the first decision under this regulation. The Commission has therefore 
initiated a GATT consultation and dispute settlement procedure with the 
United States under article XXiii of the GATT.\textsuperscript{39} The essence of the 
complaint is that § 337 in this case produced discriminatory treatment of 
imports relative to domestic United States production in the matter of 
alleged infringements of United States patents.

89 (1987).

**Switzerland**

Until now, Switzerland has had no blue-sky legislation of any kind, and 
consequently no public authority to protect what, in the United States, 
is referred to as the "integrity" of capital markets. In matters of mergers 
and acquisitions in particular, large-scale manipulations were rife up to 
quite recent times, affecting both the market as such and the underlying 
corporate decisions. Insider trading may seem to be a peccadillo in such 
an ambience.

Attention was, however, first directed to the latter form of misconduct 
by some extraterritorial consequences of investigations by the U.S. au-
thorities of insider trading on U.S. markets that appeared to originate in 
Switzerland. Swiss authorities were precluded from cooperating in such 
inquiries, since a local law prerequisite for such judicial assistance was 
that the act complained of be criminal under Swiss law also (the so-called 
"double criminality" requirement). U.S. courts and authorities tried to 
use indirect compulsion to obtain such information by putting pressure 
on affiliates or branches of Swiss banks, thereby creating an unpleasant 
atmosphere between the governments concerned.

The obvious solution was to make insider trading a criminal offense in 
Switzerland, so that the Treaty between the two countries for exchange 
of information in criminal matters could operate smoothly in this area. 
Public opinion, however, was not then prepared to take such a stern view 
of misconduct in securities matters. Thus, in 1982 the two governments 
worked out a provisional and informal arrangement, The Memorandum 
of Understanding (MOU),\textsuperscript{1} under which the Association of Swiss Bankers

\textsuperscript{*}Prepared by Pierre de Charmant, partner in the law firm of Borel, Barbey, de Charmant 
& Dunant, Geneva, Switzerland, with the assistance in the preparation of this article of 
Nicolas Killen, of this firm.

\textsuperscript{1} Memorandum of Understanding on Insider Trading, 14 Sec. Reg. & L. Rep. (BNA) 
1737 (Oct. 8, 1982) [hereinafter MOU].

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set up a "voluntary" procedure (Convention XVI) to which all Swiss banks were persuaded to adhere.

In the 1982 MOU, Switzerland made it clear that the solution provided by Convention XVI\(^2\) ought to be temporary. Fully aware that insider trading was not yet punishable per se under Swiss law (although the Tribunal federal, Switzerland's Supreme Court, lately asserted the opposite opinion in some famous but disputed decisions\(^3\)), Switzerland specified: "as the Swiss Federal Council (i.e., the federal government) will submit to the parliament a bill on the misuse of inside information, this lacuna could be filled."\(^4\)

In November 1983 a first bill on the misuse of confidential information was released by the Swiss Justice Department for consultation. It provided for both civil and criminal sanctions, and aroused strong opposition to the provisions calling for disgorging to the company all the profits gained by the misuse of the confidential information. These provisions have, therefore, been removed. In final form the Bill calls for criminal sanctions only.

I. The New Bill

The Swiss Federal Council proposes to add to the Swiss Criminal Code the following article 161:\(^5\)

1. Whoever, in a capacity as a member of the board, an officer, an auditor or a mandatary of a company, or of a company that controls or is controlled by the latter

   in a capacity as a member of a public authority or a public officer

or in a capacity as an assistant to any of them

knows a confidential fact, disclosure of which is of a nature notably to influence the market price of shares, securities or other instruments of such company, or notably to influence the market price of options on such shares, securities or instruments, traded either on a Swiss exchange or over the counter, and obtains for himself or for a third party a pecuniary profit by using this information

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2. Agreement respecting Inside Information, August 31, 1982, United States - Switzerland, Convention XVI.
4. MOU, supra no. 1, paragraph 111/7.
5. Swiss bill on the misuse of inside information, in Message du Conseil Fédéral concernant law modification de Code Pénal (operations d'initiés), May 1, 1985 [hereinafter Message].
or discloses such a fact to a third party and, by doing so, obtains for himself or for a third party a pecuniary profit

shall be punished by imprisonment or a fine.

2. Whoever, being a person to whom such a fact is disclosed, directly or indirectly, by one of the persons described under (1), and who, by using such information, obtains for himself or for a third party a pecuniary profit, shall be punished by imprisonment up to one year or a fine.

3. When a combination between two companies is being considered, (1) and (2) shall apply to both companies.

The first condition required is the knowledge of a confidential fact the disclosure of which is "of a nature notably to influence the market price" of a given stock. The Message, i.e., the explanation of the Bill given by the Swiss Federal Council to Parliament, mentions a few examples: a planned merger or tender offer, a prospective real estate or other important business operation, impending losses, etc. The meaning of the adverb "notably" remains, however, quite vague: a market fluctuation is "notable" when exceptional, as opposed to a normal one. Case law will have to refine this notion further.

The second element of the misdemeanor is to obtain a pecuniary gain. This notion of profit includes of course an avoided loss. The Message makes it clear that the profit gained must be in connection with the misuse of the confidential information.

Insiders subject to prosecution are specifically named in article 161(1) as members of the board, officers, auditors, mandataries of the company, members of a public authority, or assistants of any of them. This includes lawyers and accountants (as mandataries) and junior employees (assistants).

The tippee is also subject to prosecution under article 161(2). By using the terms "directly or indirectly," the provision enables the prosecutor to reach not only the tipper in immediate relationship with the insider, but also any other along the chain. To be considered as a tippee, the third party must have known that the information was originally unlawfully disclosed by an insider. Therefore, the third party who accidentally learns about confidential facts and then uses such information to make a profit or passes it on will not be punishable under Swiss law.

6. Id. at 14.
7. Id.
8. Id.
9. Id. at 17.
10. The typical example of a third party not prosecutable under art. 162(2) would be the taxi driver who learns the information from clients discussing in his car.
The insider shall be punished by imprisonment of up to three years or a fine up to Sw. Fr. 40,000. The tippee shall be punished by imprisonment of up to one year, or be fined as the insider. In both situations, nevertheless, the fine may be unlimited if the offender acted out of greed. Such a disposition is quite peculiar in a case of insider trading. In addition, the judge may seize the profit realized in violation of article 161 and allocate it to the victim. For the moment, however, no one has been able to determine precisely who the victim is and what the victim’s rights should be.

II. Comparison of the Two Systems

If Switzerland enacts its bill into law, the United States will obtain international assistance from the Swiss authorities under the Treaty on Mutual Assistance in Criminal Matters of 1977 in all situations in which the United States would be able to match a punishable behavior under its own law with a behavior that would also give rise to prosecution under Swiss law. This comparison of the Swiss and the American law on insider trading is based on the Swiss bill on the one hand, and current American law on the other hand, and examines how both systems deal with the most prevalent insider practices. Such a method shall determine in which cases mutual assistance will in most probability be granted to the United States.

A. Comparison

1. Directors and Officers: Both American law and the Swiss bill impose sanctions on these “classical insiders.”

2. Employees of the Corporation: They are covered by insider trading laws in the United States if inside information is acquired in the course of their employment. The Swiss bill reaches the same result by listing as an insider the assistant of a classical insider.

3. Controlling Shareholders: Under section 16(b) of the 1934 Act a ten percent shareholder is considered as a statutory insider. Under section

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11. Code pénal suisse (Cr) arts. 48(1), 101, 161(1).
12. Id. art. 161(2).
13. Id. art. 48(2).
14. Id. arts. 58(1), 60.
16. See supra note 5.
18. Those practices have been listed in id. at 202.

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20 of the same Act a "controlling person" may be held derivatively liable for the acts of others who are direct violators of rule 10b-5 or section 14(e). This derivative liability does not extend, however, to criminal liability. The controlling shareholders are not listed as insiders in the Swiss bill and will not, as such, be prosecutable under Swiss law.19

4. Accountants, Lawyers, Investment Bankers, and Consultants: With its footnote 14 in Dirks, the United States Supreme Court made it clear that these persons fall within the category of "quasi-" or "temporary" insiders. If they qualify as mandataries under Swiss law, which will mostly be the case, they will also be subject to prosecution under Swiss law.

5. Tippers and Tippees: In the United States the tipper must be found to have made a personal benefit (i.e., a profit, direct or indirect, or a reputational gain). In the Swiss bill the tipper must realize a "pecuniary" profit for himself or for a third party by disclosing the information. Even if the Swiss bill speaks of "pecuniary" advantage, the tipper who discloses the information to a third party, who makes the monetary gain, will be prosecutable. Although using different terms, both systems come to a similar result.

Under American law, tippees will not be subject to sanctions unless they knew or should have known that the tipper had breached his fiduciary duty. The Swiss bill follows exactly the same reasoning: the tippee will be prosecutable if he knew or should have known that the information was first unlawfully disclosed by an insider.

6. Tender Offer: American law allows an acquiring company to trade in shares of a target company prior to the publication of a tender offer, but does not allow the company to tip a friendly purchaser with its plan to make a tender offer. The Swiss bill does not address these practices, but if a company other than the acquiring company trades in shares or a target company, its officers and directors may be criminally liable for the insider trading committed by such other company.20

7. "Outside Employees": The situation of an outside employee (i.e., an employee who has no relationship with the issuer), who breaches a duty to his employer by trading in shares of another company, is not very

19. It is particularly difficult for a civil law practitioner to understand a provision such as § 10(b) that is merely a grant of power to the SEC. In the Swiss system, under the principle of legality (principe de la légalité), an unlawful conduct shall be described in the law itself, and such a delegation of power to an agency to define the wrongful conduct would be inadmissible. While some room can be found in administrative or civil matters, the principle is absolute in criminal law (nullum crimen, nulla poena sine lege) and is contained in Cp art. 1.

20. The corporation itself may not be criminally liable under Swiss law, but the persons acting in its name (i.e., officers, members of the board) are prosecutable in a limited number of cases, including insider trading, that are listed under Cp art. 172.
well settled in the United States today, the *Wall Street Journal* case having been appealed to the Supreme Court. Apart from cases involving clear misappropriation of information, it remains uncertain whether rule 10b-5 shall be applied to a security analyst, a financial writer, or other kind of outside employee trading on information lawfully obtained but not yet made public. The Swiss bill makes no attempt to reach such persons.

### III. Reaction to the New Bill in Switzerland

Many Swiss commentators and scholars have criticized the new bill on insider trading. It is described very often as a foreign body in the Swiss legal system. Insider trading undoubtedly is considered by everyone as dishonorable. Nevertheless, there is at the present time no unanimous opinion that it should become a crime under the Swiss Criminal Code. The critics focus mainly on the following arguments.

To justify a new criminal provision, it is necessary to know what kind of legal value it is destined to protect. The Swiss Criminal Code is constructed in such a way that all offenses are classified by titles, each title being designed to protect a particular legal value (for example: crimes against life and corporal integrity, crimes against patrimony, etc.). Article 161 will be inserted among the crimes against patrimony, along with theft, robbery, or fraud. This category of crimes requires that a victim sustain an actual or potential damage. As far as insider trading is concerned, it is somewhat harder to find a victim or to establish a damage. The unfair advantage of the one person trading on inside information is clear, but the loss of the myriad other participants of the market, who will find the market has already reacted to the information by the time it is made public, is more diffuse and difficult to apprehend.

Some Swiss scholars have even joined some American professors in defending insider trading from an economic point of view. Regarding the stock market as an information exchange that places market value on information, the insider, who trades on the basis of confidential information, does nothing but dilute the information into the market. Therefore, the information is received on a continuous basis and the market price will change step by step without a huge leap, as after a public announcement of a merger, for instance.

The third major argument against the bill is the lack of a true and urgent social need or demand for it in the present state of Swiss society. This,

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22. *Id.* (the Swiss bill on insider trading).
23. *Id.* (insider trading in the U.,S. today).
of course, is partially true. In the absence of a comprehensive system of regulation of securities markets criminalizing major market manipulations, prescribing standards of disclosure, and indeed setting up some central organization to oversee the adherence to the standards, repression of what is, after all, a minor affront to market integrity, may appear out of place.

One may, however, sense a change of mentality on the entire issue. This change is manifested not only by wider public reprobation of insider trading after the recent flagrant cases in the *St. Joes* and *Santa Fe* affairs, but by an increasing restraint among the major actors of the financial scene on engaging in the high-handed market action common a decade or two ago. With the increasing globalization of securities markets, Switzerland is thus beginning a process that may facilitate its inevitable participation in the global scheme of market regulation.

In the meantime, some commentators worry how, without some central agency such as the SEC, the new Swiss provision will be enforced with the sole skills of the ordinary cantonal prosecution offices and courts. To this, one may answer that from the point of view of its drafting techniques, the new article fits very well into the Swiss Criminal Code. Its language is simple and concise, with just enough leeway for judicial appreciation and elaboration. There is no reason to apprehend that it will create novel or insurmountable problems of application. Finally, some opponents have touched upon a nationalistic chord. To them, the bill has its origin solely in the desire of the Federal Council to please a foreign country. These opponents have branded the provision a “Rex Americana,” the adoption of which would undermine Swiss sovereignty.

IV. Near Future

Despite all these objections, the project is now on its way and is supported by major political parties, the Swiss Bankers Association, the press, as well as other professional associations. The Senate has already given its approval to the bill, which should be discussed by the House of Representatives during spring or summer of 1987. Almost certainly, Parliament in the final analysis will adopt the bill, although perhaps with some changes.

25. *Id.* at 7.

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If the Swiss bill passes into law, the SEC, in seeking to obtain information from Swiss banks, will merely have to comply with the 1977 Exchange of Information Treaty for information to become available in a majority of insider trading situations. A comparison of the Swiss bill and the American law on insider trading shows, however, that some insider trading practices will still remain free from any sanctions under Swiss law and, therefore, not capable of putting the information exchange process into motion.