

## A Comparative Analysis of Recent Accords Which Facilitate Transnational SEC Investigations of Insider Trading

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## COMMENTS

### A COMPARATIVE ANALYSIS OF RECENT ACCORDS WHICH FACILITATE TRANSNATIONAL SEC INVESTIGATIONS OF INSIDER TRADING

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#### I. INTRODUCTION

This Comment presents a comparative description and analysis of new developments in international agreements which will aid the SEC in its investigations of suspicious transactions effected through foreign financial institutions. One of the key steps in an SEC investigation of insider trading is the determination of the identity of the investor who made the suspicious trades.<sup>1</sup> This can be a major hurdle because of foreign secrecy and blocking laws which prohibit the financial intermediaries from revealing the identity of the investor.<sup>2</sup> These secrecy and blocking laws are not merely impediments designed to frustrate the SEC and attract tainted money. They are deeply rooted in history.<sup>3</sup>

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1. See Fedders, Wade, Mann & Beizer, *Waiver By Conduct - A Possible Response to the Internationalization of the Securities Markets*, 6 J. COMP. BUS. & CAP. M.L. 1, 7 (1984) [hereinafter Fedders].

2. *Id.*

3. Boyle & Thou, *The Newest Configuration of the Ugly American: A Response to Mr. Fedders*, 6 J. COMP. BUS. & CAP. M.L. 323, 326 (1984) (stating that banking secrecy predates the SEC) [hereinafter Boyle]; See Liftin, *Our Playing Field, Our Rules: An Analysis of the SEC's Waiver By Conduct Approach*, 11 BROOKLYN J. INT'L L. 525, 530 (1985) (discussing banking secrecy in Switzerland); See generally Fedders, *supra* note 1, at 30-39 (appendices providing an overview of secrecy and

The tradition of banking secrecy emerged in the sixteenth century with the development of commercial banking.<sup>4</sup> "The tradition of secrecy in the bank-customer relationship originally emerged to protect individual rights . . . ."<sup>5</sup> In Germany, for example, banking secrecy is based on the constitutional right to privacy.<sup>6</sup>

Another problem which the SEC has is that many people simply do not consider insider trading to be dishonest.<sup>7</sup> "Misuse of insider knowledge is not commonly recognized as criminal in most European countries."<sup>8</sup> Indeed, prohibitions on insider trading have been attacked by some U.S. scholars.<sup>9</sup> For example, it has been argued that prohibitions on insider trading destroy incentives to produce socially valuable information.<sup>10</sup> Another argument is that capital markets are so efficient that any possible gains resulting from governmental regulation are outweighed by the costs of the regulation.<sup>11</sup>

Foreign banks, then, often will not cooperate with SEC investigations.<sup>12</sup> Doing so may cause them to break the laws of their own coun-

blocking laws).

4. Fedders, *supra* note 1, at 30.

5. *Id.*

6. See Moessle, *The Basic Structure of United States Securities Law Enforcement in International Cases*, 16 CAL. W.L. REV. 1, 21 (1986).

7. See Boyle, *supra* note 3, at 326.

8. Capitani, *Response to Fedders' "Waiver by Conduct,"* 6 J. COMP. BUS. & CAP. M.L. 331, 331 (1984). At the time of Capitani's writing, "Only France, Great Britain, and Denmark ha[d] enacted penal provisions to cover trading on inside information." *Id.* Since then, however, some additional countries, including Sweden, have made some form of insider trading unlawful. The Securities Market Act (SFS 1986:313) §§ 7, 8, 20 (Sweden).

9. See Carlton & Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); Manne, *In Defense of Insider Trading*, 44 HARV. BUS. REV. 113 (Nov.-Dec. 1966); Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy*, 9 J. LEGAL STUD. 801 (1980).

10. Scott, *supra* note 9, at 812.

11. Manne, *What Kind of Controls on Insider Trading Do We Need in the Attack on Corporate America?* in THE ATTACK ON CORPORATE AMERICA 119, at 122-24 (M. Johnson ed. 1978). See also Fischel & Easterbrook, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 273 (arguing that competition keeps anticipated returns equal for all types of firms and that "[n]o a priori case can be made for greater legal intervention in . . . corporations."). But see Finnerty, *Insiders and Market Efficiency*, 31 J. FIN. 1141 (1976) (providing statistical evidence that insiders make abnormal returns and refuting the strong efficient market hypothesis).

12. The SEC recently obtained the cooperation of the Swiss government for the first time in identifying bank customers who violated U.S. securities laws. SEC v. Certain Unknown Purchasers of the Common Stock and Call Options for the Common Stock of Santa Fe International Corp., [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484 (S.D.N.Y. Feb. 26, 1986) [hereinafter *Santa Fe*]. Since then, the

tries.<sup>13</sup> Perhaps more importantly, cooperation with SEC investigations might be bad for business.<sup>14</sup> Are there any methods of compelling foreign banks to provide information? It is possible, in extreme cases, to compel the information through court orders and contempt proceedings.<sup>15</sup> This creates some problems in international law, however, because the court is forcing the bank to break the law of its own country.<sup>16</sup> This extraordinary method of obtaining information is not productive in the long-run as it fosters resentment rather than cooperation.<sup>17</sup> The diplomatic front appears to be the more promising route.<sup>18</sup> This Comment presents some of the progress which has been made.

Part II presents the background for these accords with a review of the facts in the case of *SEC v. Certain Unknown Purchasers of the Common Stock and Call Options for the Common Stock of Santa Fe International Corp. (Santa Fe)*.<sup>19</sup> Part III describes the negotiated accords with Switzerland, the United Kingdom, Japan, the Cayman Islands, Ontario, and Canada. A comparative analysis is presented in part IV, and conclusions are offered in part V.

## II. BACKGROUND

The *Santa Fe* case exemplifies the problems confronting an SEC investigation when alleged securities law violators hide behind foreign banking secrecy laws.<sup>20</sup> The SEC filed its original complaint against unknown purchasers of Santa Fe International Corporation (Santa Fe) stock and options on October 26, 1981.<sup>21</sup> The SEC's complaint alleged

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SEC has received Swiss governmental assistance a second time. *SEC v. Katz*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,867 (S.D.N.Y. Aug. 7, 1986).

13. Liftin, *supra* note 3, at 550.

14. "In 1964, the Cayman Islands had only one or two banks and virtually no registered nonresident businesses. By late 1981, the Caymans had about 330 banks and over 13,000 registered companies." Fedders, *supra* note 1, at 32. This explosive growth in the Cayman Islands banking industry has been partially attributable to the existence of bank secrecy. *Id.*

15. *SEC v. Banca Della Svizzera Italiana* ("St. Joe case"), 92 F.R.D. 111 (S.D.N.Y. 1981).

16. See Liftin, *supra* note 3, at 551-53.

17. See Newcomb, *Policing Trans-Border Fraud: The View From the Bridge*, 11 BROOKLYN J. INT'L L. 559, 569-74 (1985) (discussing past foreign reaction to unilateral efforts and heavy-handed methods employed by the U.S. to obtain information).

18. See Bschorr, "Waiver By Conduct": *Another View*, 6 J. COMP. BUS. & CAP. M.L. 307, 311-13 (1984).

19. *Santa Fe*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484.

20. *Id.*

21. *Id.*

that:

the Defendant Purchasers have violated the anti-fraud provisions of the Exchange Act by effecting transactions in the common stock of, and options to purchase the common stock of, Santa Fe while in the possession of material nonpublic information relating to merger discussions, negotiations and proposals between Santa Fe and Kuwait Petroleum Corp. ("KPC").<sup>22</sup>

On October 5, 1981 the merger was announced.<sup>23</sup> Under the agreement Santa Fe shareholders were to receive \$51 per share.<sup>24</sup> Prior to the announcement the closing share price was \$24.75.<sup>25</sup> After the announcement the price rose to \$43.75.<sup>26</sup> The original complaint alleged that during the twenty-five days preceding the announcement the defendant purchasers bought 3,000 call options on Santa Fe stock and 35,000 shares of stock.<sup>27</sup> The increase in value of these securities resulted in a realized profit of approximately \$6.2 million on a \$750,000 investment.<sup>28</sup> "Almost all of these purchases were made through accounts maintained with Swiss banks . . . ."<sup>29</sup>

The Commission had a difficult time identifying most of the defendant purchasers. All but one of the defendant purchasers traded through Swiss banks.<sup>30</sup> At the time the complaint was filed, the Swiss banks, through which the purchases were effected, refused to identify the purchasers upon claims that Swiss bank secrecy laws prevented them from doing so.<sup>31</sup> Thereafter, the SEC, through the U.S. Department of Justice, filed a request for assistance from the Swiss government to obtain customer identifying information and other relevant evidence.<sup>32</sup> Subsequently, the highest court in Switzerland, the Swiss

22. *Santa Fe*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,323.

23. *SEC Charges Santa Fe Insiders, Seeks Disgorgement of Profits*, 14 Sec. Reg. & L. Rep. (BNA) 1717 (Oct. 8, 1982).

24. *Investor Losses from Insider Trading in Santa Fe Could Total \$57 Million, House Subcommittee Told*, [July-Dec.] SEC. REG. & L. REP. (BNA) No. 625 at A6-A7 (Oct. 21, 1981).

25. *Id.*

26. *Id.*

27. *Santa Fe*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,323.

28. *Santa Fe*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

Federal Court, blocked assistance to the SEC.<sup>33</sup> The court considered the case a second time, and the case "was appealed to the highest political body in Switzerland, the Federal Council, before authorization to disclose the requested information was finally obtained."<sup>34</sup> This case represents the first time the SEC was successful in obtaining the cooperation of the Swiss government to identify customers who purchased securities on the U.S. markets through Swiss banks.<sup>35</sup>

### III. DESCRIPTION OF THE ACCORDS

#### A. *The Swiss Memorandum of Understanding*

The Swiss Memorandum of Understanding (MOU)<sup>36</sup> dated August 31, 1982, is the oldest of the U.S. agreements with foreign governments aimed at facilitating investigations of insider transactions. The Memorandum was designed to temporarily fill a gap in the Treaty between the United States and Switzerland on Mutual Assistance in Criminal Matters entered into force on January 23, 1977.<sup>37</sup> The 1977 Treaty provides for cooperation between the countries in investigations and court proceedings involving criminal offenses.<sup>38</sup> However, the 1977 Treaty requires that the offense be a crime under the laws of both countries to fall within the scope of the Treaty.<sup>39</sup> Insider trading, however, "is not yet *per se* punishable under Swiss law . . ."<sup>40</sup> Addressing this aspect, Art. III(1) of the Swiss MOU provides that the Swiss Federal Council will submit a bill to Parliament criminalizing insider trading.<sup>41</sup> Such a law would bring the insider trading problem under the 1977 Treaty and effectively terminate the Swiss MOU.<sup>42</sup> To date,

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33. *Swiss Supreme Court Opinion Concerning Judicial Assistance in the Santa Fe Case*, 22 I.L.M. 785 (1983).

34. *Santa Fe*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484.

35. *Id.*

36. *Switzerland-United States: Memorandum of Understanding to Establish Mutually Acceptable Means for Improving International Law Enforcement Cooperation in the Field of Insider Trading*, 22 I.L.M. 1 (1983), 14 Sec. Reg. & L. Rep. (BNA) 1737 (Oct. 8, 1982) [hereinafter Swiss MOU].

37. *Id.* at art. III, ¶ 1.

38. *Id.* at art. II, ¶ 1.

39. *Id.* at art. II, ¶ 3(b).

40. *Id.* at art. I, ¶ 2. In some circumstances trading on material non-public information could be an offense under the Swiss Penal Code for fraud, unfaithful management, or violation of business secrets. *Id.* at art. II, ¶ 3(b).

41. *Id.* at art. III, ¶ 1.

42. The usefulness of the Swiss MOU is dependent on a private Agreement Among Members of the Swiss Bankers' Association, 22 I.L.M. 7 (1983) [hereinafter Agreement]. Article 11 of the Agreement provides that "[t]he Agreement will be abro-

the bill criminalizing insider trading in Switzerland has not been enacted, and the Memorandum of Understanding is still in force. However, the bill has been passed by the upper House of the Swiss Parliament,<sup>43</sup> and it is expected to pass in the lower House as well.<sup>44</sup>

The Swiss MOU probably will be superseded soon; nevertheless, it is worth analyzing. The Swiss MOU is the first accord of its type between the U.S. and a leading banking haven.<sup>45</sup> As such, it can help shed some light on the relative merits of various other accords.

The Swiss Memorandum of Understanding draws its strength from a private agreement entered into by members of the Swiss Bankers' Association.<sup>46</sup> The private Agreement and the Memorandum of Understanding impose a number of limitations on their usefulness to SEC investigations. First of all, only trades made within twenty-five days of a public announcement are covered.<sup>47</sup> Illegal trading on material nonpublic information which occurs more than twenty-five days prior to a public announcement is not covered, and disclosure of information in such cases is still a violation of the Swiss banking secrecy laws. Second, the Agreement only covers situations in which there is "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 . . . ." <sup>48</sup> Information pertaining to illegal trading on the basis of dividend announcements or the discovery of valuable resources, for example, would still be protected from disclosure by Swiss bank secrecy law.<sup>49</sup> Third, the Agreement adopts an arguably narrow definition of an

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gated in the case of the Swiss legislature enacting legislation on the misuse of inside information." The Swiss MOU in turn, provides that "[a]t the termination of the private Agreement, the parties will consult regarding . . . the effect of such termination on this memorandum." Swiss MOU at art. IV, ¶ 2(b).

43. *Upper Half Of Swiss Parliament Approves Insider Trading Bill*, 18 Sec. Reg. & L. Rep. (BNA) 1481 (October 10, 1986).

44. *Swiss Government Publishes Draft Law Making Insider Trading Criminal Offense*, 17 Sec. Reg. & L. Rep. (BNA) 797 (May 3, 1985).

45. See Newcomb, *supra* note 17, at 575.

46. See *supra* note 42

47. Agreement at art. I.

48. *Id.*

49. An example of an actual case in which U.S. securities laws were violated, but for which no assistance would be available under the Agreement is *SEC v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 1301 (2d Cir. 1971) (in which insiders who traded or tipped others who traded on nonpublic information regarding the discovery of valuable minerals were required to disgorge profits).

insider.<sup>50</sup> Low level employees who might be insiders under U.S. law are excluded, and temporary insiders who might be liable under a misappropriation or quasi-insider theory might be excluded.<sup>51</sup> The determination of insider status is within the complete discretion of the commission set up by the Swiss Bankers' Association and is critical because no information will be disclosed if it is determined that the person effecting the trade is not an insider.<sup>52</sup> A fourth limitation is that the Swiss Federal Office for Police Matters may block disclosure of information to the SEC if it determines that such disclosure would cause considerable harm to national interests or innocent third parties.<sup>53</sup>

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50. 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 of them;
- b) a member of a public authority or a public officer who in the execution of his public duty received information about an Acquisition or a Business Combination or
- c) a person who on the basis of information about an Acquisition or a Business Combination received from a person described in 2. a) or b) above has been able to act for the latter or to benefit himself from inside information.

Agreement at art. V, ¶ 2. At least one commentator has opined that this definition might be interpreted to exclude persons who might be insiders under U.S. law. Note, *Insider Trading Laws and Swiss Banks: Recent Hope for Reconciliation*, 22 COLUM. J. TRANSNAT'L L. 303, 315-26 (1984). Examples of people who might be excluded are employees who are not members of the board, officers, or an assistant to any of them, and employees of contractors who discover information on their own, but are not deemed to be mandated persons of the company.

On the other hand, part (c) of the definition extends liability to tippees more broadly than U.S. law. The U.S. Supreme Court held in *Dirks v. SEC*, 463 U.S. 646 (1983), that tippees are liable only when the tippees have breached a fiduciary duty and the tippee knew or should have known of the breach. *Cf. SEC v. Switzer*, 590 F. Supp. 756 (W.D. Okla. 1984) (holding person who traded on information overheard at a track meet not liable). Part (c) does not impose this requirement.

51. An example of an actual case in which U.S. securities laws were violated, but for which assistance might not be available because of the Swiss definition of an insider is *Shapiro v. Merrill Lynch*, 495 F.2d 228 (2d Cir. 1974) (in which underwriters with nonpublic information regarding corporate earnings tipped customers). The argument would be that the specific tippees were employees of the underwriting company and not persons mandated by the company whose securities were traded. *But see SEC v. Katz*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,991 (S.D.N.Y. Nov. 14, 1986) (in which assistance was rendered under the Swiss MOU when financial analyst who was an employee of underwriting firm tipped others). Note that no information would be forthcoming in any event under the facts of *Shapiro* since the Agreement does not cover the type of information involved.

52. Swiss MOU at art. III, ¶ 3.

53. Swiss MOU at art. III, ¶ 3. A provision permitting the blocking of information when in the public interest is standard in these accords; however, the Swiss MOU is unusual in that it prohibits disclosure when innocent third parties might be harmed.



The procedure provided for in the Agreement is for the U.S. Department of Justice to make a written request to the Swiss Federal Office for Police Matters in connection with a formal investigation of a possible violation of insider trading laws.<sup>54</sup> The request must specifically identify the transactions under investigation, must be accompanied by documentation, and must agree to provide all evidence or summaries of evidence in the SEC's possession which is relevant and nonprivileged.<sup>55</sup> The request must also agree that the SEC will not disclose any of the information received except in connection with an SEC investigation or law enforcement action initiated by the SEC for violations of insider trading laws.<sup>56</sup> The request is then turned over to a "Commission of Inquiry" whose members are appointed by the Board of Directors of the Swiss Bankers' Association.<sup>57</sup>

The SEC must establish to the reasonable satisfaction of the Commission that it has a reasonable basis to make the inquiry.<sup>58</sup> Addressing this aspect, the Agreement sets a threshold which constitutes an irrebuttable presumption of a reasonable basis.<sup>59</sup> The threshold is crossed when either: (i) the daily trading volume of the securities increased at any time during the twenty-five trading day period prior to the public announcement by 50% or more over the average daily volume of the period during the 90th trading day to the 30th trading day prior to the announcement; or (ii) the price of the securities fluctuates at least 50% or more during the twenty-five day period prior to the announcement.<sup>60</sup> When the irrebuttable presumption is not brought into play, the determination as to whether a reasonable basis for the inquiry exists is entirely within the discretion of the Commission set up by the Swiss Bankers' Association.<sup>61</sup> The Commission is to use a standard of "reasonable satisfaction."<sup>62</sup>

If the Commission is reasonably satisfied that the SEC has grounds for an inquiry provided for in the Agreement it shall call for a

54. Agreement at art. I.

55. *Id.* at art. III, ¶¶ 2-3.

56. *Id.* at art. III, ¶ 5.

57. *Id.* at art. II, ¶ 1. The Commission is "composed of three members and three deputies. Neither the members of the Commission nor their deputies may exercise an executive function in a company which is subject to the Federal Law on Banks and Savings Banks." *Id.*

58. *Id.* at art. III, ¶ 4.

59. Swiss MOU at art. III, ¶ 3.

60. Agreement at art. III, ¶ 4.

61. Swiss MOU at art. III, ¶ 3; Agreement at art. IV, ¶ 1.

62. Swiss MOU at art. III, ¶ 3.

report from the banks involved in the transactions.<sup>63</sup> At this point, a subject bank is required to inform the customer of the investigation.<sup>64</sup> The customer is not obligated to respond.<sup>65</sup> If the customer wishes to provide evidence and information for the Commission's report, he may do so within 30 days.<sup>66</sup> In any case, the bank is to file a report with the Commission within 45 days of receipt of the inquiry providing: (i) the customer's name, address, and nationality; (ii) all details of the customer's trading in the securities and options of the company within 40 days of the announcement; and (iii) all materials received from the customer.<sup>67</sup>

The Commission then forwards a report to the Federal Office for Police Matters which is to be forwarded to the SEC unless the Commission determines that (i) the customer did not make any of the transactions identified in the inquiry; or (ii) the customer is not an insider within the terms of the agreement.<sup>68</sup> There is no provision enabling the SEC to appeal such a determination. As mentioned previously, the Federal Office for Police Matters can withhold the report from the SEC if it would materially harm national interests or innocent third parties.<sup>69</sup>

The bank is required to block the customer's account to the extent of the profit or avoided loss upon the Commission's command.<sup>70</sup> In this regard, the Agreement provides that "[t]he amounts blocked shall be held by the bank pending disposition of the matter by the SEC or U.S. courts."<sup>71</sup> The terms of the MOU imply that the Commission will instruct the bank to block the customer's account whenever a proper request has been made which reasonably satisfies the Commission that the SEC has grounds for an inquiry under the Agreement.<sup>72</sup> If the account is blocked, the bank will remit to the SEC a sum up to the unlawful profit plus accrued interest once a final judgement is entered in

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63. Agreement at art. IV, ¶ 1.

64. *Id.* at art. IV, ¶ 2.

65. Swiss MOU at art. III, ¶ 3.

66. Agreement at art IV, ¶ 1.

67. *Id.* at art. IV, ¶¶ 3-4.

68. *Id.* at art. V.

69. *See supra* note 53 and accompanying text.

70. Agreement at art. 9, ¶ 1.

71. *Id.*

72. The actual wording of the MOU is, "If the criteria of Article 1 a) [that a formal request for assistance has been made] and Article 3 [essentially that the Commission is reasonably satisfied that the request is proper] are fulfilled, the bank, at the Commission's notice shall immediately block the customer's account . . . ." *Id.*

a U.S. court against the customer or the customer consents in writing.<sup>73</sup>

The MOU suggests that in return for the cooperation of the Swiss government and the Swiss Bankers' Association, the SEC will not employ unilateral and heavy-handed tactics.<sup>74</sup> The precise phrasing of this delicate suggestion is :

If the Commission of [I]nquiry 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, use moderation and take into account the existence of this memorandum when considering alternative measures.<sup>75</sup>

The procedures of the Swiss MOU were successfully used in the case of *SEC v. Katz*.<sup>76</sup> Katz was an analyst with an investment banking firm who obtained material, nonpublic information relating to a merger between RCA and General Electric.<sup>77</sup> Katz tipped several people including one Mordo who purchased 100,000 shares of RCA through a Swiss bank.<sup>78</sup> The Swiss MOU was utilized to obtain evidence against Mordo which resulted in his consenting to disgorge \$1,087,532.<sup>79</sup> The request was reviewed and affirmed by the Swiss Bankers' Association, the Swiss Supreme Court, and the Swiss Federal Council.<sup>80</sup> The profits which Mordo disgorged were frozen in a Swiss bank during these deliberations.<sup>81</sup>

### B. *U.K. Memorandum of Understanding*

The Memorandum of Understanding between the U.K. and the U.S. was entered into September 23, 1986.<sup>82</sup> This agreement is considerably less limited than that with the Swiss. The memorandum applies to any SEC or Commodity Futures Trading Commission (CFTC) in-

73. *Id.* at art. 9, ¶ 2.

74. *Cf.* Swiss MOU at art. III, ¶ 3.

75. *Id.*

76. *SEC v. Katz*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,867.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Memorandum of Understanding on Exchange of Information Between the SEC, CFTC, and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Futures*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027 (Sept. 23, 1986) [hereinafter U.K. MOU].

vestigation into a possible violation of a U.S. statute or rule relating to the prevention of insider dealing or market manipulation.<sup>83</sup> Therefore, unlike the Swiss agreement, it is not restricted to insider trading within twenty-five days of a public announcement of an acquisition or business combination. Additionally, U.S. law would control the determination of whether an individual is an insider. The major limitation is that a request must be reasonably related to securing compliance with the legal rule or requirement which is believed to have been violated.<sup>84</sup>

The procedure provided for requires that a written request be made with the British Department of Trade and Industry (DTI) except that in urgent cases the request can be oral, providing written confirmation is made within ten days.<sup>85</sup> The request must indicate the purpose for which the information is desired and the grounds which make the request reasonably related to compliance with the law.<sup>86</sup> Attending to this issue, the U.K. MOU states that if the DTI is not satisfied that the request is reasonable and fully complies with the Memorandum of Understanding, it may require the Director of the Enforcement Division for the SEC or CFTC to certify that the request is cognizable under the terms of the memorandum.<sup>87</sup> The U.K. MOU further provides that the DTI "may not challenge such a certification except on substantial grounds which shall be fully stated in writing."<sup>88</sup>

If a request is valid, the DTI will provide that information which it has in its possession<sup>89</sup> and will use its best efforts to obtain any requested information which it does not have.<sup>90</sup> If the costs of providing or obtaining information are substantial, the DTI can require the SEC

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83. The memorandum includes in its coverage violations of: the statutes, rules, and requirements of the United States . . . relating to the prevention of insider dealing in, and market manipulation in, securities listed on an investment exchange or a national securities exchange, or quoted in an automated inter-dealer quotation system, or traded over-the-counter, where the exchange, system, or over-the-counter market is situated within, and a material part of any of the relevant transactions in securities are effected within, the territory of the requesting Authority . . . .

*Id.* at ¶ 1.

84. *Id.* at ¶ 7(d).

85. *Id.* at ¶ 7(a).

86. *Id.* at ¶ 7(b).

87. *Id.* at ¶ 7(d).

88. *Id.*

89. *Id.* at ¶ 4. There is a caveat however. "[The] Memorandum does not extend to information held by the DTI solely by virtue of powers and functions that relate to matters other than securities, investments, futures, or company law." *Id.* at ¶ 6.

90. *Id.* at ¶ 4.

or CFTC to pay the costs.<sup>91</sup> Additionally, the request may be denied by the U.K. Secretary of State after consultation with relevant U.S. Government Officials if it is in the public interest.<sup>92</sup>

The U.K. MOU governs exchanges of information between Authorities, and no private person or party is given a right to resist.<sup>93</sup> This provision is contrary to the Swiss MOU which provides an individual with the opportunity to establish to the reasonable satisfaction of the Commission that he did not engage in any of the suspicious transactions or that he is not an insider within the MOU definition.<sup>94</sup> If the individual can make such a showing, the Swiss Commission will not disclose the information requested.<sup>95</sup> While it may seem appropriate to provide an alleged wrongdoer with the opportunity to clear himself early, the deficiency of the Swiss procedure is that the alleged wrongdoer has the opportunity to clear himself in a proceeding which is not adversarial, and the SEC cannot appeal the decision.<sup>96</sup>

Like the Swiss Memorandum of Understanding, the U.K. Memorandum of Understanding is also intended to be an interim agreement.<sup>97</sup> The Memorandum notes that the Authorities shall use their best efforts to ensure that treaty negotiations begin within one year.<sup>98</sup>

### C. *Japanese Memorandum of Understanding*

A memorandum on the sharing of information between the SEC and the Securities Bureau of the Japanese Ministry of Finance was signed May 23, 1986.<sup>99</sup> The background for the memorandum is contained in the following excerpt:

The Securities Bureau . . . and the [SEC] . . . believe it is in the best interest of all nations to expose and prosecute those who would abuse the integrity of the international securities markets. The parties recognize that the growing internationalization of the securities markets has resulted in significant trading of securities of one country in the other. . . .

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91. *Id.* at ¶ 13.

92. *Id.* at ¶ 5.

93. *Id.* at ¶ 3.

94. Swiss MOU at art. III, ¶ 3.

95. Agreement at art. IV, ¶ 2.

96. Compare *supra* note 75 and accompanying text.

97. U.K. MOU at ¶ 17.

98. *Id.*

99. *U.S., Japan Sign Accord to Share Surveillance, Investigatory Information*, 18 Sec. Reg. & L. Rep. (BNA) 769 (May 30, 1986).

It is the expectation of both parties that the interaction of the Japanese and United States securities markets will continue to grow. The parties believe that this is a positive development which should be encouraged. . . . [I]t is of increasing importance that there be established procedures for the two parties to share surveillance and investigative information . . . . This would no doubt serve us in improving the protection of investors, in securing adequate supervision of . . . securities-related businesses, and in preventing fraudulent securities transactions in the respective countries.<sup>100</sup>

This is the least specific agreement which the SEC has entered into, but it at least puts the Japanese government on record as recognizing the problem of enforcing U.S. securities laws in an international market and agreeing to cooperate. The efficacious portion of the agreement is limited to the following portion of one sentence: “[T]he Securities Bureau and the Securities and Exchange Commission agree to facilitate each agency’s respective requests for surveillance and investigatory information on a case-by-case basis.”<sup>101</sup>

#### D. *Treaty With the Cayman Islands*

A treaty with the Cayman Islands relating to mutual legal assistance in criminal matters was signed July 3, 1986.<sup>102</sup> The treaty is not yet in force as it has not been ratified by the U.S. Senate. Additionally, the treaty must be approved by the British Parliament because the Cayman Islands are a British Crown Colony.

Because the treaty involves the United Kingdom there are similarities with the U.K. MOU. A key distinction is that the agreement with the Cayman Islands is an unratified treaty dealing with criminal matters in general whereas the agreement with the U.K. DTI is a memorandum strictly limited to securities and futures transactions. One resulting difference is that the Cayman Islands Treaty is not an interim agreement as is the U.K. MOU. Another distinction is that the Cay-

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100. *Memorandum of the United States Securities and Exchange Commission and the Securities Bureau of the Japanese Ministry of Finance on the Sharing of Information* at para. 3 (May 23, 1986) (obtained from SEC) [hereinafter Japanese Memorandum].

101. *Id.* at para. 3.

102. *Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland Concerning the Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters* (July 3, 1986) (printed in Appendix) [hereinafter Cayman Islands Treaty].

man Islands Treaty goes well beyond an exchange of information and includes, for example, the transfer of persons in custody.<sup>103</sup>

The Cayman Islands Treaty is tailor-made to cover violation of U.S. securities laws. The treaty defines "criminal offense" to include insider trading and fraudulent securities practices, and these two terms are defined in the same terminology used in the U.S.<sup>104</sup>

The procedure, although similar to that in the U.K. MOU, is not identical. Requests must be submitted in writing.<sup>105</sup> There is no exception for urgent cases as provided in the U.K. agreement. A request under the Cayman Islands Treaty is to contain similar information as a request under the U.K. MOU.<sup>106</sup> The request must include the nature of the investigation, the information which the request is based on, a description of the assistance sought, and the purpose for which the request is made.<sup>107</sup> Assistance may be denied under four sets of circumstances: 1) when the request does not conform with the Treaty provisions; 2) when the offense is political or military, and not an offense under ordinary criminal law; 3) when the request does not establish reasonable grounds for believing that the crime specified in the request was committed and the information sought relates to the crime and is in the territory of the requested party; and 4) when the Attorney General of the requested party has issued a certificate to the effect that the

103. *Id.* at Art. I, ¶ 2.

104. *Id.* at Art. XIX, ¶ 3(g)-(h). In the words of the Treaty, a criminal offense includes:

(g) "Insider trading" which means the offer, purchase, or sale of securities by any person while in possession of material non-public information directly or indirectly relating to the securities offered, purchased, or sold, in breach of a legally binding duty of trust or confidence;

(h) Fraudulent securities practices, which means the use by any person willfully or dishonestly of any means, directly or indirectly, in connection with the offer, purchase or sale of any security:

(i) to employ any device, scheme, or artifice to defraud;

(ii) dishonestly to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading; or

(iii) dishonestly to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person; . . .

105. *Id.* at Art. IV, ¶ 1.

106. Art. IV, ¶ 2 of the Treaty states what information must accompany a request, and Art. IV, ¶ 3 lists additional information to be provided to the extent necessary and possible. This section is substantially the same as ¶ 7(b) of the U.K. MOU. The Cayman Islands Treaty is a bit more elaborate, stating for example that a request should include addresses, birthdates and presumed locations when available. However, it seems likely that such information would always be provided when available.

107. Cayman Islands Treaty at Art. IV, ¶ 2.

execution of the request is contrary to the public interest of the requested party.<sup>108</sup> However, before assistance is denied the requested party is to consult with the requesting party "to consider whether assistance can be given subject to such conditions as it deems necessary."<sup>109</sup>

As with the Swiss and U.K. agreements, the Cayman Islands Treaty requires that information and evidence furnished be kept confidential and not used for any purpose other than what was stated in the request.<sup>110</sup> Furthermore, the Treaty contains a provision enabling the requesting party to request that the application for and granting of assistance be kept confidential.<sup>111</sup> This provision is contrary to the Swiss MOU which requires that the customer be informed of the investigation.<sup>112</sup> Under the Treaty, if "the request cannot be executed without breaking confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party which shall then determine whether the request should nevertheless be executed."<sup>113</sup>

As was previously stated, the Treaty goes beyond an exchange of information. It provides for compulsory appearances to testify and produce evidence.<sup>114</sup> Appearances and the production of documentary information and articles in the Cayman Islands can only be compelled in accordance with the law of the Cayman Islands.<sup>115</sup> A person in the Cayman Islands cannot be compelled to appear in the U.S.<sup>116</sup> A request for a search, seizure, and delivery of an article is to be executed only "if it includes the information justifying such action under the laws of the Requested Party."<sup>117</sup> Additionally, the Treaty provides for the reimbursement of certain costs incurred in executing a request.<sup>118</sup>

The Treaty, like the U.K. MOU, does not create any right on the part of any private person to suppress evidence or impede a request.<sup>119</sup>

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108. *Id.* at Art. III, ¶ 3.

109. *Id.* at Art. III, ¶ 4.

110. *Id.* at Art. VII, ¶¶ 1-2. The Cayman Islands Treaty pertains to all kinds of criminal conduct, and hence, information obtained pursuant to it may be used by any law enforcement agency providing that either the use is for a purpose stated in the request or prior consent of the Cayman Islands is obtained.

111. *Id.* at Art. VII, ¶ 3.

112. *See supra* note 64 and accompanying text.

113. *Id.*

114. *See supra* note 102 and accompanying text.

115. Cayman Islands Treaty at Art. VIII, ¶ 1.

116. *Id.* at Art. X, ¶ 1.

117. *Id.* at Art. XIV, ¶ 1.

118. *Id.* at Art. VI.

119. *Id.* at Art. I, ¶ 3.



As with both the Swiss and U.K. MOU's, the Treaty provides for consultations between the governments to discuss its effectiveness.<sup>120</sup>

The Treaty also contains a Protocol in which it is agreed that:

The terms of this Treaty may be made applicable, in whole or in part, to Anguilla, the British Virgin Islands, Montserrat or the Turks and Caicos Islands by Exchange of Notes between the Governments of the United States and United Kingdom. Such Notes shall specify the central authority of the concerned jurisdictions for purposes of assistance under this Treaty.<sup>121</sup>

### E. *Understanding With Ontario*

An articulation of an understanding between the SEC and the Ontario Securities Commission (OSC) is contained in a pair of letters exchanged between the two commissions on September 24, 1985.<sup>122</sup> The exchange of letters focuses on the linkage between the American Stock Exchange, Inc. (Amex) and the Toronto Stock Exchange (TSE). The Amex-TSE Plan provides mechanisms for the routine exchange of information between the exchanges.<sup>123</sup> In addition, the Plan requires the Amex and TSE to "cooperate fully" with one another and use "best efforts" to assist one another in investigations.<sup>124</sup> The TSE and Amex are self-regulating bodies;<sup>125</sup> nevertheless it is understood "that there may be circumstances which require the participation of both the OSC and SEC to conduct meaningful investigations."<sup>126</sup>

The SEC and OSC are committed to cooperating with each other in such investigations.<sup>127</sup> Furthermore, this understanding is consistent with past history.<sup>128</sup> "This cooperation would, of course, extend to assisting the SEC in obtaining information that cannot be obtained

120. *Id.* at Art. XVIII.

121. *Id.* at Protocol.

122. Letter from Ermanno Pascutto, Director, Ontario Securities Commission to Richard Ketchum and Gary Lynch (September 24, 1985) (discussing cooperation between OSC and SEC) [hereinafter OSC Letter]; Letter from Richard Ketchum, Director, Division of Market Regulation and Gary Lynch, Director, Division of Enforcement, Securities and Exchange Commission to Ermanno Pascutto (September 24, 1985) (discussing cooperation between OSC and SEC) [hereinafter SEC Letter].

123. SEC Letter, *supra* note 122, at 2.

124. *Id.* at 3.

125. OSC Letter, *supra* note 122, at 2. See SEC Letter, *supra* note 122, at 3.

126. OSC Letter, *supra* note 122, at 2.

127. OSC Letter, *supra* note 122, at 2; See SEC Letter, *supra* note 122, at 3.

128. OSC Letter, *supra* note 122, at 2; See SEC Letter, *supra* note 122, at 1.

through the channels provided for in the linkage plan."<sup>129</sup> It is expected that the TSE, as a self-regulatory agency subject to OSC oversight, will generally provide necessary information voluntarily.<sup>130</sup>

In the event of resistance to an OSC investigation, the OSC may issue a formal order of investigation.<sup>131</sup> A formal order gives the OSC power to compel testimony under oath and the production of documents.<sup>132</sup> It also empowers the OSC to audit the party and freeze the party's assets.<sup>133</sup> However, the investigatory powers extend only to persons within Ontario.<sup>134</sup> Nevertheless, "the OSC has a close working relationship with the securities administrators in other provinces and territories of Canada,"<sup>135</sup> and is willing to take advantage of these relationships to assist the SEC.<sup>136</sup>

It should be noted that Canadian law permits the Attorney General to "prohibit disclosure of information in cases where a foreign tribunal is exercising powers that have adversely affected significant Canadian interests in relation to international trade or commerce or that has otherwise infringed Canadian sovereignty."<sup>137</sup> The OSC has expressed its belief that this is unlikely to happen with regard to information exchanges between the OSC and SEC:

As insider trading and market manipulation are offences under the Securities Act (Ontario) or the Criminal Code (Canada), it is extremely unlikely that the Canadian Government would have any interest in protecting those who have engaged in such trading. It is important to note that the Federal Government [of Canada], in enacting the legislation, described it as a "mechanism of last resort" and "clearly designed to protect national sovereignty in exceptional cases". [sic] It is difficult to conceive of an insider trading, market manipulation, or other case involving improper trading of securities that would fall into that category, particularly when such trading is a well recognized criminal offence in both Canada and the United States.<sup>138</sup>

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129. OSC Letter, *supra* note 122, at 2.

130. *Id.*

131. *Id.*

132. *Id.* at 2-3.

133. *Id.*

134. *Id.* at 3.

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.* at 4.

### F. *Treaty With Canada*

The Treaty with Canada on Mutual Assistance in Criminal Matters was signed March 18, 1985, but the U.S. Senate has not yet voted on ratification.<sup>139</sup> The key aspects of the Canadian Treaty are similar to the Cayman Islands Treaty and the U.K. MOU so only a brief description is in order.

The treaty clearly covers violations of U.S. securities laws. "The definition of offence includes . . . offences under the law of the United States in . . . securities . . ." <sup>140</sup> The treaty further provides that "[a]ssistance shall be provided without regard to whether the conduct under investigation or prosecution in the Requesting State constitutes an offence or may be prosecuted by the Requested State."<sup>141</sup>

The Canadian Treaty is less formal than the Cayman Islands Treaty. Practical arrangements are left to be worked out by future agreement.<sup>142</sup> As with the U.K. MOU and the Cayman Islands Treaty, the Canadian Treaty "shall not give rise to a right on the part of a private party to obtain, suppress or exclude any evidence or to impede the execution of a request."<sup>143</sup> The purpose of the Treaty is exclusively to provide mutual legal assistance between the countries. Additionally, the Canadian Treaty also provides for the reimbursement of certain costs incurred in rendering assistance.<sup>144</sup>

## IV. ANALYSIS

The accords vary substantially in their coverage from the Japanese Memorandum which merely agrees to cooperate on a case-by-case basis to the formal Swiss MOU which draws a relatively bright line between what is and is not covered.

The several accords will vary in their effectiveness, but certainly all of them will aid the SEC. The Swiss MOU is the most limited accord by its own terms; however, even the Swiss MOU enabled the SEC to eventually obtain the cooperation of the Swiss government for the first time in what had been at that time the largest insider trading case

139. Treaty Between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters, March 18, 1985, 24 I.L.M. 1092 [hereinafter Canadian Treaty].

140. *Id.* at Annex.

141. *Id.* at art. III, ¶ 3.

142. "The Parties may agree on such practical measures as may be necessary to facilitate the implementation of this Treaty." Canadian Treaty at art. XVIII, ¶ 2.

143. *Id.* at art. II, ¶ 4.

144. *Id.* at art. VIII.

uncovered by the SEC.<sup>145</sup> The Swiss MOU has also been utilized since then to obtain evidence in another case which resulted in the disgorgement of more than a million dollars in illegal profits.<sup>146</sup>

The accords with the United Kingdom, Canada, and Cayman Islands are very similar, and it will be convenient to group them. These countries have especially good relationships with the U.S. Each is a military ally or the colony of a military ally, all are English speaking, and there is a substantial interdependence in their economies. All of these ties may contribute to the similarities of the accords. Additionally, the United Kingdom is a third party to the Cayman Islands Treaty.

One element which is common to all of the accords is the right of the Central Authority to block disclosure of information in the national interests. It seems likely that this provision will be standard in future accords. The Swiss agreement, however, goes further by protecting the interests of innocent private third parties.<sup>147</sup> The Swiss Federal Office for Police Matters may block assistance if it determines that considerable harm will be caused to third persons who appear to have no relationship to the offense under investigation.<sup>148</sup> There is definitely a gap between what an American would consider a significant infringement on the interests of an innocent third party and what a Swiss would consider a significant infringement.<sup>149</sup> The U.S. Supreme Court has held that there is no "legitimate expectation of privacy concerning the information kept in bank records."<sup>150</sup> In contrast, the Swiss have recognized confidentiality in banking since the sixteenth century, and violation of banking secrecy has been a criminal offense since 1935.<sup>151</sup> Given this marked difference in traditions, any disclosure which would reveal

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145. "Entry of the settlement [of *Santa Fe*] brings to a conclusion the largest insider trading case [at that time] ever commenced by the [Securities and Exchange] Commission." *Santa Fe*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484. Since then, the size of the *Santa Fe* case has been dwarfed by a case which resulted in the disgorgement of \$50 million in profits and a \$50 million fine. *SEC v. Boesky*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,991 (S.D.N.Y. Nov. 14, 1986).

146. *SEC v. Katz*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,867.

147. *Supra* note 53.

148. *Id.*

149. See generally Note, *Insider Trading Laws and Swiss Banks: Recent Hope for Reconciliation*, 22 COLUM. J. TRANSNAT'L. L. 303, 318-22 (discussing differences in Swiss and U.S. attitudes towards secrecy).

150. *Id.* at 318.

151. *U.S. v. Miller*, 425 U.S. 435, 437 (1976).

information about an innocent party's finances might be blocked.<sup>152</sup> It remains to be seen whether future agreements with other countries will follow the Swiss in this respect.

Another standard feature in these accords, which is somewhat related to the governments' reservation of power to block disclosure, is the requirement that any information obtained pursuant to the accord be kept confidential to the extent possible and used only for law enforcement purposes. In theory, a limitation on the use of information should reduce the need for blocking disclosure. More limitations on the use of information make it less necessary to block disclosure of information. Perhaps limitations on the use of information can establish adequate protection for innocent third parties so that the blocking of disclosure can be restricted to matters of national interest. Although the Swiss agreement places the standard limitations on the use of information, the Swiss apparently do not consider this to be an adequate safeguard since the circumstances under which assistance may be blocked are broadly defined.

One distinction between the Swiss MOU and the accords with the U.K., the Cayman Islands, and Canada is that the Swiss MOU makes no provision for reimbursement of costs. The other accords contain some such provision.<sup>153</sup> This may be a function of the variation in the type of assistance available under the accords. The Swiss MOU is directed at disclosure of bank records while the other agreements provide more extensive assistance.

The key distinction between the Swiss accord and the others is in whose laws determine when assistance is available. U.S. law plays absolutely no role in the determination of whether assistance shall be provided under the Swiss Accords. In contrast, the agreements with the U.K., the Cayman Islands, Canada, and Ontario all provide assistance when there are reasonable grounds for believing that a violation of U.S. law has occurred without regard to the laws of the domestic country. Even the Japanese MOU does not foreclose this approach.

This approach is of tremendous value to the SEC relative to the alternative Swiss approach of using a standard other than U.S. law in determining the availability of assistance. The latter may create some serious problems. It seems likely that the overall impact of the Swiss accord will be to reduce the amount of illegal insider profits obtained in U.S. securities markets, but some illegal transactions might be facilitated. Consider the following two hypotheticals. A director with knowl-

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152. Compare *supra* note 149.

153. See *supra* notes 91, 117, and 143 and accompanying text.

edge of the discovery of a large deposit of valuable minerals effects an illegal trade through a Swiss bank.<sup>154</sup> The Swiss accord sends a clear signal that no assistance will be forthcoming for the SEC in this scenario. Second, a domineering director has knowledge of a pending merger.<sup>155</sup> The director effects an illegal transaction through a Swiss bank knowing that the Swiss banking secrecy laws will protect him if he can delay the merger announcement for 26 days. Not only is an illegal trade encouraged, but there is potentially a delay in full disclosure of material information.

Besides cases in which the result will clearly be undesirable from the SEC's point of view, there will be cases in which the result is uncertain. Suppose a clerical employee finds a note written by an officer regarding a tender offer and trades on it. He would not be an insider under parts (a) or (b) of the definition in the Agreement, but would arguably be an insider under part (c).<sup>156</sup> Part (c) includes persons who act on the basis of inside information received from an officer of the company.<sup>157</sup> Arguably, the clerk received information from the officer in this hypothetical, although the officer did not consciously tip him. Notwithstanding this argument, the Commission of Inquiry could find that the clerk did not receive the information from the officer and hence is not an insider. While it must be admitted that the outcome of this hypothetical under U.S. law is not entirely certain, it seems likely that the requisite breach of a duty would be found.<sup>158</sup> In any event, once the Swiss make the decision to block assistance, the SEC is effectively denied an opportunity to litigate their case.

There are also practical procedural problems suggested by this hypothetical. If the SEC does not know the identity of the purchaser, the

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154. Compare *Texas Gulf Sulphur*, 312 F.Supp. 77 (in which insiders who traded or tipped others who traded on nonpublic information regarding the discovery of valuable minerals were required to disgorge profits).

155. Cf. *Santa Fe*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,484 (in which the merger announcement took place within 25 days of the illegal transactions).

156. See *supra* note 50.

157. *Id.*

158. The Supreme Court has held that breach of a duty is required in order to impose liability for trading on material nonpublic information. *Chiarella v. U.S.*, 445 U.S. 222 (1980). The requisite breach of duty was found in *Texas Gulf Sulphur*, 312 F.Supp. 77 (finding that the fiduciary which corporate officers and directors owe shareholders requires them to disclose or refrain from trading on material nonpublic information). While a clerical employee might not owe a fiduciary duty to shareholders, he may be found to owe a duty to the corporation requiring him not to misappropriate the information. See *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 313 n.22 (1985); *U.S. v. Newman*, 664 F.2d 12 (2d Cir. 1981).

Commission of Inquiry's decision may be based solely on the statements made by the purchaser. A tippee who would not be an insider had he not been tipped might avoid an extensive investigation by denying that he was tipped. An additional problem would be encountered by the SEC if the tender premium were relatively small. In that case, it is less likely that the price or volume fluctuation threshold will be crossed. Recall that the Swiss accord establishes an irrefutable presumption that the SEC has reasonable grounds to investigate when a securities' price or volume fluctuates by more than 50% during a specified period.<sup>159</sup> If the unannounced tender offer premium will be a modest 25%, it is less likely that the threshold will be crossed. This puts the burden on the SEC to make an affirmative showing of reasonable grounds.<sup>160</sup> The alternative, exemplified by the U.K. MOU, does not impose a burden to show reasonable grounds if the request is certified as cognizable under the accord.<sup>161</sup>

The point is that although the Swiss accord will probably reduce U.S. securities law violations effected through Swiss banks, drawing a fairly bright line which is incongruent with U.S. law will inevitably put some people in a position to take advantage of the incongruity. There is a trade-off between protecting the integrity of the U.S. securities markets on the one hand, and foreign governments protecting their sovereignty and the privacy rights of their citizens on the other. The balance stricken in the Swiss accord appears to give less weight to the integrity of the U.S. securities markets than the U.K., Cayman Islands, and Canadian accords.

The most damaging criticism to the efforts to negotiate these accords is the argument that these agreements will simply cause those with a propensity for violating U.S. securities laws to move their banking business from traditional banking havens, like Switzerland and the Cayman Islands, to other banking havens like the Bahamas. It is possible that new banking havens will develop as rapidly as old ones accommodate U.S. requests. The drawback of the bilateral agreements is that they are piecemeal resolution of the problem. There is a strong argument that piecemeal resolution does not resolve the problem—it merely causes the problem to resurface elsewhere.

Carried to its logical conclusion, this argument suggests that these bilateral agreements will have no impact on the volume of illegal inside transactions. This is an extreme and unlikely result. While it seems

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159. *See supra* note 60 and accompanying text.

160. *Id.*

161. *See supra* note 87 and accompanying text.

certain that some insider trading will move from Switzerland and the Cayman Islands (upon ratification of the treaty) it seems unlikely that all of it will move. The net effect should be some reduction in insider trading in U.S. securities markets. The important question is how significant will the reduction be and how does it compare with the resources expended on negotiating these bilateral agreements? This is an empirical question which can only be answered definitively, if ever, with the passage of time and the benefit of hindsight.

#### V. CONCLUSION

The bilateral agreements discussed in this Comment lead to piecemeal resolution of the problem of enforcing U.S. securities laws in an international market, but unilateral action by the U.S. is held in disfavor by some.<sup>162</sup> A multinational agreement between all the countries of the world does not appear feasible—the incentives to not go along will probably be too great for at least some countries. Therefore, enforcement of U.S. securities laws would seem to depend on the successfulness of bilateral agreements at this time. Given this, it is important to develop a model agreement.

The most significant difference in these accords is in the determination of when assistance is to be provided. The Swiss accord defines the conditions under which assistance may be provided without regard to U.S. law. The accords with the U.K., the Cayman Islands, and Canada tie assistance to violations of U.S. law. Privacy interests and foreign sovereignty are sufficiently protected by requiring first that the SEC establish reasonable grounds for suspecting that a violation of U.S. law has occurred. Once the foreign government is satisfied that this first requirement has been fulfilled, the foreign government can conduct an investigation on the SEC's behalf and compile a report. Any material which might be harmful to its national interest can be deleted from the report. The U.S. can then pay the reasonable costs incurred. This is the basic approach of the accords with the U.K., Cayman Islands, and Canada. It strikes the proper balance between protecting the integrity of the U.S. securities markets and protecting the sovereignty of foreign governments and the privacy of their banking sectors. It seems to be an approach which is superior to the Swiss approach.

It has been reported that the SEC is negotiating with Germany,

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162. See generally Boyle, *supra* note 3; Bschorr, *supra* note 18; Capitani, *supra* note 8; Liftin, *supra* note 3; Moessle, *supra* note 6; Newcomb, *supra* note 17; but see Fedders, *supra* note 1.



France,<sup>163</sup> and the International Association of Securities Commissions<sup>164</sup> on securities regulation in an internationalized securities market. It remains to be seen whether accords with these organizations will be tied to U.S. laws or follow the Swiss approach and define their own coverage.

*Mark S. Klock*

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163. *U.S., Great Britain Nearing Accord on Facilitating Information Requests*, 18 Sec. Reg. & L. Rep. (BNA) 1096 (July 25, 1986).

164. *Conference Creates Panel to Promote Securities Law Enforcement Worldwide*, 18 Sec. Reg. & L. Rep. (BNA) 1049 (July 18, 1986).

VI. APPENDIX  
TREATY  
BETWEEN THE UNITED STATES OF AMERICA AND THE  
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN  
IRELAND CONCERNING THE CAYMAN ISLANDS  
RELATING TO  
MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS\*

The Government of the United States of American and the Government of the United Kingdom of Great Britain and Northern Ireland, including the Government of the Cayman Islands;

Desiring to improve the effectiveness of the law enforcement authorities of both the United States of America and the Cayman Islands in the investigation, prosecution, and suppression of crime through cooperation and mutual legal assistance in criminal matters;

Have agreed as follows:

ARTICLE 1

Scope of Assistance

1. The Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, for the investigation, prosecution, and suppression of criminal offenses of the nature and in the circumstances set out in this Treaty, including the civil and administrative proceedings referred to in paragraph 3(c) of Article 19.

2. For the purposes of paragraph 1, assistance shall include:
- (a) taking the testimony or statements of persons;
  - (b) providing documents, records, and articles of evidence;
  - (c) serving documents;
  - (d) locating persons;
  - (e) transferring persons in custody for testimony;
  - (f) executing requests for searches and seizures;
  - (g) immobilizing criminally obtained assets;
  - (h) assistance in proceedings related to forfeiture, restitution and collection of fines; and
  - (i) any other steps deemed appropriate by both Central Authorities.

3. This Treaty is intended solely for mutual legal assistance be-

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\* Reproduced from copy provided by the United States Securities and Exchange Commission. Signatures, forms, and protocol are omitted.

tween the Parties. The provisions of this Treaty shall not create any right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request.

## ARTICLE 2

### Central Authorities

1. A Central Authority shall be established by each Party.
2. For the United States of America, the Central Authority shall be the Attorney General or a person designated by him. For the Cayman Islands the Central Authority shall be the Cayman Mutual Legal Assistance Authority or a person designated by it.
3. Requests under this Treaty shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

## ARTICLE 3

### Limitations on Assistance

1. The assistance afforded by this Treaty shall not extend to:
  - (a) any matter which relates directly or indirectly to the regulation, including the imposition, calculation, and collection, of taxes, except for any matter falling within sub-paragraphs 3(d) and 3(e) of Article 19; or
  - (b) any conduct not punishable by imprisonment of more than one year.
2. The Central Authority of the Requested Party may deny assistance where:
  - (a) the request is not made in conformity with the provisions of this Treaty;
  - (b) the request relates to a political offense or to an offense under military law which would not be an offense under ordinary criminal law; or
  - (c) the request does not establish that there are reasonable grounds for believing:
    - (i) that the criminal offense specified in the request has been committed; and
    - (ii) that the information sought relates to the offense and is located in the territory of the Requested Party.

3. The Central Authority shall deny assistance where the Attorney General of the Requested Party has issued a certificate to the effect that the execution of the request is contrary to the public interest of the Requested Party.

4. Before denying assistance pursuant to this Article the Central Authority of the Requested Party shall consult with the Central Authority of the Requesting Party to consider whether assistance can be given subject to such conditions as it deems necessary. If the Requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.

#### ARTICLE 4

##### Form and Contents of Requests

1. Requests shall be submitted in writing by the Central Authority of the Requesting Party in such form as may from time to time be agreed between the Central Authorities.

2. The request shall include the following:

- (a) the name of the authority conducting the investigation or proceeding to which the request relates;
- (b) the subject matter and nature of the investigation or proceeding for the purposes of which the request is made and in particular the criminal offense or offenses for the investigation, prosecution or suppression of which the assistance is requested;
- (c) information concerning the persons involved including, where available, their full names, dates of birth, and addresses;
- (d) the information relied upon in support of the request;
- (e) a description of the evidence, information or other assistance sought; such description shall specify where possible the time period to which any such evidence or information relates;
- (f) the purpose for which the evidence or information or other assistance is sought; and
- (g) the identity and presumed location, where known, of any person from whom evidence is sought.

3. To the extent necessary and possible, a request shall also include:

- (a) the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;
- (b) available information on the identity and whereabouts of a person to be located;
- (c) a precise description of the place or person to be searched and of the articles to be seized;
- (d) a description of the manner in which any testimony or statement is to be taken and recorded;
- (e) a list of questions to be asked of a witness;
- (f) a description of any particular procedure to be followed in executing the request;
- (g) information as to the allowances and expenses to which a person asked to appear in the territory of the Requesting Party will be entitled; and
- (h) any other information which may be brought to the attention of the Requested Party to facilitate its execution of the request.

## ARTICLE 5

### Execution of Requests

1. The Central Authority of the Requested Party shall promptly execute any request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the Requested Party shall do everything in their power to execute the request. The Courts of the Requested Party shall have jurisdiction to issue subpoenas, search warrants, or other orders necessary to execute the request.

2. When execution of the request requires judicial or administrative action, the request shall be presented to the appropriate authority by the persons designated by the Central Authority of the Requested Party.

3. Requests shall be executed in accordance with the laws of the Requested Party except to the extent that this Treaty provides otherwise. However, the method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested Party.

4. If execution of the request would interfere with an ongoing

criminal investigation or proceeding in the territory of the Requested Party, the Central Authority of that Party may postpone execution or make execution subject to conditions determined necessary after consultations with the Requesting Party. If the Requesting Party accepts the assistance subject to the conditions it shall comply with the conditions.

5. The Central Authority of the Requested Party shall promptly inform the Central Authority of the Requesting Party of the outcome of the execution of the request. If the request is denied, the Central Authority of the Requested Party shall inform the Central Authority of the Requesting Party of the reasons for the denial.

## ARTICLE 6

### Costs

1. The following expenses, and none other, incurred in executing a request shall be reimbursed by the Requesting Party upon application of the Central Authority of the Requested Party:

- (a) travel expenses of a witness presenting testimony in the territory of the Requesting Party;
- (b) fees of expert witnesses retained with the approval of the Central Authority of the Requesting Party;
- (c) fees of counsel appointed or retained with the approval of the Central Authority of the Requesting Party for a witness giving testimony;
- (d) reasonable costs of locating, reproducing, and transporting to the Central Authority of the Requesting Party documents or records specified in a request;
- (e) costs of stenographic reports requested by the Central Authority of the Requesting Party, other than reports prepared by a salaried government employee; and
- (f) reasonable costs of interpreters or translators.

2. A witness who appears in the territory of the Requesting Party pursuant to Article 10 shall be entitled to the same fees and allowances ordinarily accorded to a witness in the territory of the Requesting Party.

3. A witness who appears in the territory of the Requested Party pursuant to Article 8 shall be entitled to such fees and allowances as shall be agreed between the Central Authorities.

ARTICLE 7

Limitations On Use

1. The Requesting Party shall not use any information or evidence obtained under this Treaty for any purposes other than for the investigation, prosecution or suppression in the territory of the Requesting Party of those criminal offenses stated in the request without the prior consent of the Requested Party.

2. Unless otherwise agreed by both Central Authorities, information or evidence furnished under this Treaty shall be kept confidential, except to the extent that the information or evidence is needed for investigations or proceedings forming part of the prosecution of a criminal offense described in the request.

3. The Central Authority of the Requesting Party may request that the application for assistance, its contents and related documents, and the granting of assistance be kept confidential. If the request cannot be executed without breaking confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party which shall then determine whether the request should nevertheless be executed.

4. Except as may be permitted under paragraph 1, any information or evidence obtained under this Treaty which has been made public in the territory of the Requesting Party in a proceeding forming part of the prosecution of a criminal offense described in the request may be used only for the following additional purposes:

- (a) where a trial results in a conviction for any criminal offense within the scope of this Treaty, for any purpose against the person(s) convicted;
- (b) whether or not a trial results in the conviction of any person, in the prosecution of any person for any criminal offense within the scope of this Treaty; and
- (c) in civil or administrative proceedings, only if and to the extent that such proceedings relate to:
  - (i) the recovery of the unlawful-proceeds of a criminal offense within the scope of this Treaty from a person who has knowingly received them;
  - (ii) the collection of tax or enforcement of tax penalties resulting from the knowing receipt of the unlawful proceeds of a criminal offense within the scope of this Treaty; or
  - (iii) the recovery *in rem* of the unlawful proceeds or instrumentalities of a criminal offense within the scope of this Treaty.

## ARTICLE 8

Taking Testimony and Producing Evidence  
in the Territory of the Requested Party

1. A person requested to testify or to produce documentary information or articles in the territory of the Requested Party may be compelled to do so in accordance with the requirements of the law of the Requested Party.

2. If the person referred to in paragraph 1 asserts a claim of immunity, incapacity, or privilege under the laws of the Requesting Party the evidence shall nonetheless be taken and the claim made known to the Requesting Party for resolution by authorities of that Party.

3. The Requesting Party shall furnish information in advance about the date and place of the taking of the evidence pursuant to this Article.

4. The Requested Party shall authorize the presence of such persons as are specified in the request during the taking of any evidence in the territory of the Requested Party and shall allow persons designated in the request to question the person whose testimony or evidence is being taken.

5. Documentary information other than official records produced in the territory of the Requested Party pursuant to this Article shall be authenticated by the attestation of a person competent to do so in the manner indicated in Form A appended to this Treaty.

## ARTICLE 9

## Providing Records of Government Agencies

1. The Requested Party shall provide the Requesting Party with copies of publicly available records of government departments and agencies in the territory of the Requested Party.

2. The Requested Party may provide copies of any record or information in the possession of a government department or agency in the territory of that Party but not publicly available to the same extent and under the same conditions as it would be available to its own law enforcement or judicial authorities.

3. Official records produced pursuant to this Article shall be authenticated by the attestation of an authorized person in the manner indicated in Form B appended to this Treaty. The attestation shall be signed by, and state the official position of, the attesting person, and the seal of the authority executing the request shall be affixed thereto. Authentication of official records shall be carried out under the provisions of the Convention Abolishing the Requirement of Legalization for



Foreign Public Documents, dated 5 October 1961.

#### ARTICLE 10

##### Appearance in the Territory of the Requesting Party

1. When the appearance of a person who is in the territory of the Requested Party is needed in the territory of the Requesting Party for the purpose of the execution of a request under this Treaty, the Central Authority of the Requesting Party may request that the Central Authority of the other Party invite the person to appear before the appropriate authority in the territory of the Requesting Party. The response of the person shall be communicated promptly to the Central Authority of the Requesting Party. Such a person shall be under no compulsion to accept such an invitation.

2. A person appearing in the territory of the Requesting Party pursuant to this Article shall not be subject to service of process or be detained or subjected to any restriction of personal liberty by reason of any acts or convictions in either the territory of the Requesting or Requested Party which preceded his departure from the territory of the Requested Party.

3. The safe conduct provided for by this Article shall cease ten days after the person has been notified in writing by the appropriate authorities that his presence is no longer required, or if the person has left the territory of the Requesting Party and voluntarily returned to it.

#### ARTICLE 11

##### Transferring Persons in Custody for Testimonial Purposes

1. A person in the custody of the Requested Party who is needed as a witness in connection with the execution of a request in the territory of the Requesting Party shall be transported to the territory of that Party if the person and the Requested Party consent.

2. A person in the custody of the Requesting Party whose presence in the territory of the Requested Party is needed in connection with the execution of a request under this Treaty may be transported to the territory of the Requested Party if the person and both Parties consent.

3. For the purpose of this Article:

- (a) the Receiving Party shall be responsible for the safety and health of the person transferred and have the authority and obligation to keep the person transferred in custody unless otherwise authorized by the Sending Party;

- (b) the Receiving Party shall return the person transferred to the custody of the Sending Party as soon as circumstances permit or as otherwise agreed and in any event no later than the date upon which he would have been released from custody in the territory of the Sending Party; and
- (c) the person transferred shall receive credit for service of the sentence imposed in the territory of the Sending Party for time served in the custody of the Receiving Party.

## ARTICLE 12

### Location of Persons

1. The Requested Party shall take all necessary measures to locate or identify persons who are believed to be in the territory of that Party and who are needed in connection with the investigation, prosecution or suppression of a criminal offense in the territory of the Requesting Party.
2. The Requested Party shall promptly communicate the results of its inquiries to the Requesting Party.

## ARTICLE 13

### Service of Documents

1. The Requested Party shall effect service of any document relating to or forming part of any request for assistance properly made under the provisions of this Treaty transmitted to it for this purpose by the Requesting Party; provided that the Requested Party shall not be obliged to serve any subpoena or other process requiring the attendance of any person before any authority or tribunal in the territory of the Requesting Party.
2. The Requesting Party shall transmit any such request for the service of a document inviting the appearance of a person before an authority in the territory of the Requesting Party to the Requested Party a reasonable time before the scheduled appearance.
3. The Requested Party shall return a proof of service in the manner specified in the request.

## ARTICLE 14

### Search and Seizure

1. A request for assistance pursuant to Article 1 involving the search, seizure and delivery of an article to the Requesting Party shall

be executed if it includes the information justifying such action under the laws of the Requested Party.

2. Every official who has custody of a seized article shall certify the continuity of custody, the identity, and the integrity of its condition. No further certification shall be required. The certificates shall be admissible in evidence in the territory of the Requesting Party as evidence of the truth of the matters set forth therein.

3. The Requested Party shall not be obliged to provide any item seized to the Requesting Party unless that Party has agreed to such terms and conditions as may be required by the Requested Party to protect third party interests in the item to be transferred.

#### ARTICLE 15

##### Return of Documents and Articles

The Requesting Party shall return any documents or articles furnished to it in the execution of a request under this Treaty as soon as possible unless the Requested Party waives the return of the documents or articles.

#### ARTICLE 16

##### Proceeds of Crime

1. The Central Authority of one Party may notify the Central Authority of the other Party when it has reason to believe that proceeds of a criminal offense are located in the territory of the other Party.

2. The Parties shall assist each other to the extent permitted by their respective laws in proceedings related to:

- (a) the forfeiture of the proceeds of criminal offenses;
- (b) restitution to the victims of criminal offenses; and
- (c) the collection of fines imposed as a sentence for a criminal offense.

#### ARTICLE 17

##### Exclusivity

1. Assistance and procedures set forth in this Treaty shall not prevent one Party from granting assistance to the other Party through the provisions of other international agreements or arrangements which may be applicable.

2. Subject to the terms of paragraph 1, a Party needing assistance as provided in Article 1 in the investigation, prosecution or suppression of a criminal offense as defined in Article 19 shall request assistance pursuant to this Treaty.

3. No Party shall enforce any compulsory measure, including a grand jury subpoena, for the production of documents located in the territory of the other Party with respect to any criminal offense within the scope of this Treaty, unless its obligations under the Treaty have first been fulfilled pursuant to paragraph 4 of this Article with respect to a request concerning those documents.

4. Where denial of a request or unreasonable delay in its execution may be jeopardizing the successful completion of an investigation, prosecution or other proceeding, the Central Authority of the Requesting Party shall so inform the Central Authority of the Requested Party in writing. Thereafter, either Contracting Party may give at least 45 days' notice in writing to the other Contracting Party that, unless otherwise agreed, the Parties' obligations under this Article shall be deemed to have been fulfilled; provided that in no case shall the obligations under this Article be deemed to have been fulfilled sooner than 90 days after the date of receipt of the request for assistance.

#### ARTICLE 18

##### Consultations

1. The Central Authorities will consult, at times mutually agreed by them, to enable the most effective use to be made of this Treaty. Such consultations shall include such information as may be lawfully disclosed concerning the status and disposition of proceedings utilizing documentary information and other evidence secured pursuant to this Treaty.

2. In any case of difficulty either Central Authority may request the assistance of the Contracting Parties to resolve the difficulty by way of consultation.

#### ARTICLE 19

##### Definitions

For the purpose of this Treaty:

1. "The Contracting Parties" means the Government of the United States and the Government of the United Kingdom.

2. "The Parties" means the Government of the United States and the Government of the Cayman Islands.

3. "Criminal offense" which, except in the case of any matter

falling within sub-paragraphs (d) and (e) of this definition, does not include any conduct or matter which relates directly or indirectly to the regulation, imposition, calculation or collection of taxes, but subject always to those exclusions, means:

- (a) Any conduct punishable by more than one year's imprisonment under the laws of both the Requesting and Requested Parties;
- (b) "Racketeering" which means:
  - (i) the use or investment, directly or indirectly, knowingly by any person of any part of racketeering income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect commerce, including interstate or foreign commerce;
  - (ii) the acquisition or maintenance knowingly by any person through a pattern of racketeering activity or through collection of an unlawful debt, directly or indirectly, of any interest in or control of any enterprise which is engaged in, or the activities of which affect commerce, including interstate or foreign commerce; or
  - (iii) where any person is employed by or associated with any enterprise engaged in, or the activities of which affect commerce, including interstate or foreign commerce, the conduct or participation in the conduct, directly or indirectly, knowingly by that person of the affairs of the enterprise through a pattern of racketeering activity or collection of unlawful debt; and in respect of which—
    - (A) "Racketeering income" means any income of any person derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal;
    - (B) "Racketeering activity" means unlawful gambling activity and the act or threat of any other criminal offense (which expression, for the avoidance of doubt, does not include any offense which relates directly or indirectly to the regulation including the imposition, calculation or collection of any tax) listed in this Article;
    - (C) "Pattern of racketeering activity" means at least two acts of racketeering activity, one of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering

- activity;
- (D) "Unlawful debt" means a debt"
    - (1) incurred or contracted in unlawful gambling activity or which is unenforceable in law in whole or in part as to principal or interest because of laws relating to usury; and
    - (2) which was incurred in connection with the business of gambling in violation of the law or the business of lending money or a thing of value at a rate usurious under law, where the usurious rate is at least twice the enforceable rate; and
  - (E) "Enterprise" includes any individual partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
- (c) "Narcotics trafficking" which means all offenses or ancillary civil or administrative proceedings taken by either of the Parties or their agencies connected with, arising from, related to, or resulting from any narcotics activity covered by the Single Convention on Narcotic Drugs, 1961, or the Protocol Amending the Single Convention on Narcotic Drugs, 1961, or any other international agreements or arrangements binding upon both the Parties;
- (d) Willfully or dishonestly obtaining money, property or valuable securities from other persons by means of false or fraudulent pretenses or statements, whether oral or written, regarding or affecting benefits available in connection with the laws and regulations relating to income or other taxes;
  - (e) Willfully or dishonestly making false statements whether oral or written, to government tax authorities (e.g., willfully or dishonestly submitting a false income tax return) with respect to any tax matter arising from the unlawful proceeds of any criminal offense covered by any other provision of this definition, except sub-paragraph (f), or willfully or dishonestly failing to make a report to government tax authorities as required by law in respect of, or to pay the tax due on, any such unlawful proceeds;
  - (f) Willfully or dishonestly failing to make to the Government a report which is required by law to be made to it in respect of an international transfer of currency or other financial transactions connected with, arising from or related to the unlawful proceeds of any criminal offense falling within any provision of

this Article, except this sub-paragraph or sub-paragraph (e) above;

- (g) "Insider trading" which means the offer, purchase, or sale of securities by any person while in possession of material non-public information directly or indirectly relating to the securities offered, purchased, or sold, in breach of a legally binding duty of trust or confidence;
- (h) Fraudulent securities practices, which means the use by any person willfully or dishonestly of any means, directly or indirectly, in connection with the offer, purchase or sale of any security;
  - (i) to employ any device, scheme, or artifice to defraud;
  - (ii) dishonestly to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading; or
  - (iii) dishonestly to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person;
- (i) "Foreign corrupt practices" which means the corrupt offering, paying, or making of inducements by any person to any foreign official or foreign political party, official thereof or candidate for foreign official office in order to assist such person in obtaining or retaining business for himself or in directing business to any other person;
- (j) Any of the above defined criminal offenses, where United States federal jurisdiction is based upon interstate transport, use of the mails, telecommunications or other interstate facilities;
- (k) Such further offenses as may from time to time be agreed upon by exchange of diplomatic notes between the United States and the United Kingdom, including the Cayman Islands; and
- (l) Any attempt or conspiracy to commit, or participation as accessory after the fact to, any of the above defined criminal offenses.

## ARTICLE 20

### Ratification, Entry Into Force, and Termination

1. This Treaty shall be ratified, and the instruments of ratifica-

tion shall be exchanged at Washington as soon as possible.

2. This Treaty shall enter into force upon the exchange of instruments of ratification.

3. The Government of either the United States or the United Kingdom, including the Cayman Islands, may terminate this Treaty by giving three months' notice in writing to the other Government at any time.



