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Developments in the Internationalization of Securities Enforcement

MICHAEL D. MANN & WILLIAM P. BARRY*

I. Introduction

In today's global marketplace, cross-border securities transactions have become routine: firms and investors frequently undertake activities in one jurisdiction that impact the laws and regulations of other jurisdictions. In response, efforts to formalize cooperation among regulators have redoubled. Whereas in the past authorities paid polite lip service to cooperation, today it is real. Indeed, the scope of cooperation has developed and expanded over time, from requests under the Hague Convention and pursuant to Letters Rogatory, to the implementation of Mutual Legal Assistance Treaties (MLATs) among governments and less formal bilateral and multilateral Memoranda of Understanding (MOUs) among securities regulators. With each new development, international regulatory authorities have enhanced their ability to investigate and prosecute activities that cross into another regulator's jurisdiction.¹

The evolution of this regulatory infrastructure, necessary to support cross border regulation and enforcement, is one of the major developments of the past two decades.

What follows is the first of a two part article collecting developments in international securities regulation from 1995 to 2005. In this respect, it is a follow up to *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, Michael D. Mann et al., 29 INTL LAW 780 (1995). Part II of this article will appear in the Winter 2005 publication of *The International Lawyer*.

Part I of this article examines how the need for information about cross-border activities has defined recent developments in international cooperation among securities regulators. In many instances, no single regulator will have access to all of the information necessary to protect the interests of investors and the integrity of domestic securities markets.² In

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1. This article is a follow up to *International Agreements and Understandings for the Production of Information and Other Mutual Assistance*, Michael D. Mann et al., 29 INT'L LAW 780 (1995). Please see that article for a detailed discussion of developments in international enforcement occurring prior to this article.

2. See, e.g., Exchange Act Release No. IS-806, 59 SEC Docket 536 (May 3, 1995); INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, DISCUSSION PAPER ON INTERNATIONAL COOPERATION IN RELATION TO

addition, the globalization of the securities markets and the growing interdependence of the world's economies have fostered a need for the international community to be able to respond to prevent potential cross-market disruption. Regulators are looking for cooperative means for promoting improved internal controls and better risk management by securities market participants.³ Such improved controls will result in more complete documentation of securities transactions and will potentially open a new front for exposure of securities firms to liability for failure to maintain the appropriate records.

On a worldwide basis, securities regulators have developed a successful, multi-faceted approach to the challenges posed by the internationalization of the world's securities markets. This approach includes unilateral undertakings as well as bilateral and multilateral initiatives with foreign authorities. At the same time, firms that engage in multinational securities activities have begun to recognize the importance of developing proactive and effective regulatory relationships with regulators in several nations.

Underscoring these recent efforts is the recognition by regulators that information represents power. The goal of regulators is to enhance their ability to oversee conduct and events occurring elsewhere in the world that could affect their particular markets. The relationships, agreements, declarations, and rule changes described herein demonstrate that the Securities and Exchange Commission (SEC) has gone a long way toward achieving this goal. Regulators have established a nexus between regulation and enforcement, enabling them to take action before problems arise and, at the same time, to respond better to the needs of the marketplace. The level of innovation and sophistication of initiatives reflects the responsiveness of the SEC and other regulators to the dramatic changes brought about by globalization.

One fact that has not changed is that all cooperative agreements, and all cooperation, take place pursuant to domestic law. In general, the law governing the domestic regulators participating in international cooperative agreements continues to evolve, but is not yet fully harmonized with international cooperative initiatives. As a result, one might expect continuing difficulties with respect to the practical application of existing cooperative agreements.

The development of cooperative agreements is not the end of the effort. Regulators must operate under the constraints of domestic legislation. Globalization of securities markets has also resulted in courts in the United States and elsewhere having to address novel and complex issues. For example, does a regulator have the power under local law to provide assistance to a foreign authority under a MOU? How do differing perceptions of whether a legal proceeding is criminal or civil in nature impact evidence gathering and information sharing agreements between regulators? The results of recent cases are both interesting

CROSS-BORDER ACTIVITY OF COLLECTIVE INVESTMENT SCHEMES (June 1996), <http://riskinstitute.ch/135990.htm> (recognizing the "dramatic increase in cross-border investment management activity" and the need to formalize mechanisms for sharing information and jointly conducting inspections); Eudald Canadell, *IOSCO Reviews Progress on Financial Integrity Initiatives* (Oct./Nov. 1996), <http://www.futuresindustry.org/fimagazi-1929/asp?a=522>. For further discussion, see *infra* Parts III.B.1 and III.C.1.4.

3. See, e.g., SEC Signs MOU with the Bank of England, Exchange Act Release No. 1106, 65 SEC Docket 1855 (Nov. 4, 1997); COMMODITIES FUTURES TRADING COMMISSION, OTC DERIVATIVES OVERSIGHT STATEMENT OF THE SECURITIES AND EXCHANGE COMMISSION, THE COMMODITY FUTURES TRADING COMMISSION AND THE SECURITIES INVESTMENT BOARD (2001), <http://www.cftc.gov/oia/oiaotcderovst.htm> [hereinafter OTC DERIVATIVES]. For further discussion, see *infra* Parts III.C.5. (Bank of England MOU) and III.C.1 (Joint Statement Regarding OTC Derivatives Oversight).

and varied. However, courts generally have recognized both the global nature of the securities markets and the importance of international cooperation in enforcement.

Part II of this article, which will appear in the Winter 2005 publication of *The International Lawyer*, examines the continuing effort of U.S. regulators to expand their reach beyond U.S. borders. This global reach is causing U.S. courts to grapple more and more often with the difficult question of what circumstances give U.S. courts the authority to assert jurisdiction over securities transactions that are international in character.

The impact of the Sarbanes-Oxley Act (SOX) in expanding the extraterritorial reach of the SEC profoundly changed the global enforcement environment. The United States aggressively asserts jurisdiction under the act, which has caused other national regulators to react by establishing more aggressive regulatory initiatives of their own. While perceived overreaching by the United States has caused tension in the international enforcement community, the reaction to SOX has been to raise standards across jurisdictions. These heightened standards, combined with the existing information-sharing infrastructure, have raised the risk of regulatory exposure for international firms. The same can be said for U.S. anti-money laundering initiatives, which took on renewed importance in the wake of the terrorist attacks of September 11, 2001.

The exercise by the SEC of its post-SOX potency has once again raised the question of the reasonable limits to the scope of U.S. jurisdiction. Foreign companies registered in the United States are clearly subject to this jurisdiction, as are their auditors and officers. Does such jurisdiction similarly apply to their foreign employees? Can the SEC affect the governance of the foreign corporation that is already governed by foreign law? Should the percentage of U.S. ownership of a foreign company affect these judgments?

All of the above questions need to be viewed in the context that at the same time the United States is expanding its extraterritorial reach, investors are continuing to seek investment opportunities in companies in ways that bypass U.S. regulation. Rule 144A offerings or direct purchases on foreign markets are increasingly easy to access directly. As a result, the jurisdictional means that the SEC uses as the basis of its cases is being eroded. This begs the question of where U.S. regulators should draw their line in the sand or whether U.S. investors should have any say in where the line is drawn. The struggle to find the balance between the exercise of jurisdiction and the fundamental goal of protecting investors is exemplified in *SEC v. TV Azteca S.A. de C.V.*,⁴ which is discussed in detail in Part II of this article.

II. International Cooperation

A. SEC APPROACH TO INFORMATION SHARING

The SEC entered into its first information-sharing arrangement to obtain evidence located abroad in 1982.⁵ Since then, the SEC has made international evidence gathering a priority and has entered into more than thirty cooperative arrangements.⁶ Securities regulators around the world now use cooperative arrangements modelled on those pioneered

4. *SEC v. TV Azteca S.A. de C.V.*, No. 1:05-CV-00004 (D.D.C. filed Jan. 4, 2004).

5. See Letter from Ernst & Young to Jonathan Katz, Secretary, U.S. Securities & Exchange Commission (July 2, 2003), <http://www.sec.gov/rules/pcaob/pcaob200303/ernstyoun070203.htm>.

6. See *id.*

by the SEC as a significant means of enforcing domestic securities laws.⁷ Indeed, the negotiation of cooperative agreements has become an important hallmark for newly established securities commissions, as well as standard operating procedure for regulators in developed markets. Regulatory authorities around the world are increasingly willing to use compulsory powers on behalf of a foreign authority without requiring an underlying or parallel domestic violation.

MOUs form the basis of the SEC's ability to take enforcement action when the evidence is located overseas. The SEC may negotiate a MOU with its counterpart in a country where there is a great deal of cross-border business or where there is a broader U.S. government interest in establishing closer ties. In each case, the MOU must be crafted to fit the circumstances of the foreign market and the powers of the foreign authorities. Indeed, the actual texts of the documents reflect these differences in legal and regulatory authorities. Thus, before entering into a MOU with a foreign authority, the SEC and the foreign securities authority exchange information about their respective regulatory systems and thereby learn about each other's specific interests, needs, and capabilities.

In addition to MOUs, the SEC actively seeks to identify and use other formal and informal information gathering mechanisms, most notably U.S. mutual legal assistance treaties (MLATs) with foreign criminal authorities. In particular, the MLAT between the United States and Switzerland has provided a useful mechanism for the SEC, working with the U.S. Justice Department, to obtain information located in Switzerland, including detailed banking information.⁸ In addition, the Swiss authorities have been willing, in specific cases, to freeze profits traceable to illegal securities activities, thereby preserving the status quo pending further SEC action.

The SEC's bilateral understandings with foreign regulators and other formal and informal information-sharing arrangements provide a framework in which the SEC can seek and provide assistance for the purpose of enforcing the securities laws of the United States and foreign jurisdictions. Each year the SEC makes an increasing number of requests for assistance to foreign jurisdictions and, not unexpectedly, receives a larger volume of requests in return.

B. LEGISLATIVE BASIS FOR PROVIDING ASSISTANCE

When the SEC began to use international cooperation as a primary vehicle for gaining access to foreign-based information, it became clear that the success of such an approach would depend on legislative changes. Indeed, at that time, the SEC and most of its foreign counterparts lacked the authority to use compulsory investigative powers unless there was an independent basis for suspecting a violation of domestic securities law. The SEC sought specific legislation authorizing it to assist its counterparts and urged its counterparts to seek similar legislation in their countries.

In 1988, as part of its efforts to assist foreign authorities, the SEC proposed, and Congress enacted, legislation authorizing the SEC to conduct investigations on behalf of foreign

7. *See id.*

8. *See In re W, X, Y & Z v. Swiss Banking Commission*, 2A.355/1999/Ieb (Pub. L. Division II May 1, 2000) (Ct. of Pub. L. of the Fed. Tribunal Nov. 24, 1999). In this case, The Swiss Supreme Court indicated that there remain significant issues still to be addressed regarding the reconciliation of United States regulatory interests and Swiss privacy laws. For further discussion, *see infra* Part IV.A.3.

securities authorities, using subpoena authority if necessary. Section 21(a)(2) of the Exchange Act, added by the Insider Trading and Securities Fraud Enforcement Act (ITSFEA), empowers the SEC to conduct a formal investigation upon the request of a foreign securities authority⁹ without regard to whether the facts stated in a request would constitute a violation of the laws of the United States.¹⁰ On June 21, 1988, a measure similar to the Commission's proposal was introduced in the U.S. Senate (S.2544)¹¹ and, on June 29, 1988, the Commission's proposal was introduced in the U.S. House of Representatives (H.R.4945).¹² Hearings on the bill were held in both the House and the Senate, and the Senate Banking Committee favourably reported out the bill. The House Energy and Commerce Committee reported out the investigatory assistance section of the bill (discussed below) and that legislation was enacted on November 19, 1988 as section 6 of ITSFEA.¹³

It is important to note that, unlike corresponding statutes in other countries, the Exchange Act does not require that a matter under investigation on behalf of a foreign securities authority also constitutes a violation of U.S. law. Because the U.S. securities laws are broader than the securities laws of most other countries, a dual criminality requirement, if applied on a reciprocal basis by other nations, would tend to limit the applicability of bilateral agreements to a narrow range of cases, and hence limit the Commission's ability to obtain assistance from other nations.

The Exchange Act requires that the SEC, in deciding whether to provide the requested assistance, consider whether the foreign authority has agreed to provide reciprocal assistance.¹⁴ It allows the SEC to refuse to process any request on the grounds that the request violates the public interest.¹⁵ Further, it provides witnesses with all the protection and remedies afforded to witnesses in SEC proceedings.¹⁶ Accordingly, witnesses could obtain access to a formal order identifying the basis and subject matter of an investigation. Further, they would be able to resist enforcement of an unnecessarily burdensome subpoena. In accordance with SEC practice, any challenge to a SEC subpoena would be reviewed by the SEC as part of the authorization process for a subpoena enforcement action.

The memorandum submitted by the SEC in support of the proposed legislation states that the SEC anticipates that any person resisting the subpoena would make his reasons known at the time he initially resists the subpoena. This information would be available to the SEC for its consideration before a decision was made to institute a subpoena enforcement action. Accordingly, the SEC would have an opportunity to review the matter, and the facts as argued by the subject of the subpoena, before seeking a court determination. The memorandum further notes that the SEC believes that, by providing a witness with the same rights and protections provided to witnesses in SEC investigations, the proposed legislation resolves any constitutional due process and Fourth Amendment concerns that could be raised. Because testimony would be taken pursuant to existing investigative pro-

9. Section 3(a)(50) of the Exchange Act broadly defines the term foreign securities authority to include "any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters." 15 U.S.C. § 78c(a)(50) (2005).

10. *Id.* § 78u(a)(2).

11. International Securities Enforcement Cooperation Act of 1988, S. 2544, 100th Cong. (1988).

12. International Securities Enforcement Cooperation Act of 1988, H.R. 4945, 100th Cong. (1988).

13. Insider Trading and Securities Fraud Enforcement Act of 1988, H.R. 5133, 100th Cong. (1988).

14. 15 U.S.C. § 78u(a)(2).

15. *Id.*

16. *Id.*

cedures, a witness would be entitled to assert all relevant rights and privileges of the United States. In addition, a witness would be entitled to assert privileges available in the country seeking the evidence, even in cases where the United States does not recognize the privileges. Issues of privilege would be preserved on the record for later consideration by a court of the requesting authority. The SEC also stated that it anticipated that foreign countries providing reciprocal assistance will follow a similar procedure.

The Exchange Act provides the SEC with flexibility, as it is not required to enter into a MOU before granting assistance to a foreign securities authority. In the absence of a MOU, the SEC may, if it receives all necessary confidentiality and use assurances, assist a foreign regulator and thereby demonstrate the value of international cooperation. This allows the SEC to use its powers to encourage the development of reciprocal assistance powers in countries that may not yet be able to enter into broad MOUs.

The SEC's 1988 recommendation also contained three provisions that were approved in substantially similar form by the House and the Senate in 1990. Those provisions, along with two new provisions, were introduced in the House (H.R.1396)¹⁷ and in the Senate (S.646)¹⁸ in March 1989. In December 1990, Congress enacted the International Securities Enforcement Cooperation Act (ISECA), which amended section 24 of the Exchange Act.¹⁹ ISECA has improved substantially the SEC's ability to cooperate with the securities regulators of other countries.

Sub-section 24(d) of the Exchange Act provides a basis for withholding disclosure under the Freedom of Information Act (FOIA) of certain records obtained from a foreign securities authority.²⁰ This exemption complements existing exemptions from disclosure under the FOIA. Therefore, information obtained from a foreign securities authority that does not satisfy the specific requirements of sub-section (d), also may be withheld if it is entitled to any other FOIA exemption. The exemption provided for in sub-section (d) could be claimed where the information requested was provided by a foreign securities authority, and the foreign securities authority has in good faith determined and represented to the SEC that disclosure of such information would violate the laws applicable to the foreign securities authority.

ISECA also clarified the Commission's authority to provide foreign and domestic securities authorities with non-public information and authorized the SEC to obtain reimbursement from a foreign authority for expenses incurred in providing assistance to that authority. Finally, the SEC and U.S. Self Regulatory Organizations (SROs) were authorized to impose sanctions on a securities professional found by a foreign court or securities authority to have engaged in illegal or improper conduct.

17. Securities Acts Amendments of 1990, H.R. 1396, 101st Cong. (1990).

18. International Securities Enforcement Cooperation Act of 1989, S. 646, 101st Cong. (1990).

19. International Securities Enforcement Cooperation Act of 1990, H.R. 1396, 101st Cong. (1990).

20. 15 U.S.C. § 78x(d).

C. INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS RESOLUTION ON PRINCIPLES FOR RECORD KEEPING, COLLECTION OF INFORMATION, ENFORCEMENT POWERS, AND MUTUAL COOPERATION TO IMPROVE THE ENFORCEMENT OF SECURITIES AND FUTURES LAWS

Securities regulators around the world also have entered into MOU's or similar understandings with one another,²¹ thereby enhancing securities enforcement globally.²² In addition, regulators have joined such organizations as the International Organization of Securities Commissions (IOSCO) to establish principles that form the basis for further cooperation in securities enforcement.²³ The increased need for information on a cross-border basis has been a central theme in recent initiatives relating to enforcement of securities laws and regulations.

On October 1, 1998, the IOSCO adopted a Resolution on Principles for Record Keeping, Collection of Information, Enforcement Powers and Mutual Cooperation to Improve the Enforcement of Securities and Futures Laws.²⁴ The resolution was adopted in response to self-evaluations by IOSCO members, which revealed that information and record keeping are not always adequate, due in part to the absence of mandatory provisions for record keeping in certain jurisdictions and in part to the limited resources of regulators. The members recognized that "comprehensive record keeping, improved collection of information, strong enforcement powers and the removal of impediments to cooperation are fundamental to effective enforcement of securities and futures laws, market transparency and more generally the development of sound securities and futures markets."²⁵

The IOSCO Resolution first sets forth the principles that the participants agree are important for record keeping and enforcement and second focuses on the importance of information sharing among IOSCO members. The resolution suggests the creation of con-

21. For a listing of MOUs among the members of the International Organization of Securities Commissions, see <http://www.iosco.org>.

22. For example, the Forum of European Securities Commissions (FESCO) has implemented a multilateral MOU among its members to improve the efficiency of enforcement actions relating to cross-border transactions. Currently, there are many bilateral MOU's in place among FESCO's members; however, reliance on such bilateral arrangements requires regulators to adhere to varying terms and standards relating to the provision of assistance. The adoption of a single, multilateral MOU will provide a single set of procedures for European regulators to follow. See *FESCO: Regulators Agree to Cooperate to Improve Surveillance, Enforcement*, WORLD SEC. L. REP., Feb. 1999, at 9; *FESCO to Ink European MOU to Speed Up Cross-Border Enforcement*, GLOBAL COMPLIANCE REP., Oct. 5, 1998, at 1.

23. The Rio Declaration, which first established the basis for such cooperation and the goals of IOSCO, recognized "the need to enhance investor protection through both oversight of the internationalized markets and securities-related businesses as well as through enforcement of national securities laws with respect to international transactions." International Organization of Securities Commissioners, *Resolution Concerning Mutual Assistance* (Nov. 1986), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES1.pdf>. The Asian regional committee of the International Organization of Securities Commissions (Asian IOSCO) has been established, comprised of representatives from Australia, Japan, Hong Kong, and Malaysia.

24. The resolution derives from the 1994 IOSCO Resolution in which the members renewed their commitment to the principles of mutual assistance and cooperation and agreed to undertake self-evaluations. International Organization of Securities Commissioners, *Resolution on Commitment to Basic IOSCO Principles of High Regulatory Standards and Mutual Cooperation and Assistance* (Oct. 1994), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES11.pdf>.

25. International Organization of Securities Commissioners, *Resolution of Principles for Record Keeping, Collections of Information, Enforcement Powers and Mutual Cooperation to Improve the Enforcement of Securities and Futures Laws* (Nov. 1997), available at <http://www.iosco.org/library/resolutions/pdf/IOSCORES15.pdf>.

temporaneous records of all securities and futures transactions, including information as to funds and assets transferred, beneficial ownership and details such as price, quantity of securities and identity of brokers.²⁶ Record keeping as prescribed by the Resolution will provide a more complete document trail for transactions that will assist in monitoring and enforcement.

IOSCO members also agreed in the Resolution that a competent authority in each member's jurisdiction should have the power to identify persons who own or control public companies, bank accounts, and brokerage accounts, emphasizing that domestic secrecy laws should not prevent or restrict the collection of such information.²⁷ As a result of the self-evaluations, IOSCO members recognized that the ability of members to implement the desired measures may vary significantly depending on many factors, including domestic legislation. Because of the importance of access to information, each IOSCO member agreed under the Resolution to "strive to ensure that it or another authority in its jurisdiction has the necessary authority to obtain [the relevant] information."²⁸ This provision suggests that, while the regulator itself may not have the power to provide assistance in some cases, another government authority in the jurisdiction—the criminal prosecutor, for example—may have such power to share information with foreign regulators. Because of the different legal structures among IOSCO members, this is an important alternative.

Equally important to effective enforcement, however, is the sharing of such information with other IOSCO members. The Resolution therefore provides that members will take appropriate efforts to ensure that such information may be shared among them.²⁹ Finally, members agreed generally to take efforts to remove such other impediments to cooperation as may exist under their domestic legislative and regulatory schemes.³⁰ The IOSCO MOU, promulgated in 2002, is a product of the recognition among securities regulators of the underlying need for cross border cooperation. The IOSCO MOU is discussed below at section 6.

III. SEC Cooperation Understandings, Agreements and Declarations³¹

A. MEMORANDA OF UNDERSTANDING AND STATEMENTS OF INTENT

In recent years, the SEC has entered into MOUs with regulators in Germany, Portugal, India, Singapore, Japan, and Jersey. In addition, as noted above, in 2002, the first broad based multilateral MOU was endorsed by members of the International Organization of Securities Commissions. Each of these Understandings establishes another important relationship of cooperation in securities enforcement.

26. *Id.* § A.

27. *Id.* § B.

28. *Id.* § C.

29. *Id.* § D.

30. *Id.*

31. The SEC has established cooperative agreements with regulators world-wide, including regulators in Argentina, Australia, Brazil, Canada, Chile, Costa Rica, Egypt, the European Community, France, Germany, Hong Kong, India, Indonesia, Israel, Italy, Japan, Jersey, Mexico, Netherlands, Norway, Portugal, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the members of IOSCO.

1. German MOU

The SEC and the German Bundesaufsichtsamt für den Wertpapierhandel (BAWe) entered into a MOU on October 17, 1997.³² The German MOU provides for broad assistance, although its scope is circumscribed by the somewhat limited extent of the BAWe's authority.³³ The German MOU addresses cooperation in connection with the enforcement of securities laws and regulations, including, among others, insider trading; misrepresentation or manipulative practices in connection with the offer, purchase, or sale of any security or in the conduct of an investment business; the making of a false or misleading statement or material omission in any application or report to either of the authorities; and disclosure duties. Like most of the SEC's MOUs, the German MOU provides that the parties will consult periodically regarding matters relevant to the securities markets, in order to promote stability, efficiency, and integrity.

The grounds on which assistance may be denied are articulated in greater detail in the German MOU than in many of the SEC's other MOUs. For example, the MOU makes clear that assistance can be denied when prosecution in the requesting country could result in an individual being subjected to multiple prosecutions for the same offense.³⁴ Presumably, this section was added at the request of the German authorities, since prosecution in more than one country does not raise double jeopardy concerns under U.S. law³⁵ and the SEC has not ordinarily included such a clause in its other MOUs.³⁶

The German MOU establishes a strong basis for cooperation in obtaining information to assist in enforcement against securities violations. The SEC and the BAWe each agree to provide assistance in interviewing persons, conducting inspections, and obtaining information in order to determine whether violations of securities laws have been committed or to prove such violations. Unlike the Portuguese MOU, discussed below, however, the German MOU does not provide for participation by the requesting authority in any such

32. Memorandum of Understanding between the United States Securities and Exchange Commission and the German Bundesaufsichtsamt für den Wertpapierhandel Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, Exchange Act Release No. IS-1129, 66 SEC Docket 2312 (Oct. 17, 1997) [hereinafter MOU BAWe]. The Commodity Futures Trading Commission and the German BAWe have also entered into a Memorandum of Understanding Concerning Consultation and Cooperation in the Administration and Enforcement of Futures and Options Laws, pursuant to which a framework was established for assistance in regulating the futures markets, including providing access to files, taking statements from witnesses, obtaining information, and conducting compliance inspections and investigations of futures transactions and futures businesses.

33. The BAWe does not have regulatory authority over securities exchanges in Germany, nor does it have regulatory power over issues relating to capital or to the safety and soundness of the securities markets.

34. See MOU BAWe, *supra* note 32. The MOU is unclear as to whether assistance will be denied if the individual can be prosecuted multiple times in the United States by different U.S. Attorneys or local district attorneys.

35. Cf. *United States v. Balsys*, 524 U.S. 666 (1998) (holding that fear of foreign prosecution is not a criminal case for purposes of the Fifth Amendment right against self-incrimination).

36. But see Understanding Regarding the Establishment of a Framework for Consultations and Administrative Agreement, between the SEC and the Commission des Opérations de Bourse of France, Exchange Act Release No. IS-116 (Jan. 12, 1990), which includes a similar provision. The German MOU also states expressly that assistance may be denied in cases of insider trading if a criminal proceeding has already been initiated in the State of the requested authority based on the same facts and against the same persons, or if the same persons have been sanctioned on the same charges by the competent authorities of the State of the requested authority; provided, that if the requesting authority can demonstrate that the relief or sanctions imposed would not be duplicative, the parties agree to consult regarding assistance.

inspections or investigations. Nevertheless, the cooperation of the German authority in obtaining information which is located in its territory is a critical element in the SEC's ability to investigate potential securities violations and to take action against appropriate parties.

2. *Portuguese MOU*

The MOU between the SEC and the Comissão do Mercado de Valores Mobiliários of Portugal³⁷ (CMVM) provides for broad-based cooperation and contains a high level of detail regarding the scope of assistance and the procedures to be used in implementing the MOU. Perhaps the most important element of the Portuguese MOU is the broad scope of its provisions for cooperation in obtaining information. Like the German MOU, the Portuguese MOU provides for assistance in interviewing persons, conducting inspections, and obtaining information. However, the Portuguese MOU goes further in allowing the active participation by one authority in inspections and investigations conducted in the jurisdiction of the other authority.

For example, under the Portuguese MOU, a representative of the requesting authority may be present for the taking of testimony and may present questions to be asked of any witness by the representative of the requested authority. In addition, a representative of the requesting authority may attend any inspection and, subject to approval by the requested authority, may participate in such inspection. Finally, the requesting authority may seek to have examinations and inspections conducted by a person designated by it, provided that the discretion to grant or deny such requests rests solely with the requested authority.

While the Portuguese MOU expressly permits the SEC and the CMVM to use whatever unilateral means are available to obtain information,³⁸ the detailed framework set forth in the MOU increases the likelihood that the parties would first seek to use the MOU. Although the SEC and the CMVM have acknowledged in the MOU that they may not have the authority to implement all of the MOU's provisions, they have agreed to use all reasonable means to obtain such authority and to obtain the aid of other governmental agencies where appropriate.

3. *Indian MOU*

The MOU³⁹ between the SEC and the Securities and Exchange Board of India (SEBI) is significant primarily because it establishes a basis for mutual cooperation in securities enforcement. In light of the size of the Indian market, this general commitment to cooperation is a critical step.

37. Memorandum of Understanding between the United States Securities and Exchange Commission and the Comissão do Mercado de Valores Mobiliários of Portugal Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws, Exchange Act Release No. IS-1104, 65 SEC Docket 1691 (Oct. 10, 1997).

38. Memorandum of Understanding between the United States Securities and Exchange Commission and Ontario Securities Commission, Commission des Valeurs Mobilières du Québec, and British Columbia Securities Commission, Exchange Act Release No. IS-6, 43 SEC Docket 175 (Jan. 7, 1988). The Canadian MOU which is perhaps the broadest MOU the SEC has entered into, expressly provides that the parties will use the procedures set forth in the MOU before resorting to any unilateral measures.

39. Memorandum of Understanding between the United States Securities and Exchange Commission and the Securities and Exchange Board of India Regarding Cooperation, Consultation and the Provision of Technical Assistance, Exchange Act Release No. IS-1124, 66 SEC Docket 1863 (Mar. 18, 1998) [hereinafter Indian MOU].

Unlike the German MOU and the Portuguese MOU, the Indian MOU is fairly narrow in scope and contains very few details or procedures.⁴⁰ Rather, the parties state their "intent to provide each other assistance in obtaining information and evidence to facilitate the enforcement of their respective laws relating to securities matters," in particular in the offer, purchase, or sale of securities.⁴¹ The SEC and the SEBI also agree to use all reasonable efforts to obtain the cooperation of other domestic governmental agencies in providing assistance, as well as to consult periodically in order to develop a framework for cooperation.

The Indian MOU also addresses the provision of technical assistance by the SEC, which has agreed that, upon the request of the SEBI, it will consult with a view to establishing a technical assistance program. Such a program would include, among other things, the establishment of laws and regulations to protect investors, establishment of standards for offering securities, including disclosure standards, and market oversight and enforcement mechanisms.

4. *Singapore MOU*

The MOU between the SEC and the Monetary Authority of Singapore (MAS) followed closely upon the passage in March of 2000 of Singapore legislation allowing the MAS to cooperate with foreign securities and futures authorities by conducting investigations on behalf of those entities.⁴² The MOU is broad in scope, providing for the "fullest mutual assistance" permitted by law.⁴³ It contemplates mutual assistance through the provision of information in the files of the authority from which assistance is requested, the taking of statements, and the obtaining of information and documents. The MOU states that information provided pursuant to the agreement may be used in civil and administrative enforcement matters, as well as for investigation and prosecution of criminal matters.

In addition to providing for assistance upon request, the MOU acknowledges the importance of proactive, global enforcement by way of unsolicited assistance.⁴⁴ The agreement notes the understanding that should one authority come into possession of information that gives rise to a suspicion of a breach or anticipated breach of the laws or regulations of the other, the authority will use reasonable efforts to alert the other of this fact and to provide the information.

40. The SEC has entered into other MOUs that, like the Indian MOU, express a general intention of the parties to cooperate without setting forth any detailed procedures for implementation. As a general matter, these MOUs have been entered into with emerging market countries, such as China, Egypt, and Costa Rica. See Memorandum of Understanding between the United States Securities and Exchange Commission and the Egyptian Capital Market Authority Regarding Exchange of Information, Consultation and Technical Assistance, Exchange Act Release No. IS-932, 61 SEC Docket 753 (Feb. 12, 1996); Memorandum of Understanding between the United States Securities and Exchange Commission and the China Securities Regulatory Commission Regarding Cooperation, Consultation and the Provision of Technical Assistance, Exchange Act Release No. IS-662, 56 SEC Docket 1717 (Apr. 29, 1994); Communiqué between the United States Securities and Exchange Commission and the Costa Rican Comisión de Valores on the Provision of Technical Assistance for the Development of the Costa Rican Securities Markets, Exchange of Information and the Establishment of a Framework for Cooperation, Exchange Act Release No. IS-331, 49 SEC Docket 1644 (Oct. 16, 1991).

41. Indian MOU, *supra* note 39.

42. Memorandum of Understanding among the SEC, the U.S. Commodity Futures Trading Commission and the Monetary Authority of Singapore, Exchange Act Release No. IS-1224, 72 SEC Docket 1391 (May 16, 2000).

43. *Id.*

44. *Id.*

5. *The Japanese Statement of Intent Concerning Cooperation, Consultation and the Exchange of Information*

On May 17, 2002, the SEC, the U.S. Commodity Futures Trading Commission (CFTC), and the Japanese Financial Services Agency (Japan FSA) jointly announced the signing of a Statement of Intent Concerning Cooperation, Consultation, and the Exchange of Information (SOI).⁴⁵ The SOI is intended to facilitate cooperation in connection with both supervisory and enforcement matters and supercedes the more general memorandum of understanding signed by the SEC and the Ministry of Finance of Japan in 1986. The diplomatic *Notes Verbales* (Notes) supporting the SOI discuss the shared view of the U.S. and Japanese governments regarding the use of information obtained pursuant to the SOI by the criminal authorities of the respective countries.

The SOI contemplates the desirability of harmonization of regulatory efforts. It states that the authorities will consult periodically in an effort to improve cooperation and to "avoid[] the conflicts that may arise from the application of differing regulatory laws, regulations and practices."⁴⁶

The SOI announces that the authorities will provide each other with the fullest assistance permissible under the laws of the United States and Japan. This assistance includes the provision of information held in the requested authority's files, as well as assistance in obtaining information and documents from persons.

Similar to other information sharing arrangements, the SOI provides for unsolicited assistance in the event that one authority comes into possession of information giving rise to the suspicion of a breach or anticipated breach of the laws or regulation of the other authority.

6. *The IOSCO MOU*

The recently established IOSCO MOU provides another powerful tool for international information gathering.⁴⁷ The MOU establishes a complex framework for cooperation to which IOSCO members can subscribe. The framework was agreed upon unanimously at IOSCO's 2002 Annual Meeting. To date, twenty-three regulators have become signatories.⁴⁸ While it is too soon to tell the extent of the MOU's impact on international coop-

45. Press Release, Commodities Future Trading Commission, CFTC, SEC and Japanese Financial Services Agency Sign Information Sharing Arrangement (May 17, 2002), <http://www.cftc.gov/opa/enf02/opa4642-02.htm>. Also in June of 2002, the Tokyo Stock Exchange and the New York Stock Exchange signed an agreement for exchanging market surveillance information. The agreement expands the 2000 agreement between the SROs and enables the exchanges to request information or documents related to financial instruments traded on their respective exchanges, as well as to members and trading participants on the exchange.

46. Memorandum of Understanding on Mutual Assistance and the Exchange of Information Between the United States Securities and Exchange Commission and Commodity Futures Trading Commission and the United Kingdom Department of Trade and Industry and Securities and Investments Board, Exchange Act Release No. IS-323, 49 SEC Docket 1468 (Sept. 30, 1991) [hereinafter U.K. MOU].

47. International Organization of Securities Commissions, *International Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002), <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD126.pdf>.

48. *Id.* The following regulators are signatories to the IOSCO MOU: Australia—Australian Securities and Investments Commission; British Columbia—British Columbia Securities Commission; France—Commission des opérations de bourse; Germany—Bundesanstalt für Finanzdienstleistungsaufsicht; Greece—Capital Market Commission; Hong Kong—Securities and Futures Commission; Hungary—Hungarian Financial Supervisory Authority; India—Securities and Exchange Board of India; Italy—Commissione Nazionale per le Società

eration, it clearly constitutes a redoubling of efforts to facilitate the access to and collection of information from foreign jurisdictions. The MOU is broad-based, authorizing regulators to obtain information and evidence from a variety of sources, including the following:

- Information and documents in the files of the requested authority;
- Information and documents regarding the matters set forth in the request for assistance.

Upon request, the requested authority can require production from any person designated in the request or any person who may possess the requested information or documents. The types of information and documents subject to required production include:

- Contemporaneous records sufficient to reconstruct all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions;
- Records that identify the beneficial owner and controller and for each transaction, the account holder, the amount purchased or sold, the time of the transaction, the price of the transaction, and the individual and the bank or broker and brokerage house that handled the transaction;
- Information identifying persons who beneficially own or control non-natural persons organized in the jurisdiction of the requested authority;
- Compelled, sworn testimony (where permissible) or the statement of a person regarding the matters set forth in the request for assistance. Where permissible under the laws of the jurisdiction of the requested authority, a representative of the requesting authority may be present at the taking of statements and may provide specific questions to be asked of any witness.

The MOU also provides that each authority will make all reasonable efforts to provide unsolicited assistance to the other authorities in the form of information that it considers likely to be helpful to the other authorities in securing compliance with the laws and regulations applicable in their jurisdictions.

7. *The Jersey MOU*

On May 30, 2002, the SEC, the CFTC, and the Jersey Financial Services Commission (FSC) entered into a MOU establishing a framework for information sharing and cooperation in cross border investigations.⁴⁹ The MOU is likely to enhance the cooperative nature of the relationship that already exists between U.S. regulatory authorities and the Jersey FSC. Jersey has assisted the United States in connection with investigations and

e la Borsa; Jersey—Jersey Financial Services Commission; Lithuania—Lithuanian Securities Commission; Mexico—Comision Nacional Bancaria y de Valores; New Zealand—New Zealand Securities Commission; Ontario—Ontario Securities Commission; Poland—Polish Securities and Exchange Commission; Portugal—Comissao do Mercado de Valores Mobiliarios; Quebec—Commission des valeurs mobilières du Quebec; Spain—Comision Nacional del Mercado de Valores; South Africa—Financial Services Board; Turkey—Capital Markets Board; United Kingdom—Financial Services Authority; United States—United States Securities and Exchange Commission and Commodity Futures Trading Commission.

49. Memorandum of Understanding Between the United States Securities and Exchange Commission and Commodity Futures Trading Commission and the Jersey Services Commission Concerning Cooperation, Consultation, and the Exchange of Information, Exchange Act Release No. IS-1261, 77 SEC Docket 2802 (June 20, 2002).

requests to freeze assets. Jersey's status as an offshore financial center makes this MOU particularly significant in the development of global enforcement mechanisms.

B. OVERSIGHT OF CROSS BORDER INVESTMENT BUSINESS

Among the challenges to effective regulation in a global marketplace, it is particularly difficult for a regulator in one territory to accurately assess a firm's capital risk exposure unless that regulator has access to information relating to such firm's operations in other jurisdictions. The following is a discussion of recent initiatives which seek to formalize mechanisms for the regular exchange of information and to enhance cooperation in oversight of market participants.

The SEC's bilateral MOUs discussed above generally establish procedures for cooperation in obtaining information necessary for enforcement. In addition to such MOUs, the SEC and other regulators have undertaken certain initiatives relating to the improvement of management controls and oversight. An important element of such measures is the prompt notification of significant concerns and remedial actions. The purpose of information sharing in this context is improved oversight, early warning and the prevention of adverse effects on the markets, rather than enforcement against individual securities law violators.

1. SEC/IMRO Declaration on Cross-Border Investment Management Activity

The SEC and the U.K. Investment Management Regulatory Organization (IMRO)⁵⁰ have issued a Declaration on Cooperation and Supervision of Cross-Border Investment Management Activity,⁵¹ within the framework of the 1991 Memorandum of Understanding among the SEC, the CFTC, the U.K. Department of Trade and Industry, and the U.K. Securities and Investments Board.⁵² The stated goal of the Declaration is to promote investor protection and formalize existing mechanisms for sharing information and jointly conducting supervisory inspections of firms engaged in securities businesses in both the United States and the United Kingdom. The Declaration is the first formal arrangement for the supervision of cross-border fund management activity. It creates a new mechanism whereby each of the SEC and IMRO may obtain information regarding registered investment advisers located in the other authority's jurisdiction. It relates to investment advisers, investment fund managers, fund administrators, fund trustees, investment companies, and investment funds subject to the respective laws and regulatory requirements of the United States and the United Kingdom.

The two key elements of the Declaration are the regular flow of information and arrangements for joint inspections and surveillance. The Declaration provides for periodic sharing of information and prompt notification of significant information learned by either authority regarding dual registrants. Each party to the Declaration also agrees to notify the other, to the extent permitted by law, upon obtaining information "clearly giving rise to a

50. The IMRO is a self-regulatory organization recognized by the U.K. Securities Investments Board under the Financial Services Act of 1986. It is now part of the FSA structure, but retains its legal status within that structure pending further financial services legislation in the United Kingdom.

51. See Exchange Act Release No. IS-806, *supra* note 2.

52. U.K. MOU, *supra* note 46.

suspicion of a breach of any legal rule or requirement of [the] other Authority,"⁵³ as defined in the MOU. Finally, the Declaration provides for joint inspections to be conducted by the SEC and IMRO, thereby allowing more effective surveillance of firms doing business in both territories.

2. *SEC/Hong Kong Declaration on Cross-Border Investment Management Activity*

A declaration nearly identical to the SEC/IMRO declaration was signed in October 1995 by the SEC and the Hong Kong Securities and Futures Commission (SFC).⁵⁴ It establishes a framework for cooperation and assistance between the SEC and the SFC in supervising cross-border investment management activity.

3. *Financial Regulation Memorandum of Understanding*

On August 15, 1988, the SEC, the NYSE, the NASD, the Chicago Board of Options Exchange, Inc., and the AMEX entered into a MOU with the SIB, the Association of Futures Brokers and Dealers, the Financial Intermediaries Managers and Brokers Regulatory Association, the IMRO, the Securities Association Limited, and the Bank of England (Financial Regulation MOU). The Financial Regulation MOU provides that, upon request, certain information concerning the capital position of broker-dealers will be made available by the U.S. authorities to the U.K. authorities. By making this information available, the Financial Regulation MOU allows the U.K. regulators to exempt their capital adequacy rules in relation to U.S.-regulated broker-dealers that conduct business in the United Kingdom.

C. COOPERATION TO ADDRESS POTENTIAL MARKET DISRUPTION

1. *Joint Statement Regarding OTC Derivatives Oversight*

On March 15, 1994, the SEC, the CFTC, and the SIB issued a Joint Statement setting forth an agenda for oversight of the over-the-counter (OTC) derivatives market.⁵⁵ Once again, the primary focus of the Joint Statement is the promotion of controls, risk management, and disclosure and the sharing of information. The Joint Statement identified ways in which the SEC, the CFTC, and the SIB could cooperate in their regulatory approaches to the OTC derivatives market and set forth common goals to be achieved by the three authorities.⁵⁶

The seven-point program set out in the Joint Statement includes improving international oversight of OTC derivatives trading through enhanced information sharing; improving risk management by promoting the use of legally enforceable netting arrangements; addressing concerns about excess leverage by promoting the establishment of prudent risk-based capital charges and increased use by firms of stress simulations of severe market

53. Memorandum of Understanding with the United Kingdom (and the Commodity Futures Trading Commission), Exchange Act Release No. IS-4, 43 SEC Docket 163, (Sept. 23, 1986).

54. Declaration on Cooperation and Supervision of Cross-Border Investment Management Activity, Exchange Act Release No. IS-863, 60 SEC Docket 1206 (Oct. 6, 1995).

55. OTC DERIVATIVES, *supra* note 3.

56. *Id.* The Joint Statement recognizes the work of IOSCO in the area of cross-border activity in the OTC derivatives markets. See also International Conference on Financing for Development, *Causes, Effects and Regulatory Implications of Financial and Economic Turbulence in Emergency Markets* (Mar. 21, 2001), <http://esa.un.org/ffd/policydb/PolicyTexts/IOSCO-1.htm>.

conditions; promoting the development and use of sound management controls as part of an effort to monitor and control firms' activities and risk; encouraging strengthened standards for customer protection examining the regulatory framework for multilateral clearing arrangements; and promoting improved standards for accounting recognition, to work actively with other domestic and international securities, futures and financial regulators to promote wider regulatory cooperation.⁵⁷

This first international understanding among securities and futures regulators for developing and coordinating an approach to the OTC derivatives market demonstrates the need for, and the ability of, regulators to work in a coordinated fashion to address some of the most complex issues arising in the markets today.

2. *Windsor Declaration*

Representatives of regulatory authorities from sixteen countries came together in May 1995, and issued the Windsor Declaration in an effort to "prevent[] or contain[] the adverse effects of financial disruptions" in light of "the increase[ed] volume of cross-border [futures] transactions."⁵⁸ Like the Bank of England MOU and the SEC/IMRO Declaration, the Windsor Declaration focuses on the regular flow of information and on the development of procedures to address emergency situations in the futures markets. The four main elements of the Windsor Declaration are (i) cooperation between exchanges; (ii) protection of customer positions, funds, and assets, (iii) default procedures; and (iv) regulatory cooperation in emergencies. The Declaration is a statement by the parties recommending areas to be addressed, and changes to be implemented, through the Technical Committee of IOSCO.

With respect to cooperation between market authorities, the Windsor Declaration prescribes a survey of current procedures used to identify large exposures and specifies the type of information necessary to evaluate such exposures, as well as certain triggers and thresholds, the occurrence of which would entitle the authorities to request assistance from one another. It also establishes mechanisms for information sharing within the framework of the Declaration.

Customer positions, funds, and assets are to be protected through the development of best practices with a view to maximizing the safety of such funds and risk management for protection of the intermediary. The Windsor Declaration also proposes the development of best practices with respect to the treatment of positions and funds in the event of a default or disruption at a member firm and recommends the establishment of standards for providing information to market participants in the event of a default. Finally, the Windsor Declaration affirms the parties' commitment to regulatory cooperation in the event of an emergency situation in the futures markets or with respect to a market participant.

57. OTC DERIVATIVES, *supra* note 3.

58. Commodity Futures Trading Commission, Windsor Declaration (1995), <http://www.cftc.gov/oia/oiaiwindsordeclaration.htm>. Australian Securities Commission, Comissão de Valores Mobiliários (Brazil), Commission de Valeurs Mobilières du Québec and Ontario Securities Commission (Canada), Commission des Opérations de Bourse (France), Bundesaufsichtsamt für den Wertpapierhandel (Germany), Hong Kong Securities and Futures Commission, Commissione Nazionale per le Società e la Borsa (Italy), Securities Bureau of the Ministry of Finance of Japan, Securities Board of the Netherlands, the Monetary Authority of Singapore, Financial Services Board (South Africa), Comisión Nacional del Mercado de Valores (Spain), Swedish Financial Supervisory Authority, the Federal Banking Commission (Switzerland), the CFTC and the SEC (United States), and the Securities and Investments Board (United Kingdom).

3. *Joint Initiative to Improve Oversight of Global Securities Firms*

On July 17, 1995, the SEC and the SIB announced the first joint initiative to assess the global activities of major international securities firms by conducting in-depth studies of the financial, operational, and management controls used by selected securities firms that conduct significant cross-border derivatives and securities activities. The initiative is significant in that it brings together the major securities regulators in a practical exercise leading to a better understanding of each regulator's approaches as well as contributing to a better information exchange between the regulatory authorities in the United States and the United Kingdom.

Pursuant to this initiative, the SEC and the SIB have worked to review and evaluate internal controls used by firms with significant international securities activities, including controls relating to market, credit, liquidity, and funding risks. Because the selected firms are likely to have significant operations in third countries, the SEC and SIB expect to work jointly with representatives of other relevant regulators.

4. *Futures Industry Association MOU*

On March 15, 1996, forty-nine market authorities and self-regulatory organizations entered into an International Information Sharing Memorandum of Understanding and Agreement (FIA MOU).⁵⁹ The central focus of the FIA MOU is information sharing and, in particular, notification of certain significant events and disciplinary actions. This initiative is a complex two-tier approach involving both the exchanges and their corresponding regulators.

The exchanges that are parties to the FIA MOU recognized the need for cooperation with respect to certain significant events, and the MOU therefore sets out criteria and procedures for notification and information sharing with respect to such events. Information to be provided under the FIA MOU is limited to that which is relevant to the event that actually gives rise to a request for assistance. The parties also agree to use best efforts to keep one another informed of conclusions made on the basis of information provided and of any action taken, including disciplinary action.

In order to assist in the implementation of the FIA MOU, a Declaration on Cooperation and Supervision of International Futures Markets and Clearing Organizations was also issued on March 15, 1996, by futures exchanges and clearing organizations in the territories of the parties to the FIA MOU. The regulators who are parties to the Declaration endorsed the FIA MOU, acknowledged that the exchanges that have signed the MOU may need the assistance of their regulators in making information available to exchanges in other jurisdictions, and stated their intent to assist by all legal means.

In furtherance of the principles set out in the FIA MOU, fifteen regulatory authorities issued a Joint Communiqué on October 31, 1997, in which they encouraged the development of best practices in contract design and review and in approaches to market surveillance and information sharing. The authorities agreed upon the first international benchmarks for supervision of futures market and stressed in particular cooperation in respect of large exposures. The authorities also stated their intent to amend the Declaration on Cooperation and Supervision adopted on March 15, 1995 in order to increase the scope of participation.

59. Canadell, *supra* note 2.

5. *Bank of England MOU*

On October 27, 1997, the SEC, the CFTC, and the Bank of England⁶⁰ entered into a MOU⁶¹ (Bank of England MOU) relating to oversight of management controls, assistance in obtaining information, and cooperation in emergency oversight. The scope of the Bank of England MOU extends to firms which operate in both the United States and the United Kingdom. The parties to the Bank of England MOU expressly recognized that “[t]he growth of cross-border financial activity, including the globalisation of securities and futures firms and banks, has made the sharing of supervisory and financial information critical to the ability of the Authorities to carry out their respective oversight responsibilities.”⁶² The MOU is intended to formalize mechanisms between the authorities in order to enhance the effectiveness of regulatory oversight.

a. Management Controls

The Bank of England MOU articulates certain specific areas with respect to which the authorities believe Relevant Firms⁶³ must have management controls. These include (i) market risk management; (ii) credit risk management; (iii) balance sheet and liquidity management; (iv) operations and systems; (v) counterparty and legal risk controls; and (vi) compliance and audit. Under the Bank of England MOU, the parties agree to notify one another promptly of any significant concerns in respect of such management controls and also to inform one another of any remedial action taken against a firm. The authorities also agree to consult prior to taking remedial action where appropriate.

b. Assistance In Obtaining Information

The Bank of England MOU provides a mechanism by which each authority may obtain information from firms located in the other authority's territory. The MOU also contains an undertaking that the authorities will endeavor to communicate information relating to firms facing “serious financial difficulties” in the United States or the United Kingdom “that could have a material adverse effect on the operations of such firm in the other country,”⁶⁴ thereby establishing an early warning system.

c. Cooperation In Emergency Oversight

Finally, the authorities also recognized that cooperation in emergency situations can be critical to ensuring that on a worldwide basis problems are addressed in a timely manner. In that regard, the Bank of England MOU creates a basis for “mutual consultation in the prompt and productive exchange of information in such emergency situations”⁶⁵ and pro-

60. The Financial Services Authority (FSA) also signed the MOU to confirm that its provisions would continue in effect upon the transfer of banking supervision from the Bank of England to the FSA in 1998. Therefore, the MOU should now be thought of as an agreement between the United States authorities and the FSA.

61. Exchange Act Release No. 1106, *supra* note 3.

62. *Id.*

63. *See id.* A “Relevant Firm” is defined by the Bank of England MOU as a broker-dealer, futures commission merchant, or bank, if that entity, its parent or holding company, is incorporated or headquartered in the United States or the United Kingdom and any holding companies, subsidiaries and affiliates of such entity if that entity, alone or together with one or more of its related entities, conducts securities, futures, and/or banking transactions (including derivatives transactions) in both the United States and the United Kingdom.

64. *Id.*

65. *Id.*

vides for assistance in monitoring as well as the provision of information, including "current financial position (balance sheet and off-balance sheet) and income statement; portfolio and credit information, including details of major long and short positions; and counter party exposures."⁶⁶ It also provides that the authorities will make information available on a timely basis, advise each other of actions they intend to take, and consult concerning those actions as appropriate. The Bank of England MOU reinforces the already close relationship between U.S. and U.K. securities regulators by formalizing arrangements between them to enhance their ability to monitor securities transactions, and may serve as a model for addressing potential cross-border contagions. The necessity of cross-border real time cooperation has become more evident following the September 11, 2001 terrorist attack against the United States. The international cooperation in the area of source of funds identification and money laundering that has arisen since the attack is likely a harbinger of similar efforts in the global securities industry.⁶⁷

6. *Limited Purpose Broker Dealer*

In October 1998, the SEC adopted amendments⁶⁸ to certain rules issued under the Securities Exchange Act of 1934, as amended to create a new class of broker-dealer with tailored capital, margin and other regulatory requirements for OTC derivatives dealers, provided such dealers engage only in limited activities.⁶⁹ The amendments were unilaterally adopted by the SEC without the involvement of any foreign regulator. They nevertheless are included in this discussion because, like the Bank of England MOU, the SEC's new rules reflect an increased focus on controls, risk management and the regular flow of information.

Historically, many U.S. firms have located their OTC derivatives businesses offshore in order to avoid the restrictions—particularly with respect to capital requirements—of U.S. securities regulation, as well as the expense related to such regulation. The broker-dealer "lite" rules reflect an effort by the SEC to bring this business back onshore in order to regulate it directly, but in a manner appropriate to the OTC derivatives market. This new alternative to registration as a fully regulated broker-dealer should allow U.S. firms to compete more effectively with foreign dealers who are not subject to regulation by the SEC.⁷⁰ However, the alternative regulatory scheme is available only for dealers whose activities are limited to privately negotiated OTC derivatives transactions.

The books and records provisions of the new rules are particularly relevant to this discussion. Under such provisions, OTC derivatives dealers have an obligation to maintain certain records and to report periodically to the SEC. OTC derivatives dealers are required to register with the SEC and thereby become subject to, among other things, the books and records requirements of the Exchange Act, which have been amended to include records relevant to the OTC derivatives business. In addition, such dealers are required to report

66. *Id.*

67. See SEC v. Poyiadjis, Exchange Act Release No. 17862, 2002 WL 31643059 (S.D.N.Y. Nov. 25, 2002). Anti-money laundering initiatives are discussed in the forthcoming Part II of this article.

68. OTC Derivatives Dealers, Exchange Act Release No. 39454, 66 SEC Docket 155 (Dec. 17, 1997). The new rules, commonly referred to as the broker-dealer "lite" rules, became effective on January 4, 1999.

69. See *id.*

70. See Kyra K. Bergin et al. *Regulatory Developments and Current Issues in Regulation of Trading Markets and International Dealers*, in INTERNATIONAL SECURITIES MARKETS 199 (Alan J. Beller & Michael D. Mann co-chairs, Practising Law Institute 1997), available at 1011PLI/Corp 371 (Westlaw).

capital and other operational problems to the SEC within specified time periods and to fulfill regular reporting requirements including quarterly and annual financial statements and risk evaluation.

In addition to reporting requirements, the broker-dealer "lite" rules require OTC derivatives dealers to establish internal controls for managing the risks associated with an OTC derivatives business. The rules also articulate the basic elements for review of OTC derivatives risk management systems by the SEC. Together with regular reporting and notification of important developments, these provisions enhance the SEC's ability to understand OTC derivatives transactions and to obtain the information necessary for effective enforcement. In its focus on internal controls and risk management, the regulatory scheme under the broker-dealer "lite" rules is in some respects a departure from the SEC's typical regulatory approach and is instead more easily analogized to traditional banking regulation.

D. SEC INITIATIVES RELATING TO OVERSIGHT OF THE TRADING OF FOREIGN SECURITIES LISTED IN THE UNITED STATES—THE FOREIGN ISSUER NOTIFICATION SYSTEM

Because the securities of many companies are traded in multiple jurisdictions, regulators deem it critical that they be made aware of disciplinary actions taken against such companies in jurisdictions other than their own. Improper behavior in one securities market may be indicative of similar behavior elsewhere, and certain actions, such as suspensions, against a company may affect its ability to continue operating in other markets. In recognition of the importance it attaches to information relating to disciplinary actions taken by regulators, the SEC has entered into information sharing agreements with regulators from a number of foreign nations, including Brazil, Japan, Korea, Luxembourg, Mexico, New Zealand, Peru, Singapore, Spain, and the United Kingdom. This improves the oversight of companies that trade in U.S. and foreign securities markets.⁷¹

Since March 1996, the SEC has entered into arrangements with securities authorities in a wide range of other nations to improve oversight of companies whose securities trade both in the U.S. and foreign securities markets. Under the arrangements, the SEC and the foreign regulator will advise each other whenever certain announced enforcement-related regulatory actions are taken against issuers whose securities trade in the markets of both countries. These actions generally include:

- suspension from trading on a regulated exchange or market for more than one day;
- de-listing from a regulated exchange or market; and
- a regulator's initiation of proceedings against an issuer, such as an administrative action or enforcement lawsuit by the SEC.

The new system is expected to provide the SEC with a prompt, systematic "early warning" of sanctions involving foreign companies taken in their home countries that may be of concern to regulators and investors in the United States.⁷² The SEC also will provide

71. *Global Sec. Corp. v. British Columbia (Securities Commission)*, [2000] S.C.R. 494. Like the SEC's MOU's previously discussed, these information sharing agreements reflect the importance of bilateral arrangements between the SEC and foreign regulators in achieving effective enforcement.

72. See TransAtlantic Business Dialogue, 1999 TABD CEO Conference Conclusions (Oct. 29-30, 1999), <http://static.tabd.com/gems/1999BerlinCEOReport.pdf>.

notice to foreign regulators about actions taken in the United States regarding the securities of dually traded issuers.

The notification arrangements are intended to complement a number of existing direct market-to-market agreements under which U.S. exchanges and markets already share information directly with certain foreign counterparts regarding issuers with securities trading in the United States and abroad. The arrangements will complement existing MOUs and other arrangements the SEC has to obtain assistance in investigations and enforcement actions and to provide for the exchange of non-public information.

IV. International Assistance

Courts in a number of different countries have decided cases regarding the validity of actions taken domestically to assist foreign regulators. Even in situations where bilateral or multilateral understandings exist among regulatory authorities, the ability to implement such agreements relies on domestic authority to do so. Indeed, many MOUs and other initiatives expressly recognize that there may be limitations on the domestic authority of the parties. A clear example of such limitations occurred in connection with the SEC's MOU with Canada, where neither the SEC nor its Canadian counterparts had the necessary powers to implement the MOU when executed, but where each subsequently sought and received such authority. The cases discussed below evidence a range of different results. Significantly, the holdings turn on the issue of the basis for the domestic legal authority to provide assistance and not the legitimacy of cooperation. Indeed, in each case the courts have generally recognized the need for international cooperation in securities law enforcement.

A. EVIDENCE GATHERING

1. *British Columbia: Global Securities Corporation*

In April 2000, the Supreme Court of Canada lay to rest any question about the validity of regulatory understandings for international securities cooperation that were implemented by Provincial law. In a case challenging a request for assistance under the 1988 Memorandum of Understanding between the U.S. SEC and the British Columbia Securities Commission (BCSC), the Court ruled that domestic legislation to implement the MOU provided a valid means for compelling evidence from a Canadian person and that such evidence could thereafter be given to the foreign regulator for use in its own proceedings.⁷³ In so holding, the Court affirmed the principle that international cooperation among securities regulators was critical for the protection of domestic investors and markets.⁷⁴

Prior to the enactment of the challenged statute, the BCSC and the SEC had entered into a MOU, in which the parties agreed to provide assistance to one another, including by taking evidence and obtaining information from persons within their jurisdiction. Sec-

73. *Global Sec. Corp.*, [2000] S.C.R. 494.

74. *Id.*; cf. *KPMG Klynveld Accountants v. Stichting Toezicht Effectenverkeer* [Securities Trade Supervision Foundation], No. 92/1954/113/226, Amsterdam (Dec. 17, 1992) (subject of inquiry unsuccessfully challenged underlying Dutch legislation under which Dutch regulator had ordered provision of information requested by SEC).

tion 141(b)(1) was enacted by the British Columbia legislature to facilitate the implementation of the MOU. In particular, section 141(b)(1) permits the executive director of the BCSC to make an order “to assist in the administration of the securities laws of another jurisdiction.”⁷⁵ Therefore, the executive director was authorized under the statute to require certain persons to provide information in response to a request for assistance by the SEC under the MOU.

Global Securities Corporation was a securities firm registered in British Columbia but not registered in the United States with the SEC under the Securities Exchange Act. In furtherance of its investigation of the activities of an employee of Global, the SEC requested assistance from the BCSC under the MOU. In response, the BCSC issued orders to Global to deliver account listings and certain other information.⁷⁶ Global’s challenge to the order was twofold. First, it alleged that section 141(b)(1) was *ultra vires* and therefore constitutionally invalid. Second, it alleged institutional bias on the part of the BCSC as a result of the execution of the MOU and the BCSC’s interest in obtaining the mutual cooperation of the SEC thereunder. In defense of section 141(b)(1), the BCSC argued that the purpose of the statute was to facilitate inter-jurisdictional cooperation, which aids the BCSC in doing its job under the Securities Act.⁷⁷ The lower court agreed and dismissed Global’s *ultra vires* claim on the basis that section 141(b)(1) was incidental to the primary function of the Securities Act.⁷⁸ Moreover, the lower court had been satisfied that without cross border and interjurisdictional cooperation in the investigative process, the primary function of the [BCSC] would be seriously hampered. The Court of Appeal found no institutional bias, but did hold that section 141(b)(1) was *ultra vires* the province.

In its opinion reversing the lower court’s decision, the Court of Appeal acknowledged that the BCSC routinely exchanges information with foreign securities regulators.⁷⁹ The Court of Appeal also noted that provincial legislation may in some cases be valid notwithstanding an extra-territorial effect provided its “pith and substance” lies within the province.⁸⁰ In this case, however, the court found that the information was requested by the BCSC from Global for the sole purpose of being delivered to the SEC and not in connection with any enforcement of rights within the province. The court found that an administrative tribunal such as the SEC does not fall within the principle at this time, and stated that “[e]ventually, these considerations may militate as well in favour of a recognition of the desirability of cooperation between jurisdictions outside the Canadian federation.”⁸¹

The Supreme Court of Canada disagreed, stating that while the dominant purpose of section 141 was the enforcement of the province’s securities law, to regulate effectively it needed to be able to cooperate on a reciprocal basis with other foreign regulatory authorities, both within and outside of Canada.⁸² Such cooperation had the additional beneficial effect of assisting the local regulatory in identifying fraud in its own jurisdiction. As a result,

75. *Global Sec. Corp.*, [2000] S.C.R. 494.

76. *Id.* at 5.

77. *Id.* at 5-6.

78. *See id.* at 7.

79. *Id.* at 4.

80. *Id.* at 13.

81. *Id.* at 22.

82. *Id.* ¶ 32.

the Court held that the authority of the BCSC to provide assistance to the SEC under the MOU was constitutional.⁸³

2. *Singapore: the APL Case*

In another case in which the SEC requested assistance in obtaining information relevant to potential violations of U.S. securities laws, the High Court of Singapore found that assistance was permissible under domestic law. The case, *In Re Evidence (Civil Proceedings in Other Jurisdictions) Act*, arose out of litigation brought by the SEC relating to suspected violations of section 10(b) and rule 10b-5 of the Securities Exchange Act by certain Singapore residents.⁸⁴ The SEC charged that such persons had engaged in insider trading of the stock of APL Ltd. while in possession of non-public information regarding the potential acquisition of the company by Neptune Orient Line Ltd.⁸⁵ The SEC made an application for the appointment of an examiner in Singapore to take evidence to be used in a civil proceeding in the United States in which the SEC was seeking an order (i) enjoining the defendants from future violations of securities laws, (ii) ordering disgorgement of profits and (iii) imposing civil penalties.⁸⁶ Two people named as witnesses disputed the SEC's right to obtain evidence under the Evidence (Civil Proceedings in Other Jurisdictions) Act of Singapore (ECPOJA).⁸⁷

Under the ECPOJA, assistance may be provided to foreign authorities only if the High Court of Singapore is satisfied that the evidence sought is to be "obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated."⁸⁸ Moreover, the proceeding must be considered civil in nature under the laws of both the requesting jurisdiction and those of the court addressed in the request.⁸⁹ The witnesses argued that the U.S. proceeding instituted by the SEC would in fact be characterized as criminal in nature under Singapore law and therefore assistance should not be granted under the ECPOJA.

The Singapore court, however, ruled that assistance under the ECPOJA could be provided to the SEC.⁹⁰ The civil penalties sought by the SEC were found by the court to be penal in nature because the money collected would go to the Treasury rather than to injured persons.⁹¹ However, a proceeding seeking injunctive relief is considered a civil proceeding under both U.S. and Singapore law and therefore the requested assistance was held to be permissible.⁹² The court determined that the significant issue was the nature of the proceeding—a civil action in the U.S. courts—and not the nature of the potential relief.⁹³

83. *Id.* ¶ 36.

84. SEC v. Ong Congqin Bobby & Anor [1999] 1 S.L.R. 310, 311.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 312.

89. *Id.*

90. *Id.* at 314.

91. *Id.* at 312-13.

92. *Id.* at 313-14.

93. In a 1975 case entitled *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273, an English trial court held that the Securities Exchange Act is a penal statute and therefore unenforceable in the United Kingdom notwithstanding the fact that private citizens may get civil relief thereunder. In *Schemmer*, a receiver that was appointed in a United States insider trading action brought by the SEC had sought appointment as receiver over certain assets located in the United Kingdom, as well as injunctive relief through U.K. courts. The court's judgment in *Schemmer* was never challenged in a higher court, and has not generally been followed.

3. *Swiss Securities Law and Recent Case Law*

The Swiss have been one of the leading authorities in international cooperation. Assistance between the SEC and Swiss regulators was historically governed by the Swiss Treaty, and was traditionally handled as a criminal matter thereunder. In 1995, however, the Swiss enacted the Federal Law on Stock Exchanges and Trading in Securities (the Swiss Act).⁹⁴ The stated purpose of the law is to provide a framework for the functioning of the securities markets and to enhance transparency in securities transactions.⁹⁵ Its importance lies in the procedures contained within the law itself, which permit Swiss regulators to grant assistance to, as well as request assistance from, foreign regulators. However, as described below, interpretation of the Act has been restrictive and it has served recently to frustrate the very cooperation for which it was designed.

Under the Swiss Act, the Swiss Federal Banking Commission (the Supervisory Authority) is granted supervisory authority over the enforcement of the Swiss Act and the implementation of its provisions.⁹⁶ This authority includes the power to issue orders requiring persons subject to supervision under the Swiss Act to provide information and documents to the Supervisory Authority and the power to enforce certain penalties for failure to comply with such orders.⁹⁷

Chapter 7 of the Swiss Act further empowers the Supervisory Authority to request information from foreign supervisory authorities concerning stock exchanges and security dealers and to submit certain information to foreign supervisory authorities upon request.⁹⁸ Article 38, clause 2 of the Swiss Act provides that

[the Supervisory Authority] may forward publicly inaccessible information and documents to foreign supervisory authorities only if the said foreign authorities:

- use such information exclusively for the purpose of direct supervision of the stock exchanges and the trading in securities;
- are bound by official or professional secrecy; and
- do not, without the prior consent of the Swiss Supervisory Authority or by virtue of a general authorization clause in an international treaty, forward such information to competent authorities and to other bodies which carry out supervisory functions in the public interest. Forwarding information to criminal authorities is not permitted if mutual assistance in criminal matters would be excluded. The Supervisory Authority shall decide in consultation with the Federal Office for Police.⁹⁹

In addition to the Swiss Act, Swiss banking laws also provide a basis for international cooperation.¹⁰⁰

A recently decided example of the restrictive interpretation given by Swiss authorities to the Act is *In the Matter of W, X, Y and Z v. Swiss Banking Commission*.¹⁰¹ This case relates to

94. Federal Act on Securities Exchanges and Securities Trading of 24 March 1995 (Securities Act 1995) BEHG/LBVM/LBVM, an unofficial, amended version of the Swiss Act is available at http://www.swx.com/admission/regulation/rules_federal_en.html.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See Daniel Zuberbühler, *Int'l Regulatory Talk*, COMPLIANCE REP., Feb. 1, 1999, at 10 (director of Swiss Banking Commission discussing cooperation under securities and banking laws).

101. *In re W, X, Y & Z*, 2A.355/1999/leb.

a U.S. action entitled *SEC v. Euro Security Fund*.¹⁰² The decision of the Swiss Supreme Court is significant in that the Court held that the assurances given by the SEC were not sufficient to protect the interest of customers in the privacy of relevant customer information. The case underscores the growing recognition of the ease with which information flows when confidentiality provisions are relaxed. The Swiss Court expressed its concern that if otherwise confidential information were provided to the SEC, it might through the course of SEC or other proceedings, make its way into the domain of the general public, local and national tax authorities, or other entities which would otherwise not have access.¹⁰³

The Court held that if relevant customer information were provided to the SEC by Swiss authorities pursuant to cooperative agreements, there was a danger that such information might inappropriately be forwarded to authorities and third parties within the United States to which dissemination was not authorized under Swiss law.¹⁰⁴ The request at issue in this matter was associated with price developments immediately preceding the takeover of Elsasg Bailey Process Automation N.V. by ABB. The price developments raised suspicion of insider trading and the SEC requested the aid of Swiss regulatory authorities, the Banking Commission, in obtaining information to assist in its investigation.

Respondents W, X, Y, and Z objected to provision of the requested information, arguing that while the information and documents to be provided would be subject to confidentiality provisions, those provisions were insufficient as a matter of Swiss law in light of the open nature of SEC hearings.¹⁰⁵ The Court held that the Banking Commission's contention, that provision of the information to the SEC was predicated upon an agreement that it would be used only for investigative purposes and potentially for inclusion in an amended Complaint to be filed in U.S. District Court, was unavailing in light of an SEC letter that was ambiguous as to whether the information would be provided to other authorities. The Court held that unless there is an advance agreement between the Banking Commission and a foreign authority to permit onward disclosure, the Commission must refrain from providing the information in a situation where such onward disclosure appears possible.¹⁰⁶ During 2001, the SEC and the Banking Commission worked to respond to the concerns raised by the Swiss Supreme Court and in late December, 2001, the Court rejected these efforts and denied assistance.¹⁰⁷

B. CHALLENGES TO CONFIDENTIALITY OF INFORMATION OBTAINED UNDER MOU'S

1. *In re Global Minerals & Metals Corp.*

A decision by the CFTC underscores the importance attached to maintaining the confidentiality of information provided pursuant to cooperative agreements. *Global Minerals & Metals Corp.* demonstrates the potential impact on cross-border information sharing of less restrictive interpretations of confidentiality agreements. In this instance the FSA made clear that disclosure of confidential information provided to the SEC pursuant to the U.K. MOU would make further disclosure unlikely.¹⁰⁸ The recognition of the importance of strict con-

102. *SEC v. Euro Sec. Fund*, No. 98-7347, 2000 WL 1376246, at *1 (S.D.N.Y. Sept. 25, 2000).

103. *In re W, X, Y & Z*, 2A.355/1999/leb.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *In re Global Minerals & Metals Corp.*, No. 99-11, 2001 WL 1167807, at *6 (C.F.T.C. Oct. 3, 2001).

fidentiality constraints was taken a step further by the Swiss Supreme Court in *In the Matter of W, X, Y and Z v. Swiss Banking Commission*, discussed above. In that case, the Swiss Court prohibited dissemination of information altogether, absent a preexisting specificity clause addressing onward disclosure of confidential information. While *Global Minerals & Metals Corp.* addresses concerns related to disclosure to counsel for a defendant of confidential material,¹⁰⁹ *In the Matter of W, X, Y and Z* expresses significant reservations related to disclosure of confidential information to a government enforcement entity that could in turn disclose to another enforcement entity within the same government.

In *Global Minerals & Metals Corp.*, the CFTC reversed the order of the Administrative Law Judge (ALJ) that compelled the Division of Enforcement to provide to respondents Global Minerals & Metals Corp. (Global), R. David Campbell and Carl Alm copies of documents it obtained from regulators in the United Kingdom pursuant to the terms of the UK MOU.¹¹⁰ The CFTC determined that the ALJ's interpretation of the MOU undermined expectations of confidentiality that are vital to the continuing success of the cooperative efforts of international regulators.¹¹¹

The matter stemmed from the Division of Enforcement's investigation into unusual price movements in the world copper market.¹¹² During the investigation, the Division obtained documents from United Kingdom financial regulators pursuant to the UK MOU.¹¹³ Eventually, the investigation led to a complaint filed by the Commission against respondents, alleging that between October and December of 1995, respondents attempted to manipulate the price of copper and copper futures contracts and actually succeeded in manipulating the price.¹¹⁴ The Division made some of these documents available to respondents for inspection, but withheld others on the ground that the information was obtained from a foreign futures authority on the condition that the information not be disclosed, within the meaning of Commission Rule 10.42(b)(2)(v).¹¹⁵ The ALJ granted an order compelling production of these documents, holding that the U.K. authorities waived confidentiality when they shared these documents with the Division.¹¹⁶ The Division moved to delay production and for certification of the issue for interlocutory appeal.¹¹⁷ When the ALJ denied this request, the Division filed an application for interlocutory review.¹¹⁸

a. Granting of Interlocutory Review

The Commission granted the application, finding "extraordinary circumstances that justify immediate consideration of the ruling at issue."¹¹⁹ In this respect, the Commission noted that the Division, the SEC, and the FSA all agreed that the ALJ's interpretation was so contrary to the regulator-parties intent to the MOU that future cooperative efforts would

109. *Id.* at *1.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at *3.

118. *Id.*

119. *Id.* at *5.

be threatened as long as the validity of the ALJ's interpretation remained unresolved.¹²⁰ The Commission also agreed with the Division's argument that a post-disclosure decision that the documents should have remained confidential would not be effective or consistent with the MOU.¹²¹

The Commission cited the letter submitted to the ALJ by the FSA's Director of Enforcement, Daniel F. Waters, in which he describes the potential effect of the forced disclosure of consultative documents shared by the FSA with the CFTC.¹²² Director Walters explicitly affirmed that "[w]here confidential information is disclosed pursuant to the MOU, the FSA considers that there is a clear understanding . . . that no disclosure would occur save to the extent and in the manner provided for under the MOU."¹²³ Director Waters continued, noting the potentially deleterious effects of this type of disclosure:

The FSA's policy has been, and continues to be, one of promoting cooperation with overseas regulators in the regulation of increasingly globalised markets for financial services. If appropriate and effective regulatory policy is to be maintained in respect of ensuring continued efficient mutual assistance and cooperation between overseas regulators such as the CFTC and the FSA, it is essential that the FSA should be able to communicate with the CFTC in the knowledge that confidential documentation will not be disclosed save to the extent and in the manner provided for in the MOU. Such confidential information would not be so readily provided by the FSA if the FSA could not be sure that its confidence would be respected.¹²⁴

b. Interpretation of the MOU

The Commission was guided in its interpretation of the MOU by the same principles that guide the interpretation of treaties, and viewed its role as "limited to giving effect to the intent of the parties to the MOU."¹²⁵ When the parties to a MOU agree as to the meaning of its provisions, and that interpretation follows from its clear language, the court "must, absent extraordinarily strong evidence, defer to that interpretation."¹²⁶ To the extent the MOU's terms are not clear, the Court stated that it "must give great weight to the meaning attributed to them 'by the Government agencies charged with their negotiation and enforcement.'"¹²⁷

The Commission interpreted paragraphs 16, 17, and 19 of the MOU as creating a presumption "that shared information retains its confidentiality unless disclosed to a third party in the course of an investigation or proceeding."¹²⁸ If information is not used for one of the purposes identified in paragraph 16, it is supposed to be kept confidential.¹²⁹ Paragraph 16 provides that information will be provided "solely for the purpose of . . . conducting civil or administrative enforcement proceedings . . . or conducting any investigation related thereto for any general charge applicable to the violation of the legal rule or requirement

120. *Id.*

121. *Id.*

122. *Id.* at *5-6.

123. *Id.* at *6.

124. *Id.*

125. *Id.*

126. *Id.* (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)).

127. *Id.* (quoting *Iceland S.S. Co. v. U.S. Dep't of the Army*, 201 F.3d 451, 458 (D.C. Cir. 2000)).

128. *Id.* at *8.

129. *Id.*

identified in the request [for information].”¹³⁰ The MOU also states that “communications between the regulators regarding the sharing of documents or their content are to remain strictly confidential, unless disclosure is ‘absolutely necessary.’”¹³¹ In reaching its decision to vacate the order compelling production, the Commission noted that “the mere act of supplying information pursuant to the MOU demonstrates an intent to keep the information confidential,” and that if the ALJ’s view were correct, that sharing information pursuant to the MOU constituted a waiver of confidentiality, there would be not reason for the negotiated confidentiality provisions contained within the MOU itself.¹³²

C. INTERNATIONAL ASSISTANCE IN ASSET FREEZES

1. *U.S. SEC v. Dunne Finance Ltd.*¹³³

While the SEC has successfully frozen allegedly ill-gotten gains in a variety of circumstances pursuant to formal agreements, repatriation has usually been accomplished through the ultimate cooperation of the defendant.¹³⁴ In *U.S. SEC v. Dunne Finance Ltd.*, however, the SEC sought the repatriation of \$195,305.¹³⁵ These funds had been previously frozen by an order of the Guernsey courts in the first action ever filed by the SEC in Guernsey. Dunne Finance Limited was a relief defendant—not itself accused of substantive wrongdoing—in an action filed by the SEC in federal court in Nevada, in which the SEC alleged that the stock of Pacific Waste Management, Inc. was sold in the United States through fraudulent misrepresentations. The proceeds of such sales were located in an account in Guernsey in Dunne Finance’s name. The significance of the *Dunne Finance* case is that the Guernsey court froze and repatriated the assets of Dunne Finance as a routine matter, without questioning or challenging the SEC in any way. *Dunne Finance* is but one example of the increased willingness of courts to use their authority to assist foreign regulators in matters of securities enforcement.¹³⁶

2. *SEC v. Poyiadjis*

The *AremisSoft* case is a recent example of the development of cooperation. On November 22, 2002, the High Court of the Isle of Man entered a judgment holding that the SEC is entitled to participate directly in pending asset freezing proceedings commenced by the Isle of Man Attorney General at the request of the U.S. Attorney General.¹³⁷

In response to a request from the United States, the High Court issued restraint orders freezing approximately \$175 million deposited in two Isle of Man banks.¹³⁸ The funds were

130. *Id.* at *7.

131. *Id.* at *8.

132. *Id.*

133. *SEC v. Dunne Fin. Ltd.*, Litigation Release No. 15300 (Mar. 18, 1997); *SEC v. Dunne Fin. Ltd.*, IS-1065 (Royal Court of Guernsey Feb. 28, 1997).

134. See Michael D. Mann et al., *The Establishment of International Mechanisms for Enforcing Provisional Orders and Final Judgments Arising from Securities Law Violations*, 55 LAW & CONTEMP. PROBS. 303 (Autumn 1992).

135. Litigation Release 15300, *supra* note 133; *SEC v. Dunne Fin. Ltd.*, IS-1065.

136. See also *SEC v. Felix, Inc.* (Royal Court of Jersey Jul. 7, 1997) (freezing certain assets of an off-shore corporation administered in Jersey, Channel Islands).

137. Poyiadjis, 2002 WL 31643059.

138. *Id.* The Commission also obtained an asset freeze in the United States through an October 19, 2001, injunction entered by the U.S. District Court for the Southern District of New York.

held in the accounts of Olympus Capital Investment, Inc. and Oracle Capital, Inc., two relief defendants named in the SEC enforcement action.¹³⁹ The United States alleged that the money constituted the proceeds of insider trading involving the stock of AremisSoft.¹⁴⁰ According to the SEC, Poyiadjis and Kyprianou, two former officers with AremisSoft Corporation, engaged in massive insider trading during 1999 and 2000.¹⁴¹ The SEC alleged that during that period the company, the two officers and others overstated the company's revenues and inflated the value of acquisitions.¹⁴² The U.S. Attorney for the Southern District of New York obtained indictments against Poyiadjis and Kyprianou, both of who resided in the Republic of Cyprus, and against M.C. Mathews, who resided in India, on counts of conspiracy to commit securities fraud, mail fraud, and wire fraud; substantive counts of securities fraud; conspiracy to commit money laundering; and substantive counts of money laundering.¹⁴³

In reversing the lower court decision and permitting the Commission to participate in the asset freezing proceedings, the High Court held that the SEC was a "person affected" by the proceedings and held that "the overall circumstances in this case justify our exercising discretion in favour of the SEC becoming a Noticed Party."¹⁴⁴ The Isle of Man Attorney General worked with the SEC and the U.S. Attorney for the Southern District of New York in seeking repatriation of the funds.¹⁴⁵

3. *Efforts to Increase International Cooperation in the Freezing and Repatriation of Assets Constituting the Proceeds of Criminal Conduct*

In an October 17, 2003, address delivered at the IOSCO meeting in Seoul, Korea, Ethiopia Tafara, the Director of the Office of International Affairs at the SEC, noted the need for increased international cooperation with respect to the freezing and repatriation of assets constituting the proceeds of criminal conduct.¹⁴⁶ Tafara described this area as "one remaining hole in our international cooperative efforts. . . ."¹⁴⁷ He noted that, despite options currently available to freeze and repatriate assets, it remained "considerably more difficult" to "get money out of the hands of those who commit fraud and back into the hands of the fraud victims," once the money leaves the country.¹⁴⁸

Tafara advocated a "multilateral approach to enforcement cooperation that allows for asset freezes and asset repatriation."¹⁴⁹ He suggested an "informal, albeit widespread, expanded understanding of what powers securities regulators should have and should be able to exercise on behalf of their foreign counterparts."¹⁵⁰ He noted that in Canada, certain

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at *2.

145. *Id.*

146. Ethiopia Tafara, Dir., Office of Int'l Affairs SEC, Speech by SEC Staff: IOSCO Annual Conference: Public Discussion Panel on Combating Financial Crime Globally (Oct. 17, 2003), <http://www.sec.gov/news/speech/spch101703iosco.htm>.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

provinces have granted their securities regulators authority to freeze assets on behalf of their foreign counterparts.¹⁵¹

V. Conclusion

The enormous growth in international cooperative agreements among securities regulators over the past decade has provided regulators with potentially powerful tools for regulation and enforcement. The success of these agreements will depend upon two interrelated factors: the degree to which they are used and developed and the degree to which the national legal systems and courts support such use. Each of these factors should be recognized as separate and distinct. The agreements are statements of intent; the practice of utilizing them still needs to be developed.

In the Winter 2005 publication of *The International Lawyer*, this article will examine the issues that have arisen in the course of regulators' attempts to make use of, and in some instances exceed the scope of, the agreements discussed herein. Regulators must abandon old habits of unilateralism, however expedient the approach may appear. Similarly, courts which have jealously guarded jurisdiction must evaluate the extent to which regulators ought to be able to make use of cooperative agreements to address issues that are international in character. Part II will also discuss the reaction to the efforts of regulators, most notably U.S. regulators, to aggressively assert extra-territorial jurisdiction. Finally, Part II will identify some of the questions likely to shape the direction of international enforcement over the next ten years.

151. *Id.*