Fordham Law Review

Volume 39 | Issue 3 Article 5

1971

Secret Swiss Bank Accounts: Uses, Abuses, and Attempts at Control

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Secret Swiss Bank Accounts: Uses, Abuses, and Attempts at Control, 39 Fordham L. Rev. 500 (1971).
Available at: https://ir.lawnet.fordham.edu/flr/vol39/iss3/5

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

SECRET SWISS BANK ACCOUNTS: USES, ABUSES, AND ATTEMPTS AT CONTROL

I. INTRODUCTION

The secret numbered Swiss bank account tends to conjure up in the American mind a place to which a South American dictator transfers his country's treasury before relinquishing control, or the instrumentality through which some cloak and dagger episode of international intrigue is financed. Although these aspects of the secret Swiss account probably exist, there is another aspect of the secret Swiss account that is more closely related to the everyday lives of a growing number of United States citizens. This aspect is the rapidly expanding use of secret foreign accounts, and the anonymity they provide, by United States citizens to evade tax and securities laws, to hide the fruits of illegal transactions, and in general, to conduct their financial affairs without fear that their activities will be susceptible to scrutiny by United States law enforcement officials or regulatory agencies. This shift of the Swiss account from something "distant and romantic" to its present status as relatively easily accessible can be traced to several factors.[1] Probably the most obvious are the increase in the number of United States citizens traveling abroad and the establishment by foreign banks of branches in major United States cities and in nearby Nassau.[2] The initial deposit necessary to open a Swiss account is "nominal" and anyone determined to acquire such an account has little difficulty doing so.[3] In any event, it is clear that the Swiss banking business is growing at a prodigious rate.[4] Although the banks of several foreign nations provide the type of secret account that facilitates criminal conduct,[5] those of Switzerland have received by far the most attention. This is readily understandable, since Swiss financial institutions are clearly the best established and most reliable of any of those involved and therefore the most attactive.[6] With the growing awareness of law enforcement and regulatory

1. Hearings on H.R. 15073 Before the House Comm. on Banking and Currency, 91st Cong., 1st & 2d Sess. 10 (1970) [hereinafter cited as Hearings on H.R. 15073].

2. Hearings on the Legal and Economic Impact of Foreign Banking Procedures on the United States Before the House Comm. on Banking and Currency, 90th Cong., 2d Sess. 11 (1968) [hereinafter cited as House Hearings].

3. Estimates as to the amount necessary have been as low as $50. Hearings on S. 3678 and H.R. 15073 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 69 (1970) [hereinafter cited as Senate Hearings]. See also House Hearings, supra note 2, at 11.

4. "[T]he Swiss banks once again recorded a considerable increase in business. Between the end of November, 1968, and the end of November, 1969, the grand total of the assets of the 72 banks comprised in the monthly statistics of the National Bank rose . . . 20 per cent as against 17 per cent for the previous twelve months." 1969 Swiss Bank Corp. Ann. Rep. 16.

5. E.g., Hearings on H.R. 15073, supra note 1, at 8. "Panama, Liechtenstein, the Bahamas, Luxembourg, West Germany and other countries have enacted laws which in one degree or another are somewhat from a secrecy standpoint more strict than American laws." Id.

6. T. Fehrenbach, The Gnomes of Zurich 65 (1966) [hereinafter cited as Fehrenbach].

officials that secret foreign accounts can effectively be used by violators to avoid detection or to make damaging evidence impossible to obtain, congressional action was inevitable. Congressman Patman,[7] Chairman of the House Committee on Banking and Currency, took the first step. He is well-known for his scrutiny of the American banking industry. American banks, along with other domestic "financial institutions,"[8] are the primary target of legislation recently enacted to cope with this conduct. The Patman Committee Bill,[9] passed by the House of Representatives on May 26, 1970, and its counterpart passed by the Senate[10] on September 18, 1970, both attempt to curtail the usefulness of secret foreign accounts by requiring American banks and financial institutions to keep records and make reports concerning various financial transactions, so that the guilty can be prosecuted on evidence existing in the United States.[11] The President signed the bill on October 26, 1970.[12]

It is the purpose of this comment to examine the conditions that prevail in Switzerland with regard to bank secrecy and to illustrate a few sophisticated schemes that have been uncovered whereby United States statutes and regulations have been circumvented. Furthermore, it will examine the recent attempts by the federal government to remedy the enforcement difficulties through a treaty with Switzerland and through federal legislation.

II. Switzerland

A. *Background*

Any discussion of the use of Swiss banks and their secrecy features by United States citizens must begin with the realization that, although the existence of the system presents a problem for the United States, it cannot be viewed as a nefarious arrangement designed by the Swiss to facilitate the circumvention, for profit, of our regulations. The Swiss regard for the right to privacy in one's personal affairs, and particularly in one's financial affairs, reaches back into the traditions of the Middle Ages and follows a logical course of development up to the point where today that right to privacy is protected against violation by a criminal statute.[13] "The main reason why Swiss law protects bank secrecy so strictly is that the Swiss consider the secrecy of their private affairs as an aspect

---

"Unlike the Swiss, the other exotic banks did not stem from a national consensus, nor did they have an honest, hard-working, stable society behind them. Most of them have always been on shaky ground, and the customers know it." Id.

7. Democrat of Texas.

8. E.g., securities or commodities brokers or dealers, investment bankers, currency exchanges, issuers of traveler's checks and money orders, operators of credit card systems, insurance companies, finance companies, and pawnbrokers. H.R. 15073, 91st Cong., 2d Sess. § 203(e) (1970).

9. H.R. 15073, 91st Cong., 2d Sess. (1970).

10. S. 3678, 91st Cong., 2d Sess. (1970).

11. See H.R. 15073, 91st Cong., 2d Sess. (1970); S. 3678, 91st Cong., 2d Sess. (1970).

12. 39 U.S.L.W. 92 (Nov. 10, 1970); N.Y. Times, Oct. 27, 1970, at 28, col. 1.

13. See Comment, Swiss Banking Secrecy, 5 Colum. J. Transnat'l L. 128, 128-29 (1966) [hereinafter cited as Comment, Swiss Banking Secrecy].

of personal liberty which they wish to preserve."[14] Of course, this desire for personal privacy in financial affairs is not unique to the Swiss. In most nations, including the United States, a person's dealings with his bank are generally considered confidential.[15] In fact, the recent trend in this country has been marked by attempts to strengthen the citizen's right to privacy in his financial affairs.[16] However, due to historical circumstances, the Swiss bank depositor's right to secrecy is enforced by criminal[17] as well as civil sanctions.[18]

Although modern banking was not accepted in Switzerland until the mid-nineteenth century,[19] the Swiss banker's obligation of secrecy had its origin in the beginnings of banking activity in the sixteenth century.[20] The fact that the secret aspects of banking tradition were so elevated by the Swiss is consistent with their development as a nation. In the loose cantonal federation of Switzerland there was no such thing as national or public money. Once money was issued the government retained no further control over it; private property in Switzerland was strictly private.[21] It was in this atmosphere that the Swiss banking industry developed. Swiss law recognized secrecy as a necessary but unwritten feature of the bank's relationship with its customers long before such ideas were codified.[22] Actually, most advanced nations had the same secrecy provisions as the Swiss,[23] with one enormous exception—the Swiss courts applied secrecy as a bar to the government itself.[24] It was not until 1934 that the Swiss codified the obligation and provided a criminal sanction for its violation. The statute was enacted at that time because the Gestapo of Nazi Germany was surreptitiously attempting to probe into the records of Swiss banks to see if certain "enemies of the state" were violating German law by removing their funds

14. Friedrich, The Anonymous Bank Account in Switzerland, 1962 J. Bus. L. (Eng.) 15, 18 [hereinafter cited as Friedrich].

15. See Note, Swiss Banks and the Avoidance of American Tax and Securities Laws: An Assessment Based on Proposed Legislation, 3 N.Y.U.J. Int'l L. & Pol. 94, 103 (1970) [hereinafter cited as Swiss Banks and Securities Laws], referring to recent cases and proposed federal legislation that emphasizes protection for the privacy of bank accounts in the United States.

16. Id. at 103-04.

17. Article 47(b) of the Swiss Banking Law contains specific sanctions against certain persons actually involved in the banking industry. 10 Bereinigte Sammlung der Bundesgesetze und Verordnungen 1848-1947, at 337, 355 (Switz. 1951) [hereinafter cited as Swiss Banking Law].

18. See Comment, Swiss Banking Secrecy, supra note 13, at 129-31 for other sections of various Swiss statutes that protect one from invasion of his financial privacy by a person not specifically covered by § 47(b).

19. Fehrenbach, supra note 6, at 32.

20. Mueller, The Swiss Banking Secret, 18 Int'l & Comp. L.Q. 360, 361 (1969) [hereinafter cited as Mueller].

21. Fehrenbach, supra note 6, at 62-63.

22. See Comment, Swiss Banking Secrecy, supra note 13, at 128.

23. Fehrenbach, supra note 6, at 62-63.

24. Id.

from the country and secreting them in the privacy of anonymous Swiss accounts.[25] The statute is translated as follows:

> Anyone who in his capacity as an officer or employee of a bank, or as an auditor or his employee, or as a member of the banking commission or as an officer or employee of its bureau intentionally violates his duty to observe silence or his professional rule of secrecy or anyone who induces or attempts to induce a person to commit any such offence, shall be liable to a fine of up to 20,000 francs or imprisonment for up to six months, or both.
>
> If the offender acted with negligence he shall be liable to a fine up to 10,000 francs.[26]

B. *The Present Situation*

The Swiss secrecy statute applies to an account that is under the depositor's actual name just as it does to one under a number or code name.[27] The secrecy feature is present with every Swiss account. Code names and numbers were designated to insure that only a few of the bank's highest officials would know the true identity of the account holder and thus decrease the likelihood that an identity would be ascertainable via correspondence handled by lower echelon personnel.[28]

The duty of silence that obliges the Swiss banker to keep certain information confidential is by no means absolute. As the agent of his client the Swiss banker cannot normally divulge confidential information to third parties without the client's consent.[29] The banker, however, is not specifically privileged under Swiss law to withhold testimony in civil or penal actions as are the attorney, clergyman and physician.[30] Since the obligation to maintain discretion "is of a private law nature," it has occasionally been overriden by "public law."[31]

The policy of banking secrecy, then, is not absolute with respect to everyone seeking information, but only to those who do so without the sanction of public law and court order.[32] The principle underlying this policy is embodied in the Swiss Penal Code which prohibits foreign judicial or administrative personnel from conducting investigations in Switzerland and further prohibits foreign individuals from interrogating witnesses without court permission.[33]

There are several instances where the Swiss have determined that the banker's obligation of silence is outweighed by an overriding public interest in disclosure.[34] Among these are situations in which Swiss authorities provide "foreign countries

---

25. Mueller, supra note 20, at 361. See also Note, Swiss Banks and Securities Law, supra note 15, at 96.
26. Mueller, supra note 20, at 362.
27. Comment, Swiss Banking Secrecy, supra note 13, at 132. See also Friedrich, supra note 14, at 20.
28. Comment, Swiss Banking Secrecy, supra note 13, at 132.
29. Mueller, supra note 20, at 362-63.
30. Id. at 361.
31. Id. at 366.
32. Note, Swiss Banks and Securities Laws, supra note 15, at 97.
33. Mueller, supra note 20, at 373.
34. These include both criminal proceedings and certain civil cases. See id. at 366-70.

[with] extensive assistance for the prosecution of *criminal acts* but not for the violation of simple administrative law."[35] It is this distinction between criminal law and administrative matters that leads to the heart of this frequently misstated problem. It is not the bank secrecy statute in Switzerland that creates the problem for United States law enforcement officials investigating tax and securities crimes, but rather it is the Swiss attitude toward taxes and the fact that they have no securities regulations comparable to ours.[36]

In Switzerland the income tax is a confidential administrative matter between the taxpayer and the authorities.[37] Tax evasion is not regarded as a crime under the Swiss Penal Code.[38] Normally "[Swiss] tax authorities may receive information from a bank only with the consent of the taxpayer concerned . . . ."[39] Therefore, the aforementioned disposition of the Swiss to cooperate with foreign authorities in the prosecution of crimes[40] is not present in tax evasion cases. The Swiss, naturally enough, have consistently refused to undermine the highly valued privacy of a person's financial affairs where the matter involved does not fit within their definition of crime.[41] In view of this situation it is not surprising that the Swiss tax administration has always refused to answer inquiries by the United States Internal Revenue Service for information on assets deposited with banks in Switzerland.[42] Similarly, a Swiss bank cannot be compelled to

35. Id. at 374 (emphasis added).

36. Id. at 372-73.

37. Id. at 371.

38. Id. at 372. The Swiss do, however, differentiate between tax evasion and tax fraud. While the former is merely administrative, the latter can be the basis for criminal prosecution. Where the facts are such that the Swiss would consider it tax fraud a recent Swiss Supreme Court decision has held that "federal tax authorities can supply information to Washington on dealings with Swiss banks of a United States citizen suspected of a tax fraud." Thus in those Swiss Cantons where banks are obliged to supply information on the demand of Swiss tax authorities in connection with criminal proceedings for fraud, the Internal Revenue Service will likewise be able to obtain this information. N.Y. Times, Jan. 4, 1971, at 9, col. 1.

39. Mueller, supra note 20, at 371.

40. Id. at 374-75.

41. Although they have acceded to the European Convention of April 20, 1959 concerning legal assistance in criminal matters they have refused to give such assistance in cases of "political, military and fiscal crimes." Id. at 374-75. This policy is also embodied in a United States-Swiss Treaty. Convention with The Swiss Confederation For The Avoidance Of Double Taxation With Respect to Taxes On Income, May 24, 1951, [1951] 2 U.S.T. 1751, T.I.A.S. No. 2316 (effective Sept. 27, 1951). In Article XVI(1), the type of information the parties agree to supply is limited strictly to that which is "necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention." Id. at 1760, T.I.A.S. No. 2316, at 10. Article XVI(3) succinctly states the Swiss position on all matters of international cooperation with regard to the prosecution of crimes: "In no case shall the provisions of this Article be construed so as to impose . . . the obligation to carry out administrative measures at variance with the regulations and practice of either contracting State . . . ." Id. at 1760-61, T.I.A.S. No. 2316, at 11. Note, Swiss Banks and Securities Laws, supra note 15, at 98-99 points out the irony of the current criticism of the Swiss position in that the treaty "makes the Swiss position on the investigation of tax evasion binding on the United States . . . ."

42. Mueller, supra note 20, at 376.

give information concerning the true owner of shares and bonds which the bank keeps in a nominee account.[43]

III. Abuses

Over the years numerous imaginative schemes have been developed to take advantage of the idiosyncracies of the Swiss law with regard to taxes and securities and the banking secrecy statute.[44] The very nature of these secret transactions precludes a reliable account of their origins or an accurate description of their development and proliferation.

As early as 1958, however, the New York Regional Office of the Internal Revenue Service made an investigation into the use of secret Swiss accounts for the purpose of tax evasion.[45] Although a congressional investigation and a tightening of United States laws were recommended, no effective action was taken.[46] The situation remained this way until December, 1968, when Representative Patman's committee launched an investigation.[47] During the course of these and later hearings[48] representatives of various federal institutions[49] described some of the schemes in which secret foreign accounts (usually Swiss) were used as instrumentalities to facilitate the evasion or violation of United States laws and regulations. The three main areas of abuse appear to be transactions involving money that is the fruit of illicit conduct,[50] tax evasion,[51] and securities law avoidance.[52]

---

43. Id.

44. In his remarks to the House as he introduced H.R. 15073, Representative Patman expressed the view that, "[t]he illegal use of these accounts is as varied as the various schemes and conspiracies that the furtive, criminal imagination can devise." 115 Cong. Rec. 2. H 11689 (daily ed. Dec. 3, 1969).

45. N.Y. Times, Nov. 30, 1969, at 62, cols. 7-8.

46. Id.

47. House Hearings, supra note 2.

48. Hearings on H.R. 15073, supra note 1.

49. E.g., Statement of Robert Morgenthau, United States Attorney, S.D.N.Y., House Hearings, supra note 2, at 11; statement of Irving M. Pollack, SEC, id. at 17; statement and testimony of Randolph W. Thrower, IRS, Hearings on H.R. 15073, supra note 1, at 64; statement and testimony of Fred M. Vinson, Jr., Department of Justice, House Hearings, supra note 2, at 5.

50. E.g., the sale of heroin, Hearings on H.R. 15073, supra note 1, at 25; bribes and kickbacks to armed forces purchasing agents, id. at 128; theft of poverty program funds, id. at 31; fraudulent overcharging on defense contracts, id. at 158.

51. In this area abuses range from the simple "skimoff," where cash receipts are deposited in secret accounts before they are reported, to complex systems of double invoices whereby a business "pays" money into the account of a foreign corporation which in reality is an alter ego. Hearings on H.R. 15073, supra note 1, at 10-11. In what might be described as adding insult to injury there have been instances where a taxpayer has claimed an interest deduction on foreign "loans" that were actually withdrawals from his own secret account and where a taxpayer claimed as a bad debt deduction the failure of a foreign corporation to repay a loan when actually he owned the company and the "loan" was merely a payment to his own account. Id. at 26.

52. Varied and sophisticated schemes have been uncovered in this field. A Swiss or other foreign bank can act for its customer's account without divulging his identity. When the

A United States prosecutor[53] related some instances in which he had been faced with the problem of preparing a case involving transactions that lay beyond the reach of his investigatory powers because foreign banks were involved.[54] A review of a few of the cases handled by his office may be helpful to illustrate the methods employed to take advantage of the present situation and the difficulties involved in unravelling the pieces of the complex arrangements.

The case of *United States v. Kelly*[55] involved the use by Americans of "Liechtenstein trusts"[56] and Swiss accounts to reap an enormous profit from the sale of manipulated stock. Although each of the trusts involved had a Swiss lawyer as its titular head, they were American owned. One American promoter (a person with a criminal record who had been enjoined from trading in his own name)[57] purchased 750,000 shares of stock from an American company on credit at a nominal price (as low as $1 per share) in the name of a Liechtenstein trust. At the time of purchase the trust had assets of $20.80. The "trust" then sold the unregistered over-the-counter shares through American brokerage houses at prices manipulated to $15 with the profits going into its Swiss accounts. From his investment of $20.80 the American promotor realized the incredible sum of over $4,000,000! Each transaction between the Americans and their Swiss conspirators had the benefit of maximum secrecy. The fraud was exposed only when the individuals involved divulged its workings.[58]

United States v. Hayutin[59] is a similar case which was successfully prosecuted because insiders finally confessed. This case also involved unregistered stock which was manipulated to an artificially high price. The shares involved were delivered by corporate insiders to a foreign bank which subsequently sold them to the American public through brokers with whom it had accounts. Another aspect of this case illustrated the use of foreign branches of United States banks for illegal purposes.[60] Included as part of the plot was the illegal reimbursement of certain American brokers who promoted the sale of the shares from the profits

---

bank acts no distinction can be made between those transactions which benefit a U.S. citizen or resident and those which do not. The advantage for a U.S. citizen or resident is obvious. He may wheel and deal with no SEC or IRS scrutiny. See Hearings on H.R. 15073, supra note 1, at 11-13. Regulations under the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a to 78hh-1 (1964), as amended, 15 U.S.C. (Supp. V, 1970)) relating, for example, to the use of manipulative or deceptive devices (17 C.F.R. § 240.10b-5 (1970)), or reports of short swing sales by insiders (17 C.F.R. § 240.16a-1 (1970)) are of little concern.

53. Robert Morgenthau, Jr., former United States Attorney, S.D.N.Y.

54. E.g., House Hearings, supra note 2, at 11-17; Hearings on H.R. 15073, supra note 1, at 18-28.

55. 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966).

56. The tiny principality of Liechtenstein has very liberal legislation that allows an individual to easily transform himself into an anonymous legal entity. For a brief explanation of the details, see Hearings on H.R. 15073, supra note 1, at 366-67.

57. Id. at 20.

58. Id. at 21.

59. 398 F.2d 944 (2d Cir.), cert. denied, 393 U.S. 961 (1968).

60. Mueller, supra note 20, at 363, points out that United States banks in Switzerland come under the secrecy law as fully as a Swiss domestic bank.

reaped by the insiders. To escape detection these payments were made through the Frankfurt branch of a large United States bank. The insiders deposited the funds in an account at this branch and from there the moneys were sent to the bank from which they were withdrawn and put to unlawful use.[61]

A 1969 case involving the Arzi Bank of Zurich is unique in that it was the first time a Swiss bank was forced to answer criminal charges in this country. The charges involved violations by the bank of the Federal Reserve Board's margin requirements[62] through active solicitation of United States customers who were allowed to trade on as little as 10% margin as opposed to the 70% minimum then required by law.[63] The bank pleaded guilty to the charge.[64]

While the use of such accounts to evade laws and regulations may not be commonplace the problem is certainly not insignificant.[65] Moreover, an accurate estimate as to the number of such illegal transactions and the amount of money involved is precluded by the very nature of the problem. It has been said that a " 'conservative' estimate of the total [U.S.] money in secret foreign accounts could easily run into the hundreds of millions of dollars."[66] Furthermore, the United States sustained a balance of payments deficit of seven billion dollars in 1969 of which 3.2 billion dollars are listed under the heading "errors and omissions."[67] While there is no record of the final destination of this money, it must be assumed that some portion of it found its way into foreign accounts[68] and that the anonymity afforded depositors resulted in the frustration of United States laws or regulations.

IV. Attempted Solutions

It is in the light of the Swiss attitude regarding fiscal crimes[69] and bank secrecy and the apparently growing exploitation of this attitude by United States

61. Hearings on H.R. 15073, supra note 1, at 21.

62. For an explanation of how the old regulation operated and how it has been changed see Swiss Banks and Securities Laws, supra note 15, at 100 n.45.

63. Wall St. J., Dec. 2, 1968, at 10, col. 3.

64. See Hearings on H.R. 15073, supra note 1, at 23; House Hearings, supra note 2, at 13-14. Actively aiding the Bank in these activities were some of the employees of Coggeshall & Hicks, a member firm of both the New York and American Stock Exchanges. Some of the brokers involved had their own personal accounts with the bank through which they received illegal credit. The firm reaped approximately $225,000 in commissions as a result of the illegal trades. As a consequence the firm, its senior partner, the Swiss manager of its Geneva office, and three former registered representatives were indicted and each pleaded guilty.

65. During his tenure, Morgenthau's office procured indictments against 75 persons and referred dozens of cases to the IRS. However, he estimated that for every individual against whom action was taken six more went untouched because of a lack of competent evidence due partly to the difficulty of tracing transactions through foreign banks. Hearings on H.R. 15073, supra note 1, at 91.

66. Bus. Week, Feb. 28, 1970, at 100.

67. N.Y. Times, Feb. 26, 1970, at 38, col. 1.

68. Id.

69. Notes 37-43 supra and accompanying text.

citizens[70] that the attempted solutions and the ensuing controversy over their effectiveness have arisen.

A. *The Treaty*

Probably the most effective way to solve the problems raised, from an American point of view, would be by a treaty between the United States and Switzerland that would grant our law enforcement agencies access to the records of Swiss financial institutions if such records were necessary as evidence in a criminal prosecution. The likelihood of such a treaty has never been great since the Swiss respect for fiscal privacy in matters they do not consider crimes (*e.g.*, violation of United States tax and securities laws) is not likely to be compromised to alleviate an American problem.[71] Moreover, beyond this point of tradition, realism forces the recognition that Switzerland enjoys a high level of prosperity which is attributable, in no small portion, to its internationally respected banking industry.[72] Any radical departure from the strict policy of fiscal privacy could only be detrimental to the Swiss banking industry and the Swiss economy.

Nevertheless, preliminary negotiations were begun to explore the possibility of a treaty of cooperation. The initial meetings, held in Washington, D.C. in April 1969 and in Bern in June 1969, indicated that the Swiss adamantly maintained the position that there could be no disclosure where the acts involved were not crimes according to Swiss law.[73] Efforts continued in Washington, D.C. and in Bern in 1970 with no apparent result and it appeared that it would be some time before it could be determined whether any agreement could be reached.[74] Some hope was raised in April 1970 by a statement to the effect that the Swiss might possibly relent where known criminals were involved.[75]

The suspense ended abruptly on August 17, 1970 when it was announced that the United States and Switzerland had agreed on a draft legal aid treaty under which the Swiss Government will help trace money hidden in Swiss banks by agents of organized crime.[76] Although the exact conditions of the treaty were not disclosed it seems clear that its terms do not embody any significant departure from the traditional Swiss position.[77] Apparently the treaty will have the effect of including "organized crime with international repercussions" in the definition of crimes common to both countries.[78] If a person is indicted for a crime included under this heading the Swiss Government will request a court

70. See notes 44-68 supra and accompanying text.

71. See Mueller, supra note 20, at 377.

72. Fehrenbach, supra note 6, at 19, points out that Switzerland has poor soil, a lack of resources, and the "third or fourth highest standard of living in the world."

73. Hearings on H.R. 15073, supra note 1, at 15, 41; Senate Hearings, supra note 3, at 172.

74. Senate Hearings, supra note 3, at 172.

75. N.Y. Times, April 8, 1970, at 67, col. 5.

76. Id., Aug. 18, 1970, at 1, col. 8.

77. Id. at 8, col. 1.

78. Id.

order on behalf of the United States to facilitate the examination of confidential bank records.[79] The Swiss apparently feel that this type of criminal activity is unique enough to require exceptional measures. In such cases Switzerland would be ready to help in the prosecution of offenses involving taxes and banking operations.[80]

In the past the Swiss have provided this type of assistance where the offense involved constituted a crime in both nations.[81] Apparently the only change that this treaty will bring is that now, in this one area of "organized crime with international repercussions," the information gathered from the examination of bank records may be used as evidence in tax evasion matters whereas in the past access to such information was restricted to cases involving non-fiscal crimes.[82]

The usefulness of this treaty for United States law enforcement officials will depend on how liberally the phrase "organized crime with international repercussions" is interpreted. Statements made by the Swiss indicate that the construction will be strict and therefore the organized crime provision will be applicable in a limited number of cases.[83] For those areas of violation of tax and securities law that cannot be classified under the organized crime standard the treaty will have no effect.[84] The only possible solution in these areas, by treaty, would appear to lie in a renegotiation of the convention with Switzerland for the avoidance of double taxation,[85] so as to provide for Swiss cooperation. This treaty is designed to spare the citizen of one state, who earns income in the other, from the burden of paying tax on the income to both states. Such a renegotiation does not appear to be likely in view of the traditional Swiss attitude.[86]

---

79. Id.

80. Id.

81. E.g., in a recent Swiss case, hailed by the United States press (N.Y. Times, March 3, 1970, at 16, col. 1; Wall St. J., March 2, 1970, at 9, col. 2), the Swiss Supreme Court confirmed a lower court ruling allowing the United States Department of Justice to examine Swiss bank records and to produce them as evidence in a United States court. The defendants were charged with defrauding the United States Navy on defense contracts and since fraud is also a Swiss crime the financial records were produced. For further details see Swiss Banks and Securities Laws, supra note 15, at 94-95.

82. The Swiss Court predicated its orders on the fact that the records would not be used by the United States for "fiscal purposes." Id.

83. The Swiss negotiators stated that they "had made few concessions, and that the draft treaty constituted virtually no change from Swiss laws on tax evasion and banking secrecy." N.Y. Times, supra note 76, at 8, col. 1.

84. Mr. Nussbaumer, head of the Swiss delegation, pointed out that "bank accounts of Americans would remain secret in all cases where evidence by the United States failed to convince the Swiss authorities that the person involved was cooperating in organized crime." Id.

85. Convention with The Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, May 24, 1951, [1951] 2 U.S.T. 1751, T.I.A.S. No. 2316; see note 41 supra.

86. See note 41 supra and accompanying text.

B. *Legislation*

The difficulty inherent in negotiating a treaty that would be satisfactory to United States law enforcement interests seeking information secreted in foreign accounts caused the emphasis to be placed on the alternate route of federal legislation. The basic thrust of the recent legislation is to impose sufficient financial record-keeping and reporting requirements on those under United States jurisdiction so as to make it unnecessary for investigators to seek information protected by foreign laws.

1. Content and Aims

The recent legislation[87] contains three major provisions relevant to this area. Title I, Financial Recordkeeping, amends the Federal Deposit Insurance Act.[88] The purpose of this amendment is to require the maintenance of appropriate types of records by insured banks in the United States where such records "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[89] Insured banks are thus required to maintain records, as prescribed by the Secretary of the Treasury, of the identity of account holders and persons authorized to act with respect to their accounts.[90] Furthermore they are obliged to keep a record of checks received for deposit or collection[91] and photocopies of checks drawn on them or presented for payment.[92] The Secretary is also given discretion to extend any or all of these record-keeping requirements to certain other uninsured financial institutions.[93] Domestic transactions, regardless of amount, come under these record-keeping requirements.[94] Provisions are made to give the Secretary injunctive powers[95] and to provide civil[96] and criminal penalties.[97] Thus, the primary goal of this title is to assure the maintenance[98] of records reflecting the transfer of

87. Pub. L. No. 91-508, U.S. Code Cong. & Ad. News 5127-53 (Nov. 20, 1970). In its final form the law also contains titles added by the Senate relating to credit cards and consumer credit reporting. Id. §§ 501-622, at 5140-53.

88. 12 U.S.C. §§ 1811-31 (1964), as amended, (Supp. V, 1970).

89. Pub. L. No. 91-508, § 101, U.S. Code Cong. & Ad. News 5127-28 (Nov. 20, 1970), amending Fed. Deposit Ins. Act, 18 U.S.C. § 1821(d)(2) (1964), as amended, (Supp. V, 1970).

90. Id., amending 18 U.S.C. § 1821(d)(2) (1964), as amended, (Supp. V, 1970).

91. Id., amending 18 U.S.C. § 1821(d)(2) (1964), as amended, (Supp. V, 1970).

92. Id., amending 18 U.S.C. § 1821(d)(3) (1964).

93. Pub. L. No. 91-508, § 123(a), U.S. Code Cong. & Ad. News 5130 (Nov. 20, 1970). Among the institutions included are those in the business of issuing or redeeming checks, money orders, traveler's checks or similar instruments otherwise than as an incident to conduct of its own nonfinancial business, transferring funds or credits, operating a currency exchange, operating a credit card system, or engaging in other functions as the Secretary might specify by regulation. Id. § 123(b) at 5130.

94. The original House Bill (H.R. 15073, 91st Cong., 2d Sess. § 101(i) (1970)) exempted transactions involving less than $500 from the proposed record-keeping requirements.

95. Pub. L. No. 91-508, § 124, U.S. Code Cong. & Ad. News 5130 (Nov. 20, 1970).

96. Id. § 125.

97. Id. §§ 126-27, at 5130-31.

98. See Hearings on H.R. 15703, supra note 1, at 92, wherein Mr. Morgenthau alludes

funds since these would be of great assistance in the detection of criminal activity.[99]

Title II is entitled Reports of Currency and Foreign Transactions. Its stated purposes are similar to those in Title I[100] and the regulatory[101] and exemptive[102] powers it grants to the Secretary are quite broad. It contains three major provisions. The first concerns domestic currency transactions[103] and it requires reports to be filed with the Secretary according to his direction as to "[t]ransactions involving any domestic financial institution . . . if they involve the payment, receipt, or transfer of United States currency, or, such other monetary instruments . . . ."[104] The hope is that such reports will call attention to "[t]he deposit and withdrawal of large amounts of currency or its equivalent (monetary instruments) under unusual circumstances [which] may betray a criminal activity."[105] The second provision requires reports of exports and imports of monetary instruments[106] in and out of the United States in amounts exceeding the statutory norm.[107] The idea behind this provision is to provide a legislative weapon[108] to combat those who "send money to foreign jurisdictions with secrecy laws for the purpose of evading taxes and otherwise hiding assets."[109] The third provision, involving foreign transactions[110] directs the Secretary to require detailed records and reports from those who transact business or maintain any relationships with a foreign financial agency. The goal of this provision is to close the gaping loophole that has allowed widespread tax and security law evasion to go unpunished because law enforcement officials were often "delayed or totally frustrated when wrongdoers cloak[ed] their activities in the shield of foreign financial secrecy."[111] Title II also authorizes injunctive relief[112] and civil[113] and criminal[114] penalties similar to those provided in Title I.

Title III amends § 7 of the Securities Exchange Act of 1934[115] to apply the

---

to the necessity of Title I "in view of the trend among some of our largest banks to discontinue their practice of photocopying these documents."

99. See H.R. Rep. No. 91-975, 91st Cong., 2d Sess. 16 (1970) [Hereinafter cited as H.R. Rep. No. 91-975].

100. Pub. L. No. 91-508, § 202, U.S. Code Cong. & Ad. News 5131 (Nov. 20, 1970).

101. Id. § 204, at 5133.

102. Id. § 206, at 5133-34.

103. Id. §§ 221-23, at 5135-36.

104. Id. § 221, at 5135.

105. H.R. Rep. No. 91-975, supra note 99, at 11.

106. Pub. L. No. 91-508, § 231, U.S. Code Cong. & Ad. News 5136-37 (Nov. 20, 1970).

107. Reports must be made of such transactions involving more than $5,000 on any one occasion. Id.

108. Unreported money could be forfeited. Id. § 232, at 5137.

109. H.R. Rep. No. 91-975, supra note 99, at 13.

110. Pub. L. No. 91-508, § 208, U.S. Code Cong. & Ad. News 5134 (Nov. 20, 1970).

111. H.R. Rep. No. 91-975, supra note 99, at 12.

112. Pub. L. No. 91-508, § 208, U.S. Code Cong. & Ad. News 5134 (Nov. 20, 1970).

113. Id. § 207, at 5134.

114. Id. §§ 209-10.

115. 15 U.S.C. §§ 78a to 78hh-1 (1964), as amended, 15 U.S.C. (Supp. V, 1970).

margin requirements in securities transactions to borrowers who are either United States persons[116] or who are either controlled, acting for, or acting in conjunction with such persons, without regard to where the lender's place of business is or where the transaction occurred.[117] The ultimate intent in this instance is to protect the stability of the economy in general and the securities market in particular[118] by regulating the amount of foreign credit that can be extended for purchasing or carrying securities.[119]

2. Reception

Predictably, reaction to the bill was not uniform. Although support for the aims of the legislation has been widespread,[120] there has been much controversy as to whether these particular measures provide the best solution to the problem. The hearings before the House[121] provided a forum for spokesmen for law enforcement interests to decry abuses of existing laws[122] and to indicate support of this legislation.[123] Opponents of the legislation made their stand during the Senate hearings[124] in June 1970. During these hearings representatives of the banking and investment communities voiced their opposition[125] and proposed alternatives which they found more acceptable.[126]

Opposition to the legislation was based on many diverse grounds. Fear was expressed that the record-keeping obligations imposed would be unreasonably burdensome since they would require large expenditures for records that would be of dubious practical value.[127] The dangers to the traditional right of American citizens to privacy in their financial affairs was pointed out,[128] as was the potential danger to confidence abroad in the strength of the dollar[129] and the discouraging effects of this legislation on the willingness of foreign investors to deal in United States securities.[130] It was further emphasized that the unusually broad discretion given to the Secretary in his regulatory role should be limited

116. United States persons include: citizens or residents, a corporation organized or existing under the laws of any state, a domestic estate, or a trust in which one or more of the foregoing persons has a beneficial interest in excess of fifty percent.

117. Pub. L. No. 91-508, § 301, U.S. Code Cong. & Ad. News 5139-40 (Nov. 20, 1970), amending 15 U.S.C. § 78g(a) (1964).

118. See H.R. Rep. No. 91-975, supra note 99, at 24.

119. Id.

120. But then, who could publically oppose legislation that is described in the press as designed to stop the affluent from using secret Swiss bank accounts to commit tax evasion, stock frauds and other white collar crimes as in N.Y. Times, Aug. 5, 1970, at 17, col. 4.

121. Hearings on H.R. 15073, supra note 1.

122. E.g., Id. at 65-70, 175-80.

123. E.g., id. at 96.

124. Senate Hearings, supra note 3, at 186-92.

125. E.g., id. at 227-30, 285-88.

126. E.g., id. at 193-221.

127. E.g., id. at 236-38.

128. E.g., id. at 227-28.

129. E.g., id. at 187-88.

130. E.g., id. at 237.

since the potential for oppressive regulation is great.[131] Opponents of the bill had little success, however, as the bill was reported out by the committee almost unscathed.[132]

The Treasury Department, which will be primarily responsible for the administration of the legislation, outlined several proposals that it preferred as alternatives.[133] The Department's approach clearly distinguished domestic from foreign transactions and concerning the latter a multifaceted program was favored. Among the proposals were provisions requiring United States taxpayers to indicate on their returns the existence of any foreign bank or brokerage account[134] and giving the Secretary power to require American banks and financial institutions to keep records of certain specific foreign transactions.[135] Moreover, the Department would require persons importing or exporting large amounts of United States currency or its equivalent to file reports.[136]

With respect to domestic transactions, the proposals would authorize the Secretary to require record-keeping by banks and financial institutions *at his discretion*, rather than the mandatory approach of the statute. This is based on the fact that as of now no adequate study has been made to determine the kinds of records that will be useful.[137] The Treasury Department proposed that the Secretary be directed to continue to study the problem and issue regulations consistent with his findings. In addition, it was urged that the Treasury Currency Reports already required of financial institutions be expanded, as the Secretary deemed useful.

V. CONCLUSION

If it is to have any real meaning, the current emphasis on "law and order" as a valuable goal for our society must encompass "white collar" as well as "street" crimes. The futility and hypocrisy of crusades against the latter to the exclusion of the former are readily apparent. The widespread and apparently ever-increasing use by United States residents and citizens of secret foreign accounts to facilitate the commission of crimes and the avoidance of tax and securities laws is a problem that demands immediate attention.

Any attempt to deal with the problem would be unrealistic if it did not recognize that it is essentially an American problem that will only be effectively met by a solution devised within the framework of the United States legal system. At present treaties must be viewed as an inadequate vehicle for dealing

---

131. E.g., id. at 187-89.

132. N.Y. Times, Aug. 5, 1970, at 17, col. 4.

133. Senate Hearings, supra note 3, at 172-86.

134. Id. at 173. This will be required in taxable years beginning on or after Jan. 1, 1970 irrespective of the legislation. Id.

135. E.g., foreign remittances transferring funds abroad, foreign checks transmitted abroad for collection, large checks negotiated abroad drawn on United States banks and large foreign credit card purchases by United States citizens or residents. Id.

136. Id. at 174.

137. Id. at 153.

with the problem. The recently announced United States-Swiss draft legal aid treaty indicates that any hope of the Swiss making a major reassessment of their traditional secrecy position to facilitate United States law enforcement is unrealistic. The other nations which have emulated the Swiss,[138] with the goal of reaping profits for their confidential services, probably would never cooperate to any further extent than would the Swiss. Therefore, federal legislation directed against these abuses is necessary and desirable.

The need for some type of legislation is not challenged. However, a balancing of the potentially dangerous problems that could be created by the recent legislation against the degree of certainty that it will be effective indicates that Congress should have been more selective in its attempts to cope with the situation.

Any meaningful evaluation of the effects of the legislation, either for good or ill, is difficult in view of the broad regulatory and exemptive powers given to the Secretary of the Treasury. However, even the supporters of the legislation admit the possibility that the Secretary could impose record-keeping and reporting requirements which would, at worst, create a substantial and harmful burden on the free flow of legitimate international commerce or would, at best, result in much valueless paperwork.[139] It is also probable that a large percentage of the records and reports that could be required would have little or no law enforcement value. Law abiding institutions and citizens could be required to keep voluminous records and make extensive reports which would be only tangentially valuable in a relatively small number of criminal cases.

There is, inherent in the legislation, a danger of well intentioned overkill. Masses of records and reports (along with the inherent cost of storage and retrieval) could be required even though their usefulness would probably be slight in comparison to the burden imposed by compliance. A more targeted plan such as that proposed by the Treasury would have been preferable. The Treasury's flexible approach with its emphasis on those transactions most likely to show the international movement of funds would effectively serve the needs of law enforcement while at the same time not unduly burdening commercial intercourse. It is hoped that even within the approach favored by Congress the Treasury will use its discretionary and exemptive power to promulgate regulations that will achieve such a balance.

138. See note 5 supra.

139. H.R. Rep. No. 91-975, supra note 99, at 13.