announcement price may realize a very high return on investment [15] in a very short period of time. For one who chooses to buy options, as opposed to stock, potential profits are even more spectacular. If “playing options” is an informed gamble for the experienced trader, for the inside trader it is gambling on a sure thing. For example, with knowledge that Company X is about to make an offer for the stock of Company Y at $80 per
share (assume this is roughly twice the price at which Y stock presently trades) one could buy a thousand call options, for 100 shares each, with a striking price of 45 and very quickly turn as little as $6,250 into $3.5 million [16].

However lucrative these trades may be, they violate the federal securities laws. Rule 10b-5 prohibits trading on the basis of material non-public information [17]. Material non-public information, often called "inside information" [18], is information that, if disclosed, would significantly affect market values. Examples given by the New York Stock Exchange include "negotiations leading to acquisitions and mergers, stock splits, the making of arrangements preparatory to an exchange or tender offer, changes in dividend rates or earnings, calls for redemption, new contracts, products or discoveries" [19].

There is some uncertainty in U.S. law concerning the extent to which the illegality of trading on non-public information depends upon the trader's relationship to the subject and source of his information. In Chiarella v. United States [20], the Supreme Court reversed the conviction of a financial printer who traded on knowledge he obtained by deciphering the identities of code-named companies in tender offer materials being printed. The Court's decision was based on its finding that Chiarella had no fiduciary relationship with the shareholders whose stock he bought and therefore no duty to disclose the information he possessed [21]. If illegality depends on a trader's fiduciary responsibility, it becomes essential for the SEC to know the trader's identity early in an investigation. Read very broadly, the opinion could even raise doubts about whether the large group of professional associates of a corporation who become temporarily privy to inside information - accountants, bankers, etc. - may trade on that information without violating rule 10b-5. Under this broad reading, when suspicious trading activity has been routed through Switzerland, even the existence of a probable violation of U.S. law would be undetectable without investigatory assistance from Swiss banks.

The SEC, however, has made it clear that it does not so read Chiarella. First, since Chiarella was decided, the SEC has brought at least two 10b-5 actions based on a theory of misappropriation of non-public information [22]. Chiarella might have been convicted on this theory, but the Supreme Court did not decide the issue because it had not been properly presented to the jury in the court below [23]. Secondly, in the light of the judicial limitations placed on rule 10b-5, the SEC exercised its rule-making authority under section 14(e) of the Williams Act and, by promulgating rule 14e-3, reversed Chiarella insofar as it applied to non-public information concerning a tender offer [24]. Although there is some debate among commentators as to the validity of rule 14e-3 in the face of Chiarella [25], the rule stands; the SEC proceeds under that rule and it has not been overruled. As a practical matter, insider trading is illegal in almost all situations that the SEC investigates [26].

Beyond the Chiarella/Rule 14e-3 debate about where the regulatory line ought to be drawn, some commentators dispute the wisdom of trying to
regulate insider trading at all [27]. Insider-trading prohibitions are founded on a theory of fairness and are intended to promote public confidence in the U.S. securities markets [28]. It is believed that if profits based on inside information were routinely available to a well-connected few, this would create a clear disincentive to investment by the general public. Case law discussions of insider-trading liability make sweeping reference to principles of “relatively equal access to material information” [29], “limiting opportunities for profit from manipulation of confidential connections” [30], and “the inherent unfairness involved where a party takes advantage of...information knowing it is unavailable to those with whom he is dealing” [31]. Those commentators who are opposed to the insider-trading laws reject the “fairness” argument as overly moralistic, preferring that insider-trading regulation be evaluated in terms of economic costs and benefits. When enforcement is sought against Swiss bank account holders, opponents argue that the cost of regulation is particularly prohibitive.

Proponents of insider-trading regulation, however, find additional fairness considerations to support action against those who trade illegally through Swiss banks. Aside from the obvious lack of fairness in allowing Swiss bank account holders to profit where others risk criminal sanctions, it seems probable that traders with access to Swiss banks are those most likely to be taking unfair advantage of their connections. They are more likely to be the close friends of presidents of Fortune 500 companies, international marketing vice presidents, takeover specialists, or investment bankers. They are least likely to have heard something on the Street, at a cocktail party, while waiting on the CEO’s table at lunch, or to have figured it out while printing financial documents. In addition, U.S. broker-dealers are put at a competitive disadvantage because Swiss banks performing the same trading services can also offer their customers secrecy [32].

In the fifteen years since publication of the economic cost argument against insider-trading regulation [33], neither the SEC nor Congress has accepted its validity. Granting the premise that insider-trading laws should be enforced domestically, selective non-enforcement in cases involving Swiss bank secrecy laws would undoubtedly undermine all enforcement efforts [34]. Traders with inside information who would otherwise place trading orders with their customary broker or local Merrill Lynch branch [35] might be more inclined to take the trouble to establish trading channels in a secrecy jurisdiction. Cautious traders who would ordinarily keep the size of their transactions small to avoid detection could feel much freer to seek large illegal profits.

Finally, secrecy-jurisdiction trading on inside information may be a problem of substantial size. In 1976, the U.S. Treasury reported to Congress that the most notable characteristic of foreign portfolio investment was its rapid growth. At that time, the U.S. Treasury calculated its value at $44 billion [36]. According to a Securities Industry Association estimate, foreign holdings of
U.S. equity securities may have amounted to between $127 and $176 billion in 1980 [37]. Even more significant is the huge volume of trading on U.S. stock exchanges attributable to foreign financial institutions. Some people estimate that Swiss banks alone account for as much as 20% of the trading volume on the New York Stock Exchange [38].

This internationalization of U.S. securities markets creates a dual imperative affecting U.S. regulators. Enforcement of insider-trading prohibitions must function effectively and must also take due account of international comity and the interests of non-U.S. financial institutions [39].

2.2. The Swiss perspective

Unlike U.S. banks, Swiss banks perform both commercial and investment banking functions. In addition to the traditional commercial banking services they perform, Swiss banks buy and sell securities, either for their own account or for their customers. Swiss banks also keep accounts with New York brokerage houses through which they effect transactions on behalf of their customers. The Swiss banks' involvement in the U.S. securities market is substantial [40] and the identities of their customers in all these activities is protected by Swiss banking secrecy law [41].

Article 47 of the Swiss Banking Law is the principal provision creating criminal liability for divulging secrets entrusted to a bank. Enacted in 1934 as a public law measure to prevent Swiss bank collaboration with the Third Reich in its efforts to locate the bank accounts of Jews and other non-Aryans, Article 47 actually reinforced well-established principles of bank secrecy already existing in private law [42]. These principles included personal financial-privacy rights based on the Swiss Civil Code, the contractual duty of confidentiality owed by the banker to his client (based on the Code of Obligations), and the Penal Code's protection of Swiss trade and industry against economic espionage [43].

The Swiss place a high value on bank secrecy. Privacy in financial and economic matters may not always be completely separated from privacy in other, personal matters [44]. As in 1934, when secrecy was perceived as necessary to prevent political oppression, today Swiss bank secrecy is valued by many individuals in countries where political changes could create personal vulnerability. It is not only because of financial privacy, however, that secrecy is of great importance to the Swiss. Because secrecy protects bankers and creates public confidence in banks, it has become a cornerstone of the Swiss banking business, which is a key industry in Switzerland [45]. Nonetheless, it is not the Swiss intention to sanction economic crime or to gain stature as a major exporter of illegal schemes. Accordingly, Swiss law recognizes certain interests that may override secrecy.

The limits placed on Swiss bank secrecy derive principally from Swiss
federal and cantonal law, as well as private agreement among Swiss banks. Additional limitations exist under international agreements for cooperation and mutual assistance in criminal matters.

On the federal level in Switzerland, the criminal and civil procedure codes stipulate a public duty of testimony. Because bank secrecy is principally of a private law nature, in a federal criminal or civil case a banker's private duty of secrecy is usually superseded by his public duty of testimony. A Swiss judge, however, would have the discretion to release the banker from his public duty [46]. In administrative proceedings, there is a statutory exemption for bankers [47]. Thus, the preservation of bank secrecy in a Swiss federal criminal or civil case would be subject to judicial discretion, but it is fairly clear that secrecy would remain intact in an administrative proceeding.

Swiss cantonal law is more widely applicable than federal law and it also stipulates a public duty of testimony. In criminal matters banking secrecy cannot be invoked, but if a civil matter is involved, four of the Swiss cantons give judges the power to lift bank secrecy. The remaining cantons are divided into two groups: those cantons which do not permit a banker to testify in civil cases and those which require him to do so. Thus, in a civil case governed by cantonal law, the preservation of bank secrecy largely depends on the location of the proceedings [48].

In a public matter, only a Swiss judge may lift the veil of bank secrecy. For example, when a foreign state requests information pursuant to letters rogatory, a Swiss judge is empowered to order disclosure if authorized by a specific provision of the law. At present, Swiss treaty provisions apply only to information concerning activities that are classified as criminal offenses in Switzerland [49]. If the matter is private [50], however, the client himself may, by waiving his contractual rights, authorize disclosure of his business secret.

The banks themselves, cognizant of the importance of fighting economic crime, have signed a private Agreement which has been in effect since July 1977 [51]. The Agreement, governed by private law and implemented by the Swiss National Bank, provides for very high fines in the case of specified abuses of bank secrecy [52]. Of particular relevance are provisions requiring the banks to ascertain the beneficial owners of each account [53] and prohibiting them from supporting any attempt to deceive authorities in Switzerland or elsewhere [54]. The former provision insures that a banker who is required to testify cannot claim to be ignorant of the identity of the account holder on whose behalf business is transacted. The latter provision is more limited. Even though a Swiss banker knows of attempted deception, he cannot offer his knowledge to the authorities. Similarly, although the Agreement forbids accepting funds or carrying out business known to be illegal under Swiss law (as insider trading is not), disclosure of the would-be violator's identity is not permitted without judicial bidding.

The strongest private measure taken against insider trading is a Circular
Letter issued by the Swiss Bankers Association in 1968, advising its members that it is in their interest to avoid engaging in transactions that would violate U.S. insider-trading laws [55]. This advice is, of course, not legally binding.

Even if the Agreement and the Circular Letter effectively forbade (at the private law level) banks from knowingly assisting in the violation of U.S. insider-trading laws, a large part of the problem would still remain. Swiss banks are probably passive participants in many insider-trading transactions. This unwitting participation can lead to serious problems if a U.S. court orders the bank to disclose the identities of those customers (who may or may not be U.S. nationals) who instructed it to buy or sell a particular security (which may or may not be a U.S. security) on a U.S. exchange, even though such a disclosure might be met with criminal prosecution by Swiss authorities [56]. In this situation it is difficult for the bank to determine (1) whether the U.S. court will apply sanctions for non-disclosure [57], (2) whether sanctions or the threat of sanctions would constitute a defense to a Swiss criminal proceeding if one were brought [58], and (3) whether the bank may safely insist that the SEC proceed through diplomatic channels [59]. The potential for misunderstanding is exacerbated by the SEC's inevitable uncertainty as to whether the bank was actually an unwitting participant and the Swiss bank's uncertainty as to whether the SEC is engaging in a fishing expedition.

There are means by which the Swiss banks can sidestep the conflict. In advance of every transaction executed on behalf of a U.S. client (or all clients) they may require waivers of confidentiality in the event of an SEC investigation. They may also choose to execute transactions solely on exchanges outside the U.S. [60].

Unilateral action by the United States can increase or decrease the dimensions of the Swiss banks' dilemma [61]. Enforcement alternatives should be evaluated in light of their effectiveness in compelling disclosure and also their probable effect on Swiss banking activity in the United States. It is important to consider, as well, the effect of SEC and court actions on the sensitive diplomatic channels that aid enforcement efforts in the most complicated securities fraud cases [62]. In addition, the effect of unilateral action on the possibility of reaching a more comprehensive transnational solution should be carefully assessed [63].

3. Towards a resolution of the conflict

Although Switzerland has suggested that problems arising in the United States with regard to bank secrecy are U.S. problems which must be resolved domestically [64], the Swiss bank Agreement, the Circular Letter, and international cooperation by treaty are evidence of Swiss concern with abuses of
secrecy. Whether that concern will ever lead to the cooperative international solution hoped for by many observers is less certain.

3.1. International cooperation

There is some justification for the view that formal international agreement is only a partial solution, that it results in ineffective, cumbersome procedures [65], and that its possibilities for effecting change seem to have been exhausted [66]. One major effort to reach an international solution — begun with negotiations in 1973 and concluded with the signing of the 1977 Treaty for Mutual Assistance in Criminal Matters [67] — demonstrates the difficulty of resolving the conflict by compromise. The Treaty gives Swiss judges the power to compel a banker to give evidence upon formal request by the United States; however, the Treaty contains several limitations that render it useless to combat many forms of securities law violation. The principal limitation is the Treaty's requirement that the information requested be in connection with activities punishable as crimes in Switzerland [68]. Furthermore, the privacy of persons not connected with the offense must be protected [69], and information obtained may not be used to investigate any offense other than the specific one for which the assistance is granted [70]. Even when these limitations do not apply, Swiss assistance is subject to a variety of conditions that may impede an investigation pursuant to the Treaty [71].

It is possible, however, to view the Treaty as a valuable pioneering effort, laying a foundation of cooperative experience [72] upon which a more effective compromise solution can be built. Recent talks between United States and Swiss government officials demonstrate Swiss willingness to seek a solution to the specific problem of insider trading [73]. A joint statement issued after the first round of talks pointed to the possibility of either bank self-regulation by extension of the 1977 private Agreement or expanded applicability of the Mutual Assistance Treaty [74].

If the former alternative is chosen, Swiss banks will agree among themselves to require from customers trading on U.S. markets advance waivers of confidentiality in the event of an SEC investigation. Although there is no reason to doubt that such an agreement would be an effective solution [75], whether it will come into being may ultimately depend on Swiss bank customers. Customers are likely to object to the waiver requirement, for waivers are perceived by many as an undue erosion of confidentiality. Some may fear that information divulged to the SEC could be used in matters beyond the scope of the investigation for which it was requested. Therefore, if a private agreement of this type is to become a reality, it will probably have to evolve in stages — each stage requiring waivers from a broader category of customers. Such a solution is uncertain and, in any event, for years it would probably be limited to a narrow category of customers (e.g. directors and officers trading in stock of their own company).
Expansion of the Mutual Assistance Treaty would also be difficult to accomplish. The Swiss have traditionally been circumspect in granting legal aid to foreign states. The most recent enactment of their internal law on legal assistance does not bind them internationally to provide such assistance [76]. Past experience indicates that the search for a mutually acceptable compromise will probably require lengthy negotiation.

A third possible means of resolving the international legal conflict is suggested in statements issued by the Swiss Banking Commission and the Swiss Bankers’ Association. These statements recommended that the Swiss Parliament include a ban on insider trading in Swiss criminal law [77]. If such a law is enacted, it will remove the main barrier to the SEC’s use of the Mutual Assistance Treaty [78]. Although this is not the first time Swiss bankers have spoken of introducing criminal sanctions for insider trading [79], the Swiss Parliament has not demonstrated any great interest in enacting such a law [80]. Even if insider trading is outlawed in Switzerland, the resulting availability of the Mutual Assistance Treaty may not prove satisfactory to U.S. interests. Information requested under the Treaty might take as long as three to five years to obtain [81].

The various international solutions discussed here are significant future possibilities which should not be jeopardized by U.S. judicial, administrative, and legislative enforcement policy. At the present time, however, international cooperation is probably not a practical solution to the SEC’s enforcement problem.

3.2. Unilateral enforcement

In the absence of an international solution, the SEC and the U.S. courts have increasingly tended to take matters into their own hands. The foremost example of a strong unilateral enforcement effort by the U.S. is a recently decided case involving St. Joe Mineral’s options traded on the order of Banca Della Svizzera Italiana [82].

3.2.1. SEC v. Banca Della Svizzera Italiana (the BSI case) [83]

In March 1981 the SEC brought suit against Banca Della Svizzera Italiana (BSI) and “certain purchasers of call options for the common stock of St. Joe Minerals Corporation”. The complaint alleged that the “certain purchasers” had made a $1.4 million profit between March 10 and 12, during which time Seagram Company announced a tender offer for St. Joe stock. The SEC concluded that there was a strong probability that the purchasers had acted on information “obtained or misappropriated” from confidential sources. The trades in question had been executed on the order of BSI [84].

The SEC obtained a Temporary Restraining Order, freezing the proceeds of the allegedly unlawful transactions in BSI’s New York bank account and
directing that BSI disclose the identity of its principals "insofar as permitted by law". Relying on that qualification, BSI insisted in court conferences and communications with the SEC over an eight-month period that it could not comply with the order because to do so would violate Swiss law [85].

At the end of October, the SEC moved the court to issue an order compelling BSI to answer and imposing contempt sanctions for non-compliance. The requested sanctions included a fine of $50,000 for each day of non-compliance, a ban on trading in the U.S. securities markets, a total freeze on BSI's assets in the United States, divestiture of all properties owned by BSI within the United States, and an order for the arrest of any BSI officer, director, or controlling person found in the United States [86]. In a hearing on the motion, U.S. District Judge Milton Pollack issued an informal opinion stating that he would sign the order containing contempt sanctions, following a week's grace period in which BSI would have the opportunity to obtain waivers of confidentiality from its clients. Judge Pollack indicated that his sanctions would include fines and a ban on trading in U.S. markets [87].

In a formal written opinion issued ten days later, Judge Pollack described his sanction threat as having had a "catalytic effect" on BSI [88]. Indeed, during the week following the hearing, BSI urged its customers to authorize disclosure so as to relieve BSI from possible criminal penalties [89]. On November 12, BSI disclosed the names of three Panamanian corporations and one Swiss corporation for whom the St. Joe options had been purchased. BSI also revealed the name of the customer who had ordered the transaction on the corporations' behalf: Giuseppe Tome, a close friend and adviser of Edgar Bronfman, head of the Seagram Company [90]. Although the SEC had already made efforts to investigate Tome [91], the BSI disclosure was a breakthrough. An affidavit from BSI's assistant manager stated that Tome had instructed him to purchase the options quickly and later asked him to transfer options among several Panamanian companies for "greater confidentiality within his organization" [92]. On December 14, the SEC amended its original complaint, adding specific allegations of insider-trading activity by Giuseppe Tome [93].

BSI's disclosures were not enough to avert the precedent-setting written opinion issued by Judge Pollack on November 16 [94]. In his thorough and powerful opinion, Judge Pollack invoked a long history of foreign-law conflict cases to support his position that a Swiss bank that derives some profit from trading on U.S. securities markets cannot "resist accountability for itself and its principals... by claiming their anonymity under foreign law" [95]. The BSI opinion, however, goes further than the cases cited therein [96] and it remains to be seen whether this fact will have a "catalytic effect" on the Swiss investment community.

In the BSI opinion, Judge Pollack considered a number of factors that courts have found important when faced with similar conflicts. Most are enumerated in section 40 of the Restatement of Foreign Relations Law [97],

https://scholarship.law.upenn.edu/jil/vol4/iss4/3
which is probably the single most influential legal principle in U.S. cases involving conflicts with foreign law [98]. Another principal factor relied upon by Judge Pollack was the "good faith of the party resisting discovery", which has also been a cornerstone of U.S. case law concerning foreign-law conflicts since the Supreme Court's 1958 decision in Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers [99].

The facts in Société Internationale do not closely resemble those in the BSI case. In Société Internationale, a Swiss holding company challenged the dismissal of its complaint as a sanction for refusing to produce bank records in compliance with a discovery order. The documents in question had been constructively seized by the Swiss government. The Supreme Court held that the sanction of dismissal was not justified in the absence of a showing of bad faith. Judge Pollack observed that "[t]he Court indicated that a party who had made deliberate use of foreign law to evade American law might be subject to sanctions" [100]. Had the Swiss plaintiff "deliberately courted legal impediments", this would have constituted bad faith, but the Court did not indicate what facts might support such a contention [101].

Two other decisions cited in the BSI case do provide examples of bad faith sufficient to support the imposition of sanctions. In In re First National City Bank [102], a U.S. bank refused to produce certain documents, alleging that their production would violate German law. The district court's finding of bad faith was buttressed by its additional finding that German law did not, in fact, prohibit disclosure [103]. Similarly, in Ohio v. Arthur Andersen & Co. [104], the record contained overwhelming support for a finding of bad faith. The defendant accounting firm claimed that Swiss secrecy law forbade it from producing documents, but the court of appeals cited evidence that Andersen had engaged in dilatory tactics, had failed to show that Swiss law forbade production, and had deliberately tried to deceive the court [105]. The finding of bad faith in the BSI case was based on a different assertion.

Judge Pollack's finding of bad faith reads as follows:

BSI acted in bad faith. It made deliberate use of Swiss nondisclosure law to evade a commercial transaction for profit to it, the strictures of American securities law against insider trading. Whether acting solely as an agent or also as a principal (something which can only be clarified through disclosure of the requested information), BSI invaded American securities markets and profited in some measure thereby [106].

There is a strong message to Swiss banks in the implicit assumption that any Swiss bank is guilty of bad faith if it does not disclose at the SEC's request, when it has executed trades on U.S. markets which thereafter appear to the SEC to be probable violations of U.S. law. Judge Pollack also made reference to the agency law principle that holds an agent liable for the acts of an undisclosed principal [107]. Taken to its logical extreme, this reasoning would create liability on the part of an entity subject to foreign secrecy laws when it
participates in any violation of U.S. law, however unwittingly.

A somewhat narrower criticism of the Swiss practice of bank secrecy may be read from Judge Pollack's emphasis on the profitability of BSI's activity. In his oral opinion issued from the bench, Judge Pollack suggested that the financial interests of Swiss banks include profits attributable to secrecy [108]. The implication is that a portion of the banks' earnings are received because they offer a means of violating U.S. law. Because the banks, in this sense, hold themselves out as conduits for illegal activity, they are guilty of bad faith.

As indicated above, there were several factors supporting Judge Pollack's decision to sign the order threatening sanctions. Judge Pollack cited evidence of Congressional concern regarding the practice of using foreign banks to evade the U.S. securities laws. He also concluded that using diplomatic channels or letters rogatory, as suggested by BSI, were "not viable substitutes for direct discovery", and he seemed to consider these suggestions to be dilatory tactics [109]. Only one of the factors cited clearly distinguished this case from any other in which a Swiss bank might unwittingly be used to participate in an illegal transaction. A State Department legal adviser had submitted an affidavit informing the court that after discussions with U.S. and Swiss officials the Department of State had concluded that it did not object to the SEC's attempts to gain information through civil discovery [110]. In addition, the court stated that the Swiss government had expressed no objection to the SEC investigation [111]. Although this reference to abstention by the Swiss and U.S. governments would make possible a narrower reading of the BSI case, the court did not expressly so limit its opinion. Swiss banks may wonder whether, in the absence of State Department action, BSI would nonetheless have found itself caught between the conflicting demands of two sovereigns by virtue of its choice to engage in trading activity on U.S. markets.

There is reason to question how effective Judge Pollack's sanction-threat approach would be in a case that offered greater practical problems. In the BSI case, the threat of sanctions was particularly powerful because BSI had a New York subsidiary, large New York bank accounts, and extensive U.S. investment holdings [112]. In a case where these factors are absent, the threat of sanctions would be significantly less persuasive. Bringing out "the big guns" can achieve results only when there is something of value to fire upon [113].

There is also the possibility that a sanction-threat approach may prove counterproductive. Some Swiss banks may choose to diminish the dimensions of the dilemma they face by reducing to a minimum their U.S. assets. More important, Swiss banks may choose to retreat beyond the jurisdictional reach of the courts [114]. Despite the historically broad judicial conception of the extraterritorial reach of the U.S. securities laws [115], a U.S. court would have difficulty establishing personal jurisdiction over a Swiss bank not deemed to be doing business in the United States. This would be the case if a bank were doing no more in the United States than arranging for U.S. broker-dealers to
purchase securities on U.S. markets upon the order of foreign customers [116]. Jurisdiction would be even more difficult to establish were Swiss banks simply to purchase U.S. securities on Zurich or London exchanges [117]. In both cases insider-trading violations could still be perpetrated through Swiss banks and would effect similar harm, but these violations would be nearly impossible to investigate.

The danger of Swiss disinvestment is somewhat mitigated by the fact that this action is not a commercially attractive option for the Swiss. The Swiss cannot be expected to give up happily the breadth and depth of U.S. markets. It is also unlikely that all Swiss trading activity on U.S. markets – in options, for example – can be accommodated by foreign exchanges.

3.2.2. Alternatives to the BSI approach

Judge Pollack, commenting on his decision to sign the order threatening sanctions, stated that he had "no other reasonable alternative" [118]. One may speculate that, having been presented with a similar secrecy defense ten years before [119], Judge Pollack was unwilling to view the wait for an internationally negotiated solution as a reasonable alternative. In lieu of the sanctions-threat approach and short of waiting for an international Godot, two alternatives were open to Judge Pollack. Either he could have deferred to the SEC's rule-making authority or he could have written a more narrowly focused opinion.

The first of these alternatives could have been accomplished by means of an opinion denying the request for sanctions in light of the SEC's failure to adopt a proposed amendment to Securities Exchange Act Rule 17a-3(a) (9) [120]. This amendment, first proposed in 1976, would have required U.S. broker-dealers to obtain from any person authorized to transact business for an unnamed account assurances that such person would furnish the name of the beneficial owner of the account at the SEC's request. The proposal was met with considerable consternation on the part of U.S. broker-dealers – not only because they feared disinvestment, but also because the Rule would have placed much of the enforcement burden on their shoulders. A broker-dealer attempting to comply with the rule might lose business to those brokers who did not comply, and non-compliance would not be immediately apparent. In a release concerning the proposal the SEC stated that it would consider publishing a list of intermediaries who did not live up to their agreements and that broker-dealers who continued to maintain accounts for such intermediaries would be in violation of the Rule [121]. In addition, it was recognized that even if broker-dealers were able to get these assurances from foreign banks, in some cases there would be no practical means of enforcement.

The amended Rule was designed to provide preventive enforcement, comparable to that contemplated by an extension of the 1977 private Agreement among Swiss banks [122]. Lacking the feature of self-policing by the Swiss
banks, however, the proposed rule could easily be circumvented. A Swiss banker wishing to purchase shares of stock traded on a U.S. exchange could purchase these shares from a non-U.S. broker-dealer who had purchased the same shares for his own account through a U.S. broker-dealer. The proposed Rule would not apply to either the purchase from the U.S. broker-dealer or the Swiss bank's transaction with the non-U.S. broker-dealer. Nonetheless, the Swiss bank in this scenario might be acting for the account of a customer in possession of inside information.

Rule 17a-3(a) (9) has neither been adopted nor withdrawn from consideration [123]. It has been criticized by some as "unnecessary", because the act of trading on U.S. markets may be, by itself, sufficient to require compliance with U.S. law [124]. Judge Pollack's opinion evidences a like view, and in light of the doubtful effectiveness of preventive enforcement by the SEC, this appears to be the wiser approach.

Such an approach, however, necessarily denies the force of Swiss law and, therefore, cannot be said to resolve the actual conflict. This inherent limitation of unilateral action suggests that, in the absence of a bilateral solution, U.S. law should be applied with moderation. Moderation implies that full account should be taken of Swiss interests and that each case should turn on its own factual setting. In Judge Pollack's application of an almost per se bad faith test, there was no moderate application of U.S. law. The BSI opinion could be read to require any Swiss bank under conflicting legal requirements to choose obedience to U.S. law.

Assuming that the order to apply sanctions was proper in the BSI case, a more moderate justification of that result was available. Had Judge Pollack identified the communications of Swiss officials and the State Department as factors essential to his opinion, he would not have needed to rely on a questionable finding of bad faith [125]. Such limiting language need not have required Swiss acquiescence in disclosure of bank secrets, but it would have prescribed some indication that the problem had been considered on a diplomatic level. It may be objected that, as a matter of precedent, this hypothetical holding would require bilateral government intervention in every future SEC investigation involving a secrecy/disclosure conflict. Nonetheless, in contrast to the actual decision in the BSI case, this approach recognizes that the conflict implicates both private and governmental interests. This recognition lessens the likelihood that either the Swiss banks or the Swiss government will perceive the conflict as one to be resolved principally by the other. Although time-consuming, a requirement of government consultation would contribute to a spirit of cooperative enforcement. Cooperative experience and mutual familiarity with the concerns underlying both secrecy and disclosure rules would facilitate future efforts to reach an acceptable resolution of the conflict.
Also in keeping with an approach of moderation, Judge Pollack could have provided some guidance as to what future courts might consider as indicia of good faith. Indeed, if his finding of bad faith was premised largely on the assumption that Swiss banks profit by holding themselves out as vehicles for evading U.S. law [126], Judge Pollack might have outlined actions, short of automatic disclosure, that would demonstrate good faith and the desire to avoid illegal acts. There are several ways in which Swiss banks, either individually or in concert, may impose a waiver of confidentiality requirement on their customers so as to minimize the possibility that the banks will be unwitting participants in insider-trading transactions [127]. Short of requiring waivers for all transactions executed on U.S. exchanges, the banks may require waivers from all U.S. citizens or from all customers who fall within a group of specified insiders in relation to the stock in which they wish to trade. Alternatively, Swiss banks may require waivers that would become effective upon the announcement of a tender offer for the stock within twenty days after the trade was executed. By adopting waiver policies, individual banks could test customer reaction and lay the foundation for an eventual comprehensive and binding agreement on waiver requirements among all Swiss banks. In addition, if these limited waiver policies were considered defenses to an SEC allegation of bad faith, Swiss banks would have a means of legally protecting themselves without having to choose between serious compromise of secrecy and withdrawal from U.S. markets. At the same time, abuses of secrecy to the detriment of U.S. interests would be reduced.

4. Conclusion

The enforcement of insider-trading prohibitions is a huge task, and obtaining the names of alleged violators who operate from secrecy jurisdictions is but one component of that task, albeit a difficult one. If SEC investigations do not proceed beyond the Swiss (or any other) wall of secrecy, the resulting gap in the U.S. regulatory framework will allow insider trading to flourish. On the other hand, efforts to penetrate Swiss bank secrecy risk alienating the Swiss investment community to the detriment of the U.S. economy and of efforts to find a cooperative solution.

Judge Pollack’s decision in SEC v. Banca Della Svizzera Italiana is a major step in the direction of taking that risk. That decision, however, has also highlighted the need for a more satisfactory resolution of the legal conflict. Indeed, it may have provided the impetus necessary to achieve such a solution. Through recent negotiations and discussions, Swiss and U.S. officials have outlined several paths along which cooperation may develop. True resolution of the conflict, whether by treaty, by Swiss banks’ self-regulation, or by Swiss legislation, lies in this direction.
The serious nature of the policy conflicts involved, however, suggests that a resolution will require many years of evolution before effective enforcement of U.S. law can be realized. To ensure that unilateral enforcement efforts facilitate rather than jeopardize cooperative efforts, U.S. law should be applied with moderation. Trading on U.S. markets by Swiss banks should not be seen as requiring automatic abdication of the banks' domestic legal obligation of secrecy. Rather, each case should be evaluated on its facts, with particular emphasis on indications of governmental concern and the defendant Swiss bank's efforts to prevent its use as a conduit for illegal activity. Although this approach will necessarily add to the SEC's investigatory burden, it may lead to more comprehensive and effective future enforcement of U.S. insider-trading laws, while detracting little from present enforcement.

To be sure, Switzerland is not the only country where banking secrecy is practiced. Eventually, it is to be hoped that multilateral negotiations will evolve from the current bilateral talks. A satisfactory agreement on secrecy and securities regulation between the United States and Switzerland may provide a model for cooperation on the part of a much wider group of nations that enforce banking secrecy.

Editors' postscript

As this article goes to press, a new chapter is being added to Ms. Siegel's story. On August 31, 1982, the United States and Switzerland signed an accord allowing Swiss banks to cooperate with the SEC in investigations of insider trading. This agreement will continue in effect until the Swiss parliament enacts measures outlawing insider trading.

A complex procedure for information sharing is established under the new "memorandum of understanding". An SEC request for information will be relayed by the Justice Department to the Swiss Federal Office for Police Matters, which will submit the request to a three-member commission organized by the Swiss Bankers Association. If the transaction being investigated is related either to a business merger or to the acquisition of at least 10% of a company's shares, and if it meets other requirements established under the agreement, then the Swiss bank involved will be asked to provide a detailed report of the transaction and to freeze the account of the suspect client.

According to the negotiators, this new agreement does not have the binding force of an international treaty. It is, however, a giant step toward the comprehensive international cooperation that Ms. Siegel envisions for the future [128].

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Notes

[1] The basic provisions prohibiting trading on non-public information are embodied in sections 16(b), 10(b) and 14(e) of the Securities Exchange Act of 1934, together with Rules 10b-5 and 14e-3 promulgated thereunder. See generally H. Bloomenthal, 1981 Securities Law Handbook 163-168, 220-224 (1981). Section 16(b) applies to only a narrow range of transactions by specified insiders, and it will not be discussed in this article.


[5] In the past four years, the SEC has pressed charges in about as many cases of insider trading as they had litigated in the previous forty years. Louis, supra note 2, at 72.

[6] Id. at 78.

[7] Problems of obtaining jurisdiction, although germane to the issue at hand, have been extensively treated elsewhere and will therefore be referred to only as necessary in this article. Nonetheless, the reader should be aware that obtaining disclosure from a foreign bank does not result in the automatic return of expatriated illicit gains to the U.S. or give the SEC a means of reaching the violator. Similarly, this article does not address the problem that arises when a Swiss bank buys a U.S. security on a non-U.S. exchange for the account of a foreigner trading on inside information. For a general discussion of this and related problems see U. Köstlin, Regulating Transnational Securities Activity, 31-49 (1978) (student thesis) (available in the University of Pennsylvania Law School Library).

[8] The conflict between the SEC's investigatory mandate and the Swiss bank secrecy laws is highlighted in this article because of its prominence in the literature and reported case law. In addition, this conflict has broader international implications. The laws of many countries - including Germany, Austria, Italy, France, and the United Kingdom - also require bank secrecy with varying degrees of stringency. See Aubert, Swiss Bank Secrecy: Its Legal Basis and Limits Under Domestic and International Law, forthcoming in The Army Quarterly and Defense Journal (England, 1982). As in Switzerland, there is no criminal prohibition of insider trading in Germany, Austria, and Italy. Although there is no governmental agency in Europe comparable to the SEC, Meyer, Swiss Banking Secrecy and its Legal Implications in the United States, 14 New England L. Rev. 18, 37 (1978), French and U.K. efforts to regulate their own securities markets and to enforce their recently enacted insider-trading prohibitions (Law of Dec. 23, 1970 (France); section 68 U.K. Companies Act 1980 (U.K.)) have been impeded by bank secrecy laws. See generally Lee, Robert, Hirsch and Pollack, Secrecy Laws and Other Obstacles to International Cooperation, 4 J. Comp. Corp. L & Sec. Reg. 63 (1982) [hereinafter cited as Obstacles].


[10] id. at 23. Congress has indicated where the U.S. draws the line between the right to financial privacy and the public interest in ferreting out securities law violators. The Right to Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422 (Supp. IV 1980), generally requires notice to bank customers and an opportunity to challenge, before a government agency request for bank records is honored. In October 1980, Congress added section 21(h) to the 1934 Act, 15 U.S.C. §78u(h) (Supp. IV 1980), waiving this requirement with regard to the SEC in specific instances, including cases where records are necessary to trace beneficial ownership in any security. See also H. Friedman, Securities and Commodities Enforcement 12-13 (1981).


[14] Louis, supra note 2, at 72–75.
[15] The Lehman Brothers study showed that a sample of 24 unopposed cash offers in 1980 yielded a premium averaging 82% over the market price one month prior to the announcement. Wall St. J., Nov. 12, 1980, at 37, col. 4.

[16] It is possible, but not very likely, that a particular option would be available at 1/16 — that is, a price of $6.25 for an option to buy 100 shares. Even if the selling price were 1, however, so that an option for 100 shares costs $100, the return on investment would be 3,400%. Indeed, according to Jim Gallagher, president of the Pacific Stock Exchange, an options purchaser with pre-announcement knowledge of the Kuwait Petroleum/Santa Fe International merger could have had a return of 22,700% in less than a week. Investor Losses From Insider Trading in Santa Fe Could Total $37 Million, House Subcommittee Told, 625 Sec. Reg. & L. Rep. (BNA) A-6, -7 (Oct. 21, 1981).


[18] In discussions of insider trading, a distinction is sometimes made between “inside information” and “market information”. True inside information is generally understood to be information about a particular corporation, known to its directors, officers, employees, professional associates, and their “tippees”, which is intended to be available for corporate purposes only and not for anyone's personal benefit. Heller, Chiarella, SEC Rule 14e-3 and Dirks: “Fairness” versus Economic Theory, 37 Bus. Law 517, 522–523 (1982); In re Cady Roberts 40 S.E.C. 907, 912 (1961). Market information includes other types of non-public information which, if disclosed, would significantly affect market values. Market information has also been defined as information that does not concern the value of a company's earnings or assets but would, nonetheless, affect the market value of its stock if disclosed. Fleischer, Mundheim and Murphy, An Initial Inquiry Into the Responsibility to Disclose Market Information, 121 U. Pa L. Rev. 798, 799 (1973).


[21] Id. at 235.


[24] Rule 14e-3’s broad prohibition extends to persons who (1) are in possession of material information, (2) know or have reason to know the information is non-public, and (3) have acquired that information directly or indirectly from the offering person, the issuer, an officer, director, partner, employee or any other person acting on behalf of the offering person or issuer. 17 C.F.R. §240. 14e-3 (1981).


[26] By the time the SEC joins an investigation, the major stock exchanges and the National Association of Securities Dealers (NASD) have usually screened out false leads. An SEC investigation occurs after the exchanges and NASD have determined that no legitimate reason for unusual trading exists. Louis, supra note 2, at 76. Although the SEC may have difficulty proving that the trader actually had knowledge of inside information and that he had reason to know it was non-public, frequently professional or family relationships will provide obvious clues to the source of the information. See Wall St. J., Nov. 12, 1980, at 37, col. 4.

[27] See, e.g., Manne, In Defense of Insider Trading, 44 Harv. Bus. Rev. 113 (Nov.–Dec. 1966) (arguing that not only do the costs of regulating insider trading exceed the harm caused by such activity, but that insider trading actually contributes to market efficiency); Heller, supra note 18 (supporting unrestricted use of “market” information in the possession of non-fiduciaries).
[28] At the time of hearings on the Williams Act, the American Stock Exchange wrote to Senator Williams as follows:

In order to make certain that fair treatment is afforded to all investors sharing the public market, small and large alike, the flow of information necessary to make informed investment decisions must be assured. Above all, confidence in the public market must be preserved, and this confidence comes only when the investing public is certain that it is receiving all of the facts.


[33] See Manne, supra note 27.

[34] One commentator writes: "If [the United States] chooses ... to acknowledge conflicting foreign law as a defense to claims under the securities laws, this may leave ample room for circumvention of the Acts and may seriously jeopardize their effectiveness." U. Köstlin, supra note 7, at 83.


[40] See supra note 38 and accompanying text.

[41] See Meyer, supra note 8, at 45. Securities transactions through New York brokerage houses are lumped together, and these brokerage houses have no knowledge of the identities of the individuals who initiate the transactions. Id. at 46.

[42] Id. at 25–27.

[43] Id. at 24; see also Aubert, supra note 8. Banking information is considered a business secret. Article 273 of the Penal Code prohibits disclosure of business secrets to foreign sources. Id.

[44] See Obstacles, supra note 8, at 74.


[46] Meyer, supra note 8, at 31 & n.79.

[47] Id. at 31.

[48] Id. at 31 & n.82, 32; Aubert, supra note 8.

[49] Aubert, supra note 8. Switzerland has always refused assistance in matters concerning fiscal, political, or military offences or offences against exchange control regulations. Id.
[50] The public interest would generally be involved where disclosure of banking secrets is sought by a foreign state. Disclosure of business secrets to official or private foreign organizations can lead to charges of economic espionage. See supra note 43 and accompanying text.

[51] See Obstacles, supra note 8, at 75–76, app. at 84.

[52] Professor Hirsch comments that the Agreement "probably is more efficient than any [public] law would be, because the legislature would not dare to establish the high financial liabilities that were provided in this agreement and that have been imposed". Obstacles, supra note 8, at 75.

[53] Agreement on the Observance of Care in Accepting Funds and on the Practising of Bank Secrecy (1977), arts. 3–7, reprinted in Obstacles, supra note 8, app. at 84.

[54] Id. arts. 8 & 9. In the complaint filed against Giuseppe Tome in connection with the insider trading in St. Joe Mineral's options, the SEC alleged that Tome transferred options positions among Panamanian companies and asked the Swiss bank, acting as his broker, to change its records of the transaction. The Swiss bank refused. Second Amended Complaint at 10, SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981). To have done so would have subjected it to liability under Article 9 of the Agreement.


[56] Although disclosure of banking secrets is a criminal offense under Swiss law, the SEC noted in its Memorandum filed in SEC v. Banca Della Svizzera Italiana: "Curiously, despite Plaintiff's requests, Defendant BSI has brought no case to its attention in which a person has been prosecuted for complying with a court order such as the Plaintiff seeks. Moreover, Plaintiff has searched and also found no such case." Memorandum in Support of Plaintiff's Application for an Order at 27, SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981); see also United States v. Vetco Inc., 644 F.2d 1324, 1332 (9th Cir.), cert. den. 102 S.C. 671 (1981).

[57] For a sample of possible sanctions, see infra text accompanying note 86.

[58] There is some authority for the proposition that a U.S. court order may be deemed a "state of necessity" under Article 34 of the Swiss Penal Code, thus excusing the violation of professional secrecy. See United States v. Vetco Inc., 644 F.2d 1324, 1332 (9th Cir.), cert. den. 102 S.C. 671 (1981) (an affidavit from a representative of the Swiss Federal Attorney was produced stating that Article 34 of the Swiss Penal Code might provide a "duress" defense to a criminal charge where a company under court order handed over documents to the IRS). No Swiss court, however, has ever applied the "state of necessity" doctrine to excuse unauthorized disclosure of banking secrets. The court in SEC v. Banca Della Svizzera Italiana, discussed infra, see text accompanying notes 83–117, indicated its belief that Swiss law provided such a defense. 92 F.R.D. at 118. Maurice Aubert, a noted Swiss authority on Swiss bank secrecy, forcefully denies the validity of such a broad application of Article 34. M. Aubert, J. Kernen and H. Schöne, Le secret bancaire suisse 72 (2d ed. 1982) [hereinafter cited as Le secret].

[59] See infra text accompanying notes 118 & 119.

[60] Wall St. J., Nov. 6, 1981, at 55, col. 3; see also supra note 7.

[61] See infra note 107 and accompanying text.


[63] See text accompanying notes 73 and 74 infra.

[64] Meyer, supra note 8, at 80.
[65] See Obstacles, supra note 8, at 73, 80.
[66] U. Köstlin, supra note 7, at 96 & n.418.
[69] Art. 10(2).
[70] Art. 5.
[71] Article 10, in particular, reflects a concern for Swiss secrecy laws. When third parties are affected, art 10 (2) requires that the request for assistance relate to a “serious offence”, that assistance be “necessary”, that the information sought be of “substantial significance” to the investigation, and that reasonable efforts have already been made in the United States to obtain the information.
[72] The Swiss federal supreme court recently ruled in favor of an application by the U.S. Dept. of Justice for legal assistance in an SEC fraud investigation. The Treaty was useful in that case because the alleged fraudulent practices constituted fraud under Swiss law and thus criminal acts under the Treaty. 698 Euromarket News 7 (June 2, 1982), distributed by Common Mkt. Rep. (CCH).
[74] Id.
[75] Indeed, a waiver request has proven effective even after the onset of an SEC probe. A recent SEC complaint filed in the Santa Fe options investigation, see supra note 35, alleged that the personal accountant of a director of Santa Fe International Corporation had transferred illegal trading profits to Switzerland. After the Swiss bank requested a waiver, the money was moved back to the United States. Wall St. J., April 8, 1982, at 18, col. 1.
[78] See supra text accompanying note 68.
[79] See Meyer, supra note 8, at 37 n. 127.
[82] See also infra note 113 for a discussion of the SEC’s prosecution of American Institute Counselors.
[85] Id. at 3–6.
[86] Id. at 32–33.
[91] Tome’s name came to the SEC’s attention early in its investigation, in part because of his association with the New York brokerage house through which BSI placed the orders for St. Joe options and also because a March deposition of Bronsman revealed that he and Tome had close ties. Tome was subpoenaed in April but gave no formal reply. N.Y. Times, Nov. 18, 1981, at D6, col. 4.
[92] Id. See also supra note 54.

[94] Although "[s]ome observers thought that by providing information to the court on the St. Joe transactions, the Swiss bank might avert a precedent-setting judicial opinion in writing," Wall St. J., Nov. 17, 1981 at 24, col. 4, Judge Pollack was not persuaded that the war was over. He wrote:

Since the Court is unable to predict...whether other notions of confidentiality may be developed on behalf of the disclosed Panamanian customers of the bank, applicable to Switzerland or elsewhere, it becomes useful to analyze the legal situation posited. The principles to be applied will be similar and will serve the further purposes of this case.

92 F.R.D. at 114.

[95] Id. at 119.


[97] Restatement (second) of Foreign Relations Law of the U.S. (1965). Section 40 reads as follows:

Limitations on Exercise of Enforcement Jurisdiction.

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as
(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.


[100] 92 F.R.D. at 114.


[103] Id. at 847–848.


[105] Id. at 1372–1374. After reciting a brief history of Andersen's contradictory representations, the court concluded:

Earlier, it has represented to the court that the documents were not producible because of Swiss law and that the consents were inadequate. It is incomprehensible and inexplicable how Andersen could make such representations when it did not know what the documents contained and still had to send a lawyer to Switzerland to get the information.

Id. at 1373.


[107] This proposition, suggested by the SEC, was hotly contested by BSI:
Plaintiff's memo contains the bald assertion that "it may be assumed, in the absence of proof to the contrary, that [the customer or customers whose identities BSI is prohibited by Swiss law from revealing] are fictitious and [that] the Defendant merely seeks to conceal its own impermissible and illegal activities". This irresponsible, unsubstantiated assertion is not only not backed by a shred of evidence but also suggests that in its vigilance the SEC staff has lost touch with the underpinnings of the American judicial system. Indeed, viewed in conjunction with the staff's apparent inclination to assume that a party is "guilty until proven innocent", its desire to impose draconian sanctions upon a Swiss national for refusing to violate Swiss law seems relatively tame.

Memorandum in Opposition to Plaintiff's Application for an Order at 51 n.5.


[109] 92 F.R.D. at 113. BSI's expert witness Maurice Aubert, a recognized expert in Swiss bank secrecy law, has written: "The only proper way for a foreign authority to obtain the evidence in Switzerland consists of sending letters rogatory (used for obtaining information requested by a foreign state) to a competent Swiss authority." Aubert, supra note 8.

[110] 92 F.R.D. at 118.

[111] Maurice Aubert, expert witness for the defense in the BSI case, denies that the Swiss authorities made no objection. Le secret, supra note 58, at 443-444.


[113] In one instance of a securities fraud investigation where the SEC wished to repatriate funds as part of an enforcement action, the SEC applied for and obtained a court order requiring the Swiss Credit Bank to transfer assets from its office in Zurich to its branch office in New York. Despite serious questions regarding the court's jurisdiction and the bank's claim that it was caught between conflicting orders by the Swiss and U.S. courts, the district judge threatened to seize the New York branch. The threat, though not part of an official court order, was apparently enough to induce the bank to reach a compromise agreement in which it deposited a letter of credit in New York. Had there been no branch to seize, the court, unless willing to disregard accepted principles of international law, would have been faced with a much tougher legal problem. For a fuller discussion of the SEC's prosecution of American Institute Counselors, see Meyer, supra note 8, at 75-78.

[114] In anticipation of Judge Pollack's decision, Sam Scott Miller, general counsel of Paine Webber Inc., commented: "If the SEC position is upheld it could send a fair shock through the money centers of the world. Internationally, the American markets are viewed as attractive, but there's an awful lot of money that gets funneled through the Swiss that values privacy." Wall St. J., Nov. 6, 1981, at 55, col. 3.

[115] See, e.g., ITT v. Vencap, 519 F. 2d 1001 (2d Cir. 1975); see generally Note, American Adjudication of Transnational Securities Fraud, 89 Harv. L. Rev. 553 (1976).

[116] See Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998 (2d Cir.) cert. den. 423 U.S. 1018 (1975). No commissions were paid for the "arranging". Id. at n. 54.

[117] Any security dealt in the U.S. over-the-counter market may be purchased on a London exchange, U. Köstlin, supra note 7, at 1 n.3. U.S. securities traded in Zurich number about 100 but this could be expanded, Wall St. J., Nov. 6, 1981 at 55, col. 3.


A record in respect to each cash and margin account with such member, broker or dealer containing the name and address of each beneficial owner of such account and in the case of
a margin account, the signature of such owner; provided that, in the case of a joint account or an account other than an account of a natural person, such records are required only in respect of the person or persons authorized to transact business for such account if such persons undertake to furnish, at the request of the Commission, the name and address of each beneficial owner of such account.


[122]See supra text accompanying notes 74 and 75.

[123] 44 Fed. Reg. 28,678 (1979). A similar regulation proposed by the Commodities Futures Trading Commission (CFTC) three years ago with regard to trades executed on commodities exchanges was withdrawn. 45 Fed. Reg. 30,427 n.7 (1980), reprinted in 553 Sec. Reg. & L. Rep. (BNA) H-2 n.7 (May 14, 1980). However, the CFTC's view is not consistent on this point. A week after the proposal to require disclosure assurances was withdrawn, a more stringent regulation was proposed that would have required foreign accounts to be handled only on a fully disclosed basis. 45 Fed. Reg. 31,731 (1980), reprinted in 555 Sec. Reg. & L. Rep. (BNA) F-1 (May 28, 1980). That proposal was met with disapproval from the commodities trading industry and has not yet been adopted. Commodities Institute Updates Analysis on Domestic, International Issues of Jurisdiction, Litigation, 624 Sec. Reg. & L. Rep. (BNA) E-1, -2 (Oct. 14, 1981).

[124] It should be noted, however, that this argument has greater force with regard to futures exchanges than stock exchanges. In In re Banque Populaire Suisse, CFTC, Oct. 9, 1981, the Administrative Law Judge noted that a bank holding a futures position is committed to further action within the United States whereas stock ownership can be moved and transferred apart from any particular exchange. See ALJ Recommends 90-Day Trading Suspension for Banque Populaire Suisse in Initial Decision on Merits, 625 Sec. Reg. & L. Rep. (BNA) E-1, -2 (Oct. 21, 1981).

[125] See supra text accompanying notes 99–106.

[126] See supra text accompanying note 108.

[127] Although a comprehensive agreement among Swiss banks concerning waivers is, as yet, but a possibility considered in Swiss-U.S. bilateral talks, see supra text accompanying note 75, there is nothing to prevent Swiss banks from requiring waivers as a matter of individual banking policy.


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