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## The British-U.S. Memorandum of Understanding of 1986: Implications After Warner

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# The British-U.S. Memorandum of Understanding of 1986: Implications After Warner

Scott J. Colesanti

## **Abstract**

This Note argues that the British decision in *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985 (Warner)* has impaired British investigatory efforts in securities fraud cases and hampered future American requests for information under the MOU. Part I of this Note discusses the MOU and the events attending its passage. Part II analyzes the Warner decision and discusses relevant British and American regulatory procedures. Part III examines the MOU's flaws and presents an alternative that would assure the obligation of both British and American Authorities to investigate and to comply with the MOU.

## NOTES

### THE BRITISH-U.S. MEMORANDUM OF UNDERSTANDING OF 1986: IMPLICATIONS AFTER *WARNER*

#### INTRODUCTION

In September 1986, British and American securities regulatory agencies (the "Authorities") signed an interim agreement known as the Memorandum of Understanding<sup>1</sup> ("MOU"). The MOU grants an Authority access to its foreign counterpart's information on an investor or to information the requested party could obtain through its "best efforts."<sup>2</sup> On March 31, 1987, a British High Court ruled that a London journalist was not obligated to divulge to government inspectors the sources of his two accurate predictions as to the government's disposition of reviewed takeover bids.<sup>3</sup> This decision undermines the effectiveness of the MOU by decreasing the amount of information the British regulatory agency can gather through its "best efforts" and share with U.S. agencies.

This Note argues that the British decision in *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985*<sup>4</sup> (*Warner*) has impaired British investigatory efforts in securities fraud cases and hampered future American requests for information under the MOU. In addition, the MOU is further weakened by its reliance on vague terms and its failure to include a provision that compels the compliance of its signatories. Part I of this Note discusses the MOU and the events attending its passage. Part II analyzes the *Warner* decision and discusses relevant British and American regulatory procedures. Part III examines the MOU's flaws and presents an alternative that would

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1. Memorandum of Understanding on Exchange of Information Between the SEC, CFTC, and the United Kingdom Department of Trade and Industry in Matters Relating to Securities and Futures [hereinafter MOU], [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027 (Sept. 23, 1986).

2. *Id.* para. 4, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245; see *infra* note 7.

3. *In re an Inquiry Under the Company Securities (Insider Dealing) Act 1985*, slip op. (Ch. Mar. 31, 1987) (LEXIS, Enggen library, Cases file) [hereinafter High Court Decision].

4. *Id.*

assure the obligation of both British and American Authorities to investigate and to comply with the MOU.

### I. THE MOU: THE CALM AFTER THE STORM

The MOU was enacted amidst heightened international activity in securities purchases, the unpredictability of U.S. judicial decisions regarding foreign compliance with requests for information, and foreign hostility to U.S. investigatory efforts in the form of blocking statutes and bank secrecy laws. Signed by the Securities Exchange Commission ("SEC" or "Commission"), America's Commodities Futures Trading Commission ("CFTC"), and Britain's Department of Trade and Industry ("DTI"), the MOU purports to "facilitate the exchange of information regarding the enforcement of United States and United Kingdom securities and commodities laws."<sup>5</sup> Recognizing the need for mutual cooperation between relevant national authorities,<sup>6</sup> it provides for international investigatory efforts through the sharing of information that an agency has "in its hands or that it can by its best efforts obtain."<sup>7</sup>

#### A. Provisions of the MOU

The MOU provides that requests by the Authorities for information must meet specific criteria. The information requested must be related to the prevention of insider trading,<sup>8</sup> fraudulent security dealing, or market manipulation.<sup>9</sup> A request is deemed relevant by the requested party regarding a futures transaction<sup>10</sup> when the underlying contract is signed

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5. MOU, *supra* note 1, CCH headnote, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,244. One famous story relates how the DTI once refused a simple SEC request for a phone number. Editorial, *Hands Across the Water*, BUSINESS, Feb. 1987, at 11.

6. MOU, *supra* note 1, para. 5, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245.

7. *Id.* para. 4, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245. Nothing within the MOU defines the term "best efforts."

8. *Id.* para. 1(h)(i)(A), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,244-45. The British and the MOU refer to "insider trading" as "insider dealing." See Company Securities (Insider Dealing) Act 1985, ch. 8.

9. MOU, *supra* note 1, para. 1(h)(i)(A), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,244-45.

10. Futures are exchange traded contracts that specify a future date of delivery or receipt of a certain amount of a specific tangible or intangible product. Futures are used by business as a hedge against unfavorable price changes and by speculators

within its territory, and, regarding a securities transaction, when any material part is effected there.<sup>11</sup> Moreover, the MOU dictates the form of the requests for information<sup>12</sup> and describes sundry situations in which a request may be refused.<sup>13</sup> The request must specify the purpose for which the information is sought,<sup>14</sup> the behavior that has caused concern,<sup>15</sup> and the identity of the person under suspicion.<sup>16</sup>

Requests may be refused when they relate to information held by the DTI in its non-securities investigatory capacity.<sup>17</sup> Additionally, either Authority may refuse to comply on the grounds of "public interest,"<sup>18</sup> which is to be determined by the British Secretary of State when the DTI is the requested party.<sup>19</sup> Conversely, when the DTI requests information, the SEC or the CFTC decides after consulting with relevant U.S. government officials whether "public interest" warrants a refusal to comply.<sup>20</sup>

While requests "otherwise than under this Memorandum but for a purpose within its scope"<sup>21</sup> are allowed, they are to

who hope to profit from such changes. *NEW YORK STOCK EXCHANGE GLOSSARY* 12 (1986).

11. MOU, *supra* note 1, para. 1(h)(ii)(A), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,244-45.

12. *Id.* para. 7(a), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245. If the request is oral, it must be reduced to writing within ten days. *Id.* The form for written requests is also delineated in the MOU. *See id.* para. 7, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245-46.

13. *Id.* paras. 5-6, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245. For example, the DTI may refuse to share information it holds "solely by . . . powers that relate to matters other than securities, investments, futures, or company law." *Id.* para. 6, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245.

14. *Id.* para. 7(b)(ii), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245.

15. *Id.* para. 7(b)(iii), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245.

16. *Id.* para. 7(b)(iv), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245-46.

17. *Id.* para. 6, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245.

18. *Id.* para. 5, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,245. Nothing within the MOU defines "public interest."

19. *Id.*

20. *Id.*

21. *Id.* para. 12, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247. The "scope" of the MOU is briefly referred to in its introductory paragraph. *See infra* notes 121-27 and accompanying text.

be conducted with "moderation and restraint,"<sup>22</sup> preceded by a formal request under the MOU,<sup>23</sup> and followed by consultations by all relevant Authorities on the matter.<sup>24</sup>

Finally, the MOU is expressly an interim understanding<sup>25</sup> that is to terminate upon the signing of a bilateral treaty between the U.S. and the U.K. governing mutual cooperation in this area. The Authorities are similarly encouraged to use their best efforts to enter into formal negotiations by September 1987.<sup>26</sup>

### B. Background of the MOU

In the early 1980s, the SEC and brokerage firms under its aegis began to fear the rapid, unregulated globalization of securities markets.<sup>27</sup> In particular, American firms were concerned about the impending British deregulation of the London Stock Exchange.<sup>28</sup> Prior to the MOU's adoption, securities regulators who hoped to compel the production of evidence or testimony from abroad had to rely upon far-reaching and tenuously-based court orders.<sup>29</sup>

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22. MOU, *supra* note 1, para 12(a), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

23. *Id.* para. 12(b)(i), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

24. *Id.* para. 12(c), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

25. *Id.* para. 17, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

26. *Id.* This is not to be confused with "best efforts," *supra* note 7.

27. See Request for Comments on Issues Concerning Internationalization of the World Securities Market, Exchange Act Release No. 21,958, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,759 (Apr. 18, 1985) [hereinafter Release No. 21,958] (expressing SEC fears of rapid internationalization of the securities markets); Putka, *Insider Trading Raises Fewer Hackles Abroad*, Wall St. J., Dec. 2, 1986, at 36, col. 1.

28. See Letter from Samuel E. Hunter, Senior Vice President of Merrill Lynch Securities Trading Division, to John Wheeler, Secretary of Securities and Exchange Commission (Sept. 30, 1985) (discussing Release No. 21,958, *supra* note 27).

29. See, e.g., *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958) (Federal Rules of Civil Procedure Rule 34 required foreign petitioner to produce foreign documents); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.) (Securities Exchange Act of 1934 grants subject matter jurisdiction when a foreign security is registered and traded in the U.S.), *aff'd in part, rev'd in part*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945) (SEC may subpoena documents and witnesses outside of the United States if service is properly effected within the U.S.).

Utilizing a provision of the Securities Exchange Act of 1934 ("SEA"), the SEC has often brought suit to compel disclosure by a witness/defendant.<sup>30</sup> Section 21 of the SEA allows the SEC to bring suit in the appropriate federal district court to compel compliance with an SEC subpoena and an investigation.<sup>31</sup> United States courts have usually invoked a balancing test when ruling on the Commission's claim of jurisdiction over subject matter and the foreign witness or defendant.<sup>32</sup> The factors weighed in this approach include, but are not limited to: the national interests of the nations involved, the hardships that enforcement would impose upon the parties, and the expected extent of compliance with the compelled disclosure.<sup>33</sup>

Although the SEC contends that its principal problem in international regulation remains the gathering of evidence not directly subject to U.S. jurisdiction,<sup>34</sup> U.S. courts have compelled production on numerous occasions.<sup>35</sup> In order to pro-

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30. Section 21 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78u (1982), provides in relevant part as follows:

(c) In case of contumacy by, or refusal to obey a subpoena [sic] issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

15 U.S.C. § 78u(c) (1982). For application of this section see *SEC v. OKC Corp.*, 474 F. Supp. 1031 (N.D. Tex. 1979). The trend has been to permit inquiries if they are within the authority of the agency, not too indefinite, and "reasonably relevant." *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

31. See *supra* note 30 and accompanying text.

32. Larose, *Conflicts, Contacts, and Cooperation: Extraterritorial Application of the United States Securities Laws*, 12 SEC. REG. L.J. 99, 123-24 (1984).

33. *Id.* at 124.

34. See Report of the Securities and Exchange Commission to the House Committee on the Internationalization of the Securities Markets, SEC Interim Report, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,037, at 88,299 (Oct. 9, 1986).

35. See *supra* note 29.

tect U.S. investors,<sup>36</sup> federal courts have found that they possessed subject matter jurisdiction even when the harmful conduct occurred entirely outside of the United States<sup>37</sup> and when the transactions were executed in the United States but emanated from abroad.<sup>38</sup>

Similarly, U.S. courts have asserted personal jurisdiction over the witness/defendant despite the cautionary language of the Restatement Second of Foreign Relations Law,<sup>39</sup> which encourages judicial restraint when a foreign party is subpoenaed.<sup>40</sup> For example, U.S. courts have ruled that a foreign bank must disclose the identity of customers alleged to have violated U.S. securities laws<sup>41</sup> and that a foreign citizen must waive native bank secrecy law protection when he is a named defendant in an insider trading suit.<sup>42</sup> Moreover, in criminal investigations, U.S. courts have proven to be even more likely to compel both waivers of native protections<sup>43</sup> and production of testimony or records.<sup>44</sup>

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36. For a recent reiteration, see *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2346-59 (1987) (Blackmun, J., concurring).

37. *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968) (SEA grants subject matter jurisdiction when a foreign security is registered and traded in the United States), *cert. denied*, 395 U.S. 906 (1969).

38. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103 (7th Cir. 1984) (court found subject matter jurisdiction over foreign-emanating commodities transactions because of their artificial influence on public markets), *cert. denied*, 469 U.S. 871 (1984).

39. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 40 (1965).

40. *Id.* The Restatement provides that both states must consider certain moderating factors when they exercise jurisdiction in an area where conflicts may arise. Those factors are similar to the ones described at text accompanying *supra* note 33.

41. See *SEC v. Banca Della Svizzera Italiana*, 92 F.R.D. 111 (S.D.N.Y. 1981) (bank forced to disclose information on an Italian securities professional subsequently found to have violated § 10(b) of the SEA, 15 U.S.C. § 78j(b) (1982), and Rule 10b-5).

42. See *SEC v. Musella*, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91,800 (S.D.N.Y. Oct. 5, 1984) (court rejected defendant's assertion in pretrial motion of Fifth Amendment protection against self-incrimination in allowing SEC to draw an adverse factual inference from defendant's refusal to waive Swiss bank secrecy and to answer a deposition).

43. See *United States v. Chase Manhattan Bank N.A.*, 584 F. Supp. 1080 (S.D.N.Y. 1984) (enforcement of summons to produce banking records of American taxpayers upheld despite Hong Kong's bank secrecy law because of law's inclusion of exceptions).

44. *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings)*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied*, 462 U.S. 1119 (1983) (subpoena calling for production of bank records upheld despite fact that compliance would violate Bahamian bank secrecy rule).



Reliance on U.S. court orders compelling foreign disclosure, however, is considered offensive by foreign nations and unreliable by U.S. agencies. For example, in the wake of such assertive U.S. court action, the British have amended a recent national act to allow for the prevention of compliance.<sup>45</sup> Furthermore, there are almost as many U.S. court decisions refusing to find the foreign individual or foreign entity subject to U.S. jurisdiction as there are those that do.<sup>46</sup> To address these problems, the SEC developed the "waiver by conduct" theory.<sup>47</sup> Based on the presumption that a purchase through an American exchange constitutes a forfeiture of foreign protections, this theory has yet to be formally adopted by the Commission.<sup>48</sup>

The MOU attempts to eliminate such antagonizing means and unpredictable ends. By encouraging formal requests, the MOU discourages the immediate seeking of court-ordered disclosure. By establishing a framework under which these requests must operate, the MOU puts the relevant agencies on

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45. For example, section 177(8) of the Financial Services Act 1986, c 60, creates banking secrecy in Britain. See Mann & Sullivan, *Current Issues in International Securities Law Enforcement*, in INTERNATIONAL SECURITIES ACTIVITIES OF BANKS, FINANCIAL INSTITUTIONS AND COMPANIES at 506.

46. Compare *Asahi Metal Indus. Co. v. Superior Court*, 107 S. Ct. 1026 (1987) (decision to exercise jurisdiction over a third party defendant must comport with "fair play and substantial justice"); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.) (court may refuse to exercise jurisdiction where transactions are "predominantly foreign"), *cert. denied*, 423 U.S. 1018 (1975) with *Societe Internationale pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958) (Federal Rule of Civil Procedure 34 required foreign petitioner to produce foreign documents); *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.) (Securities Exchange Act of 1934 grants subject matter jurisdiction when a foreign security is registered and traded in the U.S.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945) (SEC may subpoena documents and witnesses outside of United States if service is properly effected within the U.S.).

47. Text of Conference on International Trading in Securities, sponsored by the New York Stock Exchange and the Boston University School of Law (hereinafter International Trading Conference), New York, N.Y. (Oct. 18, 1985). John M. Fedders, the Director of the SEC Division of Enforcement, wrote to the Congress on March 30, 1984, exposing the problem of investigating those who purchase securities through American markets from abroad. Fedder suggested that the Congress draft a bill stating that such a purchase would imply a "waiver by conduct" of foreign secrecy laws; subsequently Congressman John Dingell (D-Mich.) suggested that the SEC itself formally adopt this position. The "waiver by conduct" theory was thus opened for consideration on May 31, 1984. *Id.* at 65.

48. *Id.* at 72.

notice of potential requests and precludes the refusal of requests for reasons of ambiguity or unilaterally-defined irrelevance.

Thus, the "exchange-of-files" approach embodied in the MOU allays fears. The SEC applauded the signing of the MOU and looked forward to "enhance[d] cooperation" and mutual assistance.<sup>49</sup> The Commission saw the agreement as being flexible enough to make assistance available in cases involving "insider trading, market manipulation and misrepresentations relating to market transactions, as well as in the oversight of investment businesses and brokerage firms."<sup>50</sup> The SEC Enforcement Director extolled the cooperative agreement as a vast improvement over the "informal arrangement" that preceded it.<sup>51</sup> Similarly, he stated that the next such U.S.-U.K. agreement, with Congressional approval, might extend the Commission's reach into the files of a broker-dealer.<sup>52</sup> United Kingdom officials noted that the MOU was negotiated in only six months.<sup>53</sup>

## II. THE WARNER DECISION

The British High Court's decision in *Warner*, which upheld the right of a financial journalist to withhold his sources, in one fell swoop reduces the amount and types of information the DTI can obtain through its "best efforts."<sup>54</sup> Justice Hoffman ruled that government-appointed inspectors attempting to expose a £10,000,000 insider trading ring<sup>55</sup> believed to include at least one Crown servant<sup>56</sup> had not proven that the need for Warner's disclosure outweighed a statutorily defined reporter's privilege.<sup>57</sup>

Until August 1986, Jeremy Warner worked as a reporter

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49. See U.S., U.K. Sign Agreement to Share Securities, Commodities Information, 18 SEC. REG. & L. REP. (BNA) 1397 (Sept. 26, 1986) [hereinafter U.S., U.K. Sign].

50. See *supra* note 34 and accompanying text.

51. U.S., U.K. Sign, *supra* note 49.

52. *Id.*

53. *Id.*

54. Lindsay v. Warner, slip op. (C.A. May 6, 1987) (LEXIS, Enggen library, Cases file).

55. High Court Decision, *supra* note 3.

56. *Id.*

57. *Id.*

for *The Times* of London.<sup>58</sup> On November 7, 1985, the paper published an article written by another securities journalist that predicted that the British government's Monopolies and Mergers Commission would allow a takeover bid for the Matthew Brown brewery company that week, subject to certain conditions.<sup>59</sup> The next day Warner's column stated, with inordinate certainty, that no such conditions would be required.<sup>60</sup> Warner was subsequently proven right.<sup>61</sup>

In August 1986, Warner moved on to become the business correspondent for *The Independent*, another London publication.<sup>62</sup> His article of October 23, 1986 predicted that Strong & Fischer's bid for Garnar Booth, a fellow tanning company, would be forced to undergo review before the same commission at the request of the Secretary of State. It eventually did.<sup>63</sup>

Subsequently, the divining journalist was asked to appear before a group of government inspectors, who had been appointed by the DTI in December 1986 pursuant to the Financial Services Act of the same year.<sup>64</sup> The group had been charged with the responsibility of uncovering possible insider trading in the United Kingdom.<sup>65</sup> Asserting a general reporter's privilege to withhold the names of his sources, Warner refused to answer questions relating to either the nature or sources of his accurate predictions.<sup>66</sup>

The inspectors then filed suit to compel Warner to disclose.<sup>67</sup> Without alleging that the reporter had personally benefitted from any suspected government employee's "leaks" of information, the inspectors argued that Warner's silence, while out of court, was maintained under oath and was part of

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Warner, *supra* note 54.

64. *Id.* Section 177(1) of the Financial Services Act 1986 gives the Secretary of State the power to appoint inspectors "to carry out such investigations as are requisite to establish whether or not any contravention [of the insider trading law] has occurred and to report the results of their investigations to him." Financial Services Act 1986, ch. 60, § 177(1).

65. *Id.*

66. High Court Decision, *supra* note 3.

67. *Id.*

an examination.<sup>68</sup> He was, thus, subject to sanctions despite the section 10 reporter's privilege of the 1981 Contempt of Court Act.<sup>69</sup>

In finding for the reporter, Justice Hoffman's decision first focused on a balancing test that weighed the interest in safeguarding society from wrongdoers against the need for a reporter's privilege from disclosure.<sup>70</sup> Noting that lawyers often believe crime prevention to be paramount to "the preservation of a general principle [reporter's privilege],"<sup>71</sup> the justice nonetheless emphasized the need for a reporter's sources to feel confident that their identities will not be disclosed.<sup>72</sup> Justice Hoffman then ruled that the exception to the privilege listed in Section 10 of the Contempt of Court Act was not relevant, but, if applicable, should be construed strictly.<sup>73</sup> The inspectors having failed to prove that Warner's testimony was "necessary" to prevent further insider dealing, his statutory privilege nonetheless would remain intact.<sup>74</sup>

Justice Hoffman never decided whether an out-of-court refusal to testify can be equated with an in-court refusal that warrants a finding of contempt. Much weight was accorded the inspectors' statement that they already knew the existence and name of one "leaking" Crown servant but could possibly learn the identities of suspected and vital others through Warner's

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68. *Id.*

69. Section 10 of the Contempt of Court Act 1981 provides in relevant part:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Contempt of Court Act 1981, ch. 49, § 10 (emphasis added).

70. High Court Decision, *supra* note 3.

71. The full quote in pertinent part reads:

The weighing process is difficult because on the one hand one is concerned with an immediate and practical question, the detection or prevention of specific crimes, and on the other hand, the preservation of a general principle. It is tempting for lawyers to think common sense requires [that] paramount importance to be given to the former. But this is not necessarily so . . . a balance has to be kept.

*Id.*; see also *supra* note 69.

72. High Court Decision, *supra* note 3.

73. *Id.*

74. *Id.*

testimony.<sup>75</sup> Justice Hoffman pointed out that, since the inspectors already had a name, Warner's testimony was all the less important.<sup>76</sup> The Justice also ignored the plaintiffs' argument that Warner would be one of the few *disinterested* witnesses in the case.<sup>77</sup>

After losing this initial battle, the inspectors sought leave to appeal to the House of Lords, which was granted in a unanimous written opinion of the Civil Division Court of Appeals on May 6, 1987.<sup>78</sup> The justices were impressed by the certainty of Warner's predictions as well as the Contempt of Court Act's specific instructions granting a court the power to punish a recalcitrant witness "as if he had been guilty of contempt of the court."<sup>79</sup> Adding that the "clergyman, banker or the medical man" may not refuse to disclose when directed by a judge who has determined that the consequence is a crime,<sup>80</sup> the justices granted the appeal with the hope that the House of Lords would find for the inspectors.<sup>81</sup>

The decision illustrates the ability of a British judge on any level to hamstring an investigation at a time when British securities regulators have been criticized both at home and abroad<sup>82</sup> for their leniency. *Warner* also exemplifies the elaborate and piecemeal statutory procedure currently governing British investigations into securities frauds. In this area the British regulatory framework is novel and relatively untested because British securities statutes are continually undergoing sweeping revision.<sup>83</sup> Conversely, the American system is

75. *Id.*

76. *Id.*

77. *Id.*

78. *Warner*, *supra* note 54.

79. *Id.*; see Financial Services Act 1986 ch. 60, § 178(2)(a).

80. *Id.*

81. *Id.*

82. Forman, *Lenient Penalty in Insider Trading Case Threatens U.K. Crackdown's Credibility*, Wall St. J., July 6, 1987, at 8, col. 4; *Deterring the Insider Dealers*, The Independent (London), July 3, 1987, at 18, col. 1. The *Journal* took issue with the recent refusal by a British court to incarcerate a convicted insider trader while Britain's own *Independent* criticized U.K. regulatory efforts as severely "lagging" behind those of the New York Stock Exchange. *Deterring the Insider Dealers*, *supra*, at 18, col. 1; Forman, *supra*, at 8, col. 4.

83. For example, the Company Securities (Insider Dealing) Act 1985, ch. 8, supplanted the Companies Act 1981, ch. 62, regarding securities frauds, and the 1986 Financial Services Act, ch. 60, elaborated on these violations. See Financial Services Act 1986, ch. 60, §§ 177-178. Regarding the 1986 Act, it has been stated that:

grounded in relatively stable statutes passed over fifty years ago.<sup>84</sup>

For example, in the chain of events that led to the *Warner* case, no fewer than four recent British statutes and their procedural requirements were invoked. The inspectors were appointed under Section 177(1) of the 1986 Financial Services Act<sup>85</sup> after a finding by the Secretary of State that there were "circumstances suggesting that there may have been a contravention of section 2 of the 1985 [Insider Dealing] Act."<sup>86</sup> Section 177(4) of the 1986 Act<sup>87</sup> empowered the inspectors to examine Warner under oath, but the Contempt of Court Act of 1981<sup>88</sup> was suggested by the inspectors as a basis for suit once Warner refused to comply.

The goal of the inspectors was to punish the Crown servants believed to have "leaked" unpublished "price-sensitive" information.<sup>89</sup> While the definition of "price sensitive" has

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The apparently modest initial proposals of the Government have, however, produced a large, unwieldy, and technical piece of legislation, the subject of over one thousand parliamentary amendments and many late night debates. The Act has emerged 211 sections long and so complex that members of Parliament protested that no one, not even the Government members responsible for the Bill, understood its provisions and their implications.

Barnard, *The United Kingdom Financial Services Act, 1986: A New Regulatory Framework*, 21 INT'L LAW. 343, 344 (1987).

84. See generally Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1982 & Supp. III 1985); Securities Exchange Act of 1934 §§ 10, 21, 15 U.S.C. §§ 78j, 78u (1982 & Supp. III 1985). An exception to this history of stability would be the current controversy surrounding the application of section 10b of the SEA to non-securities personnel accused of insider trading, as in the Winans case, *United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), cert. granted, 107 S. Ct. 666 (1986). The point to be made is that when compared to Britain's ever-changing prohibitions, those of the United States concerning market manipulation and securities fraud in general are stable.

85. Financial Services Act 1986, ch. 60, § 177(1).

86. *Warner*, supra note 54.

87. Section 177(4) of the Financial Services Act 1986 provides in pertinent part as follows: "An inspector may examine on oath any person who he considers is or may be able to give information concerning any such contravention, and may administer an oath accordingly." Financial Services Act 1986, ch. 60, § 177(4).

88. Contempt of Court Act 1981, ch. 49, § 10; see supra note 69.

89. The 1980 statute defines unpublished price sensitive information as that which

- (a) relates to specific matters relating or of concern (directly or indirectly) to that company, that is to say, [sic] is not of general nature relating or of concern to that company; and
- (b) is not generally known to those persons who are accustomed or would be likely to deal in those securities but which would if it were generally

been retained in the Insider Dealing Act of 1985,<sup>90</sup> the description of parties who must abstain from trading has been expanded and restructured.<sup>91</sup> Ultimately British officials must utilize Section 37(3) of the Supreme Court Act of 1981<sup>92</sup> to freeze the wrongfully gained assets as regulators can in the United States.<sup>93</sup> Such numerous procedural requirements make it increasingly difficult to punish a British securities defrauder, whether the enforcing party be British or an inquiring American agency official.

In contrast, the SEC relies upon the established regulatory framework consisting of the Securities Act of 1933, the Securities Exchange Act of 1934, rules and regulations promulgated under both acts, and relevant court decisions. One section of the SEA authorizes investigations,<sup>94</sup> allows for examination of witnesses/defendants under oath,<sup>95</sup> grants the right to seek compelled disclosure through a district court, and empowers this court to issue such orders.<sup>96</sup> Moreover, the SEC can investigate without probable cause and "merely on the suspicion that the law is being violated, or even just because it wants assurance that it is not."<sup>97</sup> The SEA also outlines those activities that give rise to securities fraud investigations.<sup>98</sup>

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known to them be likely materially to affect the price of those securities.

Companies Act 1980, ch. 22, § 73(2)(a)-(b).

90. See Insider Dealing Act 1985, ch. 8, § 10.

91. Compare Companies Act 1980, ch. 22 § 10, §§ 68-70 with Insider Dealing Act 1985, ch. 8, §§ 1-7.

92. Supreme Court Act 1981, ch. 54, § 31.

93. For example, SEC officials can rely on the securities laws themselves in asking for a freezing of the defrauder's assets until trial. See Complaint, SEC v. Grossman, [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,184 (S.D.N.Y. Mar. 30, 1987) (No. 87 Civ. 1031 (SWK)) (petition for injunction preventing transporting of funds allegedly gained through illegal insider trading).

94. Securities Exchange Act of 1934 § 21(c), 15 U.S.C. § 78u(c) (1982).

95. *Id.* § 21(b), 15 U.S.C. § 78u(b) (1982).

96. *Id.* § 21(c), 15 U.S.C. § 78u(c) (1982).

97. United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950).

98. See Securities Exchange Act of 1934 § 10b, 15 U.S.C. § 78j (1982), which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contra-

Aside from exposing differences between the regulatory frameworks of the United States and United Kingdom, *Warner* also highlights the unfairness of the MOU's "let's swap files" approach. The MOU provides for inequitable results.<sup>99</sup> A U.S. investigator is more likely to be successful in obtaining evidence within his nation than is his British counterpart because of the latter nation's piecemeal regulatory scheme.<sup>100</sup> In this sense, the case shows that in practice the MOU would work primarily to the U.K.'s benefit. Ultimately, *Warner* hinders SEC or CFTC requests relating to either a British investor's purchases through an American exchange or to an American investor operating from abroad. The case summarily eliminates financial reporters as a source of information while decreasing the amount and types of information that the DTI can obtain through its "best efforts," for that term is not likely to be construed as requiring the DTI to ignore a recent court precedent. In comparison, SEC files are much more detailed and thorough simply because U.S. courts have allowed that agency more freedom in pursuing an inquiry.<sup>101</sup> Therefore the exchange of SEC files for those of the British is not equally beneficial.

*Warner* effectively holds that a reporter may involve himself with a securities scheme in order to relate vital but generally unknown information to his public and, as long as another potential government witness exists, not be subject to government questioning on the subject. A class of informants vital to securities regulation—financial journalists<sup>102</sup>—has in effect been judicially declared to be above and beyond questioning by a government agency. Meanwhile the MOU is unable to

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vention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

99. For example, a United States investor who purchases from abroad is subject to less regulation than the investor who purchases from this country if the foreign intermediary nation employs bank secrecy or blocking statutes. See discussion of SEC Release No. 21,186, International Trading Conference, *supra* note 47, at 66.

100. See *supra* notes 82-93 and accompanying text.

101. See *infra* notes 122-24 and accompanying text.

102. The chart that lists criminal prosecutions of insider trading at the office of the United States Attorney for the Southern District of New York office now includes reporters. Janvey, *Criminal Prosecution of Insider Trading*. 15 SEC. REG. L.J. 136, 139 (1987).



provide U.S. agencies access to either these reporters or an equally effective source of information.

### III. ANALYSIS OF THE MOU

The internationalization of securities markets is currently a major concern of Congress<sup>103</sup> and America's largest stock exchange.<sup>104</sup> Additionally, while regulatory problems relating to international transactions mount, foreign individuals and entities are expressing greater interest both in listing their securities in the U.S.<sup>105</sup> and in purchasing U.S. securities.<sup>106</sup> This internationalization has created the opportunity for criminal activity abroad by American investors,<sup>107</sup> which substantially increases the regulatory problems of the SEC.

To cope with the problem of compelling production of needed evidence and testimony in securities investigations from abroad, American and British regulators signed the MOU to replace a practice of seeking court orders and passing retaliatory legislation with one of cooperation.<sup>108</sup>

The MOU, however, is only as effective as the investigatory powers of each nation. If American regulators must de-

103. *House Plans Summertime Securities*, INVESTMENT DEALERS DIGEST, June 30, 1987, at 7, col. 1.

104. See NEW YORK STOCK EXCHANGE, 1987 FIRST QUARTER REPORT 3.

105. Brewerton, *UK Companies Line Up for Big Board Listings*, The Independent (London), June 24, 1987, at 12, col. 1; see also *Foreigners Invested 13% More in U.S. Last Year*; U.K. *Led Rise*, Investor's Daily, June 25, 1987, at 27, col. 1.

106. *Id.*; see also Sesit, *An Appraisal: Japanese Analysts Find a Lot to Like in U.S. Stocks*, Wall St. J., June 22, 1987, at 55, col. 3.

107. Last year American arbitrageur Ivan Boesky was linked to the British Guinness Company scandal, which centered on that company's illegal payments to investors in return for the purchase of large blocks of stock so as to increase its bid in a takeover offer. *U.K. Launches an Investigation into Guinness*, Wall St. J., Dec. 2, 1986, at 37, col. 1. This year Guinness Company reported taking a \$200,000,000 charge related partly to its involvement with Boesky. *Guinness Takes \$200M Charge Due to Boesky*, Newsday, Apr. 24, 1987, at 45, col. 1. In March, the British company, the largest investor in Boesky's limited partnership, sued him for misleading offering documents. *Burrough, Judge Allows Suits Against Boesky, Others to Proceed*, Wall St. J., July 29, 1987, at 4, col. 3.

Perhaps more significant is the recent decision of Israeli businessman David Sofer to cooperate in an international insider trading scheme involving high-ranking former Merrill Lynch & Co. official Nahum Vaskevitch. Allegedly Vaskevitch leaked "confidential information about numerous transactions involving Merrill Lynch clients" to the Israeli. Hertzberg, *Israeli Will Aid Trading Inquiry, Sources Assert*, Wall St. J., July 2, 1987, at 3, col. 4.

108. See *supra* notes 35-52 and accompanying text.

pend upon British files regarding an investor or an abettor, they will not be able to pursue their inquiry whenever a reporter is involved.<sup>109</sup> Such involvement by the press with the securities market is not purely hypothetical. An example is the much publicized *Winans* case in the United States,<sup>110</sup> wherein the U.S. government prosecuted a reporter who had profited through insider trading on prepublication "leaks" of his column's tenor and content. Britain's shielding of an involved reporter also undermines the spirit of the MOU by preventing access to information that would probably be obtained and produced by American officials. U.S. courts have refused to immunize non-benefitting reporters when the result would be to impede a civil<sup>111</sup> or criminal<sup>112</sup> investigation. Thus, *Warner* erects a framework under which British officials making re-

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109. See *supra* notes 55-77 and accompanying text.

110. "Winans" is the name securities industry participants and observers have attached to the *Carpenter* case. *United States v. Winans*, 612 F. Supp. 827 (S.D.N.Y. 1985), *aff'd in part, rev'd in part sub nom. United States v. Carpenter*, 791 F.2d 1024 (2d Cir.), *cert. granted*, 107 S. Ct. 666 (1986).

At the district court level of the case, *Winans*'s "journalistic purity" defense was declared untenable by the court. See *Winans*, 612 F.Supp. at 835 n.4. That defense attempted to assert that although *Winans* leaked the content of his "Heard on the Street" column prior to publication, he never compromised his professional opinions or let any profit motive alter the tenor of his writing. *Id.* at 835.

More importantly, the Second Circuit held on review that a columnist has a duty of disclosure under federal securities laws, the first amendment notwithstanding. See 791 F.2d at 1034.

111. See *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982). This case held that a reporter is prevented in a *civil* action, whether he is a party or not, from claiming a privilege to withhold his confidential sources when the information is 1) highly relevant and material, 2) necessary or critical to the maintenance of the claim, and 3) not obtainable from other available sources. 680 F.2d at 7. This test has been utilized in more than 400 reporter privilege cases regarding a reporter's disclosure of confidential or non-confidential information. Goodale, *Back to the Drawing Board for New York's Shield Law*, NAT'L L.J., July 27, 1987, at 13.

112. See *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 439 U.S. 997 (1978). That decision stated:

The point to be made, however, is that among the many First Amendment protections that may be invoked by the press, there is not to be found the privilege of refusing to reveal relevant confidential information and its sources to a grand jury which is engaged in the fundamental governmental function of "[f]air and effective law enforcement aimed at providing security for the person and property of the individual." The reason this is so is that a majority of the members of the U.S. Supreme Court have so determined.

78 N.J. at 268, 394 A.2d at 334 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972)).

quests under the MOU can receive additional and more useful information from American regulators than the latter can from the former.

Yet this disparity manifests but one of the MOU's numerous flaws. Other inadequacies include its failure to prevent a signatory agency from resorting to its prior practice of compelling disclosure, its reliance on vague guidelines such as "with moderation and restraint,"<sup>113</sup> and its ultimate dependence on differing interpretations of securities and procedural laws.

#### A. *Resort to Previous Ways*

The MOU does not preclude an agency from simply "slapping a subpoena" on a foreign individual or entity after a formal request has been refused.<sup>114</sup> Similarly, no MOU provision prevents either nation from passing legislation allowing it to prevent voluntary disclosure under certain circumstances, as Britain did in 1986.<sup>115</sup> Two recent U.S. court decisions speak against the efficacy and binding nature of agreements similar to the MOU.

The Hague Convention for the Taking of Evidence,<sup>116</sup> a multinational foreign discovery treaty addressing the problems of gathering/compelling evidence from abroad, went into effect in 1970. It was at first blatantly ignored and thereafter protested by a French witness in an SEC-commenced fraud case from 1983 to 1986.<sup>117</sup> The SEC was thus forced to settle the case in that year.<sup>118</sup>

In addition, on June 15, 1987, the Supreme Court of the United States further eviscerated the Hague Convention by ruling that "federal courts have latitude in deciding whether to require that foreign companies produce records and other evidence in U.S. lawsuits."<sup>119</sup> The agreement relegated to a non-

113. MOU, *supra* note 1, para. 12(a), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

114. 18 SEC. REG. AND L. REP. (BNA) 1397 (Sept. 26, 1986).

115. See Financial Services Act 1986, ch. 60, § 177(8)(b).

116. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

117. See Mann & Sullivan, *supra* note 47, at 531-32.

118. *Id.* at 532.

119. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542 (1987) (holding that the Hague Convention on the Taking of Evi-

dispositive role here was a formal treaty, while the MOU by its own terms is an interim agreement.<sup>120</sup>

### B. *Moderation and Restraint*

Inquiries made outside of the MOU but relating to its scope must be made "with moderation and restraint."<sup>121</sup> This term is open to greatly varying interpretations, and the U.S. definition has traditionally been more expansive than those of other nations.<sup>122</sup> United States courts have upheld the unquestionable right of U.S. administrative agencies to pursue matters relevant to their supervisory roles.<sup>123</sup> One U.S. Supreme Court Justice recently stated that investor protection was the main purpose for the 1933 and 1934 Acts.<sup>124</sup>

Moreover, at least one American exchange has itself evidenced a rather bold view of its foreign regulatory powers.

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dence Abroad in Civil or Commercial Matters, *supra* note 116, does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory).

120. MOU, *supra*, note 1, para. 17, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

121. *Id.* para. 12(a), [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,027, at 88,247.

122. See *supra* notes 39-44 and accompanying text. See generally Atwood, *Extraterritorial Discovery in International Litigation*, 135 U. PA. L. REV. 319, 324-27 n.2 (1984) ("[o]ne of the features that faces the strongest objections is the relatively broad view American courts take of their jurisdiction over anti-trust claims").

Section 21(b)-(d) of the Securities Exchange Act of 1934 puts no such similar constraint (i.e., "with moderation and restraint") on the SEC's investigations. See Securities Exchange Act of 1934 § 21(b)-(d), 15 U.S.C. § 78u(b)-(d) (1982 & Supp. III 1985).

Noteworthy is that Rule 176 of the 1933 Securities Act, which delineates the definition of "reasonable investigation" under Section 11 of the same Act, lists eight factors, all of which focus only on the suspect's actions, title and references. See Securities Act of 1933 § 11, 15 U.S.C. § 77k (1982).

123. See *Belle Fourche Pipeline Co. v. United States*, 554 F. Supp. 1350 (D. Wyo. 1983), *remanded*, 751 F.2d 332 (10th Cir. 1984), *cert. denied*, 106 S. Ct. 64 (1985) (upholding broad authority to investigate potential wrong-doings that extends beyond mere scope of an agency's regulatory authority; allows agencies to seek information from parties not ordinarily subject to an agency's jurisdiction in order to conduct an investigation); *Citadel Trading Co. v. Bagely*, 440 F. Supp. 925, 927 (E.D. Mo. 1977) (mere allegation by parties being investigated of possible damage to their business activities is not sufficient to block authorized inquiry by regulatory agency into relevant matters).

124. *Shearson/American Express Inc. v. McMahon*, 107 S. Ct. 2332, 2346 (1987) (Blackmun, J., concurring); see also *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1207 (9th Cir. 1970) ("[o]ne of the principal Congressional purposes of the Securities Exchange Act is to protect the investor in a highly sophisticated field").

Late in the winter of 1986, the President of the New York Stock Exchange ("NYSE") invoked Exchange Rule 390 in an attempt to prevent Exchange members from making markets through the London Exchange before or after NYSE hours.<sup>125</sup> The resulting uproar at home and abroad caused the Exchange to abandon this stand.<sup>126</sup>

This term was undoubtedly included in the MOU to deter either Authority from unduly pressuring a foreign witness or defendant and from expanding upon the other's concept of jurisdiction. The fact remains, however, that U.S. agencies and those they regulate maintain a different view of what "moderation and restraint" entails when securities frauds are involved than do their foreign counterparts.<sup>127</sup>

### C. *Differing Pronouncements on Fraud and Procedure*

The United States and United Kingdom also have differing interpretations of what constitutes insider trading and are currently moving in opposite directions in their attempts to deter it. In 1981, Britain criminalized through a short, one paragraph definition in the Company Securities Act<sup>128</sup> trading upon the knowledge of unpublished price sensitive information. In 1983 the U.S. Congress expressly rejected the concept of a concise definition of the crime while amending the SEA of 1934 through the Insider Trading Sanctions Act of 1984.<sup>129</sup> American legislators believed that a vague warning encompassing varying judicial interpretations of Rule 10b-5 and 14e would be a more effective deterrent than an explicit prohibition—a minefield would be more successful than a roadblock.<sup>130</sup> Now, however, bills before Congress would at last define insider trading.<sup>131</sup> Similarly Parliament took a harder

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125. Ipsen, *The Long Shadow of Bob Birnbaum*, INSTITUTIONAL INVESTOR, July 1987, 187, 189.

126. *Id.* at 189.

127. See *supra* note 122 and accompanying text.

128. See *supra* note 89 and accompanying text.

129. Pub. L. 98-376, § 2, 98 Stat. 1264, 1264 (codified at 15 U.S.C. § 78u(d)(2)(a) (Supp. III 1985)).

130. *Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the [House] Comm. on Energy and Commerce on H.R. 559*, 98th Cong., 1st Sess. (1983); H.R. REP. NO. 355, 98th Cong., 1st Sess. 32 (1983).

131. Sussman, *Bill that Defines Insider Trading Emerges in Senate*, WALL ST. J., June 18, 1987, at 24, col. 3. Oddly enough, the SEC itself has recently reversed its longstand-

stance on the crime in 1985 when it supplanted its 1981 outline of acts which can constitute the crime with a longer and more comprehensive one.<sup>132</sup>

One noteworthy difference between the two nations' definition/concept of insider trading concerns the motive for the trade: in Britain, an insider dealer must have traded in order to enjoy a profit or avoid a loss, while in the United States, an insider trader is one who *purchases* on the basis of nonpublic information, for any motive.<sup>133</sup>

Also, amidst the hodgepodge of British procedural law lies the British Supreme Court Act of 1981,<sup>134</sup> which allows for the freezing of defendants' wrongfully gained assets through the use of what was termed at common law the "Mareva Injunction."<sup>135</sup> Peculiarly, this statute expressly applies to both Britons and foreigners.<sup>136</sup> By contrast, the British securities acts mentioned previously are silent on the subject of jurisdiction over foreign nationals.<sup>137</sup> This casts doubt upon the ability of the DTI to apply British securities laws to non-British investors at the request of American officials.

The MOU's efficacy will ultimately be dependent upon a British court's application of several statutes to an alleged defrauder. It is precisely such reliance on judicial action and subsequent international tensions when the party targeted by the action is foreign that led to the MOU's drafting.<sup>138</sup> Therefore, a better approach to the problem of international regulation is the formation of an intermarket surveillance system based upon certain common and codified violations and uniform penalties that would apply equally to all participating markets.

The New York Stock Exchange and eight other American exchanges have utilized such a surveillance system since

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ing position and asked for a clear definition of insider trading. Robb, *SEC, in a Reversal, Offers Definition of Insider Trading*, N.Y. Times, Aug. 10, 1987, at A1, col. 1.

132. Company Securities (Insider Dealing) Act 1985, ch. 8.

133. See Securities Exchange Act § 21(d)(2)(a), 15 U.S.C. § 78u(d)(2)(a) (Supp. III 1985) and Read, *How to Avoid Going Inside*, BUSINESS, Feb. 1987, at 32, 35.

134. Supreme Court Act 1981, ch. 54.

135. *Id.* § 37(3).

136. See *id.*

137. See Contempt of Court Act 1981, ch. 49; Company Securities (Insider Dealing) Act 1985, ch. 8; Financial Services Act 1986, ch. 60.

138. See *supra* note 45 and accompanying text.

1985.<sup>139</sup> The initial goals of the Intermarket Surveillance Group ("ISG") were "1) defining which surveillance concerns were of an intermarket nature; 2) developing a means to review for their occurrence; and 3) adopting procedures to coordinate resulting investigations."<sup>140</sup> By locating and defining six fraudulent activities common to all of the participating U.S. exchanges,<sup>141</sup> the ISG hopes to create a more effective audit trail and therefore be better able to gather evidence necessary for effective regulation.<sup>142</sup> The Group reports directly to the SEC but is still too young to invite useful comment on its successes.

An international surveillance group would face obstacles to its formation concerning applicable securities and jurisdictional laws. Faced with the reality of a global linking of foreign securities markets,<sup>143</sup> officials should confront these problems instead of depending on agreements that speak of mutual benefit but result in unilateral gain. A codification of common violations and mutually agreed upon penalties may not be the easiest way to address the growing challenge of international securities regulation, but it is surely the way of the future.

### CONCLUSION

The *Warner* decision emphasized the weakness of the "let's swap files" approach to international securities fraud prevention. As warmly received as the emperor's new clothes, the Memorandum of Understanding nonetheless is weak because officials from one nation can have their sources of information cut off by the judiciary of the other. This frightening anomaly is evidenced by Britain's recent according of reporter's privilege to a financial journalist.<sup>144</sup> This privilege does not exist in

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139. Intermarket Surveillance Group, Status Report to the SEC for Period Covering September 1985 to September 1986 (Oct. 5, 1986).

140. *Id.* at 1.

141. *Id.* at 1-3.

142. *Id.* at 1-5.

143. Internationalization has forced exchanges competing globally to alter some of their ways. For example, in late 1986, the NYSE changed its operating hours to open one half hour earlier (9:30 A.M.) to decrease British and United States regulation and securities clearing problems. *Stock Trading Will Begin Half-Hour Earlier Today*, Wall St. J., Sept. 30, 1985, at 41, col. 1.

As of the completion of this Note, foreign agencies had openly asked the SEC for help through information on foreign investors. *Foreign Pleas for SEC Help*, N.Y. Times, Aug. 6, 1987, at D21, col. 4.

144. See High Court Decision, *supra* note 3.

the United States when the consequence is the impedence of a criminal investigation or the preclusion of a civil trial. Additionally, the MOU is weakened by its reliance upon varying legal and semantic interpretations and differing notions of the respect accorded an interim agreement. Officials from both the U.S. and the U.K. who negotiate the eventual treaty must eliminate these flaws by providing for the useful sharing of information through reciprocity provisions. These provisions should guarantee mutuality of opportunity to obtain evidence as well as obligation to gather and share it. If this cannot be accomplished, all agencies involved would be better served by working to implement an international surveillance system. Proposing such a solution might at first prove controversial, but then again, so must have been informing the fabled emperor of his lack of attire.

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